

**LITERARY SIGNALS FOR LEGAL ABSTRACTION IN THE
TALMUD YERUSHALMI AND THE JUSTINIANIC LEGAL CORPUS**

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ABSTRACT

The topic of this thesis is the development of legal abstraction in Roman and Palestinian Rabbinic legal culture in late antiquity according to an analysis of sample texts and their parallels from the Justinianic legal corpus and the *Talmud Yerushalmi*. These substantive bodies of texts suggest that Roman jurists and their Palestinian Rabbinic counterparts were not merely preserving the legal knowledge of the past but that they also actively shaped it anew with the aim of creating a conceptually coherent yet flexible system. This thesis examines literary signals in the *Institutes* and *Digest* as well as in the *Talmud Yerushalmi* in order to identify the strategies by which these texts (a) constructed their relationship to the past by quoting legal authorities, (b) established legal terms and (c) arranged those terms in a systematic or discursive manner. An initial assessment of the texts' historical context emphasises that the period between Caracalla's universal expansion of the applicability of Roman law in 212 CE and Justinian's *Novella* 146 ΠΕΡΙ ΕΒΡΑΙΩΝ ("On the Hebrews") in 553 CE saw Roman and Palestinian Rabbinic legal cultures growing apart from each other into isolation, ignorance and mutual indifference. Hence this thesis proposes an approach which goes back to the texts themselves. The thesis examines sample texts selected from the Roman law of obligations (Justinian's *Institutes* 3.13 and 4.1) and the Rabbinic law of damages (*Talmud Yerushalmi* *Bava Qamma* 1:1 [2a-b]) analysing their literary patterning and discursive structures which are discussed in the light of parallels within their own corpora. Emphasis is placed on structural characteristics and ideological tendencies, while judgement is necessarily suspended on influence, borrowing, and the exchange of legal institutions and ideas. It is concluded that the Justinianic texts and the *Yerushalmi* presented their own authority as based on the authority of the legal past which they upheld by intricate methods of quoting and explaining. The strategies of establishing and arranging legal terms suggest that the institutional context of the Roman law schools and the Palestinian Rabbinic study houses promoted a "scholastic" culture which fostered legal abstraction. Upholding the authority of the past and developing conceptual coherence, however, were carried out within very different hermeneutical parameters in the two cultures. Roman law aimed at the timeless ideals of *iustitia* and *aequitas* which motivated the philosophically-inspired forms of definition and a rigid classification framework based on the "scientific" vocabulary of *genus* and *species*. Palestinian Rabbinic law, in contrast, strove to realise the divine will which had been communicated in historical time and in the revealed text of the Bible. This is reflected in the *Yerushalmi's* technique of allowing labels to acquire technical meaning through their use (rather than defining them), and by its fluid classification framework based on the "organic" vocabulary of "fathers" (*avot*) and "generations" (*toldot*). Both of these strategies allowed the discourse to remain centred on the quotable wording of the biblical, Mishnaic and other authoritative sources. While Roman law enjoyed a measure of freedom from earlier choices of wording in its attempt to grasp the spirit of old law by philosophical enhancement, Rabbinic law distilled its hermeneutical tools and very legal vocabulary from the wording of old law.

DECLARATION

No portion of the work referred to in the thesis has been submitted in support of an application for another degree or qualification of this or any other university or other institute of learning.

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NOTE ON ABBREVIATIONS, SOURCES AND DATES

For general purposes, abbreviations and references to classical sources follow the guidelines presented in Patrick Alexander, John Kutsko et al. (1999): *The SBL handbook of style for ancient Near Eastern, Biblical, and early Christian studies* (Peabody, MA: Hendrickson).

Roman legal sources:

Abbreviations used for Roman legal sources are as follows.

CTh = *Codex Theodosianus*

G = The *Institutes* of Gaius

J = Justinian's *Institutes*

D = Justinian's *Digest*

CJ = *Codex Justinianus*

Passages in Roman legal texts are cited in an abbreviated format. For example, D.44.7.1.pr stands for the *principium* ("first line") of the first passage in the seventh section of Book 44 of Justinian's *Digest*.

Passages quoted from the *Digest* also include information about the original work. For example, the passage from Book 2 of Golden Matters (*Res aureorum*) by Gaius preserved in the *Digest* is quoted in the footnotes as "Gaius, Golden Matters 2, D.44.7.1.pr-15". The format is adapted from Alan Watson, ed. (1998): *The Digest of Justinian: English translation*. 4 vols (Philadelphia, PA: University of Pennsylvania Press).

The original Latin and the English translation of Roman legal sources are quoted according to the following editions:

CTh: Amnon Linder, ed. (1987): *The Jews in Roman imperial legislation* (Detroit, MI: Wayne State University Press).

G: Francis de Zulueta, ed. (1946): *The Institutes of Gaius*. 2 vols (Oxford: Clarendon Press).

J/D/CJ: Latin sources from the Justinianic corpus are retrieved from the ROMTEXT databank used in Peter Riedlberger's Aمانuensis 1.5 computer programme. The digitised text is from Mommsen's stereotypical edition.

Theodor Mommsen, Paul Krüger et al., eds. (1872-1895): *Corpus Iuris Civilis: Editio stereotypa* (Berlin: Weidmann).

Josef Menner and Tony Honoré, eds. (1970-): *ROMTEXT: Datenbank der lateinischen Quellen des Römischen Rechts* (Linz: Institut für Römisches Recht).

Riedlberger, Peter, ed. (2014): *Amanuensis*. 1.5 ed (München).

Translation of passages from the *Digest* and the *Codex Justinianus* is according to Watson's edition of the *Digest*, and Fred H. Blume, Bruce Frier et al., eds. (2016): *The Codex of Justinian: A new annotated translation, with parallel Latin and Greek text based on a translation by Justice Fred H. Blume*. 3 vols (Cambridge: Cambridge University Press).

Translation of passages from Justinian's *Institutes* is mine in consultation with Peter Birks and Grant McLeod, eds. (1987): *Justinian's Institutes* (London: Duckworth).

Biblical and Rabbinic sources:

The text of the Hebrew Bible is according to the *Codex Leningradiensis* as reproduced in Karl Elliger, Rudolf Kittel et al., eds. (1990): *Biblia Hebraica Stuttgartensia*. 4th emended ed (Stuttgart: Deutsche Bibelgesellschaft).

The text of the Greek Septuagint is according to the text edition of Alfred Rahlfs and Robert Hanhart, eds. (2007): *Septuaginta: Vetus Testamentum Graecum* (Göttingen: Vandenhoeck & Ruprecht).

Translation of biblical sources follows Bruce Metzger, John Barton and Martin Manser, eds. (2003): *The Holy Bible: Containing the Old and New Testaments. New Revised Standard Version: Anglicized text* (Oxford: Oxford University Press).

Rabbinic legal sources are abbreviated as follows.

m = *Mishnah*

t = *Tosefta*

y = *Talmud Yerushalmi*

b = *Talmud Bavli*

The text of the *Mishnah* for text-critical purposes is provided from MS Kaufmann A50 (Budapest) according to Georg Beer, ed. (1930): *Mischna-Handschrift Codex Kaufmann Facsimile Ausgabe* (Haag: Martinus Nijhoff.)

For general purposes, the text of the *Mishnah* is provided from the study edition of Chanoch Albeck, ed. (1952): *Shishah sidre Mishnah*. 6 vols (Jerusalem/Tel Aviv: Mosad Bialik/Dvir).

The text of the *Tosefta* is provided from the text edition of Saul Lieberman, ed. (1955-1973): *Tosefta* (New York, NY: The Jewish Theological Seminary of America). Lieberman produces the transliteration of MS Vienna whenever it was available. Lieberman fills the gaps in MS Vienna by MS Erfurt from the text edition of M. S. Zuckerman, ed. (1963): *Tosefta al pi Ketav Yad Erfurt weVienna* (Jerusalem: Wahrman).

The text of the *Talmud Yerushalmi* follows MS Leiden as edited and transliterated in Yaakov Sussman, ed. (2001): *Talmud Yerushalmi: Yotze le-or al-pi ketav yad Scaliger 3 (Or. 4720) sheba-sifriyat ha-Universitah shel Leiden im hashlamot we-tikkunim* (Jerusalem: The Academy of the

Hebrew Language). Sussman includes cross-references to Daniel Bomberg's *Editio princeps* published in Venice in 1523.

The structuring and translation of *Yerushalmi* passages are mine, unless otherwise indicated. I have consulted the German translation by Gerd Wewers (1982): *Übersetzung des Talmud Yerushalmi Band IV/1-3. Bavot - Pforten* (Tübingen: Mohr Siebeck), and the English translation by Heinrich Guggenheimer (2000-2012): *The Jerusalem Talmud* (Berlin: De Gruyter.)

The present thesis is concerned with Palestinian Rabbinic legal culture. Therefore, references to the *Bavli* are rare. For the purpose of the thesis, the stereotypical Vilna text of the *Bavli* sufficed which is taken from Yisroel Simcha Schorr, Chaim Malinowitz et al, eds. (1990-2005): *Talmud Bavli: The Gemara of the classic Vilna edition with an annotated, interpretive elucidation, as an aid to Talmud study* (Brooklyn, NY: ArtScroll Mesorah).

Dates:

Unspecified dates are all according to the Common Era. For dates before the Common Era, I have added "BCE" after the date.

NOTE ON TRANSLITERATION

The transliteration of Hebrew script used in this thesis is a simplified version of the “general-purpose style” created by the *Society of Biblical Literature*.¹ All accents and diacritical marks are omitted and double letters are used instead. *Alef* and *ayin* are marked by their vowel value only, whereas “s” may stand for *samekh* as well as *sin*, and “t” for *tet* as well as *tav*. Transliteration of vowels follows the *SBL* “general-purpose style” (except from *tzeirei* which is often transliterated as “ei”). Only the composite and pronounced *shwa* sound is transliterated, silent *shwa* is left unmarked.

א	‘	ל	l
ב	b / v	מ	m
ג	g	נ	n
ד	d	ס	s
ה	h	ע	‘
ו	w	פ	p / f
ז	z	צ	tz
ח	ch	ק	q
ט	t	ר	r
י	y	ש	s / sh
כ	k / kh	ת	t / th

¹ Alexander et al. (1999):28-29.

CHAPTER 1: INTRODUCTION

The present thesis investigates the grammatical and conceptual framework of legal knowledge in Roman and Palestinian Rabbinic sources. The project is based on the textual analysis of two structurally similar sample texts from the two legal cultures. The thesis proposes a new comparative approach which concentrates on “literary signals”, and not on the legal rules or the socio-historical context of ancient law. My primary interest is *how* the law was expressed, and not *what* the law was. The reason for this approach is that we only have access to the literary surface of the texts that the Roman and Palestinian Rabbinic legal cultures left behind. Additionally, we can gain indirect evidence for social and institutional circumstances, for the *things that happened* in the past, by distilling information from texts. Neither the texts nor the preliminary investigation of the historical context suggest that Roman and Palestinian Rabbinic legal cultures were in significant contact. Therefore, their comparison provides better results, if we focus on structural aspects and tendencies, rather than on any putative exchange of legal institutions and historical facts. For this reason, the thesis offers case studies of three literary signals for legal abstraction, namely quoting, definition and classification which have provided insights into how Roman and Palestinian Rabbinic law operate and what their fundamental assumptions are.

The point of departure for the case studies are two short passages from Justinian’s *Institutes* (533) and from tractate *Bava Qamma* in the *Talmud Yerushalmi* (ca. 425 CE). The set of passages from Justinian’s *Institutes* introduce the Roman law of obligations and delicts (*delicti*) (J.3.13 and J.4.1), while the extensive opening passages from *Yerushalmi Bava Qamma* introduces the Rabbinic law of damages (*neziqin*) (yBQ 1:1, 2a-b). The comparative literary analysis of these passages in their wider literary context indicates that two major forms of legal thinking in the late antique Eastern Mediterranean region developed in virtual isolation from each other. This idea runs against the dominant scholarly consensus which assumes a shared context between neighbouring cultures. Despite the scarcity of actual evidence for cultural contact, the ancient world is often envisioned as a bustling multi-cultural marketplace where ideas were exchanged. Accumulated parallels are often

explained by the ambiguous concept of “influence” without specifying by what mechanisms ideas travelled between the investigated cultures.

In the case of late antique Rabbinic and Roman law, the available historical evidence suggests a relationship characterised by isolation, ignorance and indifference. The present thesis proposes to embrace the potential in what may first sound to be a negative finding. I shall argue that the mutual isolation of these contemporaneous neighbouring cultures provides optimal laboratory conditions for highlighting the characteristics of their conceptual apparatus and legal method. The thesis is concerned with a period when law was transformed from profession to science, and it takes the comparative analysis of the linguistic and discursive strategies of legal texts as its point of departure for thinking about how this happened in two different contexts for legal production. The thesis will highlight structural phenomena of Roman and Palestinian Rabbinic rules (“literary signals”) in a series of case studies which demonstrate *how* the law was formulated: the strategies of quoting sources which construct a division between the editing voice of the present and the legal authorities of the past; the procedures for establishing legal terms by definitions in Roman law and the more anarchic strategies of merely “labelling” legal constellations in Palestinian Rabbinic law; and the conceptual vocabulary and strategy of classification. The study of literary signals contributes indirectly to the understanding of the history and institutions of Roman and Talmudic law and brings their contrastive foundational characteristics to light. They reinforce the likelihood that the principles of *iustitia* and *aequitas* govern the discourse on Roman law, whereas the purpose to realise the divine will stands at the centre of Rabbinic law.²

1.1 Literary signals for legal abstraction

“Literary signals” constitute the form of legal discourse by which I mean semiotic phenomena which provide a standard and coherent framework for the expression of legal rules.³ As opposed to the matter of legal discourse which is about *what* behaviour is expected, the form is about *how* that normative idea is expressed. The combination of matter and form may manifest itself in spoken or written word, sign, picture or some other signifying instrument.⁴

² A similar idea juxtaposing the biblical and Greco-Roman discourses of divine law was recently expressed by Hayes (2015). Hayes’ work reflects on Novak (1998) and Bockmuehl (2000), and her point of departure is Brague (2007).

³ Bernard Jackson is one of the most prominent scholars applying a semiotic approach to the study of legal texts, see Jackson (1995), Jackson (2000) as well as Jackson (2006).

⁴ For the various typologies of signs, see Nöth (1990):107-114.

Let us consider a sign at Lord's cricket ground at St John's Wood in London which says: "Keep off the grass." The matter, the normative idea, is the enforceable wish of the ground's management that visitors shall refrain from stepping on the carefully maintained outfield. The management could have expressed its wish by putting up a picture of a foot crossed by a red line, by announcing the message in regular intervals over a loudspeaker, or by employing people dressed in uniform who stand at the entrance gate and convey the message in various polite forms to the arriving visitors. In our case, however, the management has opted for a small wooden board on the corner of the lawn with a simple imperative. The signifying instrument of the board and the imperative of the written message constitute a literary signal of legal discourse.

Had the ground's management opted for the picture, the loudspeaker or the people in uniform, the modern investigator of legal discourse would have needed to apply different techniques to analyse these different signifying instruments. When exploring the legal cultures of ancient times, however, the investigator only has access to instruments which survived the passage of time, that is, the textual evidence of written compositions where matter and form constitute a sentence or a string of sentences. For this reason, the present study will disregard the manifold possible semiotic variations of literary signals and concentrate only on texts.

In order to avoid imposing a pre-defined set of literary signals onto ancient legal texts, the initial engagement with the selected passages will offer an independent line-by-line reading. The exercise will highlight the literary signals of legal discourse as they unfold in the text and contribute to the narrative logic of the passage. The comparison does not aim to identify interdependencies or ways of influence across Rabbinic and Roman law because, as I shall argue below in Chapter 3, drawing immediate historical insights from the comparison is problematic, if not impossible.

The proposed abstract literary approach to Rabbinic and Roman legal texts is motivated by a negative recognition. That is, by the recognition that the meeting points between Rabbinic and Roman law, or more specifically between the *Yerushalmi* and the *Institutes*, are weak and almost superficial. A possible comparison according to the external circumstances of time, place and socio-historical context is available only from the vantage point of the modern reader. Even though the texts themselves do not suggest any significant contact, the modern comparatist is nevertheless tempted to assume that neighbouring cultures *must* have influenced each other in one way or another. In order to find a common denominator, the comparatist often imposes the modern framework of legal fields onto ancient texts which resist to fit the mould. The historical overview provided in the following chapter as well as the examination of two structurally and thematically similar passages from the *Yerushalmi* and the *Institutes* suggest that the assumptions of the modern comparatist are unjustified. The texts themselves do not suggest that Rabbinic and Roman legal

learning penetrated each other to any meaningful extent which might have resulted in converging legal institutions addressing similar legal problems.

If external circumstances offer no meeting points, if the characteristics of the texts are extremely different, then the question arises: What is the point of comparing the *Yerushalmi* and the *Institutes*? Are not we comparing apples to pears? To some extent, yes, we are – but by selecting an appropriately abstract angle, the comparison of apples and pears becomes a meaningful exercise. If textual, legal and socio-cultural characteristics of the *Yerushalmi* and the *Institutes* constitute never meeting skew lines in a three-dimensional space, to use a mathematical analogy, we need to project them on the common plane of literary signals. In this plane, the characteristics can be treated as free variables of arithmetic expressions which are respectively bound in one of the three types of signals investigated in Part 2 of the thesis.

A comparison based on literary signals would theoretically allow bringing completely different legal texts to a common plane: texts from completely different periods, locations, genres and legal fields.⁵ However, this would result in variables of textual, legal and socio-cultural characteristics spread across a domain of unmanageable size. With potentially extremely different values, the aggregate explanatory power of the characteristics would be consequently weak. That is, it is almost impossible to discern how the external factors contribute to the similarities and differences observed between literary signals. To push this argument to the extreme, we may find a very similar structure of legal definitions in the ancient Chinese law of the Han dynasty (220 BCE-206) and 20th century Soviet law,⁶ but the distance between the two legal cultures would not allow to determine whether the similarity is by sheer coincidence or rather due to some common underlying socio-cultural factors.

By selecting neighbouring legal cultures for comparison, the present study assures that the domain of the free variables including textual, legal and socio-cultural characteristics is manageable, and consequently, the expression is sensitive to minor changes in their values. Even though the *Yerushalmi* and Justinian's *Institutes* preserve materials from centuries and thousands of miles apart, their final composition occurred in roughly the same time and place. Against the background of their common late antique Eastern Mediterranean context, the similarities and differences of the textual, legal and socio-cultural characteristics become more pronounced. Living apart, yet living side by

⁵ This point was also made by Secunda (2014):112 which is discussed below in section 3.1.1 "The structure of comparative research".

⁶ I do not claim that their definitions are similar, this is only a wild example. One can entertain the idea by reading Chapter 8 "The laws of the empire" in Loewe (2006):119-134 and Johnson (1969).

side, neighbours mutually amplify each other's "otherness" whereby their fundamental characteristics can be better grasped.

1.2 *The comparative study of Rabbinic and Roman law*

Law played a pivotal part in Roman and Rabbinic cultures which both produced enormous legal corpora surviving the passage of time. The development of the two legal systems is remarkably well-documented, even if the circumstances in which the texts were produced are largely unknown. Scholars of political, social and legal history have been stimulated by the abundance of primary texts, while lawyers have turned their attention to these ancient sources in search of answers to modern challenges. Roman and Rabbinic law constitute autonomous and self-sufficient fields of research, and their comparative study has largely remained an exotic exercise. Their juxtaposition is anything but straightforward. There is little in common in their specific rules, there is little certain about their historical circumstances, there is little to suggest that they influenced each other at their inception or during their reception history. Nevertheless, scholars in modern times occasionally embarked on comparative research projects which are briefly and selectively overviewed in the present section. This initial engagement with the history of scholarship is supplemented in the subsequent two chapters which discuss the historical context and the methodological challenges of the comparison of Roman and Palestinian Rabbinic law.

The modern study of Rabbinic law starts with the 19th century *Wissenschaft des Judentums* ("Science of Judaism" or simply "Jewish Studies") movement which established the historical scholarship of the Jewish "people" (*Volk*) in the context of "world history" (*Weltgeschichte*). The fourth volume of the *Geschichte der Juden* ("History of the Jews") by Heinrich Graetz (1817-1891) holds the title *Vom Untergang des jüdischen Staates bis zum Abschluß des Talmud* ("From the fall of the Jewish state until the completion of the Talmud") which is one of the earliest academic attempts of presenting the Jewish people in Talmudic times against the imperial Roman background.⁷ The *Weltgeschichte* approach of the *Wissenschaft* is echoed in similar monumental efforts by, for example, Russian historian Simon Dubnow⁸ (1860-1941) and American historian Salo Wittmayer Baron⁹ (1895-1989).

⁷ Graetz (1853). The fourth volume was published in 1853 as the first of Graetz's 11-volume history which was completed in 1875. It should be noted that Graetz's casual treatment of the Talmudic sources was subject to heavy criticism by his contemporary Samson Raphael Hirsch.

⁸ Dubnow (1926). Dubnow's Russian manuscript was first published in German as *Weltgeschichte des jüdischen Volkes* ("World history of the Jewish people") in 10 volumes between 1925-1929. The 1926 third volume entitled *Vom Untergange Judäas bis zum Verfall der autonomen Zentren im Morgenlande* ("From the fall of Judaea until the decline of the autonomous centres in the East") covers the Talmudic period in Roman Palestine and Sassanid Persia.

The history of Judaism in the early centuries of the Common Era is better documented and more extensively studied than the age of Justinian which is, according to Nicholas de Lange, characterised by “a shortage of securely datable written texts”.¹⁰ The extremely rich work of Jean Juster (1881-1915) in French, the collection of imperial laws concerning Jews by Amnon Linder in English, and the two-volume work by Alfredo Mordechai Rabello in Italian are some of the most important synthesizing works of the period.¹¹

Legally trained scholars of Jewish history produced key studies juxtaposing Rabbinic and Roman law. Boaz Cohen¹² (1899-1968) and David Daube¹³ (1909-1999) were lawyers by training just like Juster. Cohen and Daube both authored numerous essays suggesting affinities and occasional exchange between Roman and Jewish law.¹⁴ While Juster established a scholarly tradition which studies the history of the Jews from a legal perspective, Daube initiated the study of Roman and Jewish law according to their formal and linguistic features.¹⁵

Juster’s historical approach is continued by the monographs and essay collections by Rabello¹⁶ and by the recent publications by his fellow Italian Romanist Francesco Lucrezi.¹⁷ The comparative historical approach in the English language is represented by Saul Lieberman who outlined the Graeco-Roman historical and cultural context of Palestinian Rabbinic Judaism.¹⁸ In recent years, Catherine Hézser drew interesting parallels between Rabbinic and Roman legal compositions,¹⁹ while Yaakov Elman and Yoni Pomeranz published articles on risk assessment and torts in Rabbinic and

⁹ Baron (1952-1983). Baron’s 18-volume universal history covered the Talmudic period in the second and third volumes entitled “Christian era: the first five centuries” and “Heirs of Rome and Persia”.

¹⁰ de Lange (2005):401.

¹¹ See Juster (1914), Linder (1987) and Rabello (1987).

¹² Cohen was affiliated with the Jewish Theological Seminary in New York. He was also an important legal advisor of the Jewish Conservative movement.

¹³ A scholar of German origin, Daube held the chair of Regius Professor of Civil Law in Oxford (1955-1970) and later became director of the Robbins Hebraic and Roman Law Collections at Berkeley in California (1970-1981) leaving lasting scholarly influence on both sides of the Atlantic.

¹⁴ Cohen (1966) and Carmichael et al. (1992-2014).

¹⁵ Most notably Daube (1956) and Daube (1969).

¹⁶ Rabello’s commitment to Juster’s approach is evidenced by the summary of Juster’s *Les Juifs dans l’Empire romain* (1914) for a new generation of scholars in the *Aufstieg und Niedergang der römischen Welt* series in Rabello (1980). Rabello’s classic work on the Justinianic period is Rabello (1987). The English translation of a 1987 Hebrew original focusing on this topic is Rabello (2000). Rabello’s collection of essays summarising a lifetime’s work in Italian is Rabello (2010).

¹⁷ Lucrezi’s publications include two monographs which discuss the legal handling of magic and theft in Roman and Jewish law from a comparative perspective. See Lucrezi (2007) and Lucrezi (2015a).

¹⁸ Lieberman (1942) and Lieberman (1962).

¹⁹ Hézser (1998):581-641, Hézser (2007):144-163 and the edited volume of Hézser (2003)

Roman law.²⁰ These scholars of the “old school”, to use Isaiah Gafni’s expression, investigate legal documents to discover the “true tale” of the “things happened” in the past despite the very limited evidence available.²¹

Historical legal documents have been extensively studied from another perspective aiming to discover the logic and structure of law. This aim largely characterises Roman legal scholarship which stretches back to the Glossators of the 11th-12th century, the natural law thinkers of the 17th century and the German Pandectists of the 19th century.²² In the modern period, Romanists with strong theoretical interest concentrated on legal method and general principles to discover what Alan Watson describes “the spirit of Roman law”.²³ The approach was especially popular in Germany between the 1960s and 1980s when scholars dedicated monographs and articles to the *regulae iuris*, to the *rationes decidendi* and generally to the method and principles underlying Roman law.²⁴ Peter Stein’s *Regulae Iuris*²⁵ published in 1966 in English belongs to this tradition. The next generation of Romanists made further enquiries about the Greek philosophical origins of theoretical aspects and opened up the Roman legal corpus to cross-cultural study. The scholarship of Franz Wieacker, Okko Behrends and Laurens Winkel²⁶ has been pioneering in this regard. In their footsteps, Claude Moatti and René Brouwer have been investigating the philosophical origins of Roman law in recent times.²⁷

As far as Jewish law is concerned, Louis Jacobs made inquiries about Rabbinic legal method in the 1960s.²⁸ Jacobs’ early work anticipated the study of structures and forms in Talmudic legal reasoning. The now classic monograph about Rabbinic “rationality” and “science” by Menachem

²⁰ Elman (2014):250-283 and Pomeranz (2015):303-331.

²¹ Isaiah Gafni describes his historical credo with a hint of self-irony: “I am a historian of the old school, which in practical terms means that I still cling to the premise that in the past ‘things happened.’ ... As a disciple of teachers trained in the classical historical-philological methodology established by the luminaries of *Wissenschaft des Judentums*, I was weaned on the assumption that the ‘true tale’ (give or take some obvious legendary embellishments) can be uncovered once the text has undergone critical scrutiny.” Gafni (2011):355.

²² See the overview of the reception of Roman law through the centuries in Stein (1999).

²³ The expression appears in the title of Watson’s book which offers a chronological account of the development of general principles in Roman law. See Watson (1995).

²⁴ To name just a few works which can be associated with this scholarly tradition, they are Kaser (1962), Horak (1969), Schmidlin (1970), Nörr (1972):18-93 and Herberger (1981).

²⁵ Stein (1966).

²⁶ Some of Winkel’s most important publications in this area include Winkel (1988):669-679, Winkel (1996):103-120, Winkel (2015):9-22. To name just two of the many publications by Wieacker and Behrends, see the methodological introduction in Wieacker (1988):3-61 and Behrends (1998):26-60.

²⁷ Moatti (2015) and Brouwer (2015):60-76. Brouwer’s article is partly a response to Tony Honoré’s publications on the topic such as Honoré (2002) and Honoré (2010b):199-208.

²⁸ Jacobs (1961).

Fisch²⁹ was followed by the studies of Jeffrey Rubenstein, Ronen Reichman, Richard Hidary, Chaya Halberstam and Alexander Dubrau.³⁰ While these scholars concentrated on the Rabbinic material only, Henry Fischel, Catherine Hézser and David Brodsky investigated the possible presence of Graeco-Roman philosophical ideas in Rabbinic literature.³¹ In the last fifteen years, scholars started to focus more closely on parallels between Rabbinic and Roman legal method. In a study about Talmudic reasoning, Leib Moscovitz shed light on affinities between the two legal cultures in some exciting footnotes.³² In a comparable manner, Amram Tropper offered a contextual reading of *Mishnah* tractate *Avot* from the perspective of Roman jurisprudence³³ while Francesco Lucrezi examined Jewish law in the light of Roman-style general principles (*regulae iuris*).³⁴

A cautious and nuanced comparative method for the study of ancient legal cultures was developed by Daube's student Bernard Jackson who gained a unique combination of expertise in both the Roman and Jewish legal tradition. Jackson describes his pioneering and unconventional approach as "structuralist" in his early work³⁵ which he later supplemented with a systematic "semiotic" method for the language of law.³⁶ To my knowledge, scholars of ancient legal cultures remained largely unresponsive to Jackson's suggestions and preferred to pursue the more traditional avenues described above. Jackson calls for caution in the comparative study of ancient legal cultures as he points out that the evidence for the much sought after "influence" is mostly inconclusive.³⁷ My comparative study of literary signals in the Justinianic corpus and the *Yerushalmi* echoes Jackson's scepticism.

For example, my approach needs to be distanced from two otherwise intriguing scholarly trends which have been dominant in the study of Rabbinic texts in recent decades. The idiosyncratic Rabbinic corpus has provided a fertile ground for scholars who turned their eyes to the ancient world to find early examples of hypertexts, non-standard literary structures, and texts structured according to free associations.³⁸ Rabbinic texts have been also used as precedents for the

²⁹ Fisch (1997).

³⁰ Rubenstein (1997):33-73, Reichman (2006), Hidary (2010a):33-64, Halberstam (2010) and Dubrau (2014).

³¹ Fischel (1973), Hézser (2000) and Brodsky (2014).

³² See the comparative remarks in Moscovitz (2002). Moscovitz also devoted a journal article to the phenomenon of "legal fiction" in Rabbinic and Roman law in Moscovitz (2003):105-132.

³³ See the chapter entitled "Avot in the light of classical Roman jurisprudence" in Tropper (2004):189-207.

³⁴ Lucrezi (2015b):33-41.

³⁵ Jackson (1980a):15 as well as Jackson (1968), Jackson (1975b), and Jackson (1980b).

³⁶ Jackson (1995), Jackson (2000) and Jackson (2001b).

³⁷ Jackson (1980a):22-24.

³⁸ Among others, Faur (1986), Stern (1991) and Boyarin (1990).

celebration of debate and controversy, the toleration and accommodation of opposing views, and the courage to keep arguments open.³⁹ In an attempt to revitalise literary as well as political and legal theory, Rabbinic texts promised a fresh voice compared to the much studied Greek and Roman past. Rabbinic literature has become a reference point for post-modern literary thinkers as well as proponents of political and legal pluralism. Rabbi Eliezer, Rabbi Akiva and their fellow rabbis have become ancient heroes of modern scholarly trends which had turned them into the forefathers of Jacques Derrida and Harold Bloom, Bernard Williams and Charles Taylor.

No matter how exciting this development may be for scholars of the ancient world and especially students of the Talmud, the selective reading has obscured the true multivocality of Rabbinic texts. Post-modern writing is only one of the many literary features, pluralistic ideology is only one of the many voices present in Rabbinic legal texts. In order to grasp what is special, if any, about Rabbinic writing and legal thinking, we need to suspend the direct application of modern theories and return to the texts themselves.⁴⁰ In order to establish a solid foundation for the future study of the Rabbinic and Roman “spirit of law”, we need to concentrate first on the vocabulary and grammar which constitute the discernible linguistic building blocks of legal writing.

1.3 Thesis structure

The thesis divides into two main parts in chapters 2-7. Part 1 “Literary comparison without historical influence” argues that we have inconclusive evidence for influence between Rabbinic and Roman law (chapter 2), and, therefore, an approach concentrating on literary signals of legal texts promises more fruitful results (chapter 3). Part 2 “Literary signals for legal abstraction” includes a preliminary engagement with the selected passages from the *Talmud Yerushlami* and Justinian’s *Institutes* (chapter 4) followed by three chapters offering case-studies on three literary signals, namely quoting strategy (chapter 5), the establishment of legal terms (chapter 6) and their arrangement by classification (chapter 7). The concluding chapter 8 draws some general insights about the operation of Rabbinic and Roman law and proposes avenues for future research.

Chapter 2 “Historical context” reviews the relationship between the Roman authorities and Palestinian Rabbinic society mostly based on dated pieces of legislation of the Roman imperial centre. The final compilations and the sources of the Justinianic corpus and the *Talmud Yerushalmi*

³⁹ For example Stone (1993) and Hidary (2010b).

⁴⁰ This echoes Edmund Husserl’s phenomenological motto of “zurück zu den Sachen selbst!” (“back to the things themselves!”) which demanded a careful study of accessible perceptual experience instead of speculative metaphysics. See Husserl (2001):1:168.

originate mostly from the period under investigation. The starting point is Caracalla's *Constitutio Antoniana* issued in 212 which granted Roman citizenship to all subjects of the Empire. Caracalla's *constitutio* radically expanded the geographical scope of Roman law and threatened that parallel legal systems like that of Palestinian Rabbinic Judaism would soon become obsolete. The end point of the period is Justinian's *Novella* 146 ΠΕΡΙ ΕΒΡΑΙΩΝ ("On the Hebrews") issued in 553 which marks the end of imperial legislation concerning Jews in Roman Palestine. The chapter's historical overview, however, starts with the demotion of Gamaliel VI in 415 and the subsequent end of the Palestinian Patriarchate which allegedly triggered the creation of the *Talmud Yerushalmi*. The chapter concludes that the Roman imperial centre and Palestinian Rabbinic Judaism gradually became neighbours living side by side in mutual isolation, ignorance and indifference between 212 and 553.

Chapter 3 "Towards an old/new approach" departs from this hypothesis of Rabbinic isolation. It investigates the possibility of a comparative approach to historical constellations which have minimal or no contact between them. The chapter starts with outlining the formal structure of comparative research in the historical humanities and illustrates its challenges on the example of Talmudo-Iranica, the research into the *Talmud Bavli*'s culture against its Iranian background. The chapter argues that the category of influence is an unhelpful and misleading explanatory tool in the comparison of cultures with minimal or no contact. The concluding sections propose to adopt a historical null hypothesis and a cautious approach for comparing ancient legal cultures initiated by Bernard Jackson.

Chapter 4 "Literary signals for legal abstraction in two sample texts" opens Part 2 which concentrates on the close analysis of legal passages illustrating the predilection for abstraction in late antique Roman and Palestinian Rabbinic legal culture. The chapter places the components of the comparative research into the formal structure proposed in Chapter 3. It outlines the reception history of the Justinianic legal corpus and the *Talmud Yerushalmi* to illustrate the avenues which connect the texts as we have them with the late antique legal cultures they represent. The chapter shortly explains what the concept of obligations is in Roman law, presents the text and translation of the selected sample passages from Justinian's *Institutes* (J.3.13 and J.4.1), and offers preliminary remarks on the passages in their immediate literary context. The same pattern is followed for the sample text selected from the *Yerushalmi*. The brief discussion of the concept of damages in Palestinian Rabbinic law is followed by the presentation of the sample text (*Yerushalmi Bava Qamma* 1:1 (2a-b)). The text and its structured translation are accompanied with text-critical and editorial comments, as well as preliminary remarks on the passage. The chapter concludes with putting forward three literary signals for close analysis in subsequent chapters.

Chapter 5 “From text to history in Justinian and the *Yerushalmi*” accentuates literary characteristics which indicate strategies of collating, preserving and explaining legal traditions under different social and technical circumstances of text production. The chapter focuses on how the *Institutes*, the *Digest* and the *Yerushalmi* manage quoting and quoted voices which represent the projected relationship of these texts to their own legal past. It concludes with drawing the reconstructions of the compositional history of Justinianic texts and the *Yerushalmi* closer to each other. On the one hand, the cumulative editing model of the *Yerushalmi* supports David Pugsley’s reconstruction of the *Digest*’s development which views its 533 publication as the end product of legal study practices since the *Law of Citations* (426). On the other hand, the methodical editing process of Tribonian’s committee provides a useful parallel for the putative rules to which the creators of Rabbinic legal texts tacitly adhered to from the time of the *Mishnah* until the creation of the *Yerushalmi* and beyond.

Chapter 6 “The conceptual and exegetical treatment of the legal past” argues that the different strategies of establishing legal terms correspond to the ways by which Roman and Palestinian Rabbinic texts relate to their sources and to the vocabulary of their legal past. The chapter presents the definition form and its variations in the *Institutes* and the *Digest*, and the labelling form and its variations in the *Yerushalmi*. The analysis suggests that the legal past is binding for both of them. The law of the *Twelve Tables* and the *leges* cannot be changed, neither that of the Bible and the *Mishnah*. However, whereas the *Institutes* enjoys the liberty of creating new abstract legal terms and building a coherent framework hosting old rules, the *Yerushalmi* is bound by old rules as well as their very wording in the sources. The *Yerushalmi* enriches the semantic range of existing entries of the biblical and Mishnaic legal vocabulary, and it arranges them in a more coherent fashion. The *Yerushalmi*’s hermeneutical relation to old law is exegetical, while that of the *Institutes* is conceptual.

Chapter 7 “Organising legal knowledge” investigates the vocabularies of classification and their application in Roman and Palestinian Rabbinic law. Similar to the tendencies underlying the different modes of establishing legal terms, the differences suggest different approaches to the legal past. The *Institutes* preserves the meaning and intention of old rules, but because it treats them as human constructions, the *Institutes* seeks to create a conceptually appealing framework which is external to the legal material. By contrast, because the primordial formulation of law is considered to be of divine origin, the *Yerushalmi* feels compelled to preserve not only the meaning and intention of old rules, but also the exact words by which they were formulated. The philosophically motivated classification in the *Institutes* is based on the strategies of *divisio* and *partitio* and uses the *genus-species* vocabulary. The genealogical vocabulary of “fathers” and “generations” and the exegetical

perspective of classification in the *Yerushalmi* show the constraints in which Palestinian Rabbinic law operates and the authority of the historically revealed divine will which it endorses.

Chapter 8 “Synthesis and outlook” brings the findings of the three case studies in Part 2 together and place them into a wider historical and theoretical context. The strategies of quoting, establishing and organising legal terms in the Justinianic corpus and the *Yerushalmi* point towards general tendencies of Roman and Palestinian Rabbinic law. Despite their radically different text form, similar institutional circumstances of higher legal learning seem to have contributed to the systematic and abstract aspects of the Justinianic texts and the *Yerushalmi*. The reverence for the legal past and the presentation of accumulated legal knowledge are, however, expressed differently. Whereas Justinianic texts enjoy considerable amount of liberty in applying a conceptually rigid framework for law which realises *iustitia* and *aequitas*, the *Yerushalmi* is bound by the very wording of its authoritative sources. Therefore, the *Yerushalmi* creates a fluid conceptual framework in order to achieve controlled ambiguity and flexibility which are required for adapting to new circumstances. The chapter concludes with drawing potential future avenues of research which may provide statistical evidence based on big data analysis for the “scholastic” culture cherished in the late antique Roman law schools and Palestinian Rabbinic study houses.

PART 1: LITERARY COMPARISON WITHOUT HISTORICAL INFLUENCE

CHAPTER 2: HISTORICAL CONTEXT

2.1 The hypothesis of rabbinic isolation

This chapter assesses the evidence for the question of what extent the Byzantine imperial centre and the provincial Jewish community in Palestine interacted with each other in the period between Caracalla's *Constitutio Antoniana* in 212 and the reign of Justinian I (527-565) when the *Talmud Yerushalmi* and the Justinianic corpus came into being. Is there reason to believe that there were some channels by which Roman and Jewish law communicated with each other?

The lack of "securely datable written texts" in Rabbinic or otherwise Jewish sources⁴¹ make writing the history of Jews and Judaism in the age of the emperors Constantine, Theodosius and Justinian a very challenging task. Dating, compositional and genre characteristics make Rabbinic literature a questionable and mostly unreliable source for historical reconstruction. For this reason, my investigation relies predominantly on the dated pieces of Roman imperial legislation concerning Jews. These laws reflect the development of the relationship between the imperial political centre and the semi-autonomous Rabbinic ruling class. This body of "Jewry law"⁴² was the result of a political bargaining process which created the context in which Rabbinic jurisdiction operated. Rabbinic sources are only used to contextualise evidence coming from historically more reliable sources.⁴³

⁴¹ de Lange (2005):401.

⁴² According to Amnon Linder, "Jewry law" denotes the set of "special law[s] instituted by the appropriate organs of the non-Jewish society ... that supplemented, adapted, and sometimes suspended the Common law in its application to Jews." Linder (2006):130 and a similar formulation in Linder (2012):151. The evidence from the *Codex Theodosianus* (CTh) and the *Codex Justinianus* (CJ) as well as other sources of Roman-Byzantine imperial legislation is collected in Linder (1987). Sources in their original language and in English translation are quoted according to Linder's collection unless otherwise indicated.

⁴³ This means that similarly to Linder, Shaye Cohen, Martin Goodman and Günter Stemberger, I also have an *a priori* preference for extra-rabbinical material and especially of Roman legal sources. This approach has been

The point of departure for my discussion is the so-called demotion of the last patriarch Gamaliel VI in 415 which stands in the middle of the period starting with Caracalla's *Constitutio Antoniana* (212) and ending with *Novella* 146 "On the Hebrews" (ΠΕΡΙ ΕΒΡΑΙΩΝ) of Justinian I (553). The historical overview presented here has three parts: the "demotion" of Gamaliel VI and the end of the Palestinian Patriarchate (396-429); Roman "Jewry law" in the golden days of the Palestinian Patriarchate (212-396); and the isolation of the Jewish world in Palestine (429-553).

The three centuries discussed here witnessed the creation of the *Talmud Yerushalmi* and the intensification of the discriminating Christian character of the Eastern Roman Empire. Contrary to the "hypothesis of rabbinic acculturation",⁴⁴ I read the evidence as showing that Rabbis and Romans gradually grew apart from each other. They ended up showing little interest in each other's affairs, and especially in each other's legal systems.⁴⁵ I suggest that it is safer to adopt a default scholarly position which assumes a relationship characterised by virtual isolation, ignorance and indifference than to assume the opposite. It is consequently more productive to seek explanation for evidence challenging the "hypothesis of rabbinic isolation" than assuming that the evidence confirms the "hypothesis of rabbinic acculturation".

2.2 The end of the Palestinian Patriarchate (396-429)

2.2.1 The historical context for the creation of the Talmud Yerushalmi

Traditional scholarship of Rabbinic history suggests a direct link between the external threat to Rabbinic learning in Palestine and the compilation of the *Talmud Yerushalmi*. According to this understanding, editors of the *Yerushalmi* wanted to preserve Rabbinic learning in times of external threat from the Christian Byzantine-Roman Empire. For example, Louis Ginzberg writes that by "the

criticised by Lee Levine (see Levine (1996):26) among others. I agree with Levine that "every source has some value", but I also think that some have more.

⁴⁴ Seth Schwartz criticises the extreme form of what he calls the "hypothesis of rabbinic acculturation". He associates this scholarly position with Saul Lieberman and others active in the 1970s and 1980s. Schwartz argues for "systemic change" which created a distinctive "late antique Jewish world" which was otherwise "fragmented politically, socially and economically", but he did not go as far as suggesting the "hypothesis of Rabbinic isolation". See Schwartz (2001):180-184.

⁴⁵ The study of the *Talmudim* in their Roman-Byzantine and Seleucid-Persian cultural and historical contexts is still dominated by the "hypothesis of acculturation". For the *Yerushalmi*, most contributions in Schäfer et al. (1998-2002) and Hézser (2003) set out to demonstrate Rabbinic acculturation to the Roman-Byzantine context. For the *Bavli*, acculturation to the Seleucid-Persian setting has become the default position in the field of "Irano-Talmudica". The Spring 2016 issue of the *Jewish Quarterly Review* (Vol. 106, No. 2) includes a review forum about the methodological questions troubling Irano-Talmudica which echoes the challenges of any comparative enterprise about Rabbinic history and literature. See section 3.1.2 "The structure of comparative research".

death knell ... for Jewish learning in the home of its origin ... the academies of [Tiberias, Sepphoris and Lydda] in which the spirit of Judaism had been kept alive were forced to close. If the Jew were to retain his cultural and spiritual individuality, something had to be found to take the place of the living word that had been silenced – the Palestinian Talmud was the result.”⁴⁶ Ginzberg sees the beginning of the end in the local Jewish revolt and its suppression by the Roman general Ursicinus under Emperor Constantius in 352-353.

It can be suggested that Ursicinus was *specifically* appointed to the position of commander of the army (*magister equitum*) in the East to suppress the revolt of the Jews in Palestine.⁴⁷ According to the Roman historian Ammianus, Ursicinus was “well acquainted ... with the old-time discipline and with the Persian methods of warfare” which probably means that Ursicinus had experience in fighting against guerrilla packs in hilly and hot conditions. Ammianus adds that “he had for ten years suffered no loss” in the East when he was summoned to fight the “puffed up” (*sufflatus*) Sabinianus in Asia Minor’s south coastal region of Cilicia in 359.⁴⁸ A. H. M. Jones and his colleagues take the expression of “ten years” (*decennium*) in Amminianus literally, and hence they conclude that Ursicinus had been “apparently appointed” *magister equitum* of the East in 349.⁴⁹ The expression of *decennium*, however, could also mean “about a decade” which means that Ursicinus might have been in the East for “approximately ten years” by 359, and he had been probably asked to respond to the outbreak of the Jewish revolt in 352.

Jacob Nahum Epstein also sees the 352-353 revolt as the start date of the *Yerushalmi*’s creation. He quotes sources from the *Yerushalmi* where the name “Ursicinus” appears.⁵⁰ Epstein describes the generation of rabbis mentioned alongside him as the initiators of the editing process for which he allows a time of “two generations ... approximately fifty years”. Epstein tacitly suggests that the end date of the “editing process” is also the end of the Palestinian Patriarchate. Epstein echoes the

⁴⁶ Ginzberg (1941-1961):1:xxxviii-xxxix.

⁴⁷ The revolt is mentioned in 4-5th century sources like the *Liber de Caesaribus* by Aurielius Victor, the *Chronicon* by Jerome, and the *Historia Ecclesiastica* by Socrates. Whereas the Roman historian Aurelius Victor is silent about the place of the revolt, most Christian authors locate it to Sepphoris. Jerome extends the geographical scope of the revolt to Tiberias and Lydda. Fragments from Aurelius Victor and guiding notes for its understanding are provided by Stern (1974-1984):2:499-501.

⁴⁸ *Rerum gestarum* 18.6.1 and 18.6.2. Text and translation of Ammianus is according to Rolfe (1939-1950):1:434-435.

⁴⁹ See Jones et al. (1971-1992):1:985.

⁵⁰ Epstein refers to the *Yerushalmi* passages yBerakhot 5:1 (9a), yShebi’it 4:2 (25a) and yMegillah 3:1 (74a) where the name of Ursicinus appears as ‘Arsqinas (ארסקינס). See Epstein (1962):274. The spelling quoted here is according to MS Leiden as presented in Sussman (2001a):c44l10, c190l193, and c764l191.

traditional dating going back to Sherira Gaon who writes that the *Yerushalmi* was “sealed ... in the days of Rav Ashi” around 410-420.⁵¹

Traditional scholarship relates the end of the Palestinian Patriarchate to a law issued by Theodosius II (408-450) on 20 October 415 (*CTh* 16.8.22). The law takes away “the honorary prefecture” (*honoraria praefectura*) from Gamaliel VI because he “supposed that he could transgress the law with impunity”.⁵² The wording is interpreted by Mordechai Rabello that “in 415 Patriarch Gamaliel was deposed [and] the office of Patriarch disappeared in subsequent years”.⁵³ In a similar manner, Michael Avi-Yonah and Gedalyahu Alon write that “the patriarchate was abolished”⁵⁴ and “gone”⁵⁵ because of the law of Theodosius II.

The Rabbinic literary evidence is voluminous, but notoriously vague and unreliable. The temptation to magnify a rare piece of dated evidence is, therefore, difficult to resist. The interpretation of the scarce evidence is often nestled to inherited explanation models like the one which presents the history of Rabbinic Judaism in terms of continuous degeneration. This model originates in the “city-lament tradition” in the Prophets and Writings in the Hebrew Bible.⁵⁶ The *Mishnah*’s lamentation song over the gradual decline of intellectual and spiritual standards in mSotah 9:11-15 mirrors a similar literary sentiment which culminates in the principle in the *Yerushalmi* and the *Bavli* holding that earlier generations have greater authority than later ones.⁵⁷ On the basis of biblical and Rabbinic antecedents, the Epistle of the 10th century Rav Sherira Gaon creates an explanation model according to which the creation of major Rabbinic documents is triggered by the combination of internal decline and external threat. Sherira writes that Rabbi Judah ha-Nasi embarked on compiling

⁵¹ Epstein (1962):274. In a similar fashion, the *Encyclopaedia Judaica* dates the *Yerushalmi* to “c. 400” and relates the “close” of the text to the end of “the activities of the main school, that of Tiberias ... with the extinction of the patriarchate in 421, as a result of the troubles and persecution which followed the Christian domination.” Rabinowitz et al. (2007):19:485.

⁵² Linder (1987):269.

⁵³ Rabello (1980):714n212

⁵⁴ Avi-Yonah (1976):225.

⁵⁵ Alon (1980):35.

⁵⁶ See Hillers (1992):32-39. The subject is addressed by the classic German publications of Budde (1882):1-52, Jahnow (1923) and Westermann (1954):44-80, and more recently by Dobbs-Allsopp (1993):157-163.

⁵⁷ For example, we read in yShekalim 5:1 (48d): בני אנש ואין הוון בני אינש ואין חמרין: “If the ancestors were angels, we are [merely] humans; if they were humans, we are [merely] donkeys.” Text is from Sussman (2001a):c618l637, translation of the Aramaic original is mine. – The spiritual and intellectual superiority of earlier generations is expressed in the *Bavli* in bYoma 9b, bBerakhot 20a, bBerakhot 35b, and bYevamot 39b. According to some *Bavli* passages, the general decline is counterbalanced only slightly by the existence of exceptional scholars. See the passages in bShabbat 112b about Rav Papa’s praise of studying all six orders of the *Mishnah* and bMenachot 29b about the scholarship of R. Akiva excelling that of Moses.

accumulated knowledge in the *Mishnah* because he feared that the thread of tradition would break. According to Sherira, later generations found the *Mishnah*'s dense language difficult to understand and started to add commentaries, and they eventually compiled the *Talmudim* when external circumstances threatened to wipe out Rabbinic learning.⁵⁸ Moses Maimonides (1135-1204) adopts the historical pattern and justifies the creation of his own systematic recapitulation of Jewish law in the *Mishneh Torah* by reference to "severe vicissitudes" and "the pressure of hard times".⁵⁹

It seems to me that the traditional dating of the *Yerushalmi* to ca. 425 is the result of a temptation of bringing three individual events together: the demotion of Rabban Gamaliel VI by Theodosius II (415), the end of the Patriarchate, and the creation of the *Yerushalmi*. The scholarly frustration over the scarcity of dated evidence is alleviated by the age-old model which explains the creation of major corpora of Rabbinic texts by internal decline and external threat. The explanation model is also used by scholars who dissociate the aforementioned three events and deviate from the traditional dating of the *Yerushalmi*. Leib Moscovitz, for example, writes that "it has been argued that the cessation of the Patriarchate sometime between 415 and 429 indicates that the PT [=Palestinian Talmud] was redacted at this time; however, there is no evidence of any connection between these events."⁶⁰ When Moscovitz proposes an earlier composition date for the *Yerushalmi*, he argues that the corpus was put together because the rabbis were facing external threat during the Jewish revolt under Constantius in 352-353 and a corresponding internal decline of the Galilean settlement around 360-370.⁶¹

There are two options for resisting the temptation of the traditional explanation model which may lead to unsubstantiated dating of the *Yerushalmi*. One can either simply ignore the question of dating of the text and concentrate only on the *Yerushalmi*'s manuscript history. Notable examples of this option are Baruch Bokser's contribution to the *Aufstieg und Niedergang der römischen Welt*

⁵⁸ Sherira writes that "as the mind (*leiba'* - ליבא) became weak and doubt arose [regarding the correct interpretation], they recorded and studied the interpretations of ancestors which they themselves had not recorded." – The "French" and "Spanish" recensions of the text are virtually the same at this point. The translation is according to the late-12th century MS Berlin Qu. 685 (fol. 219a) ("French" recension) and the 1566 *editio princeps* printed in Constantinople (p. Y16) ("Spanish" recension) reproduced in facsimile format in Schlüter (1993):23* and 57*. See the short analysis of the passage in Kellner (1996):18-20.

⁵⁹ See the "Introduction" of Maimonides' *Mishneh Torah* in Twersky (1972):39, and Chapter 3 "Maimonides on decline" in Kellner (1996):37-54.

⁶⁰ Moscovitz (2006):667.

⁶¹ According to Moscovitz, the "sudden decline of the Galilean settlement c. 360-70" is suggested by "indirect" archaeological evidence by which he means the lack of archaeological evidence in "the missing century". See Moscovitz (2006):665-666 and an extensive discussion of the economic and demographic decline in Palestine by Safrai (1998):83-127. The lack of archaeological evidence is an inconclusive *argumentum ex silentio*.

series⁶² and Abraham Goldberg's essay about the *Yerushalmi* in Shmuel Safrai's *The literature of the sages*.⁶³ The other option are represented by contemporary scholars who are usually dubbed "minimalist" on account of their approach to Rabbinic history which operates with a minimal amount of assumptions.⁶⁴ Catherine Hézser, Seth Schwartz and others represent the "minimalist" camp which has been the strongest inspiration for my thinking about the history of Rabbinic literature in its Eastern Roman context.

2.2.2 The demotion of Gamaliel VI and the Roman honorary senatorial titles

The 420s are considered to be a turning point in the history of Rabbinic Judaism. According to the traditional scholarly narrative, the demotion of Gamaliel VI in 415 and the subsequent end of the Palestinian Patriarchate meant a political watershed. It is held that it brought higher Rabbinic learning to an end in the region and resulted in the abrupt conclusion of the *Yerushalmi*. The narrative relies on strong assumptions about the nature of Gamaliel VI's demotion and its practical consequences. These assumptions do not take into account how peculiar Gamaliel VI's demotion is in the context of the Roman system of honorary senatorial titles.

The law issued by Theodosius II on 20 October 415 (*CTh* 16.8.22) informs the *praefectus pretorio* Aurelianus⁶⁵ that the Master of Offices Helion⁶⁶ has been ordered that "the appointment documents to the honorary prefecture shall be taken from [Gamaliel], so that he shall remain in the honour that was his before he was granted the prefecture."⁶⁷ Helion supervised the *sacra scrinia*, the palatine secretariat of Constantinople, as the chief executive officer formally answerable to the *praefectus praetorio* of the East. One of the bureaus of the *sacra scrinia* was the *scrinium epistularum* which managed the correspondence with smaller foreign and provincial rulers.⁶⁸ According to the order of the emperor, Helion withdrew the appointment documents (*codicili*) which had been given to Gamaliel VI by one of his predecessors.

⁶² Bokser (1979):139-256.

⁶³ Goldberg (1987b):303-319.

⁶⁴ The term "minimalist" for the description of a contemporary "camp" of Rabbinic historiography is used by Stern (2004):125-126 and Goodblatt (2006):417-418.

⁶⁵ After a 6-week mandate in 399, Aurelianus served as *praefectus praetorio* of the East for the second time between 30 December 414 and 10 May 416. See Jones et al. (1971-1992):2:199 and 1250.

⁶⁶ Helion, who is not named in the law, served as *magister officiorum* between 30 November 414 and 19 August 427. Jones et al. (1971-1992):2:533 and 1258.

⁶⁷ *CTh* 16.8.22: *eo codicil demantur honorariae praefecturae, ita ut in eo sit honore, in quo ante praefecturam fuerat constitutus*. Linder (1987):269.

⁶⁸ See Kelly (2005):188 and Clauss (1980):12-13.

A law issued by the Western Roman emperor Valentinian I (364-375) and the Eastern Roman emperor Valens (364-378) in 372 formalised the intricate system of bureaucratic-honorary hierarchy which adopted the language formerly applicable only to the senatorial order.⁶⁹ By the time, the senatorial order had lost its aristocratic birth right character. When Constantine the Great (306-337) established a second senate in Constantinople to counterbalance the dominance of Rome,⁷⁰ he was short of appropriate candidates. His son Constantius (337-361) started a recruitment campaign⁷¹ which he formally completed by a law issued in 361, and thereby the senates of Rome and Constantinople became formally split.⁷² Senatorial offices of the East became professional, rather than privileges granted by birth right. They reflected administrative excellence of the *homines novi* and appreciated the local elite loyal to Constantinople by honorary titles.

The law issued by co-emperors Valentinian I (364-375) and Valens (364-378) in 372 created a unitary system of bureaucratic-honorary hierarchy which was divided into three grades. The lower-rank officials honoured by the title *clarissimi*, the middle-rank officials by that of *spectabiles*, and the high-rank officials by that of *illustres*. An article by Ralph Mathisen overviews the so-called *tua*-honorifics by the imperial chanceries related to the three grades such as “Your sincerity” (*tua sinceritas*) and “Your highness” (*tua celsitudo*). Mathisen constructs a chart which lists the honorifics with the corresponding senatorial offices in the three grades.⁷³

As Peter Heather notes, there is an additional aspect of the bureaucratic-honorary hierarchy which is defined by the standard term time of the office. Some offices in the three-tier system “were *militia*, rather than *dignitates*, which meant that the occupants of such an office were required to serve a lengthy term, in many cases essentially a working lifetime..., rather than the normal year or so of a *dignitas* such as a provincial governorship.”⁷⁴ The table below reconstructs the system of

⁶⁹ The fragments of the same law are preserved in *CTh* 6.7.1, 6.9.1, 6.11.1, 6.14.1 and 6.22.4. See Heather (1997):188-189 and Jones (1973):1:142-143 and 142:1096nn1013-1015.

⁷⁰ The *Origo Constantini Imperatoris*, an anonymous work written about “the origin of the emperor Constantine” around 390, says in 6.30 that “Constantine, in memory of his famous victory, called Byzantium Constantinople, after himself. ... There he founded a Senate of the second rank; the members were called *clari*.” Lieu et al. (1996):47-48. A law of Constantius II (*CTh* 6.4.5-6 of 9 September 340) addressed to the Senate in Constantinople in 340 is the earliest evidence (and thereby the *terminus ante quem*) of the new institution which establishes key offices with the budget they oversee. The history of the Senates in the two halves of the Empire also reflects a rivalry of brothers between the Eastern Roman emperor Constantius II (337-361) and his Western counterpart Constans (337-350). See Jones (1973):1:132.

⁷¹ See Zuckerman (1998):121-136.

⁷² The provisions of the law of 361 are preserved thematically in the *Codex Theodosianus*. The fragments are listed in full by Jones (1973):2:1093n1048.

⁷³ Mathisen (2001):183 and 202-205.

⁷⁴ Heather (1997):195.

bureaucratic-honorary hierarchy according to two overlapping aspects, the three grades of *clarissimi*, *spectabiles* and *illustres*, and the two grades of *militia* and *dignitas*.

Table 2.1: The late Roman system of bureaucratic-honorary hierarchy

Honorary title	Examples of offices	Prestige according to term time
<i>illustres</i>	<i>praefectus praetorio</i>	<i>dignitas</i>
	<i>magister officiorum</i>	
<i>spectabiles</i>	<i>proconsul</i>	<i>militia</i>
	<i>vicarius</i>	
	<i>magister epsitularum</i>	
<i>clarissimi</i>	<i>consul provinciae</i>	
	<i>tribunus et notarius</i>	

Honorary offices like that of Gamaliel VI were outside of the formal system of late Roman bureaucracy which are difficult to locate with precision. According to indirect evidence, the honorary title of *illustris* was not automatically granted to the Palestinian patriarch. During the time of Gamaliel VI's predecessor Judah IV, the patriarchal office was associated with the title *illustris* in three consecutive laws issued by emperor Theodosius I (379-395) and Arcadius (383-408)⁷⁵ in 392, 396 and 397.⁷⁶ However, a law issued by Arcadius in 404, when Gamaliel VI was already in office, uses the honorary title of *spectabilis*.⁷⁷ The "law of demotion" from 415 talks about Gamaliel's honorary prefecture using the superior title of *illustris*, the one which Judah IV had previously held. This indirect evidence suggests that when Gamaliel VI entered his office, he had to renegotiate his status and prove his loyalty to the Roman government. Once Gamaliel VI had successfully passed the probation period, the emperor provided the new patriarch with the appointment documents of the honorary prefecture and gave him the title of *illustris* via the Master of Offices.

⁷⁵ Theodosius I was the last emperor to rule both parts of the Roman Empire. He made his elder son Arcadius co-emperor and ruler of the East in 383 and his younger son Honorius co-emperor and ruler of the West in 393. When Theodosius I died, his sons formally divided the Empire and hence a brotherly rivalry started between the East and West.

⁷⁶ We find the expression *virorum clarissimum et inlustrium patriarcharum* in *CTh* 16.8.8. (17 April 392), and *inlustrium patriarcharum* *CTh* 16.8.11 (24 April 396) and *CTh* 16.8.13 (1 July 397). See Linder (1987):186-187, 196 and 202.

⁷⁷ The law preserved *CTh* 16.8.15 (3 February 404) includes the expression *viris spectabilis patriarchis*. See Linder (1987):220.

The practical consequences of Gamaliel VI's demotion are hard to grasp. It documents a demotion carrying unprecedented public shame at the level of imperial law.⁷⁸ To understand Gamaliel VI's demotion better, I suggest drawing analogy with the military system which functioned in parallel to the bureaucratic one. The *Digest* preserves a passage from the 3rd century jurist Modestinus which lists the punishments for soldiers such as "change of branch of the service" (*militiae mutatio*), "dishonourable discharge" (*ignominiosa missio*), and "reduction in military rank" (*gradus deiectio*).⁷⁹ The punishment of *gradus deiectio* is the closest to what was imposed on Gamaliel VI. This punishment, however, was rarely used in the ranks. Military demotion was rather camouflaged by *militiae mutatio* to avoid public shame.⁸⁰ If the analogy is extended to the bureaucracy of the later Roman Empire, *militiae mutatio* and a corresponding drop in responsibility and prestige was probably a more common method of dealing with office holders who fell out of the emperor's favour. The fact that Theodosius II chose such an unprecedented form suggests that he wanted to impose extreme shame on Gamaliel II. The emperor wanted to part radically with the patriarch, but he probably had no formal means of punishing him.

A series of laws indicate that the power of the Palestinian Patriarchate expanded by the time of Judah IV and Gamaliel VI. During the time of Judah IV, the patriarch was protected from insult (*CTh* 16.8.11 of 24 April 396) and he was allowed to litigate according to Jewish customs by mutual agreement of Jewish parties (*CTh* 2.1.10 of 3 February 398). It is reasonable to assume that when the Western Roman emperor Honorius (393-423) prohibited the patriarch from collecting taxes (*CTh* 16.8.14) in a law dated between 3 February 398 and 11 April 399, he wanted to take the opportunity offered by Judah IV's death to undermine the growing autonomy of the Patriarchate. Honorius' consideration was probably more financial than political in nature. Günter Stemberger suggests that the law aimed to stop the eastward flow of cash in a Roman Empire where the Western and Eastern parts were continuously growing apart.⁸¹ Emperor Honorius revoked the prohibition five years later

⁷⁸ Contrary to demotion, the practice of promotion is well documented from around the Roman world. It was advertised either by the government or the proud office holder. Beat Näf discusses the available literary evidence in Näf (1995). Further evidence is provided by Delbrück (1929).

⁷⁹ Modestinus, Punishments 4, D.49.16.3.1 About military punishments in general and the *gradus deiectio* in particular, see Watson (1969):117-126, and esp. 124-125.

⁸⁰ About the power of shame in Roman times see among others Balsdon (1960):43-50, the chapter entitled "The vocabulary of privilege" in Garnsey (1976):221-233, as well as Eisenhut (1973), Kelly (1976):93-111 and Kaster (1997):1-19.

⁸¹ Stemberger writes that "[the law] probably should be understood in the context of the dispute between Honorius and Arcadius, as a fiscal harassment of the eastern part of the empire, but not as a primarily anti-Jewish measure. The intention is simply to avoid the draining of money into the opposing part of the empire. The fact that a special law was passed seems to indicate that considerable sums of money were involved." Stemberger (2000):249.

(*CTh* 16.8.17 of 25 July 404) which is understood by Stemberger as a sign of reconciliation between the imperial brothers, Honorius of the West and the Arcadius of the East.⁸² If we take into consideration that Gamaliel VI's patriarchal privileges were confirmed by Arcadius earlier that year (*CTh* 16.8.15 of 3 February 404), the revocation of the prohibition can be interpreted as a sign for the strength of the patriarchal office which Constantinople struggled to curb.⁸³

The opportunity to undermine the power of the Palestinian Patriarchate arose about a decade later. The Eastern Roman emperor Honorius issued a law with his Eastern counterpart Theodosius II addressed "to Master Annas and the elders of the Jews" (*Annati didascolo et maioribus Iudaeorum*) of Ravenna only two weeks after demoting Gamaliel VI.⁸⁴ Stemberger highlights the striking aspect of the law which contradicts the one issued against the Palestinian patriarch Gamaliel VI two weeks earlier. Whereas the law demoting Gamaliel VI prevents Jewish masters from owning Christian slaves, the one addressed to Master Annas and the elders of Ravenna allows it.⁸⁵ It is unknown what position Annas held at the time and whether his designation as a "master" (*didascalus*) hints at his association with the rabbis in Palestine who challenged the political power of the Patriarchate.⁸⁶ It is reasonable to assume that Annas and his circle approached Theodosius II to undermine the political power of Gamaliel VI and to keep the West's contribution to the patriarchal office in the West. If my interpretation is correct, Theodosius II was happy to take advantage of the internal strife to destabilise the Palestinian Patriarchate.

Contrary to the traditional narrative,⁸⁷ the Patriarchate was not abolished and Theodosius did not interdict the Patriarchate after the death of Gamaliel VI.⁸⁸ A new institution associated with "the principal of the academy" (*resh pirqa* – ריש פירקא) in Tiberias is unlikely to have replaced the

⁸² See Stemberger (2000):249.

⁸³ As Seth Schwartz puts it, the 4th century witnessed "the slow and incremental growth in the influence of patriarchs and rabbis as a result of their own aggressive self-promotion". Schwartz (2001):185.

⁸⁴ The address of *CTh* 16.9.3 of 6 November 415 is repeated in a law issued 11 months later on 24 September 416 (*CTh* 16.8.23). Linder (1987):272-276.

⁸⁵ See Stemberger (2000):264.

⁸⁶ The corresponding Rabbinic sources for the rivalry between the rabbis and the Patriarchate are overviewed in Hézser (1997):429-435. A contentious article by Ben-Zion Rosenfeld argues that "a serious rift developed between the Patriarch and the rabbis... [which] indirectly effected and hastened the termination of the office of Patriarch." Rosenfeld (1988):ix.

⁸⁷ For example, Avi-Yonah (2001):187-188.

⁸⁸ According to Seth Schwartz, "the patriarch's privileges were limited in a law of 415, and under unknown circumstances abolished about ten years later", but he later adds that "there is no reason to think the Jewish primates were entirely stripped of their recognized authority over the Jews." In Schwartz (2001):192-193.

Patriarchate.⁸⁹ All we know is that by 429 the patriarchate was no more, at least as far as the imperial centre in Constantinople was concerned. A law issued by Theodosius II in that year talks about “the cessation of the patriarchs” (*post excessum patriarcharum*).⁹⁰ The law orders the “primates of the Jews” (*Iudaeorum primates*) to collect taxes from all synagogues in “the provinces of Palestine” and “in other provinces” including those in the Western part of the Empire “in the same way that the patriarchs used in the past to demand under the name Crown Gold (*coronarii aurii*)”.⁹¹ The tax which sustained the patriarchal office was rechannelled to the palatine treasury.⁹² The Patriarchate seems to have disintegrated between 415 and 429 as a result of the internal strife in the Jewish world and the revocation of external imperial support. Gamaliel VI most probably died without a rightful heir⁹³ and the community was unable to appoint a successor amidst pressure from both in- and outside.

2.3 Roman Jewry law in the golden days of the Palestinian Patriarchate (212-396)

2.3.1 Jewish status and the elusive concept of *religio licita*

The scholarly consensus has shifted in recent years towards the acknowledgement that *religio licita* is an inadequate term to describe the legal and social status of Jews in the Roman Empire.⁹⁴ The misleading interpretation goes back to an expression found in the *Apology* by the Latin Church Father Tertullian (ca. 155-240) who describes Judaism as “a very famous religion and one certainly permitted by law” (*insignissima religio certe licita*).⁹⁵

In order to establish the legal acknowledgement of Judaism in Roman law, Jean Juster provides a comprehensive account of Jewish privileges from the time of Julius Caesar (49-44 BCE) until their

⁸⁹ The institution of the *rosh ha-pereq* is only recorded in the *Seder Olam Zutta* which “lists 89 generations from Abraham to the exile and then to end of the Talmudic period.” Stemberger (1996):327. The Babylonian chronicle is dated to the early-9th century, and its historical reliability is very contentious. See Goodblatt (1994):274-276, Safrai (1998):54-55 and Goodblatt (2006):423.

⁹⁰ Martin Jacobs understands the phrase *post excessum patriarcharum* as referring to the death of the patriarch, not simply the cessation of the patriarchal office. Jacobs (1995):304.

⁹¹ *CTh* 16.8.29 of 30 May 429 in Linder (1987):321. More on Jewish tax duties in section 2.3.1 “Jewish status and the elusive concept of *religio licita*”.

⁹² The law is addressed to the Head of the Treasury (*comes sacrarum largitionum*) and orders that the “Crown Gold” should be “entered in our Largesses” (*nostris largitionibus inferatur*). On the structure of the Treasury, see Jones (1973):427-437.

⁹³ Jacobs (1995):304-307.

⁹⁴ See the essays by Görg Hasselhoff (“*Religio licita* – Rom und die Juden”) and Karl-Leo Noethlichs (“Der rechtliche Status der Juden im römischen Reich”) in Hasselhoff et al. (2017):1-12 and 55-83.

⁹⁵ *Apology* 21.1 according to the text with English translation in Glover (1931).

virtual revocation during Justinian (527-565).⁹⁶ According to Juster, the privileges were chartered by Julius Ceasar as “a true *Magna Charta* for the Jews of the Empire”.⁹⁷ Juster pushes the evidence to the extreme when presenting privileges granted to Jewish individuals as a system of communal rights. Contrary to Juster’s presentation, Tessa Rajak reviews and reevaluates the evidence about the privileges enjoyed by the Jews at the time of the First Jewish War (66-73) and dismisses Juster’s thesis. Rajak approaches Jewish privileges not at the imperial level, but at the communal level of cities. She argues that

Jewish *nomoi* were not formally incompatible with city requirements, though they could become contentious if the populace or the officials wanted to make life awkward. That was when the authorities might create difficulties about Sabbath observance, close special food markets, deny ownership of meeting places, prevent the export of funds. But it was not in the very nature of the polis to exclude such activities and in the normal course of events they must have proceeded without question. It is for this reason that it is unsatisfactory to talk of the permanent need for *privilegia* from Rome, while it is right to stress the repeated necessity for outside, i.e. Roman help.⁹⁸

Rajak’s emphasis on city communities is confirmed by a rescript issued by emperor Caracalla on 30 June 213.⁹⁹ Just like the so-called Jewish tax (*fiscus Iudaicus*) levied by Vespasian in 70,¹⁰⁰ and Caracalla’s universal expansion of tax duties camouflaged as an expansion of Roman citizenship in 212,¹⁰¹ the primary purpose of the rescript was to maximise tax income. Individual tax duties were left unaffected by the rescript which disqualified “the community of the Jews” (*universitas Iudaeorum*) in Antioch from claiming a legacy left to them in court. The law used the vague expression of *universitas* which has no legal significance. The legacy left to the Jewish community was declared unclaimable in court, because it had been left to a body which did not exist in the eyes of law.

⁹⁶ Juster’s rich footnotes include the available primary evidence. See Juster (1914):1:213-242.

⁹⁷ Juster himself attributes the expression to Benedikt Niese. Juster (1914):216-217.

⁹⁸ Rajak (1984):107. Monographic treatments of the subject are Noethlichs (1996) and Ben Zeev (1998).

⁹⁹ The law was adopted by Justinian I and preserved in his *CJ* 1.9.1. See Linder (1987):108-109.

¹⁰⁰ See the thought-provoking article by Martin Goodman who argues that emperor Nerva adopted a religious understanding of Judaism. As advertised on his coins, the “disgrace of the Jewish tax was removed” (*fisci Iudaici calumnia sublata*) in 96 when Nerva specified that only those who practise Jewish rituals were compelled to pay. The *fiscus Iudaicus* had been originally levied by Vespasian in 70 according to ethnic Jewish background. See Goodman (1989):40-44.

¹⁰¹ See footnote 119 for the evidence from the historian Cassius Dio.

Associations (*collegia*) of at least three members were able to claim legal personality which claim was denied from the Jewish *universitas* of Antioch.¹⁰² Even though they were typically professional organisations,¹⁰³ Jörg Rüpke notes that “there were *collegia* explicitly founded as religious associations”.¹⁰⁴ The ruling and vocabulary of Caracalla’s rescript denies the Jews of Antioch the communal rights of a *collegium*, and it is reasonable to think that Jewish communities in other cities of the empire were treated in a similar manner.¹⁰⁵ In Roman legal terms, Judaism was not a network of religious *collegia*, but a group of individuals “barely tolerated, and taxed.”¹⁰⁶ They were conveniently referred to as *universitas*, *ethnos* or some other legally irrelevant term in order to maximise their tax duties and minimise their legal rights.

The term *religio licita* “had no official standing”, as Jörg Rüpke writes, it “is not a Roman but a Christian concept”.¹⁰⁷ The misinterpretation of *religio licita* does not even fit its original context in Tertullian. According to Seth Schwartz, “Tertullian never implies that the legality of Judaism was a matter of state policy. On the contrary, Judaism is legal only in the sense that no one has ever bothered to declare it illegal, unlike Christianity.” Therefore, argues Schwartz, it is misconstrued to “use Tertullian’s phrase (*religio licita*) as a shorthand characterization of early and high imperial Roman policy.”¹⁰⁸

When Constantine the Great (306-337) adopted Christianity as the new imperial ideology which was hoped to reunite the Empire, the litmus test of loyalty to Rome has become religio-political in nature.¹⁰⁹ The imperial centre applied a double policy which, on the one hand, supported the conversion of Jews to the Christian faith, and, on the other hand, sought to isolate those who were reluctant to leave the Jewish “deadly sect” (*feralis secta*) behind. The legal vocabulary became polemical and often hostile. The law issued by Constantine on 18 October 329 (*CTh* 16.8.1/*CJ* 1.9.3) threatens with capital punishment, if Jews were to persecute their fellow man “raising his eyes to God’s cult” (*qui ad dei cultum respexerit*). Against those who decide to “approach their nefarious

¹⁰² In the title “The meaning of terms”, which functions as a glossary in Justinian’s *Digest*, we read that “Neratius Priscus think that three make a ‘*collegium*’ and this is rather to be followed.” (Marcellus, *Digest* 1, D.50.16.85)

¹⁰³ Rüpke notes that the largest *collegium* was that of the carpenters in Rome with 1300 roughly members. See Rüpke (2007):207.

¹⁰⁴ Rüpke (2007):206.

¹⁰⁵ Schwartz provides a similar understanding of the rescript in Schwartz (2001):191-192n136.

¹⁰⁶ Schwartz (2001):190.

¹⁰⁷ Rüpke (2007):35. and Wilson (1995):68.

¹⁰⁸ Schwartz (2001):189.

¹⁰⁹ For the earlier period, see Ando (2000). Ando describes the shift (and blending) of “pagan” and “Christian” political ideologies in Ando (2006):126-145.

sect" (*ad eurom nefariam sectam accesserit*), Constantine mentions the suffering of "the deserved punishments" (*poena merita*).¹¹⁰

The legal rhetoric changed, and Judaism which had been predominantly understood in the ethnic terms of *gens*, *natio* or *populus*, became *superstitio* or *secta*. It did not take long until Judaism became on par with the pagans and heretics, and received the same treatment.¹¹¹ A law issued by Constans on 1 November 342 (*CTh* 16.10.3) demands that "every superstition must be entirely uprooted" (*quamquam omnis superstitio penitus eruenda sit*). Constans set the tone for numerous laws using hostile vocabulary which were bolstering the dominance of the "orthodox" understanding of the Christian faith.¹¹² The Western emperor Gratian concentrated on Christians "passing over to [pagan] altars and temples, ... polluting themselves with the Jewish contagions ... [and] frequenting the Manicheans' execrable hideouts" in a law given on 21 May 383 (*CTh* 16.7.3).¹¹³ Two decades later during the time of co-emperors Honorius (393-423) and Theodosius II (408-450), the increasingly polemical language was turned against the "heretics" and "gentiles".¹¹⁴ In no more than two year between 407 and 409, Honorius issued four laws against various people who "want to throw the sacraments of the Catholic faith into disorder" (*catholicae fidei velint sacramenta trubare*)¹¹⁵ including the Donatists, the heretics and the Jews.¹¹⁶ Honorius' successor Valentinian III in the West and Theodosius II in the East followed Honorius' example and issued five further laws between them in defence of "the venerable Christianity" (*venerenda Christianitas*) between 423 and 438.¹¹⁷ Judaism gradually became part of the "triple pattern" of "Jews, pagans, heretics".¹¹⁸ Judaism

¹¹⁰ See Linder (1987):126-127.

¹¹¹ See Linder (2006):148-154

¹¹² Policies and theological arguments against the Jews and in defence of the Christian faith are first overviewed by the classic work of Parkes (1934).

¹¹³ Linder (1987):170-171.

¹¹⁴ The law of Honorius given on 25 November 407 is preserved in multiple versions in the *Const. Smir.* 12, *CTh* 16.5.43 and *CTh* 16.10.9, and adopted by Justinian in *CJ* 1.9.12. The law of Theodosius II given on 29 May 408 was preserved in *CTh* 16.8.18 and adopted by Justinian in *CJ* 1.9.11. See Linder (1987):229-234 and 237-238.

¹¹⁵ The expression appears in the law given on 24 November 408 which is preserved in *CTh* 16.5.44 in Linder (1987):240.

¹¹⁶ Apart from the two laws mentioned in the two previous footnotes, these laws are the one given on 15 January 409 preserved in *Const. Smir.* 14, *CTh* 16.2.31 and *CTh* 16.5.46 adopted by Justinian in *CJ* 1.3.10, and the one given on 1 April 409 preserved in *CTh* 16.8.19 and *CTh* 2.8.25 adopted by Justinian in *CJ* 1.9.12 and *CJ* 1.12.2. See Linder (1987):245-253 and 257-260.

¹¹⁷ Apart from the one mentioned in footnote 114, these laws are (1) the one issued on 9 April 423 preserved in *CTh* 16.8.26, *CTh* 16.9.5, *CTh* 16.10.22 and *CTh* 16.5.59 adopted by Justinian in *CJ* 1.9.16, (2) the one issued on 8 June 423 preserved in *CTh* 16.8.27, *CTh* 16.5.60 and *CTh* 16.10.24 adopted by Justinian in *CJ* 1.11.6, (3) the one issued on 1 February 425 preserved in *CTh* 15.5.5, (4) the one issued between 9 July and 6 August 425 (the only one associated with the Western emperor Valentinian III) preserved in *Const. Smir.* 6, *CTh* 16.5.62, *CTh*

did not lose its status of “permitted religion” (*religio licita*) because such category never existed. As individual Jewish privileges were gradually revoked under Christian rule, the legal context encouraged Rabbinic Judaism to isolate itself on the periphery of the Christian Roman Empire.

2.3.2 The isolating effect of Roman Jewry law

The disintegration of the Patriarchate by 429 marked the end of a period which witnessed the Jewish world becoming gradually more autonomous and more isolated from the imperial centre. The period started with emperor Caracalla’s *Constitutio Antoniana* in 212 which granted universal access to the *ius civile* and granted legal rights (and levied tax duties) to all subjects of the Empire.¹¹⁹ The law formalised what seems to have been common practice by non-citizens of the provinces who already used Roman law for their business transactions on a consensual basis.¹²⁰ The *Constitutio Antoniana* had little change on current practices as people in the provinces continued to use a mix of communal, local and imperial law. Even after the formal expansion of Roman law, the nature of the transaction and, more importantly, access to a particular type of adjudication and enforcement determined whether communal, local or imperial law was chosen.

Jill Harries distinguishes three parallel systems of dispute settlement to this effect: “the formal adjudication of courts presided over by Roman governors and other judges”; the “set arbitration procedures” according to local law as agreed by the parties; and the “unofficial dispute-settlement” where the parties deliberately avoided “the cumbersome and possibly dangerous option” of one of the two official routes.¹²¹ The provisions of compromise (*compromissum*)¹²² and custom

16.2.46, *CTh* 16.5.63, *CTh* 16.2.47 and *CTh* 16.5.4, and (5) finally the one given on 31 January 438 preserved in *Novella* 3 of Theodosius II adopted by Justinian in *CJ* 1.9.18, *CJ* 1.7.5 and *CJ* 1.5.7. See Linder (1987):291-293, 297-300, 302-303, 307-312 and 326-334.

¹¹⁸ Linder (2006):150-151.

¹¹⁹ As the historian Cassius Dio cynically remarks, Caracalla “made all the people in his empire Roman citizens; nominally he was honouring them, but his real purpose was to increase his revenues by this means”. *Roman history* 78.9.5. The translation is according to Cary et al. (1914-1927):9:297.

¹²⁰ Linder gives the examples of Paul of Tarsus and Babatha in Linder (2006):131. For the private archives of Babatha and Salome Komaise discovered in the Judean desert and dated to the 2nd century, see the sources published in Yadin et al. (1989). For an evaluation of the discoveries, see Goodman (1991):169-175, Isaac (1992):62-75 and Cotton (1993):94-108. In recent times, two monographs have been dedicated to the subject. See Oudshoorn (2007) and Czajkowski (2017).

¹²¹ Harries (2003):65-66.

¹²² As Linder points out in Linder (1987):270n271 (his reference is unfortunately inaccurate), the practice is also attested in Rabbinic literature. In *yMoed Qatan* 3:3 (82b) (see Sussman (2001a):c812l849-850), we read that “arbitration documents [according to Jewish practice] (שטרי בירורין) – Rabbi Yohannan said – “[and] *compromissum* [according to Roman practice] (קומפרומיסין)”, they are two different types of arbitration procedures.” The expression of *compromissum* also appears in a fragment of the *Sefer ha-Maasim* (Book of

(*consuetudo*) formalised the coexistence of local procedures with Roman law.¹²³ Unlike in modern times, the law of the central government hardly penetrated the farthest corners of the provinces.¹²⁴ The Empire simply provided a tax union and a common context of parallel legal and social structures which gradually grew apart. As Jill Harries notes, in the later Roman Empire, “patriarchal (and episcopal) jurisdiction depended for its effectiveness on local social values independent of the [Roman] law. ... The growing assertiveness at the heart of government showed self-confidence but also a growing gap between central and local perceptions and practice.”¹²⁵

The tendency towards isolation, ignorance and indifference was reinforced internally by Rabbinic law. Dietary and purity laws as well as the restrictions of trading with pagans have always supported Jewish isolation.¹²⁶ While these rules might have prevented voluntarily observant Jews from interacting with their pagan neighbours, it is unlikely that the Patriarchate or local Rabbinic “primates” were ever able to enforce them on Jews who chose not to follow the Rabbinic way of life. In fact, Rabbinic law distanced itself from such “ordinary”¹²⁷ or “apostate”¹²⁸ Jews rather than trying to accommodate their susceptible interactions with pagans.

Sometimes external and internal forces came into complete harmony like in the case of the law prohibiting marriage between Christians and Jews which was issued by Theodosius on 14 March 388 (CTh 3.7.2 and CTh 9.7.5). People in such relationships were “condemned for adultery” (*adulteri damnantur*) and allowed to be accused by anyone suspicious, not only by relatives.¹²⁹ The law, which

legal precedents) from the Cambridge Cairo Genizah collection (TS 10 F4⁵, 2a) which says that “a gentile who comes to [a Jewish] court, they may provide him with a judgement ... provided that a *compromissum* is written about the judgement which he [the gentile] receives.” (גוי שבא לידון יש דנין אותו ... ובלבד שייכתוב קופרוסימא לשם) (הדין שהוא מבקש) The fragment is presented in Mann (1930):8. On the *Sefer-ha-Maasim* see Mann (1930):1-5 and Stemberger (1996):186.

¹²³ Harries (2001):71. “Out of court” dispute settlement was first addressed by Harries (1999):172-190.

¹²⁴ Louis Feldman evaluates the Roman and Rabbinic textual evidence for the “nonenforcement of imperial laws” in Feldman (1993):395-397. See more on the subject below in section 2.4.1 “The non-enforcement of discriminating Jewry law”.

¹²⁵ Harries (2003):80.

¹²⁶ The most notable source for such rules is tractate *Avodah Zarah* (“Foreign worship”) in the *Mishnah*, the *Tosefta* and the two *Talmudim*. The literature on the Rabbinic laws supporting isolation is enormous. Some monographic treatments of the subject are Porton (1988), Stern (1995), Klawans (2000), and Hayes (2002).

¹²⁷ These “ordinary” Jews are called “people of the land” (*am ha-aretz*) in Rabbinic literature who were presumably less educated in the Rabbinic way of life and lax in following its requirements. The classic monograph of the subject is Oppenheimer (1977), but see also Stern (1995):114-120.

¹²⁸ Jews who fall completely outside the Rabbinic influence zone go by many names in Rabbinic literature. Contentiously, they are those referred to as *minim* (“heretics”?) or *apikuros*. See Stern (1995):105-114, Kalmin (1994):155-169 and the monographic treatment of the subject in Schremer (2010).

¹²⁹ Linder (1987):179.

was also adopted by Justinian (*CJ* 1.9.6), was in harmony with Rabbinic regulations which did not approve of inter-religious wedlock. The hierarchy of descent (*mHorayot* 3:8) and genealogical classes (*mQiddushin* 4:1) in early Rabbinic literature concentrate on the “marital caste system within Israel” which suggests that exogamous marriage was no longer considered to be a viable option.¹³⁰

The prohibition of circumcision¹³¹ and the corresponding issue of Jewish ownership of Christian slaves are examples for pieces of imperial legislation amplifying Jewish isolation. Presumably due to misguided humanistic considerations, Hadrian (117-138) infamously put a general ban on circumcision and, according to the dubious account of the *Historia Augusta* (14.2), incited the Bar Kokhba Revolt (133-135).¹³² Hadrian’s ban was revoked shortly after by Antoninus Pius (138-161) with the provision that one who circumcises a non-Jew should “suffer the punishment of a castrator”.¹³³ The *Sententiae* of the jurist Paul (5.22.3-4) from the end of the 3rd century includes a general ban on circumcision “in accordance with the Jewish custom” (*Iudaico ritu*) applying to “Roman citizens” (*cives Romani*).¹³⁴

Humanistic considerations were replaced by religio-political ones under Constantine the Great and his successors who reinforced the prohibition of circumcision, and specifically the circumcision of Christian slaves. A law issued by Constantine on 21 October 335 prohibited to circumcise “a Christian slave or of any other sect whatsoever” (*Christianum mancipium vel cuiuslibet alterius sectae*) and confirmed the protection of Jews turning to Christianity from any possible Jewish harassment.¹³⁵ Constantine II (337-340) and Theodosius (379-395) went one step further by prohibiting the buying of non-Jewish slaves.¹³⁶

¹³⁰ Biblical law is in favour of endogamous marriage, but it does not rule out marrying someone from outside the community. The “harsh polemic against intermarriage” starts with Ezra (5th century BCE) after the Jewish exile’s return to the Land of Israel. See Michael Satlow’s chapter “Endogamy and exogamy” in Satlow (2001):131-161 and esp. 138 and 149.

¹³¹ See the brief discussion of the Roman prohibition against circumcising slaves in Hézser (2005):41-44.

¹³² See Smallwood (1976):428-431, Oppenheimer (1981):55-69 and Rabello (1995):176-214.

¹³³ The law which is preserved in the *Digest* (*D.48.8.11*, Modestinus, Rules, Book 6) was issued sometime between 138 and 155. Linder (1987):100.

¹³⁴ The formulation of the law is problematic. If Jews are considered to be Roman citizens, then Paul prohibits circumcision of male children born to Jewish parents. If Jews are allowed to circumcise their sons, then they are not considered to be Roman citizens. Both positions are absurd as correctly noted in Linder (1987):118-119n113.

¹³⁵ The law is preserved in various versions in the *Const. Smir.* 4, *CTh* 16.9.1 and *CTh* 16.8.5. See Linder (1987):139-142.

¹³⁶ The law of Constantine given on 13 August 339 is preserved in multiple versions in *CTh* 16.9.2, *CTh* 16.8.6 and *CJ* 1.10.1, that of Theodosius given in September 384 in *CTh* 3.1.5. See Linder (1987):147-149 and 176-177.

The aforementioned law issued by the Western Roman emperor Honorius on 6 November 415 (*CTh* 19.9.3) stands out as an anomaly in the gradual process of restricting Jewish rights.¹³⁷ The law allows the possession of Christian slaves on the condition that they are permitted “to keep their proper religion” (*propriam religionam eos servare*). The law should not be understood as a sudden and short-lived change of policy, but rather as a part of the political game which aimed to destabilise the Palestinian Patriarchate. It was addressed to Master Annas in Ravenna only two weeks after the law which had withdrawn the honorary prefecture from Gamaliel VI, prohibited patriarchal jurisdiction over Christians, and banned the possession of Christian slaves. The fact that Honorius’ brother and Eastern co-emperor Theodosius II repeated the prohibition of buying Christian slaves two years later, on 10 April 417,¹³⁸ underlines the anomalous character of the law addressed to Annas.

Between the age of Constantine and Justinian, the imperial policy concerning circumcision and the Jewish ownership of Christian slaves remained consistent. The policy is in harmony with the efforts of establishing a new imperial centre in Constantinople with a new Senate and a new elite (*homines novi*). I suggest that the underlying purpose of the circumcision and slave laws was to restrict the practice of domestic Jewish “conversion” by which non-Jewish labour became acceptable even according to Rabbinic standards¹³⁹ and to separate Jewish and Christian labour in general.¹⁴⁰ The next section will give further examples of imperial policy which aimed at the redistribution of power and wealth at the expense of Jews. Even if such policy was not totally successful, it resulted in a growing gap between the Christian imperial centre and the Rabbinic periphery.

¹³⁷ See the paragraph relating to footnote 84 above.

¹³⁸ *CTh* 16.9.4 in Linder (1987):278-279.

¹³⁹ According to Genesis 17:12-13, “he that is born in the house, or bought with money of any foreigner, that is not of thy seed” are to be circumcised to which tAvodah Zarah 3:11 explicitly adds the requirement of immersion. Hézser notes that the practice of circumcising and immersing gentile slaves does not technically constitute conversion, but it rather functions “as symbolic purification rites supposed to cleanse the slaves from their former contact with idolatry”. Hézser (2005):36.

¹⁴⁰ There is an alarmingly successful modern example of cultural isolation by separating labour. During the first wave of Jewish settlements at the turn of the 19th and 20th centuries in what later became Mandatory Palestine, the new Jewish landowners predominantly employed more expensive and less experienced “Hebrew labour” to create a self-reliant economy. What was originally a *bona fide* consideration had arguably devastating consequences on Jewish-Arab relations in the Middle East. See Aaronsohn (1996):219-225 and the monographic treatment of the subject in Shafir (1996).

2.4 The isolation of the Jewish world in Palestine (429-553)

2.4.1 The non-enforcement of discriminative Jewry law

The establishment of a new elite in the Eastern Roman empire was reinforced by the destabilisation of old structures. The imperial centre set its eyes on the cities and their local councillors (*curiales*) who were responsible to collect taxes and supplement them from their own resources, if they failed to raise the expected amount.¹⁴¹ The tax income of the cities was hit hard by the great inflation of the 3rd century from which they never really recovered. The cities became reliant on the imperial centre which was reluctant to inject resources or change the funding structure. The previously prestigious curial positions became a significant financial burden for the office holders.¹⁴² Candidates tried to avoid curial offices and a local political career. As Peter Heather puts it, “in migrating to ‘imperial’ careers, the curials were merely following the money.”¹⁴³

When Constantine the Great provided in a law issued on 11 December 321 (*CTh* 16.8.3) “that the Jews shall be nominated to the curia” contrary to “the ancient custom”,¹⁴⁴ he was hardly legislating in favour of them. The negative purpose of the original legislation is underlined by subsequent laws which deal with the exemption from curial duties and the revocation of the exemption. Constantine granted exemption to “those who dedicated themselves with complete devotion to the synagogues of the Jews, to the patriarchs or to the presbyters [of the Sanhedrin]”.¹⁴⁵ This exemption was revoked by Gratian in 383, reinstated by the Eastern Roman emperor Arcadius in 397, and revoked again by the Western Roman emperor Honorius in 398.¹⁴⁶

In 399, Arcadius legislated against “any man born to a curial father, or one who had already begun curial liturgies [who] illegally occupy a State office”.¹⁴⁷ This law indicates that curial and senatorial careers became more and more separated. During Constantius’ recruitment campaign, which was formally concluded in 361, the Eastern senatorial ranks grew exponentially. By the end of the 4th century, the emperors tried to put a cap on the lucrative imperial careers¹⁴⁸ and stop the curials

¹⁴¹ Földi et al. (1996):224.

¹⁴² See Jones (1973):732-734.

¹⁴³ Heather (1997):205.

¹⁴⁴ Linder (1987):121-122.

¹⁴⁵ *CTh* 16.6.2 (of 29 November-1 December 330) in Linder (1987):134.

¹⁴⁶ The laws are preserved in *CTh* 12.1.99-100 and *CJ* 1.9.5 (of 18 or 19 April 383), *CTh* 16.8.13 (of 1 July 397), and *CTh* 12.1.157-158 and *CJ* 10.32.49 (of 13 September 398) in Linder (1987):165-166, 202-203 and 213-214.

¹⁴⁷ *CTh* 12.1.165 (of 28 or 30 December 399) which was adopted by Justinian in *CJ* 1.9.10. See Linder (1987):219.

¹⁴⁸ See Heather (1997):189, and 205-206 and the hints in Mathisen (2001):196-200.

from abandoning their local duties. The imperial centre tried to keep the loyal new elite (*homines novi*) in imperial senatorial offices, and members of the old administrative elite (*homines veteres*) in local curial offices.

Shortly after Gamaliel's demotion in 415, a law issued by Honorius with Theodosius II barred "those living in the Jewish superstition" from entering to offices of the State Service. The nominal reason was that Jews were unable to meet the formal requirement of taking "the oath of the Service". The law, however, did not exclude "Jews educated in the liberal studies from the freedom of practising as advocates". The emperors cynically permitted the Jews "to enjoy the honour of the curial liturgies, which they possess by right of their birth's prerogative and their family's splendour."¹⁴⁹ A few years later in 425, a law issued by Theodosius II with Valentinian III also deprived the Jews of "the right to practice law".¹⁵⁰ On this occasion, the reasoning became explicitly religio-political as the emperors argued that they did not want "people of the 'Christian law' to become slaves to them [the Jews]".¹⁵¹ As the senatorial offices of the State Service and the legal career became inaccessible, there is reason to believe that Jews also stayed away from "liberal studies" which was a prerequisite for these careers.¹⁵² Participation in the educational system simply became a meaningless dead-end for young Jews. Confiscation of Jewish property and the prohibition against building or restoring synagogues supplemented the restrictive laws the language of which increasingly echoed that of the theological genre of *adversus Iudaeos*.¹⁵³

Justinian adopted the Jewry laws of the 5th century with almost no exception. The laws were preserved in his *Codex*¹⁵⁴ and reinforced in his *Novella*.¹⁵⁵ Justinian wanted to establish imperial unity

¹⁴⁹ *CTh* 16.8.24 (of 10 March 418) in Linder (1987):281-282.

¹⁵⁰ *Const. Smir.* 6 which is dated between 9 July and 6 August 425. See Linder (1987):305-308.

¹⁵¹ *Const. Smir.* 6: *quibus Christianae legis nolumus servire personas* - Unlike the previous quotations which follow Linder, this translation is mine. According to my search in the *Amanuensis* database (Riedlberger (2014)) the expression of *Christiana lex* refers to the orthodox Christian doctrine supported by the emperor which appears 16 times in *Const. Smir.*, *CTh* and *CJ*. For example, it appears in the law of Theodosius II prohibiting to mock Christianity on Purim (*CTh* 16.8.18 of 29 May 408) where it is synonymous with "Christian faith". The law uses the expressions *in contemptum Christiane fidei* and *citra contemptum Christianae legis* interchangeably.

¹⁵² It is, however, technically incorrect to say that Jews were banned from the educational system as Nicholas de Lange suggests (without identifying the primary source) in de Lange (1992):23 and in de Lange (2005):421.

¹⁵³ The comprehensive collection and treatment of this genre is Schreckenberg (1990).

¹⁵⁴ See footnotes 114, 116 and 117 above.

¹⁵⁵ There are five laws in Justinian's *Novella* which concern the Jews: (1) *Novella* 37 of 1 August 535 concerning the African church which includes harsh measures against heretics, pagans and Jews; (2) *Novella* 139 of 535 or 536 about marital prohibitions including the one against Levirate marriages (see Deut. 25:5-10); (3) *Novella* 45 of 18 August 537 barring Jews from public offices, but imposing on them the significant financial burdens of the curial office; (4) *Novella* 131 of 18 March 545 excluding heretics and Jews from all business transactions concerning real estate associated with the Church and prohibiting the building of synagogues; (5) and finally

and marginalise possible antagonistic elements similar to his predecessors. Earlier privileges granted to Jews had been gradually revoked and the Jewish religion had become par with pagans and heretics. What was new in the laws issued by Justinian is the ideological grounding according to the Chalcedonian theological doctrine.¹⁵⁶ As Klingenberg puts it, Justinian's legislation broke with the "fundamental principle" regarding the "distinction between heresy and Judaism".¹⁵⁷

Whether anti-Jewish laws were effective has been brought into question by modern scholars. According to Linder, the "continuous reiteration" of the laws concerning Jewish ownership of Christian slaves, the barring of Jews from the State Service and their duty to serve in the local *curia* "testifies ... to the continuous commitment of the legislator to a goal that was, almost by definition, unattainable."¹⁵⁸ A law issued by Justin with Justinian in 527, which puts pagans, Jews and Samaritans on par with heretics, talks about people who "heedless of the laws' command infiltrated public offices" (τῆς τῶν νόμῶν ἀμελησάντας παραγγελίας στρατείαις).¹⁵⁹ Another law issued in 537 confirms the duty of Jews and heretics to serve in the *curia*¹⁶⁰ which suggests that they were still successfully evading their onerous responsibilities.

Jewry laws concerning synagogues tell a similar story. Laws issued by Theodosius, Arcadius and Honorius between 393 and 412 protected synagogues and the personal safety of Jews against what reads like local mob attacks.¹⁶¹ The turning point of imperial policy concerning synagogues is 415 when the law issued by Theodosius II demoting Gamaliel VI also prohibited the patriarch to establish

the much discussed *Novella* 146 of 13 February 553 about the acceptable languages used in the synagogue service and the prohibition of the *deuterosis* which is discussed in more detail below. These *Novella* are overviewed in Klingenberg (1996):79-99.

¹⁵⁶ The official proceedings of the 451 Chalcedon Council were published by Theodosius II's Eastern successor Marcian (450-457) who wished to see the end of "the unholy quarrel" (ἡ βέβηλος ἔρις) by advocating the Christological doctrine about the divine and human nature of Christ coming together in one body. The doctrine was not to be debated in public. See Linder (1987):337-356 and the general introduction in Gaddis et al. (2005):1:1-85.

¹⁵⁷ He emphasises this point with reference to *Novella* 37 concerning the African church, but it applies to Justinian's legislation in general. Klingenberg (1996):82.

¹⁵⁸ Linder (2006):167.

¹⁵⁹ *CJ* 1.5.12 (between 4 April and 1 August 527). The translation of Linder offered here (Linder (1987):357 and 360) is modified in Blume et al. (2016):1:202-203 which reads that "disregarding the sanction of the law, they have insinuated themselves into clerical posts". The Blume-Frier translation translates στρατεία as "clerical post" which is somewhat vaguer than Linder's "public office" referring to senatorial jobs in the State Service.

¹⁶⁰ *Novella* 45 (of 18 August 537) in Linder (1987):394-397.

¹⁶¹ *CTh* 16.8.9 (of 29 September 393), *CTh* 16.8.12 (of 17 June 397), *CTh* 16.8.20, *CTh* 2.8.26 and *CTh* 8.8.8 (of 26 July 412). The latter law is also adopted by Justinian and preserved in *CJ* 1.9.13. See Linder (1987):190, 198, and 264-267.

new synagogues.¹⁶² The personal safety of Jews and the old synagogues were still under imperial protection as another law issued by Theodosius II in 410 indicates. The law says that “no one shall be destroyed for being a Jew ... Their synagogues and habitations shall not be indiscriminately burnt up, nor wrongfully damaged without any reason.”¹⁶³ It was not until the death of Gamaliel VI and the disintegration of the Palestinian Patriarchate that the prohibition of building new synagogues became universal. A third law of the same Theodosius II issued on 15 February 423 says that “no synagogues shall be constructed from now on, and the old ones shall remain in their state.”¹⁶⁴ The law was reinforced in the Western part of the Empire by Honorius later that year on 8 June 423.¹⁶⁵ Justinian adopted Honorius’ wording and published it in his *Codex* on 16 November 529 (*CJ* 1.11.6). A decade later, Justinian confirmed the prohibition and ruled that if new synagogues were built in violation of the law, “the holy church of the place shall vindicate the buildings to its ownership”.¹⁶⁶

There is scattered evidence that synagogues were indeed prevented from being rebuilt during the reign of Justinian. Johannes Irmischer notes that when the synagogue of Berytus collapsed, it was not allowed to be rebuilt.¹⁶⁷ He also refers to the contemporary report by John Malalas who writes in his *Chronographia* 18 that when an earthquake destroyed all synagogues of Laodicea in Asia Minor, the Christian churches of the city had been all miraculously survived. Irmischer suggests that the Jewish community was unlikely to benefit from the subsequent reconstruction programme reported in Malalas’ *Chronographia*.¹⁶⁸ Additional archaeological evidence is provided by Annabel Wharton who notes that the synagogue of Gerasa in Transjordan was transformed into a church in 530-531.¹⁶⁹

Other parts of the Empire and especially rural Galilee, the home of the Rabbinic movement and the *Talmud Yerushalmi*, apparently evaded the watchful eyes of the imperial centre. Nicholas de Lange writes that “there are concrete examples of synagogues being built, repaired, and embellished, and the archaeological record suggests that the period in general was one of quiet prosperity for the Jews.”¹⁷⁰ He refers to the synagogue of Sardis in Lydia, a mosaic pavement in Gaza dated to 508-509,

¹⁶² *CTh* 16.8.22 (of 20 October 415) in Linder (1987):269-270.

¹⁶³ *CTh* 16.8.21 (of 6 August 420) which was *verbatim* adopted by Justinian and preserved in *CJ* 1.9.14. See Linder (1987):284-285.

¹⁶⁴ *CTh* 16.8.25 (of 15 February 423) in Linder (1987):288.

¹⁶⁵ *CTh* 18.8.27, *CTh* 16.5.60 and *CTh* 16.10.24 in Linder (1987):297-299.

¹⁶⁶ *Novella* 131 (of 18 March 545): ἡ τῶν τόπων ἁγία ἐκκλησία τὰς οἰκοδομὰς τῇ ἰδίᾳ δεσποτείᾳ ἐκδικεῖται. See Linder (1987):400-401.

¹⁶⁷ Irmischer (1990):160. Unfortunately, Irmischer does not provide the primary evidence.

¹⁶⁸ Irmischer (1990):160.

¹⁶⁹ Wharton (1995):69.

¹⁷⁰ de Lange (2005):406.

and the lavishly decorated synagogue of Beth Alpha in Galilee dated to the reign of Justin I (518-527). Excavations at en-Nabratein in Galilee suggest that Jews relocated their synagogues to the village from nearby Gush Halav which had been destroyed in an earthquake around 550.¹⁷¹ An article by Thomas Braun also lists synagogues built in a period when they were outlawed by the imperial centre.¹⁷² Lee Levine summarises the available evidence in his monumental work about *The ancient synagogue* with the following words:

... despite this litany of anti-Jewish words and deeds, we have become well aware that sermons were often not heeded nor legislation always enforced. Despite official restrictions, the Jews of Byzantine Palestine continued to build synagogues (e.g., Merot, Capernaum, Bet Alpha, southern Judaea), repair those already standing (e.g., Ma'oz Hayyim, Hammat Tiberias, Hammat Gader, 'En Gedi), and entirely rebuild and refurbish others after a period of abandonment and disrepair (Nevoraya). In many instances, it was at this time (i.e., the sixth and seventh centuries) that a synagogue building reached its greatest dimensions (e.g., Hammat Tiberias, 'En Gedi, Nevoraya, Horvat Rimmon, Hammat Gader). In several regions (e.g., the Golan), many synagogues were erected where few, if any, seem to have existed beforehand.¹⁷³

The Jewish world on the periphery of the Christian empire adapted well to the harsh imperial measures, and thrived against all odds in the age of Theodosius and Justinian. As Patrick Gray puts it, “the point is not just that the Judaism of the villages [of Galilee] was a durable phenomenon ... unlikely to be susceptible to the kind of change Justinian’s legislation was aimed at producing. The point is also that that such village-based Judaism could and did simply ignore the legislation.”¹⁷⁴

2.4.2 Novella 146 ΠΕΡΙ ΕΒΡΑΙΩΝ (“On the Hebrews”) of Justinian (553)

It is against this background that Justinian’s *Novella* 146 ΠΕΡΙ ΕΒΡΑΙΩΝ (“On the Hebrews”), issued on 8 February 553, should be read. The law has three main topics: it grants freedom to hold services in the synagogues in any language and promotes the Greek translations of the Hebrew Bible; it prohibits “what they call *deuterosis*” (τὴν δὲ παρ’ αὐτοῖς λεγομένην δευτέρωσιν) in favour of “the holy words themselves” (αὐτὰς ... τὰς ἱερὰς φωνὰς); and it speaks out about those “who shall attempt to introduce ungodly nonsense” (τινες δὲ παρ’ αὐτοῖς κενωφωνίας ἀθέους ἐπεισάγειν ἐγκειρήσαιεν) including the denial of resurrection, of the last judgement, and of the existence of angels.¹⁷⁵ In the preamble of *Novella* 146, Justinian refers to the petitions of some Hebrews who

¹⁷¹ Meyers et al. (1981):6-7.

¹⁷² Braun (1998):143-147.

¹⁷³ Levine (2005):211.

¹⁷⁴ Gray (1993):263.

¹⁷⁵ Text and translation of *Novella* 146 is according to Linder (1987):405-410. The much-debated expression δευτέρωσις is translated as “Mishnah” in Linder. I have kept the term in transliteration to avoid a possible misleading connotation of Linder’s translation which equates δευτέρωσις with the *Mishnah* of Judah ha-Nasi.

complain about their fellowmen maintaining the exclusive use of the Hebrew language in the synagogue service.¹⁷⁶ Combined with contemporary evidence of synagogue decorations which are considered to be incompatible with Rabbinic Judaism,¹⁷⁷ *Novella* 146 is often interpreted as suggesting the existence of alternative non-rabbinic Judaisms in the 6th century.¹⁷⁸

The Church Fathers used the term *deuterosis* to refer to oral legal traditions of the Jews, most notably the *Mishnah* and the *Talmud*.¹⁷⁹ According to the side-lined opinion of Samuel Krauss, Justinian uses the term more broadly. He means not only the legal works and midrashic interpretations of the Bible, but also the interpretative Targum translations. Krauss probably goes too far when he shifts focus from synagogue to the Rabbinic study house and suggests that Justinian's *Novella* 146 intended to see the end of Rabbinic learning altogether.¹⁸⁰ Krauss and his fellow "old school" historians¹⁸¹ like Jean Juster, Michael Avi-Yonah and Albert Baumgarten¹⁸² probably take the preamble of the *Novella* 146 too literally and assume that the text as a whole responds to real life events and aims to resolve the tension between "Hellenising" and "Hebraising" factions of the Jewish community.

Giuseppe Veltri calls the historical reliability of *Novella* 146 into question. He notes that when Justinian speaks about the "ungodly nonsense" of some Jews in chapter 2, he echoes stereotypical themes known from the New Testament, Josephus and the polemical writings of the Church Fathers.¹⁸³ In Acts 23:8, we read that "the Sadducees say that there is no resurrection, or angel, or spirit; but the Pharisees acknowledge all three." The denial of the last judgement mentioned by Justinian is also associated with the Sadducees in Josephus (*BJ* 2.165 and *AJ* 18.16-17) and the Synoptic Gospels (Mt 22:23, Mk 12:18 and Lk 20:17).¹⁸⁴ Justinian's attack against heretical Jewish

¹⁷⁶ According to Michael Avi-Yonah, "the emperor used an internal dispute in the synagogue of Constantinople". See Avi-Yonah (1976):249. Without supporting evidence, this seems to be mere conjecture.

¹⁷⁷ Prominent examples are the mosaics found in the synagogues of Bet Shean, Bet Alpha or Na'aran. See Levine (2005):216-224.

¹⁷⁸ According to Willem Smelik, "the second chapter [of *Novella* 146] addresses non-rabbinic but contemporary Jewish beliefs". Smelik (2012):145 and 150-154.

¹⁷⁹ Wilhelm Bacher refers to Jerome, and suggests that the term may also apply to the halakhic midrashim. Bacher (1899):123. Juster expresses the same opinion and provides a comprehensive overview of the Patristic use of the term δευτέρωσις. Juster (1914):1:372-374 and esp. n.376 on 372. The same view is expressed by Seyberlich (1964):77, Baumgarten (1980):42-43 and Veltri (1994):128.

¹⁸⁰ Krauss (1914):61-61.

¹⁸¹ Gafni (2011):355. See also footnote 21.

¹⁸² In addition to the aforementioned works by Juster and Avi-Yonah, see Baumgarten (1980):37-44.

¹⁸³ Veltri (1994):120.

¹⁸⁴ Juster collects the primary evidence in informative footnotes from Josephus and the major Church Fathers in Juster (1914):374-377.

views sounds a few centuries out of date. Veltri also notes that *Novella* 146 is the only primary evidence for the claim that the Septuagint and Aquila's Greek translations of the Hebrew Bible were still in use in some synagogues. There is no supplementary evidence for the practice in pagan or Christian sources, and it is not documented in contemporary Jewish sources either.¹⁸⁵

Finally, when Justinian prohibits the *deuterosis*, whatever he exactly means by the term, his major objection is that "it is an invention of men in their chatter, exclusively of earthly origin, and having in nothing of the divine" (ἐξεύρεσιν δὲ οὐσαν ἀνδρῶν ἐκ μόνης λαλούντων τῆς γῆς καὶ θεῖον ἐν αὐτοῖς ἔχόντων οὐδέν). As Baumgarten suggests,¹⁸⁶ the proper context of *Novella* 146 is the Christian-Jewish debate where the image of Judaism is informed more by Christian self-definition than the Judaisms of the time.¹⁸⁷ According to Veltri, "Justinian reduces Judaism for his own purposes" and presents a Pharisaic-Sadducean divide well known from Christian sources. He concludes that "*Novella* 146 is more like a sermon for missionary activity among the Jews than a law which mirrors the historical circumstances of Jewish liturgy."¹⁸⁸

2.5 Isolation, ignorance and indifference

In my view, *Novella* 146 indicates general ignorance about Rabbinic Judaism which became dominant in Jewish circles, produced an enormous literary output, and elected for an inward-looking way of life. During the period between Theodosius II and Justinian when the *Yerushalmi* was presumably created, Jewry law seems to have been less about providing policy for the outland parts of the Empire where most Jews lived. The laws might have never reached hidden corners like Galilee and they are unlikely to have been enforced within the loose imperial structure. Jewry law of the period was, therefore, more likely to be about declaring a religious conviction by which political loyalty was tested and unwanted elements were purged.

The ignorance of the imperial centre about Rabbinic activity was most probably due to a lack of interest. Judaism was no longer a political force to reckon with after the disintegration of the Palestinian Patriarchate following the death of Gamaliel VI around 423. Jews were barred from the

¹⁸⁵ Veltri (1994):124.

¹⁸⁶ Baumgarten writes that "the true context of *Novella* 146 ... is the debate between Jews and Christians over the correct interpretation of the Bible. ... The motive was theological." Baumgarten (1980):43-44.

¹⁸⁷ The point has been made in various publications by Daniel Boyarin, most notably in Boyarin (2004b) and Boyarin (2004a):21-57.

¹⁸⁸ Veltri (1994):128 and 129-130. Parkes expresses the same view when he writes that "the law is obviously intended to undermine from within the powers of resistance of Talmudic Judaism to Christian missionary activity." Parkes also reads *Novella* 146 as evidence for "the survival of Sadducean doctrine into the sixth century" about which I am not convinced. Parkes (1934):252.

lucrative senatorial offices of the State Service, they were compelled to serve and financially support the local councils as curials. They were barred from the legal profession, and as a result, Jews presumably decided against participating in the pagan education system which no longer promised a lucrative office or profession. They became economically isolated by the restrictive measures against possessing Christian slaves. As the Patriarchate dissolved, the Crown Tax was rechannelled to the imperial treasury in 429. Social institutions of the Jewish communities became unfunded and their imperial representation ceased. Judaism gradually became invisible and it was reduced to a theological idea in the eyes of the Christian-Roman imperial centre. Rabbinic Judaism, which was wired to isolate itself,¹⁸⁹ found a cooperating partner which was happy to ignore its existence. To draw conclusion from these historical investigations, any comparison of the *Talmud Yerushalmi* and the Justinianic corpus, or Rabbinic and Christian-Roman literature in general, needs to be very cautious. The default approach needs to embrace the “hypothesis of rabbinic isolation” which assumes, unless otherwise indicated, that Jewish-Roman connections are characterised by mutual ignorance and indifference.

¹⁸⁹ For a good overview of the Rabbinic “theory and practice” of isolationism, see Urbach (1980):2:269-298.

CHAPTER 3: TOWARDS AN OLD/NEW APPROACH

The age of Justinian produced two legal corpora comparable in their size and their lasting influence. The *Talmud Yerushalmi* prefigured much of the *Bavli*'s legal discussion which has remained the legal and ethical cornerstone of Judaism until this day. The Justinianic corpus was in the centre of legal development in the Byzantine Empire, and it shaped the Western civilian legal tradition since its Medieval rediscovery. The age of Justinian is characterised by Michael Maas as “a historical milestone, marking transition from antiquity to the Middle Ages in the Mediterranean world”.¹⁹⁰

As I have argued in the previous chapter, Jewish life on the Palestinian periphery of the Roman Empire quietly transformed and grew apart from the imperial centre in Constantinople. The lack of direct evidence for the transformation led Nicholas de Lange to describe the “long gap of some two centuries between the compilation of the *Yerushalmi* and the *Bavli*” as a period when “nothing much appears to happen”.¹⁹¹ The period was probably more eventful in terms of Jewish-Roman relations, but one which moved towards mutual isolation, ignorance and indifference of the Eastern Roman Empire and Palestinian Rabbinic Judaism. The question I am addressing in the current chapter is whether the comparison of their legal texts is justified against this historical background, and if so, what meaningful results their comparison can provide and what methods are appropriate to achieve them.

Jonathan Z. Smith's polemical Jordan Lectures in Comparative Religion at the School of Oriental and African Studies in 1988 presented a methodological challenge to an audience which by definition was committed to the comparative enterprise. As Smith writes,

...the enterprise of comparison, in its strongest form, brings differences together solely within the space of the scholar's mind. It is the individual scholar, for his or her own good theoretical reasons, who imagines their cohabitation, without even requiring that they be consenting adults – not processes of history, influence, or diffusion which, all

¹⁹⁰ Maas (2005):3.

¹⁹¹ de Lange (2005):403.

too often, have been held to be both the justification for and the result of comparison.¹⁹²

One may conclude that not only “the hunt after ‘influence’”, to use Reuven Yaron’s expression,¹⁹³ but also comparison as such is “a singularly futile occupation”.¹⁹⁴ The question arises: why go compare? If “finding [influences] out ought not to become the primary aim of research”,¹⁹⁵ as Yaron says, then does demonstrating the uniqueness of historical structures by reference to other contemporary cultures justify the project?¹⁹⁶ Smith also warns against this kind of fallacy where the *sui generis* character is too easily transformed from a relative category to an absolute one.¹⁹⁷ In “the statement of comparison,” writes Smith, “there is always an implicit ‘more than’, and there is always a ‘with respect to’.”¹⁹⁸ Comparison has a triadic structure constituted by the two compared entities and a reference point according to which the comparison is carried out. According to Smith, the fallacy of uniqueness ignores the inherent triadic structure of comparison and turns a descriptive account into a normative one.

The first section of this chapter overviews the comparative scholarship of Roman and Rabbinic law which sometimes has suggested a closer affinity between two legal cultures than the sceptical picture I put forward as the “hypothesis of Rabbinic isolation” in the previous chapter. The section concludes that Roman and Rabbinic law are incomparable entities according to traditional principles.

The second section argues that “the hunt after ‘influence’” in comparative historical research is structurally similar to the aversion to the so-called null hypothesis in STEM (science, technology, engineering and medicine) subjects. The section proposes an old/new approach inspired by Bernard Jackson’s works on comparing ancient legal cultures from the 1960s onwards. The chapter concludes that beyond the search for “influence” or “uniqueness”, the comparative study of literary signals is the most promising method for understanding how Rabbinic and Roman law operates.

¹⁹² Smith (1990):115.

¹⁹³ Reuven Yaron refers to the “hunt for interpolation” (*Interpolationenjagd*) which captivated the scholarship of Justinian’s *Digest* and the study of Roman law for long decades at the turn of the 20th century. See the classic critique of Lenel (1925):17-38 and more recently Johnston (1989):149-166.

¹⁹⁴ Yaron (1960):viii.

¹⁹⁵ Yaron (1960):viii.

¹⁹⁶ Contributors to the *Oxford handbook of comparative law* present various approaches to this question, including functionalism (Michael Ralf), the study of transplants and receptions (Michele Graziadei) or comparison for the understanding of religion (Harold Berman) and legal history (James Gordley). The comparative study of ancient legal cultures remains a niche area standing at the crossroads of the approaches presented in the volume. See Reimann et al. (2006).

¹⁹⁷ Smith (1990):41.

¹⁹⁸ Smith (1990):51.

3.1 Comparison and influence

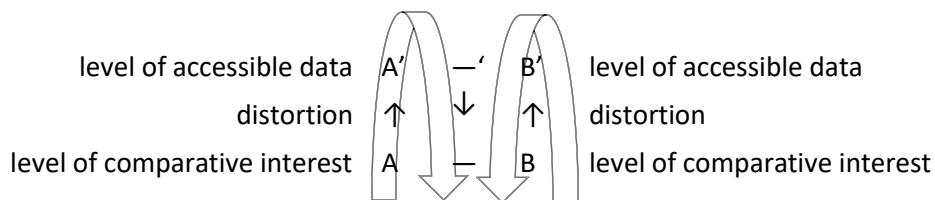
3.1.1 The structure of comparative research

Comparative research investigates two sets of phenomena and draws conclusions from their relation. The two sets of phenomena are represented here by A and B, and their relation by the dash symbol (—). All three components of the relational structure “A — B” need to be carefully conceptualised. A and B need to be of the same category. In the historical humanities, categories like historical events, institutions and ideas of political or religious nature are customarily made subject of comparative research. These abstract categories are distilled by the comparatist from physically accessible artefacts which survived the passing of time.

For example, the historical event (A) of granting Roman citizenship to all subjects of the Empire by Caracalla in 212 is accessible to us as a historical account (A') in a modern print edition of Cassius Dio's *Roman history* (78.9.5). The relationship between an event (A) and an account (A') is often problematic. We need to assess how well the section in Cassius Dio's *Roman history* (A') represents the expansion of Roman citizenship by Caracalla (A), and what are the circumstances of the creation of A' and its long reception history stretching from its initial form to the form which is now accessible to us. While we hope to say something about how A and B relate to each other, we can actually observe only A' and B'.

If that was not complicated enough, we also need to conceptualise the relation between A' and B', that is —', and how it represents the relation between A and B, that is, —. Finally, as the most speculative and problematic step of the exercise, we need to move from the relation at the level of accessible data (—') to the relation at the level of comparative interest (—). I have summarised the components and steps of comparative research in the diagram below.

Diagram 3.1 The structure of comparative research



This simplified and abstract diagrammatic description highlights how complex and precarious comparative research can be. The study is carried out in the following steps which all require careful conceptualisation and critical reflection:

- (1) identifying the correct categories at the level of comparative interest (A and B);
- (2) identifying their manifestations at the level of accessible data (A' and B');
- (3) reckoning with the distortion from A to A' and from B to B' via the mechanisms of representation and reception (↑ and ↑);
- (4) conceptualising the relation at the level of accessible data (—');
- (5) reckoning with the distortion of returning to the level of comparative interest (↓);
- (6) and explaining the speculatively constructed relation between the initial categories at the level of comparative interest (—).

It is not until the final step that the study explains the ultimate purpose of the comparative enterprise, that is, the nature of the projected relation between phenomena such as historical events, institutions and ideas of political or religious nature. For reasons probably related to the social and cultural circumstances of modern scholarship, this final step of explanation is often one-dimensional and self-censored. The relationship is regularly characterised by “influence”. The language used is often metaphorical which makes it difficult to understand what mechanisms are proposed to be at play. At times, “influence” only seems to mask the fact that it is unclear how the compared phenomena relate to each other or that information is lacking to provide an explanation to their relationship.

The methodological caveats related to comparison and the explanation by influence are clearly expressed by Shai Secunda, a leading voice in the research of the *Talmud Bavli*'s Iranian context. Secunda writes that:

Talmudo-Iranica is first and foremost a comparative endeavor, and predominantly a program of research that normally considers the way one culture and textual tradition influenced another. But what does the term “comparative” mean here and, more generally speaking, in the history of religions? Moreover, what if any is the use of the category “influence”—a term that although much maligned has been central to the scholarly habit of comparing cultures and literatures?¹⁹⁹

Secunda describes the nature of accessible data in “Talmudo-Iranica” which has a striking resemblance to the comparative research of Rabbinic and Roman law in Late Antiquity.

The evidence that has come down to us is almost entirely literary and it presents numerous difficulties for historical research, particularly on account of its enclosed, “self-sufficient” quality. Almost all surviving Sasanian compositions are inward-looking, so that direct correlations between the text of the Bavli and Middle Persian literature on the one hand and historical realities on the other are relatively few and far in between. Even when they do occur one wonders to what extent they reflect reality, or whether they merely constitute set-pieces assembled as part of an internal discourse. These factors and others similar to them would seem to exclude the possibility of an

¹⁹⁹ Secunda (2014):111.

extensive comparative research program that studies the interactions between late antique Jews and Zoroastrians, their texts, and their religions.²⁰⁰

According to the model of comparative research presented above, Secunda's literary evidence, that is, "the text of the Bavli and Middle Persian literature" is at the level of accessible data, while "historical realities" or the religions of "late antique Jews and Zoroastrians" are at the level of Secunda's comparative interest. The two levels are not distinguished in Secunda's description, but it is clear that his ambition is to say something about history and religion, and texts constitute the data by which he wishes to gain access to history and religion. Secunda later acknowledges that the comparative analysis "could just as well have examined connections between the Talmud and oral texts from twentieth-century cargo-cults" which "might advance our understandings of the machinery of religion and oral text production". He adds that "Talmudo-Iranica attempts to make a more immediate contribution to the elucidation of religious texts by reference to parallels from their geo-historical context." He also rejects "the assertion than an entire system in the Bavli is *sui generis*, 'unique,' or hermetically sealed off from the context in which and from which it developed".²⁰¹

The *status questionis* of the comparative research into Rabbinic and Roman law cannot be characterised in clearer terms than Secunda does for Talmudo-Iranica. Even though drawing parallels from texts of other eras, locations and genres may provide some general anthropological insights, comparative Talmud research is at its most powerful when it is carried out in what Secunda calls the "geo-historical context". He also notes that "in some academic cultures and particularly in Jewish studies, scholars have come to expect illustrations of 'undeniable' and presumably uncomplicated instances of influence that can explain why a particular religious phenomenon looks the way it does."²⁰² Secunda illustrates the problematic nature of the traditional comparative approach fixated on identifying influence when the dating of texts and the reconstruction of their coming into being are almost impossible. He concludes that:

Perhaps the most vexing of these [disadvantages of the comparative research programme] is the nagging problem presented by texts as inward-focused as the Bavli and Middle Persian literature: If the two sets of texts that are to serve as reflections of cultural interactions seem to be, outside of handful of admittedly succulent passages, so generally uninterested in each other, it is hard to claim that the distinct cultures that produced the textual corpora actually intersected in history.²⁰³

²⁰⁰ Secunda (2014):110.

²⁰¹ Secunda (2014):112.

²⁰² Secunda (2014):115.

²⁰³ Secunda (2014):126.

Despite his reservations, however, Secunda commits himself to identifying some kind of influence and suggests that parallels “are best read by employing various models of religious adaptation, cultural negotiation, and the like”. He adds that “encounters with Iranian traditions may have set off a chain of reactions that took rabbinic tradition in new directions, whatever they may have been.”²⁰⁴ I might belong to the group that Secunda describes as “comparative ‘minimalists’”²⁰⁵, but to my mind, Secunda pays a high price for saving the comparative project and the assumption of cultural interchange. The references to “protracted processes of oral production and transmission” and to “a kind of late antique (and early medieval) ‘text-scape’”²⁰⁶ generate more problems than they are capable to solve. The ambiguous metaphorical language Secunda requires to talk about interchange is often confusing. If we are ready to acknowledge that we are ignorant about the nature of “the chain of reactions” which connect two neighbouring cultures, why do we need to commit ourselves to the explanation by influence?

As Secunda himself writes, the search of influence has become “a type of discourse common in some academic cultures and particularly Jewish studies”. I will suggest below that this is not only the scholarly fashion of our time, but a paradigm encouraged by contemporary funding and publication policies. In an academic environment which supports short 3-5 year-long projects, and expects immediate results and instant scholarly gratification, comparative research of ancient cultures has become a high-risk enterprise. One needs to make an extreme intellectual investment to obtain the skills for the study of parallels in other cultures such as learning the relevant languages, and mastering the history and literature of multiple and quite dissimilar cultures.²⁰⁷ Due to the enormity of the intellectual investment which seems to deny quick return, the temptation to doctor findings and overemphasise superficial similarities is hard to resist.

While Secunda embraces the notion of influence in full awareness of its problematic nature, Michael Satlow offers a reinterpretation of the categories at the level of comparative interest which prevents the fallacy of influence from arising. In an intriguing essay entitled “Beyond influence”, he notes that most scholars conducting comparative research on ancient Judaism unknowingly commit themselves

²⁰⁴ Secunda (2014):125.

²⁰⁵ Secunda (2014):121.

²⁰⁶ Secunda (2014):131.

²⁰⁷ In an article published as part of the review forum about the threat of “parallelomania” in *Irano-Talmudica*, Secunda writes that “no one said that contextualizing the Bavli would be easy. From the outset of the project it was clear that the precarious state of Sasanian studies – and indeed, of the Sasanian sources themselves – would require Talmudists to spend years learning the languages, and cultures of late antique Iran.” Secunda (2016):235.

to a static notion of “Judaism”. The term “Judaism” denotes different identities in antiquity,²⁰⁸ but as Satlow writes, “the term is a heuristic construct, a category created and used by modern scholars for specific reasons”. He suggests that in order to avoid confusion, we need to shift “attention to the agents themselves, the Jews”.²⁰⁹ According to Satlow, this requires to “de-essentialise the Jews” and approach their various “imagined communities”²¹⁰ without enforcing a normative idea about what it means to be “Jewish”. He concludes his essay by putting forward “the analytic category ‘culture’” which he understands to be a dynamic category of process, a verb rather than a noun.

For many scholars of ancient Jews and Judaism, “culture” is a noun rather than a verb. “Jewish culture,” “rabbinic culture,” and “Greco-Roman culture,” for example, are frequently understood as transparent categories needing little explicit justification. No matter how precise the cultural category (e.g. Palestinian amoraic culture) or nuanced the description of the interaction between the cultures, the assumption that culture exists as a static category is severely limiting. ... an analytic category “culture” works better as a verb. It is an ongoing, shifting, highly complex set of negotiations. Throughout antiquity Jewish identity was largely voluntary with Jews deeply embedded within their wider environments. ... To describe “rabbinic culture,” for example, is to unpack the ways in which the rabbis filtered their traditions through their deep structure of meaning, which were themselves largely products of the broader material, intellectual, religious, and social worlds in which they lived.²¹¹

Satlow’s answer to the conundrum of comparison and influence is the dismissal of static categories. He proposes to dissolve the more abstract categories of culture and society into “the agents themselves”, and, therefore, he eliminates static explanations of relation including that of influence. However, in my view, Satlow runs the risk of fragmenting the units of comparison to an extent which prevents the construction of any explanations whatsoever about how Jewish and non-Jewish “cultures” or their “agents” related to each other in antiquity. The following section considers an alternative answer to the conundrum, and prepares the way for an approach which promises results without making comparison contingent on relational explanations.

3.1.2 Comparing the incomparable

The historical sketch in the previous chapter argued that the *Talmud Yerushalmi* and the Justinianic corpus are created by neighbouring cultures which knew and cared little about each other. The available evidence does not warrant the widely-held assumption that Palestinian Rabbinic Judaism and its Byzantine-Christian imperial master shared a cultural context in which ideas, motifs, and legal

²⁰⁸ Satlow refers here to Shaye Cohen’s work on the subject. See Cohen (1999):69-106 and 140-174.

²⁰⁹ Satlow (2008):44.

²¹⁰ Satlow’s expression of “imagined communities” is borrowed from sociologist Benedict Anderson. See Anderson (1983).

²¹¹ Satlow (2008):53.

institutions were exchanged. On the contrary, the evidence rather substantiates the assumption that they developed their enormous legal corpora in isolation. Whenever they reflect on the existence of the “other”, it is rather the imaginary version of it than the real one. The picture of the “other” serves the purpose of constructing self-identity rather than reflecting on the existence of a neighbour in flesh and blood.

The question then remains whether there is any use of comparing their respective legal discourses. What possible gain the exercise could produce, if it does not point towards the mechanisms of influence? Why should we accumulate parallels the existence of which is either due to sheer coincidence or simply impossible to explain?

Samuel Sandmel, who introduced the term “parallelomania” in 1962, was not dismissive of comparison. Quite the contrary, Sandmel was one of the fervent advocates of comparative religion provided that the investigation was done with due care. His critique was primarily directed against the approach represented by “the five immense books which constitute the Strack and Billerbeck *Kommentar zum Neuen Testament aus Talmud und Midrash*”.²¹² Almost as a Rabbinic running commentary to the books of the New Testament, the Strack-Billerbeck provides intriguing parallels from centuries of Rabbinic literature with little effort of explaining the nature of their insinuated relationship. Sandmel grants “that [it] is a useful tool”, but he immediately adds that:

So is a hammer, if one needs to drive nails. But if one needs to bisect a board, then a hammer is scarcely the useful tool. ... If it is retorted that I am addressing myself not to the value of Strack-Billerbeck but to its misuse, then I must reply that the manufacturer who shapes a hammer to resemble a saw bears some responsibility for the misuse of the tool. I would charge therefore that Strack-Billerbeck is shaped as though its compilers were out of touch with NT scholarship.²¹³

The debate around “parallelomania” was recently reignited by a review article by Robert Brody. It highlighted “the problem of anachronism”, the positing of influence and “methodological flaws”²¹⁴ in Irano-Talmudica. Brody emphasises that “traces of an Iranian impact are most obvious in areas that might be broadly described as folklore, while influence in the area of law appears to have been limited to a recognition of the legitimacy of the law of the land in matters of taxation, eminent domain, and grants of land tenure”. The article which is directed primarily against Yaakov Elman concludes with the following statement:

In my opinion there is no convincing evidence that rabbinic law adopted Iranian legal institutions (although it clearly did adopt and adapt elements of other legal systems),

²¹² Strack et al. (1922-1928).

²¹³ Sandmel (1962):8-9.

²¹⁴ These problems are respectively mentioned in Brody (2016):209, 210 and 212.

and even in nonlegal areas some scholars have been far too quick to posit Iranian influence. Research in this area has sometimes been conducted with more enthusiasm than caution and would benefit greatly from a combination of lowered expectations and higher methodological rigor.²¹⁵

The *Jewish Quarterly Review* published Brody's polemical article with responses and opened up a debate about the gains and pitfalls of comparative Talmud research and especially those of Irano-Talmudica. Contributions of the JQR review forum relate to my topic at three important points. First, Brody's criticism is levelled against Yaakov Elman's suggestion that the Bavli adopts Iranian legal institutions. According to Brody, there are "very fundamental differences in the legal realm,"²¹⁶ and one should distinguish clearly between the exchange of "cultural artefacts", to use Shai Secunda's expression,²¹⁷ and the exchange of legal ideas and institutions. Second, as Richard Kalmin points out in his contribution, we should consider the possibility that parallels or affinities between cultures are not due to cultural exchange, but they are either mere coincidences or manifestations of the late antique *Zeitgeist*.²¹⁸ Third, the debate around "parallelomania" can be easily derailed, if one shifts the focus of the original criticism. Sandmel's classic article disapproved the anachronistic accumulation of parallels insinuating cultural contact in Strack-Billerbeck. Brody's article objected against suggesting "that rabbinic law adopted Iranian legal institutions" on the basis of anachronistic and superficial parallels. The criticisms of Sandmel and Brody were derailed because their respondents shifted the focus and argued for the gains of comparative research in general which Sandmel and Brody never placed into question. As I now move forward to propose an old/new approach to the comparative study of late antique Rabbinic and Roman legal texts, the review forum around "parallelomania" in Irano-Talmudica reminds us that the legal realm is specific, that there are explanation models which do not assume contact, and that accumulating parallels may create the wrong impression of contact.

²¹⁵ Brody (2016):231-232.

²¹⁶ Brody (2016):210.

²¹⁷ Secunda (2016):240

²¹⁸ Kalmin analyses parallel narratives about the execution of Isaiah in Syriac Christian and Babylonian Rabbinic texts, and he concludes that "minimally this example shows that the Mesopotamian Christian and Jewish communities occupied a common cultural sphere. The extent of that commonality, however, is still impossible to gauge." Kalmin (2016):245.

3.2 Towards an old/new approach

3.2.1 The null hypothesis and the influence paradigm

Researchers in the comparative historical humanities seek to discover the mechanisms by which societies interact and social structures travel through time and space. Parallels are accumulated to achieve a significantly relevant correlation which is then interpreted as a correlation between societies. The correlation is usually translated by the notion of influence, but it is rarely explained what social mechanisms that notion represents. Even though societies co-exist in close temporal and geographical proximity, their relationship can be still best characterised by isolation, ignorance and indifference. The available evidence is often not enough to suggest any interaction.

Setting historical humanities and STEM subjects side by side promises fruitful insights about the nature of historical comparison and influence. The ultimate purpose of STEM researchers is to discover an underlying mechanism which could be eventually controlled by human intervention. The mechanism is customarily derived from a statistically significant *correlation* between two or more variables. Sometimes, however, the mechanism which the research is meant to discover is not there, the correlation is statistically not strong enough to suggest an underlying mechanism, or the mechanism is too complex for a simple significance testing.

In the “Physics” section of the social news networking site Reddit, an anonymous post sparked heated conversation on the topic where the author described the “symptoms of a greater systematic problem in medical research, derived from the policies of the journals and the lack of coherence among fields.”

You run the experiment sufficiently for a given set of parameters and find that there’s no apparent effect when you treat the data... Despite this work being a significant contribution to understanding, most journals will literally reject your publication because the *null hypothesis* is not rejected... drop a few features like double-blindness and random selection integrity and suddenly you get some statistical blips. These blips are publishable, and you can claim that there is some effect and justify the publication.²¹⁹

The null hypothesis refers to the default position in inferential statistics that there is no correlation between two phenomena.²²⁰ Similarly to the assumption of innocence in a criminal trial according to which the defendant is innocent until proven guilty, the relationship between two measured

²¹⁹ quaz4r (25 March 2014).

²²⁰ See the classic explanation of the concept in Fisher (1935):18-20.

phenomena is null until significance testing suggests otherwise.²²¹ As Neil Weiss explains in his *Introductory statistics*, the hypothesis test can be described by the following maxim:

Take a random sample from the population. If the sample data are consistent with the null hypothesis, do not reject the null hypothesis; if the sample data are inconsistent with the null hypothesis and supportive of the alternative hypothesis, reject the null hypothesis in favour of the alternative hypothesis.²²²

The test itself does not specify the correlation level required for either the null or the alternative hypothesis. The researcher needs to set the probability benchmark, also known as the significance level, before running the test. The benchmark needs to be high, if the researcher wants to avoid substantiating an underlying mode of action where other factors might have contributed to the correlation of the investigated phenomena. The significance level is set according to the nature of the test, the risk of suggesting an underlying mode of action incorrectly, and the personal preference for scientific caution. Significance testing is not about truth, but about managing probabilities.²²³ As Weiss explains, “any decision we make based on a hypothesis test may be incorrect because we have used partial information obtained from a sample to draw conclusions about the entire population.” He concludes that:

...if we do not reject the null hypothesis, we simply reserve judgment about which hypothesis is true. In other words, if we do not reject the null hypothesis, we conclude only that the data do not provide sufficient evidence to support the alternative hypothesis; we do not conclude that the data provide sufficient evidence to support the null hypothesis.²²⁴

Reserving judgement is not what the financial and social forces pushing STEM subjects forward want to see. Project based funding schemes, publication and career pressure contribute to an unfortunate environment which expects immediate and readily applicable “positive” results. In some instances, “negative” results are self-censored and silenced,²²⁵ even though they could have contributed to formulating sharper research questions and excluding dead-ends. Fortunately, the academic culture, the funding and publishing policies in the comparative historical humanities are more favourable

²²¹ The analogy is described by Edward K. Cheng with the following words: “Classical hypothesis testing starts with a null hypothesis, in effect a favoured or status quo result from which we will depart only if we have considerable evidence to the contrary. In criminal justice, a finding of ‘not guilty’ easily fills the role of a null hypothesis, with guilt being the natural alternative if we have sufficient evidence.” Cheng (2013):1276-1277.

²²² Weiss (2012):359 and 362.

²²³ As Fisher puts it, “the null hypothesis is never proved or established, but is possibly disproved, in the course of experimentation.” Fisher (1935):19.

²²⁴ Weiss (2012):362 and 364.

²²⁵ Another aspect of the flawed funding and publication system is the reluctance of retracting incorrect results. See Else (2017).

towards the “negative” results of so-called “unsuccessful” projects. Nevertheless, the historical version of the null hypothesis is still treated with reservation, and the dominant scholarly consensus still favours the assumption of a “shared cultural context” and “cross-cultural influence”.

The structural similarity with the methods used in STEM subjects is noted in a classic article published by American historian William Sewell in 1967. He relates hypothesis testing to the comparative method used in historical research. According to Sewell, the comparative method cannot provide the explanations themselves, it merely constitutes “a set of rules which can be methodically and systematically applied in gathering and using evidence to test explanatory hypotheses”. Creating the “explanations to be subjected to test” is “a task for the historical imagination.”²²⁶

Sewell’s thoughts echo Marc Bloch who holds that explanation is where the essence of the “historian’s craft” lies. In his book which addresses the question “What is the use of history?”, Bloch writes that “the nature of our intelligence is such that it is stimulated far less by the will to know than by the will to understand, and, from this, it results that the only sciences which it admits to be authentic are those which succeed in establishing explanatory relationships between phenomena.”²²⁷ In Bloch’s opinion, the future of history writing depends on whether it could go beyond the mere accumulation of knowledge, and provide systematically tested explanatory models similar to the natural sciences.²²⁸

In a programmatic essay published in 1927, Bloch identifies three major contributions of the comparative method in the study of history: formulating new research problems, distinguishing between real causes and local “pseudo-causes”, and highlighting the uniqueness of particular processes.²²⁹ Bloch distinguishes between two types of comparisons, one between separated and

²²⁶ Sewell (1967):217.

²²⁷ Bloch (1954):10.

²²⁸ Bloch modifies Max Weber’s distinction between “explanation” and “understanding” to the study of history. Weber notes that “every science of psychological and social phenomena is a science of *human* conduct (which includes all thought and attitudes). These sciences seek to ‘understand’ this conduct and by means of this understanding to ‘explain’ it ‘interpretatively’.” Weber (1949):40. A methodological article by A. A. van den Braembussche explains the tension between “explanation” and “understanding” with the following words: “the irreconcilability of ‘explanation’ and ‘understanding’ continues to constitute an impediment. A real attempt to address the problem on the plane of metatheory is thus ruled out. It is hardly any wonder that historians aiming at such an integration continually fall back on Max Weber, whose *verstehende Soziologie* at the turn of the century indicated that necessary complementarity of ‘understanding’ and ‘explanation’.” van den Braembussche (1989):8.

²²⁹ Bloch (1928):16-26.

another between neighbouring societies.²³⁰ When societies are separated from each other in time and place, their analogies cannot be explained by mutual influence or a common cause.²³¹ Neighbouring contemporary societies, however, are in permanent contact which makes it difficult to identify the principal or common cause responsible for their similarities. The direction of “influence” between them and the structure of their synchronic development is almost impossible to identify.²³²

What Bloch and his fellow historians did not emphasise is that research into ancient societies pose an additional challenge. The evidence is so scarce, the observed phenomena are so vague, that it is difficult to ascertain whether two societies are separated or neighbouring in the Blochian sense. Sporadic demographical structures, insufficient means of communication and limited technological resources make the ancient world a special case for comparative historical research. Neighbouring cultures can develop in virtual isolation, whereas imperial political structures allow the dissemination of cultural and social models in societies separated from each other in time and place. As Sewell puts it, “mere temporal and spatial proximity ... does not assure similarity, and some societies which are very remote from one another are surely more alike, at least in ways that are crucial for some explanatory models, than some neighbouring societies.”²³³

3.2.2 Comparing ancient legal cultures

Bernard Jackson diagnosed a standstill in comparative legal history in an article published a year after Sewell’s classic. According to Jackson, archaeological and literary discoveries placed the reliability of legal sources in question which in turn rendered the grand narratives about legal progress suspicious.²³⁴ He writes that “‘influence’ has become almost a dirty word in legal history.”²³⁵ According to Jackson, linguistic affinity between neighbouring legal cultures is one way to gain sufficient evidence for foreign influence.²³⁶ Another way, in Jackson’s view, is to identify an

²³⁰ Bloch borrows the idea from Émile Durkheim who distinguished between the comparison of societies with similar and fundamentally different structures. See the useful summary in Burke (2005):21-22.

²³¹ Bloch (1928):17.

²³² Bloch (1928):19.

²³³ Sewell (1967):215.

²³⁴ Jackson refers to the grand narratives of Maine (1861), Diamond (1935) and Seagle (1941).

²³⁵ Jackson (1968):373.

²³⁶ Jackson gives an elaborate example of the definition of burglary where linguistic affinity suggests that the Germanic *Lex Saxonum* from the 8th century was influenced by Roman and Jewish law via Canon law. See Jackson (1968):376-378

incongruent legal institution²³⁷ which can be best explained as transplanted from foreign law.²³⁸ He also notes that similar procedures or legal rituals suggest influence between two cultures, and that “influence from one system of law to another may be shown in the form in which the law is expressed”.²³⁹

Jackson differentiates between “form” and “content” in a programmatic essay calling for a methodological turn in the comparative study of ancient legal cultures.²⁴⁰ He evaluates the types of evidence and arguments which are customarily used in the historical humanities to support “influence” between societies. He calls for a structuralist understanding where “innate factors” (such as “classification system”, particular rules or accepted types of argumentation) and “environmental factors” (such as “political objectives”, “socio-economic factors” or “foreign cultural influence”)²⁴¹ enjoy an equal share. In Jackson’s model, “foreign cultural influence” is only one of the many factors contributing to the development of a specific piece of legal “form” or “content”. His conclusion is very cautious: the evidence for the influence of foreign legal cultures on Jewish law is mostly inconclusive. If at all, writes Jackson, “foreign influence is more discernible in form than in content”²⁴² which resonates with the comparative study of Rabbinic literary structures.²⁴³

In a more detailed study about the extent and limits of cultural exchange between Roman and Jewish law, Jackson writes that “whether parallels [between Roman and Jewish law] betoken ‘influence’ is a question involving more than mere matching of the parallels against our knowledge of the historical background. The availability of channels of transmission is not a sufficient condition of ‘influence’.”²⁴⁴ He argues that the study of Roman influence on Jewish law needs to take into account the parallels, the channels of transmission as well as the general theory about the nature of influence between legal cultures. The comparative study may or may not lead to the confirmation of

²³⁷ Jackson distinguishes between two types of inconsistency. One where the legal institution is inconsistent with “the overall stage of development of a legal system”, and another which “stands out as wholly inconsistent with the general culture of which it is a part.” Jackson (1968):377-378.

²³⁸ The similar rules about the goring ox in the ancient world, for example, has attracted the attention of scholars of Roman as well as Jewish law. See Jackson (1978), Finkelstein (1981), Katz (1992), Watson (1993):21-30 and Wright (2009).

²³⁹ Jackson (1968):381. Apart from the dialogue form, Jackson points out the pervasiveness of the classification form in Greek, Roman, Jewish and Islamic legal writing. Chapter 7 “Organising legal knowledge” discusses the subject of classification.

²⁴⁰ Jackson (1980a).

²⁴¹ These examples are reconstructed according to Jackson (1980a):15-19.

²⁴² Jackson, Jackson (1980a):23.

²⁴³ See among others Saul Lieberman’s “Rabbinic interpretation of Scripture” in Lieberman (1962), as well as Siegal (2013) and Brodsky (2014).

²⁴⁴ Jackson (1980b):181.

foreign influence, and when it does not, it does not mean that the study is pointless and wasted. Beyond “the identification of historical contacts”, the comparative exercise also contributes to “the search for universals” and “the reconstruction of particulars”.²⁴⁵

Documenting the similarities and differences between cultures without any significant historical contact allows to recognise what is a universal anthropological constant and what is truly peculiar and unique about a particular culture. Both types of insight usually stay hidden, if we only concentrate on one culture or on historical influence between two cultures. Transition from similar surface phenomena to the supposed influence is sometimes proposed in the historical humanities despite the scarcity of material and literary evidence for cultural and social exchange. This is due to the way research questions in most comparative historical projects are formulated. That is, they tacitly commit themselves to only one explanation for the similarities, that of influence. If the project cannot demonstrate influence between the observed cultures, then it is considered to be a failure. For this reason, comparative historical projects sometimes qualify the achieved results to demonstrate influence “to some extent” instead of acknowledging that the available evidence does not support any. Even though the verdict of “influence unlikely” would have opened up other avenues for explanation, many comparative historical projects choose to see influence where there is none.

The present project is probably one of them. The little we know about the historical circumstances of late antique Roman and Rabbinic jurisdiction suggests that influence is unlikely. Nevertheless, the comparison of legal texts from the *Talmud Yerushalmi* and the Justinianic legal corpus is not pointless, we just need to look beyond influence. After these considerations about historical context and methodology in Part 1, the next chapter introduces the sample texts which constitute the point of departure for the subject of literary signals for legal abstraction in Part 2.

²⁴⁵ Jackson (1975b):8.

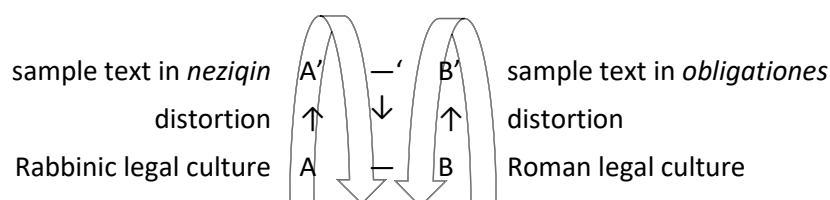
PART 2: LITERARY SIGNALS FOR LEGAL ABSTRACTION

CHAPTER 4: LITERARY SIGNALS FOR LEGAL ABSTRACTION IN TWO SAMPLE TEXTS

4.1 *The structure of comparing obligationes and neziqin*

The insights gained from the previous two chapters encourage to suspend judgement about possible borrowings, influences and cross-cultural interactions. Despite the geographical proximity of Palestinian Rabbinic Judaism and the intellectual centres of the Eastern Roman Empire, there is no indication that structural or thematic similarities and differences in their law are due to contact. This does not mean that the comparison of Rabbinic and Roman legal culture is futile. It only means that one particular type of explanation for similarities and differences is unlikely, and we should concentrate on other options. Similarities may be due to coincidence, similar social and *institutional* structures, or even a common *Zeitgeist*. Differences may be due to underlying doctrinal beliefs and hermeneutical tendencies. Texts are only what we have and the differences and similarities we see in them is the combination of multiple factors. The best we can do is to select texts which are close to each other in terms of their thematic and structural characteristics, so that we can tell something meaningful and plausible about the legal cultures they represent. I shall now illustrate the structure of the comparative investigation with the help of the diagram presented in the previous chapter.

Diagram 4.1 Comparing Rabbinic and Roman legal cultures via sample texts in *neziqin* and *obligationes*



I also proposed six steps for constructing the comparative study in section 3.1.2 “The structure of comparative research” which I now apply to my topic.

- (1) The categories at the level of my comparative interest (A and B) are Palestinian Rabbinic and Byzantine Roman legal culture. Even if preliminary investigations indicate that I am unlikely to say anything substantial about their relationship marked here with the dash (—), I would still like to say something meaningful about them separately.
- (2) Palestinian Rabbinic and Byzantine Roman legal culture are manifested by the texts as we have them today. Their literary corpora are unmanageably large, and therefore I had to focus on a small sample. If the sample texts are thematically and structurally similar, there is more chance that they underline characteristics of the legal cultures they represent which are more pronounced when set side by side than seen in isolation. This is the reason for excluding areas which are peculiar to Roman or Rabbinic law such as family and ritual law. The comparison of these areas would tell about differences and similarities of legal content, but they do not promise to shed light on the reason why. Selecting the Roman law of obligations (*obligationes*) and the Rabbinic law of damages (*neziqin*) promise to say something about underlying doctrinal and hermeneutical tendencies or social and institutional structures. For closer focus, I have selected the introductory passages to the topic of *obligationes* (J.3.13 and J.4.1) and *neziqin* (yBava Qamma 1:1 (2a-b)) at the level of accessible data (A' and B'). They accentuate text profile as well as the strategies these texts use to establish and organise legal terms.
- (3) Palestinian Rabbinic and Byzantine Roman legal culture are represented here by two sets of sample passages and the supplementary texts presented in the case-study chapters. The reception history of Justinian's *Institutes* and *Digest* in section 4.2.1 and that of the *Talmud Yerushalmi* in section 4.3.1 briefly deal with the distortion from A to A' and from B to B' (↑ and ↑). This topic is also touched upon by sections 5.1.3, 5.2.2 and 8.1.1 which reconstruct the compositional history of these corpora.
- (4) The relation between the introductory passages to *obligationes* (J.3.13 and J.4.1) and *neziqin* (yBava Qamma 1:1 (2a-b)), which is represented here by the dash with the accent (—'), only exists in the mind of the comparatist. Similarities and differences are discussed in the case-study chapters.
- (5) As I move back to the level of comparative interest (↓), that is, from text to history and culture, the real similarities and differences between the introductory passages to *obligationes* and *neziqin* are translated to supposed similarities and differences between Palestinian Rabbinic and Byzantine Roman legal culture.

- (6) That is to say, similarities and differences are *made* to tell something about underlying doctrinal and hermeneutical tendencies or social and institutional structures. The explanation between the initial categories represented here by the dash (—) is hopefully meaningful and plausible, but it is speculatively constructed.

The current chapter provides the background for the passages selected for detailed literary analysis. Sections 4.2.1 and 4.2.2 constitute a brief reception history of Justinian's *Institutes* and *Digest*, and that of the *Talmud Yerushalmi*. The purpose of these sections is to indicate the intellectual avenues by which the texts have come to us, that is, how the physical texts have been preserved for the modern reader, and how engagement with the texts over the centuries have shaped the modern reader's view.

Section 4.3.1 briefly introduce obligations in its Roman legal context before the subsequent sections presents the sample texts from Justinian's *Institutes* (4.3.2) and provide preliminary analysis of the text in its immediate literary context (4.3.3). Sections 4.4.1, 4.4.2 and 4.4.3 follow the same structure for the *Yerushalmi*. The presentation of the original Latin and Hebrew-Aramaic texts in 4.3.2 and 4.4.2 is supplemented with philological notes. I made a deliberate effort to preserve the awkward character of the original texts, and to reproduce their terminology and syntax in my translation. The chapter concludes with highlighting three types of literary signals which have emerged from the preliminary analysis, that is, text voice and editing, establishing legal terms, and the terminology used for arranging legal terms. These literary signals, which are discussed in the subsequent chapters, work in tandem and supplement each other to create an abstract framework for law.

4.2 Reception history of the Justinianic corpus and the Talmud Yerushalmi

4.2.1 The reception of Justinian's *Institutes* and *Digest*

The Justinianic legal corpus gradually sank into oblivion after the death of emperor Justinian in 565. In the Greek-speaking Byzantine Empire, the complex and enormous text of the *Digest* proved to be inaccessible to the Byzantine jurists who were more interested in legal practice than in legal science. The Justinianic corpus was abridged to serve the practical needs of the law schools and courts. Emperor Leo III enacted a summary of Justinian's codification in the *Ecloga Legum* ("Select passages") in 741. In the late 9th and early 10th century, the Justinianic corpus was adapted, updated and abridged in the practical compilations known as the *Eisagoge* ("Introduction") and its revised

version, the *Procheiros Nomos* ("Useful law").²⁴⁶ The most important document of the period is, however, the *Basilika* which was initiated by Emperor Basil I and completed by his son Leo the Wise in 890. The *Basilika* is a revised and reordered Greek paraphrase of the Justinianic corpus in 60 books which omitted obsolete laws and presented the material in a supposedly more orderly fashion.²⁴⁷ The *Basilika* was later abridged, for example, in the *Hexabiblos* ("Six books", created in 1345) which was instrumental in preserving some form of Roman law in Greek-speaking areas even after the fall of Constantinople in 1453.²⁴⁸

The Justinianic corpus became obscure in the Latin West. Even though Justinian enacted his codification as law in Italy after defeating the Goths in 554, Byzantine power was short-lived and Roman law survived in some form in the Germanic kingdoms according to the better rooted *Theodosian Code*. With the decline of the professional jurists, law was administered by laymen mostly according to local custom. The codes of King Liutprand (712-744) and Charlemagne (768-814) respectively enacted Lombard and Frankish custom intermingled with Roman legal institutions.²⁴⁹ The Roman Catholic Church, which developed its own legal system primarily based on Roman ideas, was instrumental in preserving some elements of Roman law during a period of general intellectual decline.²⁵⁰ The decline is marked by the fact that the *Digest*, as Wolgan Müller notes, "completely disappeared in the Latin West. After Pope Gregory the Great last cited it in a letter of 603, the sources remained silent for almost half a millennium."²⁵¹ The next "securely dateable reference to the *Digest*" in the West is not until 1076.²⁵²

The revival of the study of Roman law in the 11th century has been customarily related to the "rediscovery" of the *Digest* in Pisa.²⁵³ The codex which is now known as the the *Florentine Codex* was

²⁴⁶ On Byzantine legal documents until the time of the *Basilika*, see Schminck (1986):55-107 and Bochove (1996) which challenges Schminck's dating. Edwin Freshfield produced English translations of these sources: Freshfield (1926) and Freshfield (1928).

²⁴⁷ The text edition by Hans Scheltema presents the main text and the commentaries on the margins of the main text (*scholia*) in separate books and series. See Scheltema et al. (1955-1988).

²⁴⁸ An outline about the history of Byzantine law is offered by van der Wal et al. (1985) and more recently by Lokin et al. (2011). In English, Bernard Stolte provides an overview of Byzantine codification and legal history in Stolte (2014) and Stolte (2015).

²⁴⁹ See the classic account of this period by Vinogradoff (1929).

²⁵⁰ See Robinson et al. (2000):1.4.2-3 and passim and Bellomo (1995):34-54.

²⁵¹ Müller (1990):1.

²⁵² Radding (1988):8.

²⁵³ This view is popularised by Max Conrat and Hermann Kantorowicz. Conrat writes about the "fortunate destiny" of Roman legal sources in the 11th century and relates the juristic revival in Bologna to the rediscovery of the *Florentine Codex* of the *Digest*. Conrat (1891):63 and 71-72.

created around 555, shortly after the text's official publication by Justinian in 529.²⁵⁴ Contrary to the *Institutes*, the *Code*, and the *Novels* which, according to Charles Radding, "had been in continuous use throughout the early Middle Ages",²⁵⁵ the *Digest* was a difficult source which was studied to a limited extent.²⁵⁶ Radding plays down the significance of the emergence of a single copy and suggests with Guido Astuti that "the reappearance of the *Digest* should instead be seen ... as an effect of the revival of juridical culture in Italy in the eleventh century, a revival that created an audience capable of understanding what the book had to teach."²⁵⁷

With significant scholarly predecessors in Pavia, the revival of Roman law is usually associated with the Bologna-based jurist Irnerius (ca. 1050-1125) who developed a curriculum of Roman law independent from the study of Canon law and Lombard customary law.²⁵⁸ The 12th century Glossators of Bologna followed Irnerius' glossing technique. The glosses of the *Quattuor Doctores* ("Four doctors"), that is, Bulgarus, Martinus Gosia, Jacobus de Boragine and Hugo de Porta Ravennate,²⁵⁹ were preserved in the monumental collection completed by Accursius in 1230 and remained an indispensable study tool for Roman law.²⁶⁰ His *Glossa Ordinaria* had been preserved on the margins of manuscript editions of Justinianic texts before it was first published in printed format by Denis Godefroy in 1583 which coined and immortalised the term *Corpus Iuris Civilis*.

Another group of Roman law scholars in the Italian peninsula known as the Commentators became dominant in the 13-15th centuries. They were successors of the liberal approach developed by the law schools in France and by the so-called *Ultramontani* ("those beyond the mountains") in the

²⁵⁴ For a summary of the textual history of the *littera Florentina*, see Bretone (1992):255-256.

²⁵⁵ Radding (1988):8.

²⁵⁶ A collection of *Digest* excerpts created in Italy around 1080 known as the *Collectio Britannica* has survived in a single manuscript now kept in the British Library. Kantorowicz and Buckland emphasised the importance of the so-called "Royal MS 11. B. XIV of the British Museum" which includes edited glosses by Rogerius, Irnerius, Bulgarus and Martinus among others. See Kantorowicz et al. (1938):1-7.

²⁵⁷ Radding (1988):10 based on Astuti (1984):207-209.

²⁵⁸ Irnerius' scholarly contribution is found on the margins of early manuscripts of Roman law where his glosses are marked by the sigla *y* or *G*. The most commonly used publication of the glosses is Besta (1896). A brief account of Irnerius' work and method is provided by Radding (1988):159-171 and Ascheri (2013):20-28.

²⁵⁹ Their political intervention in the rivalry between pope and emperor also indicates the growing significance of professional jurists and that of Roman law. The rivalry manifested itself in the Investiture Controversy about the appointment of lesser church officials and started with Pope Gregory VII's prohibition of lay appointment in 1075. Both pope and emperor sought justification for their positions in Roman law which underlines the significance of the support of the "Four doctors" to Frederick Barbarossa in 1155. In return, Barbarossa granted privileges to the law students of Bologna which is effectively the moment when the modern university was born. See Stein (1999):52-54.

²⁶⁰ The glosses are curiously similar in both format and style to those by Rashi (1040-1105) and the Tosafists of the 12-13th century.

school of Orléans.²⁶¹ Unlike the Glossators who worked according to strict exegetical principles and concentrated on the sources of Roman law in isolation, the Commentators such as Bartolus (1314-1357) and Baldus (1327-1400) sought to adapt Roman law to contemporary circumstances in their monographs, commentaries and collections of opinions.²⁶² Franz Wieacker asserts that “the Commentators were able to transform the law of Justinian into the *ius commune*, a common law for the whole of Europe, and to apply to the rich variety of the non-Roman laws in Europe their ways of thinking about law.”²⁶³

The texts of the Justinianic corpus were first exposed to text-critical scrutiny by the legal humanists of the 16th century. They wanted to reconstruct the true and eloquent original either by relying on “conjecture, using their knowledge of antiquity to guess what the text ought to be”²⁶⁴ or by consulting the *Florentine Codex* like Politian (late 15th century) and Jacques Cujas (1522-1590). The humanist intervention had a contradictory impact on the study of Justinianic texts. Some 16th century scholars such as François Duaren, François Connan or Hugues Doneau set out to develop civil law as a science in the spirit of Cicero’s call for a *ius civile in artem redactum* (“civil law transformed into science”).²⁶⁵ Others like Alberico Gentili dismissed the humanist ideals and sought to accommodate Roman law to local customary law in the spirit of the Commentators Bartolus and Baldus. In most parts of Europe, the Bartolist approach, which emphasised the practical application of the *ius commune* in local legal practice, became dominant. The emerging universities in German-speaking lands were formally entrusted by Emperor Charles V in 1532 to give opinions on difficult legal cases according to classic sources with the result that law faculties practically became part of the judiciary system.²⁶⁶ From the Bartolist powerhouses of Italy and France, the centre of legal learning moved to the Dutch provinces which were gradually gaining independence. Works such as *De iure belli ac pacis* (“On the law of war and peace”) by Hugo Grotius (1625), the *Notae* (“Notes”) on the *Institutes* of Justinian by Arnold Vinnius (1646), or the *Commentarius ad Pandectas* (“Commentary to the Digest”) by Johannes Voet (1698-1704) became extremely popular and remained in print throughout Europe until the 19th century.²⁶⁷

²⁶¹ Stein (1999):54-57 and 67-68.

²⁶² See Stein (1999):71-74.

²⁶³ Wieacker (1995):57.

²⁶⁴ Stein (1999):77.

²⁶⁵ The *locus classicus* is in Cicero’s *De Oratore* 1.41.185-42.191. See Bona (2006):1-13 and Moatti (2015):247-255.

²⁶⁶ Strauss (1986):83-85.

²⁶⁷ Stein (1999):99-101.

Natural law thinkers in the 17th century envisioned a geometrical order which they wished to rediscover in (or impose upon) the somewhat disorderly Justinianic corpus. The most notable efforts to recover that order is the *Corpus iuris reconcinnatum* ("The repaired *Corpus iuris*") by Gottfried Wilhelm Leibniz (1665-1672)²⁶⁸ and the *Pandectae Justinianae in novum ordinem digestae* ("Justinian's *Encyclopaedia* arranged in a new order") by Joseph Pothier (1748-1752). Codes from the 18th century were motivated by the geometrical ideals of Leibniz and Pothier and occasionally referred to Roman sources as they sought to unify diverse local laws, remove obsolete rules and settle disputed legal matters. The *Codex Maximilianeus Bavaricus civilis* ("The Maximilian Bavarian Civil Code") in 1756, the Prussian *Allgemeines Landrecht* ("General State Law") in 1794 and the Austrian *Codex Theresianus* ("Theresian Code") drafted in 1766 and put into force in a simplified version in 1812 are the first of their kind. Pothier's work is directly related to the French *Code Civil* (1804) which motivated the project of a unified code for all German-speaking lands. The latter project was advocated by Karl-Friedrich von Savigny in his 1814 pamphlet *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft* ("Of the vocation of our age for legislation and jurisprudence").²⁶⁹

Savigny started the project with a text-critical analysis of medieval witnesses to provide a solid foundation for restoring the law of the classical Roman jurists in his *System des heutigen römischen Rechts* ("System of present-day Roman law").²⁷⁰ The discovery of Gaius's *Institutes* by Barthold Niebuhr in Verona in 1816 strengthened Savigny's text-critical efforts which reached a climax towards the end of the 19th century. It was at this time that Theodor Mommsen published the Justinianic corpus, and Otto Lenel reconstructed the *Praetor's Edict* and the sources cited in the *Digest*.²⁷¹ The texts published by Mommsen and Lenel remain standard in Roman law scholarship until today. Savigny's efforts in restoring classical law thrived in the 19th century German Pandect-science with the landmark publications being Rudolf von Jhering's *Der Geist des römischen Rechts* ("The spirit of Roman law", 1852-1858) and Bernhard Windscheid's *Pandektenrecht* ("Pandect law", 1862-1870). The latter had enormous impact on the German *Bürgerliches Gesetzbuch* ("Civil Code") which came into force in 1900 and marked the end of the most influential period of Roman legal scholarship.

²⁶⁸ The title is that of a long-term project rather than an individual publication. For the intriguing legal scholarship of Leibniz, who is better known for his mathematical and philosophical works, see Armgardt (2014)

²⁶⁹ Savigny (1975).

²⁷⁰ The *Geschichte des römischen Rechts im Mittelalter* was published in the original German between 1815-1831, the *System* between 1840-1849. The English translations of these works are Savigny (1979a) and Savigny (1979b).

²⁷¹ Mommsen et al. (1872-1895), Lenel (1883) and Lenel (1889).

In most European countries, Roman law and its envisioned geometrical system have retained its status as the entry to legal learning. The study of Roman law, however, has lost its immediate practical value and gradually transformed into a pure academic discipline. In the first half of the 20th century, text-critical interest was dominant. The Justinianic corpus was exposed to meticulous inquiry by scholars who wished to purify the sources of the classical jurists from what they thought to be non-classical Byzantine interpolations. Since the criteria of identifying non-classical elements in the classical jurists by either style or legal doctrine proved to be unverifiable, the so-called *Interpolationenjagd* ("hunt for interpolations")²⁷² eventually lost its momentum. While Roman law is still a core subject at the universities of Oxford and Cambridge, scholars from English-speaking countries²⁷³ mostly arrive at its study from a historian or classicist background. Common law scholars occasionally use Roman sources to stimulate legislative change.²⁷⁴ In the civilian tradition, some envision the European Union as a possible central force for a unified European legislation based on the Roman law tradition.²⁷⁵

4.2.2 The reception of the *Talmud Yerushalmi*

Unlike the leading role the Justinianic corpus played in the history of Western legal tradition, the *Talmud Yerushalmi* has always been side-lined in favour of the *Talmud Bavli* in the Jewish legal tradition. The *Yerushalmi* has been primarily used to provide additional evidence and parallels for the study of the *Bavli*. North African Talmudic scholars in the 11th century like Rabbi Hananel of Kairouan and Alfasi of Fez as well as the 12th century Moses Maimonides used the *Yerushalmi* for the explanation of the *Bavli*'s text. Additionally, Talmudic scholars from the 12th century onwards known collectively as the Tosafists produced explanations to the *Bavli*'s text and drew support for their arguments from the *Yerushalmi*²⁷⁶ in a manner similar to the medieval Glossators of the Justinianic

²⁷² The text-critical obsession was criticised by Lenel (1925):17-38. See more about this subject in section 8.1.1 "From text to history in Justinian and the *Yerushalmi*".

²⁷³ Notable exceptions in the English-speaking world where the law is primarily based on the Roman tradition is Scotland, South Africa and the American state of Louisiana.

²⁷⁴ Former Regius Professor of Civil Law at Oxford, Peter Birks wished to provide English private law with a more orderly framework partly based on the study of Roman law in Birks (2000). More recently, Neal Wiley investigated how Justinianic sources motivated Supreme Court decisions in the United States in Wiley (2016).

²⁷⁵ An important contemporary voice in this regard is Reinhard Zimmermann who works in this pan-European direction. See Zimmermann (1996). Some important accounts about the role of Roman law in European legislation are Wieacker (1990), Wieacker (1995), Földi et al. (1996) and Zimmermann (2001).

²⁷⁶ Urbach (1955):543ff.

corpus. It was not until the 13th century that one of the *Yerushalmi*'s tractate (Sheqalim) received a commentary of its own by Rabbi Meshullam in Normandy.²⁷⁷

The first printed edition of the *Yerushalmi* was produced in Venice in 1523-1524 by Daniel Bomberg who primarily used the single complete manuscript of the *Yerushalmi*, MS Leiden, which is dated to 1289.²⁷⁸ Particular parts of the text received more attention from Talmudic scholars from the mid-16th century: some concentrated on the tractates which appear in the *Yerushalmi* only,²⁷⁹ others on the non-legal parts of the work. The first comprehensive commentary was produced by the 18th century Moshe Margolies. His *Penei Moshe* ("The face of Moses") is one of the two most important traditional commentaries to the *Yerushalmi*. The other is David Fränkel's *Qorban ha-'Eidah* ("Community sacrifice"), also from the 18th century. Apart from isolated exceptions, traditional Talmud scholarship has remained focused on the *Bavli* and used the *Yerushalmi* as a supplementary resource of parallels.

Stemberger lists "modern" commentaries to the *Yerushalmi* which are produced by scholars working according to secular academic standards.²⁸⁰ From these, Isaac Lewy's *Introduction and commentary to Talmud Yerushalmi* and Saul Lieberman's *Ha-Yerushalmi ki-fshuto* ("The Yerushalmi in its literal meaning") on the Talmudic order *Neziqin* ("Damages") specifically engage with tractate *Bava Qamma*. In a brief monograph with the title *Talmud shel Qisrin* ("The Talmud of Caesarea"), Lieberman suggests that while the majority of the *Yerushalmi* tractates were produced in Tiberias at various times before 429,²⁸¹ the tractates of order *Neziqin*, and among them tractate *Bava Qamma*,

²⁷⁷ The commentary is attributed to R. Meshullam and his student R. Samuel ben R. Shneur of Evreux by Abraham Schreiber's 1954 text edition. Stemberger notes that E. E. Urbach challenges the attribution and credits the early Tosafists with its creation. See Stemberger (2011):187.

²⁷⁸ Sussman (2001b):ט-י and ט-י [ix-x and xiv-xvi]. See section 4.4.2 on the text of the *Yerushalmi*.

²⁷⁹ With exception of *Berakhot* ("Blessings"), tractates in the first order of the *Mishnah*'s six (*Zeraim* – "Seeds") discuss laws about agricultural activity in the Land of Israel. These tractates did not receive commentaries in the *Bavli*, presumably for the reason that they had no relevance for the Babylonian Jewish community living outside the Land of Israel. Stemberger notes that the traditional explanation is wanting in light of the fact that tractates about the Temple ritual in order *Qodashin* ("Holy things"), which have also no relevance outside the Land of Israel, do have commentaries in the *Bavli*. Stemberger (2011):191.

²⁸⁰ See Stemberger (2011):188.

²⁸¹ Yaakov Sussman notes that the latest authority mentioned in the *Yerushalmi*, R. Yose beR. Bun was active in the 360s which is therefore the *terminus a quo* for the *Yerushalmi*'s final redaction. Sussman (1990):132-133. Traditionally, the *Yerushalmi*'s editing is related to the dissolution of the patriarchate in 429. See Epstein (1962):274 and Ginzberg (1941-1961):1:83. Above, section 2.2.1 "The historical context for the creation of the *Talmud Yerushalmi*" considered this possibility.

were produced by the rabbis in Caesarea and presumably earlier than the tractates originating from Tiberias.²⁸²

As Talmudic scholarship has dramatically expanded in the last few decades, scholars started to look at less chartered territories. The *Mishnah* has become an independent focus of research,²⁸³ and the *Yerushalmi* has also received more attention than before. The *Yerushalmi*'s text was exposed to philological scrutiny in two major projects which produced a synoptic edition of the major text witnesses of the *Yerushalmi* by Peter Schäfer in 1995 and a critical edition of the MS Leiden text by Yaakov Sussman in 2001.²⁸⁴ Heinrich W. Guggenheimer's English translation completed in 2012 sought to replace the maligned translation completed by Jacob Neusner in 1994.²⁸⁵ The *Yerushalmi*'s German translation and commentary initiated by the late Martin Hengel remains the only translation in any modern language which was created according to the highest academic standards.²⁸⁶ The translation and commentary of tractate *Bava Qamma* in Hengel's German series was produced by Gerd Wewers.²⁸⁷

Wewers also authored an important philological and theological account of the three *Bavot* tractates which systematically compared the text of the *Yerushalmi* and the *Bavli*.²⁸⁸ While the study of the *Bavli* has remained the main focus in Rabbinic scholarship of the modern academia, the *Yerushalmi*'s evidence has become unavoidable since its rediscovery for scholarly purposes in the 1980s. Any study on the *Bavli*'s text these days reckons with the parallels in the *Yerushalmi*, even if the comparison contributes little to the understanding of the *Bavli* itself. Among the many monographs accounting for differences between the *Yerushalmi* and the *Bavli*, between the Jewish community in Roman Palestine and Sassanid Persia, Christine Hayes' *Between the Babylonian and Palestinian Talmuds* and Richard Kalmin's *Jewish Babylonia between Persia and Roman Palestine* have become classic.

The three-volume collection of articles edited by Peter Schäfer and Catherine Hézser which was published under the title *The Talmud Yerushalmi and Graeco-Roman culture* is possibly the most comprehensive overview of the scholarship dedicated to the study of the *Yerushalmi* in recent

²⁸² Lieberman (1931).

²⁸³ See the overview of the state of research in Mishnah studies in Rosen-Zvi (2008) and Tropper (2010).

²⁸⁴ Schäfer (1991) and Sussman (2001a).

²⁸⁵ Guggenheimer (2000-2012) and Neusner (1982-1994).

²⁸⁶ Avemarie et al. (1975-2011).

²⁸⁷ Wewers (1982).

²⁸⁸ Wewers (1984).

decades.²⁸⁹ Apart from an important monograph about the social context of Rabbinic culture in Roman Palestine,²⁹⁰ Catherine Hézser also published a volume about Jewish literacy and edited a collection of essays about Rabbinic legal culture.²⁹¹ Legal abstraction in the *Yerushalmi* was discussed in Leib Moscovitz's monograph about the development of Talmudic reasoning, while his terminological dictionary of the *Yerushalmi* has become an important study tool.²⁹²

4.3 Text and context of the Roman law of obligations in Justinian's Institutes

The present section introduces two passages related to the law of obligations from Justinian's *Institutes*. After some opening general remarks on obligations in Roman law, I shall present the Latin text and my translation of the passages which provide a definition for the term *obligatio* and the classification of corresponding topics. The section concludes with a preliminary analysis of the passages from which my discussion of literary signals for abstraction in Roman legal texts departs.

4.3.1 Obligations in Roman law

According to the early 3rd century jurist Paul, "the essence of obligations [consists in] ... that it binds another person to give, do, or perform something."²⁹³ The element of binding also appears in the definition of Justinian's *Institutes* (J.3.13.pr) according to which "an obligation is a legal tie which binds us to the necessity of making some performance in accordance with the laws of our state."²⁹⁴ Obligation creates a *duty* of one person incurring the obligation which is parallel to the *right* of another person to enforce it. The abstract term of *obligatio* grasps the complexity of a personal liability with its two sides of duty and right. In Roman legal terms, *obligatio* is always *in personam* and not *in rem*. This means that *obligatio* is always a personal liability: it is a duty towards another person and a right to be enforced from another person. From another perspective, however, obligation belongs to the law of things in the threefold institutional scheme of the laws of persons, things and actions. The reason for this is that the person to whom resources and services are due owns the obligations as a thing which is yet to be materialised, that is, obligation is a *res incorporalis*. The legal term *obligatio* is a relatively new and artificially constructed term in Roman law. With reference to the works of Max Kaser and Peter Birks, it is argued below that people had bound

²⁸⁹ Schäfer et al. (1998-2002).

²⁹⁰ Hézser (1997). Another important monograph in the topic is Miller (2006).

²⁹¹ Hézser (2001) and Hézser (2003).

²⁹² Moscovitz (2002) and Moscovitz (2009).

²⁹³ Paul, Institutes 2, D.44.7.3.pr.

²⁹⁴ Birks et al. (1987a):105.

themselves to give, do or perform something to each other long before the jurists attempted to grasp the essence of the transaction. Obligation was always easier to grasp in practice than in abstract terms. Notably, the father of the threefold institutional scheme, the late 2nd century jurist Gaius avoided defining *obligatio*²⁹⁵ and only discussed its subcategories which offer themselves for a more practical approach.

Both Kaser and Reinhard Zimmermann identify the historical roots of the personal liability associated with obligation in the punishment for a wrongful act (*delictum*) committed against another person which they distinguish from crimes committed against the community.²⁹⁶ According to Kaser, “the right to kill” was first replaced by retaliation (*talio*)²⁹⁷ and then by composition of heads of cattle (*pecus*) and finally by composition of money (*pecunia*). Money composition was already in place by the time of the *Twelve Tables* (ca. 450 BCE) which still acknowledged “expiatory killing [as] the final stage of execution”.²⁹⁸ The “redeemable, pledge-like, power of seizure” associated with delictual liability, as Kaser puts it, “could also be created artificially by transactions giving rise to liability”.²⁹⁹ The *Institutes* of Gaius (G.3.89-181) as well as its Justinianic update (J.3.13-29) discuss obligations according to the transactions which generate them rather than according to the content of the obligations. The focus on transactions in Gaius and Justinian supports Kaser’s idea that contractual obligations came into being by transactions which aimed to create the “redeemable, pledge-like, power of seizure” artificially.

The idea of obligation and its inherent twin concepts of duty and right should be seen as results of gradual consolidation and abstraction. Fritz Schulz calls the Roman law of obligation a “unique achievement in the history of human civilisation.”³⁰⁰ In the same spirit, Reinhard Zimmermann writes that “indeed, the concept of ‘obligatio’ is a very advanced and refined one which was not part of the primitive thinking patterns of archaic Roman law (let alone any other legal system), but which stood

²⁹⁵ The absence of the definition of *obligatio* is noted, among others, by du Plessis (2012):72-73.

²⁹⁶ Kaser (1968):135 and Zimmermann (1996):4-6.

²⁹⁷ The *talio* principle in the *Twelve Tables* is discussed in Tuori (2007a). The talionic principle is probably best known in its biblical formulation in Ex 21:23-25: “life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burn for burn, wound for wound, stripe for stripe”. From the enormous literature on the topic, I highlight the work of three scholars of subsequent generations active in Britain who worked on the talionic principle and its wider legal, literary and historical context. See Daube (2003), Jackson (1975a), Jackson (2001a), and Jacobs (2013). Daube supervised the doctoral work of Jackson, while Jackson supervised Jacobs.

²⁹⁸ Kaser (1968):136-137.

²⁹⁹ Kaser (1968):137 and Zimmermann (1996):4 which almost verbatim follows Kaser. It should be noted that contrary to Kaser and Zimmermann, Jolowicz et al. (1972) (originally published in 1932) discusses the law of obligations in distinct stages, and refrains from drawing a line of evolution from delictual to contractual liability.

³⁰⁰ Schulz (1951):463.

at the end of a long evolution.”³⁰¹ According to Kaser, this refined vocabulary of the law of obligations including “the mature concept of obligatio was reached during the later Republic at the latest”.³⁰²

Formal elements played a significant part in the shaping and development of Roman law. Obligations could be originally enforced by a limited number of specific procedural means (*actiones*) only, and therefore unenforceable obligations did not prevail. The development of the Roman law of obligations, therefore, depends on the development of Roman civil procedure as described by John Kelly, Kaser and Ernest Metzger.³⁰³ The limitations of the *legis actiones* system was addressed by a procedural reform which started with the establishment of the peregrine praetor in 242 BCE. The peregrine praetor was responsible for providing special procedures for transactions between Roman citizens and those foreigners who did not have access to Roman law and the *legis actiones* system. The procedures were gradually standardised in written pleadings (*formulae*) which allowed a quicker and more flexible operation.³⁰⁴ According to Peter Birks, the benefits made the formulary system attractive to Roman citizens too who are thought to have demanded its use for their own transactions instead of the complicated and overly formalised *legis actiones* system.³⁰⁵ Consequently, the *legis actiones* system gradually fell out of use, and it was formally abolished by Augustus in 17 BCE.

The formulary system was practised on the authority of the peregrine praetor, not on the authority of the *ius civile*, that is, Roman law proper available to Roman citizens only. Therefore, the formulary system and the many obligations which became enforceable by it form part of the so-called honorary part of Roman law (*ius honorarium*). The formulary system adapted city law to a geographically growing state which was run on the Republican idea. Even though Rome became an empire and its governmental structure became monarchic with Augustus, the legal system and political offices still reflected the constitution of the Republic. The formulary system was gradually phased out by a third procedural system where the transactions became enforceable by the investigation (*cognitio*) of an imperially appointed and paid bureaucrat or the emperor himself.³⁰⁶ The formulary system was abolished in 342 and civil procedure became practically controlled by the

³⁰¹ Zimmermann (1996):2.

³⁰² Kaser (1968):139.

³⁰³ Selecting only one piece of work on the topic from each scholar, see: Kelly (1966), Kaser (1996), and Metzger (2013).

³⁰⁴ Birks (1969a):357.

³⁰⁵ Birks talks about the “formulary infiltration of *legis actiones* claims” and outlines a five-step process by which the formulary system gradually took over. See Birks (1969a):364 and 366-367.

³⁰⁶ Kaser (1967b):137-141.

State. The types of obligations developed according to their enforceability in the three stages of the civil procedure.³⁰⁷ Their peculiar character and peculiar presentation in the sources reflect the history of Rome which grew from city to empire while continually adapting its law to new challenges.

4.3.2 Justinian's Institutes 3.13 and 4.1

The Latin text of the *Institutes* presented here is from the edition by Theodor Mommsen as revised by Paul Krüger.³⁰⁸ Mommsen's text is based on early manuscript evidence, the textual tradition supported by Theophilus' Greek paraphrase and early printed editions.³⁰⁹ My translation recreates the grammatical and semantic characteristics of the Latin. The English text should be considered a mirror of the Latin, rather than an independent one. Words in square brackets in the translation do not have an equivalent in the Latin text; they are added to the English for the ease of understanding. Latin terms whose terminological meaning would have been lost by translating them into English, like *leges*, are left in their Latin original. The terms *genera* and *species* are translated by "classes" and "types". The terminological inconsistency of the sources will be highlighted in Chapter 7. My translation goes consciously against the objective of Peter Birks and Grant McLeod who create a lucid and modern English text so that "the English rendering can free itself from the kind of obsessive fidelity to the original which can quickly turn the language into translationese."³¹⁰ For my purposes, that "obsessive fidelity" is more appropriate.

J.3.13.pr-2

Nunc transeamus ad obligationes. obligatio est iuris vinculum, quo necessitate adstringimur alicuius solvendae rei, secundum nostrae civitatis iura. 1. Omnium autem obligationum summa divisio in duo genera deducitur: namque aut civiles sunt aut praetoriae. civiles sunt, quae aut legibus constitutae aut certe iure civili comprobatae sunt. praetoriae sunt, quas praetor ex sua iurisdictione constituit, quae etiam honorariae vocantur. 2. Sequens divisio in quattuor species deducitur: aut enim ex contractu sunt aut quasi ex contractu aut ex maleficio aut quasi ex maleficio. prius est, ut de his quae ex contractu sunt dispiciamus. harum aequae quattuor species sunt: aut enim re contrahuntur aut verbis aut litteris aut consensu. de quibus singulis dispiciamus.

Let us now proceed to obligations. Obligation is a bond of law by which we are tied to someone by the necessity of releasing a *res* according to the law of our state. 1. The primary division of all obligations breaks down into two classes: for [obligations] are

³⁰⁷ One of the clearest presentation of the three stages can be found in Metzger (2013):13-15.

³⁰⁸ Mommsen et al. (1872-1895). For further bibliographic details, see the "Note on abbreviations and sources" at the beginning of the thesis.

³⁰⁹ The earliest manuscript is dated to the 9th century, the first printed edition "emanated from Mainz in 1468" and "a much improved text was produced by the great legal humanist Cujas in 1585." See Birks et al. (1987b):27.

³¹⁰ Birks et al. (1987a):27.

either civil or praetorian. Civil [obligations] are those which have been approved by established *leges* or by civil law. Praetorian [obligations] are those which the praetor has established according to his own legal authority – these are also called honorary [obligations]. 2. The secondary division breaks down into four types: [obligations] are either [derived] from contract, as if from contract, from wrongdoing, or as if from wrongdoing. We shall first consider those which are [derived] from contracts. The types of these are likewise four: they are contracted either by *res*, by words [spoken], by letters [written], or by consent. Let us consider them one by one.

The other sample text which provides the starting point for my literary analysis is the fourfold classification of delicts in Justinian's *Institutes*. The subject of delictual obligations opens the fourth and final book which divide into two major parts: one about the latter half of the subject of obligations (the delictual and quasi-delictual ones in J.4.1-5) and the subject of actions (J.4.6-17). As above, the Latin text is according the Mommsen, the translation is mine.

J.4.1.pr

Cum expositum sit superiore libro de obligationibus ex contractu et quasi ex contractu, sequitur, ut de obligationibus ex maleficio dispiciamus. sed illae quidem, ut suo loco tradidimus, in quattuor genera dividuntur: hae vero unius generis sunt, nam omnes ex re nascuntur, id est ex ipso maleficio, veluti ex furto aut rapina aut damno aut iniuria.

As it has been explained in the preceding book about obligations [arising] from contract and [arising] as if from contract, we shall subsequently consider the obligations [arising] from wrongdoing. Whereas those [arising from contract], as we said in its [proper] place, divide into four classes, these [arising from wrongdoing] are of one class, for all of them arise from *res*, that is from the wrongdoing itself such as theft, robbery, damage or contempt.

4.3.3 Preliminary remarks on the sample text from the *Institutes*

Justinian's *Institutes* clearly marks the transition from the subject of acquisitions (J.2.1-3.11) to the subject of obligations (J.3.13-4.5) at the beginning of the passage presented above. Marking the transition probably looks obvious to a reader accustomed to modern academic writing standards, but this aid in Justinian's *Institutes* is remarkable in the context of contemporary legal compendia. Justinian's *Digest* as well as the *Yerushalmi* of Rabbinic Judaism generally do not signpost their own structures. When they violate the coherence principle and start talking about something out of place, ancient legal compendia generally expect their readers to detect the change of subject automatically.

Justinian's transparent signposting in J.3.13.pr is expressed by *transeamus* ("let us proceed"). This "let us proceed" acknowledges the existence of a governing voice ("we") as well as that of a readership ("you"). Section 5.1.1. "The omnipresent voice of the *Institutes*" will relate the "we" and the "you" of the *Institutes* to the rhetorical setting expressed in the imperial constitutions where

Justinian presents himself as the ultimate legal educator of “young people keen to study law” (*cupidae legum iuventuti*). The “we” of the text’s governing voice appears several times in the structurally relevant parts of the *Institutes* where it introduces a new subject or makes a transition between two subjects before this “we” sinks into anonymity during the discussion of a particular subject. The reader’s “you” remains largely implicit in the body of the *Institutes* as a presupposed counterpoint of the text’s “we”. Contrary to the anonymity of the neutral third person singular voice which dominates the text, the “we” and “you” appear at structural turning points of the *Institutes*. The personal voice establishes contact between the text’s projected author and the reader and sketches “the map of the law”.³¹¹ For example, the *transeamus* in J.3.13.pr indicates a transition from one type of incorporeal things (*successio*) to another (*obligatio*) already envisaged in J.2.2.2.³¹²

The *transeamus* phrase introduces a peculiar definition of *obligatio* in Justinian’s *Institutes*: “Obligation is a bond of law by which we are tied to someone by the necessity of releasing a res according to the law of our state.” With the exception of Paul (early 3rd century),³¹³ jurists avoided to provide a definition exemplifying what Fritz Schulz calls a “disinclination for general conceptions... and abstract formulations of legal rules” in the classical period of Roman law.³¹⁴ The definition is a characteristic literary signal for abstraction which is discussed in detail in Chapter 6 “Establishing legal terms”. Section 6.1.3 “The ‘defective’ definition of *obligatio* in the *Institutes*” emphasises that the definition is not logically binding. It is rather a rhetorical tool which provides an orientation point for the novice reader.

The “defective” definition is followed by a list of classification which is another literary signal for abstraction discussed in Chapter 7 “Organising legal knowledge”. The classification says that “the primary division of all obligations breaks down into two types... The secondary division breaks down into four types...” Justinian’s *Institutes* differentiates between *divisio* and *partitio* as well as “primary” (*summa*) and “secondary” (*sequens*) divisions. The sample text also differentiates between “classes” (*genera*) and “types” (*species*)³¹⁵ which are, as it shall be argued, not mere synonyms. There is a relatively consistent vocabulary of classification in Justinian’s *Institutes*: the

³¹¹ The metaphor is used by Birks et al. (1987b):14.

³¹² J.2.2.2: “Incorporeal things cannot be touched, they are of those types which exist in law just as inheritance, usufruct or obligations contracted in whatever way.” For more details, see section 5.1.1.

³¹³ Paul, *Institutes* 2, D.44.7.3.pr: “The essence of obligations does not consist in that it makes some property or a servitude ours, but that it binds another person to give, do, or perform something for us.”

³¹⁴ Schulz (1936):48.

³¹⁵ See sections 7.1.1 “*Divisio* and *partitio* in Justinian’s *Institutes*” and 7.1.2 “*Genus* and *species* in Justinian’s *Institutes*”.

operation of classification is called “division” (*divisio*) by which legal terms “divide into” (*dividuntur*) classes (*genera*) and types (*species*).

The classification of legal terms and the corresponding vocabulary in Justinian’s *Institutes* can be interpreted as an attempt to rectify the “slackness and laziness” (*segnities atque inertia*) of the jurists who, according to Cicero, “would not have their art (*scientiae*) made common property” and “there were none able to distribute these [legal] matters into their kinds and arrange them artistically (*artificiose digesta generatim componerent*)”.³¹⁶ In Cicero’s view, “special knowledge” (*scientia*) “can be reduced to an art” (*ad artem redigi possit*) only by the careful organisation of scattered particular pieces of information. For this reason, “the art of civil law” (*ars iuris civilis*) is yet to be achieved. I shall argue that the “defective” nature of the classification in Justinian’s *Institutes* can be explained in two ways. First, the text combines legal traditions which contradict each other at certain points, and, therefore, Justinian was unable to realise Cicero’s *ars iuris* without encroaching on the authority of the legal past. Second, classification and its vocabulary were possibly shaped according to didactic considerations which were designed to provide an orientation to the novice student of law rather than a fully consistent “artistic” framework. This means that the three literary signals of legal abstraction, “text voice” (Chapter 5), “definition” (Chapter 6) and “classification” (Chapter 7), all have a strong rhetorical and didactic aspect.

4.4 Text and context of the Rabbinic law of damages in the Talmud Yerushalmi

I now turn to the second sample passage which introduces the Rabbinic law of damages (*neziqin* – נזיקין) in tractate *Bava Qamma* of the *Talmud Yerushalmi*. The opening general remarks on *neziqin* are followed by the presentation of the Hebrew-Aramaic text with philological notes. The concluding preliminary analysis of the passage illustrates the manner in which Rabbinic legal discourse handles its own abstract terminology. I will highlight literary signals in their immediate context which are structurally similar to those discussed in the preliminary analysis of the two Justinianic passages above.

4.4.1 Damages in Rabbinic law

Rabbinic legal sources do not provide an abstract definition for the term “damages” (*neziqin*). The English common law vocabulary uses the term “torts” for phenomena structurally similar to those subsumed under the category of *neziqin* in Rabbinic law. In order to avoid misleading connotations and to capture the broader range covered by *neziqin*, the term is generally translated as “damages”

³¹⁶ *De Oratore* 1.41.185-187 in Sutton (1942):128-131.

rather than “torts” in English. *Neziqin* is the title of one of the six orders of the *Mishnah* and the two *Talmudim*. The order covers a wide range of topics in private and public law from torts and property to procedural and criminal matters. The three ten-chapter long *Mishnah* tractates of *Bava Qamma*, *Bava Metzia* and *Bava Batra* at the beginning of order *Neziqin* provide the main source for Rabbinic private law. The *Talmud Bavli* attests that the three *Bavot* tractates originally constituted an undivided 30-chapter long tractate under the title *Neziqin*.³¹⁷ This fact is also reinforced by the oldest manuscripts of the *Mishnah*.³¹⁸

The vocabulary, orthography and distinctive short-hand style makes the *Bavot/Neziqin* tractate distinctive in the *Talmud Yerushalmi*. Saul Lieberman was the strongest advocate of the theory that *Bavot/Neziqin* is the result of an early composition.³¹⁹ Lieberman’s theory about the “Talmud of Caesarea” has received some challenges. Jacob Nachum Epstein argued that the “editorial” activity of the rabbis of Caesarea was not restricted to *Bavot/Neziqin*,³²⁰ while Gerd Wewers insisted that the distinctiveness of *Bavot/Neziqin* only applies to the quoted traditions, but not to the anonymous “editorial” layer of the text.³²¹ Yaakov Sussman’s philological analysis pointed out that the distribution of rabbinic authorities is not as distinct as Lieberman suggested.³²² Finally, Catherine Hézser’s study of stories in *Bavot/Neziqin* concluded that the association with Caesarea is not conclusive.³²³ These challenges, however, did not dismiss Lieberman’s grand theory, but rather fine-tuned it and contributed to its overall plausibility.³²⁴

³¹⁷ In bBQ 102a, the anonymous voice of the text (the *stam*) stipulates that the third generation (until 310) Babylonian *amora* Rav Yosef disagrees with his second generation (until 280) colleague Rav Huna who holds that “the entire *Neziqin* constitutes one tractate” (כולה נזיקין חדש מסכתא היא). The implication of Rav Huna’s view is that a dispute between two *tannaim*, R. Meir and R. Yehudah, in mBQ 9:4, and an anonymous ruling related to their dispute in mBM 6:2 originally appeared in the same tractate. The *Talmud Bavli* projects a dispute about the applicability of a hermeneutic rule which holds that if a dispute is followed by an anonymous ruling in the same tractate, then one cannot claim that “there is no order to mishnayot” (אין סדר למשנה) and, therefore, the law is according to the anonymous ruling which resolves the dispute. The *Bavli*’s 11th century commentator Rashi expresses the same view in s.v. בניקין in bBer 20a and s.v. נזיקין כולו in bAZ 7a.

³¹⁸ The three *Bavot* tractates are undivided and bear the title *Neziqin* in MS Kaufmann A 50 and MS Parma de Rossi 138. See Wewers (1984):14-16, and Stemberger (2011):135-136.

³¹⁹ Lieberman (1931) whose position is adopted by the Introduction of Ginzberg (1941-1961).

³²⁰ Epstein (1962):286.

³²¹ Wewers (1984):294-304.

³²² Sussman (1990):121-123.

³²³ Hézser (1993):403-405.

³²⁴ See also the summary of the debate in Stemberger (2011):192-194.

The first of the *Bavot* tractates in the *Mishnah* and the two *Talmudim*, *Bava Qamma*, talks about “damages in the narrower sense”³²⁵ which is occasionally discussed as the Rabbinic law of torts in English-language scholarship dominated by a common law vocabulary.³²⁶ The opening sentence of the *Mishnah* tractate talks about four “fathers of damages” corresponding to the biblical passage of Exodus 21:28-22:14 which constitutes the starting point for the Rabbinic law of damages.³²⁷ Rabbinic tradition collects the Bible’s specific scenarios of damages under headings such as the goring ox (Ex 21:28-32, 35-37, 22:1-3), the open pit (Ex 21:33-34), the grazing cattle (Ex 22:4) and the burning fire (Ex 22:5).³²⁸ The *Mishnah* (mBQ 1:1 below) uses the word “damage” in the singular (*nezeq* - נזק) for the amount payable by “the one causing the damage” (*hamaziq* - המזיק). In a similar fashion, the *Yerushalmi* (unit 6.4.1.1 in the translation below) talks about paying “half damages” (*chatzi nezeq* - חצי נזק) where the responsibility for the damage caused is shared. In another sense, the *Mishnah* also talks about five types of losses which need to be compensated in cases where someone injures another a person. One of them is “damage” in the singular (*nezeq* - נזק) which is the value loss of an injured slave.³²⁹

Rabbinic sources discuss damages in different senses and at various levels of abstraction. As it is argued below in Chapter 6, the *Yerushalmi* refrains from providing abstract definitions and, instead, it establishes the meaning of the “fathers of damages” by accumulating cases which belong to their categories. The strategy is partly due to the *Yerushalmi*’s dependence on the *Mishnah*’s structure and the insinuated purpose of preserving the spirit of biblical law in a form which is considered to be superior to the *Mishnah* in terms of coherence. The *Mishnah*’s thematic rearrangement³³⁰ of the

³²⁵ Stemberger (2011):130.

³²⁶ See Chapter 5 “The law of torts” in Albeck (2014):357-440.

³²⁷ See the list of biblical passages presented ahead of tractate *Bava Qamma* in Albeck (1952):4:5-7.

³²⁸ The verses about safeguarding someone else’s property (Ex 22:6-14) are discussed in tractate *Bava Batra*.

³²⁹ The other four types are pain (*tza’ar* - צער), medical costs (*ripuy* - ריפוי), loss of livelihood (*shevet* - שבת) and humiliation (*boshet* - בושת). See mBQ 8:1 and bBQ 83b. The compensation payable to a raped woman is also categorised as *nezeq* in Rabbinic law. See the entries in Steinsaltz (2014):326-327 and a comparative reading of some types of losses with Roman law in Pomeranz (2015):304-317.

³³⁰ The *Mishnah*’s thematic arrangement is followed by the two *Talmudim* and their numerous commentators. While the Talmudic arrangement of six orders with their constituent tractates has been playing a vital role in Jewish legislation until today, alternative arrangements were also created in the post-Talmudic period. The *She’iltot*, *Halakhot Pesukhot*, and *Halakhot Gedolot* are the most important codificatory works of the Geonic period in Babylonia (8th-11th centuries). Two additional frameworks were developed for the accumulating Jewish legal tradition during the Middle Ages. Moses Maimonides’ *Mishneh Torah* (ca. 1180) offered a radically architectonic rearrangement which has remained dominant in the Sephardic world. Jacob ben Asher also broke away from the Talmudic commentary format and restated the law and practices of “immediate interest” in four thematic volumes in his *Arba’ah Turim* (ca. 1340). The Ashkenazic world has attached itself to Yosef Karo’s *Shulchan Arukh* (1564-1565) which adopted the thematic arrangement of the *Arba’ah Turim* and

Jewish law of damages builds on the specific cases which are embedded in the Exodus text of the Bible. The *Mishnah* isolates law from narrative and supplements it with legislation which “began immediately after the Revelation at Sinai.”³³¹ According to the *Yerushalmi*’s subtle criticism, the *Mishnah* stays loyal to the biblical language (“Just as Scripture speaks, so speaks the Mishnah”),³³² but fails to preserve the coherence of the biblical law of damages. The Exodus passage only covers a minuscule fraction of an enormous legal field from which the entirety of the Rabbinic law of damages is extrapolated. The opening passage of tractate *Bava Qamma* in the *Talmud Yerushalmi*, which is presented in the next section, stays in touch with the legal tradition preserved in the texts of the *Mishnah* and the Bible. It claims divine authority emanating from the Revelation at Sinai as recorded in the biblical text which possibly prevented Rabbinic law to superimpose a completely artificial, man-made, “philosophical” structure upon the legal tradition.³³³

The Rabbinic legal “system” is characteristically “chaotic”³³⁴ compared to the institutional framework which was created by Gaius, adopted by Justinian and perfected by the Pandectists. We cannot speak about a “philosophical” structure underlying the plethora of rules coordinated by the Rabbinic legal vocabulary and hermeneutic rules. The Rabbinic law of damages has resisted fitting into a preconceived mould and the term *neziqin* has resisted fitting into an abstract definition. Three modern approaches illustrate how scholars of Rabbinic law answered to this characteristic “chaos”.

The antiquarian approach represented by Shalom Albeck emphasises the centrality of Talmudic law for any systematic representation of the Jewish legal tradition. In the Preface of his *Introduction of Jewish law in Talmudic times*, Albeck insists that there is an “ironclad principle” of Jewish law which holds that drawing conclusions is valid “provided that they do not contradict the law in the Talmud itself”. He writes that “Jewish law has attained a unity of principles and rules ... and the portion of

synchronised its content with the *Mishneh Torah*. For the codificatory work of the Geonim, Maimonides, Jacob ben Asher and Yosef Karo, see respectively Libson (1996):201-207, Shochetman (1996):277-279, Passamaneck (1996):338-339 and Passamaneck (1996):339-341.

³³¹ Elon (1994):2:546.

³³² See section 4.2.4 and 7.2.2.

³³³ Maimonides’ *Mishneh Torah* is the preeminent exception. Maimonides intended to preserve and ultimately replace the Jewish legal tradition with his own legal compilation: לפי שאדם קורא תורה שבכתב תחילה ואחר כך – “Therefore someone who studies the Written Torah first and then this [work] will know the entire Oral Law from it, and there will be no need to read any other book [created] between them.” Maimonides (1965):9. (Translation is mine.)

³³⁴ The inverted commas indicate that presupposing a system in Rabbinic law is questionable, and celebrating its alleged pluralistic chaos is anachronistic. Important contributions such as Roth (1986) about the systematic character of Rabbinic law, or Stone (1993) about its chaotic, debate-oriented character tell us more about the legal ideals of our present age than that of the Rabbinic world.

this system that relates to the commandments governing interpersonal relationships, must begin with Talmudic Law”.³³⁵

The *Mishpat Ivri* (“Hebrew law”) approach chooses the opposite direction of enquiry. Instead of moving from the past to the present, its approach is stimulated by contemporary concerns.³³⁶ *Mishpat Ivri* studies “the history and basic principles”, the legal and literary sources of “the Jewish legal system” from an internal-analytical as well as from an external-comparative perspective.³³⁷ The ultimate goal of this scholarly exercise, according to Menachem Elon, is to inform and encourage “the application of Jewish law in the world of practical affairs in the Land of Israel”.³³⁸ *Mishpat Ivri* assumes a normative “system of Jewish law” providing the lens through which Jewish legal sources are read.³³⁹ The rabbinic terminology and classification in the Jewish law of obligations and damages are recurring topics in *Mishpat Ivri*’s scientific study of the sources.³⁴⁰

A third modern approach to the study of Rabbinic law juxtaposes Rabbinic legal sources with modern court decisions. When Elliot Dorff and Arthur Rosett designed their course at the UCLA School of Law in 1974, they wanted “to provide a professional tool for young lawyers working in legal service programs in Jewish neighbourhoods in Los Angeles”.³⁴¹ Dorff and Rosett realised that their course does not only assist lawyers with clients who voluntarily subject themselves to Jewish religious law on top of abiding to American secular law, but the study of biblical and Rabbinic law with American court cases helps to understand how these very different legal systems operate. Just

³³⁵ Albeck (2014):7.

³³⁶ The major voices of the *Mishpat Ivri* approach (Izhak Englard, Menachem Elon, Haim Cohn and Shalom Albeck as a forerunner) have been collected together in a volume edited by Bernard Jackson who critically assesses the methodological standpoints of these scholars in a theoretical review article included in the volume. See Jackson (1980c).

³³⁷ Elon (1994):1:l.

³³⁸ Elon (1994):1:li. Some of the most important advocates of the *Mishpat Ivri* approach served in the Supreme Court for Israel such as Haim Cohn (1960-1981), Elon (1977-1993) and Izhak Englard (1997-2003). The special role of the Jewish legal tradition was approved by the 1980 Foundations of Law Act which cut links with English law and provided that “where a court finds that a question requiring decision cannot be answered by reference to an enactment or a judicial precedent or by way of analogy, it shall decide the same in the light of the principles of freedom, justice, equity and peace of the heritage of Israel”. The section is translated with a commentary in Sinclair (1996):411-415. The wording forms part of section 13 of the “Basic Law proposal: Israel as the Nation-State of the Jewish People” which was proposed to the Israeli Parliament by Avi Dichter from the ruling Likud party in 2011. The proposal with many contentious elements went through some rewording, and was approved by the Likud-led Israeli government in 2014. This “*de facto*” constitution is still far from being passed and is being challenged from both left and right in the Israeli Parliament.

³³⁹ The theoretical position of *Mishpat Ivri* is made explicit in Englard (1975). The approach echoes the 19th century German Pandectists who reached back to Roman law to stimulate legislation.

³⁴⁰ See Elon (1994):1:75-80.

³⁴¹ Dorff et al. (1988):2.

like Dorff and Rosett provide materials for the law of injuries in an American setting,³⁴² Menachem Elon and his colleagues align biblical, Rabbinic and post-Rabbinic sources for the law of torts with corresponding decisions of the Israeli Supreme Court.³⁴³

All three approaches are illuminating, but all three result in a somewhat chaotic presentation of Jewish law in general and the field of *neziqin* in particular. They have little resemblance to a “system” or “unity of principle and rules”. They discuss various themes by blending Talmudic and modern legal language, regularly shifting perspectives between sides of an unlikely cooperation between Talmudic, common and civil law. The antiquarian and the *Mishpat Ivri* approach assume that there is a system to be found in Jewish law and *neziqin*, while the case-law approach elegantly evades the problem. We can conclude that even though we do not know what the term *neziqin* really means, its resistance to be defined and systematised is one of its important characteristics.

4.4.2 Talmud Yerushalmi Bava Qamma 1:1 (2a-b)

The previous section has introduced and problematised the legal content subsumed under the category of *neziqin* in Rabbinic law. It has touched upon some of the methodological issues surrounding the modern reconstruction of Rabbinic legal concepts as concepts. The present section turns to one of the key Palestinian Rabbinic sources to see how *neziqin* was formulated and used in the literary evidence as they are available to us.

The Hebrew-Aramaic text of the opening passage of tractate *Bava Qamma* in the *Talmud Yerushalmi* is presented here according to Daniel Bomberg’s *editio princeps*.³⁴⁴ Bomberg and his editor Hiyya Meir bar David relied almost exclusively on MS Leiden of the *Yerushalmi*,³⁴⁵ while all subsequent printed editions relied completely on Bomberg’s.³⁴⁶ MS Leiden is therefore the single most important and virtually uncontested source for the *Yerushalmi*’s text. There are no significant variant readings for the sample presented and translated below.³⁴⁷ MS Escorial and the Bologna fragment do

³⁴² See “Topic four: Rabbinic law of injuries” in Dorff et al. (1988):133-184.

³⁴³ See Elon et al. (1999):145-188.

³⁴⁴ Ed. pr. Venice mBQ 1, 2a-b as presented in the Bar Ilan Responsa 21+ database and checked against Weissman-Chajes (1866).

³⁴⁵ The dependence of ed. pr. Venice on MS Leiden is discussed by Stemmerger (2011):204-205 who refers to Mishor (1978):578 and Lieberman (1963):283-305.

³⁴⁶ Sussman (2001b):י-ט [ix-x].

³⁴⁷ According to the photo images of MS Leiden Or. 4720 on www.yerushalmionline.org (accessed on 29 August 2017) and the transcription in Sussman (2001a). Major text witnesses of the *Yerushalmi* are presented in parallel columns in Schäfer (1991).

not include the text constituting passage A.³⁴⁸ The Savona fragment, which covers a few lines around units 3 to 5, only confirms the Venice-Leiden text and does not provide significant variant readings.³⁴⁹

In order to stay as close as possible to the linear presentation of the text in ed. pr. Venice,³⁵⁰ orthographic markers in the Hebrew-Aramaic text are kept to a minimum. In-line blank spaces in the continuous text indicate the topic-shifts which correspond to units 1 to 6. A few more lines of the subsequent passage B have been presented in both the Hebrew-Aramaic text and the translation to demonstrate that the Venice-Leiden text puts the formal marker of the passage-boundary at the wrong place.³⁵¹ The pristine presentation of the Hebrew-Aramaic text of the *Yerushalmi* is supplemented with a structured presentation which corresponds to the English analytical translation.

³⁴⁸ MS Escorial starts with the second chapter of tractate *Bava Qamma* (Rosenthal et al. (1983):1). The Bologna fragment (Bologna, Archivio di Stato, Ms. Ebr. 574) only includes the ending of the first chapter. See Rosenthal et al. (1983):253.

³⁴⁹ Fr. Ebr. 1.2 (Savona, Biblioteca del Seminario Vescovile) transcribed and with a photo image in Rosenthal et al. (1983):270-271.

³⁵⁰ MS Leiden uses blank spaces and upper-case points at the end of smaller thematic units. It is difficult to discern whether blank spaces and points mark thematic boundaries at two distinct levels or they simply reinforce one another. The scribe might just have had aesthetic considerations in mind and left shorter or longer blank spaces in order to achieve a justified text layout. A conscious thematic segmentation of the text is doubtful in light of the end of the passage A where the scribe of MS Leiden (just like the typesetter of ed. pr. Venice) failed to detect a major shift in the topic across passages which relate to two *Mishnah* lemmata.

³⁵¹ Ed. pr. Venice marks the end of the unit with the abbreviated form of *pisq'a* (פיסקא), i.e. *pis* (פיס), meaning “passage” and it also provides the next *Mishnah* lemma in abbreviated form (וכשחזיק חב המזיק כולי). The base-text of ed. pr. Venice, MS Leiden (Vol. 2. 175r) uses the same markers (פיס, an abbreviated *Mishnah*-lemma) and it also starts a new indented line. The Venice-Leiden text presents Rabbi Yose as the last voice of passage A, but the statement would better fit passage B as it corresponds to the *Mishnah* lemma in its beginning. The separator markers follow Rabbi Yose in the Venice-Leiden text, but some pencil markings around the *Mishnah* lemma in MS Leiden suggest that a reader of the manuscript already realised that the segmentation is faulty, and Rabbi Yose relates to the new *Mishnah* lemma. The reader who marked this segmentation error in MS Leiden might have already been familiar with the tradition presented in modern print editions like the standard Vilna edition (printed by Fromm in Vilna in 1922 and reprinted in Jerusalem in 1973), or he might have simply spotted that something did not make sense. The pencil markings demonstrate the surprise of the reader of MS Leiden as he encountered orthographic signs incongruent with the topic-shift of the text.

Mishnah Bava Qamma 1:1 (MS Kaufmann 128r)³⁵²

ארבעה אבות נזיקים השור והבור והמבעה וההבער לא השור כהרי המ' המבעה ולא המבעה כהרי השור לא זה וזה שיש בהן רוח חיים והרי האש שאין בה רוח חיים ולא זה וזה שהדרכן לילך ולהזיק והרי הבור שאין דרכו לילך ולהזיק הצד השווה שבהן- שדרכן ל' להזיק ושמירתן עליך וכשהזיק חב המזיק לשלם תשלומי נזק במיטב הארץ

Talmud Yerushalmi Bava Qamma 1:1, 2a-b (ed. pr. Venice)

ארבעה אבות נזיקין כו' השור זה הקרן דכתיב כי יגף שור איש את שור רעהו וגו' עד כדון בתם במועד מניין או נודע כי שור נגח הוא וגו' הבור כי יפתח איש בור וגו' בעל הבור ישלם וגו' המבעה כי יבער איש שדה או כרם ושלח את בעירה זה הרגל דכתי' משלחי רגל השור והחמור וכתוב הסר מסוכתו והיה לבער זה השן פרוץ גדירו והיה למרמס זה הרגל וההבער דכתיב כי תצא אש ומצאה קוצים וגו' און תנינן ארבעה אבות נזיקין ותני רבי חייה שלש עשר נזק צער ריפוי שבת ובושת שומר חנם והשואל נושא שכר והשכור אמור מעתה מה דתנינן און להכשר נזקין מה דתני רבי חייה בין להכשר נזקין בין לניזקי גופו ר' חגי שאל היך תנינן ארבעה אבות נזיקין אם הכל אמור בשור אחד ניתני שלשה ואם הכל אמור בשור שלשה ניתני חמשה אלא כמה דאישתעי קרייא אישתעיית מתניתא תולדות הקרן נגיחה נגיפה נשיכה רביצה בעיטה דחייה רבי יצחק מקשי נגיפה נגיחה עיקר הן ואת עביד לון תולדות אלא מתחיל בעיקר ומסיים בתולדות תולדות הבור כל פירקא תליתיא דתנינן בנזיקין רבי תני הניח גחלת ברשות הרבים ובא אחר ונתקל בה וצלוחיתו בידו נשרפו כליו ונשברה צלוחיתו חייב על הצלוחית משום בור ועל הכלים משום אש תולדות הרגל תני בהמה שנכנסה לרשו' היחיד והזיקה בין בידה בין ברגלה בין בקרנה בין בעול שעליה בין בשליף שיש בה בין בעגלה שהיא מושכת משלם נזק שלם והמזיק בכרמלית משלם נזק שלם תולדות השן הוון בעיין מימר פרה שאכלה שעורים וחמור שאכל כרשינין וכלב שליקלק את השמן וחזיר שאכלה בשר כולהון תולדות השן אינון אמר ר' יצחק כולהון עיקר שן אינון והא תאני תולדת השן בשדרסה על גבי נוד מלא שמן ובסיכה גופה נהנה כמה דתימר תמן השן אוכלת והגוף נהנה אוף הכא נהנה גופה רבי ירמיה בעי היתה מהלכת ופולטת עשבים מהו אמר רבי יוסי מה אם המניח גחלת לרשות הרבים עד מקו' שהיא מתהלכת היא מזקת מאי כדון אמר רבי יוסי בי רבי בון תיפתר במניח סכין סמוכה לרשות הרבים כמה דתימר תמן האש נוגע מצד אח' ונתחלחל כולו אוף הכא אדם נוגע מצד אח' ונתחלחל כולו רבי יוסי בי רבי בון בשם רבי לוי בור מלא מים ונפל שמה גדי קטן ונכנסו מים דרך אזניו ונתחלחל כולו וכא נתחלחל כולו רבי ירמיה בעי היתה מהלכת ומעקרת עשבים בגופה ובקרנה מהו שינוי הוא דרכה לכן רבי בון בר חייה בשם רבי שמואל בר רב יצחק אם לא נאמר שור הייתי למד שור מן הבור מה אם הבור שאין דרכו לילך ולהזיק חייב לשלם שור שדרכו לילך ולהזיק לא כל שכן או מה הבור משלם נזק שלם אף השור משלם נזק שלם או מה השור משלם חצי נזק אף בור משלם חצי נזק אילו לא נאמר שור הייתי למד שור מן הבור או אילו לא נאמר בור הייתי למד בור מן השור ולמה תניננה הכא דאית ליה מילין סגין כן לא הרי מושב כהרי מושב ולא הרי משכב כהרי מושב ניחא לא הרי מושב כהרי משכב אם מושב בטפח יטמא יטמא משכב בארבע' טפחים מפני שטמא משכב בארבעה טפחים יטמא מושב בטפח אילו לא נאמר משכב הייתי למד משכב מן המושב אילו לא נאמי' מושב הייתי למד מושב מן המשכב ולמה תניננה הכא דאית לתנוייה סגין מילין כן לא פרשת נירות כהרי פרשת שילוח טמאין ולא פרשת שילוח טמאין כהרי פרשת נירות אילו לא נאמר פרשת שילוח טמאין הייתי למד פרשת שילוח טמאין מפרשת נירות ולמה תניננה הכא דאית לתנוייה סגין מילין כן הצד השווה שבהן שהן בצו מיד ולדורות אף כל שהוא בצו מיד ולדורות אמר רבי לא צריך הוא שיאמר לכל אחד ואחד והשור מלמד שהבעלין מיטפלין בנבילה דכתיב והמת יהיה לו וכתוב בבור והמת יהיה לו תני רבי ישמעאל יצאו קרקעו' שאינן מיטלטלי' יצא אדם שאין לו הנייה במותו והאש מלמדת על כולהון שהו' חייב על האונסין

אמר רבי יוסי הדא אמרה אדם שחבל בחבירו תחילה אף על פי שחזר ונעש' נשק חייב דכתיב ומכה בהמה ישלמנה ישלם פחתה פיס וכשהזיק חב המזיק כו' אמר רבי חנינה מכה בהמה ישלמנה ישלם

³⁵² The digital image of the folio can be accessed on the website of the David Kaufmann Collection of the Library of the Hungarian Academy of Sciences: <http://kaufmann.mtak.hu/en/ms50/ms50-128r.htm> (Accessed on 29 August 2017).

The English translation presented below aims to reflect the perplexing difficulty of the original text. The Hebrew-Aramaic text does not read smoothly, and my translation resists the temptation of making more sense in English than the text does in its original language. I consulted the available modern translations which present a more readable text at the cost of creating a misleading impression of the original. Moïse Schwab's French provides a continuous prose and translates nominal structures into complete sentences.³⁵³ Neusner's English translation stays closer to the original, but adds background information in square brackets to such extent that his text reads more like a commentary than a translation.³⁵⁴ Guggenheimer's English translation³⁵⁵ provides an alternative for a non-academic audience and seeks to replace Neusner's heavily criticised translation.³⁵⁶ Even if generally making more sense than the Hebrew-Aramaic, Gerd Wewers' German rendering comes closest to my approach.³⁵⁷

In short, my translation reads with difficulty at times, but it does so on purpose. The Hebrew-Aramaic text is often fragmentary with missing or incomplete predications. Nominal structures are linked to each other in a topic-comment instead of a subject-predicate form.³⁵⁸ For example, instead of saying that "the ox is the horn", the Yerushalmi says that "the ox: this is the horn". My translation tries to keep the nominal structures and the fragmentary nature of the original, and refrains from filling all the gaps by providing extensive additional information. I have only included a few English words in square brackets, which can be inferred from the immediate context. Wherever it was possible, I gave the location of the quoted source in regular brackets. The multi-layer segmentation and the corresponding fonts are explained in the following chapter, in section 5.2.1 "From clauses to voices in the *Talmud Yerushalmi*". The segmentation is illustrated there by table 5.2 "The projected historical layers of the *Talmud Yerushalmi*".

³⁵³ Schwab (1871):1-5.

³⁵⁴ Neusner (1984a):13-20.

³⁵⁵ Guggenheimer (2000-2012).

³⁵⁶ The pinnacle of academic critique against Neusner's translation of the *Yerushalmi* is the last ever piece written by Saul Lieberman who authored his harsh review few days before his death. See Lieberman (1984). Some consider Lieberman's review the turning point in Neusner's career after which he was ostracised from the academic Jewish Studies community.

³⁵⁷ Wewers (1982):3-9.

³⁵⁸ The topic-comment structure was first discussed by the Prague School and introduced to the English-speaking linguistic scholarship by Michael Halliday in the 1960s. See Brown et al. (1983):70. and Halliday et al. (2004):65.

Mishnah Bava Qamma 1:1

ארבעה אבות נזיקים השור והבור והמבעה וההבער לא השור כהרי המי המבעה ולא המבעה כהרי השור לא זה וזה שיש בהן רוח חיים והרי האש שאין בה רוח חיים ולא זה וזה שהדרכן לילך ולהזיק והרי הבור שאין דרכו לילך ולהזיק הצד השווה שבהן- שדרכן ל' להזיק ושמירתן עליך וכשהזיק חב המזיק לשלם תשלומי נזק במיטב הארץ

Four fathers of damages: the ox, the pit, the grazer and the fire-starter. The ox is indeed not like the grazer, and the grazer is indeed not like the ox. Neither these [two], in which there is a living soul, are like the fire in which there is no living soul. And nor are these [three], which are accustomed to go and cause damage, like the pit which is not accustomed to go and cause damage. The common aspect in them is that they are accustomed to cause damage, and their safeguarding is upon you. And when it causes damage, the offender is bound to pay the damages from the best of his land.

Talmud Yerushalmi Bava Qamma 1:1, 2a-b

Passage A

Segment א

(1) ארבעה אבות נזיקין כו'

(1) "Four fathers of damages etc." (mBQ 1:1)

(1.1) השור זה הקרן דכתיב כי יגף שור איש את שור רעהו וגו'

(1.1) "THE OX", this is the horn; as it is written "IF A MAN'S OX GORES THE OX OF HIS FELLOW-MAN ETC." (Exodus 21:28) So far the discussion was about the tame one; the attested one, where [does it come] from? "OR IF IT HAS BEEN ATTESTED THAT IT IS AN OX WHICH HAD ALREADY GORED ETC." (Exodus 21:29)

(1.2) עד כדון בתם במועד מניין או נודע כי שור נגח הוא וגו' הבור כי יפתח איש בור וגו'

(1.2) "The pit"; "if a man leaves the pit open etc." "The owner of the pit pays etc." (Exodus 21:34)

(1.3) בעל הבור ישלם וגו' המבעה כי יבער איש שדה או כרם ושלח את בעירה זה הרגל דכתי' משלחי רגל השור והחמור וכתיב הסר מסוכתו והיה לבער זה השן פרוץ גדירו והיה למרמס זה הרגל

(1.3) "The grazer"; "if a man lets a field or vineyard to be grazed over, and lets the grazing loose" (Exodus 22:4), this is the foot; as it is written "those who lets the feet of the ox and the ass loose." (Isaiah 32:20) It is written, "remove its hedges and it shall be for devouring" (Isaiah 5:5), this is the tooth; "break its fences, and it shall be for trampling down" (Isaiah 5:5), this is the foot.

(1.4) וההבער דכתיב כי תצא אש ומצאה קוצים וגו'

(1.4) "The fire starter"; as it is written, "when fire starts and catches the thorns etc." (Exodus 22:6)

Segment ב

(2) אגן תניין ארבעה אבות נזיקין

(2) We learned: "four fathers of damages",

(2.1) ותני רבי חייה שלש עשר נזק צער ריפוי שבת ובושת שומר חנם והשואל נושא שכר והשכור אמור מעתה מה דתנינן אנן להכשר נזקין מה דתני רבי חייה בין להכשר נזקין בין לניזקי גופ

(2.1) *but Rabbi Hiyya taught thirteen: "DAMAGE, DISCOMFORT, TREATMENT, REST, AND SHAME, FREE GUARDIAN AND THE BORROWER, WAGE TAKER AND THE RENTER."* (tBQ 9:1) Say from now on: *what we had learnt* is about letting damages [happen], *what R. Hiyya taught* is about either letting damages [happen], or the damages [caused] to one's person.

(2.2) ר' חגיגי שאל היך תנינן ארבעה אבוי נזיקין אם הכל אמור בשור אחד ניתני שלשה ואם הכל אמור בשור שלשה ניתני חמשה אלא כמה דאישתעי קרייא אשתעיית מתניתא

(2.2) Rabbi Haggai asked: *"How have we learnt: 'FOUR FATHERS OF DAMAGES'?"* If all of them are related to one [single] ox, *we should have learnt: 'three'*; and if all of them are related to three [different] oxen, *we should have learnt: 'five'*. Rather, *just as Scripture speaks, so speaks the Mishnah*.

Segment ג

(3) תולדות הקרן

(3) The generations of horn:

(3.1) נגיחה נגיפה נשיכה רביצה בעיטה דחייה

(3.1) goring, pushing, biting, lying down, kicking, thrusting.

(3.2) רבי יצחק מקשי נגיפה נגיחה עיקר הן ואת עביד לון תולדות אלא מתחיל בעיקר ומסיים בתולדות

(3.2) *Rabbi Isaac raised a problem: "Pushing and goring are roots, and do you make them generations?"* Rather, it starts with the roots and concludes with the generations.

(4) תולדות הבור

(4) The generations of pit:

(4.1) כל פירקא תליתיא דתנינן בנזיקין

(4.1) the entire third chapter that we learn in "Damages". (i.e. mBQ 3)

(4.2) רבי תני הניח גחלת ברשות הרבים ובא אחר ונתקל בה וצלוחיתו בידו נשרפו כליו ונשברה צלוחיתו חייב על הצלוחית משום בור ועל הכלים משום אש

(4.2) *Rabbi taught: "If [someone] left a burning coal in the public domain, and another person came and stumbled over it, and his flask was in his hand." [If] his clothes got on fire and his flask got broken, he is responsible for the flask on account of "pit" and for the clothes on account of "fire".*

(5) תולדות הרגל

(5) The generations of foot:

(5.1) תני בהמה שנכנסה לרשו' היחיד והזיקה בין בידה בין ברגלה בין בקרנה בין בעול שעליה בין בשליף שיש בה בין בעגלה שהיא מושכת משלם נזק שלם והמזיק בכרמלית משלם נזק שלם

(5.1) *it has been taught: "A piece of cattle which entered the domain of an individual and caused damage"* (mBQ 2:2) – "either by its hand [front foot], or by its leg [back foot], or by its horn, or by the yoke which is upon it, or by the load which is on it, or by the wagon which it draws – [the owner of the animal] pays full damages; and [the animal] which

causes damage in a neutral domain - [the owner of the animal] pays full damages.” (tBQ 1:6)

(6) תולדות השן

(6) The generations of tooth:

(6.1) הוון בעיין מימר פרה שאכלה שעורים וחמור שאכל כרשינין וכלב שליקלק את השמן וחזיר שאכלה בשר כולהון תולדות השן אינון אמר ר' יצחק כולהון עיקר שן אינון

(6.1) *They used to raise the problem: “A cow which eats barley, and an ass which eats bitter vetch, and a dog which licks the oil, and a swine which eats meat” (tBQ 1:8) – all of them are actually generations of tooth. R. Isaac said: “All of them are actually roots of tooth.”*

(6.2) והא תאני תולדת השן בשדרסה על גבי נוד מלא שמן ובסיכה גופה נהנה כמה דתימר תמן השן אוכלת והגוף נהנה אוף הכא נהנה גופה

(6.2) *However, it has been indeed taught: “The generations of tooth: when [an animal] trampled on a leather bottle full of oil, and by anointing its body it enjoyed some benefit.” Just as you would say there: “the tooth eats, and the body enjoys some benefit”; so too here: the body enjoys some benefit.*

(6.3) רבי ירמיה בעי היתה מהלכת ופולטת עשבים מהו

(6.3) *Rabbi Jeremiah enquired: “[If the animal] had marched and torn grass – what about that?”*

(6.3.1) אמר רבי יוסי מה אם המניח גחלת לרשות הרבים עד מקו' שהיא מתהלכת היא מזקת מאי כדון

(6.3.1) Rabbi Yose: “What?! If someone leaves a burning coal on the domain of many, [then his liability applies] up to the place it extends and causes damage!” *What is this about?*

(6.3.2) אמר רבי יוסי בי רבי בון תיפתר במניח סכין סמוכה לרשות הרבים כמה דתימר תמן האש נוגע מצד אחי ונתחלחל כולו אוף הכא אדם נוגע מצד אחי ונתחלחל כולו

(6.3.2) Rabbi Yose the son of Rabbi Bun: “It shall be resolved by [reference to the scenario in which someone] leaves a knife close to the domain of many. *Just as you would say there* that the fire touches one side [of the domain], and yet the entirety of it is affected, *so too here* a man touches one side [of the knife], and yet all of his [body] is affected.”

(6.3.3) רבי יוסי בי רבי בון בשם רבי לוי בור מלא מים ונפל שמה גדי קטן ונכנסו מים דרך אזניו ונתחלחל כולו וכא נתחלחל כולו

(6.3.3) Rabbi Yose the son of Rabbi Bun in the name of Rabbi Levi: “[If there is] a pit full of water and a young goat falls into it, and the water enters [its body] through its throat, and yet all of its [body] is affected.” *And here* all of its [body] is affected.

(6.4) רבי ירמיה בעי היתה מהלכת ומעקרת עשבים בגופה ובקרנה מהו שינוי הוא דרכה לכן

(6.4) *Rabbi Jeremiah enquired: “[If the animal] had marched and uprooted grass by its body and horn – what about that?” It [demonstrates] a difference, as it is customary for it to do so.*

(6.4.1) רבי בון בר חייה בשם רבי שמואל בר רב יצחק אם לא נאמר שור הייתי למד שור מן הבור

(6.4.1) Rabbi Bun the son of Hiyya in the name of Rabbi Shmuel the son of Rabbi Isaac: “If ‘ox’ had not been said, I would have learnt ox from the pit.”

(6.4.1.1) מה אם הבור שאין דרכו לילך ולהזיק חייב לשלם שור שדרכו לילך ולהזיק לא כל שכן או מה הבור משלם נזק שלם אף השור משלם נזק שלם או מה השור משלם חצי נזק אף בור משלם חצי נזק אילו לא נאמר שור הייתי למד שור מן הבור או אילו לא נאמר בור הייתי למד בור מן השור

(6.4.1.1) If the pit, which is not customary to march and cause damage, [the owner] is required to pay full damages, the ox, which is customary to march and cause damage, is it not all the more so? Or, just as [the owner of] the pit pays full damages, so too [the owner of] the ox pays full damages. Or, just as [the owner of] the ox pays half damages, so too [the owner of] the pit pays half damages. If “ox” had not been said, I would have learnt ox from the pit, or unless “pit” had been said, I would have learnt pit from the ox.

(6.4.1.2) ולמה תניננה הכא דאית ליה מילין סגין

(6.4.1.2) And why did we learn that here? Because he [who said this] had many issues [to talk about].

(6.4.1.2.1) כן לא הרי מושב כהרי משכב ולא הרי משכב כהרי מושב נחא לא הרי מושב כהרי משכב אם מושב בטפח יטמא יטמא משכב בארבע' טפחים מפני שטמא משכב בארבעה טפחים יטמא מושב בטפח אילו לא נאמר משכב הייתי למד משכב מן המושב אילו לא נאמר מושב הייתי למד מושב מן המשכב ולמה תניננה הכא דאית לתנוייה סגין מילין

(6.4.1.2.1) Likewise, the seat is indeed not like the couch, and the couch is indeed not like the seat. *Rightly so*: the seat is indeed not like the couch. If the seat becomes unclean by one handbreadth, then a couch would become unclean by four handbreadths – [but] for the reason a couch is unclean by four handbreadths, then a seat would become unclean by one handbreadth. If “couch” had not been said, I would have learnt the “couch” from the “seat”, and if “seat” had not been said, I would have learnt “seat” from the “couch”. *And why did we learn that here? Because the Tanna had many issues* [to talk about].

(6.4.1.2.2) כן לא פרשת נירות כהרי פרשת שילוח טמאין ולא פרשת שילוח טמאין כהרי פרשת נירות אילו לא נאמר פרשת שילוח טמאין הייתי למד פרשת שילוח טמאין מפרשת נירות ולמה תניננה הכא דאית לתנוייה סגין מילין כן הצד השהו שבהן שהן בצו מיד ולדורות אף כל שהוא בצו מיד ולדורות

(6.4.1.2.2) Likewise, the biblical passage of the lamps (Leviticus 24:1-4) is indeed not like the biblical passage of the dismissal of the unclean ones (Numbers 5:1-4), and the biblical passage of the dismissal of the unclean ones is indeed not like the biblical passage of the lamps. If the biblical passage of the dismissal of the unclean ones had been said, I would have learnt the biblical passage of the dismissal of the unclean ones from the biblical passage of the lamps. *And why did we learn that here? Because the Tanna had many issues* [to talk about]. Therefore, the common aspect in them is that they are about a “command!”, immediately [as well as pertaining] to future generations. [The same applies to] each [biblical passage] which is about a “command!”, immediately [as well as pertaining] to future generations.³⁵⁹

(6.4.1.3) אמר רבי לא צריך הוא שיאמר לכל אחד ואחד

³⁵⁹ Subunits 6.4.1.2.1 and 6.4.1.2.2 do not form a cohesive whole with their immediate context. They digress significantly from the major topic of the passage. The digression is so pronounced that the thematic continuity is easy to re-establish when unit 6.4.1.3 picks up the thread again.

(6.4.1.3) Said Rabbi La: "It is necessary to be said [explicitly] on each and every [occasion]."

(6.4.1.4) והשור מלמד שהבעלין מיטפלין בנבילה דכתיב והמת יהיה לו

(6.4.1.4) And the ox teaches that the owner takes care of the carcass; *as it is written, "AND THE DEAD BEAST SHALL BE HIS OWN."* (Exodus 21:36)

(6.4.1.4.1) וכתיב בבור והמת יהיה לו תני רבי ישמעאל יצאו קרקעו שאינן מיטלטלי יצא אדם שאין לו הנייה במותו

(6.4.1.4.1) *And is this also written about the pit, "AND THE DEAD BEAST SHALL BE HIS OWN"? Rabbi Ishmael taught: "LAND PROPERTIES, WHICH ARE NOT MOVABLE, ARE EXCLUDED." A person whose death brings no benefit is excluded.*

(7) והאש

(7) And the fire

(7.1) מלמדת על כולהן שהו' חייב על האונסין

(7.1) teaches about all [other categories] that he is responsible for the wrongdoings.

Passage B (opening lines)

(1.1) אמר רבי יוסי הדא אמרה אדם שחבל בחבירו תחילה אף על פי שחזר ונעש' נשק חייב דכתיב ומכה בהמה ישלמנה ישלם פחתה פיס

(1.1) Rabbi Yose said: "This is to say: a person who owes [damages] to his fellow-man, even though he initially turned against himself and suffered damage, is liable"; *as it is written, "AND THE ONE WHO STRIKES AN ANIMAL SHALL SURELY PAY"* (Leviticus 24:18) *for the loss. Pass[age].*

(1) וכשהזיק חב המזיק כו'

(1) And when he causes damage, he is required to etc. [pay from the best of his land]. (mBQ 1:1)

(1.2) אמר רבי חנינה מכה בהמה ישלמנה ישלם

(1.2) Rabbi Hanina said: "and the one who strikes an animal shall surely pay." [...]

4.4.3 Preliminary remarks on the sample text from the Yerushalmi

The opening passage of tractate *Bava Qamma* in the *Talmud Yerushalmi* takes the *Mishnah* text as the point of departure for its own legal enterprise. A closer look on the *Yerushalmi*'s classification of damages show a discrepancy with the one presented in the *Mishnah*. As I shall argue below and in more detail in Chapter 7, the discrepancy is due to the *Yerushalmi*'s aim to provide a framework for the law of damages which is more coherent, more abstract, and more systematic than Biblical and Mishnaic law, but at the same time, the *Yerushalmi* presents this aim as one which is based completely on Biblical and Mishnaic law. The dual aims of innovation and traditionalism manifest itself in the *Yerushalmi*'s commentary as well as in the vocabulary it uses. Even though the *Yerushalmi*'s commentary quotes the Mishnaic source as authoritative, it employs Biblical assistance

in order to reclassify the types of damages found in the *Mishnah*. The *Yerushalmi* combines the term “generations” which is known from the genealogical tables of the Bible and the term “fathers” which the *Mishnah* links to “generations”. The *Yerushalmi* realises the potential in the *Mishnah*’s text of creating a generic vocabulary of classification which could be potentially used in other legal domains, not just in the law of damages.

The sample text presented in the previous section has been divided into three major segments according to major topic shifts and changes in the text’s voice. The three segments constitute the three major steps in the reclassification of what the *Mishnah* presents as damages. In segment א, the anonymous voice of the *Yerushalmi* associates “the four fathers of damages” found in the *Mishnah* with supporting Biblical evidence. In segment ב, the exchange of anonymous and quoted voices tacitly replaces the *Mishnah*’s fourfold division of damages with a new fivefold division. In segment ג, the new five categories of damages are taken as accepted and used as thematic headings for further elaboration.

One can thus gain from this sample, to whose analysis the subsequent chapters will contribute details, a first glimpse of how the *Yerushalmi* enforces what is potentially a more coherent legal framework while trading on the authority of the Bible and the *Mishnah*. The *Yerushalmi* presents Rabbi Haggai’s overwhelming challenge against the incoherence of the Mishnaic classification, and, at the same time, it defends the *Mishnah*’s wording by saying that “just as Scripture speaks, so speaks the Mishnah”. The *Yerushalmi* points out a close linguistic affinity between the Bible and the *Mishnah*, and it implies that the *Mishnah* remains loyal to the Biblical wording, even if such loyalty results in incoherence. In light of segment ג which takes the new coherent classification for granted, the statement can be understood as the *Yerushalmi*’s critique against the *Mishnah*’s literalist approach to the Bible. The *Yerushalmi*, instead, implicitly parts with literalism and reconstructs a coherent classification which “must have been” the Bible’s true intention. The *Yerushalmi* presupposes that the meaning of the Bible’s divine law is fully coherent, but its human interpretation in the *Mishnah* failed to preserve the Bible’s wording with the Bible’s meaning. In the *Yerushalmi*’s presentation, the *Mishnah* and the *Yerushalmi* opted for two different options available for human interpreters of the divine law. The *Mishnah* opted to preserve the Bible’s wording, whereas the *Yerushalmi* opted to preserve the Bible’s meaning.

A specific legal purpose meets a specific text form in the *Yerushalmi* passage which presents new legal knowledge as arising from a close engagement with the legal tradition preserved in the *Mishnah* and the Bible. The underlying tension between continuity and change in legal knowledge partly explains the *Yerushalmi*’s complicated text form which covers inferences and logical steps by a complex web of voices and keeps the reasoning largely implicit. The transitions between constituent

parts of the text are mostly unmarked. If cohesion and texture are considered to be prerequisites for considering a flow of written data as *text*,³⁶⁰ then the *Yerushalmi* often reads as *non-text*. The modern reader may find the lack of cohesion and texture wanting. According to the standards of forensic prose which originate from the rhetorical art of classical antiquity, the *Yerushalmi*'s text form is frustrating. The modern reader is understandably tempted to attribute what seems like a text of substandard quality to historical and social circumstances which prevented the author or authors from doing a better job. But why should we measure the *Yerushalmi* against the standards of clarity of classical forensic prose? What if ambiguity is exactly what the *Yerushalmi* wants to achieve?

The *Yerushalmi* achieves the accommodation of legal traditionalism with legal innovation by what I call "controlled ambiguity". By ambiguity, the *Yerushalmi* prevents the first reading of the text from exposing a controversy with the legal tradition. By doing it in a controlled fashion, the *Yerushalmi* preserves the controversy for those who are ready to read and re-read the passage in a circular fashion. The first reading trades on the linearity of the text, and on the explicit logical and structural signposts of the surface level.³⁶¹ The re-reading, however, assumes that the text is understood in light of the already known ending, and similarly, each constituent part in light of all other parts. Therefore, the text gradually exposes a meaning which is hidden in circularity.

4.5 Three literary signals as case-studies

These preliminary remarks on the sample texts chosen from the *Institutes* and the *Talmud Yerushalmi* draw attention to three types of literary signals providing a common perspective to compare early signs of legal abstraction in Roman and Rabbinic law. The three chapters in Part 2 investigate these signals as case-studies. The chapters draw in additional literary evidence and expand the theoretical scope. The case studies inform the preliminary results in section 8.1 which

³⁶⁰ According to Michael Halliday and Ruqaiya Hasan, cohesive relationships within a written set of data are constitutive for calling the set a text. They write that "the concept of TEXTURE is entirely appropriate to express the property of 'being a text'. A text has texture and this is what distinguishes it from something that is not a text. It derives this texture from the fact that it functions as a unity with respect to its environment." Halliday et al. (1976):2.

³⁶¹ This echoes the idea of Leo Strauss who argues that external circumstances compelled authors to develop a multi-layered writing technique, creating the same text with different meaning for the initiated (esoteric meaning) and the uninitiated (exoteric meaning). See Strauss (1952). The theory has received mixed reactions, especially by intellectual historians and scholars of the early modern and Enlightenment period. See for example Whatmore (2016):33-38.

highlight general tendencies of Roman and Rabbinic law suggested by the literary analysis carried out in the three case-study chapters of Part 2.

The first literary signal is concerned with the management of voices in the text. These voices are commonly and unjustifiably associated with an artificially constructed “author” of the text who presents many “sources”. In order to reclaim the literary characteristic of the “author” and the “sources”, I shall propose a closer investigation of how quoting and quoted voices are used. I supplement the evidence of the *Institutes* with another work from the Justinianic corpus, namely the *Digest* which shows closer affinity with the *Yerushalmi* in many respects as far as the management of quoting and quoted voices are concerned. I shall relate the literary strategies of the *Institutes* and the *Digest* to the compositional history of these works. The compositional model of Justinianic works will inform my thinking about how the *Yerushalmi*’s text came into being which is notoriously undocumented and marred with unsubstantiated assumptions.

The second literary signal is about the different strategies of establishing legal terms in the *Institutes* and the *Yersuhalmi*. Chapter 6 “Establishing legal terms” present the Roman “definition” and the Rabbinic “label” as literary strategies with a particular syntactic structure and rhetorical function. The variations of the “definition” are supplied by the *Institutes* with additional evidence drawn from the *Digest*. The case study of the “defective definition” of the term *obligatio* will highlight the rhetorical function of the strategy. The chapter will then progress to describe an unfamiliar strategy of establishing legal terms used in the commentary layer of the *Yerushalmi*. Whereas we find the familiar strategies of definitions and classificatory lists in the *Mishnah*, the *Yerushalmi*’s commentary on the *Mishnah* text uses a cumulative “labelling” strategy. I shall argue that the *Yerushalmi* avoid the definition form due to a rhetorical consideration which encourages creative thinking and maintains controlled ambiguity.

The third literary signal is closely related to the second. Chapter 7 “Organising legal knowledge” deals with strategies of arranging legal terms into coherent sets. The chapter argues that the Roman classification of obligations in the *Institutes* and the Rabbinic classification of damages in the *Yerushalmi* are just as accidental as the rules and terms they rely on.³⁶² The chapter emphasises that the evidence of the *Institutes* and the *Yerushalmi* shed light on methodological tendencies of Roman and Rabbinic law which are expressed in literary terms: by an artificially created vocabulary of classification and its application to the legal matter at hand. The *Institutes* and the *Yerushalmi* both

³⁶² The thesis argues against a dominant school of legal thinkers who claim that law has an inherent logic and a natural arrangement of topics and terms to be reconstructed from the historically accidental rules. See the programmatic statements about the “nature” and “system” of Roman and Rabbinic law in Jhering (1852-1858):1:25-28 and Albeck (2014):7-9.

aim to preserve the authority of the legal tradition while creating rhetorical efficiency. There is nothing natural about law, and there is no hidden inherent logic to discover.

CHAPTER 5: TEXT - VOICE - HISTORY

Late antique Roman and Rabbinic law are documented in an asymmetrical fashion. There is abundant literary evidence for their substance and thinking style, but there is almost no evidence outside the texts themselves which would enable one to write their history. Without contextual information, literary categories such as the text's governing voice or text coherence cannot be associated with historical categories such as the author and the author's editorial design. The current chapter concentrates on the literary evidence and describes literary functions which are often erroneously conceptualised as "author" and "source" due to a premature leap from text to history. The comparison of the literary strategies visible in Justinianic texts and the *Talmud Yerushalmi* provides the foundation for reconstructing some of the historical circumstances of their production.³⁶³

In order to make a sharp distinction between literary and historical categories, my approach uses the conceptual apparatus of the text-profiling framework developed by Alex Samely and his colleagues.³⁶⁴ The profiling "inventory" is based on the analysis of "anonymous and pseudepigraphic works of Jewish antiquity",³⁶⁵ but its categories can be fruitfully applied to texts outside the geographical and temporal boundaries of the corpus. The profiling framework defines "text" as "a complex verbal entity, usually a plurality of sentences or other units of meaning, whose de facto boundaries or verbal and literary signals invite constructing the meaning of *any one* of its sentences/units in the light of the meaning of *all others*."³⁶⁶ That is to say that a "text" is more than a string of words and sentences; a "text" realises coherence in order to generate meaning beyond individual sentences. The function of coherence is the reader's sense-making assumption which

³⁶³ See also section 8.1.1 "From text to history in Justinian and the *Yerushalmi*".

³⁶⁴ See the "Inventory" and its commentary in Samely et al. (2013) as well as the corresponding individual text profiles in Samely et al. (2012).

³⁶⁵ Samely et al. (2013):3.

³⁶⁶ Samely et al. (2013):22.

enables to read sentences in light of each other. Creating coherence and therefore creating a “text” may not have been the intention of the person or persons who put words and sentences next to each other.

“Governing voice” is another key concept of Samely’s profiling framework which relates to the assumed coherence of the “text”. Samely explains the concept by saying that “the identity of the governing voice then is a function of the unity of the text, effectively excluding all aspects of an author or redactor. The persona of the governing voice is first and foremost the result of abstract structures in the text, not the author’s imprint (or even disguise). But it is nevertheless usually the projection of some *person*, because it is the result of a unified reading of the text, which seems to invoke personhood.”³⁶⁷ Samely’s profiling framework provides the language to grasp the difference between literary and historical categories. It differentiates between the literary mask projected by the text’s governing voice (persona) and the historical identity of the text’s creator (the person of the author), and ultimately between text and history.

Let me illuminate the entangled relationship between the different literary and historical agencies by the example of former American president Ronald Reagan’s “autobiography”, *An American life*.³⁶⁸ The narrating voice of the “autobiography”, the projected persona of Ronald Reagan associated with the narrating voice, and the name “Ronald Reagan” which appears on the title page constitute three separate literary agents. None of these, not even the name “Ronald Reagan” can be associated with the historical person of the American president Ronald Reagan on the basis of the text only. In fact, contemporary book reviews³⁶⁹ of the “autobiography” provide evidence that the text is ghost written by the former New York Times correspondent Robert Lindsey. The narrating voice, the projected persona of Ronald Reagan and the name “Ronald Reagan” on the title page are all part of the fiction of *An American life*, just like the text’s self-appellation as an autobiography. The chasm between text and history needs to be bridged by contextual evidence which is external to the text itself.³⁷⁰

The imperial pronouncements announcing and celebrating the publication of Justinian’s *Institutes* and *Digest* provide some contextual evidence about the authors and history. They are, however,

³⁶⁷ Samely et al. (2013):106.

³⁶⁸ Reagan (1990).

³⁶⁹ For example Dowd (1990).

³⁷⁰ The example here given is an extreme version of Sergey Dolgopolski’s description of *The Adventures of Huckleberry Finn* where the text provides no evidence that the pseudonym “Mark Twain” on the title page can be associated with the historical person of Samuel Langhorn Clemens. See Dolgopolski (2013):60-61 and passim.

individual literary constructions which carry the same uncertainty as the legal compositions themselves. In this chapter, I relate this contextual evidence to the examination of the quoting and quoted voices³⁷¹ in the *Institutes* and *Digest* (5.1 “Voice, quoting and compositional history in the Justinianic corpus”), two texts in the Justinianic corpus which disclose diametrically opposite literary strategies. Whereas the *Institutes* creates an omnipresent and omniscient voice, the governing voice in the *Digest* is virtually silent. The only written cues for the existence of the *Digest*’s governing voice are the titles of the sections and the reference headings of the quoted sources. There is no discursive additions to the quoted sources which would explain their links and logical relations. When we relate these literary strategies to the reconstructed compositional history of the *Institutes* and *Digest*, we gain an editorial model which provides a background for understanding the even more enigmatic Rabbinic corpus.

In the case of the *Talmud Yerushalmi*, we have no evidence concerning the historical circumstances. The identity of the author and the process by which the text was created are wrapped in oblivion. The *Epistle of Rav Sherira Gaon* (10th century Babylonia) speculates about the authors and historical circumstances of Talmudic works from a distance of several centuries after the supposed creation of the corpus.³⁷² Sherira relies on the careful examination of the literary evidence and gives no indication that he has access to contextual historical evidence. Sherira is virtually in the same position as the modern reader who distils historical knowledge from the literary sources. The obscure historical circumstances of the *Talmud Yerushalmi* are matched with an obscure text where the most fundamental distinction between quoting and quoted voices is marred by uncertainty. For this reason, section 5.2.1 “From clauses to voices in the *Talmud Yerushalmi*” starts with the elementary task of separating clauses and illustrates how the distinction between quoting and quoted voice is constructed according to the analysis of a quotation unit. I will argue that the *Yerushalmi* presents a peculiar literary strategy in which quoting and quoted voice is difficult to differentiate. The text uses this flexibility and porousness as a literary device to create coherence and structure. Section 5.2.2 “Caveats against the historical reconstruction of the anonymous ‘editor’” criticises scholarly speculations about the compositional history of Talmudic texts which are based on a premature leap from text to history.

³⁷¹ The “literary gap” between “quoting” and “quoted” voice is explained for the text of the *Talmud Bavli* by Moulie Vidas who says that “more than a division between an ‘apodictic’ layer and a ‘dialectical’ layer or even a division between an ‘attributed’ layer and an ‘anonymous’ layer, the division in the Bavli is between a quoting layer and a quoted layer.” Vidas (2014):77.

³⁷² The classic text edition is Lewin (1921) which was updated with an introduction and the facsimile of the manuscripts in Schlüter (1993). A critical evaluation of the source is provided by Brody (1998):20-26.

5.1 Voice, quoting and compositional history in the Justinianic corpus

The current section deals with the question of how the literary profile of the *Institutes* and *Digest* can be related to the reconstruction of their compositional history. The first two sections describe the opposing strategies of the *Institutes* and *Digest* by which they project a literary persona and present what they suggest being their respective sources. The *Institutes* uses a total governing voice which is always present and speaks from the perspective of knowing all. The text marks thematic shifts by grammatical variations of the governing voice, and it identifies quoted information by quotation formulas. The well-structured literary profile of the *Institutes* is characteristic of its textbook genre which stands in contrast with that of the *Digest*. Here the governing voice is almost completely silent and enclosed in technical parts of the text such as section titles, reference headings or the order of quoted materials. Signposting and managing the 9,132 quotations in the *Digest*³⁷³ bear witness to a literary structure which scholars have used to reconstruct the text's compositional history. While keeping literary description and historical reconstruction separate, the current section suggests a slow transition from the hard evidence of text to the virtually unknown territory of history. The literary profile and reconstructed compositional history of the Justinianic texts will assist our understanding of the compositional history of the *Talmud Yerushalmi* for which we possess even less contextual evidence.

5.1.1. The omnipresent voice of the *Institutes*

The literary profile of the *Institutes* is probably the most familiar to the modern reader from the three texts examined in this chapter. The *Institutes* starts with defining the fundamental concept of justice and jurisprudence and outlines the threefold scheme of the law of things, persons and actions. "Justice is a persistent and perpetual will to provide each person with his right,"³⁷⁴ opens the *Institutes*, and it later adds that "all the law we use relates either to persons, or to things or to actions. But let us see (*videamus*) those about persons first."³⁷⁵ The text defines the key concepts and provides concise thematic plans whenever it starts the discussion of a new topic. "Obligation is a bond of law",³⁷⁶ starts the thematic section of obligations in J.3.13.pr which is followed by the division of obligations in the next sentence. The text's governing voice is always present and leads

³⁷³ The figure is according to Honoré (2010a):1.

³⁷⁴ J.1.1.pr-1: *Iustitia est constans et perpetua voluntas ius suum cuique tribuens.*

³⁷⁵ J.1.2.12: *Omne autem ius, quo utimur, vel ad ad personas pertinent vel ad res vel ad actiones. ac prius de personis videamus.*

³⁷⁶ See section 4.3.2 "Justinian's *Institutes* 3.13 and 4.1" for introductory comments on the Latin text.

the reader from topic to topic with careful signposting which is characteristic to ancient as well as modern textbooks.³⁷⁷

The *Institutes* generally refrains from identifying itself³⁷⁸ and speaks from an anonymous “‘omniscient’ reporting stance”³⁷⁹ which is characterised by Gérard Genette in the context of narrative fiction as the “narrator [who] knows more than the character, or more exactly, says more than any of the characters knows.”³⁸⁰ Genette’s terminology can be fruitfully applied to thematic non-fiction texts³⁸¹ like the *Institutes* where the asymmetrical distribution of knowledge between the governing voice and the projected addressee of the text is similar to what Genette describes for narrative prose.³⁸² Speaking predominantly from the impersonal third-or from the anonymous first-person perspective, the *Institutes* projects an absolute persona who is always present and knows everything.

The beginning of a new thematic section is signposted by replacing the anonymous third-person perspective with the anonymous first-person perspective (“we” or “I”). In the opening sentences of the *Institutes*, the definition of justice was formulated from the anonymous third-person perspective which is then replaced by the perspective of the “we” as the *Institutes* outlines the three fundamental areas of the law of things, persons and actions. The same happens in the opening passage about obligations. Here the opening phrase introduces a new topic by using the perspective of the “we” and replaces it with the anonymous third-person perspective when providing a definition for “obligation”: “Let us now proceed (*nunc transeamus*) to obligations. Obligation is (*est*) a bond of law...”³⁸³ Thematic transitions are signposted by grammatical means which draws the reader’s attention to the fact that one subject is completed and a new one begins. The reader is

³⁷⁷ See the individual profiles of ancient Greek and Roman textbooks (Lehrbücher) in Fuhrmann (1960).

³⁷⁸ On two occasions, the anonymous first person projects the literary persona of the emperor Justinian. The first-person voice refers to “our imperial father Justin” (*divus Iustinus pater noster*) in J.2.7.3 and to “my imperial father Justin” (*divi Iustini patris mei*) in J.2.12.4 which projects the persona of Justin’s son, the emperor Justinian. As the two expressions appear in close proximity to each other and nowhere else in the text, they should be treated as exceptions going against the predominantly anonymous perspective.

³⁷⁹ Samely et al. (2013):106 and 111.

³⁸⁰ Genette (1980):188.

³⁸¹ Samely’s text profiling “Inventory” distinguishes between five “text types”: (1) poetic or rhetorical-communicative form, (2) narrative, (3) thematic discourse, (4) sequential commentary, and (5) compound of independent texts. These “‘genre’-defining” sections of Samely’s “Inventory” are summarised in a tabular format in Samely et al. (2013):32.

³⁸² Samely explains the concept of the “projected addressee” by saying that it is “like that of the governing voice, a function of the statements and the unity of the text. Thus it does not denote the historical person to whom the author (!) wished to address the text.” Samely et al. (2013):125.

³⁸³ J.3.13.pr: *Nunc transeamus ad obligationes. obligatio est iuris vinculum...*

addressed by the jussive tense of the verb form (“let us...”). As a rhetorical device, the jussive tense seeks the reader’s “permission” and thereby creates a relationship between the governing voice and the projected addressee of the text. The change of perspective and the jussive verb form express the message: “Be aware, dear reader, and note that we move on to another subject.”

The anonymous first-person jussive verb form plays the same rhetorical role at other strategic points of the *Institutes*. The *videamus* (“let us see”) in J.1.2.12 announces that the law of persons shall be discussed as the first of the three principal areas of law: “All the law we use relates either to persons, or to things or to actions. But let us see (*videamus*) those about persons first.” Three of the most common first-person plural jussive verb forms in the *Institutes* are *videamus* (“let us see”), *dispiciamus* (“let us consider”) and *transeamus* (“let us proceed”). The verb forms predominantly appear in the first paragraph of a particular title.³⁸⁴ The forms *videamus* and *dispiciamus* introduce a new subject, whereas *transeamus* suggests that the topic shift follows a preconceived logic, a necessary transition from one subject to another. For example, the verb form *transeamus* which introduces obligations in J.3.13.pr is conceptually related to the general classification of incorporeal things which “cannot be touched, they are of those types which exist in law just as inheritance, usufruct or obligations contracted in whatever way”.³⁸⁵ The *transeamus* in J.3.13.pr emphasises that there is a shift at a higher level of the hierarchy of topics, in this case, at the level of incorporeal things from inheritance to obligations.³⁸⁶ The verb form seems to supplement the rhetorical function

³⁸⁴ The verb form *videamus* appears in the *principium* (“first line”) in 7 out of the overall 13 instances in Justinian’s *Institutes*. The ratio is 8 of 10 for *dispiciamus*, and 3 of 3 for *transeamus*.

³⁸⁵ J.2.2.2: *Incorporales autem sunt, quae tangi nun possunt. qualia sunt ea, quae in iure consistunt: sicut hereditas, usus fructus, obligationes quoquo modo contractae.* – The institutional division of corporeal and incorporeal objects are discussed in detail with their parallels in Cicero, Charisius and Seneca by Francesco Giglio. See Giglio (2013):128-136. Contrary to the 19th century Pandectist position which regarded the division as a loose one, Giglio suggests that “Gaius created an action-based system of the law of things” (157), and concludes that “the right of ownership is linked to the *meum esse* assertion of the claimant *in rem*. The *intentio* of the *formula* applies to all corporeal things, but also to the inheritance, which is intangible. ... The tangibles and, for historical reasons, the inheritance, are the equivalent in the law of things of the *meum esse* statement in the law of actions, whereas the intangibles correspond to the *mihi esse* statement with the exception of *obligationes*, which were probably added by Gaius into a classification based upon claims *in rem*.” (162-163) Giglio discusses the concept of ownership and the *meum esse* assertion in a forthcoming article. See Giglio (2018).

³⁸⁶ Similarly, *transeamus* in J.1.13.pr introduces the classification of people outside family authority which relates to J.1.8.pr distinguishing between independent and dependant people. J.1.8-12 discusses the status of dependent people who are under owner- or family-based authority. Having concluded the subject, it logically follows that the *Institutes* would turn attention to independent people and the in-between class of those under *tutela* (guardianship) and *curatio* (supervision). The third use of *transeamus* introduces the topic of *fideicommissa* (trusts) in J.2.23.pr. Having described the basic characteristics of wills in J.2.10-19, the *Institutes* turns to *legata* (legacies) by the use of *videamus* after having apologised for what seems to be a digression from the theme of wills. (J.2.20.pr: *quae pars iuris extra propositam quidem materiam videtur.*) As explained in

of *videamus* and *dispiciamus* which simply mark thematic boundaries. The form *transeamus* points towards the coherence within larger segments of the text and emphasises the institutional framework which holds the exposition of the law together.

The imperial pronouncements relating to Justinian’s legislative enterprise provide some contextual evidence to relate the above literary categories to historical ones. These pronouncements are literary artefacts which are separate from the *Institutes* and *Digest*. Because of their own literary character, the methodological division between text and history is duplicated. The projected persona of the pronouncements is Justinian whose name appears in the greetings and signature of the pronouncement written in the form of a public letter.³⁸⁷ The projected addressees of the pronouncements vary: *Constitutio Deo auctore*³⁸⁸ is addressed to the head of Justinian’s editorial committee, Tribonian; *Constitutio Omnem* to the law professors (*antecessores*); *Constitutiones Tanta* and *Dedoken* to the Senate, the people and cities of the empire; and *Constitutio Imperatoria* to “the young people keen to study law” (*cupidae legum iuventuti*). The dedication of the latter pronouncement (*Const. Imp.* 3-4), which is the preface of the *Institutes*, is worth investigating in more detail.

specialiter mandavimus ut nostra auctoritate nostrisque suasionibus componant Institutiones: ut liceat vobis prima legum cunabula non ab antiquis fabulis discere, sed ab imperiali splendore appetere.

We entrusted them [i.e. the editors Tribonian, Theophilus and Dorotheus]³⁸⁹ specifically that they should compose the *Institutes* by our authority and by our encouragement: so that you could grasp the first cradle of the laws by imperial splendour and not study them based on old tales.

This passage in the *Constitutio Imperatoria* says that the *Institutes* is created by the editors Tribonian, Theophilus and Dorotheus. The *Institutes*, however, projects an anonymous absolute

J.2.23.1, contrary to *legata*, the *fideicomissa* bind not by law, but only by conscience (*nullo vinculo iuris, sed tantum pudore*), and from this perspective the two legal phenomena are presented as twins. Proceeding from one to another is, therefore, a logical move as suggested by the verb form *transeamus*.

³⁸⁷ Michael Trapp offers a definition of the letter form in his Trapp (2003):1: “it is a piece of writing that is overtly addressed from sender(s) to recipient(s), by the use at the beginning and end of one of a limited set of conventional formulae of salutation (or some allusive variation thereof) which specify both parties to the transaction.”

³⁸⁸ An imperial pronouncement (also known as *constitutio*) is generally referred to by the opening word or words of the text.

³⁸⁹ These names appear in *Const. Imp.* 3 to which the hidden subject of the subordinate clause “they should compose” refers.

persona.³⁹⁰ Tribonian, Theophilus and Dorotheus may have created the *Institutes*, but their authorship is not “recreated” in the literary fiction of the *Institutes*. One might take their concealment as an indication that they are indeed the historical authors, but that would still not allow to associate the literary strategies employed by the *Institutes* with an authorial intention. The transition from text to history remains a case by case exercise.

Let us consider the relationship between quoting and quoted voices which will be the focus of the next section when describing the *Digest*. Even though the thinking process of the editors is inaccessible, the projected relation between quoting and quoted voices in the text enables us to propose a theory about how the historical authors managed their sources. In the text of the *Institutes*, the direct quotation and the paraphrase are the fundamental projected literary relations between the quoting and the quoted voice. The direct quotation is introduced by a quoting formula (“X says”) which functions as the literary marker to differentiate between two voices. In the paraphrase, the quoting voice absorbs the quoted one. The paraphrase is grammatically marked by the infinitive or the subjunctive tense which agrees with the quoting formula in the quoting voice. The following passage from the *Institutes* (J. 3.23.2) about barter trade illustrates how the different voices are expressed.

Sabinus and Cassius thought that the price could consist in other things [than money]. ... They appealed for support to Homer, who at one place says that the Achaean army bought wine by giving goods in exchange [using the following words]: ‘Then the long-haired Achaeans bought wine, some with bronze and others with shining steel, some with hides and some with live oxen, others with slaves.’³⁹¹

Sabinus et Cassius etiam in alia re putant posse pretium consistere ... argumentoque utebantur Graeco poeta Homero, qui aliqua parte exercitum Achivorum vinum sibi comparasse ait permutatis quibusdam rebus, his verbis: ἐνθεν ἄρ’ οἰνίζοντο κερηκομόωντες Ἀχαιοί, ἄλλοι μὲν χαλκῷ, ἄλλοι δ’ αἶθωνι σιδήρῳ, ἄλλοι δὲ ῥινοῖς, ἄλλοι δ’ αὐτῆσι βόεσσι, ἄλλοι δ’ ἀνδραπόδεσσι.

The quoting formula “Sabinus and Cassius ... think” (*Sabinus et Cassius ... putant*) and “[Homer] says” (*ait*) introduce paraphrases expressed by the infinitive construction. Another quoting formula “using the following words” (*his verbis*) introduces a direct quotation from Homer. The quoted voice is also marked by the change of language to Homer’s original Greek. Both the paraphrase and the direct quotation use clear written signs and differentiate unambiguously between the quoting and the quoted voices. These features are characteristic to the textbook genre of the *Institutes* and

³⁹⁰ Or, according to the incidental evidence quoted in footnote 378 above, emperor Justinian, who is projected as the persona of the pronouncement itself.

³⁹¹ The quoted Homer passage is *Iliad* 7.472-475. To the translation by Birks and McLeod, I have added the phrase “that the price could consist in other things [than money]” in the first sentence, and “using the following words” for the Latin *his verbis*. See Birks et al. (1987a):113.

correspond to its omnipresent and omniscient governing voice. As we shall see, the *Digest* and the *Talmud Yerushalmi* construct the governing voice by other literary means including different quoting strategies which either lack written signs or abandon the unequivocal demarcation of a quoted text. The deviation from the standard quoting strategy of the textbook genre indicate different literary profiles which point towards different historical circumstances. The examination of quoting strategies will be used to describe some peculiar features of the *Digest* and the *Yerushalmi*, and the possible historical circumstances of their creation.

5.1.2 *The silent compiler and the compositional history of the Digest*

In general terms, the governing voice is the function of unity and coherence of a text. If the text makes sense, if it holds together, it is due to the governing voice. The presence of the governing voice does not need ample literary signs, it does not even need a narrating perspective like the impersonal third-person and the anonymous first-person perspectives of the *Institutes*. In the *Digest*, this narrating function is missing, and the governing voice is almost completely silent. Its presence is encoded in technical literary signs.

The single most important textual evidence for the *Digest* is the 6th century *Codex Florentinus*.³⁹² In this manuscript, the 50 books of the *Digest* are divided into thematic sections which are also listed in the *Index titulorum* which practically functions as the table of contents for the *Florentinus*. In the thematic sections, the quoted sources are introduced by reference headings which include the author's name, the title of his work and the number of the book from which the source is quoted.

³⁹² The *Codex Florentinus* is probably a very early secondary copy of the *Digest* dated to the mid-6th century, a couple of decades after the official publication in 533. The manuscript's extraordinary antiquity obtained almost unquestionable authority for the *Florentinus* in Byzantine and Medieval times. As Charles M. Radding and Antonio Ciaralli put it, "all manuscripts in the medieval university tradition thus became codices descripti – copies of a still existing manuscript – making their inclusion in the edition [of Mommsen] unnecessary." (Radding et al. (2007):173.) The Medieval philological tradition approached the text of the manuscript with measured philological criticism and created minor variant readings in the so-called vulgate versions of the Justinianic corpus. Mommsen considered and mostly rejected these variant readings in favour of the *Florentinus*. He only acknowledged textual emendations of Medieval scholars where they could be confirmed by early fragments or by the evidence of the *Basilika*, the abridged and adapted version of the Justinianic corpus in Greek completed in 890 in Constantinople. According to Radding and Corelly, Mommsen's editorial strategy is probably too extreme and more credit is due to the Medieval scholars of the text of the Justinianic corpus. They write that "accustomed to documents and books that required no particular reverence, and that perhaps had not been copied with the greatest skill, they [the Medieval scholars] were already adept at using textual criticism of a kind not seen until much later in ecclesiastical texts or the liberal arts. These traditions of emending texts, indeed, survived into the Bolognese period of legal studies, where their effects have complicated the lives of editors ever since." (Radding et al. (2007):209.) With these reservations in mind, the *Codex Florentinus* and the edited text of Mommsen can be still considered reliable for the purpose of an investigation which focuses on literary characteristics rather than on legal nuances. For this reason, the thesis uses Mommsen's Latin text for the *Digest*.

These reference headings are often highlighted by indentation, larger font type or even different ink colour. The numbering of the sections and sources is a modern editorial convention which is not present in the *Florentinus*. The 9,132 quoted sources constitute the quoted voice of the *Digest*. The quoting voice is present in the titles of section, the reference headings, and the order in which the sources are presented within the sections.

The imperial pronouncements corresponding to the *Digest* are also included in the *Florentinus*. The *Constitutio Dedoken*, which announces the publication of the *Digest* to the Greek speaking world, is found in the very beginning of the manuscript. It is followed by the *Florentine Index* (or *Index auctorum*), a list of juristic works quoted in the *Digest* with an introductory remark in Greek, and the “table of contents” in form of the *Index titulorum*, also with an introductory remark. The imperial pronouncements *Constitutio Deo auctore*, *Omnem*, and *Tanta* are added to the introductory collection of documents in the *Florentinus*.³⁹³

The status of the introductory collection is a matter of debate. With the exception of the *Constitutio Deo auctore*,³⁹⁴ there is no evidence that they were preserved separately from the text of the *Digest*. In order to avoid unsubstantiated assumptions, I shall treat them as contextual evidence which talk about the historical circumstances and the editorial design of the *Digest* – but as literary evidence which is still subject to the methodological distinction between literary and historical categories. It is more plausible that their inclusion in the *Florentinus* was more a matter of convenience rather than the creation of an elaborate literary fiction.

The introductory remark (in Greek) describes the *Florentine Index* with the following words: “From which old authorities and the books written by them is composed the present work of the *Digest* or *Pandects* of our most pious Emperor Justinian.”³⁹⁵ What follows is a list of 206 titles by 38 jurists. The list arranges authors after Julian (ca. 110-170) and Papinian (141-212) “in roughly chronological

³⁹³ The order of these documents is carefully recorded by Baldi (2010):103-104. The manuscript evidence puts the Greek *Const. Δέδωκεν* and the *Index auctorum* with its Greek inscription in the first place which suggests a readership of Greek speakers. Baldi suggests that some sheets in the opening documents have been mixed up, and the correct order should be the following: *Index titulorum*, *Const. Deo auctore*, *Const. Omnem*, *Const. Tanta*, *Const. Δέδωκεν*, *Index auctorum*. This order is found in the edition of the *Digest* by Mommsen and in its English translation of Watson (1998a). Unfortunately, Baldi does not elaborate why correcting the order is necessary.

³⁹⁴ *Const. Deo auctore* is included Justinian’s codex (C.1.17.1) which suggests that the pronouncement commissioning the creation of the *Digest* is a text independent from the *Digest*.

³⁹⁵ *Codex Florentinus* fol. 4r: ΕΞ ΟΣΩΝ ΑΡΧΑΙΩΝ ΚΑΙ ΤΩΝ ΥΠ’ΑΥΤΩΝ ΓΕΝΟΜΕΝΩΝ ΒΙΒΛΙΩΝ ΣΥΝΚΕΙΤΑΙ ΤΟ ΠΑΡΟΝ, ΤΩΝ ΔΙΓΕΣΤΩΝ ΗΤΟΙ ΤΟΥ ΠΑΝΔΕΚΤΟΥ ΤΟΥ ΕΥΣΕΒΕΣΤΑΤΟΥ ΒΑΣΙΛΕΩΣ ΙΟΥΣΤΙΝΙΑΝΟΥ, ΣΥΝΤΑΓΜΑ. – Text is according to Baldi (2010):104, translation is according to Pugsley (1993).

order, from Quintus Mucius Scaevola, consul in 95 BC, to Hermogenianus in the fourth century AD”.³⁹⁶

According to David Pugsley’s theory, “the Florentine Index was originally a list of works in the imperial law library in Constantinople”³⁹⁷ dating back to a time before 321.³⁹⁸ Pugsley suggests that Tribonian rediscovered the collection, and “in his enthusiasm he persuaded Justinian to give his permission to publish the works” in a form which eventually became the *Digest*.³⁹⁹ Further titles were added to “Emperor Constantine’s Roman Law library” in the order of acquisition which produced a list of titles consulted by the compilers of the *Digest*.⁴⁰⁰

Another list to reckon with is the reconstruction by Friedrich Bluhme and Paul Krüger of “the order in which the works were read by the committees”.⁴⁰¹ The Bluhme-Krüger *Ordo librorum iuris veteris* (“The order of ancient legal works”), abbreviated as “BK Ordo”, was originally included in the text edition of the *Digest* by Mommsen and Krüger.⁴⁰² According to the reference headings which include the name of the quoted jurist and title of his work, Bluhme noticed that the thematic sections quote the juristic works in a certain order.⁴⁰³ The sections first quote thematically relevant fragments from a group of works which Bluhme called the “Sabinian mass”; they are followed by fragments quoted from works in the “Papinian mass”; and the sections end with fragments quoted from works in the “edictal mass”. Bluhme named the three masses according to their dominant jurist or legal source, namely Sabinus (early 1st century), Papinian (141-212) and the *Praetor’s Edict*.⁴⁰⁴ The BK Ordo gives a

³⁹⁶ Pugsley (1993):94.

³⁹⁷ Pugsley (1993):96.

³⁹⁸ The dating is according to Constantine’s constitution published on 14 September 321 which prohibited to use the notes of the jurists Ulpian, Paul and Marcian on the works of Papinian. For the reason *Const. Deo auctore* 6 encourages the use of these notes, Pugsley suggests that they were probably part of the law library rediscovered by Tribonian and predating Constantine’s prohibition. Pugsley (1993):96-97.

³⁹⁹ Pugsley (1993):98.

⁴⁰⁰ According to the standard accounts by Fritz Schulz and Giovanni Rotondi, the order of authors in the index is symbolical (Schulz (1953):319n314) or by *honoris causa* (Rotondi (1922):1:298-299). Pugsley notes that this explanation only applies to the first few authors, and it generally fails to account for the arrangement. Pugsley’s revaluation of the evidence produces a coherent, yet very speculative history of the *Digest* which many Romanists are reluctant to accept.

⁴⁰¹ Honoré (2006):2.

⁴⁰² Mommsen et al. (1872-1895):927-931 The BK Ordo has been revised by Dario Mantovani (1987):90-103 and more recently by Tony Honoré (2006):37-47.

⁴⁰³ Bluhme (1960 [1820]):50-96, 235-277, 368-404.

⁴⁰⁴ The *Praetorian Edict* was annually published by the elected *praetor urbanus*. The text of the *Edict* became fixed by the end of Hadrian’s reign (138) from which point its text is also referred to as the *Perpetual Edict*. The text of the *Edict* has not survived. According to quoted fragments in the works of the jurists, Otto Lenel has reconstructed the structure and some parts of the text in Lenel (1883).

number to each juristic work quoted in the *Digest* which are grouped into the three groups of source masses. For example, Gaius' *Institutes* is number 25 in the BK Ordo and belongs to the Sabinian mass which includes works numbered from 1 to 94; Paul's *Replies* is number 186 and belongs to the Papinian mass numbering works from 180 to 262; and finally, Ulpian's commentary on the *Edict* is number 95 which belongs to the edictal mass numbering works from 95 to 179. The BK Ordo includes an Appendix with juristic works numbered from 263 to 275.

By the re-examination of the reference headings and the BK Ordo, Tony Honoré has identified smaller source groups within the masses according to their common author, subject or genre.⁴⁰⁵ For example, Honoré separates juristic works numbered 21 to 27 in the Sabinian group as a smaller genre group of institutional works which includes Gaius' *Institutes*. In Honoré's two-tier Ordo, Paul's *Replies* belongs to a genre group of *responsa* which are numbered 186-193 in the Papinian mass. Finally, Ulpian's commentary on the *Edict* forms part of a subject group of early edictal commentaries numbered 95 to 99 in the edictal mass. The modern reconstruction of the systematic order will help us to uncover the compositional intention of the silent editor of the *Digest*.

Table 5.1 below presents the order of quoted sources in the section entitled *de obligationibus et actionibus* ("On obligations and actions"). The first column includes the conventional four-tier numbering of the quoted sources in Mommsen's text edition, a scholarly convention facilitating the referencing of the text. The reference headings found in the *Codex Florentinus* are presented in the second column. The third column "Source mass" gives the name of the mass to which the quoted source belongs according to Bluhme. The fourth column "BK" gives the number of the quoted source in the *Ordo librorum iuris veteris* by Bluhme and Krüger. Finally, the fifth column "Honoré group" gives the number and name of the source group which Tony Honoré has identified within the source masses. The line drawn after D.44.7.26 indicates the end of the Sabinian section, the one after D.44.7.34 the end of the Papinian section, and the one after D.44.7.60 the end of the edictal section. The final quoted source of the thematic section is from a group of works constituting the Appendix mass of the *Digest*.

Table 5.1: The order of sources in the *Digest*, D.44.7

	Reference heading	Source mass	BK	Honoré group
D.44.7.1.pr-15	<i>Gaius libro secundo aureorum</i>	Sabinian	24	(v) institutional
D.44.7.2.pr-3	<i>Gaius libro tertio institutionum</i>	Sabinian	25	(v) institutional
D.44.7.3.pr-2	<i>Paulus libro secundo institutionum</i>	Sabinian	27	(v) institutional
D.44.7.4.pr	<i>Gaius libro tertio aureorum</i>	Sabinian	24	(v) institutional

⁴⁰⁵ For the updated Bluhme-Krüger *ordo librorum* and Honoré's source groups, see Honoré (2006):37-47.

D.44.7.5.pr-6	<i>Gaius libro tertio aureorum</i>	Sabinian	24	(v) institutional
D.44.7.6.pr	<i>Paulus libro quarto ad Sabinum</i>	Sabinian	3	(i) ad Sabinum
D.44.7.7.pr	<i>Pomponius libro 15 ad Sabinum</i>	Sabinian	2	(i) ad Sabinum
D.44.7.8.pr	<i>Pomponius libro 16 ad Sabinum</i>	Sabinian	2	(i) ad Sabinum
D.44.7.9.pr	<i>Paulus libro nono ad Sabinum</i>	Sabinian	3	(i) ad Sabinum
D.44.7.10.pr	<i>Ulpianus libro 47 ad Sabinum</i>	Sabinian	1	(i) ad Sabinum
D.44.7.11.pr	<i>Paulus libro 12 ad Sabinum</i>	Sabinian	3	(i) ad Sabinum
D.44.7.12.pr	<i>Pomponius libro 29 ad Sabinum</i>	Sabinian	2	(i) ad Sabinum
D.44.7.13.pr	<i>Ulpianus libro primo disputationum</i>	Sabinian	10	(iii) Ulpian
D.44.7.14.pr	<i>Ulpianus libro septimo disputationum</i>	Sabinian	10	(iii) Ulpian
D.44.7.15.pr	<i>Iulianus libro quarto digestorum</i>	Sabinian	14	(iv) Julian
D.44.7.16.pr	<i>Iulianus libro 13 digestorum</i>	Sabinian	14	(iv) Julian
D.44.7.17.pr	<i>Iulianus libro 33 digestorum</i>	Sabinian	14	(iv) Julian
D.44.7.18.pr	<i>Iulianus libro 54 digestorum</i>	Sabinian	14	(iv) Julian
D.44.7.19.pr	<i>Iulianus libro 73 digestorum</i>	Sabinian	14	(iv) Julian
D.44.7.20.pr	<i>Alfenus libro secundo digestorum</i>	Sabinian	15	(iv) Julian
D.44.7.21.pr	<i>Iulianus libro tertio ex Minicio</i>	Sabinian	19	(iv) Julian
D.44.7.22.pr	<i>Africanus libro tertio quaestionum</i>	Sabinian	20	(iv) Julian
D.44.7.23.pr	<i>Africanus libro septimo quaestionum</i>	Sabinian	20	(iv) Julian
D.44.7.24.pr-3	<i>Pomponius libro singulari regularum</i>	Sabinian	45	(vii) regulae
D.44.7.25.pr-2	<i>Ulpianus libro singulari regularum</i>	Sabinian	46	(vii) regulae
D.44.7.26.pr	<i>Ulpianus libro quinto de censibus</i>	Sabinian	13	unattached
D.44.7.27.pr	<i>Papinianus libro 27 quaestionum</i>	Papinian	180	(xii) Papinian
D.44.7.28.pr	<i>Papinianus libro primo definitionum</i>	Papinian	182	(xii) Papinian
D.44.7.29.pr	<i>Paulus libro quarto responsorum</i>	Papinian	186	(xiv) responsa
D.44.7.30.pr	<i>Scaevola libro primo responsorum</i>	Papinian	187	(xiv) responsa
D.44.7.31.pr	<i>Maecianus libro secundo fideicommissorum</i>	Papinian	196	(xv) fideicommissa
D.44.7.32.pr	<i>Hermogenianus libro secundo iuris epitomarum</i>	Papinian	208	(xvi) sententiae-iuris epitomae
D.44.7.33.pr	<i>Paulus libro tertio decretorum</i>	Papinian	222	(xviii) Tryphonius
D.44.7.34.pr-2	<i>Paulus libro singulari de concurrentibus actionibus</i>	Papinian	226	unattached
D.44.7.35.pr-1	<i>Paulus libro primo ad edictum praetoris</i>	edictal	96	(xxv) early edictal
D.44.7.36.pr	<i>Ulpianus libro secundo ad edictum</i>	edictal	95	(xxv) early edictal
D.44.7.37.pr-1	<i>Ulpianus libro quarto ad edictum praetoris</i>	edictal	95	(xxv) early edictal
D.44.7.38.pr	<i>Paulus libro tertio ad edictum</i>	edictal	96	(xxv) early edictal
D.44.7.39.pr	<i>Gaius libro tertio ad edictum provinciale</i>	edictal	98	(xxv) early edictal
D.44.7.40.pr	<i>Paulus libro 11 ad edictum</i>	edictal	96	(xxv) early edictal
D.44.7.41.pr-1	<i>Paulus libro 22 ad edictum</i>	edictal	96	(xxv) early edictal
D.44.7.42.pr-1	<i>Ulpianus libro 21 ad edictum</i>	edictal	96	(xxv) early edictal
D.44.7.43	<i>Paulus libro 72 ad edictum</i>	edictal	102	(xxvi) later edictal
D.44.7.44.pr-6	<i>Paulus libro 74 ad edictum praetoris</i>	edictal	102	(xxvi) later edictal
D.44.7.45.pr	<i>Paulus libro quinto ad Plautium</i>	edictal	124	(xxix) ad Plautium
D.44.7.46.pr	<i>Paulus libro septimo ad Plautium</i>	edictal	124	(xxix) ad Plautium

D.46.7.47.pr	<i>Paulus ex libro 14 ad Plautium</i>	edictal	124	(xxix) ad Plautium
D.44.7.48.pr	<i>Paulus libro 16 ad Plautium</i>	edictal	129	(xxix) ad Plautium
D.44.7.49.pr	<i>Paulus libro 18 ad Plautium</i>	edictal	129	(xxix) ad Plautium
D.44.7.50.pr	<i>Pomponius libro septimo ex Plautio</i>	edictal	131	(xxix) ad Plautium
D.44.7.51.pr	<i>Celsus libro tertio digestorum</i>	edictal	134	(xxx) Celsus- Marcellus digesta
D.44.7.52.pr-10	<i>Modestinus libro secundo regularum</i>	edictal	139	(xxxi) Modestinus
D.44.7.53.pr-1	<i>Modestinus libro tertio regularum</i>	edictal	139	(xxxi) Modestinus
D.44.7.54.pr	<i>Modestinus libro quinto regularum</i>	edictal	139	(xxxi) Modestinus
D.44.7.55.pr	<i>Iavolenus libro 12 epistularum</i>	edictal	153	(xxxii) Iavolenus
D.44.7.56.pr	<i>Pomponius libro 20 ad Quintum Mucium</i>	edictal	154	unattached
D.44.7.57.pr	<i>Pomponius libro 36 ad Quintum Mucium</i>	edictal	154	unattached
D.44.7.58.pr	<i>Licinius libro octavo regularum</i>	edictal	175	unattached
D.44.7.59.pr	<i>Callistratus libro primo edicti monitorii</i>	edictal	176	unattached
D.44.7.60.pr	<i>Ulpianus libro 17 ad edictum</i>	edictal	95	(xxv) early edictal
D.44.7.61.pr-1	<i>Scaevola libro 28 digestorum</i>	Appendix	267	

The numbers in the “BK” and “Honoré group” columns indicate that the order of quoted sources is not slavishly enforced in D.44.7. Bluhme’s source masses and Honoré’s constituent source groups are kept together, but rhetorical considerations shape the order of the source groups and the order of quoted sources within. D.44.7 opens with sources quoted from what Honoré calls the “institutional group” (BK 21-27) which, as the BK number suggests, normally comes after the “ad Sabinum” (BK 1-3), “Ulpian” (BK 10-11) and “Julian” groups (BK 14-20). Sources from these groups are quoted in D.44.7.6-23 in their regular order. The “institutional group” is probably prioritised because it includes the most important passages for the history of the Roman law of obligations from the *Res cottidianae* (“Everyday matters”)⁴⁰⁶ and *Institutes* by Gaius. Violating what seems to be the standard order shows that a silent editorial intention is at work. The governing voice does not say a word, and yet it achieves to direct the reader’s understanding of the collected sources.

To elaborate on this point further, it is worth having a closer look at the order of selected fragments from the “institutional” group in D.44.7.1-5. Fragments from the second and third book of the *Res cottidianae* of Gaius envelop other selected fragments from the *Institutes* of Gaius and Paul. Similar flexibility can be observed in the subsequent section which includes quotations from Honoré’s “ad

⁴⁰⁶ The work is known by what Reinhard Zimmermann calls “a somewhat peculiar title”: *Res cottidianae sive aureae* (“Everyday or Golden matters”). The references in the *Digest* customarily refer to the work as the *libri aureorum* (“Golden books”). On Gaius in D.44.7, see Zimmermann (1996):14-15.

Sabinum” group (D.44.7.6-12). The section opens with a general statement from Paul (BK 3)⁴⁰⁷ followed by sources relevant to void actions from Pomponius (BK 2), Paul (BK 3) and Ulpian (BK 1) in D.44.7.7-11. The “ad Sabinum” section ends with what seems to be an appendix of a smaller detail from Pomponius (BK 2).⁴⁰⁸

We find fragments from works which Honoré identifies as unattached to any author, subject or genre group at the end of the Sabinian, Papinian and edictal sections (D.44.7.26, D.44.7.34 and D.44.7.56-59). According to Honoré, fragments from the unattached works are added to the end of the subsection to keep them in their proper source mass, but prevent them from disturbing the preconceived order of the fragments from the attached source groups. A concluding section of addenda appears also at the end of the thematic section (D.44.7.61). Here we find works which constitute the “appendix” of “late arrivals” in the *Digest* which are numbered from 263-275 in the BK Ordo.⁴⁰⁹

The *Digest*’s quoting strategy and the order of quoted sources have been described so far in terms of the available literary evidence. Even though there is little contextual evidence which would allow a transition from text to history, the ultimate purpose of Friedrich Bluhme and his fellow scholars of the *Digest* was to reconstruct the historical circumstances of the editing process. The strongest piece of contextual evidence is the *Const. Deo auctore* dated to 15 December 530 which is preserved independently in the *Codex* (C.1.17.1) and predates the publication of the *Digest* in 533. The rhetorical language of *Deo auctore* remains vague about the nature of the editorial process. It instructs that there shall be “total concord, total consistency” among the legal writers who “will have equal weight”, and “a completely full revision of the law” shall be carried out “by way of logical distinction or supplementation or in an effort toward greater completeness”.⁴¹⁰ Scholars have related the arithmetic literary design to the contextual evidence to unravel a concealed compositional history of the *Digest*.

The *Digest* was published together with the *Institutes* in 533 only three years after its creation had been commissioned by the *Deo auctore*. According to the *Constitutio Tanta* and *Dedoken*, Tribonian’s committee revised “nearly two thousand books and nearly three million lines”.⁴¹¹ One

⁴⁰⁷ Paul, *ad Sabinum* 4, D.44.7.6: “In all temporary actions, the obligation does not terminate until the whole of the very last day is completed.”

⁴⁰⁸ Pomponius, *ad Sabinum* 29, D.44.7.12: “In an action on deposit, loan for use, mandate, tutelage, and of unauthorized administration, the heir is liable in full for the wrongful intent of the deceased.”

⁴⁰⁹ See Honoré (2010a):110-136.

⁴¹⁰ The expressions are collected from *Const. Deo auctore* 8, 5, 2 and 9.

⁴¹¹ *Const. Tanta* 1 and *Const. Dedoken* 1.

fragment follows another, appropriately truncated to subject, and arranged in a designed order. Scholars of Roman law have found the speed and magnitude of Tribonian's editorial effort staggering which would be quite impossible even with the help of modern technology. A key area of scholarly interest was the supposed intervention of the compilers of the *Digest* in the quoted sources.⁴¹² It was assumed that the hand of the compilers should be detected beyond the minimal evidence of section titles, order of sources and references.⁴¹³ The investigation of the quoted materials for editorial interventions was encouraged by the instruction to the editorial committee in the *Const. Deo auctore* by which Justinian commissioned, among others, the creation of the *Digest*:

If you find anything in the old books that is not well expressed, or anything superfluous or wanting in finish, you should get rid of unnecessary prolixity, make up what is deficient, and present the whole in proportion and in the most elegant form possible. What is more, if you find anything not correctly expressed in the old laws or *constitutiones* (enactments) which the ancient writers quoted in their books, you should also take care to rectify it and put it into proper form, so that what is chosen by you and set down there may be deemed genuine and the best version and be treated as if it were what was originally written; and let no one dare to assert that your version is faulty by comparison with the old text.⁴¹⁴

Scholars now agree that editorial intervention was mostly stylistic, and the compilers did not make substantive changes. Sources which predate the *Digest's* wording can be used as independent witnesses to these cases, but such cases and sources are scarce.⁴¹⁵ Scholars of the *Digest* suggest that the editorial efforts concentrated on the methodical processing of a vast library instead of meddling with the sources. By a leap from text to history, the *Digest's* literary design has been related to Tribonian's editorial intention. Tribonian is credited with the creation of the layout of the *Digest* by the thematic sections inspired by the *Codex* and the *Perpetual Edict*.⁴¹⁶ Additionally, Tribonian is thought to have created a method by which the source masses and the constituent source groups had been systematically read, truncated, and arranged in thematic sections. According to this reconstruction, the two sides of the design "merely" had to be put together

⁴¹² In chronological order, see Buckland (1924):343-364, Wenger (1953):854-865, and Wieacker (1988):1:154-182.

⁴¹³ Pugsley notes that the references in the index of the *Codex Florentinus* as well as in the body of the *Digest* are always given in full according to Justinian's prohibition of using abbreviations in *Const. Deo auctore* 13 and *Const. Tanta* 22. See Pugsley (1993):101-102.

⁴¹⁴ *Const. Deo auctore* 7. – The editorial intervention to the quoted sources is confirmed by the opening paragraphs of the *Const. Tanta* and *Dedoken* which celebrated the publication of the *Digest* and the *Institutes*.

⁴¹⁵ One notable example is the *Collatio legum Mosaicarum et Romanarum* ("Comparison of Mosaic and Roman law") by the hand of a presumably "Christian jurist in Italy in the early 390s" who was versed in both Roman and Biblical legal cultures. See Frakes (2011):124-151, and especially 149.

⁴¹⁶ Julian's *Perpetual Edict* as the codification ideal for Justinian's project is critically assessed by Chapter 4 "The disputed codification of law" in Tuori (2007b):135-179.

allowing a speedy and reliable processing of the sources which culminated in the *Digest's* 9,132 quoted fragments.

Regarding the thematic sections, Justinian announces in *Const. Deo auctore* 5 that the *Digest* shall “distribute the whole law into fifty books and distinct titles in imitation both of our Codex of *constitutiones* and of the Perpetual Edict.”⁴¹⁷ The *Digest* shows some structural affinity with the 45 titles of the *Perpetual Edict*⁴¹⁸ and the 12 books of the *Codex*,⁴¹⁹ but the affinity is never comprehensive enough to account for the *Digest's* thematic arrangement.

Tribonian's design is generally related to the *Law of Citations* (426) issued by emperor Valentinian III who wished to achieve a reliable and transparent operation of the law.⁴²⁰ The *Law of Citations* authorised the use of juristic works by Papinian, Paul, Gaius, Ulpian and Modestinus and provided a mechanistic calculation according to authority in case their opinions contradict each other on a particular matter. The restrictive and inflexible nature of the mechanism is thought to have been improved by Tribonian's committee who were inclusive in their use of sources and thorough in their mechanistic presentation of the fragments. According to Bluhme's ground-breaking theory about Tribonian's editorial team, three separate committees worked on their own to excerpt and truncate sources according to preconceived thematic subjects. Eventually, the sections produced by the committees were put together to create the thematic sections. The distribution of labour explains why we find quoted sources of “unattached” works at the end of the subsection associated with the three masses. Each committee created their own section of a particular theme and supplemented it, if necessary, with addenda.

Honoré describes the BK Ordo's Appendix as “a group of writings that fall outside the three main groups of work ... [which] became available to Justinian's compilers after the reading of the main masses had begun.” The works were associated with one of the masses and their corresponding committees, but according to Honoré, they were “told to read these books only after they had finished reading the works originally assigned to them. Through pressure of time, the three

⁴¹⁷ *Const. Deo auctore* 5 and 12.

⁴¹⁸ The description of legal proceedings is found in the beginning of both the *Digest* (5-11) and the *Perpetual Edict* (tit. 3-24). Tutelages, wills and legacies are also discussed in approximately the same order in the middle of both works (*Digest* 26-27, 28-29 and 30-36 and *Ed. perp.* tit. 22, 26 and 27). The structure of the *Perpetual Edict* is consulted according to Lenel (1883):xvi-xxiv.

⁴¹⁹ Only the second version of the *Codex* has survived which was revised and published after the publication of the *Digest*. The first version is no longer available. There is no way to tell how closely the *Digest* imitated the structure of the first *Codex*, and to what extent the structure of the second *Codex* differed from the first one. See Kaser (1967a):253 and Bretone (1992):253-256.

⁴²⁰ The *Law of Citations* is preserved in the *Codex Theodosianus* (C.1.4.3). It is described briefly in Kaser (1967a):230-231 and Bretone (1992):243-244.

committees had made only a modest start on the late arrivals.”⁴²¹ A late arrival of this kind was Scaevola’s *Digest* which provided an extended fragment to conclude the thematic section *de obligationibus et actionibus* in D.44.7.61.⁴²² The fragment tells about an awkward case which deliberates whether a promise made in a love letter is legally binding or not. One is tempted to attribute a rhetorical function to the passage which concludes the section on a light-hearted note.⁴²³

David Pugsley has been a unique voice among scholars interested in reconstructing the historical circumstances of the *Digest*. By extraordinary detective work, Pugsley has offered a revaluation of the literary and contextual evidence.⁴²⁴ As we have seen above, Pugsley suggested that Tribonian rediscovered emperor Constantine’s law collection in the imperial library of Constantinople and convinced Justinian that the priceless collection should be made public in some form. An emperor of great ambitions, Justinian commissioned the creation of the *Digest* and a corresponding reform of legal education. According to Pugsley, the law schools had used annotated commentaries by Ulpian on Sabinus and the *Edict* to present the positions of the five jurists prioritised by the *Law of Citations* (426). Pugsley suggests that the law schools created collections of fragments arranged under thematic titles from these annotated commentaries. The “collection of inscription-less fragments”⁴²⁵ was a convenient but generally disorganised teaching material which, according to Pugsley, provided a thematic design for the *Digest* which had been already familiar to the law schools. The rediscovery of Constantine’s law library and the thematically arranged teaching material used in the law schools allowed Tribonian’s committee to finish the *Digest* in three years. According to minor editorial inconsistencies in the arrangement of topics in the books, Pugsley also suggests that the *Digest* was published in three instalments: books 1-19 first, books 20-36 second, and books 37-50 third. The three-step publication explains why closely related topics like special sale transactions in Book 14

⁴²¹ Honoré (2010a):497-498.

⁴²² It is difficult to understand why the penultimate fragment from Book 17 of Ulpian’s *ad edictum* (D.44.7.60) was dissociated from its appropriate “early edictal group” which appear in D.44.7.35-42. One wonders whether the short statement (“Penal actions which are concurrent with respect to the same money do not bar one another”) avoided the editor’s attention during the initial round of the compilation process, and they corrected the mistake by supplementing it together with the “late arrivals”.

⁴²³ Scaevola, *Digest* Book 28, D.44.7.61.1: “Seia, wishing to fix a salary, sent a letter as follows: ‘To Lucius Titius, greeting. If you are of the same mind and of the same regard to me as you have always been, then, on receipt of my letter, forthwith dispose of your estate, and come here; I shall provide you with ten yearly for as long as I live. For I know that you love me very well.’ My question is whether, if Lucius Titius did sell his estate and went to her and since that time has been with her, the annual salary is due to him in terms of this letter. The answer was that the person having cognizance of the case shall have to decide from the persons and the circumstances whether an action ought to be granted.”

⁴²⁴ Pugsley’s journal articles and writings related to the compilation of the *Digest* has been collected in Pugsley (1995-2000).

⁴²⁵ Pugsley (2006):196.

and Books 20-23 were not merged: by the time the committee started working on Books 20-23, Book 14 had been already published. The publication in three instalments also explains the extraordinary short period of fourteen days in which the *Digest* was entered into force after its publication. The *Constitutio Omnem* requires the teaching of Books 1-36 only by which “the young may become completely accomplished and equipped for every legal activity”. The remaining Books 37-50 is ordered for self-study by the *Omnem* “so that the students can read them later on and display their knowledge of them in court”.⁴²⁶ According to Pugsley, the second instalment of Books 20-36 had been published and it was being prepared for teaching at the time when the project of the *Digest* was concluded in 533. As Books 37-50 were not compulsory teaching materials, the *Digest* could enter into force almost immediately.

Writing the untold story about the *Digest*’s coming-into-being is a testament to the wit and imagination of scholars. A truly fascinating story unfolds as Romanists reconstruct the historical circumstances of the *Digest*’s composition based on internal literary and circumstantial historical evidence. On this occasion, the internal literary evidence was the management of quoting and quoted voice, the first of my highlighted types of literary signals. It showed rhetorical and pedagogical aims of the composition, and together with circumstantial historical evidence, it drew the contours of a fascinating story about the composition of the texts of the *Institutes* and *Digest*.

In this section, I have clearly separated the description of the *Digest*’s text from the scholarly accounts about the *Digest*’s compositional history. The former is a fact, the latter is speculation. When I now turn to the evidence of the *Talmud Yerushalmi* which presents a more complicated literary profile with virtually no contextual evidence about its history, the literary description and historical reconstruction of the Justinianic sources will offer a valuable reference point. Keeping in mind that the chasm between text and history is virtually unbridgeable, I propose to use the *Digest*’s reconstructed compositional history as a background against which we read the historical interpretation of the literary evidence in the *Yerushalmi*. The unique features of the *Yerushalmi*’s literary profile and compositional history are put into fresh light by the comparison with the *Institutes* and *Digest*.

5.2 Voice, quoting and compositional history in the Talmud Yerushalmi

Shifts between voices in the *Talmud Yerushalmi* are more ambiguous than in the *Institutes* and *Digest*.⁴²⁷ Even the identification of clauses can be sometimes challenging, let alone their association

⁴²⁶ *Const. Omnem* 5. Translation is according to Watson (1998a):l.

⁴²⁷ Some textual difficulties and literary ambiguities have been highlighted by Moscovitz (1998).

with the different voices of the text. For this reason, the current section departs from a basic syntactic analysis in order to distinguish between quoting and quoted voices. I will then describe the characteristics of the governing voice which scholars associate with the historical “editors”. In 5.2.1 “From clauses to voices in the *Yerushalmi*”, the peculiar quoting technique is demonstrated by the syntactical analysis of a short quotation from the opening passage of tractate *Bava Qamma*. The *Yerushalmi* proceeds from source to source and narrates the links and logical relationships. On the continuum between zero and total governing voice, the *Yerushalmi* occupies a middle position between the two Justinianic texts: the *Yerushalmi*’s governing voice is omnipresent and omniscient like that of the *Institutes*, but it conceals itself in a text which is dominated by the quoted sources like the *Digest*. In 5.2.2 “Caveats against the historical reconstruction of the anonymous ‘editor’”, I shall move from the evidence of the text to the undocumented history of the *Yerushalmi*’s composition. The section provides a critique of scholarly reconstructions which turn literary functions into historical categories. Considering that contextual evidence is unavailable to support the transition from text to history, the gold standard for evaluating reconstructions of the *Yerushalmi*’s compositional history is the plausibility and coherence of the account. Even though the contextual evidence is scarce and the story is largely untold, the story about the *Digest*’s coming-into-being shall provide a useful parallel to evaluate the techniques by which sources are preserved, transmitted and arranged in the *Yerushalmi*.

5.2.1 From clauses to layers in the *Yerushalmi*

The *Yerushalmi*’s quoting system is unlocked in two steps. I shall first identify the clauses of the unpunctuated Hebrew/Aramaic text of a short quotation in the opening passage of tractate *Bava Qamma* which is marked as subunit (3.2) in the text presented above in chapter 4. I shall then present a reading method which associates the clauses with either the quoting or the quoted voice of the *Yerushalmi*. All punctuation marks and typographical aids of modern text editions have been removed from the quotation below, and words are translated one by one in order to illustrate the challenge of identifying the shift between quoting and quoted voice in the unpunctuated Hebrew/Aramaic text.

רבי יצחק מקשי נגיפה נגיחה עיקר הן ואת עביד לון תולדות אלא מתחיל בעיקר ומסיים בתולדות

Rabbi Isaac raised a problem pushing goring root they and you make them generations rather it starts with the root and concludes with the generations

Rabbi (רבי) Isaac (יצחק) raised a problem (מקשי) pushing (נגיפה) goring (נגיחה) root (תולדות) rather (עיקר) they (הן) and you (ואת) make (עביד) them (לון) generations (תולדות) rather (אלא) it starts (מתחיל) with the root (בעיקר) and concludes (ומסיים) with the generations (בתולדות)

In order to identify the clauses in the string of words above, we need to locate the predications which constitute the clauses. One clause is established by one predication which is either nominal (e.g. “John is a cricketer”) or verbal (e.g. “John plays cricket”).

There is one nominal clause in the text above which is marked by the juxtaposition of the subject “pushing goring” (נגיפה נגיחה) and the nominal predicate “root” (עיקר). In English, the structure of the clause could be illustrated by the sentence “John, he is a cricketer”. Here we find the subject “John” in a focus position in the beginning of the sentence. The pronoun “he” in the nominal construction “he is a cricketer” refers back to “John”. The pronoun “they” (הן) in our text indicates that there are multiple subjects which allows to isolate “pushing (נגיפה) goring (נגיחה)” in the opening focus position, even though the conjunctive “and” (-ו) between the words is missing. Unlike English, Hebrew does not require the verb “be” in the present tense to link the subject and predicate, and marks the nominal construction by mere juxtaposition.⁴²⁸

There are four finite verbs in the text above which mark four verbal clauses. The verb form “raised a problem” (מקשי) is attached to the subject “Rabbi Isaac” (רבי יצחק). The verb “make” (עבד) is attached to the pronoun “you” (את). The clause includes the direct object “them” (לון) marked by the Aramaic accusative particle -ל, and the indirect object “generations” (תולדות). The subject of the verbs “starts” (מתחיל) and “concludes” (מסיים) is missing. The reader needs to understand from the context that it refers to the list of obligations discussed before. The conjunctive “rather (אלא)” at the beginning of the two clauses with the verbs “starts” and “concludes” marks a contrastive relationship with the previous sentence where the subject “and you” (ואת) is in an emphatic focus position. The evidence of “and you” and “rather” suggests that the clause “and you (ואת) make (עבד) them (לון) generations (תולדות)” should be read as a rhetorical question. Horizontal strokes in the Hebrew/Aramaic text and the English translation below mark the boundaries of the clauses. I have updated the English and also added punctuation marks which indicate the tone of the particular clause, either the default declarative (e.g. “John plays cricket”) or the interrogative marked by the conjunctives and structure of the clauses (e.g. “Does John play cricket?”).⁴²⁹ The interrogative clause is marked by the question mark, while declarative clauses are marked by full-stops.

רבי יצחק מקשי | נגיפה נגיחה עיקר הן | ואת עבד לון תולדות | אלא מתחיל בעיקר | ומסיים בתולדות

⁴²⁸ This phenomenon is called the zero copula which is standard in nominal sentences in Semitic (e.g. Hebrew and Arabic), Uralic (e.g. Hungarian and Finnish) and Turkic languages (e.g. Turkish and Tatar).

⁴²⁹ Randolph Quirk distinguishes between four tones or sentence types in English: declarative, interrogative, imperative and exclamative. The four sentence types express four discourse functions: statement, question, directive and exclamation. The types are marked by word order, additional linguistic elements (like interrogative pronouns), punctuation (in writing) and intonation (in speech). See Quirk et al. (1985):803-804.

Rabbi Isaac raised a problem. | Pushing and goring, they are roots. | And do you make them generations? | Rather, it starts with the roots. | And it concludes with the generations.

Now that we have isolated the clauses, we can now proceed to differentiate between quoting and quoted voices in the text. The quoting voice of the text expresses itself either from the neutral third-person or from the anonymous first-person perspective like in the *Institutes*. This voice is traditionally called the *stam* of Rabbinic texts which means “anonymous”.⁴³⁰ The *Yerushalmi* presents itself as a lemmatic commentary on the *Mishnah*. The *Yerushalmi* divides the *Mishnah*’s text into small pieces (*lemmata*) functioning as the headings of smaller discourse units.⁴³¹ The commentary is constituted by a series of quoted sources which are arranged and narrated by the *stam* to convey a certain understanding of the Mishnaic *lemma*. The quotations are presented as belonging to different historical periods of Jewish legal learning: biblical, Tannaitic (ca. 10-220) and Amoraic (ca. 220-500). Tannaitic sources are divided into two further groups: one group of quotations from the text of the *Mishnah*, and another group of quotations from the Tannaitic period which are not preserved in the *Mishnah*. A source of the former type is traditionally called a *mishnah* (or *mishnayot* in plural).⁴³² A source which is not preserved in the *Mishnah* is traditionally called a *baraita* (or *baraitot* in plural) which means “outside”, that is, outside the text of the *Mishnah*. A quotation presented as Amoraic is traditionally called a *memra* (or *memrot* in plural) which means “saying” or “dictum”. The *Yerushalmi*’s quoting voice (*stam*) layers the text with the help of quoting formulas and narrates the logical relationships between the quotations. The *stam* projects a hierarchy in which biblical quotations enjoy the highest level of authority, followed by *mishnayot*, then *baraitot* and finally *memrot*.⁴³³ This hierarchy of the layers of Jewish legal learning forms part of the *Yerushalmi*’s fiction: it is projected systematically in the text, but it is always the quoting voice which selects and arranges the quotations, and narrates their logical relationships. The abundance of

⁴³⁰ As Samely puts it, “Rabbinic studies routinely uses a term for the anonymous voice of rabbinic texts, *stam* in Hebrew or *stamma* in Aramaic. The term originates in rabbinic literature itself. Some scholars employ the term in such a way that its reference oscillates between what is here called the governing voice, on the one hand, and the historical authors or redactors of rabbinic texts, all of whom are unknown, on the other. This wreaks havoc with the methodology of Talmudic studies.” Samely et al. (2013):105. n.105.

⁴³¹ The discourse unit stretching from *lemma* to *lemma* is traditionally called the *sugya*. Similarly to the ambiguous term *stam*, scholars and readers of Talmudic texts use the term *sugya* in a confusingly flexible manner. They merge smaller units of lemmatic commentary into one *sugya*, or divide larger units of lemmatic commentary into multiple *sugyot*. The vagueness about the meaning of *sugya* is probably due to Talmudic reading habits: one *sugya* is generally understood to be a self-contained discourse unit which can be read and discussed in one study session. See also Samely et al. (2013):315 and n.313.

⁴³² The common noun “*mishnah*” signifies a quotation unit, whereas the proper noun “*Mishnah*” with a capital letter in English stands for the whole text.

⁴³³ See Elon (1994):1:268 and Ta-Shma (1998).

quoted materials conceals the fact that the *stam* is the omnipresent and omniscient voice of the *Yerushalmi*. The following table summarises the layers of the *Yerushalmi* where the level and the associated font type suggest the projected authority.

Table 5.2: The projected historical layers of the Talmud Yerushalmi

LEVEL OF LAYER	LAYER	LETTER TYPE
#1	Bible	<i>SMALL CAPITALS IN BOLD AND ITALICS</i>
#2	Mishnah	SMALL CAPITALS IN BOLD
#3	<i>baraita</i>	SMALL CAPITALS
#4	<i>memra</i>	regular script (within quotation marks)
#5	<i>stam</i>	regular script
#4-5	anything Aramaic	<i>italics</i>

In the sample quotation unit above, the clause “Rabbi Isaac raised a problem” is a quoting formula which marks the transition from the quoting to the quoted voice. The quoting voice expresses the contrastive logical relationship between the quotation and the context by the Aramaic expression “raised a problem” (מקשי).⁴³⁴ It also associates the quoted voice with the character of Rabbi Isaac who belongs to the 5th generation of Palestinian Tannaim (ca. 200) according to the internal literary evidence of Rabbinic texts.⁴³⁵ The terminological language of the quoting formula signifies that the clause belongs to the quoting voice,⁴³⁶ and what immediately follows (“Pushing and goring, they are principles”) belongs to the quoted voice. The beginning of the quotation is marked by the quoting formula, whereas the text uses no formal signals to mark its end. Therefore, it is often difficult to tell where the voice shifts from the quoted speech back to the anonymous voice of the text.⁴³⁷

In order to address the difficulty, I am proposing a reading method which assists the layering of the text. The method is constituted by five assumptions about the character of the quoting and the quoted voice which are applied sequentially according to their increasing problematic nature and decreasing argumentative force.

⁴³⁴ The terminological dictionary of Leib Moscovitz differentiates between four usages of מקשי which can express (1) a “surprise from logical inference”; (2) a “contradiction between different literary sources”; (3) a “difficulty in the literary sources”; or (4) a “problem of different kind”. Option (1) is illustrated by our clause in yBava Qamma. See Moscovitz (2009):452 and especially n. 539.

⁴³⁵ The index and the reference list in Stemmerger (2011):412-416 and 478-115 is a good starting point for associating a named quotation with one of the traditional generations of Rabbinic scholarship.

⁴³⁶ The consistent use of terminological language is considered to be a good marker of the quoting layer. See the classic work of Bacher (1899) and the Introduction in Moscovitz (2009):1-18. In order to avoid circular reasoning, one needs to have other reasons to associate a particular clause with the quoting layer. The reading method presented below offers further markers.

⁴³⁷ As Leib Moscovitz puts it, the anonymous materials are “of a piece, both substantively and stylistically, with the attributed material.” Moscovitz (2006):672.

- (1) the introductory formula is part of the anonymous voice of the text;
- (2) the quoted speech starts straight after the introductory formula;
- (3) terminological language indicates the anonymous voice of the text;
- (4) the quoted source speaks in one language only, either in Hebrew or Aramaic;
- (5) the quoted source is brief, and it is limited to a clause or two.

Assumptions (1) and (2) are straightforward and therefore the quoting formula (“Rabbi Isaac raised a problem”) and the subsequent clause (“Pushing and goading, they are principles”) can be confidently associated with the *Yerushalmi*’s governing voice and the projected character of Rabbi Isaac. There remain four possible distributions of voices presented in tabular format below. The Hebrew of the last two clauses and the fact that they semantically complement each other suggests that the two clauses constitute one sentence and belong to the same voice. The sentence is marked as (d) in Table 5.3 below which specifies the language of the introductory formula (a) and the subsequent two clauses (b) and (c) in unit (3.2). Bold lines signify a change of voice in the four columns of the four options, and, therefore, they also highlight the length of the voices. The table illustrates four possible distributions of clauses of which options #1-3 shall be eliminated according to the assumptions of the reading method.

Table 5.3: Quoting and quoted layer in subunit 3.2

	Clause(s)	Language	Option #1	Option #2	Option #3	Option #4
(a)	Rabbi Isaac raised a problem רבי יצחק מקשי	Aramaic	Yerushalmi	Yerushalmi	Yerushalmi	Yerushalmi
(b)	Pushing and goading are roots. נגיפה נגיחה עיקר הן	Hebrew	Rabbi Isaac	Rabbi Isaac	Rabbi Isaac	Rabbi Isaac
(c)	And do you make them generations? ואת עבד לון תולדות	Aramaic	Yerushalmi	Rabbi Isaac	Rabbi Isaac	Yerushalmi
(d)	Rather, it [the list] starts with the root and concludes with the principles אלא מתחיל בעיקר ומסיים בתולדות	Hebrew	Rabbi Isaac	Rabbi Isaac	Yerushalmi	Yerushalmi

The voice of the *Yerushalmi* and Rabbi Isaac changes back and forth in option #1. Quotation marks may clarify the distribution:

Rabbi Isaac raised a problem: “Pushing and goring, they are roots.” And do you make them generations? “Rather, it [the list] starts with the roots. And it concludes with the generations.”

Option #1 associates Aramaic with the *stam* and Hebrew with Rabbi Isaac. According to this distribution, the rhetorical question in clause (c) (“And do you make them generations?”) is an interjected remark by the *stam* enclosed by two clauses which form a single quotation: “Pushing and goring are roots, ... rather, it starts with the roots and concludes with the generations.” Without the rhetorical question in the middle, the quotation sentence is fragmentary which makes option #1 implausible. The quotation is expected to constitute a well-formed unit, not a grammatical fragment.

The voice of the *Yerushalmi* is followed by an extended quotation in option #2:

Rabbi Isaac raised a problem: “Pushing and goring, they are roots. And do you make them generations? Rather, it [the list] starts with the roots. And it concludes with the generations.”

Option #2 could be eliminated with reference to the terminological use of the conjunctive “rather” (אלא) in sentence (d) which indicates the anonymous voice of the *Yerushalmi*’s commentary. According to Moscovitz, “it seems that in isolated instances ‘rather it is so’ (אלא כיני) is interchangeable with ‘rather’ (אלא)”. He adds that the full phrase “rather it is so” (אלא כיני) generally introduces a correction of a Tannaitic wording and thereby eliminates a difficulty or contradiction.⁴³⁸

The concluding sentence starting with “rather” indeed offers a correction by dividing the list of damages in unit (3.1) (“goring, pushing, biting, lying down, kicking, thrusting”) into two halves where the first two items are “roots” (“pushing” and “goring”) and the remaining four are “generations” (“biting”, “lying down”, “kicking” and “goring”). The *Yerushalmi*’s commentary proposes an alternative “punctuation” of the Tannaitic source attributed to Rabbi Isaac without visible, printed signs.⁴³⁹

⁴³⁸ Moscovitz (2009):72.

⁴³⁹ Compared to modern written languages, ancient languages like Hebrew, Greek and Latin are extremely rich in particles which do not carry any substantial meaning other than marking the structure of the text. See, for example, the Introduction in Denniston et al. (1954):x-lv about Greek particles. One way to explain the abundance of particles is that they serve structuring purposes in the oral as well as written presentation of the text. Particles assist the oral performance where they are combined with interpretative intonation, while particles indicate the structure of the written text in absence of punctuation. The habit of separating words and applying punctuation in writing is relatively new. After some failed attempts in the ancient world, it became gradually common with Christianity from the 6th century. See the history of punctuation in Houston (2013).

The solution to Rabbi Isaac's problem is associated with the *Yerushalmi's* voice in option #3, but the rhetorical question still belongs to Rabbi Isaac:

Rabbi Isaac raised a problem: "Pushing and goring, they are roots. And do you make them generations?" Rather, it [the list] starts with the roots. And it concludes with the generations.

In option #3, the *Yerushalmi* as well as Rabbi Isaac speak in two languages.⁴⁴⁰ A brief quotation associated with a named authority is reasonably expected to use one language only. In absence of any punctuation (in reading) or intonation (in oral presentation), the beginner Talmud reader is advised to pay close attention to the language of the text, and to identify a Tannaitic source according to its Hebrew language, and an Amoraic one or the anonymous voice of the *Yerushalmi* according to its Aramaic.⁴⁴¹ Additionally, the internal evidence of Rabbinic literature suggests that quoted materials are usually extremely short, generally limited to a single clause. Even though there is no compelling evidence against a longer and bilingual quotation associated with a named authority, literary conventions of Rabbinic texts make it unlikely.

Option #4, therefore, presents the most plausible distribution of voices. Here the *Yerushalmi* introduces and quotes a brief statement in the name of Rabbi Isaac, but it explains the difficulty it presents and the solution to it by using its own voice.

Rabbi Isaac raised a problem: "Pushing and goring, they are roots." And do you make them generations? Rather, it [the list] starts with the roots. And it concludes with the generations.

The neutral third-person and the anonymous first-person plural perspective is compatible with the assumption that the *Yerushalmi's* voice projects a corporate persona of "editors". The voice is always present and always in control, and therefore the mixing of Hebrew and Aramaic in the quoting/narrating voice is less surprising than in the quoted voice. The relationship between quoting and quoted voice is asymmetrical. The one who is quoted does not "know" about the one who quotes, but the one who quotes "knows" about the one who is quoted. For this reason, isolated quotation sentences are expected to make sense on their own, whereas the commentary may be fragmentary as long as it makes sense when combined with the quotations.

The next section engages with the *Yerushalmi's* compositional technique at a more general level which relates the evidence of the text to the reconstructed history of its composition. It investigates

⁴⁴⁰ Speaking in two languages is indeed possible, especially in a Targumic environment. See Smelik (2015). The assumption of the working method related to monolingualism needs to be treated with care.

⁴⁴¹ Vidas expresses a similar intuition with reference to dating materials in the Talmud: "anonymous parts differ from the dicta in language and style – whereas – dicta tend to be brief and in Hebrew, anonymous parts are verbose and mostly in Aramaic". Vidas (2014):45-46.

how the projected corporate persona and other literary strategies is used to gain information about the historical editors and their editorial strategies. The composition indicates that the *Yerushalmi* is more than a mere sourcebook arranged by *Mishnah* lemmata, but there are rhetorical and pedagogical considerations at play. These considerations show that the legal tradition has been systematically processed and produced the signs of legal abstraction.

5.2.2 Caveats against the historical reconstruction of the anonymous “editor”

The transition from text to history is even more complicated in the *Yerushalmi* than in the *Institutes* and *Digest*. There is no contextual evidence which would shed light on the *Yerushalmi*’s compositional history. Scholars of Rabbinic literature (including Rav Sherira Gaon) use internal literary evidence for historical reconstruction. This “evidence” belongs to the *Yerushalmi*’s projected fiction rather than to its history. Below I shall briefly discuss the *Yerushalmi*’s quotation technique which have been used by scholars for theorising about the historical circumstances of its composition.

As noted in the previous section, the quoting voice of the *Yerushalmi* projects a hierarchy of sources. The quoting formulas introduce quotations from the Hebrew Bible, distinguish between Tannaitic teachings from inside (*mishnayot*) and “outside” the *Mishnah* (*baraitot*) and mark Amoraic teachings after the *Mishnah*’s text was closed (*memrot*).

The material evidence of the Dead Sea Scrolls, the Cairo Genizah fragments, and medieval manuscripts support the idea that the Hebrew Bible and the *Mishnah* have a textual history independent from the *Yerushalmi*.⁴⁴² Even though the historical creators may not have had access to a written copy, the literary characteristics of the *Yerushalmi* suggest that the Hebrew Bible and the *Mishnah* were available to them as independent source texts. The *Yerushalmi*’s lemmatic commentary follows the structure of the *Mishnah* closely which indicates that the *Yerushalmi*’s historical creators had the *Mishnah* in front of them in some form. The *Yerushalmi* also refers to the Hebrew Bible and the *Mishnah* as closed documents. A good example is the Aramaic saying in unit (2.2) of the opening passage of tractate *Bava Qamma* (yBQ 1:1 (2a)) which compares the language and style of the Bible and the *Mishnah*: “just as Scripture (קרייא) speaks, so speaks the *Mishnah* (מתניתא)”.

The quotations are systematically marked and correspond to the independently preserved Bible and *Mishnah* texts. Expressions like the Hebrew “as it is said” (שנאמר) or the Aramaic “as it is written” (דכתיב) consistently mark biblical quotations. The reader is expected to have an intimate

⁴⁴² For material evidence of the Hebrew Bible, see Emanuel Tov’s comprehensive overview of textual witnesses in Tov (2001):21-154. For the *Mishnah*, see Krupp (1987):252-262.

acquaintance with the biblical text and recognise where the quotation begins and ends. The pertinence of the quoted words to the subject, however, varies case by case. Sometimes the quotation is just a reminder which activates the knowledge of a specific part in the Bible. The relevant information is often not the quoted part, but something which the reader may find in the context. Other times the biblical quotations are isolated from the context, and it is the wording of the particular biblical segment which provides proof.

The *Yerushalmi* applies hermeneutical techniques for the text of the *Mishnah* which are based on the techniques developed for the interpretation of the biblical text. The segmentation of the biblical text has been described for the *Mishnah* by Alex Samely.⁴⁴³ The *Yerushalmi* adopts the *Mishnah*'s method, and applies it to the text of the *Mishnah* itself. The *Yerushalmi* approaches the *Mishnah* in segmented parts and expects an intimate acquaintance with the *Mishnah* comparable only to the Bible. The reader is expected to identify what *is* from the *Mishnah*, and also what *is not*. On the one hand, the *Yerushalmi* assumes that readers recognise where the Mishnaic quotations begin and end. On the other hand, the *Yerushalmi* assumes that readers recognise, if the quotation comes from “outside” the *Mishnah* text, even though the quoted Tannaitic authority may regularly appear in the *Mishnah*. Because of this expectation, the *Yerushalmi* uses the same introductory formulas for all quotations from the Tannaitic period. The reader is expected to ascertain whether they are *mishnayot* or *baraitot* according to an intimate acquaintance with the *Mishnah* text. Expressions like “it is taught” (תניא) and “we learned” (תניין) introduce unattributed quotations from the Tannaitic period, others like “X taught” (X תני) introduces attributed ones.⁴⁴⁴

That the *Mishnah* text was available in its entirety to the historical creators is indicated by the *Yerushalmi*'s quoting technique which marks *baraitot* in a negative way. The reader is expected to identify a *baraita* as a Tannaitic quotation which does *not* appear in the *Mishnah* text. Quotations from masters of the Amoraic period (*memrot*) have their own set of introductory formulas. Expressions like “he enquired” (בעי) and “he raised a problem” (מקשי) mark an Amoraic teaching. These two examples also illustrate that introductory formulas often signify the logical relationship by which *memrot* relate to the subject discussed in the *Yerushalmi*. When the formula uses a generic verb like “to say” (אמר), the *Yerushalmi* also works according to the assumption that the named authority is recognised as belonging to the Tannaitic or the Amoraic period.

⁴⁴³ Samely (2002):31-58. In a journal article, Samely relates Rabbinic exegetical methods to Paul Grice's theory about implied meaning which assumes relevance and consistency to explain seemingly incongruent language use. See Samely (1992):167-205.

⁴⁴⁴ See the individual entries in Moscovitz (2009).

The quoting formulas present *baraitot* and *memrot* attributed to named authorities as teachings transmitted orally from masters to disciples. For example, a *memra* attributed to Rabbi Shmuel from the 3rd generation of the Amoraic period is introduced in the opening passage of tractate *Bava Qamma* in the *Yerushalmi* presented as subunit (6.4.1) in section 4.2.2 above with the following formula: “Rabbi Bun the son of Hiyya in the name of Rabbi Shmuel the son of Rabbi Isaac”. The formula registers the identity as well as the intellectual pedigree of Rabbi Shmuel. This lesser known Amoraic master and his disciple Rabbi Bun are vouchsafed by the names of their fathers, Rabbi Isaac and Hiyya.⁴⁴⁵ In case the name is already a trademark of authority, the *Yerushalmi* may use a quoting formula which only includes the name of the quoted authority like in the case of a *memra* attributed to Rabbi Hiyya from the first generation of the Amoraic period in subunit (2.1) which is introduced by the simple formula “Rabbi Hiyya taught”.⁴⁴⁶

It is debated in what form *baraitot* (as well as *memrot*) were available to the historical creators of the *Yerushalmi*, and how they used these sources for the composition of the *Yerushalmi*’s text. The *Tosefta*, a collection of Tannaitic teachings arranged in the order of the *Mishnah*,⁴⁴⁷ and the Tannaitic commentaries to the biblical books of Exodus, Leviticus, Numbers and Deuteronomy include many of the *baraitot* quoted in the *Yerushalmi*. In a similar fashion, the biblical commentaries from the Amoraic period provide parallels to many of the *Yerushalmi*’s *memrot*. In absence of material evidence (manuscripts or fragments) and literary references, it seems unlikely that *baraitot* and *memrot* were preserved and transmitted in edited collections.⁴⁴⁸

In David Weiss Halivni’s view, *baraitot* and *memrot* are genuine records of legal rulings which were memorised and transmitted without explanations. In a historical reconstruction expandable to the

⁴⁴⁵ See a short description of these authorities from the third and fourth generation of Palestinian Amoraim in Stemberger (2011):104-109.

⁴⁴⁶ Rabbi Hiyya, the “editor” of the *Tosefta* according to Sherira Gaon, belongs to the transition period between the Tannaitic and Amoraic masters. He is sometimes associated with the fifth generation of the Tannaim. See Stemberger (2011):97.

⁴⁴⁷ The *Talmudim*’s variant readings of parallels which can be associated with passages from the *Tosefta* have been interpreted in two opposing ways. Epstein argued that the variants show that the *Tosefta* was known to the creators of the *Talmudim* in different versions, whereas Albeck holds that textual deviation rather indicates that the *Talmudim* are unaware of the *Tosefta*. See Epstein (1957):241-262 and Albeck (1925). The major study of on the topic by Yaakov Elman supports Albeck’s position. See Elman (1994) as well as the overview in Stemberger (2011):174-175. I have dealt with the entangled relationship between the *Mishnah* and *Tosefta* in Ribary (2011).

⁴⁴⁸ Michael Higger’s modern collection of *baraita* (Higger (1938-1948)) is not the reconstruction of a lost literary document. Unlike Otto Lenel who did mean to reconstruct lost juristic works in his *Palingenesia* (1889) according to the quotations preserved in the *Digest*, the Higger collection does not make historical claims and merely presents itself as a useful study tool. See Higger (1942):93-98.

Yerushalmi, Halivni posits that the anonymous redactors⁴⁴⁹ of the *Talmud Bavli* composed elaborate discursive passages in order to justify the snippets of apodictic rules they had received from previous generations.⁴⁵⁰ Halivni associates the *stam* voice of the *Bavli* with the historical creators whom he calls “Stammaim”. The term has misleading connotations which blur the difference between the Talmud’s anonymous voice (*stam*) and the unidentified historical creators responsible for the Talmud’s compilation (Stammaim). For dating purposes, the term “Stammaim” is not more helpful than the traditional periods of Rabbinic scholarship, that is, those of the Amoraim (ca. 200-500), the Savoraim (ca. 500-600) or the Geonim (589-1038). Halivni seems to commit a category mistake by creating a historical concept based on a literary phenomenon.⁴⁵¹

Daniel Boyarin and Shamma Friedman supplement Halivni’s traditional understanding by attributing greater creativity to the historical creators. Similar to Halivni, they also associate the historical creators with the quoting-narrating voice.⁴⁵² There seems to be a certain obsession with dating which entices scholars to make the leap from the perceived literary persona to an enigmatic historical person. When Robert Brody contests the (late) dating of the historical composition of the *Bavli*, he notes that “it is often necessary to distinguish between the nucleus of the memra and the anonymous layer or comment referring to it.”⁴⁵³ As Moulie Vidas adds, “the different styles of presentation - Aramaic vs. Hebrew, brief vs. verbose, anonymous vs. attributed - [are not] indicators of different periods but as different conventions for transmitting material with different functions.”⁴⁵⁴ Brody correctly dissociates literary features from the historical creators of the text, but similarly to his fellow Talmud scholars, he fails to uproot the mistaken idea that text can be translated into history without the external evidence about the historical context.

Scholars like Yaakov Sussman and Christine Hayes offer a different strategy to answer the enigma of the compositional history of the *Talmudim* which avoids the hunt for the historical “author”. According to them, the *Yerushalmi* and the *Bavli* should be seen as snapshots of a literary continuum of a cumulative commentary enterprise which was shaping over many generations and centuries.

⁴⁴⁹ Halivni uses the term “Stammaim” to denote the anonymous compilers of the Talmud. See Halivni (2013):3-24. This volume is the translation of Halivni’s introduction to the study of tractate *Bava Batra* of the Babylonian Talmud which is Halivni (2007).

⁴⁵⁰ See Halivni (1986):76-92 and Halivni (2013):145-154.

⁴⁵¹ Sergey Dolgopolski makes a similar critical point when he assesses Halivni’s approach with the following words: “the problems of historical approaches to the Talmud have to do with assuming a historically empirically unverified (and perhaps unverifiable) agency responsible for the Talmud’s genesis, while claiming to produce an account of the empirically verifiable history of the Talmud’s production.” Dolgopolski (2013):46.

⁴⁵² See Boyarin (2007):339-342 and Friedman (2010):58.

⁴⁵³ Brody (2009):227.

⁴⁵⁴ Vidas comments on Brody’s position in this quotation in Vidas (2014):47.

According to this explanation, the *Yerushalmi*'s inferior eloquence and structure is simply due to the fact that it preserves an earlier phase in the crystallisation of the *Talmud*.⁴⁵⁵

Following the lead of Jacob Neusner, scholars in the 1970s abandoned the idea of writing biographies of Rabbinic authorities as they had become disenchanted with the historical reliability of the stories about their lives scattered in Rabbinic literature.⁴⁵⁶ Scholars in the 1990s abandoned the idea of reconstructing the intellectual profile of Rabbinic authorities as they had become disenchanted with the reliability of attributions of quoting formulas.⁴⁵⁷ We should now probably give up on the possibility that the compositional history of Rabbinic texts could be written based on the literary evidence of the texts themselves.

This does not mean that we need to embrace a nihilistic or relativistic approach. The *Yerushalmi*'s compositional history may lack contextual evidence of a Rabbinic origin, but its reconstruction may be assisted by the comparison with the reconstructed compositional history of Justinianic texts and the *Digest* in particular. The comparison requires that the *Yerushalmi* be, on the one hand, a coherent compositional entity, and, on the other hand, commensurate to the *Digest*. For the first requirement, we can point to the fact that the *Yerushalmi*'s literary features communicate ideological and editorial preferences which are coherent with other Rabbinic texts. The collective evidence of multiple Rabbinic literary compositions indicates that the *Yerushalmi*'s approach to the old law is not only the fiction of the *Yerushalmi*, but it can be also reasonably associated with its historical creators, even though we do not know who these people were and when they lived. For the second requirement, we can point to the common anthological nature of the *Digest* and the *Yerushalmi*, to the similar technological limitations of their editorial process, as well as to their similar educational and study environment.

⁴⁵⁵ Christine Hayes explains the different nature of the two Talmudim by reference to "the enormous time lag between the completion of the two works and the intense and vigorous development of the Bavli that occurred particularly in the later part of the period (perhaps into the seventh century)." Hayes (1997):21. Hayes takes Yaakov Sussman as the point of departure for her own explanation. See Sussman (1990):96-105. Even though Sussman's theory is compelling in its elegant simplicity, Hayes refrains from describing the *Yerushalmi* as "a genuine 'talmud' (study) of the Mishnah [which] is composed primarily of comments, glosses, and explanations of the Mishnah – around which it revolves. ... For the Bavli, on the other hand, the Mishnah is but a point of departure for lengthy and involved debates and dialectical discussions" Hayes (1997):21. In fact, what Hayes writes about the Bavli applies very much so to the *Yerushalmi* too. Pace Sussman and Hayes, the difference is more to do with the literary surface than with the nature of the enterprise.

⁴⁵⁶ See, among others, Green (1978):77-96.

⁴⁵⁷ See, among others, Stern (1994):28-51.

5.3 Text – Voice – History: Comparative observations

The *Institutes*, the *Digest* and the *Yerushalmi* use different narrating, text building and quoting techniques indicating different text profiles and purposes. The *Digest* presents an extreme case where the 50 books of the work are constituted by 9,132 quotations. The presence of the governing voice of the text is minimal. It is restricted to the titles of the thematic sections and the reference headings of the quotations. The logic behind the order of quotations is not made explicit. To put it bluntly, the compiler voice of the *Digest* is largely silent as quotation follows quotation without commentary. According to the imperial pronouncements added to the text of the *Digest* in the authoritative *Codex Florentinus* manuscript, the *Digest's* structure follows the *Codex* and the *Praetorian Edict* and it is designed to be used as a teaching material in the reformed five-year legal curriculum.

Contrary to the *Digest*, the governing voice of the *Institutes* and that of the *Yerushalmi* are present on every page of the texts in which logical relationships are presented from an omnipresent and omniscient perspective. The *Institutes'* use of quotations is limited compared to the *Digest* and the *Yerushalmi*. It quotes earlier sources to illustrate the historical development of some rules, but the text is not dominated by quotations. The text follows a multi-level thematic structure initiated by the jurist Gaius in his mid-2nd century *Institutes* which was updated for the Justinianic corpus. At the top of the thematic structure also known as the “institutional framework” of Roman law, we find the three areas of the law of persons, things and actions. They are divided into smaller areas as the text submerges into details. The clear hierarchical structure supports the evidence of the *Constitutio Imperatoria* which states that the *Institutes* has been created as an elementary textbook for law students.

Finally, the *Yerushalmi*, like any other Rabbinic texts, does not have a preamble or introduction which would inform the reader about its intended use.⁴⁵⁸ The *Yerushalmi* is also different from the Justinianic materials inasmuch as it is a sequential commentary which closely follows the order of an earlier text, the *Mishnah*. The *Yerushalmi* segments the text of the *Mishnah* and presents its own idea of law in a commentary format. Unlike the *Institutes*, but similar to the *Digest*, the *Yerushalmi's* text is dominated by quoted materials taken from the Bible, the *Mishnah*, *baraitot* and *memrot*. The logical relationships between the quoted sources are narrated by the quoting voice. The abundance and dominance of quoted materials achieve the impression that the law is old and vouchsafed by the authority of tradition.

⁴⁵⁸ As Samely puts it, “rabbinic texts usually contain no meta-communicative information whatsoever.” See Samely (2017):153 and 159-161, and more generally Samely et al. (2013):89-94.

Scholars of Roman and Rabbinic legal texts used to try to unlock the unfamiliar structure and ascertain the reliability of quotations in their primary sources. Due to the lack of evidence, this type of investigation has now been largely abandoned. Romanists have come to the conclusion that the “interpolation hunting” cannot reconstruct the “original” and “genuine” voice of the jurists. The hunt ended in the common opinion that in most cases there is no reason to doubt that the *Digest*’s quotations are reliable. The intervention of the compilers are considered to have been minimal by most.⁴⁵⁹ Due to the lack of evidence from outside the text of the *Digest*, incoherence in style and logic could not be translated into evidence about the interpolating activity of the compilers.⁴⁶⁰ In Rabbinic scholarship, textual criticism has reached a similar conclusion. The variations in wording and contradictory attributions of the same quotations at distinct parts of the Rabbinic corpus have been acknowledged to be “commonplace ... [and] often insignificant.”⁴⁶¹ Such differences do not affect the reasoning of the passage where they appear.

⁴⁵⁹ See Johnston (1989):149-166.

⁴⁶⁰ As Wolfgang Kaiser writes, “clarity about the alterations and omissions made by the compilers can be achieved only in those cases in which the same text has not only survived in the *Digest* but is also attested elsewhere”. Kaiser (2015): 128.

⁴⁶¹ Vidas (2014):65.

CHAPTER 6: ESTABLISHING LEGAL TERMS

Legal terms highlight and compress relevant aspects of legally significant events into shorthand expressions. Justinian's *Institutes* and the *Yerushalmi* follow different strategies of establishing them. The *Institutes* predominantly creates definitions, while the commentary layer of the *Yerushalmi* uses a strategy which I shall call "labelling". These strategies are approached as literary phenomena below and described according to their syntactic structure and rhetorical function.

The fundamental difference between definitions and labels can be illustrated by two ways of answering the same question, "What is austerity?" Let us assume that the expression "austerity" is unknown to me, and I am in search for an explanation. When I ask my informed partner, the answer may take the form of a definition. I ask, and my informed partner answers, "A situation when people do not have much money to spend because there are bad economic conditions."⁴⁶² Definitions in the *Institutes* establish unknown or ambiguous legal terms in this manner.

Yet my question about "austerity" could have been answered in a completely different manner. My informed partner could have asked whether I had been following the news about the economic crisis in Greece, or she could have told me about the daily hardship of Greeks living in Thessaloniki which she had visited during her recent trip to the city. She would then conclude her explanation, "This is austerity." This latter strategy may seem to be a rather inefficient and time-consuming way to inform me about the meaning of an unknown term, but it is not just a legitimate alternative, it is also perhaps the one which gives me a better idea what austerity really is about. The labels in the commentary layer of the *Yerushalmi* resemble this explanation strategy.

The first section (6.1 "Definitions in Justinian's *Institutes*") investigates the linguistic variations of definitions in the *Institutes* supplemented by the evidence provided by a title in the *Digest* dedicated to "The meaning of expressions" (D.50.16). The definition of *obligatio* in the *Institutes* (J.3.13.pr-1)

⁴⁶² Hornby et al. (2010):68.

provides a case-study for detailed analysis. It is argued that even though the definition of *obligatio* fails to define the term according to a strict logical sense, it achieves a rhetorical effect thanks to its literary form. One possible justification for a logically defective definition of *obligatio* is that it provides a didactic orientation point for the novice student of law.

The second section (6.2 “Labels in the *Talmud Yerushalmi*”) argues that contrary to the strategy used in the *Institutes*, the *Yerushalmi* prefers a labelling technique, which has been provisionally defined above for the purpose of establishing legal terms. Definitions and their functional parallels, that is, classificatory lists are few and far between in the *Yerushalmi*. These standard tools of establishing legal terms predominantly appear in the *Mishnah* layer of the text, that is, in the short passages incorporated from an independent work, the 3rd century *Mishnah* which constitutes the starting point for the *Yerushalmi*’s commentary. The layers which are peculiar to the *Yerushalmi* prefer the cumulative method of labels. There is no orientation point in form of an abstract definition or classificatory list which could be expanded by way of analogy. The text uses a legal term (e.g. “damage” or “horn”) to label a particular case, and the reader is expected to build her own understanding of the scope of the legal term in a cumulative manner.

6.1 Definitions in Justinian’s Institutes

6.1.1 The normative and descriptive sense of definition

The Western mind is accustomed to definition as a standard strategy of establishing the meaning and scope of ambiguous or unknown terms. In the footsteps of Aristotle⁴⁶³ and the Medieval scholastic thinkers,⁴⁶⁴ logicians and philosophers of science in modern times⁴⁶⁵ achieved a nuanced

⁴⁶³ Aristotle differentiates between four types of definition which he terms as ὁρισμός. See Deslauriers (1990). The first type of his four is “an account of what something is” (*Post. An.* 93b29: λόγος τοῦ τί ἐστὶ) which is what we ordinarily call a definition. See Barnes (1994):58 and 222-223. Aristotle’s theory of definitions is discussed in monographic detail by Deslauriers (2007).

⁴⁶⁴ Aristotle’s theory was popularised by the 3rd century Neo-Platonist Porphyry (ca. 234-305) who wrote a summary introduction (*Eisagoge*) to Aristotle’s *Categories*. It is by Boethius’ (ca. 480-524) Latin translation of the *Eisagoge*, which became the standard introductory textbook in logic in Medieval times, that the definition according to *genus* and distinguishing character became widely accepted. During the Middle Ages, Averroes (1126-1198), Abelard (1079-1142), Duns Scotus (1266-1308) and William of Ockham (1287-1347), among others, wrote commentaries to the *Eisagoge*. See Barnes (2003):ix-xxvi and 367-371 and Kneale et al. (1978):224-246.

⁴⁶⁵ The scholastic tradition was continued in the early modern period by, among others, Blaise Pascal (1623-1662), Benedict de Spinoza (1632-1677), John Locke (1632-1704) and Gottfried Wilhelm Leibniz (1646-1716). See the excellent collection of relevant sources in Sager (2000). The “semantic tradition” culminating in the early 20th century Vienna Circle, including Moritz Schlick, Otto Neurath, Rudolf Carnap and Kurt Gödel, is discussed by Chapter 7 “Logic in transition” in Coffa (1991):113-140.

formal understanding of “definition” which penetrated the language of science as well as that of everyday life. Contrary to definition, the “label” has remained largely invisible to those doing and thinking about science. Due to its elusive nature, it has been either neglected or classed as a failed attempt at definition.

According to the modern logical understanding of “definition”, the meaning of any unknown or ambiguous term X (*explanandum*) can be specified in two ways, either by an intensional or an extensional definition.⁴⁶⁶ The former specifies the necessary and sufficient conditions which any item *needs* to fulfil in order to be described by term X.⁴⁶⁷ The latter points to (ostensive definition) or lists (enumerative definition) all constituent items. Both the extensional and the intensional definition is normative in nature. The normative character also means that if the definition leaves an element of doubt, that is, if it fails to provide the necessary and sufficient conditions, fails to successfully point to the item, or fails to give the complete list of constituent items, then it fails to qualify as a definition.

In contrast to the normative understanding of traditional logic, I suggest a descriptive approach in order to create room for the phenomenon of definition in a looser, non-logical sense in the language of ancient legal cultures. I have accumulated examples of definitions and reflected on the language intuition which has identified them as such.⁴⁶⁸ During this exercise, definition has revealed itself as,

⁴⁶⁶ In a lexicographic context, the two types of definitions are described by Geeraerts (2003):88-91. The glossary of the edited volume in which Geeraerts’s article is published provides the following definitions for the two types: “intensional definition, the definition that specifies the properties or distinctive features of a lexical item which distinguish it from other items in the same class”, “extensional definition, the definition which consists of enumerating all the members of the class comprised by the *definiendum*.” Sterkenburg (2003):402 and 398-399. An accessible account of intensional and extensional definitions as well as the theory of definitions in general is offered by Swartz (1997).

⁴⁶⁷ Traditional textbooks in logic express a normative approach to definitions and require them to adhere to four rules: stating the essence of the *definiendum*, avoiding circularity, avoiding negative formulation, avoiding figurative and obscure language. As Patrick Suppes puts it, “a traditional definition per *genus et differentiam* is often called a *real* definition because it is said to characterize the essence of species.” Suppes (1957):151-152. An advanced discussion of the normative approach to definitions and a challenge to the traditional normative model is provided by Quine (2013):170-173 and Belnap (1993):115-146.

⁴⁶⁸ The study of reading is burdened with many paradoxes. The observer has no access to the processes which take place in the reading subject’s mind, she can only record some symptoms. According to A. W. McHoul, “reading, in short, is practically a non-observable ... in the case of describing a naturally occurring reading, practically all information must be unavailable to third-party observers” McHoul (1982):102 and 107. For this reason, informed by the phenomenological tradition and ethnomethodology, McHoul suggests that the observing and the observed subject be merged, and that one’s own reading be recorded in as much detail as possible which is later to be analysed carefully and methodically. The exercise points “directly towards a reflexive analysis where reader-as-analyst and analyst-as-reader are indistinguishably fused.” McHoul (1982):109.

on the one hand, having a specific sentence structure, that of the nominal construction or one of its many variations, and as, on the other hand, being embedded in a discourse environment which directs the reader's attention to the imminent explanation of an unknown or ambiguous term. These two aspects, the nominal construction and the supporting discourse environment result in a specific literary structure which constitutes the literary signal of definition. Whether what reads like a definition also fulfils the normative logical criteria is a completely different matter.

6.1.2 The linguistic variations of definition in the *Institutes*

Corresponding to the elementary nature of the *Institutes*, when unknown or ambiguous terms are introduced, the text often provides a brief explanation. The very first sentence of the work sets out to define what it means by the concepts of "justice" (*iustitia*) and "wisdom in the law" (*iuris prudentia*)⁴⁶⁹ which govern the legal enterprise and therefore also that of the *Institutes*: "Justice is a persistent and perpetual will to provide each person with his right. Wisdom in the law is the acquaintance with things divine and human, the knowledge of just and unjust."⁴⁷⁰

The new topic of obligations in the middle of Book 3 of the *Institutes* starts with a similar definition of another concept: "Obligation is a bond of law by which we are tied to someone by the necessity of releasing a *res* according to the laws of our state."⁴⁷¹ The linguistic structures of the three definitions of "justice", "wisdom in the law" and "obligation" are strikingly similar: the term to be explained is put in the first, focus position of the sentence (*explanandum*); the finite form of the verb "be" (*copula*) is put in the second position; and the sentence is concluded with an expandable nominal phrase which offers the explanation (*explanans*).

In order to find common characteristics of definitions, we need to come to terms with how we identify the presence of a definition in the text. If a definition is identified by the nominal

⁴⁶⁹ Birks' translation "wisdom in the law" reflects the compound structure of the Latin *iuris prudentia*. Birks et al. (1987a):37.

⁴⁷⁰ J.1.1.pr-1: *iustitia est constans et perpetua voluntas ius suum cuique tribuens. iuris prudentia est divinarum atque humanarum rerum notitia, iusti atque iniusti scientia.* – The difficulty to define what law is about is grasped by H. L. A. Hart: "No one has thought it illuminating or important to insist that medicine is 'what doctors do about illness' or a 'a prediction of what doctors will do', or to declare that what is ordinarily recognized as a characteristic, central part of chemistry, say the study of acids, is not really part of chemistry at all. Yet, in the case of law, things which at first sight look as strange as these have often been said, and not only said but urged with eloquence and passion, as if they were revelations of truths about law, long obscured by gross misrepresentations of its essential nature." Hart (1961):1.

⁴⁷¹ J.3.13.pr: *obligatio est iuris vinculum, quo necessitate adstringimur alicuius solvendae rei, secundum nostrae civitatis iura.* – The expression *solvendae rei* is translated as "to perform something" in Thomas (1975):197 and "making some performance" in Birks et al. (1987a):105. The idea is that one needs to "give up" or "let go" (*solvere*) the "thing" (*res*) which may be in his possession, but it belongs to someone else by *obligatio*.

construction of “X is Y”, then it is pointless to note that definitions share a similar sentence structure which happens to be “X is Y”. That would be circular reasoning. During a slow reading of the *Institutes* and the title in the *Digest* collecting juristic passages related to “The meaning of expressions” (D.50.16), I consciously dismissed any formal rules for identifying definitions in the text. I was keeping an open mind and used my reading intuition, so that common characteristics may arise with no externally enforced formal rules. At the same time, I was also observing myself so that I could understand what literary signs my reading intuition responds to. I was trying to bring the unconscious mechanism of identifying a “definition” to the surface.⁴⁷²

When I articulated the observations collected in this manner, I found that sentence structure is by far the most important factor. The nominal construction of “X is Y” activates the reader’s alertness for a possible definition. Having marked a number of possible instances of definitions, I realised that the nominal construction can be expressed without the copula. Passive forms of various verbs of saying and perception can play exactly the same role. Sentences in the *Institutes* where the *explanandum* X “is said” (*dicitur*), “named” (*vocatur*), “called” (*appellantur*), “perceived” (*videtur*), or “understood” (*intellegitur*)⁴⁷³ to be the *explanans* Y have been noted as variations of the same nominal construction which highlights the subject in a focus position and provides a nominal predicate for its meaning. Additionally, we find the passive forms of “indicated” (*significatur*) and “accepted” (*accipitur*) in this role in the juristic passages collected in “The meaning of expressions” title of the *Digest*.⁴⁷⁴

⁴⁷² The “reflexive analysis where reader-as-analyst and analyst-as-reader are indistinguishably fused” is motivated by McHoul (1982). See footnote 468 above.

⁴⁷³ Examples of variations of the nominal sentence structure where passive forms of verbs of saying and perception appear instead of the copula use of the verb “be”:

(1) *dicitur*: “By the authority of the emperor we adopt those males and females who are sui iuris. This type of adoption is called adrogatio.” – *imperatoris auctoritate adoptamus eos easve, qui quaeve sui iuris sunt. quae species adoptionis dicitur adrogatio* (J.1.11.1);

(2) *vocatur*: “what is peculiar to a state is called civil law” – *id ipsius proprium civitatis est vocaturque ius civile* (J.1.2.1);

(3) *appellantur*: “whatever the emperor establishes by a public letter, legislates after learning [about a specific case], or orders by an edict, it is agreed to be [valid] law: these are what are called pronouncements” – *quodcumque igitur imperator per epistulam constituit vel cognoscens decrevit vel edicto praecepit, legem esse constat: haec sunt, quae constitutiones appellantur* (J.1.2.6);

(4) *videtur*: “In general, with a price allocated for you, it is perceived as hire.” – *alioquin mercede interveniente locatus tibi usus rei videtur* (J.3.14.2);

(5) *intellegitur*: “the one who cannot speak at all, and not the one who speaks with difficulty, is understood to be dumb” – *mutus is intellegitur, qui eloqui nihil potest, non qui tarde loquitur* (J.2.12.3).

⁴⁷⁴ In addition to the passive verbal expressions listed in the previous footnote, the *Digest* also uses the following ones:

Following the track of verbs of saying and perception, I soon detected another possible variation when the nominal sentence structure is turned into a double object construction. Here the verb of saying and perception is used in an active form, whereas the *explanandum* X and the *explanans* Y appear as objects: one as the object which the verb describes, and the other as its fitting description.⁴⁷⁵ Examples of this variation are the sentences in the *Institutes* with the verb forms “we call” (*loquimur*) or “we name” (*appellamus*),⁴⁷⁶ whereas the juristic passages in the *Digest* also use the forms “we mean” (*significamus*), “we talk of” (*dicimus*), and “we regard” (*habemus*).⁴⁷⁷

Certain verbs also allow a variation where the *explanandum* X is the subject, the *explanans* Y is the object, and they are connected together by an active verb form. Among others, *explanandum* X “signifies” (*significat*), “corresponds to” (*pertinet*), “includes” (*continet*) and “relates to” (*respicit ad*) to *explanans* Y.⁴⁷⁸ This variation features predominantly in the juristic passages in “The meaning

(6) *significatur*: “By the expression ‘as long as she is married’ first marriages are meant.” – *hoc sermone dum nupta erit primae nuptiae significantur*. (Pomponius, Sabinus 6, D.50.16.89)

(7) *accipitur*: “Capere is regarded as something which takes effect, accipere as something which occurs even if someone has not acquired something to hold it.” – *capere cum effectu accipitur: accipere, et si quis no sic accepit, ut habeat* (Paul, Edict 73, D.50.16.71.pr)

⁴⁷⁵ The *explanandum* is the direct object of the sentence marked by the accusative form. The *explanans* is the indirect object of the sentence marked either by the accusative or following a preposition corresponding to the verb used in the sentence.

⁴⁷⁶ Examples of double object constructions where active forms of verbs of saying and perception appear along with the *explanandum* and the *explanans* as objects:

(1) *loquimur*: “We call him deaf the one who does not hear at all, and not the one who hears with difficulty.” – *de eo surdo loquimur, qui omnino non exaudit, non qui tarde exaudit* (J.2.12.3)

(2) *appellamus*: “the mixing of male and female which we call marriage” – *maris atque feminae coniugatio quam nos matrimonium appellamus* (J.1.2.pr).

⁴⁷⁷ (3) *significamus*: “In the designation ‘movable’ we mean also ‘mobile’.” – *mouentium, item mobilium appellatione idem significamus* (Celsus, Digest 19, D.50.16.93);

(4) *dicimus*: “We talk of several persons as a household under a peculiar legal status if they are under naturally or legally subjected to the power of a single person.” – *iure proprio familiam dicimus plures personas, quae sunt sub unius potestate aut natura aut iure subiectae* (Ulpian, Edict 46, D.50.16.195.2);

(5) *habemus*: “We do not regard as being ‘public’ those things which are sacred or hallowed or designed for public use, but those things which are, as it were, the property of communities.” – *Inter publica habemus non sacra nec religiosa nec quae publicis usibus destinata sunt: sed si qua sunt civitatum velut bona* (Ulpian, Edict 10, D.50.16.17.pr).

⁴⁷⁸ Examples of subject-verb-object construction from D.50.16:

(1) *significat*: “The designation ‘weapons’ does not only include such things as shields, swords and helmets, but sticks and stones.” – *Armorum appellatio non utique scuta et gladios et galeas significat, sed et fustes et lapides* (Gaius, Provincial Edict 21, D.50.16.41);

(2) *pertinet*: “The designation of *locus* relates not only to country but also to urban properties according to Labeo.” – *Loci appellationem non solum ad rustica, verum ad urbana quoque praedia pertinere Labeo scribit* (Ulpian, Edict 69, D.50.16.60.1);

of expressions” (D.50.16). The *Digest*’s compiling principle is to demonstrate the use of legal expressions, rather than offering definitions for terms like the *Institutes*. The two purposes are mostly commensurate, but they approach legal terms at two levels of abstraction: one targeting the term itself (definitions in the *Institutes*), the other targeting the use of the term (the meaning of expressions in the *Digest*). The difference is also underlined by the fact that the juristic passages in the *Digest* allow to build a vocabulary naming the *explanandum* explicitly as an “expression” (*apellatio* or *significatio*), “word” (*verbum*), “name” (*nomen*) or “saying” (*sermo*). Most of the collected passages seem to have been identified according to this abstract vocabulary which puts the *explanandum* in a strong focus position. A telling sign of the different approach is that, notwithstanding the copula *est*, various forms of the verbs “signify” (*significare*) and “include” (*continere*) are used most often, whereas *apellatio* and *verbum* are the most common expressions for naming the legal term itself.⁴⁷⁹

Even though the nominal construction or one of its variations activates the reader’s alertness to the possible presence of a definition, the sentence also needs to appear at a strategically important point of the text in order to be recognised as a definition. So that the reader should expect them, definitions are at times introduced by rhetorical means. For example, the first sentence of the section on actions in J.4.6.pr directs the reader’s attention to the key concept before it offers a definition: “It remains that we speak about actions. An action is nothing else than the right of prosecuting in court.”⁴⁸⁰ The focus position of the *explanandum* X (“action”) is emphasised by the first person plural voice which appears at strategically important milestones of the *Institutes*. The intuition of identifying a definition, which is predominantly based on the nominal construction or on one of its variants, is reinforced here by the structure of the paragraph and the context. The text creates the expectation that a concept needs to be explained. That is, before the text explains X, it declares that X needs explanation.

(3) *continet*: “Marcellus as reported by Julian remarks that by the word ‘destroyed’, cut up, broken, and forcibly abstracted are meant.” – *Marcellus apud Iulianum notat verbo perisse et scissum et fractum contineri et vi raptum* (Ulpian, Edict 5, D.50.16.9);

(4) *respicit ad*: “For the designation “public” relates in a number of cases to the Roman people.” – *nam publica appellatio in compluribus causis ad populum Romanum respicit* (Gaius, Provincial Edict 3, D.50.16.16).

⁴⁷⁹ For the standard form, see the example of passage (1) with *significat* in the previous footnote (Gaius, Provincial Edict 21, D.50.16.41).

⁴⁸⁰ J.4.6.pr: *Superest, ut de actionibus loquamur. actio autem nihil aliud est, quam ius persequendi iudicio quod sibi debetur.*

6.1.3 The “defective” definition of *obligatio* in the *Institutes*

The definition of obligation in Book 3 of the *Institutes* combines a number of the above discussed elements. Let us consider the definition in its immediate context:

J.3.13.pr-1

Nunc transeamus ad obligationes. obligatio est iuris vinculum, quo necessitate adstringimur alicuius solvendae rei, secundum nostrae civitatis iura. 1. Omnium autem obligationum summa divisio in duo genera deducitur: namque aut civiles sunt aut praetoriae.

Let us now proceed to obligations. Obligation is a bond of law by which we are tied to someone by the necessity of releasing a *res* according to the laws of our state. 1. The primary division of all obligations breaks down into two *genera*: for [obligations] are either civil or praetorian.

The opening sentence turns the reader’s attention to the term “obligation”. The sentence generates the expectation for further explanation of the term which is left hanging in the laconic first sentence. “Let us now proceed to obligations” – and as if something is missing, the reader asks: “But what are obligations actually?” The expectation is met by the next sentence which provides a definition in a standard nominal construction with the copula (*est*). Finally, the third sentence supplements the definition with a classification of obligations.

To our knowledge, only the early 3rd century jurist Paul provided a definition for the concept of *obligatio*⁴⁸¹ before the *Institutes’* attempt. The concept is undefined in the *Institutes* of Gaius (ca. 161) who, while offering a hierarchical and architectonic framework for the elementary study of Roman law, is often reluctant to give conceptually rigid definitions for abstract terms. For example, even though Gaius says that theft (*furtum*) is “generally when someone handles another person’s object without the owner’s consent”,⁴⁸² a few paragraphs later he mentions the possibility of committing theft against one’s own property when the particular object is pledged or otherwise due to another person.⁴⁸³

⁴⁸¹ “The essence of obligations does not consist in that it makes some property or a servitude ours, but that it binds another person to give, do, or perform something for us.” – *Obligationum substantia non in eo consistit, ut aliquod corpus nostrum aut servitutem nostram faciat, sed ut alium nobis obstringat ad dandum aliquid vel faciendum vel praestandum.* (Paul, *Institutes* 2, D.44.7.3.pr)

⁴⁸² G.3.195: *Furtum autem fit ... generaliter cum quis rem alienam invito domino contrectat.*

⁴⁸³ G.3.200: *Aliquando etiam suae rei quisque furtum committit, veluti si debitor rem, quam creditori pignori dedit, subtraxerit, vel si bonae fidei possessori rem meam possidenti subriperim.* – On the definition of *furtum* in Gaius and in Roman law in general, see Watson (1991).

Contrary to the definition of corporeal and incorporeal things which employed plain physical language (i.e. “which can and cannot be touched”),⁴⁸⁴ the definition of obligation in Justinian’s *Institutes* is based on a metaphor.⁴⁸⁵ In a landmark essay in the philosophy of science, Mary Hesse notes that almost every foundational concept of the modern sciences is metaphorical in nature.⁴⁸⁶ Her insight seems to apply to hard and soft sciences alike as well as to the law of ancient times.

The definition of obligation provided by Justinian consists of three principal parts as outlined in a tabular format below.

Table 6.1: Defining *obligatio* in Justinian’s *Institutes* (J.3.13.pr)

<i>obligatio est</i>	Obligation is
(1) <i>iuris vinculum</i> ,	(1) a bond of law,
(2) <i>quo necessitate adstringimur alicuius solvendae rei</i> ,	(2) by which we are tied to someone by the necessity of releasing a <i>res</i>
(3) <i>secundum nostrae civitatis iura</i> .	(3) according to the laws of our state.

The verbal noun *obligatio* is created by the abstract noun⁴⁸⁷ ending of –tio from the verb *obligo* which means “to tie up”.⁴⁸⁸ The metaphorical use of this verb is predominant. In various moral, legal and religious contexts, *obligo* is used to express the conveyance of a binding responsibility.⁴⁸⁹ In legal Latin, as Fritz Schulz notes, *obligare rem* and *obligare personam* are standard expressions: the former means “to bind a thing” by giving it in mortgage, while the latter means “to bind a person” by imposing a duty upon him. The metaphorical use of the verb form predates the abstract noun form of *obligatio*,⁴⁹⁰ but once the systematic legal concept of *obligatio* has been established, according to

⁴⁸⁴ See above in footnote 385.

⁴⁸⁵ Peter Birks notes that “the word ‘obligation’ denotes an incorporeal asset, but it is based on a very corporeal metaphor.” Birks (1997a):8.

⁴⁸⁶ See Hesse (1993) and her chapter “The Explanatory Function of Metaphor” in Hesse (1963):157-177. For a reappraisal of Hesse in light of metaphor research see Rentetzi (2005).

⁴⁸⁷ On the use of action nouns in Roman law, see Daube (1969):24-29.

⁴⁸⁸ Glare (2012):1214. In Horace’s *Ode* 17.67, the passive participle form of *obligo* is used to describe Prometheus in chains: *optat Prometheus obligatus aliti* – “Prometheus yearns, chained fast to the bird of prey.”

⁴⁸⁹ Glare (2012):1214-1215.

⁴⁹⁰ Schulz (1951):455.

Schulz, it can “prevail over the concept of enforcement (*actio*)”.⁴⁹¹ Apparently, an abstract term is difficult to create, but once created, it is difficult to dismiss.⁴⁹²

In the first principal part of the definition, *obligatio* is related to *vinculum*, the chains, bonds, or fetters tied on an imprisoned person. The word predominantly means some sort of physical restraints, whereas its metaphorical use is rare.⁴⁹³ The strong physical image of imprisonment is qualified by the genitive of *ius*, a complicated term of varied uses which is commonly understood as “the law in general” as opposed to *lex* as “a statute which is a source of *ius*”.⁴⁹⁴ In the opening title of Justinian’s *Digest*, Paul is quoted as defining *ius* in its first and widest sense as “whatever is just and good”.⁴⁹⁵ When read against Paul’s definition, the metaphor of *iuris vinculum* expresses the internal tension encapsulated in *obligatio* which restricts the person, yet, which is just and good. The second principal part of the definition pushes the imagery of *vinculum* even further. The physical, non-metaphorical meaning of the Latin words *adstringimur* (“we are tied...”) and *solvendae* (“for the sake of releasing”) both contribute to the rich imagery of bonds.⁴⁹⁶ The three-part definition draws the term *obligatio* from the vocabulary relating to bonds (*vinculum*, *adstringo* and *solvo*) to the abstract vocabulary of legal terms (*ius*, *res* and *civitas*).

The abstract noun *necessitas* has a key function in merging the two vocabularies. It derives from the abstract adjective *necesse* meaning “indispensable” or “inevitable”, and thereby in a more abstract sense “necessarily true” or “compulsory”. Between the semantic fields of physical restraint and legal abstraction, we find *obligatio* which functions as the target term of the definition and *necessitas* which is used as the vehicle term. The former is closer to the physical vocabulary of bonds, the latter is closer to the abstract vocabulary of law. As the table below illustrates, the definition draws *obligatio* from its physical connotations to the semantic field of law by the force of its abstract

⁴⁹¹ Collinet adds that “this is due to the triumph of the informal *extra ordinem* procedure and especially of the pre-Justinian procedure by *libellus*.” Collinet (1932):493.

⁴⁹² The difficult birth of abstract legal terms and their resistance once born are in line with the theory of knowledge systems applied to law in Collins (1997).

⁴⁹³ Glare (2012):2065-2066.

⁴⁹⁴ Berger (1953):525.

⁴⁹⁵ Paul, Ad Sabinum 14, D.1.1.11.pr: *Ius pluribus modis dicitur: uno modo, cum id quod semper aequum ac bonum est ius dicitur, ut est ius naturale. altero modo, quod omnibus aut pluribus in quaque civitate utile est, ut est ius civile.* – “The term ‘law’ is used in several senses: in one sense, when law is used as meaning what is always fair and good, it is natural law, in the other, as meaning what is in the interest of everyone, or a majority in each civitas, it is civil law.” – On the various abstract concepts in the passage by Paul, see Schiller (1978):549-560.

⁴⁹⁶ The verbs *stringo* and *solvo* are predominantly used in various contexts of physical restraint. Glare (2012):1828. and 1787-1789.

grammatical form which is reinforced by the association with *necessitas*.⁴⁹⁷ The definition manages to enrich the legal vocabulary by seizing lexical items from an otherwise unrelated vocabulary. *Obligatio* and *necessitas* belong to the language of law more naturally on account of their specific grammatical forms as abstract nouns than to the physical language of bonds. This is exactly why the definition seems to achieve its goal.

Table 6.2: Making *obligatio* abstract by means of a definition

Vocabulary of law (abstract)		Vocabulary of bonds (physical)
<i>ius</i>	<i>obligatio</i>	<i>vinculum</i>
<i>res</i>	←	<i>adstringo</i>
<i>civitas</i>	(<i>necessitas</i>)	<i>solvo</i>

The definition associates *obligatio* with the vocabulary of law while maintaining its physical connotation with bonds, but it does not actually explain how the two vocabularies relate to each other, and what *obligatio* actually means. The creative mental processing by which the semantic fields of bonds and of law are brought into contact is left to the reader's imagination. The reader is in no position to tell in what sense the phrase "we are tied to someone" is used or what "releasing a *res*" means. The third part of the definition which informs that "being tied" and "being released" are "according to the laws of our state" informs the reader, the novice student of law, that the ambiguities are dealt with in other parts of the legal system. This third part effectively postpones the attempt of defining *obligatio* until the reader acquires a good understanding what "the laws of our state" (*nostrae civitatis iura*) are. Without any practical consequence, this definition of *obligatio* is not "binding". In the normative logical sense, *obligatio* is not defined either by the classical jurists or by Justinian's *Institutes*.

Two classic authors of Roman law, Paul Collinet and Fritz Schulz, note the striking absence of set concepts and definitions in the early periods of Roman law. Collinet writes that "at the beginning of Roman law, not only the word *contractus*, but also the idea or concept of contract was unknown".⁴⁹⁸ In a similar vein, Schulz talks about the "disinclination for general conceptions... and abstract formulations of legal rules".⁴⁹⁹ He supports his argument about the absence of an early definition of

⁴⁹⁷ Raymond Gibbs reviews what psycholinguists call "the embodied, metaphoric nature of many abstract concepts" in Gibbs (1996). Conceptual metaphor theory goes back to the influential work of Lakoff et al. (1980). The limitations of the theory has been summarised by McGlone (2007).

⁴⁹⁸ Collinet (1932):488.

⁴⁹⁹ Schulz (1936):48.

contractus and *obligatio* with the lawyers' disinclination for conceptual rigidity. Schulz quotes the 1st century BCE Cicero who writes that "what has been expressed in one idea is split up infinitely."⁵⁰⁰ Cicero's contemporary, the jurist Iavolenus Priscus, defends the lawyers' disinclination by saying that "every definition in civil law is dangerous, for rare are those that cannot be subverted".⁵⁰¹ A definition which does not say anything, like that of *obligatio*, is free from the danger of being subverted. Ambiguity prevails as the scope and use of the term *obligatio* remains to be specified and adapted as circumstances require.

The *Institutes'* definition of *obligatio* remains effective, even if it does not meet the normative criteria of modern logic. The compound sentence in J.3.13.pr has the descriptive characteristics of definition which activates the reader's attention, introduces an idiosyncratic abstract term (*obligatio*), associates it with the vocabulary of law, but postpones its understanding. This is exactly what the *Institutes* wants to achieve in the first few lines of a book-long section about the complex topic of obligations. According to Justinian's *Constitutio Imperatoriam*, the *Institutes* is the "first cradle of law" (*prima legum cunabula*) "for young people keen on studying law" (*cupidae legum iuventuti*). If so, then the ambiguous definition of *obligatio* makes good sense. It familiarises the novice student of law with the term and postpones its explanation until a better understanding of "the laws of our state" is acquired.

6.2 Labels in the Talmud Yerushalmi

6.2.1 Labels and ostensive definitions

What I call label would be ordinarily grouped together with the ostensive definition in modern logic which "points" to an item to explain what term X stands for. The most common use of the ostensive definition is found in language acquisition. Inasmuch as the speaker is capable of grouping similar real-life items, she understands that they could be referred to by one term. The speaker only needs

⁵⁰⁰ *De legibus* 2.19.47: *quod positum est in una cognitio, id infinitum dispertiuntur*. (Translation is mine.) The quotation from Cicero is overtranslated with an anachronistically modern taste in Schulz: "the discussion [of the lawyers] is split up into endless cases and no abstract summary is made." See the discussion of the passage in Schulz (1936):49-51.

⁵⁰¹ *Omnis definitio in iure civili periculosa est; parum est enim, ut non subverti posset* (Iavolenus, Letters 11, D.50.17.202) – Peter Birks adds that "an English lawyer might feel an involuntary affection for the first-century jurist, Iavolenus Priscus. He was after all imperial law officer (*iuridicus*) for the province of Britain, and his most famous apophthegm might have been conceived precisely to be the motto of modern English jurisprudence in its post-Wittgensteinian phase." Birks (1997a):6.

some help with pairing, so that she would be eventually able to say that this red rounded edible object in the bowl in front of her is what the English language calls “apple”.⁵⁰²

The use of label in ancient legal texts is similar to some extent to the above scenario. The reader understands the words in the text, but she acquires a “new language” of the law which uses familiar words in unfamiliar fashion. Contrary to language acquisition, however, it is not term X *as a word* which is unknown, but *its use* in the language of law. Additionally, the use of a particular term in the language of law is not arbitrary. The red rounded edible object in the bowl is defined as “apple”, but as long as the speakers of the language agree on the use, it could be defined as “tomato”, “rabbit” or “mz/x”. Contrary to the arbitrariness of natural language acquisition, the use of term in legal language is grounded. The use is either self-explanatory because it relies on a culturally defined common sense,⁵⁰³ or the use is determined by an authoritative source which makes that particular use of the term inevitable.

That authoritative source in the *Yerushalmi*’s case is the Bible or the *Mishnah*. The label does not say what term X *is* or *needs to be*, it only demonstrates its use in a new context by labelling separate cases by the term. There is no abstract reference from which new cases can be deduced, nor an instructing list which would allow an analogical expansion of the term to cover more cases. The reader is only instructed by the very method of labelling about how new cases may be grouped under the same label.

A similar descriptive approach can be applied to labels as to definitions. While reading the *Yerushalmi*, I realised that where a definition would be in place, the text uses a different strategy. Terms are introduced as self-explanatory or as part of the authoritative vocabulary of the Bible and the *Mishnah*, but they do not trigger an explanation. The reader’s focus is directed to them, the text pauses just like it would before a definition, but then the definition does not occur. The text continues in its normal manner by discussing case after case with the legal response they generate. Cases are put under a particular label only retrospectively or by hindsight. This usually comes in the form of a short nominal sentence using a deictic pronoun, that is, in the form of a sentence which reads “This is X.”

⁵⁰² A classic article discussing ostensive definitions and challenging the traditional doctrine of “meaning” is Putnam (1973). For the ambiguity of ostensive definitions in language acquisition, see the thought experiment of “radical translation” in Quine (2013):23-27.

⁵⁰³ Deslauriers regards the self-explanatory/non-self-explanatory distinction fundamental in Aristotle’s theory of definition. A self-explanatory term has nothing else than itself as the term’s “origin” or “source” (ἀπὸ τοῦ), and, therefore, a “what is it” type (τί ἐστίν) definition would result in circularity. Barnes notes that Aristotle’s argument is “muddled” about the nature of self-explanatory terms, but Deslauriers offers a neat reconstruction. See Barnes (1994):221, Deslauriers (1990):3-14 and Deslauriers (2007):55-65.

6.2.2 Rabbinic strategies of establishing legal terms

The reader who has been accustomed to the language of modern law, and especially to the distinction between general and specific rules in civilian legal systems⁵⁰⁴ would be surprised to notice the almost complete absence of definitions in tractate *Bava Qamma* of the *Talmud Yerushalmi*. The single instance resembling a definition appears in a *Mishnah* lemma (yBQ 2:6 (2d)) on which the *Yerushalmi* comments.

אי זהו תם ואי זהו מועד מועד שהעידו בו שלשה ימים ותם שיחזור בו שלשה דברי רבי יהודה

Which one [cattle] is tame and which one is an attested [danger]? The attested is the one against which they testified [that it had been causing damage] for three [consecutive] days. The tame is the one which he does not return to it [i.e. its damage causing behaviour] for three [consecutive days]. The words of Rabbi Yehudah.

The opening double question directs the reader's attention to the key terms "tame" and "attested danger", it identifies them as the terms begging explanation (*explanandum*). The two subsequent phrases place these terms in an opening focus position, link the two halves of the nominal construction with the (zero) copula,⁵⁰⁵ and finally provide an explanation in the subordinate sentence introduced by the connector *ו*- (*explanans*).⁵⁰⁶ The identification of X as *explanandum* in the first sentence, and the subsequent nominal construction "X is Y" allows to call the above example as a definition in the discourse sense.

In the context of the whole tractate, the peculiarities of the definition of "tame" and "attested danger" in yBQ 2:6 (2d) are more remarkable than their conformity to the definition form. Let us

⁵⁰⁴ The clear distinction between general and specific rules is characteristic to the German *Bürgerliches Gesetzbuch* (BGB) which has an *Allgemeiner* and a *Besonderer Teil*. Civil codes in legal systems following the German Pandectist method have the same structure, e.g. the Hungarian *Polgári Törvénykönyv* (Ptk.).

⁵⁰⁵ As the classic Biblical Hebrew grammar of Wilhelm Gesenius puts it, "the syntactical relation existing between the subject and predicate of a noun-clause is as a rule expressed by simple juxtaposition, without a *copula* of any kind." Gesenius (1909):§141f, p. 453. The nominal construction and the phenomenon of the zero copula in Semitic languages in general is discussed by Cohen (1984).

⁵⁰⁶ Some Hebrew grammars describe *ו*- (*she*-) as a "substantiviser". According to this understanding, what other languages express with a subordinate clause is usually expressed in Hebrew by a "substantival clause". The standard markers of a substantival clause is either *כי* (*ki*) or *אשר* ('*asher*). The latter is abbreviated with the connector *ו*- from Mishnaic Hebrew onwards. The phenomenon is explained for Biblical Hebrew by Paul Joüon and Takamitsu Muraoka: "A nominal or verbal clause may form a unit which can be considered and treated as a substantive. Thus 'I know *that* you arrived' is equivalent to 'I know (of) your arrival'; the clause 'that you arrived' is a substantival clause equivalent to the substantive *your arrival*, and just as the latter is an object, *that you arrived* is an object clause." Joüon et al. (2006):§157a, p. 589. Joüon and Muraoka's "substantival clause" provides a unified explanation for the use of *אשר* which are separated into different grammatical functions (demonstrative, object clause, relative etc.) by Segal when he describes the connector *ו*- as Rabbinic Hebrew's equivalent with the biblical *אשר*. Pérez Fernández depends largely on Segal. Neither of them opts for Joüon and Muraoka's "substantival" approach. Segal (1927):204-206 and Pérez Fernández (1997):50-53.

consider these peculiarities one by one which will assist to find an alternative way to approach the tractate's strategy of establishing legal terms.

Firstly, the definition of "tame" and "attested danger" is part of the *Mishnah* lemma in the *Yerushalmi* text. The *Mishnah* lemma constitutes the foundational layer of the text on which the *Yerushalmi's* commentary rests. The *Yerushalmi* preserves the text of the *Mishnah* in the lemmata virtually unaltered.⁵⁰⁷ These dissected chunks of *Mishnah* texts form an integral part of the *Yerushalmi's* text, but the boundary between the *Mishnah* lemma and the *Yerushalmi's* corresponding commentary is always clearly marked.

Secondly, contrary to Justinian's *Institutes* where definitions appear in bulk, the definition of "tame" and "attested danger" in yBQ 2:4 (2d) is an isolated case, the one and only definition in the whole tractate. The *Institutes* employs the definition form whenever an unknown or ambiguous term is introduced, and it does not leave the relating terms of the particular legal subfield hanging in the air. If one term is defined, so are the rest. Definition is a continuous *practice*, a specific *mindset* for the *Institutes* which tractate *Bava Qamma* does not exercise.

Thirdly, the definition of "tame" and "attested danger" comes well after these terms are first used in tractate *Bava Qamma* of the *Yerushalmi*. In contrast, the *Institutes* provide a definition at the first appearance of the unknown or ambiguous term, unless the term is secondary to the legal topic discussed in which case the definition may be delayed. In yBQ, the terms "tame" and "attested danger" appear for the first time in a *Mishnah* lemma which lists five kinds of "tame" and "attested danger".⁵⁰⁸ The *Yerushalmi's* commentary subsequently contributes to the understanding of these terms, but not by the definition form. The *Mishnah* lemma following the list of five kinds of "tame" and "attested danger" enumerates animals which are considered to be an attested danger.⁵⁰⁹ The *Yerushalmi's* subsequent commentary in yBQ 2:1 (2d) suggests that an animal is tame with regard to a damaging action "which does not fit its habit" (בשאין דרכה לכן). The terms "tame" and "attested danger" appear a few more times in the tractate until the text eventually offers the definition in yBQ

⁵⁰⁷ The fascinating fact that the *Mishnah* is virtually the same as it appears independently in the lemma layer of the *Yerushalmi* and the *Bavli* strongly suggests that the text of the *Mishnah* was not accommodated to the *Yerushalmi's* and the *Bavli's* needs. The *Mishnah* text is, therefore, generally thought to be unaltered and genuine, a good representation of what the text might have been when Rabbi Judah ha-Nasi has "published" it around 220. For the reliability of the *Mishnah* text, see Stemberger (2011):157-158. For the "oral publication" of the *Mishnah*, see "The publication of the *Mishnah*" in Lieberman (1962):83-99.

⁵⁰⁸ yBQ 1:4 (2a): "Five tame and five attested [danger]: the cattle is neither an attested [danger] to gore, nor to push, nor to bite, nor to lie down, nor to kick." – חמשה תמין וחמשה מועדין הבהמה אינה מועדת לא ליגח ולא ליגוף – ולא לשוך ולא לרבוץ ולא לבעוט

⁵⁰⁹ yBQ 1:5 (2a): "The wolf and the lion, the bear and the tiger, and the panther and the snake, behold they are attested." – הזאב והארי הדוב והנמר והברדלס והנחש הרי אילו מועדין -

2:6 (2d) as quoted above at the beginning of this section. That is to say, definition is preceded by two other discourse forms with a similar function: the classificatory list (“Five tame and five attested...” in yBQ 1:4 (2a)) and the label (“The wolf and the lion..., behold they are attested” in yBQ 1:5 (2a)). What is remarkable about tractate *Bava Qamma* in the *Yerushalmi* is that the standard strategies of establishing legal terms (intensional and extensional definitions) are employed only in the *Mishnah* layer.

The definition strategy starts from a broad and relatively simple description approximating the complexity of the legal term. The description may be later modified and specified through the examination of particular cases, or supplemented by exceptions in order to achieve a more nuanced understanding of the term. The labelling strategy works in the opposite direction and starts from the specific cases. The accumulation of cases under the same label gradually builds a sense of the appropriate application of the term, but it resists the formulation of a general description. The label is simply a name which signifies that individual cases belong to the same group.

Ludwig Wittgenstein’s idea of the “family resemblance”⁵¹⁰ may illustrate how labels work. The cases under one label relate to each other as members of a family: some members share some common characteristics (e.g. dark hair, brown eyes), other members share others (e.g. hook nose, full lips). Different subgroups of the family sharing a particular characteristic cross and overlap each other – but there is no single characteristic that all members of the family share. Nevertheless, an outsider is capable of recognising the family relationship and identify new members after she have met a few from the same family. The skill of recognition is not abstract, but a practical one which the outsider would struggle to put into words.

The student of Rabbinic law acquires a similar practical skill of associating cases with labels by encountering the cases accumulated in the *Yerushalmi* text. There is an added difficulty the student of Rabbinic law had to face which originates in a crucial difference between the family resemblance of family members and that of legal cases. The former is based on a natural relationship while the latter is an arbitrary intellectual construction. There are undisputable ways to prove that a person belongs to a family (e.g. DNA profile), while the association of a legal case with a label is a matter of debate. It is probably for this reason that the labelling strategy is presented as a conflict of opinions

⁵¹⁰ The idea of *Familienähnlichkeit* appears in several places in Wittgenstein’s works, but its fullest exposition is found in §§65-71 of the posthumously published *Philosophical Investigations*. Wittgenstein demonstrates the idea of *Familienähnlichkeit* on the example of games: “I can think of no better expression to characterize these similarities [of games] than ‘family resemblances’; for the various resemblances between members of a family build, features, colour of eyes, gait, temperament, and so on and so forth overlap and criss-cross in the same way.” Wittgenstein (2009):§67, 36e.

of named authorities. The student of Rabbinic law does not only acquire the practical skill of associating labels with cases, but also the skill of evaluating different opinions.

6.2.3 Variations of labelling in the Talmud Yerushalmi

The following example concerning the phrase “sale in error” (מקח טעות) presents the standard format of the labelling strategy. The phrase “sale in error”, which appears a few times in the *Mishnah*, is treated as self-explanatory without an accompanying definition. The phrase is applied to a case which is not presented in the Bible or the *Mishnah*. The labelling is associated with a named authority (Rav) who is in debate with one of his colleagues (Shmuel) about the validity of the labelling.⁵¹¹

If someone sells a bull to his fellow, and it is found to be goring – Rav says, “It is a sale in error” (מקח טעות הוא), but Shmuel says, “He may tell him: ‘I sold it to you for slaughter’”.⁵¹²

The deictic pronoun (“this”/“that” – הוא, hu’) puts the phrase “sale in error” in a focus position, and underlines its terminological use which activates a network of related passages with the same phrase. Among others, “sale in error” is used in mKetubbot 1:6 where it describes the acquisition of a woman for marriage who does not show the signs of virginity.⁵¹³ In mKetubbot 7:8, the phrase is applied to the marital acquisition of a woman with hidden bodily defects.⁵¹⁴ Finally, in mBava Batra 6:3, the phrase describes the sale of wine which has later turned sour.⁵¹⁵ In all of these cases, the label indicates that the transaction should be considered void, but it leaves open what the particular legal response should be. The phrase “sale in error” as a label highlights a structural similarity, a family resemblance between different transactions.

Similar to the definition form, the label also has variations. The example above presents the paradigmatic form which is constituted by three steps: (1) the presentation of the word or phrase

⁵¹¹ A series of debated purchases is also found in ySheviit 5:3 (26a). While they are labelled as “sales in error” by Rav, Shmuel considers them valid. The items quoted here from yBQ 4:7 (4c) appear as the first in the series in ySheviit 5:3 (26a).

⁵¹² yBQ 4:7 (4c): המקח טעות הוא ושמאל אמר יכיל הוא מימר ליה לשחיטה מכרתיו לך

⁵¹³ mKet 1:6: “If someone marries a woman and does not find in her the signs of virginity (בתולים) ... he claims, ‘...my sale was a sale in error (מקח טעות).’”

⁵¹⁴ mKet 7:8: “If she [the betrothed woman] got bodily defects (מומין), ...and entered the husband’s domain, the husband has to bring evidence that she had had those defects before she was betrothed, and his sale was therefore a sale in error.”

⁵¹⁵ mBB 6:3: “If someone sells wine to his fellow-man and it turns sour, he is not liable – but if it is known that his wife [tends] to turn sour, then it is a sale in error.”

used as the label (or the lack of it); (2) the presentation of the case to which the label is applied; (3) and the operation which relates the case to the label.

In step 1, if it is borrowed from the vocabulary of the Bible or the *Mishnah*, the label usually appears as part of a quote supporting the reasoning, or even as part of the lemma on which the *Yerushalmi* comments. The label, however, is often the *Yerushalmi*'s innovation in which case it is left unexplained and treated as self-explanatory. The label's meaning gradually becomes clear from its use in different contexts.

In step 2, the case may be presented from the Bible or the *Mishnah*, or it can describe a new scenario with no biblical or Mishnaic origin. The selling of the goring bull (yBQ 2:6 (2d)) is an example for the latter, its Mishnaic parallels with the phrase "sale in error" (mKetubbot 1:6, 7:8 and mBava Batra 6:3) are examples for the former.

In step 3, the label and the case are related to each other in a grammatical structure. In tractate *Bava Qamma* of the *Yerushalmi*, I have identified three major variations. The first one is the nuclear nominal sentence structure with deictic pronoun exemplified above ("It is a sale in error").⁵¹⁶ The sentence includes a nominal subject and a nominal predicate. The subject slot is occupied by the deictic pronoun (e.g. "that"), the predicate slot by the label (e.g. "sale in error").

The second one is the marking of the label with the definite article. In the following example, the definite article signifies that "tooth" (שן) is to be understood terminologically. The "tooth" does not appear in the immediate context to which the definite article could point. Highlighting "tooth" by the definite article refers the reader to the terminological vocabulary, and to the parallel passages where "tooth" is used in a similarly abstract sense.

If he put his produce in a private courtyard without permission and a bull came from another place and ate them, he is not liable. If it was hurt by them, he is not liable. This implies that the "tooth" (שהשן) is not liable in a courtyard which belongs to neither party.⁵¹⁷

The third variation of the labelling strategy is the simple sentence structure of comparison. Here the comparative prefix (-כּ - ki-) signifies that what follows should not be understood literally, but in an abstract terminological sense. The structure explains locally what that abstract terminological sense is. Similar to other variations of the labelling strategy, the meaning is to be derived from the use in

⁵¹⁶ Further examples from yBava Qamma are (1) the opening passage yBQ 1:1 (2a): "This is the horn" (זה הקרן), "This is the foot" (זה הרגל) and "This is the tooth" (זה השן); (2) yBQ 4:2 (4a): "From what time is it 'tame'?" (אימתי הוא תם); (3) yBQ 4:9 (4c): "It is 'false despair'" (יִיאֹשׁ טְעוֹת הוּא); (4) and passages inquiring about the label with the common exegetical operator "what about that?" (מהו), e.g. in yBQ 3:5 (3d)

⁵¹⁷ yBQ 5:4: הכניס פירותיו לחצר בעל הבית שלא ברשות ובא שור ממקום אחר ואכלן פטור הוּזַק בהן פטור הדא אמרה שהשן פטורה בחצר שאינה לשניהן

other passages. The cross-references created by the label builds a network of related passages which accumulates enough evidence to build a sense for the label's use. In the example below, the labelling strategy in the comparative sentence structure is reinforced by the deictic pronoun "they" (הן -hen).

There came Rav Yehudah in the name of Shmuel: "One estimates neither for the thief nor for the robber nor for the borrowed but only for damages, and guardians are like damages."⁵¹⁸

The three steps and the variations of the labelling strategy are summarised in a tabular format below.

Table 6.3: Variations of the label form

Step 1 First appearance of the term		Step 2 The case to which the label is applied		Step 3 Sentence structure of the label
In biblical lemma		biblical passage		Nuclear nominal structure with deictic pronoun ("this is the...", "that is the...")
OR	AND	OR	AND	OR
In Mishnah lemma		Mishnah passage		Putting the label in a focus position by a definite article
OR		OR		OR
Term presented as self- explanatory (missing)		Particular case		Simple structure of comparison ("X is like Y")

The close textual context sometimes does not present the term at all which leaves step 1 empty as an extreme variation of a self-explanatory term – the *Yerushalmi* expects that the reader is familiar with the general legal vocabulary of which the term is part. In step 2, the *Yerushalmi* predominantly features a particular case – the occasional examples where the case is quoted from the Bible or *Mishnah* preserve the exegetical origins of the strategy. In step 3, the labelling operation mostly appears as the opinion of a named rabbinic authority – the *Yerushalmi* also requires its reader to assess the relative authority of the opinion.

The variant forms of the labelling operation in step 3 share the common characteristic of creating a cognitive tension. The constituent lexical items cannot be reconciled in a meaningful sentence, if they are taken in their neutral meaning. The incongruity creates a tension leading to a prolonged mental processing by which the neutral sense of the word is abandoned. The reader is pushed

⁵¹⁸ yBQ 1:1 (2b): אתא רב יהודי בשם שמוי אין שמין לא לגנב ולא לגזלן ולא לשואל אלא לנזקי והשומרי כנזקי הן

towards an idiomatic alternative as part of a metaphoric reinterpretation.⁵¹⁹ In addition to the tension created by incongruent lexical items, there is an additional common characteristic of these sentence forms inasmuch as they put the label term in a focus position. The focus concentrates the tension on one linguistic item, and it suggests that the incongruity can be solved by a standardised idiomatic reinterpretation. The word or phrase used as a label effectively works as an item in an imaginary index which refers the reader to other uses of the same word or phrase in the text. In the context of tractate *Bava Qamma* of the *Yerushalmi*, the focus indicates that the particular word or phrase is an item of a legal terminology which signifies a family of related cases. In order to grasp fully what legal response is expected in the particular case, the reader needs to consult other members of the family with the same label.

The opening passage of tractate *Bava Qamma* sheds light on the exegetical origins of the strategy of establishing legal terms in the *Yerushalmi*. From the perspective of the activity of labelling outlined above, the opening passage appears to be a peculiar example. In step 1, the legal terms have biblical origins which are presented as part of an authoritative *Mishnah* lemma (mBQ 1:1).⁵²⁰ In step 2, the *Yerushalmi* presents biblical passages introduced by the formula “as it was written” (דכתיב) to which the labels shall be applied. In step 3, the *Yerushalmi* relates the label to the biblical passage by a nuclear nominal structure with the deictic pronoun (e.g. “This is the ‘foot’”). The association of labels and biblical passages are carried out anonymously which blocks any debate about their validity. The “horn”, the “foot”, and “the tooth” all appear in nuclear nominal sentences with the deictic pronoun “this” (זה - zeh): “This is the horn” (זה הקרן), “This is the foot” (זה הרגל) and “This is the tooth” (זה השן). The opening passage does not explain the terms, but simply declares that another word (“bull” in the case of “horn”) or a biblical passage (in case of “foot” and “tooth”) are linked. This peculiar anonymous use which accommodates the biblical vocabulary with the *Yerushalmi*’s own terms indicates the hermeneutic origins of the labelling strategy which possibly goes back to the biblical exegetical practice.⁵²¹

⁵¹⁹ At the heart of a lexical metaphor lies the identification of two otherwise incongruent words in the form of “A is B”. See Cameron (2012):345. The impossibility of one-to-one lexical translations of many metaphorical expressions reveals that lexical variation is often accompanied by grammatical variation. See Halliday (1994):341.

⁵²⁰ The “horn” (קרן) is a notable exception where the *Yerushalmi* departs from the biblical-Mishnaic vocabulary. The change of terminology is part of a larger project by which the *Yerushalmi* replaces the *Mishnah*’s fourfold classification of damages to a fivefold one. See section 7.2.2 “Reclassifying damages in the *Yerushalmi*”.

⁵²¹ The *Yerushalmi*’s enigmatic dictum which concludes the classification part of the opening passage (yBQ 1:1 (2a)) is instructive: “just as Scripture speaks, so speaks the Mishnah” – כמה דאישתעי קרייא אישתעיית מתניתא –

6.3 Establishing legal terms: Comparative observations

Legal terms are neither a priori, nor essential tools. Roman law was quite capable to handle contractual relationships or determine liability without the concepts of *contractus* and *obligatio*.⁵²² Likewise, biblical law was functional without differentiating between the various kinds of damages. The creation of legal terms, however, enabled the association of similar cases, and facilitated a quicker and more reliable operation of the law. It is reasonable to suppose that it also assisted the acquisition of legal knowledge in formalised tuition. In fact, the institutionalised educational setting was probably one of the major factors contributing to the conceptualisation of Rabbinic and Roman law.

Legal terms play a crucial role in both Justinian's *Institutes* and the *Yerushalmi*, but the two documents follow different strategies of establishing them. The *Institutes* applies the familiar definition strategy. As a general rule, the definition is provided immediately after the first use of the legal term, and it is formulated as an expandable nominal structure ("X is Y") or a semantic variation thereof. Apart from some isolated instances which appear in the historical layers of the text, the *Yerushalmi* avoids definitions, and applies the labelling strategy which is unfamiliar to the Western mind. Particular rules are labelled by a legal term in different grammatical forms ("this is X", "the X", or "it is like X") without making explicit what groups them together, and indeed, there may be no such underlying general principle. By accumulating case after case under one label, the scope and applicability of the legal term gradually unfolds.

The difference is partly due to a difference in genre.⁵²³ Justinian's *Institutes* is presented as an elementary textbook which introduces the different legal institutions didactically and in an orderly fashion. The *Constitutio Imperatoriam*, which is attached to the *Institutes* as a preface, dedicates the work to "young people keen on studying law" (*cupidae legum iuventuti*) which forms the "first cradle of law" (*prima legum cunabula*). As Peter Birks puts it, "the divisions and sub-divisions do not always make a perfect pyramid, but the order is always coherent".⁵²⁴

Didactic clarity and orderliness, fundamental virtues of an elementary textbook, are missing from the *Yerushalmi*. It is first and foremost a running commentary on a previous legal compendium, the

⁵²² About the absence of the concept of *contractus* in early Roman law, see Collinet (1932):488. The chapter has argued that the abstract term *obligatio* was also missing from the vocabulary of the early Roman jurists.

⁵²³ Genre and structural characteristics are discussed in Chapter 5 "Text – Voice – History".

⁵²⁴ Birks et al. (1987a):13.

Mishnah.⁵²⁵ Thematically governed by the *Mishnah*, which is hardly an elementary work itself, the *Yerushalmi* reads more like an advanced collection of case law by which the intricacies of legal reasoning can be acquired indirectly.⁵²⁶ Didactic and practical considerations seem to be secondary in a text which is used for regular intellectual exercise in biblical and Rabbinic traditions as part of Jewish religious practice. In an article discussing educational features in ancient Jewish literature, Samely distinguishes between three constellations which may result in the educational use of a text: (1) it was either “composed for being used in specific practices of teaching and learning”; (2) or it was “adopted as the object of educational activity”; (3) or its “composition in some manner reflects in its literary features certain educational activities”. According to Samely, the constellation of adopting the text for educational purposes “seems to apply to Scripture and the *Mishnah* in ancient and rabbinic Judaism.”⁵²⁷ The *Yerushalmi* may represent the case of a text which was adopted for education while some of its literary features also reflect educational activity. The *Yerushalmi* reads like an advanced legal compendium where the presentation does not need to be as didactic and orderly as in an elementary textbook. The definition of basic terms would be nevertheless compatible with this advanced genre, and definitions would be just as helpful as they are at an elementary level. It is not the genre, but rather, as I shall suggest in section 8.1.2, the different approach to the legal past which explains why Justinian’s *Institutes* prefers definitions, and why the *Yerushalmi* opts for labels.

⁵²⁵ Section 7.2.2 “Reclassifying damages in the *Yerushalmi*” argues that there is an underlying coherent structure which the *Yerushalmi* promotes in an indirect way.

⁵²⁶ The genre and purpose of Talmudic documents have been debated almost since their creation. They are regularly described as “law codes”, “study books” or “anthologies” – they fit all of these categories, and none of them perfectly. In case of the *Mishnah*, see, for example, Goldberg (1987a):211-251.

⁵²⁷ Samely (2017):151.

CHAPTER 7: ORGANISING LEGAL KNOWLEDGE

Unity in any intellectual endeavour, from literary compositions to professional guidelines and policy making, is achieved by some kind of coherence. In this regard, law is no exception. Real or assumed coherence is what makes early Roman legal fragments and scattered biblical sentences constitute what we now call “Roman” and “Rabbinic law”.⁵²⁸ Whether these principles translate into a structured presentation of continuous texts is a different matter. The loosely organised texts from the earliest periods of Roman and Jewish culture suggest that ordered presentation law was not triggered by some inherent logic. Later generations aspired to create a coherent vocabulary and the arrangement of legal concepts by classification in order to preserve old legal materials for contemporary needs. The prime examples of such aspirations are the *Mishneh Torah* of Maimonides⁵²⁹ and the preparatory work of the German Pandectists.⁵³⁰ Maimonides and the Pandectists envisioned to create a modern legal system from the sources of Jewish and Roman law. The present chapter discusses how Justinian’s *Institutes* contributed to the Roman classification of obligations and how tractate *Bava Qamma* in the *Yerushalmi* shaped the Rabbinic classification of damages. Both texts appear to have provided a more systematic framework than the early Roman or biblical materials, but they did not implement the kind of rigorous codification we see in Maimonides or the Pandectists. The *Institutes* and the *Yersushalmi* aspire to keep the integrity and authority of the legal tradition while adapting it to contemporary needs with conceptual coherence and rhetorical efficiency.

I shall distinguish between two sides of the classification enterprise in this chapter. One will be the generic framework of classification with a distinct vocabulary which can be divorced from the legal matter. The other will be the process by which the generic framework and vocabulary are applied to

⁵²⁸ See Samely et al. (2013):98-100 about unity and coherence.

⁵²⁹ See Shochetman (1996):277-279.

⁵³⁰ See Stein (1999):119-123.

the legal matter at hand. A close reading of two short passages from the *Institutes* and the *Yerushalmi* will be taken to suggest that what reads like the crystallisation of a more coherent classification (Roman) or the adherence to a primordial classification (Rabbinic) tell us more about the general underlying principles and tendencies of Roman and Rabbinic law than the inherent logic of the particular legal substance discussed in the passages.

The first section (7.1 “The Roman classification of delicts”) argues that Roman law adopted a classificatory framework of *divisio* with the *genus-species* vocabulary. The vocabulary is somewhat inconsistent and the framework does not fully realise the potential of conceptual consistency sought by virtually all scientific endeavours in the Western tradition. The rhetorical effect of a neat and symmetrical presentation seems to be more important to Justinian’s *Institutes* than the coherence and rigour that the classificatory framework of *divisio* with the *genus-species* vocabulary could offer. The section will use the classification of obligations and its constituent delictual class in the *Institutes* as a case study. It will argue that the purpose of the texts is not the discovery of an inherent metaphysical order of concepts, but rather the creation of a rhetorically effective presentation.

The second section (7.2 “The Rabbinic classification of damages”) argues that Rabbinic law developed a standardised framework of classification based on the biblical vocabulary of genealogical tables. The case study of damages (*neziqin*) in the opening section of tractate *Bava Qamma* in the *Yerushalmi* shows how the classification unfolds within a terminological framework of “fathers” and “generations”. The formal perspective of classification is conspicuously merged with an exegetical perspective which differentiates between biblical (“roots”) and non-biblical (“generations”) types. The *Yerushalmi* passage will be shown to propose a new classification which is presented as one staying loyal to the past, but it actually deviates from the classification preserved in the opening chapter of tractate *Bava Qamma* in the *Mishnah*. The classification is challenged in later parts of the *Mishnah* tractate which the *Yerushalmi* recycles to support its own version. The overlaps between the perspectives of classification and exegesis on the one hand, and the concealed reclassification on the other, indicate that the *Yerushalmi* balances innovation with tradition, rhetorical effect with rigour.

7.1 The Roman classification of delicts in Justinian’s *Institutes*

Classification often has a literary form which expresses a normative structure. The two aspects, however, do not necessarily go hand in hand. The form is similar in this respect to definition which can be didactically effective, even if it does not meet the criteria of modern logic and does not provide normative guidance. In a similar fashion, even if an instance of classification appears to be

logically fallible and fails to provide normative guidance, the literary characteristics of the presentation (symmetry, neatness and so on) may still facilitate the user's grasping of a complex system of legal concepts. In fact, it may be proposed that a somewhat ambiguous classification of legal concepts enables flexibility and adaptivity in a controlled manner.⁵³¹

7.1.1 Divisio *and* partitio

A close reading of two interrelated passages in Justinian's *Institutes* which introduce the topic of obligations (J.3.13.pr-2) and the class of delictual obligations (J.4.1.pr) demonstrates an interplay of literary and normative aspects. The text and context of the passage were briefly described in sections 4.3.2 and 4.3.3 above. Here I will merely repeat the English translation of text parts which are directly relevant to the discussion.

The primary division (*summa divisio*) of all obligations breaks down into two types (*in duo genera deducitur*): for [obligations] are either civil or praetorian. Civil [obligations] are those which have been approved by established *leges* or by civil law. Praetorian [obligations] are those which the praetor has established according to his own legal authority – these are also called honorary [obligations]. (J.3.13.1)

The expression *summa divisio* appears four times in Justinian's *Institutes*.⁵³² Apart from that of obligations, there is a *summa divisio* in the law of persons⁵³³, another in the law of actions⁵³⁴, and a third one in interdicts.⁵³⁵ In the sense of “classification”, the abstract noun *divisio* and its associated verb form appear further twelve times in the *Institutes*.⁵³⁶

⁵³¹ Legal theorist Albert Kocourek (1875-1952) writes in the editorial preface of *Science of legal method* that “another abuse of logic ... consists in the overrefinement of distinctions to a point where the law in its system becomes too esoteric even for the learned.” Bruncken et al. (1921):xlvi.18. Alan Watson relates to this observation in Watson (1998b):xvii.

⁵³² Expressions and phrases are located with the help of the search engine in Riedlberger (2014).

⁵³³ J.1.3.pr: “The primary classification of the law of persons is that all people are either free or enslaved.” – *Summa itaque divisio de iure personarum haec est quod omnes homines aut liberi sunt aut servi*.

⁵³⁴ J.4.6.1: “The primary classification is by two: [actions] are made either *in rem* or *in personam*.” – *Summa divisio in duo genera deducitur: aut enim in rem sunt aut in personam*.

⁵³⁵ J.4.15.1: “The primary classification of interdicts is that they are either prohibitory, restitutory or exhibitory.” – *Summa autem divisio interdictorum haec est, quod aut prohibitoria sunt aut restitutoria aut exhibitoria*.

⁵³⁶ The verb form *dividitur* is used for differentiating between *ius civile* and *ius gentium* in J.1.2.1. All other instances use the abstract noun *divisio*: J.1.8.pr on persons *sui* and *alieni iuris*; J.1.13.pr on persons under family authority, guardianship, supervision or none of these; J.2.1.pr on things which are either private or not; J.2.13.5 and J.2.18.2 on the classification of adoptees; J.3.13.2 on the fourfold secondary classification of obligations; J.3.18.pr on stipulations which are either judicial, praetorian, conventional or hybrid; J.4.6.16 on the secondary classification of actions into restorative, penal and hybrid types; J.4.6.29 referring to the classification of actions into those based on good faith or strict law (in J.4.6.28); J.4.15.2 on the secondary

In Aristotle, *divisio* is the comprehensive presentation of a subject according to its constituent parts as opposed to *partitio* which provides illustrative examples which can be analogically expanded.⁵³⁷ In an attempt to create “a science of civil law” (*ars iuris civilis*),⁵³⁸ the 1st century CE Roman rhetorician, philosopher and legal advocate Cicero adopted Aristotle’s rhetorical devices and wrote a manual for legal advocacy.⁵³⁹ The *Topica* wanted to provide Roman law with a rigorous structure that Cicero admired in the scientific endeavours motivated by Aristotle. His proposition did not meet with great enthusiasm by the professional jurists and the *divisio* technique remained relatively isolated in Roman law, mostly restricted to the institutional scheme used for elementary tuition.

In certain cases, the *divisio* structure is merely alluded to by the use of grammatical connectives in Justinian’s *Institutes*. The use of the exclusive disjunction expresses that a particular field has a set number of constituent elements and everything within that field belongs to one of them. Two items of a *divisio* can be expressed by the connectives *quaedam... quaedam...* (some... other...).⁵⁴⁰ The connectives *alia... alia...* (some... other...), *vel... vel...*, *aut... aut...*, and *sive... sive...* (either... or...) allow division into two⁵⁴¹ or more than two items.⁵⁴²

classification of interdicts into those “obtaining, retaining, or recovering possession”; and finally, J.4.15.7 on the tertiary classification of interdicts into single and double types.

⁵³⁷ Aristotle expresses this idea in various forms in his *Posterior Analytics* (Book 2), *Topics* (Book 6) and *Metaphysics* (Book 7). See the discussion of relevant passages in “Aristotle on collection and division” in Deslauriers (2007):18-32 and van der Merwe (2001).

⁵³⁸ The *loci classici* are *De Oratore* 1.41.185-190 and *Brutus* 41.152. The programme of the *ars iuris civilis* is discussed by Schmidlin (1970) and Herberger (1981):48-54. See also Bona (2006) and Mancal (1982):178-179 for the relationship between philosophy and jurisprudence in Cicero.

⁵³⁹ See van der Merwe (2002). The subject was also addressed by “The legal aspect of the *Topica*” in Reinhardt (2003):53-72, a collection of essays in Powell et al. (2004) and the monograph by Frier (1985).

⁵⁴⁰ The construction reinforces what has been already introduced as “another division” in J.1.8.pr: “There follows another division in the law of persons, for some people are of their own authority, while others are subject to another person’s authority.” – *Sequitur de iure personarum alia divisio. nam quaedam personae sui iuris sunt, quaedam alieno iuri subiectae sunt.*

⁵⁴¹ J.2.1.pr: “[Things] are either belong to our own wealth or fall outside of it.” – *quae vel in nostro patrimonio vel extra nostrum patrimonium habentur*; J.1.2.3: “Our law is either written or unwritten.” – *ius nostrum aut ex scripto aut ex non scripto*; J.2.21.pr: “Revocation of a legacy is confirmed, whether it has been revoked by the same will or by a codicil, if the revocation is expressed by words contrary [to the original will] ..., or by words not contrary [to the original will], that is, by any words whatsoever.” – *Ademptio legatorum, sive eodem testamento adimantur sive codicillis, firma est, sive contrariis verbis fiat ademptio ... sive non contrariis, id est aliis quibuscumque verbis.*

⁵⁴² J.1.8.pr: “They are either subject to the authority of someone else, or they are under the authority of their parents or their masters.” – *quae alieno iuri subiectae sunt, aliae in potestate parentum, aliae in potestate dominorum sunt.* The connectives *vel... vel... vel...* are used for the most fundamental classification in the institutional scheme in J.1.2.12: “All the law we use relates either to persons, or things, or actions.” – *Omne autem ius, quo utimur, vel ad personas pertinet vel ad res vel ad actiones.*

The conjunctive connective (*et* – and) is ambiguous. It sometimes expresses a *partitio*,⁵⁴³ but it can also express a *divisio* in the form of a comprehensive list. The latter is generally reinforced by the context which eliminates the ambiguity. For example, two items of a *divisio* conjoined by the connective *et* (and) are introduced as the *duo genera* (two types) of gifts in J.2.7.pr.⁵⁴⁴

The primary division of obligations is followed by a secondary one in Justinian's *Institutes*.

The secondary division (*sequens divisio*) breaks down into four types (*in quattuor species deducitur*): [obligations] are either [derived] from contract, as if from contract, from wrongdoing, or as if from wrongdoing. We shall first consider those which are [derived] from contracts. The types of these are similarly four (*harum aequae quattuor species sunt*): they are contracted either by *res*, by words [spoken], by letters [written], or by consent. Let us consider them one by one. (J.3.13.2)

The *sequens divisio* of obligations distinguishes the modes by which obligations are created. The thematic section on obligations (J.3.13-4.12) is organised according to the *sequens divisio* by discussing obligations derived from contract first, then moving on to those derived *as if from contract* and so on. The *summa* and the *sequens divisio* reflect two different perspectives and serve two different goals: one evokes the authority of the legal tradition, the other provides a thematic structure for the discussion of the field.⁵⁴⁵ Where alternative classifications are available, the topic is not necessarily arranged according to the *summa divisio*.

The *genus-species* vocabulary assists the presentation of constituent items of the *summa* and *sequens divisio*. The *summa divisio* has two classes (*genera*), whereas the *sequens divisio* has four types (*species*). J.4.1.pr compares the classification of contractual and delictual obligations and uses the expression “divide into” (*dividuntur*) which is lexically related to *divisio*. The paragraph points out that contractual obligations have four constituent classes (*quattuor genera*), whereas delictual obligations are all of one class (*unius generis sunt*).

As it has been explained in the preceding book about obligations [arising] from contract and [arising] as if from contract, we shall subsequently consider the obligations [arising]

For the connectives *aut... aut... aut...*, see J.1.16.pr: “For status loss is either of the largest, the smaller (which is also called ‘medium’) or the smallest degree.” – *nam aut maxima est capitis deminutio aut minor, quam quidam mediam vocant, aut minima.*

⁵⁴³ J.1.25.15: “In Rome, teachers of grammar, teachers of rhetoric as well as physicians... enjoy exemption from the duties of guardianship and supervision.” – *Item Romae grammatici rhetores et medici ... a tutela vel cura habent vacationem.*

⁵⁴⁴ J.2.7.pr: “Another class of acquisition is gift. There are two types of gifts: one made with one’s death in mind and one made without that thought.” – *Est etiam aliud genus acquisitionis donatio. donationum autem duo genera sunt: mortis causa et non mortis causa.*

⁵⁴⁵ The *Institutes* occasionally also offers a tertiary (*tertia*) *divisio* as in the case of interdicts where we have a *summa* (J.4.15.1), a *sequens* (J.4.15.2) as well as a *tertia divisio* (J.4.15.7).

from wrongdoing. Whereas those [arising from contract], as we said in its [proper] place, divide into four classes (*genera*), these [arising from wrongdoing] are of one class (*genus*), for all of them arise from *res*, that is, from the wrongdoing itself such as theft, robbery, damage or contempt. (J.4.1.pr)

The passages of J.3.13.1-2 and J.4.1.pr bear witness to a relatively consistent vocabulary of classification: the operation is called “division” (*divisio*) by which legal terms “divide into” (*dividuntur*) classes (*genera*) and types (*species*).

7.1.2 Genus and species

Besides the various grammatical forms of *divisio* discussed above, the *genus-species* vocabulary is another indication for classification. Before I started engaging with the literary evidence, I had expected to find *genera* and *species*⁵⁴⁶ consistently marking higher and lower levels in the hierarchy of classification. The occurrences in Justinian’s *Institutes* draw a more complicated and somewhat inconsistent picture. With one exception,⁵⁴⁷ the words *genus* and *genera* consistently mark types with common characteristics.⁵⁴⁸ These types cover the entire range of their class and therefore they constitute a *divisio*. For example, the two types of actions in court are those brought against a thing (*in rem*) or against a person (*in personam*) which cover all possible actions. There is no action in court which does not belong to one of the two types.⁵⁴⁹

The word *species* predominantly marks paradigmatic, yet specific scenarios which motivate new legislation.⁵⁵⁰ The list of *species* in a class is not comprehensive, and, therefore, they constitute a *partitio*. In two exceptional cases, *species* is unidentified in the *Institutes* which refers to “various factors” (*plures species*) and “many situations” (*multae species*)⁵⁵¹ motivating some change in the law.

⁵⁴⁶ The meaning of “species” is more ambiguous, but it is used at least 3 times in a classification context: J.1.2.4, J.1.2.10, and J.3.13.2.

⁵⁴⁷ The term *genus* stands for unspecified special classes which is equivalent with the dominant use of *species* in J.3.18.3: “Their [conventional stipulations] classes are nearly as many as the number of things for contracts we have mentioned.” – *quarum totidem genera sunt, quot paene dixerim rerum contrahendarum*.

⁵⁴⁸ The *Institutes* uses the words *genus* or *genera* 13 times where the context is about classification: J.1.2.4, J.1.5.pr, J.2.7.pr, J.2.7.3, J.2.10.1, J.2.20.2, J.3.13.1, J.3.24.2, J.3.27.pr, J.3.28.pr, J.4.1.pr, J.4.1.3, and J.4.6.1.

⁵⁴⁹ J.4.6.1: “The primary division of all actions ... is into two types: they are either [brought] against a thing, or against a person.” – *Omnium actionum ... summa divisio in duo genera deducitur: aut enim in rem sunt aut in personam*.

⁵⁵⁰ For example, the harshness of the possibility to hold back one third of the assets of an emancipated child motivates an equitable new rule. J.2.9.2 calls the scenario a *species* (“in this case” – *in ea specie*). Further examples are found in J.2.20.26-27 and J.2.23.5-6

⁵⁵¹ The translation of Birks and McLeod expresses that these *species* are unidentified. See J.3.9.9 (8) and J.3.11.7 which are found in Birks et al. (1987a):103 and 107.

The bulk of the literary evidence suggests that *genus* relates to *species* in Justinian's *Institutes* as *generaliter* (generally) relates to *specialiter* (specifically). In turn, the combination of *genus-generaliter* corresponds to *divisio*, that of *species-specialiter* to *partitio*. That means that instead of marking higher and lower levels of a conceptual hierarchy, *genus* serves the goals of *divisio*-type classification while *species* marks scenarios which deserve special treatment. One particular passage about theft illustrates the difference of these terms well. In J.4.1.3, the *divisio* of theft includes manifest and non-manifest types (*genera*), whereas "theft by receiving" (*conceptum*) and "theft by bestowing" (*oblatum*) are called "types of *actio* supplementing those of theft" (*species actionis furto cohaerentes*). The basic *divisio* of theft with two *genera* has an appendix with two *species*.⁵⁵²

The *genus-species* vocabulary, however, does not always correspond to *divisio* and *partitio*. In a couple of examples, *species* indeed marks a hierarchal level of classification, in other instances, it is used synonymously with *genera*. The *ius civile* is said to be of two *species*, one written and one unwritten (J.1.2.10). Adoption is said to have two modes (*duobus modis*), one of which is also called a *species* in the same passage (J.1.11.1). Plebeians, patricians and senators are said to be *species* of the people of Rome which, in turn, is called a *genus* (J.1.2.4). Our passage about obligations provides the prime example about the inconsistent use of the term *species*. In J.3.13.1-2, the *summa divisio* specifies two *genera* of obligations, but the *sequens divisio* talks about four *species*. In J.4.1.pr, contractual obligations are said to have four *genera* as opposed to delictual obligations which are all of one *genus*. Not only *species* marks classification here, but the hierarchy of *genus* and *species* is reversed. Obligations have four *species*, and one of these (the class of contractual obligations) have four *genera*.

The reader who is looking for philosophical elegance might be slightly disappointed that the *genus-species* vocabulary is not used to its potential conceptual consistency. Roman law as presented in Justinian's *Institutes* does not fully embrace the scientific framework of the *ius civile* as Cicero's *Topica* envisioned it.⁵⁵³ Instead of setting a rigid conceptual hierarchy, the *genus-species* vocabulary provides an adaptive generic framework of classification which is conceptually wanting.

⁵⁵² J.4.1.3: "There are two classes of theft, one manifest and one non-manifest. For 'by receiving' and 'by bestowing' are rather types of *actio* supplementing those of theft rather than classes of theft themselves." – *Furtorum autem genera duo sunt, manifestum et nec manifestum. nam conceptum et oblatum species potius actionis sunt furto cohaerentes quam genera furtorum.*

⁵⁵³ Derek van der Merwe notes that Cicero's *ars iuris civilis* did not attract much interest from the professional jurists. van der Merwe (2002):76-69.

7.1.3 Didactic considerations in legal classification

The adaptation of this generic framework of classification is also wanting, a fact which may be related to rhetorical and didactic considerations of the creators of the text. The paragraph which immediately follows the definition of *obligatio* classifies obligations in Roman law according to the authority on which they rest. J.3.13.1 says that obligations are either “approved by established *leges* or by civil law”, or they are “established according to [the praetor’s] own legal authority”. The *summa divisio* reflects the traditional distinction between civil and praetorian law,⁵⁵⁴ but apart from reinforcing the definition of obligation by evoking the authority of the legal past, it has little practical relevance. The *summa divisio* relates closely to the concluding phrase of the definition of *obligatio* which states that obligations are “according to the laws of our state” (*secundum nostrae civitatis iura*). The *summa divisio* in Justinian acknowledges the existence of praetorian obligations which Gaius has “simply ignored”.⁵⁵⁵ Praetorian legislation is rarely discussed by Gaius⁵⁵⁶ who concentrates on the presentation of the *ius civile*, whereas Justinian’s *Institutes* usually outlines three stages from the *leges* via the praetorian amendments to the imperial remedies.

The standard reconstruction of how the classification of obligations developed by the time of Justinian posits a straight line from the twofold classification in Gaius’ *Institutes* via the threefold classification in Gaius’ *res cottidianae* (“Everyday matters”)⁵⁵⁷ to the fourfold classification in Justinian’s *Institutes*. This standard reconstruction holds that soon after Gaius set up the twofold classification of contracts and delicts, he realised that he was unable to account for a number of legal phenomena which, on the one hand, fell under the general label of *obligatio*, but, on the other hand, could not be put in the category of either contracts or delicts. For this reason, Gaius created a third miscellaneous class (*ex variis causarum figuris*) which anticipated the classes of quasi-contracts and quasi-delicts.⁵⁵⁸ Taking the necessary step foreshadowed in Gaius, Justinian’s *Institutes* created

⁵⁵⁴ On the sources of law see Watson (1995):57-64 and in more detail with primary sources, du Plessis et al. (2015):27-54. The lasting effect of the system of authoritative sources is discussed by Kaser (1962), Stein (1978) and Winkel (1996).

⁵⁵⁵ Birks (1997a):14. According to Mayer-Maly, the absence/presence of the *summa divisio* is a crucial and less emphasised difference between the *Institutes* of Gaius and that of Justinian. Mayer-Maly (1967):378.

⁵⁵⁶ One notable exception is the praetorian amendment of the regulation of intestate succession in G.3.18-33a.

⁵⁵⁷ Preserved in three passages quoted in the *Digest* (D.44.7.1, 4-5). The passage is reconstructed in Lenel (1889):§498 on cc. 257-258.

⁵⁵⁸ Voluntary mandate, guardianship and legacy are considered to be binding “not from a contract proper” (*non proprie ex contractu*), but only “as if from a contract” (*quasi ex contractu*). Similarly, the negligent handling of the case by a judge, and various negligent behaviours of tenants and others are also considered to be binding “not by a wrongdoing proper” (*non proprie ex maleficio*), but only “as if by a wrongdoing” (*quasi ex maleficio*). See Gaius, Everyday matters 3, D.44.7.5.

the separate classes of quasi-contracts and quasi-delicts⁵⁵⁹ by dividing the third miscellaneous class of Gaius' *res cottidianae* into two.⁵⁶⁰

Neat and logical as it may seem, the "straight course of development of the system is the result of an old-fashioned evolutionism" according to Theo Mayer-Maly.⁵⁶¹ Justinian's *sequens divisio* is not a developed version of the threefold classification in Gaius' *res cottidianae*. The examples of quasi-delicts in Justinian are mostly of praetorian origin which fall outside the scope of the classification in Gaius.⁵⁶² If anything, the fourfold structure in Justinian is rather a step back to the rigid boundaries of the twofold classification in Gaius. The miscellaneous third class of Gaius' *res cottidianae* made room for peculiar cases and rules, and it provided the classification with some flexibility. By dismissing the miscellaneous class, Justinian's *Institutes* assumes that each of the four classes has a common characteristic and requires that all legal phenomena grouped under the term *obligatio* be put in one of the four. Within this rigid framework, all possible exceptions need to be explained away or left unexplained.

This unnecessary and conceptually inferior neatness in Justinian can be explained by didactic considerations. The adverb *aeque* (similarly) in the subsequent sentence indicates that neatness is

⁵⁵⁹ Note that neither the *Institutes* of Gaius, nor that of Justinian used the abstract terms "quasi-contracts" and "quasi-delicts". In Justinian, they are formulated as obligations which are "as if from contracts" (*quasi ex contractu*) and obligations which are "as if from wrongdoing" (*quasi ex maleficio*). In Justinian's wording, *quasi* is an adverb qualifying the verb of the sentence (*sunt*): *aut enim ex contractu sunt aut quasi ex contractu aut ex maleficio aut quasi ex maleficio*. (J.3.13.2)

⁵⁶⁰ Peter Birks expresses this standard view in the following manner: "In his *Institutes* Gaius tried a simple division into two: every obligation arises from a contract or from a wrong. But he found almost at once that that would not work. ... In another book Gaius settled for a residual miscellany: every obligation arises from a contract, a wrong or some other kind of event. ... The fourfold classification which stands in Justinian's *Institutes* is a response to the challenge of the residual miscellany." Birks (1997a):18. The same view is expressed in Zimmermann (1996):14.

⁵⁶¹ Mayer-Maly (1967):379.

⁵⁶² du Plessis et al. (2015):251-252. The scholarship on the problematic nature of quasi-delicts and their possible common characteristic is significant, but mostly speculative. For example, Eric Descheemaeker suggests that the common denominator of the quasi-delictual class is *culpa*, i.e. a culpable, but not necessarily unlawful act, and those under the heading of "quasi delict" are examples of strict liability. Descheemaeker (2009a):57-67 and 73-88 and Descheemaeker (2009b). Descheemaeker's strict liability theory was previously proposed by Gordon (1967):303-310 and Stein (1958):563-570. Birks also sees *culpa* as a defining characteristic, but unlike Stein, Gordon and Descheemaeker, he argues more cautiously for a common characteristic of "the liability without personal misfeasance" in the quasi-delictual class. See Birks (1969b):174. In face of the confusing primary evidence, one is tempted to agree with Wolfgang Kunkel who says that "the category of quasi-delictual obligations ... is without any scientific value". Kunkel is paraphrased by Stein (1958):433.

exactly what Justinian's *Institutes* wanted to achieve.⁵⁶³ Justinian's *Institutes* says about the first class of obligations arising from contract that "the types of these are similarly (*aeque*) four". The adverb *aeque* suggests that the fourfold structure of the *sequens divisio* of obligations is repeated to mirror the four types (*species*) of obligations in general.

The fourfold structure appears a few more times within the passages dealing with the law of obligations. Stipulations,⁵⁶⁴ obligations by agreement (*consensu*),⁵⁶⁵ the modes of discharging an obligation⁵⁶⁶ and delicts⁵⁶⁷ all have four classes. The passage about stipulations uses the connectives *alia... alia...* (some... other...) indicating a comprehensive list by exclusive disjunction. The passage about obligations by agreement does not qualify the list and the one about delicts notably uses the particle *veluti* (such as).⁵⁶⁸ It is unclear whether the four classes in these cases constitute a comprehensive list, or they are only prime examples open to analogical expansion. Unlike stipulations, obligations by agreement and delicts, the four modes of discharging an obligation are not summarised in a list heading. The primary mode is performance (J.3.29.pr), while the three further modes are ancillary and arranged according to how common they are: *item* ("likewise" in J.3.29.1) adds verbal release to performance, *praeterea* ("also" in J.3.29.3) adds *novatio*⁵⁶⁹ to the previous two, and finally *amplius* ("furthermore" in J.3.29.4) adds contrary agreement⁵⁷⁰ to the previous three. As the differences in the formulations indicate, stipulations only *happen to* divide into four (and only four), obligations by agreement and delicts only *happen to* have four prime

⁵⁶³ Olivia Robinson shares Kunkel's sceptical position sceptical about the substantive nature of the quasi-delictual class. According to Robinson, the fourfold classification of obligations in general, and the class of quasi-delicts in particular, are artificial. She writes that "quasi-delict was an artificial category, made to balance quasi-contract and keep a nice symmetry." Robinson (1998):246.

⁵⁶⁴ J.3.18.pr: "Of stipulations, some are judicial, some are praetorian, some are conventional, some are of a shared [type being] both praetorian and judicial." – *Stipulationum aliae iudiciales sunt, aliae praetoriae, aliae conventionales, aliae communes tam praetoriae quam iudiciales*.

⁵⁶⁵ J.3.22.pr: "Obligations by agreement come into being in sale, hire, partnership and mandate." – *Consensu fiunt obligationes in emptionibus venditionibus, locationibus conductionibus, societatibus, mandatis*. The four types listed in the opening line of J.3.22 are discussed separately in the subsequent four paragraphs (J.3.23-26).

⁵⁶⁶ Discharge of obligations is achieved by performance, verbal release, renewal of the original obligation with different conditions (*novatio*), or, in case of obligations by agreement, by contrary agreement. See J.3.29.

⁵⁶⁷ J.4.1.pr: "...all of them [i.e. obligations by wrongdoing] arise from *res*, that is, from the wrongdoing itself such as theft, robbery, damage or contempt." – *...omnes ex re nascuntur, id est ex ipso maleficio, veluti ex furto aut rapina aut damno aut iniuria*.

⁵⁶⁸ The word *veluti* appears in both list of delicts of J.4.1.pr and J.4.8.pr.

⁵⁶⁹ According to Buckland, *novatio* is "discharge by substituting a different obligation for that already existing." Buckland (1931):§113 on 309-311

⁵⁷⁰ This mode of discharge applies only to obligations contracted by agreement. See Evan-Jones et al. (1998):172.

classes (and possibly more), discharge of obligations only *happen to* have four ways. In contrast, obligations are *made to* fit a preconceived symmetrical fourfold structure.⁵⁷¹

The symmetrical structure is also emphasised in the classification of delictual obligations. While contractual obligations “are contracted either by *res*, by words [spoken], by letters [written], or by consent” (J.3.13.2), delictual obligations “are of one class, for all of them arise from *res*, that is from the wrongdoing itself” (J.4.1.pr).⁵⁷² What Justinian’s *Institutes* means by arising from *res* in the delictual class is not clear. A closer look on the topic suggests an underlying principle which favours a practical, litigation-based approach and a symmetrical, though somewhat incoherent, presentation.

In the contractual class, obligations created by *res* include the physical handling of an object, the actual transfer of a thing from one’s domain to another’s such as loan (*mutuum*), unjust enrichment (*qui non debitum accepit*), loan for use (*commodatum*), deposit (*depositum*) or pledge (*pignus*). Even though all five modes listed under obligations contracted by *res* includes a receiving party, the receiving party’s contribution is irrelevant. It is the handling or transfer of the object itself which creates the legal bond. The obligated party owes to his fellow man on account of the benefit he enjoys from the contractual relationship. The *Institutes* assumes that no rational person would actively contribute to his own loss, no one would stipulate or agree to his own detriment. The parties may have honourable or fraudulent intentions, but they are assumed to be at their senses and act for their own good.

In the delictual class, the handling of the object is apparent in theft (*furtum*) and robbery (*rapina*).⁵⁷³ The element of *res* in the delictual types of the loss wrongfully caused (*damnum*) and contempt (*iniuria*) is, however, quite ambiguous. Similar to the *Institutes* of Gaius, the section about *damnum* is based entirely on the first and third chapter of the *lex Aquilia*⁵⁷⁴ which predates the whole institutional enterprise by centuries and restricts itself to the topic of *damnum*. In Justinian’s *Institutes*, most of the examples are damages caused indirectly or by proxy such as the damage

⁵⁷¹ See Robinson (1998):245-250 and the “fundamental dichotomy between *natura* and *institutio*” in Behrends (1998). Behrends’ dichotomy is explained by Francesco Giglio as one between “what belongs to nature and what is created by our intellect. The former has a factual character. It exists because it is there and can be touched. The latter has a normative character. It exists because it is created rationally.” Giglio (2013):138.

⁵⁷² The same comparison is made by Gaius, but neither him, nor Justinian explains why *res* is the only source for delictual obligations. G.3.182: “Obligations from these sources all belong to one class, whereas, as we have already explained, obligations from contract are distributed among four classes.”

⁵⁷³ Theft is defined as “the handling of a thing with fraudulent intention” (*furtum est contrectatio rei fraudulosa*, J.4.1.1) and the robber is said to be someone who “handles a thing without the owner’s consent” (*alienam rem invito domino contrectat*, J.4.2.pr). On this subject, see Giglio (2017).

⁵⁷⁴ The law, which “remained the basis of the law of damage all through the Roman Republic and Principate”, was passed sometime after 287 BCE (the date of the *Lex Hortensia*). See Crawford (1996):723-726.

caused by a falling branch during the pruning work (J.4.3.5). Only a couple involve the direct handling of *res* (including slaves) such as the doctor cutting into a slave (J.4.3.6) or the person spoiling the wine of his fellow man (J.4.3.13). The category of *damnum* does not seem to fit the classification of delictual obligations, which “all arise from *res* only”. Unlike contractual obligations which require the active (and rational) participation of two parties, delictual obligations are one-sided. There is no element of benefit on the side of the obligated party whose responsibility arises on account of the loss suffered by his fellow man.

The fourth and final item of the delictual class, contempt (*iniuria*), has virtually nothing to do with the handling of the object which so far seemed to be the common denominator of the obligations “contracted by *res*”. Justinian’s *Institutes* lists assault, slander, libel, sexual harassment and more as examples of *iniuria* in J.4.4. The loss incurred is not to the property of the wronged party, but to his or her reputation. When a free person is hit on the body, his loss by *iniuria* is not constituted by the physical harm, but the insult constituted by the assault. When an assault is committed against a slave, it is his master who is considered to have suffered *iniuria*. In short, it is neither the handling of a thing, nor the damage caused to a thing which matters, but the violation of the person’s right for good reputation.

Justinian’s *Institutes* uses the term *res* differently in contractual and delictual obligations. In the five modes of contractual obligations *ex re*, the *res* and its handling justifies bringing a disputed matter to court, and this is the element which needs to be proved in order to initiate the lawsuit. The defendant may not be in agreement, he may not have enjoyed any benefit from the transferred object, for example, because he has forgotten about it. These circumstances are utterly irrelevant. What matters is whether the handling of the object, for example, its transfer for the sake of deposit, has indeed happened. This relies on one person alone. Obligations contracted by *res* are one-sided.

Similar to contractual obligations *ex re* (loan, unjust enrichment, loan for use, deposit and pledge), those arising “from the wrongdoing itself such as theft, robbery, damage or contempt” are created by the operation of one party only. For contractual obligations *ex re*, the defining factor is the physical handling of the object which means that they are also one-sided. For delictual obligations, the two ideas are reversed. The defining factor is the one-sided nature of the contested event, that is, that even though two people face each other in a lawsuit as plaintiff and defendant, only the behaviour of one is legally relevant. If my reconstruction of the thought process is correct, Justinian’s *Institutes* groups the various delictual obligations together by emphasising the abstract idea of handling instead of the thing itself. The focus has shifted from physical object to conduct which is enabled by the idea of the “handling of the object” which serves as a middle term between object and conduct.

Object and conduct are both marked by the term *res* which links contractual and delictual obligations together. The common language of *res* enables a symmetrical presentation of the types of obligations. One can argue for a conceptual basis for the different meanings of *res* in contractual and delictual obligations, but the important thing is that the presentation facilitates the grasping of the basics of a complicated system. For the elementary purposes of Justinian's *Institutes*, the details can wait until they are discussed in more detail later in the *Institutes*. As long as the subsystems of the contractual and delictual obligations are inherently closed and coherent, as long as they are mutually exclusive and avoid thematic overlaps, the different senses of the same term do not cause contradictions.⁵⁷⁵

The current section has described Roman legal classification in two respects. The first is the adaptive generic framework of *divisio* and the accompanying *genus-species* vocabulary. The second is the application of this framework to the legal matter at hand. The literary evidence of the classification of obligations and supporting parallel passages in Justinian's *Institutes* have drawn the contours of a rhetorically effective, but conceptually mediocre presentation. One might have expected to find a rigorous application of the *divisio* and *partitio* techniques and the corresponding *genus-species* vocabulary adapted from Aristotle to the *ius civile* by Cicero's *Topica*. Yet, a "'scientific' approach to law such as would produce an *ars iuris civilis*"⁵⁷⁶ had limited impact on the professional jurists. As the textual evidence reviewed in this section shows, the symmetrical surface of Justinian's *Institutes* masks the kind of operational flexibility which characterises not just the topic here discussed, but the bulk of Roman legal sources. The relevance of the form and content of classification in the *Institutes* will become clearer when they are compared with the techniques employed by Rabbinic legal sources.

7.2 The Rabbinic classification of damages in the Talmud Yerushalmi

The opening passage of *Bava Qamma* in the *Talmud Yerushalmi* is discussed below according to the two aspects of classification I used for the *Institutes*. To begin with, the section below outlines the adaptive framework of classification which is based on a genealogical vocabulary. Afterwards, the section will argue that the *Yerushalmi* imposes a new system onto the already existing Mishnaic classification. The reclassification is, however, executed in a concealed and careful way, so that the authority of the *Mishnah*, and of the legal past which the *Mishnah* represents can be maintained.

⁵⁷⁵ See the application of the theory of system of knowledge to the legal realm by Collins (1997):160-162.

⁵⁷⁶ Wording is by van der Merwe (2002):89.

7.2.1 The genealogical vocabulary of classification

The English translation of the units from yBQ 1:1 (2a), on which my argument rests, is reproduced below.⁵⁷⁷ The structured presentation of the text is accompanied by the use of italics, bold and small capitals. For ease of reference, I also include the tabular summary of the stylistic markers from chapter 5 which corresponds to the projected historical layers and voices of the *Talmud Yerushalmi*.

Table 7.1: The projected historical layers of the *Talmud Yerushalmi*

LEVEL OF LAYER	LAYER	LETTER TYPE
#1	Bible	<i>small capitals in bold and italics</i>
#2	Mishnah	<i>small capitals in bold</i>
#3	baraita	small capitals
#4	memra	regular script (within quotation marks)
#5	stam	regular script
#4-5	anything Aramaic	<i>italics</i>

(3) The generations (תולדות) of horn:

(3.1) goring, pushing, biting, lying down, kicking, thrusting.

(3.2) (a) *Rabbi Isaac raised a problem*: (b) “Pushing and goring are roots (עיקר), (c) *and do you make them generations?*” (d) Rather, it starts with the roots (עיקר) and concludes with the generations (תולדות).

According to the opening passage as a whole, the legal class “horn” has six associated types of damages: goring, pushing, biting, lying down, kicking, and thrusting which are called the “generations of horn” by the heading. The word “generations” appears a second time in (3.2.c) in a statement attributed to Rabbi Isaac. After the introductory formula (3.2.a), the compound sentence declares (3.2.b) that “pushing and goring” are “roots” (*iqqar* - עיקר), and not “generations” (*toldot* - תולדות) as suggested by the anonymous list in (3.1). The anonymous voice resolves this terminological challenge from Rabbi Isaac by dividing the list presented in (3.1) into two subgroups: the subgroup of “roots” with pushing and goring, and the subgroup of “generations” with the remaining four elements of the list.

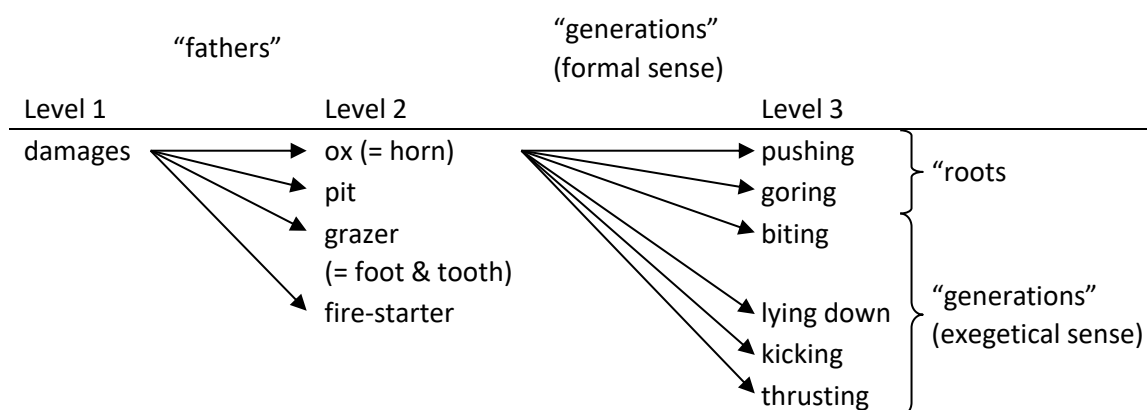
When Rabbi Isaac points out in unit (3.2) that the six listed items of “horn” combines “roots” and “generations”, the perspective shifts away from the multi-level classification to parallel classification systems approaching the subject from different perspectives. The two subsets within the six listed items under the label of “horn” are determined from an exegetical perspective. The first two items

⁵⁷⁷ For the Hebrew-Aramaic original and the literary context, please see sections 4.4.2 and 4.4.3.

appear in the biblical passage on which the law of damages rests (Exodus 21:28-22:14),⁵⁷⁸ the four others do not. According to the exegetical logic, “goring” and “pushing” are fundamental types which bear the authority of the Bible and, therefore, called “roots”. The other four are derivative types held up by the Rabbinic legal tradition which are, therefore, called “generations”. This fundamental distinction between “generations” and “roots” corresponds to the one between rules *de-oraita* (“from the Torah”) and *de-rabbanan* (“from our rabbis”). As a rule of thumb, rules *de-oraita* enjoy greater authority than rules *de-rabbanan*, but this is certainly not always the case, and there is considerable debate about the scope and legal force of these concepts within Rabbinic literature itself.⁵⁷⁹

It follows that the term “generations” is used in two ways. When coordinated with “fathers”, it is part of the formal vocabulary of classification, when coordinated with “roots”, it is part of the exegetical vocabulary. The two different senses of “generations” intertwines in unit (3.2.a-c). The ambiguity of “generations” allows the shift from the formal to the exegetical sense. The anonymous voice could have responded to Rabbi Isaac’s challenge by pointing out that “generations” have two different meanings, but instead it harmonised two positions by obscuring the functional difference of “generations” in different contexts. Table 7.2 below presents the structure of damage types in a tabular format and highlights the two different uses of the term “generations”.

Table 7.2: “Fathers”, “roots” and “generations” in yBava Qamma 1:1 (2a)



The words “fathers”, “roots” and “generations” form an abstract vocabulary of classification which is independent from the legal content of damages. The vocabulary combines a multi-level structure of classification (“fathers” and “generations”) with a two-tiered structure indicating exegetical origin

⁵⁷⁸ The root ng”ch (נִגַּח) appears six times in Ex 21:28, 29, 31, 32 and 36. The root ng”f (נִגַּף) appears once in Ex 21:35.

⁵⁷⁹ See Roth (1986):13 for the meaning of the concepts *de-oraita* and *de-rabbanan*. He later adds “that the only thing about these categories that is not subject to dispute is the fact that they exist.” (45)

(“roots” and “generations”). The two perspectives are tied together by “generations” which means different things in the two contexts.

The vocabulary of “fathers” and “generations” originates in the biblical genealogical tables. The plural noun *toldot* (תולדות) is derived from the root דל"ד (יליד) which is associated with “procreation”. The singular noun *yeled* (ילד) means “child” or “son”, whereas *toldot* appears only in the plural in the biblical genealogical tables and means “generations”. The book of Genesis includes extensive passages which link the gaps between the protagonists of the narrative account by genealogical tables. The Bible provides an effective and simple model of “fathers” and “generations” which arranges human beings in temporal clusters.⁵⁸⁰

The phrase “divisions according to their families” (*toldot le-mishpachotam* - תולדות למשפחותם) and its variations appear eleven times in the first chapter of Numbers and a few times in 1Chronicles. The specification “according to their families” (*le-mishpachotam* - למשפחותם) suggests that *toldot* is not restricted to genealogical relations between human beings. This is the case in Genesis 2:4 which uses the phrase “these are the products of heaven and earth” (*eileh toldot ha-shamayim weha-aretz* - אלה תולדות השמים והארץ) to describe the completed work of the Creation.⁵⁸¹ The Septuagint adds the word “book” (*biblos* - βιβλος) in its translation⁵⁸² which shows that *toldot* is understood to mean “the narrative account” of Creation in the Genesis passage. The various biblical uses already point towards the conceptualisation of “generations”.

The word *av* appears on many pages of the Bible, but always in the sense of “father” or “ancestor”.⁵⁸³ The word *'iqqar* does not appear in the biblical corpus.⁵⁸⁴ The conceptual use of these two terms and that of “generations” is first witnessed by the *Mishnah*. Here we find expressions like the “fathers of work”,⁵⁸⁵ the “generations for water”,⁵⁸⁶ and the “principle of Shabbat”.⁵⁸⁷ The

⁵⁸⁰ Robert Wilson discusses the material against the background of oral and Ancient Near Eastern genealogies in Wilson (1977):137-198.

⁵⁸¹ The overview of biblical usage is according to s.v. ילד, יליד and תולדות in Brown et al. (1952):408-410. and Lisowsky (1993):603-608 and 1511-1512.

⁵⁸² LXX Gn 2:4: Αὕτη ἡ βιβλος γενέσεως οὐρανοῦ καὶ γῆς – “This is the book of the creation of heaven and earth”. (Translation is mine.)

⁵⁸³ S.v. אב in Brown et al. (1952):3. and see also the 10-page long entry of the word in Lisowsky (1993):1-10.

⁵⁸⁴ The nominal root is reconstructed according to other Semitic languages which point towards the meaning of “root”. See s.v. עק"ר and corresponding entries in Brown et al. (1952):785 and Lisowsky (1993):1109-1110.

⁵⁸⁵ Apart from “the fathers of damages” (*avot neziqin* - אבות נזיקין) in mBava Qamma 1:1, we find the expression “the fathers of uncleanness in the Torah” (*avot hatum'ot sheba-Torah* - אבות הטומאות שבתורה) in mZabim 5:10 and “the fathers of work” (*avot mela'khot* - אבות מלאכות) in mShabbat 7:2. Similarly to the fourfold list of damages introduced by the heading “the fathers of damages” in mBava Qamma, the expression “the fathers of work” stands as the heading of a list of 39 types of work which are prohibited on the day of

Mishnah metaphorically expands the “fathers” of human genealogy to legal institutions, but it uses the other concepts in isolation.

This step towards a coherent conceptual vocabulary is taken by the *Yerushalmi*. It creates a common semantic map by creatively expanding the vocabulary of human genealogy. The expansion of the vocabulary proposes that the legal institution of “horn” relates to the legal institution of “goring” in a similarly organic way as Abraham relates to Isaac.⁵⁸⁸ The analogical expansion separates the genealogical model from its original content, so that “fathers” and “generations” serve as elements of a formal conceptual vocabulary. The concept of *‘iqqar* supplements this vocabulary with an exegetical perspective which bears witness to the *Yerushalmi*’s objective of building a bridge between the *Mishnah* and the Bible and upholding the authority of the legal past these texts represent.

7.2.2 Reclassifying damages

Conceptual innovation and exegetical traditionalism characterise the *Yerushalmi*’s classification of damages. A new structure of five types of damages emerges from the *Yerushalmi*’s commentary on the opening passage of tractate *Bava Qamma* in the *Mishnah* which only includes four. The confrontation with the legal past takes place in a hidden manner. The *Yerushalmi* carries out the

Shabbat. The preceding *mishnah* (mShabbat 7:1) also uses the singular form “father of damage” (*av mela’kha* - אב מלאכה).

⁵⁸⁶ The word *toldot* appears twice in the headings of two parallel lists in mMakhshirin 6:5 in the phrases “generations for water” (*toldot le-mayim* - תולדות למים) and “generations for blood” (*toldot le-dam* - תולדות לדם) which give examples of substances considered as water and blood in relation to the purity regulations discussed in the tractate. Not only the topic-comment structure, but also the use of the word *toldot* is very similar to our *Bava Qamma* passage in the *Yerushalmi*. The previous *mishnah* in mMakhshirin lists seven substances susceptible to uncleanness including water and blood, which are then presented (mMakhshirin 6:5) as broad categories with further derived types (*toldot*) of substances.

⁵⁸⁷ The beginning of Chapter 7 in tractate *Shabbat* provides evidence for a conceptual usage of the word *‘iqqar* in the *Mishnah*. The chapter starts with “a great general rule” (*klal gadol* - כלל גדול) which distinguishes between negligent and intentional violation of the Shabbat work prohibition by using the expressions “everyone who forgets the principle of Shabbat” (*kol hashokheach ‘iqqar Shabbat* - כל השוכח עיקר שבת) and “one who knows the principle of Shabbat” (*hayodea’ ‘iqqar Shabbat* - היודע עיקר שבת). The word *‘iqqar* is also used in the statement of a general rule (“this is the rule”, *zeh haklal* - זה הכלל) in mBerakhot 6:7 which distinguishes between a “main dish” (*‘iqqar* - עיקר) and a “garnish” (*tfeilah* - טפלה) in relation to table blessings. The idiomatic expression “at all” (*kol ‘iqqar* - כל עיקר), which is used in emphatic negations (“not at all”), covers the remaining five appearances of the word *‘iqqar* in the *Mishnah*, two times in mEruvin 3:6, and one each in mPesachim 4:5, mBeitzah 2:6 and mChullin 2:9.

⁵⁸⁸ How a model is expanded analogically to create an overarching scientific theory is demonstrated by Mary Hesse. She distinguishes between two forms of analogy, one based on a “one-to-one correspondence between different interpretations of the same formal theory” (formal analogy) and another, so-called “pretheoretic analogy” which enables “predictions to be made from a model” (material analogy). See Hesse (1963):68.

transition from the *Mishnah's* four types of damages to its own system of five in three smooth steps. Here I restrict myself to quoting only those parts of segments א, ב and ג in the opening passage of tractate *Bava Qamma* in the *Yerushalmi* which directly relate to the reconstruction of the three steps.

Segment א

(1) "Four fathers of damages etc." (ארבעה אבות נזיקין) (mBQ 1:1)

(1.1) "THE OX", this is the horn (השור זה הקרן); *as it is written "IF A MAN'S OX GORES THE OX OF HIS FELLOW-MAN ETC."* (Exodus 21:28) So far the discussion was about the tame one; the attested one, where [does it come] from? *"OR IF IT HAS BEEN ATTESTED THAT IT IS AN OX WHICH HAD ALREADY GORED ETC."* (Exodus 21:29)

(1.2) "The pit" (הבור); "if a man leaves the pit open etc." "The owner of the pit pays etc." (Exodus 21:34)

(1.3) "The grazer" (המבעה); "if a man lets a field or vineyard to be grazed over, and lets the grazing loose" (Exodus 22:4), this is the foot; as it is written "those who lets the feet of the ox and the ass loose." (Isaiah 32:20) It is written, "remove its hedges and it shall be for devouring" (Isaiah 5:5), this is the tooth; "break its fences, and it shall be for trampling down" (Isaiah 5:5), this is the foot.

(1.4) "The fire starter" (ההבער); as it is written, "when fire starts and catches the thorns etc." (Exodus 22:6)

Segment א is arranged according to the four principal Mishnaic types of damages which are quoted in a lemmatic fashion from mBava Qamma 1:1. The four types of damages in the *Mishnah* are based on Exodus 21:28-22:14.⁵⁸⁹ The Mishnaic categories "pit" and "fire-starter"⁵⁹⁰ are preserved by the *Yerushalmi* which merely supplements them with biblical proof-texts. The *Yerushalmi*, however, relabels the "ox" and "grazer" by applying the simplest literary form of the labelling technique, that

⁵⁸⁹ "The ox" (השור) appears in Ex 21:28-36, "the pit" (והבור) in Ex 21:33-34, "the grazer" (והמבעה) in Ex 22:4, and "the fire starter" (וההבער) in Ex 22:5. See the editorial notes in Albeck (1952):4:17.

⁵⁹⁰ The change of wording from "fire-starter" to "fire" in unit (1.4) is in harmony with an alternative wording in the *Mishnah* which is motivated by the biblical formulation "when fire starts" in Ex 22:6 (*ki teitzei esh* - כי תצא אש). After the initial list of the four principal categories of damages, mBQ 1:1 states that they are mutually exclusive. In doing so, the category of "the fire starter" (ההבער) becomes "the fire" (האש) as the *Mishnah* says: "these two [i.e. "the ox" and "the grazer"], which have living soul in them, are indeed not like the fire which does not have a living soul" - לא זה וזה שיש בהן רוח חיים כהרי האש שאין בו רוח חיים.

is, the nominal structure with a deictic pronoun (“this is the...”).⁵⁹¹ The Mishnaic “ox” is given a new label which does not appear in the Bible: “the ox’, this is the horn”. The “horn” is only inferred from the act of goring (*yiggach* - יגח) and pushing (*yiggof* - יגף) in Exodus 21:28 and 21:35.

The sheer size of the “grazer” unit (1.3) suggests that this is the point where the *Yerushalmi* considerably deviates from the *Mishnah*. Here the *Yerushalmi* distinguishes between the aspects of “the tooth” and “the foot” which are not supported by the biblical wording of Exodus 21:28-36. The *Yerushalmi* finds biblical support in the non-legal, prophetic book of Isaiah. The word “foot” appears once in Isaiah 32:20, and the *Yerushalmi* also infers it from the act of “trampling down” in Isaiah 5:5. The same verse provides circumstantial support for the word “tooth” which is inferred from the act of “devouring”. The biblical proof-texts link the three new types (“horn”, “tooth” and “foot”) to the biblical tradition, but compared to the four listed in the *Mishnah*, the textual support is weak. Table 5.2 below summarises how segment א aligns the Mishnaic categories with those five which will eventually form the *Yerushalmi*’s fivefold classification in segment ג.

Table 7.3: Shifting from four to five “fathers of damages”

unit	Segment א		→ Segment ג		unit
	Lematic terms from the <i>Mishnah</i>	Terms in the <i>Yerushalmi</i> ’s commentary	Way of identification	terms used in the <i>Yerushalmi</i>	
(1.1)	the ox - השור	the horn – הקרן	explicitly (“this is the...”)	the horn – הקרן	(3)
(1.2)	the pit - הבור	the pit – בור	by biblical quotation only	the pit – הבור	(4)
(1.3)	the grazer - המבעה	the tooth - השן	explicitly (“this is the...”)	the tooth - השן	(5)
		the foot - הרגל	explicitly (“this is the...”)	the foot - הרגל	(6)
(1.4)	the fire starter- ההבער	the fire - אש	by biblical quotation only	the fire - האש	(7)

In segment ב, the focus shifts from the names of the categories to their number. The *Mishnah*’s “four fathers of damages” is challenged so that “four” could eventually become “five” by the end of the *Yerushalmi*’s reclassification of damages.

⁵⁹¹ See 6.2.3 “Variations of labelling in the *Talmud Yerushalmi*”. Please note that the deictic pronoun *zeh* (זה) is conspicuously missing when the *Yerushalmi* identifies the “fire-starter” with “fire”. Its absence underlines the fact that there is nothing innovative in the change of wording.

Segment ב

(2) *We learned*: “four fathers of damages”,

(2.1) *but Rabbi Hiyya taught thirteen*: “DAMAGE, DISCOMFORT, TREATMENT, REST, AND SHAME, FREE GUARDIAN AND THE BORROWER, WAGE TAKER AND THE RENTER.” (tBQ 9:1) Say from now on: *what we had learnt* is about letting damages [happen], *what R. Hiyya taught* is about either letting damages [happen] (להשכר נזיקין), or the damages [caused] to one’s person (לנזיקי גופו).

(2.2) Rabbi Haggai asked: “*How have we learnt: ‘FOUR FATHERS OF DAMAGES’?*” If all of them are related to one [single] ox, *we should have learnt*: ‘three’; and if all of them are related to three [different] oxen, *we should have learnt*: ‘five’. Rather, *just as Scripture speaks, so speaks the Mishnah* (כמה דאישתעי קרייא אישתעיית מתניתא).

The first of the two challenges is resolved in a relatively straightforward manner. The dictum in unit (2.1) is attributed to Rabbi Hiyya, whereas it appears anonymously in the *Tosefta* (tBQ 9:1).⁵⁹² The *Yerushalmi* also attaches a numerical heading to the list which promises “thirteen” elements, but the quoted list contains only nine. The reader reasonably assumes that the missing four are those in the *Mishnah* lemma. The *Yerushalmi*’s heading does not include the expression “fathers of damages” which enables a division into two subsets of damages. The anonymous voice of the *Yerushalmi* relates the Mishnaic four elements to the perspective of the wrongdoer (“letting damages [happen]”) and the remaining nine with the perspective of the injured party (“damages [caused] to one’s person”). The contradiction between “four” (*Mishnah*) and “thirteen” (Rabbi Hiyya’s dictum) is resolved by distinguishing between the perspectives of the wrongdoer and the injured party which constitute two subsets in Rabbi Hiyya’s list of thirteen.

The second challenge in unit (2.2) is the crucial step by which the *Yerushalmi* moves away from the *Mishnah*’s four types of damages to its own five. The dictum is attributed to the Amoraic authority Rabbi Haggai who argues that there is an inconsistency in the *Mishnah*’s classification of four. According to Rabbi Haggai, if the three types of damages caused by cattle (“the horn”, “the foot” and “the tooth”) are grouped under the single heading “ox”, then the list should have three “fathers” overall, that is, “the ox” with three subtypes as well as “the pit” and “the fire”. If, however,

⁵⁹² Anonymous statements (traditionally called *stam*) usually enjoy greater authority as they are meant to represent the majority opinion. As Samely puts it, “the *stam* represents the collective consensus of all rabbis if no alternative is appended to it. If the issue was put to a vote, the *stam* represents the majority position. The named second party is therefore the one defeated by a majority vote. This is, at best, an idealization of the historical developments behind halakhic texts. Samely (2007):104. By presenting the dictum in an attributed form rather than anonymous, the *Yerushalmi* limits the authority of the dictum.

“the horn”, “the foot” and “the tooth” are treated as separate types of damages, then the list should include five, that is, “the horn”, “the foot” and “the tooth” as well as “the pit” and “the fire”. The table below presents the fourfold list of the *Mishnah* and the two alternative options offered by Rabbi Haggai’s dictum.

Table 7.4: Competing classifications of the “fathers of damages” in the *Yerushalmi*

<i>Mishnah</i> (four elements)	Option #1 of Rabbi Haggai (three elements)	Option #2 of Rabbi Haggai (five elements)
the ox - השור	the horn – הקרן	the horn – הקרן
! the grazer – המבעה	the ox - השור	the foot - הרגל
	the tooth - השן	the tooth - השן
the pit – בור	the pit – בור	the pit – בור
fire starter - ההבער	the fire - אש	the fire - אש

The *Yerushalmi* does not point out that Rabbi Haggai’s dictum is based on circular reasoning. The *Mishnah*’s four categories of “ox”, “pit”, “grazer” and “fire” are borrowed from the foundation passage of Exodus, whereas the *Yerushalmi*’s “horn”, “foot”, and “tooth” are merely inferred from passages in Exodus and Isaiah. The challenge against the *Mishnah*’s division of four only applies, if one accepts that the *Yerushalmi*’s mere inferences and proof-texts from prophetic books provide evidence of equal authority for establishing the three categories of “horn”, “foot” and “tooth” as biblical on a par with the *Mishnah*’s four categories of “ox”, “pit”, “grazer” and “fire”. Otherwise, one could simply dismiss Rabbi Haggai’s challenge by pointing out that the types which are inconsistent with the *Mishnah*’s division of four do not appear in the opening passage of tractate *Bava Qamma* of the *Mishnah*, that is, they are not even types which need to be integrated into the classification of damages. The moment the reader acknowledges that “horn”, “foot”, “tooth”, “pit” and “fire” are all biblical types which need to be reconciled in a coherent system, Rabbi Haggai’s challenge becomes compelling. In order to maintain an internal coherence of the classification, we need to talk about either three or five types, and not four as the *Mishnah* does.

The *Yerushalmi* does not resolve Rabbi Haggai’s challenge against the *Mishnah*’s division of four. Instead, it concludes the challenge with a statement that sounds like a proverb: “just as Scripture speaks, so speaks the *Mishnah*”.⁵⁹³ The sentence is awkwardly vague in a place where the reader

⁵⁹³ For the problematic nature of drawing the line between the anonymous voice of the text and the quoted speech and for the five methodological assumptions in 5.2.1 “From clauses to layers in the *Yerushalmi*”.

expects a straightforward answer to the question whether the division of damages is by three, four or five. As if the challenge was so overwhelming, the *Yerushalmi* falls back on a proverbial statement which expresses how the *Yerushalmi* sees the relation between the Bible and the *Mishnah*, and how this relation justifies the *Yerushalmi*'s deviation from the *Mishnah*'s division of four in tractate *Bava Qamma*. Segment ג of the opening passage systematically discusses "the generations of horn", "the generations of pit", "the generations of foot", "the generations of tooth" and "fire"⁵⁹⁴ by which the *Yerushalmi* tacitly approves the challenge against the *Mishnah*'s conceptually inconsistent division of four, and opts for the consistent division of five.

The proverbial statement suggests that the *Mishnah*'s division is due to an extreme *exegetical loyalty* to the Bible which holds on to the very wording of the biblical text. This sounds like a fair description of the *Mishnah*'s approach to the Bible considering that tractate *Bava Qamma* in the *Mishnah* follows the topical arrangement of Exodus 21:28-22:14 and employs its vocabulary in formulating the "four fathers of damages" in mBava Qamma 1:1.

The proverbial sentence about the relation between the *Mishnah* and the Bible is out of place. It appears where the reader expects the resolution or dissolution of the *Yerushalmi*'s challenge. The sentence is incongruous with the context. This tension indicates that the *Yerushalmi* follows a different strategy. Instead of insisting on the biblical *wording*, the *Yerushalmi* presents itself as an enterprise in pursuit of the Bible's intended *meaning*. It takes the liberty of deviating from the biblical wording and creating its own legal vocabulary which are partly based on mere inferences from biblical passages, legal, prophetic or otherwise. In this sense, the *Yerushalmi* exercises an approach to the legal past which is similar to the conceptual approach in Justinian's *Institutes*. The crucial difference is that the *Yerushalmi* realises the conceptual innovation in a concealed manner. A new and conceptually more appealing understanding of the sources is presented as a traditionalist interpretation.

⁵⁹⁴ The damage type "fire" does not have "generations". "Fathers" and "generations" constitute two levels of the formal hierarchy of classification, but they also seem to hold legal significance. A particular damage classified as principal ("father") results in full, whereas one classified as derivative ("generation") results in shared responsibility for the incurred damage. Full responsibility for a damage classified as "father" requires that the wrongdoer "pay the damages from the best of his land" (לשלם תשלומי נזק במיטב הארץ) according to the end of mBQ 1:1. Shared responsibility for a damage classified as "generation" means that the value of the damage is shared between the wrongdoer and the injured party. The expression "one is responsible for the wrongdoings" (הוא חייב על האונסין) suggests that damages classified under "fire" are exclusively of the principal "father" category. Unlike damages classified as "generations" of "horn", "pit", "foot" or "tooth", responsibility for damages of "fire" is never shared. See "Negligence and unforeseeable circumstances in the categories of injuries" in Albeck (2014):412-425.

7.3 Organising legal knowledge: Comparative observations

Justinian's *Institutes* and the *Yerushalmi* show common characteristics and significant differences in their vocabularies of classification and their adaptation to the legal matter at hand. The *Institutes* uses a static *genus-species* vocabulary, and creates symmetrical classification in the law of obligations. In both regards, the *Institutes* is untidy according to modern standards of legal coherence which indicates that rhetorical considerations may have played an important part in the phrasing. The *Yerushalmi* uses an organic "fathers-generations" vocabulary and promotes a new classification in the disguise of being the commentary of old law. In both regards, the *Yerushalmi* shows that exegetical loyalty to the legal tradition is key for maintaining authority, and innovation needs a traditionalist veil.

Classification was discussed above according to two aspects: as an adaptive generic framework and the way the framework is applied to the legal material. The former provided a vocabulary and a mental structure for the manipulation of an unmanageably large set of rules. Roman law adopted the *genus-species* framework which has become dominant in the Western scientific tradition. Combined with abstract definitions described in the previous chapter, the vocabulary freezes the observed phenomena into solid unchanging items which can be subsequently arranged in a static system of classification. As long as the existence of the observed phenomena is presupposed, their coming into being is uninteresting. They are always already there, their change is ruled out, and therefore the creation of an intellectually appealing whole is theoretically possible.

At this point, the Rabbinic framework of classification offers a strong alternative. The vocabulary and structure are based on the genealogical tables of the Hebrew Bible. Principal legal categories (*avot* – "fathers") generate secondary ones (*toldot* – "generations"). Key characteristics are carried over from the "fathers" to the "generations" in an organic and dynamic manner which allows modifications. The vocabulary is in harmony with the labelling technique which offered an alternative to establishing legal terms by definition exercised by Roman law. Labels do not set rigid abstract boundaries, and, therefore, the legal terms can be dynamically expanded to fit new scenarios. Elements grouped under one label relate to each other like members of a family: any two legal scenarios have a number of common characteristics, yet, it is not possible to provide an abstract description which applies to all scenarios under the same label.

In Justinian's *Institutes*, *genus* relates to *species* as *generaliter* (generally) relates to *specialiter* (specifically), one corresponding with the technique of *divisio* and the other with the technique of *partitio*. However, the example of obligations and few other passages indicate that the use of *species*

is not fully consistent. It is sometimes used as a synonym of *genus*, and sometimes as a lower level of the hierarchy of classification.

In the *Yerushalmi*, the vocabulary of “fathers” and “generations” encouraged by biblical genealogical tables is merged with the vocabulary of “roots” and “generations”. The former represents a formal perspective of classification, the latter an exegetical perspective differentiating between legal terms generated from the biblical text (*de-oraita*) or created by Rabbinic authority (*de-rabbanan*). The word “generations” is used in two different senses and ties two perspectives together which would possibly work better in separation. From the modern normative point of view of legal dogmatics, the vocabularies of classification used in Justinian’s *Institutes* and the *Yerushalmi* are wanting, but at the same time, their controlled ambiguity allows to adapt to new circumstances.

The application of the Roman *genus-species* framework and the Rabbinic fathers-generations framework bear witness to their adaptive flexibility. The static *genus-species* framework is intellectually appealing for the coherence and consistency it allows and indeed necessitates. By its nature, however, the static framework cannot neatly handle miscellaneous phenomena which fall outside its scope. As soon as the contours of the framework are drawn, it is difficult to modify it without radical changes. We have seen that obligations were indeed arranged in new radically forms from Gaius to Justinian. Additionally, the neat symmetrical structure of Justinian’s *Institutes* is achieved at the price of being somewhat artificial. The structure is based on two different meanings of *ex re*. The term *res* marks the physical object in the class of contractual obligations, and the conduct related to the physical object in the class of delictual obligations. The word *res* artificially ties the two sides of obligations together, but for the elementary purposes of the *Institutes*, artificial neatness seems to be enough.

The fathers-generations framework of the *Yerushalmi* may fall short in terms of coherence and consistency, but its organic nature allows the integration of exceptions and new rules. The “generations” (*toldot*) do not have to replicate all characteristics of their “fathers” (*avot*) in order to be part of the classification. Major traits are preserved, but the “generations” can maintain some of their peculiarities. What would be classified as exceptions in a static framework can still fit the framework which is organic. The flexibility of the framework allows the *Yerushalmi* to deviate from the classification of damages presented in the *Mishnah*, but the confrontation is not open. It provides biblical justification for its own legal terms, and tacitly approves a challenge against the Mishnaic classification. Strictly speaking, the *Yerushalmi*’s reasoning is circular inasmuch as it provides a new classification for terms which are partly introduced by the *Yerushalmi* itself. The shift from the Mishnaic classification to the one offered by the *Yerushalmi* is concealed rather than explained. The *Yerushalmi* explains the *Mishnah*’s exegetical loyalty to the language of the Bible with

a proverb (“just as Scripture speaks, so speaks the Mishnah”). The *Yerushalmi* tacitly distances itself from the *Mishnah*, and indicates that it prefers a neat symmetrical structure to a mediocre classification echoing biblical language.

The investigation of establishing and organising legal terms have underlined diverging tendencies of conceptualisation in Justinian’s *Institutes* and the *Yersushalmi*. Both of them establish legal terms, create adaptive frameworks and vocabularies for their classification, and realise neat and symmetrical, though somewhat artificial classifications. However, the same goal is addressed by different techniques. Definitions and labels on the one hand, and the *static genus-species* and the organic fathers-generations vocabularies on the other represent diverse ways to deal with the same intellectual challenge.

CHAPTER 8: SYNTHESIS AND OUTLOOK

The historical and methodological background work in Part 1 showed that traditional assumptions about the cross-fertilisation of neighbouring cultures cannot be applied in the case of late antique Roman and Palestinian Rabbinic legal cultures. The evidence about cross-cultural exchange in the period between Caracalla's universal expansion of the applicability of Roman law in 212 and Justinian's *Novella* 143 ΠΕΡΙ ΕΒΡΑΙΩΝ ("On the Hebrews") in 552 is inconclusive. The analysis of the scarce historical evidence suggested that Roman and Palestinian Rabbinic jurisdiction moved towards relative isolation from each other in a period which witnessed the accumulation of legal knowledge and the eventual creation of the Justinianic legal corpus and the *Talmud Yerushalmi* (chapter 2). For this reason, common comparative practices and explanations were found inappropriate, and it was concluded that we need to approach our texts with a methodological tool box which includes little reference to historical circumstances and which does not target to bring out some hidden avenues of influence (chapter 3). Instead, engaging with texts on their own terms was proposed as the first step towards diachronic and cross-cultural comparison. It was argued that the scope and nature of the results such comparison produces is different than what comparative historical research normally aims at. We are not able to pinpoint the exchange of legal institutions and ideas, we are not able to say much about the *things that happened* in the past. Instead, we are able to highlight structural and conceptual tendencies of the texts which represent Roman and Palestinian Rabbinic legal culture. The first engagement of selected passages from the law of obligations in Justinian's *Institutes* and the law of damages in the *Talmud Yerushalmi* drew attention to three structurally similar literary signals which indicated a tendency towards abstraction in radically different ways (chapter 4).

The three case studies in Part 2 offered close readings of texts from the perspective of three literary signals which allowed to reflect on how Roman and Palestinian Rabbinic legal texts operate. The analysis of quoting and quoted voices indicated that Justinianic texts and the *Yerushalmi* developed different strategies to uphold the authority of the legal past while providing law with an adaptive

conceptual framework and with controlled ambiguity to answer to legal change (chapter 5). The rigid top-down strategy of definitions in Justinian's *Institutes* and *Digest* and the fluid bottom-up strategy of labels in the commentary layer of the *Yerushalmi* drew attention to underlying general tendencies. Roman law's relation to old law appeared to be conceptual which is governed by the principles of *iustitia* and *aequitas*. By contrast, Palestinian Rabbinic law's relation to old law was described as exegetical which is governed by the principle of divine will (chapter 6). This difference between definitions and labels, conceptual and exegetical tendencies is reflected by the classification frameworks which organise legal terms in the Justinianic corpus and the *Yerushalmi*. The rigid hierarchical classification framework of Roman law based on the "scientific" vocabulary of *genus* and *species* was contrasted with the fluid organic framework of Palestinian Rabbinic law based on the "organic" vocabulary of "fathers" and "generations". Both classification frameworks were found wanting in terms of coherence and consistency. The conceptual shortcomings were understood as indications of other extra-legal considerations. While Justinian's *Institutes* compromise for the sake of didactic-rhetorical effect, the *Yerushalmi* conceded conceptual neatness in order to harmonise different vocabularies of classification and to mask a deviation from the *Mishnah* (chapter 7).

The present chapter attempts to draw out lines between the historical and methodological background work in Part 1 and the three case studies about literary signals for legal abstraction in Part 2. The thesis has possibly opened up more questions than it has managed to answer, it has unsettled more assumptions than it has managed to resolve. The three subsections of 8.1 below will outline the horizon of these questions and assumptions by placing preliminary results distilled from the case studies in chapters 5, 6 and 7 into a wider context. The concluding section will then sketch two possible future avenues of research, the investigation of "scholasticism" in Roman and Palestinian Rabbinic legal culture, and the application of analytical tools of big data to ancient legal texts.

8.1 The wider context of preliminary results

8.1.1 From text to history in Justinian and the *Yerushalmi*

The analysis of quoting and quoted voices in the Justinianic corpus and the *Yerushalmi* suggested that literary conventions, social and educational circumstances explain the "evolution" of these texts better than the putative essence or philosophy of Roman and Rabbinic legal culture.⁵⁹⁵ As discussed

⁵⁹⁵ The educational environment of Roman and Rabbinic law is relatively understudied. The Roman legal curriculum can be reconstructed from the imperial prescripts of Justinian which indicates the educational

above in section 5.1.2 “The silent compiler and the compositional history of the *Digest*”, David Pugsley suggests that Roman law schools developed teaching materials after the *Law of Citations* published in 426 had limited the legal scholarship to the five most prominent jurists. According to Pugsley, the schools annotated Ulpian’s commentaries on the work of Sabinus and the *Praetorian Edict* to provide their students with the favoured juristic opinions in a thematic order. When the discovery of Constantine’s law library in Constantinople sparked Tribonian’s ambition to make it publicly available, he decided to adopt and update what had been already in use in the schools, and eventually replaced them with the *Digest* in 533. Pugsley’s reconstruction emphasises historical continuity, a cumulative process which started with Sabinus and the *Praetor’s Edict*, continued with Ulpian’s commentaries on these works, and concluded with annotated versions of Ulpian’s commentaries developed in the law schools. There is no independent evidence for the initial stages of the cumulative process, but the *Digest* can be taken as a collage which blends the editorial activity of many generations into one text.

In this regard, the literary history of Talmudic legal scholarship is better documented. While we only have one snapshot image of Roman law taken in 533, the literary evolution of Palestinian Rabbinic law is documented in three snapshots available in the *Mishnah*, the *Tosefta* and the *Yerushalmi*. Each of these texts can be described as long-exposure photo images in which stationary elements of the legal past are captured, but their contours are blurred and smeared. The nature of the cumulative process which the literary snapshots grasp is obscured by the lack of contextual evidence. Similarly to Pugsley, who attempts to separate the individual images blended in the *Digest*’s collage, David Weiss Halivni tries to decipher the contours of the stationary elements of the legal past in the available Rabbinic documents. Halivni puts forward a compelling theory according to which the accumulation of legal knowledge in the dialectical form of challenge and resolution is due to the Rabbinic “predilection for justified law” which he considers to be peculiar to Talmudic legal culture.⁵⁹⁶

The work of Pugsley and Halivni is a reaction to generations of previous scholarship which was preoccupied with reconstructing the *ipsissima verba* of jurists and rabbis in Justinianic and Rabbinic texts. While these avenues of research have been largely abandoned in recent times, the two fields

purpose of the *Institutes*, the *Digest* and the *Code*. The Rabbinic evidence about educational practices is even more indirect than the Roman. It is based on stories which may represent a Rabbinic ideal rather than actual practice. Some of the relevant studies are Sherman (1908):499-512 and Scheltema (1977):307-331 as well as Goodblatt (1975), Gafni (1978):12-37 and Rubenstein (2002):55-68.

⁵⁹⁶ “Jewish law, including biblical law, in contrast to other ancient Near Eastern law, is vindicatory. ... It is part of the purpose of this book to trace, from the Bible onward, the vicissitudes of this unique characteristic of Jewish law.” Halivni (1986):7-8.

have expressed opposing undertones when reconciling how to move from the texts at hand to their compositional history. Otto Lenel, an early and important critic of the “interpolation hunting” in Roman law,⁵⁹⁷ rearranged the quotations of the *Digest* in his *Palingenesia* in order to reconstruct juristic works which had not been preserved independently. Lenel’s reconstruction is based on the assumption that the bibliographical information in the reference headings as well as the quotations are largely accurate.⁵⁹⁸

Theoretically, the quoting formulas of the *Yerushalmi* allow a similar reconstruction of legal opinions which are partly attributed to the various Tannaitic and Amoraic masters. The quoting formula provides information about the provenance of the saying and the intellectual pedigree of the quoted master as in the following formula discussed in section 5.2.2 above, “Rabbi Bun the son of Hiyya in the name of Rabbi Shmuel the son of Rabbi Isaac”. What the formula does not record is the title of the work from which the quotation is taken, presumably for the reason that such work never existed. Reconstructions based on quoted materials have been nevertheless created by scholars of Rabbinic literature. Michael Higger’s *Otzar ha-baraitot* collects non-Mishnaic Tannaitic teachings preserved in the *Talmud*, but it does not intend to reconstruct lost works which might have been available to the creators of the *Talmud*.⁵⁹⁹ Another example comparable to Lenel’s *Palingenesia* in Rabbinic scholarship is the reconstruction of the Tannaitic commentary to the book of Exodus attributed to the exegetical school of Rabbi Akiva known as the *Mekhilta de Rabbi Shimon bar Yochai*. Meir Friedman, David Hoffman, Jacob Epstein and Ezra Melamed collected passages from classical Rabbinic literature, medieval commentators and fragments preserved in the Cairo Geniza for the reconstruction.⁶⁰⁰

The *Digest*’s reference headings and the *Yerushalmi*’s quoting formulas are both meant to vouchsafe the accuracy of their quotations. The two texts have chosen different literary forms to mark quotations. The difference indicates that quotable materials were available for the creators in different forms. The bibliographical information preserved in the reference headings of the *Digest* suggests that the text was created in a primarily written scholarly environment. The reference point

⁵⁹⁷ See Lenel’s classic article about the subject in Lenel (1925):17-38.

⁵⁹⁸ The assumption is confirmed by the handful of cases where the quotation did survive independently from the *Digest* like the second quotation in D.44.7 which bears the reference heading of “Gaius libro tertio institutionum”, that is, “of the third book of Gaius’s Institutes”. The accuracy of the quotation is confirmed by the 5th century Verona palimpsest predating the *Codex Florentinus* of the *Digest*. The palimpsest, which was discovered in 1816 by Barthold Niebuhr, preserves Gaius’ work almost completely. See Zulueta (1946).

⁵⁹⁹ See Higger (1938-1948) and the accompanying article of Higger (1942).

⁶⁰⁰ See Friedmann (1870), Hoffmann (1905) and Epstein et al. (1955).

here is the written primary work preserved in the library.⁶⁰¹ According to Pugsley's reconstruction, this library could be the one discovered by Tribonian and documented in the *Florentine Index*.

By contrast, the *Yerushalmi*'s quoting formulas project a primarily oral scholarly environment in which the authority of the quotation is guaranteed by the preservation of the legal opinion in master-disciple relationships. Oral transmission of post-biblical legal knowledge forms part of the *Yerushalmi*'s fiction,⁶⁰² and the complete absence of literary and physical evidence suggests that Rabbinic masters indeed refrained from creating individual legal works. There is no "Institutes" of Rabbi Ishmael or "Responses" of Rabbi Akiva. What we have instead are corporate commentaries to biblical books attributed to the exegetical schools of Rabbi Ishmael and Rabbi Akiva⁶⁰³ constituted by anonymous and named quotations similar to those found in the *Yerushalmi*.

The literary and sporadic physical evidence suggest that the works quoted in the *Digest* were available as separate texts. The *Bible* and the *Mishnah* were similarly available for the *Yerushalmi*, but perhaps they were partly recalled from oral repositories. The *Tosefta*, and the various Tannaitic and Amoraic biblical commentaries preserve some of the *baraitot* and *memrot*, but the abundance of additional materials suggests that the *Yerushalmi*'s creators had more (or different) sources to rely on. According to Halivni and others, Tannaitic and Amoraic legal knowledge was preserved in short and mostly apodictic forms, and transmitted orally by professional "reciters" (תנאים – *tanna'im*).⁶⁰⁴ This is certainly how the Tannaitic and Amoraic masters are quoted in the *Yerushalmi* (and *Bavli*), but it is quite inconceivable that the "reciters" memorised them as large unstructured collections. Commenting on this point, Catherine Hézser notes the scarcity of public as well as

⁶⁰¹ Justinian's *Constitutio Omnem* expresses the wish that the *Digest* should gain ultimate authority making any previous collections of law (including the primary sources) superfluous. Talking about the completed project of the *Institutes* and *Digest* and the accompanying curriculum, *Const. Omnem* 11 says that "all this, we ordain, is to be in force for all future ages, to be observed by everyone: professors and students of the law, secretaries, and the judges themselves."

⁶⁰² The reality and ideology of the "Oral Torah" has been the focus of scholarly interest for decades. The starting point of the investigation is Gerhardsson (1961a), while Jaffee (2001) and Alexander (2006) are two of the most influential works in recent decades. Rosen-Zvi (2008) offers a good overview of the theoretical and methodological problems of "orality" research in Rabbinic literature. The machine assisted investigation of a large Rabbinic corpus, which is outlined below in section 8.2, is expected to push the field ahead from its current standstill.

⁶⁰³ Since David Hoffmann, scholars of the Tannaitic midrash collections have suggested the existence of two exegetical schools in Tannaitic times, one associated with Rabbi Ishmael and the other with Rabbi Akiva. The schools are believed to have created separate commentaries to the biblical books of Exodus, Leviticus, Numbers and Deuteronomy, though not all of them have survived. See the monographic treatment of the subject in Yadin-Israel (2004).

⁶⁰⁴ See the discussion of two Rabbinic ideal types, the "analytical Talmudic sage" and the "living book" in Vidas (2014):143-149.

private archives and libraries in Rabbinic times,⁶⁰⁵ while Martin Jaffee suggests that the memorisation and transmission of Rabbinic teachings might have been assisted by written aids for personal use.⁶⁰⁶

The comparison provides interesting insights about the supposed compositional history of the *Institutes*, *Digest* and the *Yerushalmi*. These texts predominantly project a corporate literary persona as their speaking voice which is always present and always in control. Contextual evidence suggests that the corporate literary persona of Justinian's *Institutes* and *Digest* can be aligned with a historically identifiable corporate author, that is, with Tribonian's editorial committee which put together the *Digest* and updated the *Institutes*. In absence of any contextual evidence, the *Yerushalmi*'s "editorial committee" remains historically unidentifiable.

Scholars of the *Talmud Yerushalmi* and *Bavli* address this frustrating state of affairs by different strategies. Halivni and the proponents of "Stammaitic" authorship maintain that the corporate literary persona stands for a specific historical group of people (the "Stammaim"), even though they cannot be named or dated. As I have argued above in section 5.2.2, the theory does not account for the transition from text to history and commits itself to a hunt for the "author" who may not even exist. The anonymous voice cannot be aligned with a historical group of people; the anonymous voice is rather the mask of a historically diffuse corporate authorship. To adapt this theory to our own thinking about text and history, we may say that it is not the "authorial intention" which grants coherence to the text, but the set of literary conventions (structure, terminology, quoting technique) to which generations of the *Yerushalmi*'s creators adhered to. The peculiarity of the literary composition may be illuminated with an analogy: the *Yerushalmi*'s text is like a step-by-step report of a prolonged chess game. By reading the report, one may be tempted to assume that there is a particular person playing the game which is in fact played by a series of individuals who all adhere to the rules of play.

8.1.2 The Roman and Rabbinic treatment of the legal past

The legal past is held in the highest esteem in both Roman and Rabbinic law. In Rabbinic law, the idea of "the chain of tradition" is supposed to guarantee that the fundamental virtues of continuity, authority and reliability are upheld. Similar in style to the genealogical tables in the Bible,⁶⁰⁷ the

⁶⁰⁵ Hézser (2001):150-168.

⁶⁰⁶ Jaffee (1998):46, 57 and passim.

⁶⁰⁷ The genealogical line is recorded in the genealogical tables for the descendants of Adam in Genesis 5:3-32, of Noah in Genesis 10, and of Shem in Genesis 11:10-32. Genealogical tables attracted great interest in the 1970s and 1980s encouraged by the research into kinship structures in anthropology. See the monographic

opening passage of tractate *Avot* in the *Mishnah* demonstrates an unbroken chain of master-disciple relationships from Moses to Hillel and Shammai, that is, from the revelation at Mount Sinai to the first giants of Rabbinic learning.⁶⁰⁸ The idea of the chain of tradition seems to be at work in the Rabbinic quoting formulas which record the intellectual provenance of the quoted juristic opinion.⁶⁰⁹ The written account of the Bible (“Written Torah”) is supplemented by the Rabbinic tradition which gradually unfolds in the mouth of scholars (“Oral Torah”).⁶¹⁰ The past is not just an ideal, but the absolute reference point. According to its self-description, Rabbinic law is the realisation of the divine will which was expressed at one particular point in history at the revelation at Mount Sinai.

Roman law has a similarly intimate, though not absolute, relation to the legal past. Justinian’s *Institutes* presents the historical development of law from the *leges* via the remedies offered by the *praetor* and the Senate until the law is settled by imperial legislation. The imperial legislation is meant to re-establish the ideal simplicity of the *leges* which allegedly became obscured over time as the changing circumstances had required corrections without maintaining the ideal coherence of the old law. On the topic of male and female right of inheritance in the agnatic line,⁶¹¹ Justinian’s *Institutes* praises the *Twelve Tables* which “made simplicity the handmaid of law”. That ideal is what the *Institutes* aims to achieve as well.

“We ourselves, anxious to follow the scheme of the Twelve Tables and preserve its outline, applaud the sensitivity of the praetors but find their remedy inadequate. ... Our

summary in Wilson (1977) as well as Oden (1983), Prewitt (1981) and Donaldson (1981). A recent monographic overview of the field is McClenney-Sadler (2007).

⁶⁰⁸ See the chain of traditions in mAvot 1:1-12, the idea of oral transmission in bEruvin 54b and the summary in Cohen (2007). The chain of tradition seems to be broken or the form of transmission changed after Hillel and Shammai as noted by Saldarini (1974).

⁶⁰⁹ Jacob Neusner records the introductory formulas (“attributives”) in his 20-volume long study of the tractates of the Mishnaic order *Tohoroth*. One of the two concluding volumes of the project is dedicated to the literary description of the tractates. Here, Neusner writes a short paragraph about the attributive and the form אומר which he sadly finds uninteresting: “WMR [אומר] functions to join said opinion to a particular name and bears no particular or substantive meaning in the many thousands of cognitive units in which it occurs. No purpose is served by cataloguing them.” In an article which differentiates between three basic “quotation forms” (אמר אי; אמר אי משום ב; and אמר אי משמיה דב), Richard Kalmin concentrates on the question of using them for the sake of dating. Kalmin (1988):167-187. The phenomenon of “speech reports” in Rabbinic literature is treated by the chapter “The literary device of quoting rabbis” in Samely (2007):97-115.

⁶¹⁰ The landmark publication in the topic is Gerhardsson (1961b). Martin Jaffee, who coined the expression “Torah in the mouth”, revisited the problem of transmission in light of anthropological findings about oral cultures in Jaffee (2001).

⁶¹¹ See Buckland (1931):§73 on 201-205. As Berger puts it, “the agnatic tie is created by descentance in the male line from a common ancestor.” Berger (1953):358.

pronouncement has redesigned the system and made it conform to the scheme of the Twelve Tables.”⁶¹²

In both Rabbinic and Roman circles, old law is hardly ever abrogated or admitted to being abrogated.⁶¹³ It either falls out of use, or it is adapted to keep the integrity of the old and to implement the purpose of the new. Among rules falling out of use, we find procedural rules which became obsolete as Rome grew into an empire and absorbed people beyond the city walls,⁶¹⁴ and ritual laws which became inapplicable after the destruction of the Temple in Jerusalem in 70.⁶¹⁵ Rules falling out of use still remain theoretically part of the law, and it is only incidental that in a given historical period they are not in use. In Rabbinic law, for example, rules associated with the Temple in Jerusalem (ritual or otherwise) are kept alive in case the Temple is reconstructed and its ritual is re-established in what Judaism considers to be the messianic era.⁶¹⁶ In Roman law, old rules remain theoretically available for innovations, but generally once a rule falls out of use, it is hardly ever brought back to life.⁶¹⁷

How old law is adapted to changing circumstances uncovers a fundamental difference between Rabbinic and Roman law. The *leges* in general and the *Twelve Tables* in particular orientate the

⁶¹² J.3.2.3a-b: *simplicitatem legibus amicam amplexa ... Nos vero legem duodecim tabularum sequentes et eius vestigia in hac parte conservantes laudamus quidem praetores suae humanitatis, non tamen eos in plenum causae mederi invenimus ... ideo in plenum omnia reducentes et ad ius duodecim tabularum eandem dispositionem exaequantur nostra constitutione sanximus omnes legitimis personas*. Translation is from Birks et al. (1987a):95.

⁶¹³ Some examples of rare pieces of abrogated law are given by Wolfgang Kaiser: the abolition of the *adsertor* in the action for freedom in 528 (C.7.17.1), the abolition of Latin citizenship in 531 (C.6.7.1), and the abolition of *caduca* and the *SC Trebellianum* in 533 (Tanta and Dedoken 6). See Kaiser (2015):145, n. 152. Other examples are the 3rd century BCE *Lex Aquilia* which “abrogated the earlier legislation on the matter... [of] the damage done to another’s property”, and the *Lex Domitia* on “the system of election of pontiffs and augurs” which was abrogated by Sulla (138-178 BCE). See Berger (1953):547 and 551. By the time of the classical jurists, abrogating old materials of civil law might not have been an option anymore.

⁶¹⁴ The formulary system is understood to have replaced the system of *legis actiones* in the *lex Aebutia de formulis* (ca. 150 BCE) and the *leges Iuliae* (17-16 BCE) according to a passage in Gaius (Inst. 4.30). See Jolowicz et al. (1972):218-225.

⁶¹⁵ One example is the idiosyncratic *sotah* procedure against the wife who is suspected with adultery. The *Mishnah* dedicates a complete tractate to the topic, but notes in mSotah 9:9 (in a part which is supposedly a later supplement to the tractate) that *sotah* fell out of use “when adulterers multiplied” (משרבו הנמאפים). See the monographic discussion of “the rite that never was” in Rosen-Zvi (2012).

⁶¹⁶ The *Mishnah* describes the Temple rituals as if they are still being practised. According to Jacob Neusner, these descriptions belong to “a realm of made-up memories, artificial dreams, hopes, yearnings”. This realm, however, also opens up a discussion about the messianic times when the Temple is rebuilt and its rituals are re-established. See Neusner (1984b):5. The rebuilding of the Temple has become a key idea in contemporary Jewish radical movements discussed by Ravitzky (1996).

⁶¹⁷ The aforementioned *Lex Domitia* (103 BCE), which was first abrogated by Sulla, “was later restored by the Lex Atia”. Berger (1953):551.

legislative work of the Roman jurists, and later, that of the emperors. The old law plays a quasi-constitutional role as later generations considered themselves obliged to uphold its purpose. That purpose is condensed into the meta-legal principles of *iustitia* and *aequitas*. The former is defined as the ultimate goal of “learning in the law” according to the opening paragraph of Justinian’s *Institutes*.⁶¹⁸ The latter is described as the most important idea to be considered “in every context but particularly in the law” according to the jurist Paul.⁶¹⁹ Once the purpose of old law is grasped in light of the meta-legal ideals of *iustitia* and *aequitas*, there is nothing to prohibit the creation of a more orderly framework and a more coherent vocabulary. Maintaining the purpose of old law is of primary importance, the wording of old law is secondary. Venerating the past and enhancing the expression of its purpose is expressed by a comment in the *Institutes* which justifies the renaming of a legal transaction: “We were anxious to uphold whatever could be upheld and to find clearer terminology.”⁶²⁰ Old law is historically significant, but it is an essentially arbitrary expression of “the knowledge of divine and human matters”.⁶²¹

For Rabbinic law, the reception of the Torah at Mount Sinai is a historical event. At the same time, the text of the revealed Torah is an absolute expression of the knowledge of divine and human matters.⁶²² The text of the Torah *does not signify* justice and equity, but the Torah in its very wording *is* justice and equity. Whereas the ultimate goal of Roman law is to accomplish *iustitia* and *aequitas*, the ultimate goal of Rabbinic law is to accomplish the divine will as revealed in the Torah. For this reason, maintaining the purpose of Torah is not possible without maintaining its wording. If the rabbis were to create a more orderly framework and a more coherent vocabulary, this would only be possible inasmuch as the elements of the framework and vocabulary arise from the very wording of the Torah itself.

⁶¹⁸ J.1.1.pr-1: “Justice is a persistent and perpetual will to provide each person with his right. Wisdom in the law is the acquaintance with things divine and human, the knowledge of just and unjust.” – *iustitia est constans et perpetua voluntas ius suum cuique tribuens. Iuris prudentia est divinarum atque humanarum rerum notitia, iusti atque iniusti scientia*.

⁶¹⁹ Paul, Questions 15, D.50.17.90

⁶²⁰ J.2.7.3: *sed nos plenissimo fini tradere sanctiones cupientes et consequentia nomina rebus esse studentes constituimus*. Translation is from Birks et al. (1987a):65.

⁶²¹ This definition of “law” is from the opening paragraph of the *Institutes* (J.1.1.1).

⁶²² Christine Hayes suggests that the Torah from Sinai occupies the space of “natural law” in Rabbinic legal thought. See Hayes (2015):330-354. Hindy Najman brings out the difference between natural and divine law when presenting Philo’s legal theory: “for Philo, the unwritten law is the Law of Nature, whose universally acknowledged authority underlies the authority of Mosaic Law because Mosaic Law is the most perfect particular, written copy of Natural Law.” Najman (2003):136. In Najman (2004), she traces “sacred writing in ancient Judaism”, that is, the human production of divine law, to biblical prophecy and the biblical narratives of divine revelation.

The *Yerushalmi*'s hermeneutical relation to old law is exegetical which affects the way it establishes legal terms. The *Yerushalmi* binds itself to the thematic order of the *Mishnah*⁶²³ and to the language of the Bible. It discusses legal matters by closely following the Mishnaic order, but the legal terms are predominantly borrowed from the language of the Bible or motivated by biblical vocabulary. The *Yerushalmi* assumes an intimate acquaintance with the Bible and treats legal terms borrowed from the biblical text as self-explanatory. Rather than creating a semantic tension to be alleviated with a definition, the first use of the legal term activates the biblical context with all possible cross-references.⁶²⁴ The *Yerushalmi* accumulates cases and associates them with a particular legal term by using the labelling strategy (e.g. "this is a sale in error"), and thereby it builds a web of cross-references which gradually approximates the meaning of the term. The meaning is not independent so that it could be grasped through a reformulation in abstract terms such as justice, equity or sanctity. It is embedded in the text of the *Bible* which is absolute for the *Yerushalmi*. Instead of abstract definitions, continuous reading and cross-references make it clear how a particular term is used.

By contrast, the *Institutes*' hermeneutical relation to old law is conceptual. The *Institutes* and the *Digest* are not bound by the wording of old law. The texts adopt the structure of previous materials: Justinian's *Institutes* closely follows Gaius, the *Digest* more or less follows the traditional order of the *Praetorian Edict* – but neither the *Institutes*, nor the *Digest* are commentaries. They are independent works. The terms do not have to be generated from an absolute text, and in case they are, their meaning is not locked in an absolute text. The meaning does not have to be excavated by careful exegetical techniques, but can be expressed independently in general abstract terms.

8.1.3 The Roman and Rabbinic classification of law

There is nothing extraordinary or specifically scientific in the attempt to arrange our environment according to controlled concepts. In the 1970s, Rodney Needham described different systems of social symbols by which societies arranged themselves and their social norms into manageable wholes following the work of Robert Hertz, Emile Durkheim and Marcel Mauss⁶²⁵. The complexity of

⁶²³ David Weiss Halivni suggests that the commentary style of the *Talmudim* returns to the exegetical approach of the *midrashei halakhah* from the *Mishnah*'s statutory approach. For the *Mishnah*'s thematic reorganisation and the affinity between the *Talmudim* and *midrashei halakhah*, see Halivni (1986):41-43 and 94-95. The tension between the Mishnaic and Talmudic presentation is discussed in Wimpfheimer (2011):9-13.

⁶²⁴ Biblical quotations are often fragmentary in which the relevant proof-text may be the unquoted part of the sentence. As Alexander Samely puts it, "linguistically speaking, the most natural small, quotable piece of Scripture is the sentence, so that even if only part of a sentence is quoted, it is the whole of the predication that is often intended." Samely (2013).

⁶²⁵ Hertz (1973). and Durkheim et al. (1963).

genders, social groups, imagined and perceived geographical settings are translated, according to Needham, into manageable structures of two, three, four and so on. Needham describes the different origins such as social determinism, ritual origins, the encoded relational structure such as opposition, transition, and the possible transformations such as inversion, disruption, nullification of “primitive” classifications.⁶²⁶ The subject of “primitive” and “scientific” classifications may be different, but they essentially have the same structure according to the conclusions of the classic essay by Durkheim and Mauss.⁶²⁷

From an anthropological perspective, the classification framework developed for law as a particular aspect of human existence is remarkable for two reasons: (1) it is usually a multi-layered hierarchy (2) which aims to overarch the entirety of the legal field. The symbolic move of classification described by anthropology occurs in law when physically available phenomena are translated into legal concepts. The classifiable objects in law are already symbolic, that is, they are already mentally processed and express some level of intellectual ordering. For this reason, legal concepts are already effective tools for realising social order even before they have been meticulously arranged. In some sense, legal concepts already *make some sense* even before they are classified.

It is no surprise then that the practical significance of classification is doubted by some lawyers who underline its potentially debilitating effect. This doubt especially holds in the English common law tradition. For example, Peter Birks’ systematic presentation of modern English private law⁶²⁸ generated little enthusiasm on home soil.⁶²⁹ Birks advocated the importance of classification and demonstrated its value in the subfield of obligations based on his extensive study of the Roman sources. In the *Preface* of an edited volume on the subject, Birks justifies the project by saying that “it is a frequent criticism of law schools that law graduates show insufficient ability to move from one category of the law to another ... If lawyers cannot move efficiently across the law, the law itself cannot be reliably applied ... The institutional classification was an advance in the quest for legal rationality. Roman law built itself up without it.”⁶³⁰

⁶²⁶ Needham (1979).

⁶²⁷ “Primitive classifications are therefore not singular or exceptional, having no analogy with those employed by more civilized peoples; on the contrary, they seem to be connected, with no break in continuity, to the first scientific classifications.” Durkheim et al. (1963):81.

⁶²⁸ Birks (2000)

⁶²⁹ See Tettenborn (2002):217-219 and Samuel (2004):335-362.

⁶³⁰ Birks (1997b):v-vi.

According to Cicero's criticism, "what has been expressed in one idea is split up infinitely."⁶³¹ Orientation in the vast Roman legal literature was certainly not easy. In *De Oratore*, Cicero promotes the idea of an *ars iuris civilis* which would adopt scientific rigour endorsed by Aristotle's *Topica*. Towards the end of his life, Cicero wrote a practical manual for that purpose with the same title (*Topica*) in which he described the *loci* ("patterns") of sound legal reasoning, among them the organising principle of *divisio* and *partitio* and the accompanying *genus-species* vocabulary. The general reservations of the professional jurists against a systemic approach prevented the *Topica* from setting Roman law on a new course. Classification and the systemic approach were restricted to works adopting the institutional scheme pioneered by Gaius and Ulpian, and revitalised by Justinian's *Institutes*. The lawyers' reservations were partly due to their wish to preserve the socially exclusive character of the profession which remained the privilege of an elite class who could dedicate a lifetime of study to the subject.

Rabbinic law was also a predominantly elite intellectual enterprise. The control of the Rabbinic class over a Palestinian Jewish community was presumably weak, and Rabbinic law was mostly exercised on a voluntary basis by a committed few.⁶³² Additionally, loyalty to the revealed word of God and preservation of the chain of tradition which stretched back to the revelation at Mount Sinai prevented Rabbinic law from providing the legal material with a fully systematic presentation. In an article about the Rabbinic interpretation of the Bible, Alex Samely reconstructs "a list of such fundamental assumptions, compatible with a theology of revelation which construes God as a perfect author". Samely's list includes "that the text contains (i) no contradiction, (ii) no superfluous elements, (iii) no non-truth, and that it (iv) explains its own code."⁶³³ The rearrangement of rules in a more orderly fashion was only possible, if these assumptions were left intact, or, at least, they were not openly contradicted.

The classification of legal terms was not necessary for the operation of law. It was probably the ambition of the legal elite who developed an appetite for conceptual coherence and consistency in the late antique Roman law schools and the Rabbinic study houses. This may be the reason why the vocabularies of classification and their adaptation in Justinian's *Institutes* and the *Yerushalmi* reflect

⁶³¹ *De legibus* 2.47: *quod positum est in una cognitione, id infinita dispertiuntur*. See footnote 500 above.

⁶³² See the "'minimalist' approach to Rabbinic history" in Stern (2004):125-126 and more generally Schwartz (2001). "The possibility and probability of noncoercive law" in Schauer (2015):23-42 considers how norms are followed, if there are no sanctions which many see as the cornerstone of law.

⁶³³ Samely (1991):65 notes that literary evidence supports the fundamental assumption that the Bible "explains its own code, however, undermines the assumptions which hold that the Bible does not include contradiction and superfluous elements."

the strategies these texts use to establish legal terms, and yet, why classification shows some conceptual shortcomings in both legal cultures.

The static *genus-species* vocabulary is a top-down “scientific” classification framework which the *Institutes* uses in the law of obligations to create artificial structural symmetry between subjects. The vocabulary is, however, inconsistent, its application is conceptually wanting according to modern methodological standards which may be due to didactic-rhetorical considerations. The artificial symmetry of Justinian’s *Institutes* was probably meant to provide novice students with a first good grasp of general subjects knowing that conceptual and legal inaccuracies are addressed later in the legal curriculum.

The fluid “father-generations” vocabulary is a bottom-up “organic” classification framework which the *Yerushalmi* uses in the law of damages to mask a deviation from the Mishnaic classification. The *Yerushalmi* adopts a conceptually more coherent framework whose elements are partly introduced to the field of damages by the *Yerushalmi* itself. The “organic” vocabulary of “fathers” and “generations” originates in biblical genealogical tables, which the *Yerushalmi* merges with the vocabulary of “roots” and “generations”. The latter vocabulary has exegetical connotations: “roots” correspond to *de-oraita* rules which rest on the authority of the biblical text, while “generations” correspond to *de-rabbanan* rules which are created by Rabbinic authority.

8.2 Future avenues: “Scholasticism” and big data analysis

I conclude this thesis by highlighting two future avenues for the comparative research of literary features in ancient legal texts. Contrary to the synchronic analysis carried out here, the machine assisted analysis of big literary corpora described below will allow providing a diachronic perspective. It has the potential of furnishing linguistic evidence for claiming that some common features of legal abstraction in Rabbinic and Roman law can be explained by reference to a “scholastic” *Zeitgeist* of higher legal learning which emerged parallelly in the late antique Roman law schools and Rabbinic study houses. Changes in the grammatical profile of legal language through the ages can be related to the changing educational environment of Rabbinic and Roman law which does not presuppose influence or a shared social and cultural context.

In a linguistic study of scientific English from the early modern period onwards, Michael Halliday and James Martin argue that the nominalisation technique was a key aspect of facilitating the development of new theories and the presentation of “new knowledge”. They write that,

From Newton to the present day, there has steadily evolved a form of clause construction characterized, not by objectivity as in the popular idea of scientific

discourse (which was a late nineteenth-century refinement), but by objectification—that is, representing actions and events, and also qualities, as if they were objects.⁶³⁴

Roman legal texts from the Twelve Tables to Justinian and Rabbinic legal texts from the Bible to the *Talmudim* seem to have undergone a similar grammatical change. The nominalisation technique which Halliday and Martin noticed in the English language of experimental sciences applies to some extent to the language of ancient law. Late antique Roman and Rabbinic legal texts replace verbs and adjectives used in the sources they rely on with abstract nouns, and thereby they turn *processes* and *qualities* into *things*. Nominalisation creates static elements to facilitate effective reasoning where the rules of logic or some other hermeneutical computation apply.

David Daube already proposed to see a closer link between grammar and thinking style of ancient legal texts in a comment he makes on the grammatical forms of the conditional and relative clauses in Roman legislation. Daube writes that the relative clause “refers, not to a situation, but to a category, a person defined by his action. It does not inform you how to meet a contingency, but declares the proper treatment ... It is more general, abstract, detached.”⁶³⁵ Daube also points out that whereas early Roman legislation preferred conditional clauses, the classical period of Roman law favoured relative clauses. He conjectures that “this change reflects an evolution from what we might call folk-law to a legal system. ... A comparison with the use of conditional and relative clauses in other ancient systems of law would show that the thesis I am advancing is of universal application.”⁶³⁶ In a later work, Daube also noted the more and more common use of action nouns in Roman law which support his claim about the “evolution” of legal abstraction.⁶³⁷

A preliminary look on a heading in the *Yerushalmi* text of the opening passage of tractate *Bava Qamma* (units 3 and 3.1) illustrates how the linguistic theory of Halliday and Martin can be combined with Daube’s conjecture.

The generations (תולדות) of horn: goring (נגיחה), pushing (נגיפה), biting (נשיכה), lying down (רביצה), kicking (בעיטה), thrusting (דחייה).

Here the *Yerushalmi* uses the Qal verbal noun pattern of אַיִחָה (*axixah*) for the roots נג״ח, נג״פ, נש״כ, נש״י, רב״צ, דח״ה. According to Lisowsky’s biblical concordance, these nominal forms do not

⁶³⁴ Halliday et al. (1993):57.

⁶³⁵ Daube (1956):6.

⁶³⁶ Daube (1956):6-8.

⁶³⁷ See Daube (1969):24-29.

appear in the Bible⁶³⁸ which generally opt for other, less abstract nominal patterns.⁶³⁹ The quoted passage above has two close parallels in tractate *Bava Qamma* of the *Mishnah*, one of which uses perfect verbal forms (mBQ 2:5)⁶⁴⁰ and the other infinitive forms (mBQ 1:4).⁶⁴¹ Table 8.1 below summarises how the same verbal idea is expressed in three different forms which I propose to be seen as three steps of the nominalisation process.

Table 8.1: Three steps of nominalisation in *Bava Qamma*

Source	Grammatical form	Meaning/Effect
#1 mBQ 2:5 נגח נגף נשך רבץ בעט it gored, pushed, bit, lied down, kicked	perfect verbs	nuclear story, dramatic effect
#2 mBQ 1:4 לא ליגח ולא ליגוף ולא לשוך ולא לרבוץ ולא לבעוט neither to gore, nor to push, nor to bite, nor to lie down, nor to kick	infinitives	verbal effect, but nominal use
#3 yBQ 1:1, 2a נגיחה נגיפה נשיכה רביצה בעיטה goring, pushing, biting, lying down, kicking	verbal nouns	nominal in meaning and form

To use Daube's language, the infinitives in mBQ 1:4 describe the actions of "goring, pushing etc." as legal categories, whereas the finite verbs ("If it gored, pushed, etc") in mBQ 2:5 describe them as situations. Daube's conjecture invites the investigation of a larger body of texts in a diachronic fashion. More examples are needed to construct a solid thesis about the change of grammatical forms from Bible through *Mishnah* to the *Talmudim*, from the *Twelve Tables* through Gaius to the Justinianic corpus. Passages will have to be associated with historical periods which might prove to be challenging in Roman texts, and near impossible in Rabbinic texts because of the historical unreliability of their attributions.

⁶³⁸ Lisowsky (1993). Nominalised derivatives of the six roots attested in the biblical corpus are נגף ("striking"), מגפה ("plague"), דחי ("stumbling") and מדחה ("overthrow"), two of which express the result of the verbal idea and two the process itself.

⁶³⁹ Segal (1927):61-61.

⁶⁴⁰ mBQ 2:5: "An ox which causes damage in the domain of an individual..." – how is it so? If it gored, pushed, bit, lied down, kicked, in the domain of many: [the owner] pays half damages; in the domain of the one who caused the damage: Rabbi Tarfon says that he pays full damages, and the Sages say that he pays half damages. שור המזיק ברשות הניזק כיצד נגח נגף נשך רבץ בעט ברשות הרבים משלם חצי נזק ברשות - הניזק רבי טרפון אומר נזק שלם וחכמים אומרים חצי נזק

⁶⁴¹ mBQ 1:4: "Five tame and five attested [danger]: the cattle is neither an attested [danger] to gore, nor to push, nor to bite, nor to lie down, nor to kick." - לא ליגח ולא ליגוף ולא לשוך ולא לרבוץ ולא לבעוט

A future project may seek to provide linguistic evidence for the hypothesis that the tendency towards abstraction manifested in the “scholastic” attitude of the jurists of Rabbinic and Roman law is the endpoint of a longer historical development. The diachronic analysis can successfully apply the methods of Natural Language Processing (NLP) which have been routinely used in the corpus and computational analysis of big digital data of modern languages. In a recent post published on the Talmud Blog,⁶⁴² I have outlined the background of NLP methods applied to Rabbinic literature and what we can learn from projects concentrating on other classical linguistic data, notably Latin. I argued that the obstacles Rabbinic literature poses are enormous, even compared to Latin, and that our expectations to achieve meaningful results in short research projects should be very moderate.

NLP tools have been developed on contemporary linguistic data with fairly consistent morphology, syntax and orthography. Tools for Semitic languages like Modern Hebrew and Modern Standard Arabic are still significantly underperforming compared to the analytical success rate achieved in European languages. The analysis of historical linguistic data only adds to the challenge.⁶⁴³ Texts are collected from a vast geographical area, and sometime from a period stretching over millennia. Consequently, the linguistic data is extremely inconsistent in terms of morphology, syntax and orthography. Due to the limited availability of historical texts, databanks are also much smaller compared to those of contemporary languages.

The origins of NLP analysis can be traced back to the 1960s when Brown University’s Henry Kučera and W. Nelson Francis put together a manually annotated English-language databank totalling 1 million words. The Brown Corpus became the gold standard for any NLP-related projects in the English language in syntax (e.g. part-of-speech tagging), semantics (e.g. machine translation), discourse (e.g. automatic summarization) and speech (e.g. speech recognition). English linguistic research has since replaced the Brown Corpus with other corpora including more than 100 million analysed words.⁶⁴⁴ The business potential of the research into contemporary English (automated translation, voice control etc.) has kept the field well funded in the past 50 years, and yet, it produced results at a much slower rate and on a much smaller scale than expected.

The comparative disadvantage of machine assisted research into Rabbinic texts cannot be disregarded. Rabbinic texts do not only constitute inconsistent linguistic data in terms of non-standardised morphology, syntax and orthography, but these texts are mostly without punctuation. They often use a short-hand “lecture notes” style, mix different dialects and sometimes even

⁶⁴² See Ribary (2017).

⁶⁴³ See Piotrowski (2012) and McGillivray (2014) specifically about Latin.

⁶⁴⁴ Examples include the Corpus of Contemporary American English, the British National Corpus and the International Corpus of English.

different languages. Additionally, like other Semitic linguistic data, the visual presentation of texts is more ambiguous due to the lack of vowels. The use of *mater lectionis* (עִם קְרִיאָה – *eim qri'ah*) could be helpful, but because its use is also inconsistent, it only complicates the matter further. These challenges are potentially insurmountable.

As Michael Satlow correctly points out, the first step is to create databanks for Rabbinic texts. The field has cutting-edge technology at its disposal, but if we compare ourselves to the research into contemporary English, we are approximately in the era of the 1960s when Kučera and Francis started to build the Brown Corpus. Unless there is a very unlikely breakthrough in the Optical Character Recognition (OCR) techniques applied to manuscript materials, then manuscript data will have to be recorded manually. The same applies to creating the gold standard of Rabbinic texts similar to the Brown Corpus. The corpus needs to be tagged and annotated manually, checked and double-checked so that it could provide a solid foundation for any further research. At this point, I see little chance that the job can be done without enormous labour input,⁶⁴⁵ and I am a bit sceptical whether the field will be able to secure the funding that such effort requires.⁶⁴⁶

On a more positive note, I believe that even a small-scale investigation about the changing grammar of Roman and Rabbinic law may shed light on the developing “scholastic” legal culture in Late Antiquity. José Ignacio Cabezón’s category of “scholasticism”⁶⁴⁷ has inspired interesting works in this field by Michael Swartz, and more recently by Adam Becker and Noah Bickart.⁶⁴⁸ According to my hypothesis, the changing grammar of law can be related to the changing social setting of legal learning. As law gradually turned from a trade and profession into something more similar to art and

⁶⁴⁵ As I have recently learned from an informal communication with the Academic Director of the Friedberg Jewish Manuscript Society, Professor Menachem Katz, at the British Association for Jewish Studies conference in Edinburgh on 11 July 2017, their “Hachi Garsinan” Talmud Bavli Variants research unit manually transcribe the digital images of manuscripts and fragments at their disposal, and they also try to reproduce the physical layout of the text in the digital file. This is exactly the kind of extraordinary and enormously labour-intensive project which may create the gold standard, and possibly pave the way for that aforementioned unlikely breakthrough in OCR techniques.

⁶⁴⁶ My contribution to *The Talmud Blog* ends on a positive note: the machine assisted research of unruly historical texts has the potential to develop new methods which are capable of tackling inconsistent linguistic data or even the mixture of non-standardised languages. Homogeneous language environments are the exceptions rather than norm on our planet. We mix languages in one sentence, and potentially none of them follow the rules of our language textbooks. Two examples from personal experience: My partner, who is an Australian national of Chinese-Malay origin, uses a mix of “bad” (her word, not mine) Mandarin, Cantonese, Malay and English when she speaks to her family and friends back home. And my cricketing friends from India, Pakistan and Bangladesh use a mix of non-standard Urdu, Punjabi, Hindi and English among themselves. I would not be surprised that something similar were true of the majority of the global population.

⁶⁴⁷ Cabezón (1994).

⁶⁴⁸ Swartz (1998), Becker (2010) and Bickart (2015).

science (Cicero's *ars iuris*), the social circumstances of legal tuition as well as the grammatical expression of law changed.

After all, the gap between Roman and Rabbinic legal culture may be narrower than it first seems. Contrary to Halivni, "predilection for justified law" does not seem to be the essence of Rabbinic law. The meticulous quoting practices of the *Digest* and the *Yerushalmi* attest that "predilection for justified law" is common to both legal cultures which are possibly related to the "scholastic" environment that late antique Roman law schools and Palestinian Rabbinic study houses cherished. These putative study practices produced literary outputs which read as works in progress. Therefore, what is occasionally celebrated as a unique characteristic of Rabbinic literature, that is, the idea of the "open text", is common to both cultures.

If anything, what is unique about the *Yerushalmi* is its dialectical exposition of legal sources which provides indirect evidence of analytic study practices in written form. According to Pugsley, annotated versions of Ulpian's commentaries to Sabinus and the *Praetorian Edict* were produced and used in the Roman law schools before the time of Justinian, but the evidence of study practices was excised from the *Digest* following Justinian's order. While Rabbinic texts preserved the Oral Torah in a structured written form, the "Oral Digest", the discussion of legal sources by generations of Roman jurists, has become concealed and only hinted at by marginal notes from the time after Justinian. It is the respective text form of the *Digest* and the *Yerushalmi* which is unique, and not their legal, social and institutional circumstances. There are more to find out about these texts and the legal cultures they represent, if we keep interrogating these texts on their own terms.

BIBLIOGRAPHY

- Aaronsohn, Ran (1996): "Settlement in Eretz Israel - A colonialist enterprise? "Critical" scholarship and historical geography." *Israel Studies* 1: 214-229.
- Albeck, Chanoch (1925): "Die Herkunft des Toseftamaterials." *Monatsschrift für Geschichte und Wissenschaft des Judentums* 69: 311-328.
- Albeck, Chanoch, ed. (1952): *Shishah sidre Mishnah*. 6 vols. Jerusalem/Tel Aviv: Mosad Bialik/Dvir.
- Albeck, Shalom (2014): *Introduction to Jewish law in Talmudic times*. Translated by Edward Levin et al. Ramat Gan: Bar-Ilan University Press.
- Alexander, Elizabeth Shanks (2006): *Transmitting Mishnah: the shaping influence of oral tradition*. Cambridge: Cambridge University Press.
- Alexander, Patrick, John Kutsko, James Ernest et al. (1999): *The SBL handbook of style for ancient Near Eastern, Biblical, and early Christian studies*. Peabody, MA: Hendrickson.
- Alon, Gedalyahu (1980): *The Jews in their land in the Talmudic age, 70-640 C.E.* Translated by Gershon Levi. Jerusalem: Magnes Press.
- Anderson, Benedict (1983): *Imagined communities: Reflections on the origin and spread of nationalism*. London: Verso.
- Ando, Clifford (2000): *Imperial ideology and provincial loyalty in the Roman Empire*. Berkeley, CA: University of California Press.
- Ando, Clifford (2006): "Religion and *ius publicum*." In *Religion and law in classical and Christian Rome*. Edited by Clifford Ando and Jörg Rüpke. Stuttgart: Franz Steiner, 126-145.
- Armgaradt, Matthias (2014): "Leibniz as legal scholar." *Fundamina* 20: 27-38.
- Ascheri, Mario (2013): *The laws of late medieval Italy (1000-1500): Foundations for a European legal system*. Leiden: Brill.
- Astuti, Guido (1984): "Recezione teorica a applicazione pratica del diritto romano nell'età del rinascimento giuridico." In *Tradizione Romanistica e civiltà giuridica Europea*. Edited by Giovanni Duirni. Naples: Edizioni Scientifiche Italiane, 237-262.
- Avemarie, Friedrich, Hans-Jürgen Becker, Martin Hengel et al., eds. (1975-2011): *Übersetzung des Talmud Yerushalmi*. Tübingen: Mohr Siebeck.
- Avi-Yonah, Michael (1976): *The Jews of Palestine: A political history from the Bar Kokhba war to the Arab conquest*. Oxford: Basil Blackwell.

- Avi-Yonah, Michael (2001): "The Second Temple (332 BC-70 AD) & Jews, Romans and Byzantines (70-633)." In *A history of Israel and the Holy Land*. Edited by Michael Avi-Yonah. New York, NY: Continuum, 114-193.
- Bacher, Wilhelm (1899): *Die älteste Terminologie der jüdischen Schriftauslegung: Ein Wörterbuch der bibelexegetischen Kunstsprache der Tannaiten*. Leipzig: Hinrichs.
- Baldi, Davide (2010): "Il Codex Florentinus del Digesto e il Fondo Pandette della Biblioteca Laurenziana (con un'appendice dei documenti inediti)." *Segno e Testo* 8: 99-186.
- Balsdon, J. P. V. D. (1960): "Auctoritas, dignitas, otium." *The Classical Quarterly* 10: 43-50.
- Barnes, Jonathan, ed. (1994): *Aristotle: Posterior Analytics*. Oxford: Clarendon.
- Barnes, Jonathan, ed. (2003): *Porphyry: Introduction*. Oxford: Clarendon.
- Baron, Salo Wittmayer (1952-1983): *A social and religious history of the Jews*. 2nd ed. 18 vols. New York, NY: Columbia University Press.
- Baumgarten, Albert (1980): "Justinian and the Jews." In *Rabbi Joseph H. Lookstein memorial volume*. Edited by Leo Landman. New York, NY: Ktav, 37-44.
- Becker, Adam (2010): "The comparative study of "scholasticism" in late antique Mesopotamia: Rabbis and East Syrians." *AJS Review* 34: 91-113.
- Behrends, Okko (1998): "Die Person oder die Sache?" *Labeo* 44: 26-60.
- Bellomo, Manlio (1995): *The common legal past of Europe, 1000-1800*. Translated by Lydia Cochrane. Washington, DC: Catholic University of America Press.
- Belnap, Nuel (1993): "On rigorous definitions." *An International Journal for Philosophy in the Analytic Tradition* 72: 115-146.
- Ben Zeev, Miriam Pucci (1998): *Jewish rights in the Roman world: The Greek and Roman documents quoted by Josephus Flavius*. Tübingen: Mohr Siebeck.
- Berger, Adolf (1953): "Encyclopedic dictionary of Roman law." *Transactions of the American Philosophical Society* 43: 333-809.
- Besta, Enrico (1896): *L'opera d'Irnerio: Contributo alla storia del diritto italiano*. Torino.
- Bickart, Noah Benjamin (2015): *Tistayem: An investigation into the scholastic culture of the Bavli*. PhD thesis supervised by Richard Kalmin. New York, NY: The Jewish Theological Seminary of Aमेirca.
- Birks, Peter (1969a): "From legis actio to formula." *The Irish Jurist* 5: 356-367.
- Birks, Peter (1969b): "The problem of quasi-delict." *Current Legal Problems* 22: 164-180.
- Birks, Peter and Grant McLeod, eds. (1987a): *Justinian's Institutes*. London: Duckworth.
- Birks, Peter and Grant McLeod (1987b): "Introduction." In *Justinian's Institutes*. Edited by Peter Birks and Grant McLeod. London: Duckworth, 7-28.
- Birks, Peter (1997a): "Definition and division: A meditation on Institutes 3:13." In *The classification of obligations*. Edited by Peter Birks. Oxford: Clarendon, 1-35.
- Birks, Peter, ed. (1997b): *The classification of obligations*. Oxford: Clarendon.
- Birks, Peter, ed. (2000): *English private law*. Vol. 2. Oxford: Oxford University Press.
- Bloch, Marc (1928): "Pour une histoire comparée des sociétés européennes." *Revue de synthèse historique* 46: 15-50.

- Bloch, Marc (1954): *The historian's craft*. Manchester: Manchester University Press.
- Bluhme, Friedrich (1960 [1820]): "Die Ordnung der Fragmente in den Pandectentiteln." *Labeo* 6: 50-96, 235-277, 368-404.
- Blume, Fred H., Bruce W. Frier, Serena Connolly et al., eds. (2016): *The Codex of Justinian: A new annotated translation, with parallel Latin and Greek text based on a translation by Justice Fred H. Blume*. 3 vols. Cambridge: Cambridge University Press.
- Bochove, Thomas Ernst van (1996): *To date and not to date: On the date and status of Byzantine law books*. Groningen.
- Bockmuehl, Markus (2000): *Jewish law in Gentile churches: Halakhah and the beginning of Christian public ethics*. Edinburgh: T&T Clark.
- Bokser, Baruch (1979): "An annotated bibliographical guide to the study of the Palestinian Talmud." In *Aufstieg und Niedergang der römischen Welt II 19.2: Religion (Judentum: Allgemeines, Palästinisches Judentum)*. Edited by Hildegard Temporini and Wolfgang Haase. Berlin: de Gruyter, 139-256.
- Bona, Ferdinando (2006): "Das Ideal der Rhetorik bei Cicero und das 'ius civile in artem redigere'." *Rivista di Diritto Romano* 6: 1-13.
- Boyarín, Daniel (1990): *Intertextuality and the reading of Midrash*. Bloomington, IN: Indiana University Press.
- Boyarín, Daniel (2004a): "The Christian invention of Judaism: The Theodosian Empire and the Rabbinic refusal of religion." *Representations* 85: 21-57.
- Boyarín, Daniel (2004b): *Border lines: the partition of Judaeo-Christianity*. Philadelphia, PA: University of Pennsylvania Press.
- Boyarín, Daniel (2007): "Hellenism in Jewish Babylonia." In *The Cambridge companion to the Talmud and Rabbinic literature*. Edited by Charlotte Elisheva Fonrobert and Martin S. Jaffee. Cambridge: Cambridge University Press, 336-364.
- Brague, Rémi (2007): *The law of God: The philosophical history of an idea*. Translated by Lydia Cochrane. Chicago, IL: University of Chicago Press.
- Braun, Thomas (1998): "The Jews in the late Roman Empire." *Scripta Classica Israelica* 17: 141-171.
- Bretone, Mario (1992): *Geschichte des römischen Rechts: Von den Anfängen bis zu Justinian*. München: C.H. Beck.
- Brodsky, David (2014): "From disagreement to Talmudic discourse: Progymnasmata and the evolution of a Rabbinic genre." In *Rabbinic traditions between Palestine and Babylonia*. Edited by Ronit Nikolsky and Tal Ilan. Leiden: Brill, 173-231.
- Brody, Robert (1998): *The Geonim of Babylonia and the shaping of medieval Jewish culture*. New Haven: Yale University Press.
- Brody, Robert (2009): "Stam ha-Talmud we-divrei ha-Amora'im." In *Iggud: Mivchar ma'amarim be-mada'ei ha-Yahadut. Vol. 1*. Edited by Aharon Shemesh et al. Jerusalem: Magnes, 213-232.
- Brody, Robert (2016): "Irano-Talmudica: The new parallelomania?" *Jewish Quarterly Review* 106: 209-232.
- Brouwer, René (2015): "Ulpian's appeal to nature: Roman law as universal law." *Tijdschrift voor Rechtsgeschiedenis* 83: 60-76.

- Brown, Francis, Samuel Driver and Charles Briggs, eds. (1952): *A Hebrew and English lexicon of the Old Testament*. Oxford: Clarendon Press.
- Brown, Gillian and George Yule (1983): *Discourse analysis*. Cambridge: Cambridge University Press.
- Bruncken, Ernest and Layton Register, eds. (1921): *Science of legal method: Select essays by various authors*. New York, NY: Macmillan.
- Buckland, William (1924): "Interpolations in the Digest." *The Yale Law Journal* 33: 343-364.
- Buckland, William (1931): *The main institutions of Roman private law*. Cambridge: Cambridge University Press.
- Budde, Carl (1882): "Das hebräische Klagelied." *Zeitschrift für Alttestamentliche Wissenschaft* 2: 1-52.
- Burke, Peter (2005): *History and social theory*. 2nd ed. Cambridge: Polity.
- Cabezón, Jose Ignacio (1994): *Buddhism and language: A study of Indo-Tibetan scholasticism*. Albany, NY: State University of New York Press.
- Cameron, Lynne (2012): "Metaphor in spoken discourse." In *The Routledge handbook of discourse analysis*. Edited by James Paul Gee and Michael Handford. London: Routledge, 342-355.
- Carmichael, Calum M. and Laurent Mayali, eds. (1992-2014): *Collected works of David Daube*. 5 vols. Berkeley, CA: Robbins Collection.
- Cary, Earnest and Herbert Foster, eds. (1914-1927): *Cassius Dio's Roman history. In nine volumes*. The Loeb Classical Library. Cambridge, MA: Harvard University Press.
- Cheng, Edward (2013): "Reconceptualizing the burden of proof." *The Yale Law Journal* 122: 1254-1279.
- Clauss, Manfred (1980): *Der magister officiorum in der Spätantike (4.-6. Jahrhundert): Das Amt und sein Einfluss auf die kaiserliche Politik*. München: Beck.
- Coffa, Alberto (1991): *The semantic tradition from Kant to Carnap: To the Vienna station*. Edited by Linda Wessels. Cambridge: Cambridge University Press.
- Cohen, Boaz (1966): *Jewish and Roman law: A comparative study*. 2 vols. New York: Jewish Theological Seminary of America.
- Cohen, David (1984): *La phrase nominale et l'évolution du système verbal en sémitique: Études de syntaxe historique*. Leuven: Peeters.
- Cohen, Shaye (1999): *The beginnings of Jewishness: Boundaries, varieties, uncertainties*. Berkeley, CA: University of California Press.
- Cohen, Shaye (2007): "The Judaeian legal tradition and the halakhah of the Mishnah." In *The Cambridge Companion to the Talmud and Rabbinic literature*. Edited by Charlotte Elisheva Fonrobert and Martin Jaffee. Cambridge: Cambridge University Press, 121-143.
- Collinet, Paul (1932): "The evolution of contract as illustrating the general evolution of Roman law." *The Law Quarterly Review* 48: 488-494.
- Collins, Hugh (1997): "Legal classifications as the production of knowledge systems." In *The classification of obligations*. Edited by Peter Birks. Oxford: Clarendon, 57-70.
- Conrat, Max (1891): *Geschichte der Quellen und Literatur des römischen Rechts im früheren Mittelalter*. Leipzig: J. C. Hinrichs.

- Cotton, Hannah (1993): "The guardianship of Jesus son of Babatha: Roman and local law in the province of Arabia." *The Journal of Roman Studies* 83: 94-108.
- Crawford, Michael, ed. (1996): *Roman statutes*. London: Institute of Classical Studies.
- Czajkowski, Kimberley (2017): *Localized law: The Babatha and Salome Komaise archives* Oxford: Oxford University Press.
- Daube, David (1956): *Forms of Roman legislation*. Oxford: Clarendon Press.
- Daube, David (1969): *Roman law: Linguistic, social and philosophical aspects*. Edinburgh: Edinburgh University Press.
- Daube, David (2003): "Lex talionis." In *Collected works of David Daube. Vol 3: Biblical law and literature*. Edited by Calum Carmichael. Berkeley, CA: Robbins Collection, 203-239.
- de Lange, Nicholas (1992): "Jews and Christians in the Byzantine Empire: Problems and prospects." In *Christianity and Judaism: Papers read at the 1991 Summer meeting and the 1992 Winter meeting of the Ecclesiastical History Society*. Edited by Diana Wood. Oxford: Blackwell, 15-32.
- de Lange, Nicholas (2005): "Jews in the age of Justinian." In *The Cambridge Companion to the age of Justinian*. Edited by Michael Maas. Cambridge: Cambridge University Press, 401-426.
- Delbrück, Richard (1929): *Die Consulardiptychen und verwandte Denkmäler*. Berlin: de Gruyter.
- Denniston, John and Kenneth Dover (1954): *The Greek particles*. 2 ed. Oxford: Clarendon Press.
- Descheemaeker, Eric (2009a): *The division of wrongs: A historical comparative study*. Oxford: Oxford University Press.
- Descheemaeker, Eric (2009b): "The Roman division of wrongs: A new hypothesis." *Roman Legal Tradition* 5: 1-23.
- Deslauriers, Marguerite (1990): "Aristotle's four types of definition." *Apeiron* 23: 1-26.
- Deslauriers, Marguerite (2007): *Aristotle on definition*. Leiden: Brill.
- Diamond, Arthur (1935): *Primitive law*. London: Longman.
- Dobbs-Allsopp, Frederick (1993): *Weep, O daughter of Zion: A study of the city-lament genre in the Hebrew Bible*. Roma: Editrice Pontificio Istituto Biblico.
- Dolgopolski, Sergey (2013): *The open past: Subjectivity and remembering in the Talmud*. New York, NY: Fordham University Press.
- Donaldson, Mara (1981): "Kinship theory in the Patriarchal narratives: The case of the barren Wife." *Journal of the American Academy of Religion* 49: 77-87.
- Dorff, Elliot and Arthur Rosett (1988): *A living tree: The roots and growth of Jewish law*. Albany, NY: State University of New York Press.
- Dowd, Maureen (1990): "Where's the Rest of Him?" Review of Ronald Reagan's *An American life*. *New York Times*, 18 November 2017.
- du Plessis, Paul (2012): *Studying Roman law*. London: Bristol Classical Press.
- du Plessis, Paul and Andrew Borkowski (2015): *Borkowski's textbook on Roman law*. 5th ed. Oxford: Oxford University Press.
- Dubnow, Simon (1926): *Die Geschichte des jüdischen Volkes im Orient vom Untergange des jüdischen Staates bis zum Verfall der autonomen Zentren in Morgenlande*. Translated by A. Steinberg. Berlin: Jüdischer Verlag.

- Dubrau, Alexander (2014): "Rabbinic stories about divergent legal models of thought." *Unpublished manuscript* presented at the Jewish Law Association conference in Antwerp between 14-17 July 2014.
- Durkheim, Emile, Marcel Mauss and Rodney Needham (1963): *Primitive classification*. London: Cohen & West.
- Eisenhut, Werner (1973): *Virtus romana: Ihre Stellung im römischen Wertsystem*. München: Wilhelm Fink.
- Elman, Yaakov (1994): *Authority and tradition: Toseftan baraitot in Talmudic Babylonia*. Hoboken, NJ: Ktav.
- Elman, Yaakov (2014): "Commercial law in Rome and Ctesiphon: Roman juriconsults, rabbis and Sasanian dastwars on risk." In *Rabbinic traditions between Palestine and Babylonia*. Edited by Ronit Nikolsky and Tal Ilan. Leiden: Brill, 250-283.
- Elon, Menachem (1994): *Jewish law: History, sources, principles*. Translated by Bernard Auerbach and Melvin Sykes. 4 vols. Philadelphia, PA: The Jewish Publication Society.
- Elon, Menachem, Bernard Auerbach, Daniel Chazin et al. (1999): *Jewish law (Mishpat Ivri): Cases and materials*. New York, NY: Matthew Bender.
- Else, Holly (2017): "To err is human; to admit it, trying." *Times Higher Education Supplement* 2290: 34-39, 26 January - 1 February 2017.
- Englard, Izhak (1975): "Unity and plurality of system: General relationship between state and religious law." In *Religious law in the Israel legal system*. Edited by Izhak Englard. Jerusalem: Hebrew University of Jerusalem, 33-46.
- Epstein, Jacob Nachum and Ezra Zion Melamed, eds. (1955): *Mekhilta d'Rabbi Shimon b. Jochai: Fragmenta in Geniza Cairensi reperta digessit apparatu critico, notis, praefatione instruxit*. Jerusalem: Mekitze Nirdamim.
- Epstein, Jacob Nachum (1957): *Mevo'ot le-sifrut ha-Tannaim: Mishnah, Tosefta u-Midreshei Halakhah*. [Introductions to Tannaitic literature: Mishnah, Tosefta and halakhic midrash]. Jerusalem: Magnes.
- Epstein, Jacob Nachum (1962): *Mevo'ot le-sifrut ha-Amora'im: Bavli we-Yerushalmi*. [Introductions to Amoraic literature: The Palestinian and Babylonian Talmud]. Jerusalem: Magnes.
- Evan-Jones, Robin and Geoffrey MacCormick (1998): "Obligations." In *A companion to Justinian's Institutes*. Edited by Ernest Metzger. London: Duckworth, 127-207.
- Faur, José (1986): *Golden doves with silver dots: Semiotics and textuality in rabbinic tradition*. Bloomington, IN: Indiana University Press.
- Feldman, Louis (1993): *Jew and gentile in the ancient world: Attitudes and interactions from Alexander to Justinian*. Princeton, NJ: Princeton University Press.
- Finkelstein, Jacob (1981): "The ox that gored." *Transactions of the American Philosophical Society* 71: 1-89.
- Fisch, Menachem (1997): *Rational rabbis: Science and Talmudic culture*. Bloomington, IN: Indiana University Press.
- Fischel, Henry (1973): *Rabbinic literature and Greco-Roman philosophy: A study of epicurea and rhetorica in early Midrashic writings*. Leiden: Brill.

- Fisher, Ronald (1935): *The design of experiments*. Edinburgh: Oliver & Boyd.
- Földi, András and Gábor Hamza (1996): *A római jog története és intézményei*. [The history and institutions of Roman law]. Budapest: Nemzeti Tankönyvkiadó.
- Frakes, Robert (2011): *Compiling the Collatio legum Mosaicarum et Romanarum in late antiquity*. Oxford: Oxford University Press.
- Freshfield, Edwin, ed. (1926): *A manual of Roman Law: The Ecloga*. Cambridge: Cambridge University Press.
- Freshfield, Edwin, ed. (1928): *A manual of Eastern Roman Law: The Procheiros Nomos*. Cambridge: Cambridge University Press.
- Friedman, Shamma (2010): *Sugyot be-cheker ha-Talmud ha-Bavli: Asufat mechkarim be-'inyenei, mivneh herkev we-nusach*. New York, NY: The Jewish Theological Seminary of America.
- Friedmann, Meir, ed. (1870): *Sefer Mekhilta de-Rabi Yishmael*. Wien.
- Frier, Bruce (1985): *The rise of the Roman jurists: Studies in Cicero's Pro Caecina*. Princeton, NJ: Princeton University Press.
- Fuhrmann, Manfred (1960): *Das systematische Lehrbuch: Ein Beitrag zur Geschichte der Wissenschaften in der Antike*. Göttingen: Vandenhoeck & Ruprecht.
- Gaddis, Michael and Richard Price, eds. (2005): *The acts of the Council of Chalcedon*. 3 vols. Liverpool: Liverpool University Press.
- Gafni, Isaiah (1978): "'Yeshiva' ve'Metivta'." *Zion* 43: 12-37.
- Gafni, Isaiah (2011): "Rethinking Talmudic History: the challenge of literary and redaction criticism." *Jewish History* 25: 355–375.
- Garnsey, Peter (1976): *Social status and legal privilege in the Roman Empire*. Oxford: Clarendon.
- Geeraerts, Dirk (2003): "Meaning and definition." In *A practical guide to lexicography*. Edited by Piet van Sterkenburg. Amsterdam: John Benjamins, 83-93.
- Genette, Gérard (1980): *Narrative discourse: An essay in method*. Translated by Jane E. Lewin. Oxford: Blackwell.
- Gerhardsson, Birger (1961a): *Memory and manuscript: Oral tradition and written transmission in rabbinic Judaism and early Christianity*. Translated by Eric Sharpe. Lund: C. W. K. Gleerup.
- Gerhardsson, Birger (1961b): *Memory and manuscript: Oral tradition and written transmission in rabbinic Judaism and early Christianity*. Lund: C.W.K. Gleerup.
- Gesenius, Wilhelm (1909): *Gesenius' Hebrew grammar*. Translated by Alfred Cowley. Edited by Emil Kautzsch. Oxford: Clarendon Press.
- Gibbs, Raymond (1996): "Why many concepts are metaphorical?" *Cognition* 61: 309-319.
- Giglio, Francesco (2013): "Coherence and corporeality: On Gaius II,12-14." *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung* 130: 127-163.
- Giglio, Francesco (2017): "The taxonomy of the *actio furti*: Between ownership and commerce." *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung* 134: 106-146.
- Giglio, Francesco (2018): "The concept of ownership in Roman law." *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung* 135: forthcoming.
- Ginzberg, Louis (1941-1961): *Perushim we-chidushim bi-Yerushalmi: Meyusadim 'al mehqarim be-hishtalshelut ha-halakhah weha-hagadah be-Erets Yisra'el u-Bavel*. [Commentary on the

- Palestinian Talmud: A study of the development of the Halakah and Haggadah in Palestine and Babylonia]. 4 vols. New York, NY: The Jewish Theological Seminary of America.
- Glare, P. G. W., ed. (2012): *Oxford Latin dictionary*. 2 ed. Oxford: Oxford University Press.
- Glover, Terrot, ed. (1931): *Tertulian's Apology and De Spectaculis*. Loeb Classical Library, vol. 250. London: William Heinemann.
- Goldberg, Abraham (1987a): "The Mishna - a study book of Halakha." In *The Literature of the Sages*. Vol. 1. Edited by Shmuel Safrai. Assen: Van Gorcum, 211-251.
- Goldberg, Abraham (1987b): "The Palestinian Talmud." In *The literature of the Sages. First part: Oral Tora, halakha, Tosefta, Talmud, external tractates*. Edited by Shmuel Safrai. Assen: Van Gorcum, 303-319.
- Goodblatt, David (1975): *Rabbinic instruction in Sasanian Babylonia*. Leiden: Brill.
- Goodblatt, David (1994): *The monarchic principle: Studies in Jewish self-government in antiquity*. Tübingen: Mohr Siebeck.
- Goodblatt, David (2006): "The political and social history of the Jewish community in the Land of Israel, c. 235-638." In *The Cambridge History of Judaism. Vol. IV: The Late Roman-Rabbinic Period*. Edited by Steven Katz. Cambridge: Cambridge University Press, 404-430.
- Goodman, Martin (1989): "Nerva, the Fiscus-Judaicus and Jewish Identity." *Journal of Roman Studies* 79: 40-44.
- Goodman, Martin (1991): "Babatha's story: Review of *The documents from the bar Kokhba Period in the Cave of Letters* by Yigael Yadin." *The Journal of Roman Studies* 81: 169-175.
- Gordon, William (1967): "The Roman class of quasi-delicts." *Temis* 21: 303-310.
- Graetz, Heinrich (1853): *Geschichte der Juden. Band 4: Vom Untergang des jüdischen Staates bis zum Abschluß des Talmud*. Berlin: Veit.
- Gray, Patrick (1993): "Palestine and Justinian's legislation on non-Christian religions." In *Law, politics and society in the ancient Mediterranean world*. Edited by Baruch Halpern and Deborah Hobson. Sheffield: Sheffield Academic Press.
- Green, William Scott (1978): "What's in a name? The problematic of Rabbinic 'biography'." In *Approaches to Ancient Judaism*. Edited by William Scott Green. Missoula, MT: Scholars Press for Brown University, 77-96.
- Guggenheimer, Heinrich (2000-2012): *The Jerusalem Talmud*. Berlin: De Gruyter.
- Halberstam, Chaya (2010): *Law and truth in biblical and rabbinic literature*. Bloomington, IN: Indiana University Press.
- Halivni, David Weiss (1986): *Midrash, Mishnah, and Gemara: the Jewish predilection for justified law*. Cambridge, MA: Harvard University Press.
- Halivni, David Weiss (2007): *Meqorot u-mesorot : Bi'urim ba-Talmud Masekhet Bava Batra*. [Sources and traditions : a source critical commentary on the Talmud tractate Bava Batra]. Jerusalem: Magnes Press.
- Halivni, David Weiss (2013): *The formation of the Babylonian Talmud*. Translated by Jeffrey Rubenstein. Oxford: Oxford University Press.
- Halliday, Michael and Ruqaiya Hasan (1976): *Cohesion in English*. London: Longman.

- Halliday, Michael and James Martin (1993): *Writing science : Literacy and discursive power*. London: Routledge.
- Halliday, Michael (1994): *An introduction to functional grammar*. 2nd ed. London: Arnold.
- Halliday, Michael and Christian Matthiessen (2004): *An introduction to functional grammar*. 3 ed. London: Arnold.
- Harries, Jill (1999): *Law and empire in late antiquity*. Cambridge: Cambridge University Press.
- Harries, Jill (2001): "Resolving disputes: The frontiers of law in late antiquity." In *Law, society, and authority in late antiquity*. Edited by Ralph Mathisen. Oxford: Oxford University Press, 68-82.
- Harries, Jill (2003): "Creating legal space: Settling disputes in the Roman Empire." In *Rabbinic law in its Roman and Near Eastern context*. Edited by Catherine Hézser. Tübingen: Mohr Siebeck, 63-81.
- Hart, H. L. A. (1961): *The concept of law*. Oxford: Clarendon Press.
- Hasselhoff, Görge and Meret Strothmann, eds. (2017): *"Religio licita?" Rom und die Juden*. Berlin: de Gruyter.
- Hayes, Christine (1997): *Between the Babylonian and Palestinian Talmuds: Accounting for halakhic difference in selected sugyot from Tractate Avodah Zarah*. Oxford: Oxford University Press.
- Hayes, Christine (2002): *Gentile impurities and Jewish identities: intermarriage and conversion from the Bible to the Talmud*. New York, NY: Oxford University Press.
- Hayes, Christine (2015): *What's divine about divine law? Early perspectives*. Princeton, NJ: Princeton University Press.
- Heather, Peter (1997): "Senators and senates." In *The Cambridge Ancient History*. Edited by Averil Cameron and Peter Garnsey. Vol. 13. Cambridge: Cambridge University Press, 184-210.
- Herberger, Maximilian (1981): *Dogmatik: Zur Geschichte von Begriff und Methode in Medizin und Jurisprudenz*. Frankfurt am Main: Vittorio Klostermann.
- Hertz, Robert (1973): "The pre-eminence of the right hand: A study in religious polarity." In *Right and left: Essays on dual symbolic classification*. Edited by Rodney Needham. Chicago, IL: University of Chicago Press, 3-31.
- Hesse, Mary (1963): *Models and analogies in science*. London: Sheed & Ward.
- Hesse, Mary (1993): "Models, metaphors and truth." In *Knowledge and language. Volume 3: Metaphor and knowledge*. Edited by F. R. Ankersmit and J. J. A. Mooij. Dordrecht: Kluwer, 49-66.
- Hézser, Catherine (1993): *Form, function, and historical significance of the rabbinic story in Yerushalmi Neziqin*. Tübingen: Mohr Siebeck.
- Hézser, Catherine (1997): *The social structure of the rabbinic movement in Roman Palestine*. Tübingen: Mohr Siebeck.
- Hézser, Catherine (1998): "The codification of legal knowledge in late antiquity: The Talmud Yerushalmi and Roman law codes." In *The Talmud Yerushalmi and Graeco-Roman culture. Vol. 1*. Edited by Peter Schäfer. Tübingen: Mohr Siebeck, 581-641.
- Hézser, Catherine (2000): "Interfaces between Rabbinic literature and Graeco-Roman philosophy." In *The Talmud Yerushalmi and Graeco-Roman culture. Volume 2*. Edited by Peter Schäfer and Catherine Hézser. Tübingen: Mohr Siebeck, 161-187.

- Hézszer, Catherine (2001): *Jewish literacy in Roman Palestine*. Tübingen: Mohr Siebeck.
- Hézszer, Catherine, ed. (2003): *Rabbinic law in its Roman and Near Eastern context*. Tübingen: Mohr Siebeck.
- Hézszer, Catherine (2005): *Jewish slavery in antiquity*. Oxford: Oxford University Press.
- Hézszer, Catherine (2007): "Roman law and rabbinic legal composition." In *The Cambridge Companion to the Talmud and Rabbinic Literature*. Edited by Charlotte Elisheva Fonrobert and Martin Jaffee. Cambridge: Cambridge University Press, 144-163.
- Hidary, Richard (2010a): "Classical rhetorical arrangement and reasoning in the Talmud: The case of Yerushalmi Berakhot 1:1." *AJS Review* 34: 33-64.
- Hidary, Richard (2010b): *Dispute for the sake of heaven: Legal pluralism in the Talmud*. Providence, RI: Brown Judaic Studies.
- Higger, Michael (1938-1948): *Otzar ha-baraitot*. New York, NY: Hotza'at Debe Rabanan.
- Higger, Michael (1942): "The study of the baraita." *Jewish Quarterly Review* 33: 93-98.
- Hillers, Delbert (1992): *Lamentations: A new translation with introduction and commentary*. New York, NY: Doubleday.
- Hoffmann, David, ed. (1905): *Mechilta de-Rabbi Simon b. Jochai: Ein halachischer und haggadischer Midrasch zu Exodus*. Frankfurt am Main: J. Kaufmann.
- Honoré, Tony (2002): *Ulpian: Pioneer of human rights*. Oxford: Oxford University Press.
- Honoré, Tony (2010a): *Justinian's Digest: Character and compilation*. Oxford: Oxford University Press.
- Honoré, Tony (2010b): "Ulpian, natural law and Stoic influence." *Tijdschrift voor Rechtsgeschiedenis* 78: 199-208.
- Honoré, Tony (2006): "Justinian's Digest: The distribution of authors and works to the three committees." *Roman Legal Tradition* 3: 1-47.
- Horak, Franz (1969): *Rationes decidendi: Entscheidungsbegründungen bei den älteren römischen Juristen bis Labeo*. Innsbruck: Kommissionsverlag.
- Hornby, Albert Sydney and Joanna Turnbull, eds. (2010): *Oxford advanced learner's dictionary of current English*. Oxford: Oxford University Press.
- Houston, Keith (2013): *Shady characters: The secret life of punctuation, symbols, and other typographical marks*. New York, NY: W. W. Norton & Company.
- Husserl, Edmund (2001): *Logical investigations*. Translated by J. N. Findlay. Edited by Dermot Moran. 2 vols. London: Routledge.
- Irmischer, Johannes (1990): "The Jews under the reign of Justinian." *Eos Commentarii Societatis Philologiae Polonorum* 78: 155-161.
- Isaac, Benjamin (1992): "The Babatha archive: A review article." *Israel Exploration Journal* 42: 62-75.
- Jackson, Bernard (1968): "Evolution and foreign influence in ancient law." *The American Journal of Comparative Law* 16: 372-390.
- Jackson, Bernard (1975a): "The problem of Exodus 21:22-25 (*Ius talionis*)." In *Essays in Jewish and comparative legal history*. Edited by Bernard Jackson. Leiden: Brill, 75-107.
- Jackson, Bernard (1975b): "Sources and problems." In *Essays in Jewish and comparative legal history*. Edited by Bernard Jackson. Leiden: Brill, 1-24.

- Jackson, Bernard (1978): "Liability for animals in Roman law: An historical sketch." *The Cambridge Law Journal* 37: 122-143.
- Jackson, Bernard (1980a): "History, dogmatics and *halakhah*." In *Jewish law in legal history and the modern world*. Edited by Bernard Jackson. Leiden: Brill, 1-26.
- Jackson, Bernard (1980b): "On the problem of Roman influence on the Halakah and normative self-definition in Judaism." In *Jewish and Christian self-definition*. Edited by E. P. Sanders. London: SCM Press, 2:157-203.
- Jackson, Bernard (1980c): "Modern research in Jewish law - Some theoretical issues." In *Modern research in Jewish law*. Edited by Bernard Jackson. Leiden: Brill, 136-155?
- Jackson, Bernard (1995): *Making sense in law: Linguistic, psychological and semiotic perspectives*. Liverpool: Deborah Charles.
- Jackson, Bernard (2000): *Studies in the semiotics of biblical law*. Sheffield: Sheffield Academic Press.
- Jackson, Bernard (2001a): *Lex talionis: Revisiting Daube's classic*. Accessed on 25 September 2017. <http://jewishlawassociation.org/resources.htm>.
- Jackson, Bernard (2001b): "A semiotic perspective on the comparison of analogical reasoning in secular and religious legal systems." In *Pluralism in law*. Edited by Arend Soeteman. Dordrecht: Kluwer, 295-325.
- Jackson, Bernard (2006): *Wisdom-laws: A study of the mishpatim of Exodus 21:1-22:16*. Oxford: Oxford University Press.
- Jacobs, Louis (1961): *Studies in Talmudic logic and methodology*. London: Vallentine Mitchell.
- Jacobs, Martin (1995): *Die Institution des jüdischen Patriarchen: Eine quellen- und traditionskritische Studie zur Geschichte der Juden in der Spätantike*. Tübingen: Mohr Siebeck.
- Jacobs, Sandra (2013): "Natural law, poetic justice and the talionic formulation." *Political Theology* 14: 661-669.
- Jaffee, Martin (1998): "The oral-cultural context of the Talmud Yerushalmi." In *The Talmud Yerushalmi and Graeco-Roman Culture. Vol. I.* . Edited by Peter Schäfer. Tübingen: Mohr Siebeck, 27-61.
- Jaffee, Martin (2001): *Torah in the mouth: Writing and oral tradition in Palestinian Judaism, 200 BCE-400 CE*. Oxford: Oxford University Press.
- Jahnow, Hedwig (1923): *Das hebräische Leichenlied im Rahmen der Völkerdichtung*. Giessen: A. Töpelmann.
- Jhering, Rudolf von (1852-1858): *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung*. 3 vols. Leipzig: Breitkopf und Härtel.
- Johnson, Edward (1969): *An introduction to the Soviet legal system*. London: Methuen.
- Johnston, David (1989): "Justinian's Digest: The interpretation of interpolation." *Oxford Journal of Legal Studies* 9: 149-166.
- Jolowicz, Herbert and Barry Nicholas (1972): *Historical introduction to the study of Roman law*. 3rd ed. Cambridge: Cambridge University Press.
- Jones, A. H. M., J. R. Martindale and John Morris (1971-1992): *The prosopography of the later Roman Empire*. 3 vols. Cambridge: Cambridge University Press.

- Jones, A. H. M. (1973): *The later Roman Empire, 284-602: A social economic and administrative survey*. 2nd ed. 2 vols. Oxford: Blackwell.
- Joüon, Paul and Takamitsu Muraoka (2006): *A grammar of biblical Hebrew*. Roma: Pontificio Istituto Biblico.
- Juster, Jean (1914): *Les Juifs dans l'Empire romain: Leur condition juridique, économique et sociale*. Paris: Paul Geuthner.
- Kaiser, Wolfgang (2015): "Justinian and the *Corpus Iuris Civilis*." In *The Cambridge companion to Roman law*. Edited by David Johnston. Cambridge: Cambridge University Press, 119-148.
- Kalmin, Richard (1988): "Quotation forms in the Babylonian Talmud: Autentially Amoraic, or a later editorial construct?" *Hebrew Union College Annual* 59: 167-187.
- Kalmin, Richard (1994): "Christians and heretics in rabbinic literature of late antiquity." *Harvard Theological Review* 87: 155-169.
- Kalmin, Richard (2016): "The Bavli, the Roman East, and Mesopotamian Christianity." *Jewish Quarterly Review* 106: 242-247.
- Kantorowicz, Hermann and William Buckland (1938): *Studies in the Glossators of the Roman Law: Newly discovered writings of the twelfth century*. Cambridge: Cambridge University Press.
- Kaser, Max (1962): *Zur Methode der römischen Rechtsfindung*. Göttingen: Vandenhoeck & Ruprecht.
- Kaser, Max (1967a): *Römische Rechtsgeschichte*. Göttingen: Vandenhoeck & Ruprecht.
- Kaser, Max (1967b): "The changing face of Roman jurisdiction." *The Irish Jurist* 2: 129-143.
- Kaser, Max (1968): *Roman private law*. Translated by Rolf Dannenbring. 2nd ed. London: Butterworths.
- Kaser, Max (1996): *Das römische Zivilprozessrecht*. Edited by Karl Hackl. 2nd ed. München: Beck.
- Kaster, Robert (1997): "The shame of the Romans." *Transactions of the American Philological Association* 127: 1-19.
- Katz, Marilyn (1992): "Ox-slaughter and goring oxen: Homicide, animal sacrifice, and judicial process." *Yale Journal of Law & the Humanities* 4: 249-278.
- Kellner, Menachem (1996): *Maimonides on the "decline of the generations" and the nature of rabbinic authority*. Albany, NY: SUNY Press.
- Kelly, Christopher (2005): "Bureaucracy and government." In *The Cambridge Companion to the Age of Constantine*. Edited by Noel Lenski. Cambridge: Cambridge University Press, 183-204.
- Kelly, John (1966): *Roman litigation*. Oxford: Clarendon Press.
- Kelly, John (1976): "'Loss of face' as a factor inhibiting litigation." In *Studies in the civil judicature of the Roman Republic*. Edited by John Kelly. Oxford: Clarendon Press, 93-111.
- Klawans, Jonathan (2000): *Impurity and sin in ancient Judaism*. Oxford: Oxford University Press.
- Klingenberg, Eberhard (1996): "Justinian's Novellae concerning the Jews." In *Jewish Law Association studies VIII: The Jerusalem 1994 conference volume*. Edited by E. A. Goldman. Atlanta: Scholars Press, 79-99.
- Kneale, William and Martha Kneale (1978): *The development of logic*. Oxford: Clarendon.
- Krauss, Samuel (1914): *Studien zur byzantisch-jüdischen Geschichte*. Wien: Jahresbericht der Israelitisch-Theologischen Lehranstalt.

- Krupp, Michael (1987): "Manuscripts of the Mishnah." In *The Literature of the Sages*. Vol. 1. Edited by Shmuel Safrai. Assen/Philadelphia: Van Gorcum/Fortress Press, 252-262.
- Lakoff, George and Mark Johnson (1980): *Metaphors we live by*. Chicago, IL: University of Chicago Press.
- Lenel, Otto, ed. (1883): *Das Edictum Perpetuum: Ein Versuch zu dessen Wiederherstellung*. Leipzig: Teubner.
- Lenel, Otto, ed. (1889): *Palingenesia iuris civilis*. Leipzig: Teubner.
- Lenel, Otto (1925): "Interpolationenjagd." *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung* 45: 17-38.
- Levine, Lee (1996): "The status of the Patriarch in the third and fourth centuries: Sources and methodology." *Journal of Jewish Studies* 47: 1-32.
- Levine, Lee (2005): *The ancient synagogue: The first thousand years*. 2nd ed. New Haven, CN: Yale University Press.
- Lewin, Benjamin, ed. (1921): *Sefer Igeret Rav Sherira Gaon: Mesuderet bi-shene nuschaot, nusach Sfarad we-nusach Tzarfat*. [The book of the Epistle by Rav Sherira Gaon: Spanish and French recension arranged in parallel columns] Edited by. Haifa: Itskowski.
- Libson, Gideon (1996): "Halakhah and law in the period of the Geonim." In *An introduction to the history and sources of Jewish law*. Edited by Neil Hecht et al. Oxford: Clarendon, 197-250.
- Lieberman, Saul (1931): *Talmud shel Qisrin: Yerushalmi massekhet Neziqin*. Jerusalem: Trabiz Supplements.
- Lieberman, Saul (1942): *Greek in Jewish Palestine: studies in the life and manners of Jewish Palestine in the 2nd-4th centuries C. E.* New York, NY: The Jewish Theological Seminary of America.
- Lieberman, Saul (1962): *Hellenism in Jewish Palestine: studies in the literary transmission, beliefs and manners of Palestine in the 1st century BCE-4th century CE*. New York, NY: The Jewish Theological Seminary of America.
- Lieberman, Saul (1963): "Yerushalmi Horayot." In *Sefer ha-yovel le-Rabbi Chanoch Albeck mugash al yadei talmidaw, yedidaw we-muqiraw le-mila'at lo shvi'im shanah*. Edited by Chanoch Albeck. Jerusalem: Mosad ha-Rav Kook, 283-305.
- Lieberman, Saul (1984): "A tragedy or a comedy?" *Journal of the American Oriental Society* 104: 315-319.
- Lieu, Samuel and Dominic Montserrat, eds. (1996): *From Constantine to Julian: Pagan and Byzantine views - A source history*. London: Routledge.
- Linder, Amnon, ed. (1987): *The Jews in Roman imperial legislation*. Detroit, MI: Wayne State University Press.
- Linder, Amnon (2006): "The legal status of the Jews in the Roman Empire." Chap. 5 In *The Late Roman-Rabbinic Period*. Edited by Steven Katz. Vol. 4. Cambridge: Cambridge University Press, 128-173.
- Linder, Amnon (2012): "The legal status of Jews in the Byzantine Empire." In *Jews in Byzantium: Dialectics of minority and majority cultures*. Edited by Robert Bonfil et al. Leiden: Brill, 149-217.

- Lisowsky, Gerhard (1993): *Konkordanz zum hebräischen Alten Testament*. Stuttgart: Deutsche Bibelgesellschaft.
- Loewe, Michael (2006): *The government of the Qin and Han Empires, 221 BCE-220 CE*. Indianapolis, IN: Hackett.
- Lokin, Jan and Bernard Stolte (2011): *Introduzione al diritto bizantino: Da Giustiniano ai Basilici*. Pavia: IUSS Press.
- Lucrezi, Francesco (2007): *Magia, stregoneria e divinazione in diritto ebraico e romano*. Torino: G. Giappichelli.
- Lucrezi, Francesco (2015a): *Il furto di terra e di bestiame in diritto ebraico e romano*. Torino: Giappichelli.
- Lucrezi, Francesco (2015b): "Sulle 'regulae iuris' in diritto ebraico: Omaggio a Reuven Yaron." *Iura & legal systems* 2: 33-41.
- Maas, Michael (2005): "Roman questions, Byzantine answers: Contours of the age of Justinian." In *The Cambridge Companion to the age of Justinian*. Edited by Michael Maas. Cambridge: Cambridge University Press, 3-27.
- Maimonides, Moses (1965): *Mishneh Torah al-pi defus Wenetziyah 1575-1576*. [Mishneh Torah according to the printed edition of Venice 1575-1576]. Jerusalem: Elumot.
- Maine, Henry Sumner (1861): *Ancient law: its connection with the early history of society and its relation to modern ideas*. London: John Murray.
- Mancal, Josef (1982): *Untersuchungen zum Begriff der Philosophie bei M. Tullius Cicero*. München: Fink.
- Mann, Jacob (1930): "Sefer ha-ma'asim le-vnei Eretz Yisrael." [Book of Palestinian halachic practice] *Tarbiz* 1:3: 1-14.
- Mantovani, Dario (1987): *Digesto e masse bluhmiane*. Milano: Giuffrè.
- Mathisen, Ralph (2001): "Imperial honorifics and senatorial status in late Roman legal documents." In *Law, society, and authority in late antiquity*. Edited by Ralph Mathisen. Oxford: Oxford University Press, 179-207.
- Mayer-Maly, Theo (1967): "Divisio obligationum." *The Irish Jurist* NS 2: 375-385.
- McClenney-Sadler, Madeline (2007): *Recovering the daughter's nakedness: A formal analysis of Israelite kinship terminology and the internal logic of Leviticus 18*. New York, NY: T&T Clark.
- McGillivray, Barbara (2014): *Methods in Latin computational linguistics*. Leiden: Brill.
- McGlone, Matthew (2007): "What is the explanatory value of a conceptual metaphor?" *Language and Communication* 27: 109-126.
- McHoul, A. W. (1982): *Telling how texts talk: Essays on reading and ethnomethodology*. London: Routledge & Kegan Paul.
- Metzger, Ernest (2013): "An outline of Roman legal procedure." *Roman Legal Tradition* 9: 1-30.
- Meyers, Eric, James Strange, Carol Meyers et al. (1981): "Preliminary report on the 1980 excavations at en-Nabratein, Israel." *Bulletin of the American Schools of Oriental Research* 244: 1-25.
- Miller, Stuart (2006): *Sages and commoners in late antique Eretz Israel: a philological inquiry into local traditions in Talmud Yerushalmi*. Tübingen: Mohr Siebeck.

- Mishor, Mordechai (1978): "Tviah shel dfus Wenetziah al gabei K"Y Leiden shel ha-Yerushalmi." *Kiryat Sefer* 53: 578.
- Moatti, Claude (2015): *The birth of critical thinking in Republican Rome*. Translated by Janet Lloyd. Cambridge: Cambridge University Press.
- Mommsen, Theodor, Paul Krüger, Rudolf Schoell et al., eds. (1872-1895): *Corpus Iuris Civilis: Editio stereotypa*. Berlin: Weidmann.
- Moscovitz, Leib (1998): "Double readings in the Yerushalmi." In *The Talmud Yerushalmi and Graeco-Roman Culture. Vol. I.* . Edited by Peter Schäfer. Tübingen: Mohr Siebeck, 83-125.
- Moscovitz, Leib (2002): *Talmudic Reasoning: from casuistics to conceptualization*. Tübingen: Mohr Siebeck.
- Moscovitz, Leib (2003): "Legal fictions in rabbinic law and Roman law." In *Rabbinic Law in Its Roman and Near Eastern Context*. Edited by Catherine Hézser. Tübingen: Mohr Siebeck, 105-132.
- Moscovitz, Leib (2006): "The formation and character of the Jerusalem Talmud." In *The Cambridge history of Judaism. Volume 4: The late Roman-Rabbinic period*. Edited by Steven Katz. Cambridge: Cambridge University Press, 663-677.
- Moscovitz, Leib (2009): *Ha-terminologyah shel ha-Yerushalmi*. [The terminology of the Yerushalmi]. Jerusalem: Magnes Press.
- Müller, Wolfgang (1990): "The recovery of Justinian's Digest in the Middle Ages." *Bulletin of Medieval Canon Law* 20: 1-29.
- Näf, Beat (1995): *Senatorisches Standesbewusstsein in spätrömischer Zeit*. Freiburg: Universitätsverlag.
- Najman, Hindy (2003): *Seconding Sinai: The development of Mosaic discourse in Second Temple Judaism*. Leiden: Brill.
- Najman, Hindy (2004): "The symbolic significance of writing in ancient Judaism." In *The idea of biblical interpretation: Essays in honor of James L. Kugel*. Edited by Hindy Najman and Judith Newman. Leiden: Brill, 139-173.
- Needham, Rodney (1979): *Symbolic classification*. Santa Monica, CA: Goodyear.
- Neusner, Jacob, ed. (1982-1994): *The Talmud of the Land of Israel: A preliminary translation and explanation*. 39 vols. Chicago, IL: University of Chicago Press.
- Neusner, Jacob, ed. (1984a): *The Talmud of the Land of Israel. Volume 28: Baba Qamma*. Chicago, IL: University of Chicago Press.
- Neusner, Jacob (1984b): "Mishnah and Messiah." *Biblical Theology Bulletin: Journal of Bible and Culture* 14: 3-11.
- Noethlichs, Karl-Leo (1996): *Das Judentum und der römische Staat: Minderheitenpolitik im antiken Rom*. Darmstadt: Wissenschaftliche Buchgesellschaft.
- Nörr, Dieter (1972): "Spruchregel und Generalisierung." *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung* 89: 18-93.
- Nöth, Winfried (1990): *Handbook of semiotics*. Bloomington, IN: Indiana University Press.
- Novak, David (1998): *Natural law in Judaism*. Cambridge: Cambridge University Press.
- Oden, Robert (1983): "Jacob as father, husband, and nephew: Kinship studies and the Patriarchal narratives." *Journal of Biblical Literature* 102: 189-205.

- Oppenheimer, Aharon (1977): *The am ha-aretz: a study in the social history of the Jewish people in the Hellenistic-Roman period*. Leiden: Brill.
- Oppenheimer, Aharon (1981): "The ban on circumcision as a cause of the revolt: A reconsideration." In *Der Bar-Kokhba-Aufstand: Studien zum zweiten jüdischen Krieg gegen Rom*. Edited by Peter Schäfer. Tübingen: Mohr Siebeck, 55-69.
- Oudshoorn, Jacobine (2007): *The relationship between Roman and local law in the Babatha and Salome Komaise archives: General analysis and three case studies on law of succession, guardianship, and marriage*. Leiden: Brill.
- Parkes, James (1934): *The conflict of the Church and the Synagogue: A study in the origins of antisemitism*. London: Soncino Press.
- Passamaneck, Stephen (1996): "Toward sunrise in the East 1300-1565." In *An introduction to the history and sources of Jewish law*. Edited by Neil Hecht et al. Oxford: Clarendon, 323-357.
- Pérez Fernández, Miguel (1997): *An introductory grammar of rabbinic Hebrew*. Translated by John Elwolde. Leiden: Brill.
- Piotrowski, Michael (2012): *Natural language processing for historical texts*. San Rafael, CA: Morgan & Claypool.
- Pomeranz, Jonathan (2015): "The Rabbinic and Roman laws of personal injury." *AJS Review* 39: 303-331.
- Porton, Gary (1988): *Goyim: Gentiles and Israelites in Mishnah-Tosefta*. Atlanta, GA: Scholars Press.
- Powell, Jonathan and Jeremy Paterson, eds. (2004): *Cicero the advocate*. Oxford: Oxford University Press.
- Prewitt, T. J. (1981): "Kinship structures and the Genesis genealogies." *Journal of Near Eastern Studies* 40: 87-98.
- Pugsley, David (1993): "On compiling Justinian's *Digest* (3): 'The Florentine Index'." *Legal History* 14: 94-105.
- Pugsley, David (1995-2000): *Justinian's digest and the compilers*. 2 vols. Exeter: University of Exeter.
- Pugsley, David (2006): "On pre-Digests." *Fundamina* 12: 193-202.
- Putnam, Hilary (1973): "Meaning and reference." *The Journal of Philosophy* 70: 699-711.
- quaz4r (25 March 2014): "Leading medical journals would not accept this publication because it supports the null hypothesis." *Reddit*.
- Quine, Willard van Orman (2013): *Word and object*. Cambridge, MA: MIT Press.
- Quirk, Randolph, Sidney Greenbaum, Jeffrey Leech et al. (1985): *A comprehensive grammar of the English language*. London: Longman.
- Rabello, Mordechai (1980): "The legal condition of the Jews in the Roman Empire." In *Aufstieg und Niedergang der römischen Welt II 13*. Edited by Hildegard Temporini and Wolfgang Haase. Berlin: de Gruyter, 662-762.
- Rabello, Mordechai (1987): *Giustiniano, ebrei e samaritani: Alla luce delle fonti storico-letterarie, ecclesiastiche e giuridiche*. Milano: Giuffrè.
- Rabello, Mordechai (1995): "The ban on circumcision as a cause of Bar Kokhba's rebellion." *Israel Law Review* 29: 176-214.

- Rabello, Mordechai (2000): *The Jews in the Roman Empire: Legal problems, from Herod to Justinian*. Aldershot: Ashgate Variorum.
- Rabello, Mordechai (2010): *Ebraismo e diritto: Studi sul diritto ebraico e gli Ebrei nell'Impero Romano*. Salerno: Rubettino.
- Rabinowitz, Louis Isaac and Stephen Wald (2007): "Jerusalem Talmud." *Encyclopaedia Judaica* (2nd edition) 19: 483-487.
- Radding, Charles (1988): *The origins of medieval jurisprudence: Pavia and Bologna, 850-1150*. New Haven, CT: Yale University Press.
- Radding, Charles and Antonio Ciaralli (2007): *The Corpus Iuris Civilis in the Middle Ages: Manuscripts and transmission from the sixth century to the juristic revival*. Leiden: Brill.
- Rajak, Tessa (1984): "Was there a Roman charter for the Jews? ." *Journal of Roman Studies* 74: 107-123.
- Ravitzky, Aviezer (1996): *Messianism, Zionism, and Jewish religious radicalism*. Chicago, IL: University of Chicago Press.
- Reagan, Ronald (1990): *An American life*. London: Hutchinson.
- Reichman, Ronen (2006): *Abduktives Denken und talmudische Argumentation: Eine rechtstheoretische Annäherung an eine zentrale Interpretationsfigur im babylonischen Talmud*. Tübingen: Mohr Siebeck.
- Reimann, Mathias and Reinhard Zimmermann, eds. (2006): *The Oxford handbook of comparative law*. Oxford: Oxford University Press.
- Reinhardt, Tobias, ed. (2003): *Cicero's Topica*. Oxford: Oxford University Press.
- Rentetzi, Maria (2005): "The metaphorical conception of scientific explanation: Rereading Mary Hesse." *Journal for General Philosophy of Science* 36: 377-391.
- Ribary, Marton (2011): *Rabbi's final notes: Concluding sections of Mishnah tractates moulded from the Tosefta* (Unpublished MPhil thesis). MPhil thesis supervised by Joanna Weinberg: University of Oxford.
- Ribary, Marton (2017): "Natural language processing of Rabbinic texts: Contexts, challenges, opportunities." *The Talmud Blog*, 23 March 2017. Accessed on 25 September 2017.
<https://thetalmudblog.wordpress.com/2017/03/23/>
- Riedlberger, Peter, ed. (2014): *Amanuensis*. 1.5 ed. München.
- Robinson, Olivia (1998): "Justinian's institutional classification and the class of quasi-delict." *Legal History* 19: 245-250.
- Robinson, Olivia, T. D. Fergus and William Gordon (2000): *European legal history: Sources and institutions*. 3 ed. London: Butterworths.
- Rolfe, J. C., ed. (1939-1950): *History by Ammianus Marcellinus*. 3 vols., Loeb Classical Library, vol. 300, 315 & 331. Cambridge, MA: Harvard University Press.
- Rosen-Zvi, Ishay (2008): "Orality, narrative, rhetoric: New directions in Mishnah research." *AJS Review* 32: 235-249.
- Rosen-Zvi, Ishay (2012): *The Mishnaic Sotah ritual: temple, gender and midrash*. Translated by Orr Scharf. Leiden: Brill.

- Rosenfeld, Ben-Zion (1988): "Mishbar ha-nesi'ut ba-Eretz Yisrael ba-me'ah ha-revi'it le-sfirah." [The crisis of the patriarchate in Eretz Israel in the fourth century] *Zion* 53: ix and 239-257.
- Rosenthal, Eliezer S. and Saul Lieberman (1983): *Yerushalmi Nezikin: Yotse le-or 'al-pi ketav-yad Eskori'al be-tseruf mavo*. Jerusalem: The Israeli Academy of Sciences.
- Roth, Joel (1986): *The halakhic process: A systemic analysis*. New York, NY: Jewish Theological Seminary of America.
- Rotondi, Giovanni (1922): *Scritti giuridici*. Pavia.
- Rubenstein, Jeffrey (1997): "On some abstract concepts in rabbinic literature." *Jewish Studies Quarterly* 4: 33-73.
- Rubenstein, Jeffrey (2002): "The rise of the Babylonian rabbinic academy." *Jewish Studies, an Internet Journal* 1: 55-68.
- Rüpke, Jörg (2007): *Religion of the Romans*. Translated by Richard Gordon. Cambridge: Polity.
- Safrai, Zeev (1998): *The missing century: Palestine in the fifth century. Growth and decline*. Leuven: Peeters.
- Sager, Juan, ed. (2000): *Essays on definition*. Amsterdam: John Benjamins.
- Saldarini, Anthony (1974): "The end of the Rabbinic chain of tradition." *Journal of Biblical Literature* 93: 97-106.
- Samely, Alexander (1991): "Between Scripture and its rewording: Towards a classification of rabbinic exegesis." *Journal of Jewish Studies* 42: 39-67.
- Samely, Alexander (1992): "Scripture's implicature: The midrashic assumptions of relevance and consistency." *Journal of Semitic Studies* 37: 167-205.
- Samely, Alexander (2002): *Rabbinic interpretation of Scripture in the Mishnah*. Oxford: Oxford University Press.
- Samely, Alexander (2007): *Forms of rabbinic literature and thought: An introduction*. Oxford: Oxford University Press.
- Samely, Alexander, Philip Alexander, Rocco Bernasconi et al., eds. (2012): *Database for the analysis of anonymous and pseudepigraphic Jewish texts of antiquity*. Manchester: The University of Manchester. Accessed on 29 August 2017.
<http://literarydatabase.humanities.manchester.ac.uk/>.
- Samely, Alexander (2013): "The Bible as talked about: Reflections on the usage and conceptual implications of the term Miqra' in early Rabbinic literature." *Unpublished*.
- Samely, Alexander, Philip Alexander, Rocco Bernasconi et al. (2013): *Profiling Jewish literature in Antiquity: An inventory from Second Temple texts to the Talmuds*. Oxford: Oxford University Press.
- Samely, Alexander (2017): "Educational mechanisms in ancient Jewish literature. An overview of unknowns." In *Jewish education from Antiquity to the Middle Ages: Studies in honour of Philip S. Alexander*. Edited by George Brooke and Renate Smithuis. Leiden: Brill, 147-200.
- Samuel, Geoffrey (2004): "English private law: Old and new thinking in the taxonomy debate." *Oxford Journal of Legal Studies* 24: 335-362.
- Sandmel, Samuel (1962): "Parallelomania." *Journal of Biblical Literature* 81: 1-13.
- Satlow, Michael (2001): *Jewish marriage in antiquity*. Princeton, NJ: Princeton University Press.

- Satlow, Michael (2008): "Beyond influence: Toward a new historiographic paradigm." In *Jewish literatures and cultures: Context and intertext*. Edited by Anita Norich and Yaron Eliav. Providence, RI: Brown Judaic Studies, 37-53.
- Savigny, Friedrich Karl von (1975): *Of the vocation of our age for legislation and jurisprudence*. New York: Arno Press.
- Savigny, Friedrich Karl von (1979a): *The history of the Roman law during the middle ages*. Translated by E. Cathcart. Westport, CN: Hyperion Press.
- Savigny, Friedrich Karl von (1979b): *System of the modern Roman law*. Translated by William Holloway. Westport, CN: Hyperion Press.
- Schäfer, Peter and Catherine Hézser, eds. (1998-2002): *The Talmud Yerushalmi and Graeco-Roman culture*. 3 vols. Tübingen: Mohr Siebeck.
- Schäfer, Peter, ed. (1991): *Synopse zum Talmud Yerushalmi*. Tübingen: Mohr Siebeck.
- Schauer, Frederick (2015): *The force of law*. Cambridge, MA: Harvard University Press.
- Scheltema, Herman, Nicolaas Van der Wal and D. Holwerda, eds. (1955-1988): *Basilica: Textus librorum - Scholia in librum*. Vol. 17. Groningen: Wolters.
- Scheltema, Herman (1977): "Das Kommentarverbot Justinians." *Tijdschrift voor Rechtsgeschiedenis* 45: 307-331.
- Schiller, Arthur (1978): *Roman law: Mechanisms of development*. The Hague: Mouton.
- Schlüter, Margarete (1993): *Auf welche Weise wurde die Mishna geschrieben? Das Antwortschreiben des Rav Sherira Gaon*. Tübingen: Mohr Siebeck.
- Schmidlin, Bruno (1970): *Die römischen Rechtsregeln: Versuch einer Typologie*. Köln: Böhlau.
- Schminck, Andreas (1986): *Studien zu mittelbyzantinischen Rechtsbüchern*. Frankfurt am Main: Löwenklau.
- Schrekenberg, Heinz, ed. (1990): *Die christlichen Adversus-Judaeos-Texte und ihr literarisches und historisches Umfeld (1.-11. Jh.)*. 2nd ed. Frankfurt am Main: Peter Lang.
- Schremer, Adiel (2010): *Brothers estranged: Heresy, Christianity, and Jewish identity in late antiquity*. Oxford: Oxford University Press.
- Schulz, Fritz (1936): *Principles of Roman law*. Translated by Marguerite Wolff. Oxford: Clarendon Press.
- Schulz, Fritz (1951): *Classical Roman law*. Oxford: Clarendon Press.
- Schulz, Fritz (1953): *History of Roman legal science*. Oxford: Clarendon Press.
- Schwab, Moïse, ed. (1871): *Le Talmud de Jérusalem*. Paris: Imprimerie nationale.
- Schwartz, Seth (2001): *Imperialism and Jewish society, 200 B.C.E. to 640 C.E.* Princeton, NJ: Princeton University Press.
- Seagle, William (1941): *The quest for law*. London: Alfred A. Knopf.
- Secunda, Shai (2014): *The Iranian Talmud: Reading the Bavli in its Sasanian context*. Philadelphia, PA: University of Pennsylvania Press.
- Secunda, Shai (2016): "'This, but also that': Historical, methodological, and theoretical reflections on Irano-Talmudica." *Jewish Quarterly Review* 106: 233-242.
- Segal, M. H. (1927): *A grammar of Mishnaic Hebrew*. Oxford: Clarendon Press.

- Sewell, William (1967): "Marc Bloch and the logic of comparative history." *History and Theory* 6: 208-218.
- Seyberlich, Rose-Marie (1964): "Die Judenpolitik Kaiser Justinians I." In *Byzantinistische Beiträge: Gründungstagung der Arbeitsgemeinschaft Byzantinistik in der Sektion Mittelalter der Deutschen Historiker-Gesellschaft vom 18 bis 21 April 1961 in Weimar*. Edited by Johannes Irmscher. Berlin, 73-80.
- Shafir, Gershon (1996): *Land, labor and the origins of the Israeli-Palestinian conflict, 1882-1914*. Berkeley, CA: University of California Press.
- Sherman, Charles (1908): "The study of law in Roman law schools." *Yale Law Journal* 7: 499-512.
- Shochetman, Eliav (1996): "Jewish law in Spain and the halakhic activity of its scholars before 1300." In *An introduction to the history and sources of Jewish law*. Edited by Neil Hecht et al. Oxford: Clarendon, 271-298.
- Siegal, Michal Bar-Asher (2013): *Early Christian monastic literature and the Babylonian Talmud*. Cambridge: Cambridge University Press.
- Sinclair, Daniel (1996): "Jewish law in the state of Israel." In *An introduction to the history and sources of Jewish law*. Edited by Neil Hecht et al. Oxford: Clarendon, 397-419.
- Smallwood, Mary (1976): *The Jews under Roman rule: From Pompey to Diocletian*. Leiden: Brill.
- Smelik, Willem (2012): "Justinian's Novella 146 and contemporary Judaism." In *Greek Scripture and the rabbis*. Edited by Timothy Law and Alison Salvesen. Leuven: Peeters, 141-164.
- Smelik, Willem (2015): "The translation as a bilingual text: The curious case of the Targum." *AJS Perspectives* 6: 8-10.
- Smith, Jonathan Z. (1990): *Drudgery divine: On the comparison of early Christianities and the religions of late antiquity*. London: School of Oriental and African Studies.
- Stein, Peter (1958): "The nature of quasi-delictual obligations in Roman law." *Revue Internationale des droits de l'antiquité* 5: 563-570.
- Stein, Peter (1966): *Regulae iuris: From juristic rules to legal maxims*. Edinburgh: Edinburgh University Press.
- Stein, Peter (1978): "The sources of law in Cicero." In *Atti del III Colloquium Tullianum (Roma, 3-5 Ottobre 1976)*. Edited by Scevola Mariotti. Roma: Centro di Studi Ciceroniani, 19-31.
- Stein, Peter (1999): *Roman law in European history*. Cambridge: Cambridge University Press.
- Steinsaltz, Adin (2014): *The Talmud: A reference guide*. Revised edition edited by Rabbi Joshua Schreier ed. Jerusalem: Koren.
- Stemberger, Günter (1996): *Introduction to the Talmud and Midrash*. Translated by Markus Bockmuehl. Edinburgh: T&T Clark.
- Stemberger, Günter (2000): *Jews and Christians in the Holy Land: Palestine in the fourth century*. Translated by Ruth Tuschling. Edinburgh: T&T Clark.
- Stemberger, Günter (2011): *Einleitung in Talmud und Midrasch. 9. Auflage*. C. H. Beck. München: Beck.
- Sterkenburg, Piet van, ed. (2003): *A practical guide to lexicography*. Amsterdam: John Benjamins.
- Stern, David (1991): *Parables in Midrash: Narrative and exegesis in rabbinic literature*. Cambridge, MA: Harvard University Press.

- Stern, David (2004): "Anthology and polysemy in classical midrash." In *The anthology in Jewish literature*. Edited by David Stern. Oxford: Oxford University Press, 108-139.
- Stern, Menahem, ed. (1974-1984): *Greek and Latin authors on Jews and Judaism*. 3 vols. Jerusalem: The Israel Academy of Sciences and Humanities.
- Stern, Sacha (1994): "Attribution and authorship in the Babylonian Talmud." *Journal of Jewish Studies* 45: 28-51.
- Stern, Sacha (1995): *Jewish identity in early rabbinic writings*. Leiden: Brill.
- Stolte, Bernard (2014): "Codification in Byzantium: From Justinian I to Leo VI." In *Diverging Paths? The shapes of power and institutions in medieval Christendom and Islam*. Edited by John Hudson and Ana Rodríguez. Leiden: Brill, 59-74.
- Stolte, Bernard (2015): "The law of New Rome: Byzantine law." In *Cambridge Companion to Roman Law*. Edited by David Johnston. Cambridge: Cambridge University Press, 355-373.
- Stone, Suzanne Last (1993): "In pursuit of the counter-text: The turn to the Jewish legal model in contemporary American legal theory." *Harvard Law Review* 106: 813-894.
- Strack, Hermann and Paul Billerbeck, eds. (1922-1928): *Kommentar zum Neuen Testament aus Talmud und Midrasch*. 5 vols. München: Beck.
- Strauss, Gerald (1986): *Law, resistance, and the state: The opposition to Roman law in Reformation Germany*. Princeton, NJ: Princeton University Press.
- Strauss, Leo (1952): *Persecution and the art of writing*. Glencoe, IL: Free Press.
- Suppes, Patrick (1957): *Introduction to Logic*. Princeton, NJ: Van Nostrand.
- Sussman, Yaakov (1990): "We-shuv le-Yerushalmi Neziqin." [Once more about order Neziqin in the Talmud Yerushalmi]. In *Mechqarei Talmud*. Edited by Yaakov Sussman and David Rosenthal. Jerusalem: Magnes Press, 55-133.
- Sussman, Yaakov, ed. (2001a): *Talmud Yerushalmi: Yotze le-or al-pi ketav yad Scaliger 3 (Or. 4720) sheba-sifriyat ha-Universitah shel Leiden im hashlamot we-tikkunim*. [Talmud Yerushalmi: Published according to MS Scaliger 3 (Or. 4720) of the University of Leiden with completions and corrections] Edited by. Jerusalem: The Academy of the Hebrew Language.
- Sussman, Yaakov (2001b): "Mavo." [Introduction to the Talmud Yerushalmi (MS Leiden)]. In *Talmud Yerushalmi: Yotze le-or al-pi ketav yad Scaliger 3 (Or. 4720) sheba-sifriyat ha-Universitah shel Leiden im hashlamot we-tikkunim*. Edited by Yaakov Sussmann. Jerusalem: The Academy of the Hebrew Language, תל-ט [ix-xxxvii].
- Sutton, Edwards, ed. (1942): *Cicero's De Oratore: Books 1-2*. The Loeb Classical Library. Cambridge, MA: Harvard University Press.
- Swartz, Michael (1998): "Scholasticism as a comparative category and the study of Judaism." In *Scholasticism: Cross-cultural and comparative perspectives*. Edited by José Ignacio Cabezón. Albany, NY: State University of New York Press, 91-114.
- Swartz, Norman (1997): *Definitions, dictionaries, and meanings*. Burnaby, BC: Simon Fraser University. Accessed on 29 November 2015. www.sfu.ca/~swartz/definitions.htm.
- Ta-Shma, Israel (1998): "The law is in accord with the later authority - *Hilkahat kebratai*: Historical observations on a legal rule." In *Authority, process and method: Studies in Jewish law*. Edited by Hanina Ben-Menahem and Neil Hecht. Amsterdam: Harwood Academic Publishers, 101-128.

- Tettenborn, Andrew (2002): "Review of Peter Birks' *English private law*." *The Cambridge Law Journal* 61: 217-219.
- Thomas, J. A. C. (1975): *The Institutes of Justinian: Text, translation and commentary*. Amsterdam: North-Holland.
- Tov, Emanuel (2001): *Textual criticism of the Hebrew Bible*. 2 ed. Minneapolis, MI: Fortress Press.
- Trapp, Michael (2003): *Greek and Latin letters: An anthology, with translation*. Cambridge: Cambridge University Press.
- Tropper, Amram (2004): *Wisdom, politics, and historiography : Tractate Avot in the context of the Graeco-Roman Near East*. Oxford: Oxford University Press.
- Tropper, Amram (2010): "The state of Mishnah studies." In *Rabbinic texts and the history of Late Roman Palestine*. Edited by Martin Goodman and Philip Alexander. Oxford: Oxford University Press, 91-115.
- Tuori, Kaius (2007a): "Revenge and retribution in the Twelve Tables: Talio esto reconsidered." *Fundamina* 13: 140-145.
- Tuori, Kaius (2007b): *Ancient Roman lawyers and modern legal ideals: Studies on the impact of contemporary concerns in the interpretation of ancient Roman legal history*. Frankfurt am Main: Vittorio Klostermann.
- Twersky, Isadore, ed. (1972): *A Maimonides reader*. New York, NY: Behrman House.
- Urbach, Efraim (1955): *Ba'alei ha-tosafot: Toldotehem, chiburehem we-shitatam*. [The Tosafists: Their history, writings and methods]. Jerusalem: Mosad Bialik.
- Urbach, Efraim (1980): "Self-isolation or self-affirmation in Judaism in the first three centuries: Theory and practice." In *Jewish and Christian self-definition*. Edited by E. P. Sanders. London: SCM Press, 2:269-298.
- van den Braembussche, A. A. (1989): "Historical explanation and comparative method: Towards a theory of the history of society." *History and Theory* 28: 1-24.
- van der Merwe, Derek (2001): "A rhetorical-dialectical conception of the common law - Aristotle's *Topics*." *Journal of South African Law* 118: 664-691.
- van der Merwe, Derek (2002): "A rhetorical-dialectical conception of the common law - Aristotelian influence on the genesis of Roman legal science." *Journal of South African Law* 119: 76-107.
- van der Wal, Nicolaas and Jan Lokin (1985): *Historiae iuris graeco-romani: Les sources du droit byzantin de 300 à 1453*. Groningen: E. Forsten.
- Veltri, Giuseppe (1994): "Die Novelle 146 ΠΕΡΙ ΕΒΡΑΙΩΝ: Das Verbot des Targumvortrags in Justinians Politik." In *Die Septuaginta zwischen Judentum und Christentum*. Edited by Martin Hengel and Anna Maria Schwemer. Tübingen: Mohr Siebeck, 116-130.
- Vidas, Moulié (2014): *Tradition and the formation of the Talmud*. Princeton: Princeton University Press.
- Vinogradoff, Paul (1929): *Roman Law in Medieval Europe*. Edited by Francis De Zulueta. 2 ed. Oxford: Clarendon Press. 1909.
- Watson, Alan (1991): "The definition of furtum and the trichotomy." In *Studies in Roman private law*. Edited by Alan Watson. London: Hambledon, 269-282.

- Watson, Alan (1993): *Legal transplants: An approach to comparative law*. 2nd ed. Athens, GA: University of Georgia Press.
- Watson, Alan (1995): *The spirit of Roman law*. London: University of Georgia Press.
- Watson, Alan, ed. (1998a): *The Digest of Justinian: English translation*. 4 vols. Philadelphia, PA: University of Pennsylvania Press.
- Watson, Alan (1998b): *Sources of law, legal change, and ambiguity*. Philadelphia, PA: University of Pennsylvania Press.
- Watson, George (1969): *The Roman soldier*. Ithaca, NY: Cornell University Press.
- Weber, Max (1949): *On the methodology of the social sciences*. Glencoe, IL: Free Press.
- Weiss, Neil (2012): *Introductory statistics*. 9th ed. Boston: Addison-Wesley.
- Weissman-Chajes, Marcus, ed. (1866): *Talmud Yerushalmi: Kemo she-nidpas be-Venenetsiyah bi-shenat 5282*. [Talmud Yerushalmi: As it was printed in Venice in the year 5282] Edited by. Krotoshin D.B. Monash.
- Wenger, Leopold (1953): *Die Quellen des römischen Rechts*. Wien: A. Holzhausen.
- Westermann, Claus (1954): "Geschichte der Klage im Alten Testament." *Zeitschrift für die Alttestamentliche Wissenschaft* 25: 44-80.
- Wewers, Gerd (1982): *Übersetzung des Talmud Yerushalmi Band IV/1-3. Bavot - Pforten*. Translated by Gerd Wewers. Tübingen: Mohr Siebeck.
- Wewers, Gerd (1984): *Probleme der Bavot-Traktate: Ein redaktionskritischer und theologischer Beitrag zum Talmud Yerushalmi*. Tübingen: Mohr Siebeck.
- Wharton, Annabel (1995): *Refiguring the post classical city: Dura Europos, Jerash, Jerusalem and Ravenna*. Cambridge: Cambridge University Press.
- Whatmore, Richard (2016): *What is intellectual history?* Cambridge: Polity Press.
- Wieacker, Franz (1988): *Römische Rechtsgeschichte: Quellenkunde, Rechtsbildung, Jurisprudenz und Rechtsliteratur*. München: Beck.
- Wieacker, Franz (1990): "Foundations of European legal culture." *The American Journal of Comparative Law* 38.
- Wieacker, Franz (1995): *A history of private law in Europe with particular reference to Germany*. Translated by Tony Weir. Oxford: Clarendon.
- Wiley, Neal (2016): "Reading Justinian through his Supreme Court citations." *Elon Law Review* 8: 479-502.
- Wilson, Robert (1977): *Genealogy and history in the biblical world*. New Haven, CT: Yale University Press.
- Wilson, Stephen (1995): *Related strangers: Jews and Christians, 70-170 CE*. Minneapolis, MI: Fortress Press.
- Wimpfheimer, Barry (2011): *Narrating the law: A poetics of talmudic legal stories*. Philadelphia, PA: University of Pennsylvania Press.
- Winkel, Laurens (1988): "Die stoische οἰκείωσις-Lehre und Ulpian's Definition der Gerechtigkeit." *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung* 105: 669-679.
- Winkel, Laurens (1996): "The role of general principles in Roman law." *Fundamina* 2: 103-120.

Bibliography

- Winkel, Laurens (2015): "Roman law and its intellectual context." In *The Cambridge companion to Roman law*. Edited by David Johnston. Cambridge: Cambridge University Press, 9-22.
- Wittgenstein, Ludwig (2009): *Philosophical investigations*. Translated by G. E. M. Anscombe et al. Chichester: Wiley-Blackwell.
- Wright, David (2009): *Inventing God's law: How the Covenant code of the Bible used and revised the laws of Hammurabi?* Oxford: Oxford University Press.
- Yadin-Israel, Azzan (2004): *Scripture as logos: Rabbi Ishmael and the origins of Midrash*. Philadelphia, PA: University of Pennsylvania Press.
- Yadin, Yigael, Jonas Greenfield and Naphtali Lewis, eds. (1989): *The documents from the Bar Kokhba period in the Cave of Letters*. Jerusalem: Israel Exploration Society.
- Yaron, Reuven (1960): *Gifts in contemplation of death in Jewish and Roman Law*. Oxford: Clarendon Press.
- Zimmermann, Reinhard (1996): *The law of obligations: Roman foundations of the civilian tradition*. Oxford: Clarendon Press.
- Zimmermann, Reinhard (2001): *Roman law, contemporary law, European law: The civilian tradition today*. Oxford: Oxford University Press.
- Zuckerman, Constantin (1998): "Two reforms of the 370s: Recruiting soldiers and senators in the divided Empire." *Revue des études byzantines* 56: 79-139.
- Zulueta, Francis de, ed. (1946): *The Institutes of Gaius*. 2 vols. Oxford: Clarendon Press.