

# Recent Trends in the Study of the Intellectual History of Law and Jewish Law Scholarship

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## I. Introduction

In this article I discuss eight recent, and relatively recent, trends in the study of the history of law, especially the intellectual history of law, and ask whether similar trends exist in the study of the history of Jewish law.<sup>1</sup> My

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- 1 For recent discussions of historiographical trends in the study of other legal systems see, for example, "[Symposium Issue]: 'Law As...': Theory and Method in Legal History," *UC Irvine Law Review* 1 (2011): 519–1079; "[Symposium Issue]: 'Law As...' II, History As Interface for the Interdisciplinary Study of Law," *UC Irvine Law Review* 4 (2014): 1–491; *L'Histoire du droit en France: Nouvelles tendances, nouveaux territoires*, ed. Jacques Krynen and Bernard d'Alteroche (Paris: Garnier, 2014); "'Law As...' III, Glossolalia: Toward A Minor (Historical) Jurisprudence," *UC Irvine Law Review* 5 (2015): 239–511; Markus D. Dubber, "New Historical Jurisprudence: Legal History as Critical Analysis of Law," *Critical Analysis of Law* 2.1 (2015): 1–18; "Symposium Issue: The New Ancient Legal History," *Critical Analysis of Law* 3.1 (2016). An overview of recent trends in the intellectual history of law (focusing on western law) can be found in a companion article of mine which discusses ten (rather than eight) trends in the intellectual history of law generally. See Assaf Likhovski, "The Intellectual History of Law," in *The Oxford*

purpose is to identify research questions and tools that add new dimensions to the study of the history of Jewish law. I believe that by comparing Jewish law scholarship to work conducted outside the field one can gain a better understanding of the unique aspects of the historiography of Jewish law (and perhaps also of other religious legal systems).

Before proceeding to the main part of the article, several caveats are in order. First, to describe recent 'trends' in the study of the history of Jewish law, one must assume that this is indeed a distinct academic field whose current state can be analyzed and discussed comparatively. On the one hand, one can certainly identify institutional structures that are typical of mature academic fields: the study of Jewish legal history has a long institutional history going back at least to 1917 and the establishment of the Jewish Law Society, *Hevrat ha-Mishpat ha-'Ivri*, in Moscow. This society no longer exists, but there are several scholarly organizations (the Jewish Law Association and the Jewish Legal Heritage Society, for instance), as well as several academic research institutes, devoted to the topic. There are also several academic journals, such as *Diné Yisrael*, *Shnaton ha-Mishpat ha-'Ivri*, or the *Jewish Law Annual*, publishing works on Jewish law and its history.

On the other hand, like some other legal systems, especially ones with long trajectories, the history of Jewish law is studied by many types of scholars working in many types of institutional settings: by students of Jewish religion, philosophy, and culture, by Jewish historians, and by legal scholars. Some researchers are interested in Jewish legal history as a way to reconstruct Jewish social or cultural history. Some are drawn to the jurisprudential or comparative law insights this system provides. Some investigate the history of Jewish law for normative reasons, for example as a source of inspiration for contemporary Israeli law, and use history as part of a normative rather than descriptive pursuit.<sup>2</sup> The relative methodological (and ideological) coherence that characterized this field in the middle decades of the twentieth century (at least in Israel, where much of the scholarship written on Jewish law during that period were dominated by Menachem Elon's work) no longer exists. The field is now more pluralistic than it used to be (in a sense, this article can be seen as an exercise in mapping what might be called the post-Elonian phase

*Handbook of Legal History*, ed. Markus Dubber and Christopher Tomlins (Oxford: Oxford University Press, forthcoming).

- 2 On different motivations for the study of Jewish law see, for example, Arye Edrei, "Why Teach Jewish Law," *Iyune Mishpat* 25 (2001): 467–87 (Hebrew).

of the study of the history of Jewish law).<sup>3</sup> This pluralism has undermined the very notion of a single unitary entity called 'Jewish law' whose essence and boundaries are clear and whose historiography can be analyzed as a discrete field of inquiry.<sup>4</sup> Given the multiple motivations, methodologies, and audiences of Jewish law scholars, and indeed the plurality of notions of Jewish law, any attempt to map out 'trends' in the study of the history of Jewish law may be open to question.

Second, I compare the intellectual history of law and the history of Jewish law. The intellectual history of law is merely one sub-category of legal history. The intellectual history of law deals with topics such as the history of legal theories developed by academic legal scholars in universities and other institutions of higher learning, the history of legal education, the history of academic and other legal texts, or the structures that underlie the legal thought of professionals lawyers in a given era. However, legal historians are not only interested in legal ideas. They are also interested in the history of specific legal norms; in the history of legal institutions (legislatures, official and unofficial courts, juries, and so on); in the social history of law; in the economic history of law, and many other topics.<sup>5</sup> Why compare the

- 3 It is important to note that the Elonian paradigm was based on the work of earlier scholars such as Chaim Tchernowitz (Rav Tzair) and Asher Gulak who themselves were heavily indebted to the dogmatic-historical methodology of the German historical school. On the intellectual roots of this paradigm see Assaf Likhovski, *Law and Identity in Mandate Palestine* (Chapel Hill: University of North Carolina Press, 2006), 127–53, 161–66.
- 4 For theoretical discussions see, for example, Bernard S. Jackson, "Jewish law or Jewish Laws," *Jewish Law Annual* 8 (1989): 15–34 (on "Jewish laws"); Ze'ev W. Falk, "Review: What Is 'Jewish Law'?" *Journal of Law and Religion* 11 (1994–1995): 835–44 (arguing that Elon's narrow definition of 'Jewish law' was motivated by his Orthodox beliefs, and criticizing him for ignoring the biblical period, numerous non-orthodox legal sources (from the Samaritans to Reform Judaism), and for the use of an ahistorical, anachronistic, and theoretically shallow analytical methodology). For a somewhat similar discussion of Islamic law scholarship see Amr A. Shalakany, "Islamic Legal Histories," *Berkeley Journal of Middle Eastern and Islamic Law* 1 (2008): 1–82.
- 5 For discussions of Jewish legal history and its relationship to the social and economic history of the Jews, see, for example, Haym Soloveitchik, *Use of Responsa as Historical Source* (Jerusalem: Merkaz Shazar, 1990) (Hebrew); Jay R. Berkovitz and Ephraim Kanarfogel, "Introduction [to Special Issue: New Perspectives on Jewish Legal History]," *Jewish History* 31 (2017): 1–6. For concrete examples of histories of Jewish law that link it to the economic and social history of Jewish

study of the history of Jewish law primarily to the study of the *intellectual* history of law? One possible answer would be that some aspects of Jewish law – for example, the fact that Jewish legal texts are studied for religious reasons and not merely as a practical matter (for litigation, or for judicial decision-making purposes) – creates something of a parallel between the producers and students of Jewish law and scientists and philosophers (or law professors), that is, the people intellectual historians study.

Third, I am not a scholar of Jewish legal history. I am an outsider, a tourist in the land of Jewish law. Tourists sometimes have interesting insights about the places they visit. They sometimes see things to which long-time residents may be blind. But touristic impressions can also be highly misleading and should be taken with a grain of salt. My article is based on a very idiosyncratic and eclectic survey of some contemporary trends in Jewish law scholarship. It is informed by my familiarity with the work of certain people, and by my specific identity as an Israeli legal historian working in a law school (rather than, for example, as an American historian working in a history department), which means that I may miss much of the important work currently being carried out in the field. In addition, I should note that the footnotes in this article are non-exhaustive, containing only examples that illustrate the points I make in the text. They do not (and cannot) mention every work relevant to the ground covered by this article.

Fourth, I discuss eight historiographical ‘trends’ in this article. One might object that it is impossible to talk about trends (or fashions, or styles) in vast disciplinary fields such as history, intellectual history, the history of legal ideas, or even the history of Jewish legal ideas. These are vast oceans of knowledge and inquiry, and most of the trends I identify as recent have actually existed, in various forms, prior to the last few decades. A possible response to such an objection would be that, like any general historiographical survey, this article is also, by definition, inaccurate. A related objection would be to ask: “Why talk about eight trends and not seven or nine?” or “Why did you choose these eight specific categories?” A possible answer to these

communities, rather than focusing on its intellectual history see, e.g., Jacob Katz, *The ‘Shabbes Goy’: A Study in Halakhic Flexibility*, trans. Yoel Lerner (Philadelphia: Jewish Publication Society, 1992); Haym Soloveitchik, *Principles and Pressures: Jewish Trade in Gentile Wine in the Middle Ages* (Tel Aviv: ‘Am ‘Oved, 2003) (Hebrew); idem, *Wine in Ashkenaz in the Middle Ages: Yeyn Nesekh – A Study in the History of Halakhah* (Jerusalem: Merkaz Shazar, 2008) (Hebrew).

objections is that the categories I use are not always clear-cut. Some of the trends I identify can be broken into sub-categories. Other trends, it might be argued, can be aggregated, or replaced by alternative categories. Ultimately, however, the answer is that I am using this number of categories merely as scaffolding for surveying the field.

## II. The Eight Trends

### 1. Spatial Frameworks

Over the last twenty years or so, many historians, legal historians, and also intellectual historians of law, have become interested in expanding the spatial frameworks used to study the past. Nineteenth-century historiography was linked to the nation-state and its institutions: national universities, archives, museums, and so on, and the boundaries of the nation-state determined the boundaries of the stories told by historians, certainly those interested in modern history.

This was also the case for some legal historians. Students of ancient or medieval law (much like historians of philosophy, music, or science) have often used transnational and global frameworks to tell their stories.<sup>6</sup> However, those working on the history of modern law (that is, nineteenth- and twentieth-century law) have often focused on the history of national legal systems. The positivist definition of law, which equates it with the norms produced by the 'sovereign' (that is, in practice, the institutions of the nation-state), has also helped confine historians of modern law within national boundaries. Standard works on the intellectual history of modern law therefore often

6 For a general discussion of the spatial frameworks used by legal historians, see Dubber, "New Historical Jurisprudence." See also Nader Hakim and Fatiha Cherfouh, "Pensée juridique contemporaine: Hétérogénéité et expansion," in *L'Histoire du droit en France*, 117–43. Two concrete examples of older works of transnational or global intellectual histories of pre-modern (Western) law are: Harold Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, MA: Harvard University Press, 1983); and J. M. Kelly, *A Short History of Western Legal Theory* (New York: Oxford University Press, 1992). A more recent example is Jean-Louis Halpérin, *Five Legal Revolutions Since the 17<sup>th</sup> Century: An Analysis of a Global Legal History* (Cham: Springer, 2014).

discuss the history of American or French schools of legal thought rather than the history of legal ideas unconfined within national borders.<sup>7</sup>

Recently, however, a series of post-national turns – the global, transnational, colonial/postcolonial, and comparative turns – have revolutionized historiography.<sup>8</sup> The waning of the nation-state and the rise of transnational entities such as the European Union, as well as the transnational or global nature of contemporary problems such as global warming, or cross-border migration, have led historians to search out similar phenomena in the past. Some of these border-spanning phenomena are natural, for example climate change.<sup>9</sup> However, some of our contemporary problems are associated with transnational ideas, for example, authoritarian populism or terrorist ideology. It is therefore not surprising that the turns I just mentioned have also resulted in a growing interest in writing global or transnational intellectual histories.<sup>10</sup> Transnational history has also been facilitated by the digital revolution that now allows historians to trace the movement of ideas across national borders with an ease unimaginable even a decade ago.<sup>11</sup>

Scholars interested in the intellectual history of modern law have also been influenced by these turns. One type of transnational legal history, long-pursued, has been that of legal transplants.<sup>12</sup> Much of the work on transplants seeks to answer questions posed by comparative lawyers (about

7 See, for example, Neil Duxbury, *Patterns of American Jurisprudence* (Oxford: Clarendon Press, 1995); David Kennedy and William W. Fisher III, *The Canon of American Legal Thought* (Princeton: Princeton University Press, 2006); Nader Hakim and Fabrice Melleray, *Le renouveau de la doctrine française: Les grands auteurs de la pensée juridique au tournant du XXe siècle* (Paris: Dalloz, 2009).

8 See, for example, C. A. Bayly, Sven Beckert, Matthew Connelly, Isabel Hofmeyr, Wendy Kozol, and Patricia Seed, "AHR Conversation: On Transnational History," *American Historical Review* 111 (2006): 1441–64; Durba Ghosh, "Another Set of Imperial Turns?" *American Historical Review* 117 (2012): 772–93; Lynn Hunt, *Writing History in the Global Era* (New York: W. W. Norton, 2014).

9 See, for example, Ronnie Ellenblum, *Climate Change and the Decline of the Eastern-Mediterranean, 950–1072 AD* (Cambridge: Cambridge University Press, 2012).

10 See, for example, Samuel Moyn and Andrew Sartori, eds., *Global Intellectual History* (New York: Columbia University Press, 2013).

11 See Lara Putnam, "The Transnational and the Text-Searchable: Digitized Sources and the Shadows they Cast," *American Historical Review* 121 (2016): 377–402.

12 On transplants, see, for example, David Nelken, "Toward a Sociology of Legal Adaptation," in *Adapting Legal Cultures*, ed. David Nelken (Oxford: Hart, 2001), 7–54; Michele Graziadei, "Transplants and Receptions," in *The Oxford Handbook*

the proper classification of a given legal system, for example), rather than questions about causation, change, context, or conditions for the emergence of ideas and structures of thought (notions that intellectual historians are inclined to investigate).<sup>13</sup> However, some of the works are closer to traditional works on the intellectual history of law, for example, studies that examine the influence of legal thinkers belonging to one legal system on the thought of legal thinkers belonging to another system.<sup>14</sup> Another variety of works in this genre are studies that analyze *mutual* influence, or interactions within networks of scholars in two or more countries, or works that compare similar developments in two or more jurisdictions without reference to the problematic concept of influence.<sup>15</sup>

*of Comparative Law*, ed. Mathias Reimann and Reinhard Zimmerman (Oxford: Oxford University Press, 2006), 441–75.

- 13 A collection of articles that tries to straddle the divide between comparative lawyers and legal historians is “Histories of Legal Transplantations,” *Theoretical Inquiries in Law* 10 (2009): 299–743. See also Thomas Duve, ed., *Entanglements in Legal History: Conceptual Approaches* (Frankfurt am Main: Max Planck Institute for European Legal History, 2014). For a theoretical survey see Martijn van der Burg, “Cultural and Legal Transfer in Napoleonic Europe: Codification of Dutch Civil Law as a Cross-National Process,” *Comparative Legal History* 3 (2015): 85, 85–92.
- 14 For example, the influence of continental ideas, especially those of German law, on American law. See James Herget, *American Jurisprudence, 1870–1970: A History* (Houston: Rice University Press, 1990); Mathias Reimann, *The Reception of Continental Ideas in the Common Law World, 1820–1920* (Berlin: Duncker & Humblot, 1993); *Der Einfluß deutscher Emigranten auf die Rechtsentwicklung in den USA und in Deutschland*, ed. Marcus Lutter, Ernst C. Stiefel and Michael H. Hoeflich (Tübingen: Mohr Siebeck, 1993); M. H. Hoeflich, *Roman and Civil Law and the Development of Anglo-American Jurisprudence in the Nineteenth Century* (Athens, GA: University of Georgia Press, 1997); *Jurists Uprooted: German-speaking Émigré Lawyers in Twentieth-century Britain*, ed. Jack Beatson and Reinhard Zimmermann (Oxford: Oxford University Press, 2004); Katharina Isabel Schmidt, “Law, Modernity, Crisis: German Free Lawyers, American Legal Realists and the Transatlantic Turn to ‘Life,’ 1903–1933,” *German Studies Review* 39 (2016): 121–40. For methodological discussions of the problems of tracing influence in the legal realm, see, for example, Alan Watson, *Legal Transplants: An Approach to Comparative Law* (Athens, GA: University of Georgia Press, 1974), 10–15; Neil Duxbury, *Jurists and Judges: An Essay on Influence* (Oxford: Hart, 2001), 5–22.
- 15 On mutual influence, see Richard A. Cosgrove, *Our Lady the Common Law: An Anglo-American Legal Community, 1870–1930* (New York: New York University Press, 1987); David M. Rabban, *Law’s History: American Legal Thought and the Transatlantic Turn to History* (Cambridge: Cambridge Uni-

There have also been some attempts to write global histories of legal thought. Here the aim (at least ideally) is not to study the flow of legal ideas between two or more jurisdictions but to provide a bird's-eye view of developments in legal thought that appeared simultaneously in many jurisdictions. Such an approach is found in Duncan Kennedy's important article on "three globalizations" of modern legal thought. Kennedy analyzed the production of three styles of legal thought ("classical legal thought," "the social," and "the third globalization") in one or another western metropolitan center in the last 150 years, and the reception of these styles in other western and non-western jurisdictions.<sup>16</sup> Kennedy's narrative was based on the assumption that modern legal thought is western in origin, but recently some scholars have begun to explore the impact of non-western legal thinkers on the history of modern law and modern legal thought.<sup>17</sup>

versity Press, 2014). For a comparative intellectual history of law that is not based on the notion of influence, see Assaf Likhovski, "Czernowitz, Lincoln, Jerusalem, and the Comparative History of American Jurisprudence," *Theoretical Inquiries in Law* 4 (2003): 621–57. See generally David Ibbetson, "The Challenges of Comparative Legal History," *Comparative Legal History* 1 (2013): 1–11.

- 16 Duncan Kennedy, "Three Globalizations of Law and Legal Thought: 1850–2000," in *The New Law and Economic Development: A Critical Appraisal*, ed. David M. Trubek and Alvaro Santos (New York: Cambridge University Press, 2006), 19–73. On Kennedy's historiographical approach see Justin Desautels-Stein, "Back in Style," *Law and Critique* 25 (2014): 141–62. For a French discussion of the global history of law (and legal thought) see Jean-Louis Halpérin, *Profils des mondialisations du droit* (Paris: Dalloz, 2009).
- 17 See, for example, William Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge: Cambridge University Press, 2009), 269–92; William Twining, "Social Science and Diffusion of Law," *Journal of Law and Society* 32 (2005): 203–40; Arnulf Becker Lorca, *Mestizo International Law: A Global Intellectual History 1842–1933* (Cambridge: Cambridge University Press, 2014), 1–37; Pierre Singaravélou, *Professer l'Empire: Les 'sciences coloniales' en France sous la IIIe République* (Paris: Publications de la Sorbonne, 2011), 297–332. For an earlier work on an earlier period, see P. G. Monateri, "Black Gaius: A Quest for the Multicultural Origins of the 'Western Legal Tradition,'" *Hastings Law Journal* 51 (2000): 479–555. For a general discussion of the study of non-western sites for the production of modern knowledge, see generally Suzanne Marchand, "Has the History of the Disciplines Had its Day?" in *Rethinking Modern European Intellectual History*, ed. Darrin M. McMahon and Samuel Moyn (New York: Oxford University Press, 2014), 130, 143–44.

Are the global, transnational, colonial/postcolonial and comparative turns relevant to the study of the history of Jewish law? As I noted earlier, confinement within national boundaries is especially evident in works dealing with the history of modern law and modern legal thought. National borders are less relevant to the study of the history of Jewish law, a legal system whose roots go back to antiquity and whose adherents have lived for many centuries in communities dispersed around the globe. Here, one can argue, the historiographical mood, if there is one, has actually shifted in the opposite direction: not zooming-out beyond the boundaries of the nation to capture the flow of ideas across political borders, but zooming-in – that is, moving from works that describe the history of Jewish law on a global scale to histories that focus on specific regions.

Earlier works on Jewish law, especially Elon's research project, were based on an approach that combined Jewish nationalism and a global perspective: the assumption that Jewish law was an organic unitary entity spanning the whole globe. An awareness of differences between different Jewish communities or regions existed, of course, but was not a major scholarly concern. In Elon's case, the assumption about the basic unity of Jewish law was probably informed both by his religious beliefs and also by a specific Zionist conception of Jewish historiography prevalent at the Hebrew University in the 1950s when Elon studied there.<sup>18</sup> In this sense, the "global" nature of mid-twentieth Jewish historiography and of the study of Jewish law is misleading. Jewish historiography was global, but this was only because of the diasporic nature of Jewish communities. In its essence, it was nationalist.

Since the 1970s, however, the notion of a single Jewish Diaspora and culture has given way to an interest in analyzing differences between different Jewish communities, and the notion of a single Jewish culture

18 Out of seventy-four entries of works by Elon in "Rambi: The Index of Articles in Jewish Studies," only five deal with specific Jewish regions. On the 'Jerusalem School' of historiography, see, for example, David N. Myers, *Re-Inventing the Jewish Past: European Jewish Intellectuals and the Zionist Return to History* (New York: Oxford University Press, 1995); Amos Funkenstein, "Jewish History among Thorns," *Zion* 60 (1995): 335–47 (Hebrew). For a theoretical discussion of the methodological assumptions related to the notion of a single Jewish culture, as well as an opposing 'multicultural' narrative that focuses on the local contexts, see, for example, Moshe Rosman, *How Jewish is Jewish History?* (Oxford: Littman Library, 2007), 82–89.

has been replaced by that of Jewish *cultures*.<sup>19</sup> This change, because of its emphasis on exploring difference, rather than of unity, across space might arguably be seen as analogous to the comparative or transnational turns in other subfields of history.

The rise in an interest in regional difference is also evident in scholarship on Jewish legal history. It seems that the spatial framework used today by many students of Jewish law is often narrower than that used in the middle decades of the twentieth century, and that many scholars of Jewish law are now interested in capturing distinctions between regions of the Jewish Diaspora rather than in tracing the development of a single organic entity called 'Jewish law.'<sup>20</sup> One area of study in which sensitivity to local differences has long been the norm is that of local customary Jewish law.<sup>21</sup>

A second interesting variety of this kind of work, which may be seen as the Jewish law equivalent of the postcolonial turn, is the study of Jewish law produced by rabbis in the modern Middle East, North Africa, and, more generally, the Mediterranean world. The examination of the thought of these rabbis was somewhat marginalized in more traditional works, which focused mostly on Ashkenazic Judaism in the modern era; and the current interest in this region may be thus seen as echoing the growing interest worldwide in focusing attention on non-western thinkers.<sup>22</sup>

19 See, for example, David Biale, ed., *Cultures of the Jews: A New History* (New York: Schocken Books, 2002), preface; Rosman, *How Jewish*, 17–18.

20 See, for example, Arye Edrei and Doron Mendels, "A Split Jewish Diaspora: Its Dramatic Consequences," *Journal for the Study of the Pseudepigrapha* 16.2 (2007): 91–137 (discussing regional identities in antiquity); Maoz Kahana, *From the Noda BeYehuda to the Chatam Sofer* (Jerusalem: Merkaz Shazar, 2015), 276–347 (Hebrew) (discussing local halakhic cultural territories in medieval and modern central Europe).

21 See Daniel Sperber, *Minhagei Yisrael: Origins and History* (Jerusalem: Mosad ha-Rav Kook, 1989–2007) (Hebrew); Israel M. Ta-Shma, *Early Franco-German Ritual and Custom* (3<sup>rd</sup> ed., Jerusalem: Magnes, 1999) (Hebrew); idem, *Ritual, Custom and Reality in Franco-Germany 1000–1350* (Jerusalem: Magnes, 2000) (Hebrew).

22 See recently, for example, Zvi Zohar, *Rabbinic Creativity in the Modern Middle East* (London: Bloomsbury Academic Press, 2013) (dealing with halakhic authorities in Iraq, Syria, and Egypt); Elimelech Westreich, "'Medicine and Jewish Law in Moroccan Tradition in the 20<sup>th</sup> Century,'" *Iyune Mishpat* 37 (2014): 139–94 (Hebrew) (one example of a series of works by Westreich on halakhic thought in Morocco). For an explicit discussion of orientalism and attitudes to modern Sephardic rabbis see Ariel Picard, *The Philosophy of Rabbi Ovadya Yosef in an Age of Transition: Study*

A third variety of this approach might perhaps be called ‘the British-colonial turn in Jewish law scholarship’ – an academic interest in the impact of the British Empire on Jewish law. Such works highlight processes of isomorphism between imperial structures and Jewish law institutions, texts, and networks. Examples of this type of work are studies that analyze the impact of British law and legal thought on the creation of the Rabbinical Court of Appeal in mandatory Palestine, the enactment of regulations governing the procedures of the rabbinical courts in this territory, or the British-imperial context of the scholarly study of Jewish law in the early twentieth century.<sup>23</sup> There are also works that examine the unique nature of Jewish law, and Jewish-British isomorphism, in other British territories, as well as in other imperial and even transimperial contexts.<sup>24</sup>

*of Halakhah and Cultural Criticism* (Ramat Gan: Bar Ilan University Press, 2007), 46–50 (Hebrew). Of course, interest in regional variety is not confined to the Middle East. For recent works dealing with medieval Europe, see, for example, Ephraim Kanarfogel, *The Intellectual History and Rabbinic Culture of Medieval Ashkenaz* (Detroit: Wayne State University Press, 2013) (Germany and northern France); Pinchas Roth, “Regional Boundaries and Medieval Halakhah: Rabbinic Responsa from Catalonia to Southern France in the 13<sup>th</sup> and 14<sup>th</sup> Centuries,” *Jewish Quarterly Review* 105 (2015): 72–98 (southern France and Catalonia); Pinchas Roth with Ethan Zadoff, “The Talmudic Community of Thirteenth-Century England,” in *Christians and Jews in Angevin England: The York Massacre of 1190, Narratives and Contexts*, ed. Sarah Rees Jones and Sethina Watson (Woodbridge: York Medieval Press, 2013), 184–203 (analyzing thirteenth century Anglo-Jewish halakhic thought based on the assumption that it was “a localized domain with distinct regional identities, features, and mentalities” different from those of other regions of Europe such as northern France).

- 23 See, for example, Elimelech Westreich, “The Legal Activities of the Chief Rabbis during the Period of the British Mandate: A Response to the Zionist Challenge,” in *A Hundred Years of Religious Zionism*, ed. Dov Schwartz and Avi Sagi (vol. 2, Ramat Gan: Bar Ilan University Press, 2003), 83–129 (Hebrew); Amihai Radzyner, “Rabbi Ouziel, the Tel-Aviv-Jaffa Rabbinat and the Rabbinical Court of Appeal: A Play in Four Acts,” *Mehkera Mishpat* 21 (2004): 129–243 (Hebrew); Amihai Radzyner, “On the Beginning of Rabbinical Courts’ Procedural Regulations: ‘Sidrei Ha-Mishpatim’, 1921,” *Mehkera Mishpat* 25 (2009): 37–75 (Hebrew); idem, “On the Beginning of Rabbinical Courts’ Procedural Regulations: ‘Takkanot Ha-Diyun’, 1943,” *Diné Israel* 25 (2008): 185–260 (Hebrew); idem, “Jewish Law in London: Between Two Societies,” *Jewish Law Annual* 18 (2009): 81–135.
- 24 See Levi Cooper, “Forum Conveniens: Legal Questions in the Burmese Jewish Community” (unpublished paper). On Jewish law in other imperial contexts, see, for example, Levi Cooper, “European Codification Impacts Jewish Legal Writing: Code Napoleon, *Hayei Adam* and *Shulhan Arukh Harav*,” (unpublished paper);

A final variety of works using new spatial frameworks is found in works dealing with Jewish law in a comparative fashion. Comparative works undermine the essentialist conception of Jewish law as a unique entity existing across time and space. Instead of seeing it as an organic and unitary entity, they connect Jewish law to the various cultural contexts within which it existed. Comparative studies of Jewish law are not, of course, new. For example, a major strand in the scholarship of the first Jewish law scholar at the Hebrew University, Asher Gulak, was comparative.<sup>25</sup> However, it seems that during the dominance of the Elonian paradigm there was less interest (at least among Israeli academics) in comparing Jewish law and other legal systems than there is today, when there is a wealth of studies comparing Jewish law to similar legal systems in the Greco–Roman world, the Sasanian Empire, or the world of Islam.<sup>26</sup> Such works, which are based on a synchronic rather than a diachronic approach to the history of Jewish law, have also been written on Jewish law in the early-modern and modern eras.<sup>27</sup>

Anton Mordechai Kanevskiy, “The Place of Halacha in the Legal System of the Russian Empire” (unpublished paper). On the transimperial context see Jessica M. Marglin, “Mediterranean Modernity through Jewish Eyes: The Transimperial Life of Abraham Ankawa,” *Jewish Social Studies* 20 (2014): 34–68.

- 25 See Likhovski, *Law and Identity*, 163.
- 26 See, for example, Catherine Hezser, ed., *Rabbinic Law in Its Roman and Near Eastern Context* (Tübingen: Mohr-Siebeck, 2003); Hayim Lapin, *Rabbis as Romans: The Rabbinic Movement in Palestine, 100–400 CE* (Oxford: Oxford University Press, 2012); Christine Hayes, *What’s Divine about Divine Law? Early Perspectives* (Princeton: Princeton University Press, 2015); Yifat Monnickendam, “The Kiss and the Earnest: Early Roman Influences on Syriac Matrimonial Law,” *Le Muséon* 125 (2012): 307–34; *Shoshannat Yaakov: Jewish and Iranian Studies in Honor of Yaakov Elman*, ed. Shai Secunda and Steven Fine (Leiden: Brill, 2012); Gideon Libson, *Jewish and Islamic Law: A Comparative Study of Custom during the Geonic Period* (Cambridge, MA: Harvard University Press, 2003); Lena Salaymeh, *The Beginnings of Islamic Law: Late Antique Islamic Legal Traditions* (Cambridge: Cambridge University Press, 2016).
- 27 For example, Jay R. Berkovitz, *Protocols of Justice: The Pinkas of the Metz Rabbinic Court 1771–1789* (vol. 1, Leiden: Brill, 2014), 79–105; Jessica M. Marglin, “Cooperation and Competition among Jewish and Islamic Courts: Double Notarization in Nineteenth-Century Morocco,” in *Studies in the History and Culture of North African Jewry: Volume III*, ed. Moshe Bar-Asher and Steven Fraade (New Haven: Yale Program in Judaic Studies and the Hebrew University Center for Jewish Languages and Literatures, 2012), 111–29. For a broad-brush discussion of the relationship between Jewish law and other legal systems in the last two thousand years see Steven Wilf, “Jewish Law,” in *The Oxford Handbook of Legal History*, ed.

## 239\* Intellectual History of Law and Jewish Law Scholarship

A specific variety of this type of comparative studies shows the similarity between a given non-Jewish legal thinker/s and a given halakhic thinker/s (and perhaps also the *influence* of the former on the latter).<sup>28</sup> Of course, just as the assumption about the insularity of Jewish law is problematic, so is the assumption about ‘influence,’ and there have been extended theoretical discussions of the utility of this notion and attempts to replace it with more nuanced concepts dealing with Jewish–gentile interaction in a non-binary fashion, such as assimilation, acculturation, appropriation, embeddedness, fusion, entanglement, or hybridity.<sup>29</sup>

Markus Dubber and Christopher Tomlins (Oxford: Oxford University Press, forthcoming).

- 28 See, e.g., Chaim N. Saiman, “Legal Theology: The Turn to Conceptualism in Nineteenth-Century Jewish Law,” *Journal of Law and Religion* 21 (2005–2006): 39–100 (showing the similarity of the nineteenth-century analytical approach and the jurisprudential ideas of the *Brisker* school); Shai Wozner, *Legal Thinking in the Lithuanian Yeshivot: The Heritage and Works of Rabbi Shimon Shkop* (Jerusalem: Magnes, 2016) (Hebrew) (nineteenth century legal science); Kahana, *From the Noda BeYehuda*, 408–11 (German romanticism); Assaf Likhovski, “The Invention of ‘Hebrew Law’ in Mandatory Palestine,” *American Journal of Comparative Law* 46 (1998): 339–73; Amihai Radzyner, “From Dogmatist to Historian: Asher Gulak and the Research on Jewish Law in the Hebrew University, 1925–1940,” *Mada’ey ha-Yahadut* 43 (2005–2006): 169–200 (Hebrew) (on the impact of the German historical school on the twentieth-century movement for the revival of Jewish law and on specific thinkers such as Asher Gulak).
- 29 For theoretical discussions of the relationship between Jewish and non-Jewish culture generally, see, for example, Biale, *Cultures*, preface; Rosman, *How Jewish is Jewish History?*, 82–110; Michael L. Satlow, “Beyond Influence: Toward a New Historiographic Paradigm,” in *Jewish Literatures and Cultures: Context and Intertext*, ed. Anita Norich and Yaron Z. Eliav (Providence: Brown Judaic Studies, 2008), 37–53; David N. Myers, *Resisting History: Historicism and Its Discontents in German-Jewish Thought* (Princeton: Princeton University Press, 2003), 157–72; Scott Ury and Israel Bartal, “Between Jews and Their Neighbours: Isolation, Confrontation and Influence in Eastern Europe,” in *Jews and Their Neighbours in Eastern Europe*, ed. Scott Ury and Israel Bartal (Oxford: Littman Library, 2012), 3–30. For a brief discussion of the history of the waning and reemergence of interest in studying such interactions during the talmudic period (as well as another theoretical discussion of the notion of influence), see Shai Secunda, *The Iranian Talmud: Reading the Talmud in Its Iranian Context* (Philadelphia: University of Pennsylvania Press, 2013), 10–14, 110–43. For a theoretical discussion and critique of the notion of legal origins, borrowing, and influence see also Salaymeh, *Beginnings of Islamic Law*.

## 2. Temporal Frameworks

The expansion of the spatial frameworks used by some historians in recent decades was accompanied by the expansion of temporal ones. In the mid-twentieth century, historiography was dominated by social history. Historians focused on entities (society, social classes, the family) in which changes occur over centuries rather than decades. The broad timeframes used by historians were especially evident in the work of the mid-twentieth-century French *Annales* school. Historians influenced by the *Annales* approach sought to analyze *longue durée* structures, and also to use social science approaches, including quantification, appropriate for measuring change over long periods (such techniques also appearing in other historiographical traditions, for example in cliometrics in the United States).

Beginning around 1970, broad frameworks and social-science methodologies lost their appeal. Many historians became fascinated by local or regional history; and, in parallel to the narrowing of spatial frameworks, the timeframes used also narrowed. The research focus of many historians shifted to micro-history, to singular events, to anecdotes, or to the biographies of specific individuals (no longer the biographies of unique leaders or geniuses, but rather those of ordinary people). Quantitative analysis of large data sets involving whole populations also went out of fashion.

In the last few years, a revival of the interest in studying *longue durée* change can be observed. Such interest is evident in a recent influential book by historians Jo Guldi and David Armitage entitled *The History Manifesto*, published in 2014.<sup>30</sup> There have also been calls for a return to writing intellectual histories that use *longue durée* frameworks, similar to that used by one of the major intellectual historians of the early twentieth century, Arthur Lovejoy, in his landmark book, *The Great Chain of Being*.<sup>31</sup>

In previous generations, legal historians wrote works that spanned centuries and even millennia.<sup>32</sup> A contemporary call to return to such broad

30 Jo Guldi and David Armitage, *The History Manifesto* (Cambridge: Cambridge University Press, 2014). For the lively debate created by the arguments made in this book, see, for example, "AHR Exchange: On *The History Manifesto*," *American Historical Review* 120 (2015): 527–54.

31 See Darrin M. McMahon, "The Return of the History of Ideas?" in McMahon and Moyn, *Rethinking*, 13–31.

32 One early, and very influential, example is Henry Maine, *Ancient Law* (London: J. Murray, 1861).

frameworks can be found in an article by legal scholar Markus Dubber, who recently wrote a “legal history manifesto,” inspired by Guldi and Armitage’s book. In this manifesto Dubber calls for a new comparative–historical approach to the study of legal history, which he terms “New Historical Jurisprudence” – an approach that is broad both spatially and temporally.<sup>33</sup> Dubber also provides some concrete examples of how such new historical jurisprudence can be produced, for example by analyzing the histories of two competing concepts of government, “law” vs. “police” (that is, a government based on rule of law and a government based on discretionary power), over wide ranges of space and time: the West from ancient Athens to today.<sup>34</sup>

Can one identify a similar shift from an interest in the short term to an interest in the *longue durée* in Jewish law scholarship? It can certainly be argued that some parts of the cycle between short- and long-term historiography also appear in works on the history of Jewish law. The work of the scholars associated with the Jewish legal revival movement in the early decades of the twentieth century, as well as Elon’s work in the middle decades of the twentieth century, for instance, provide examples of the *longue durée* approach.<sup>35</sup>

In parallel to the (relative) decline of the Elonian paradigm in recent decades, shorter timeframes have been adopted. Today, students of the history of Jewish law rarely seem to use a temporal timeframe that spans the history of Jewish law from antiquity to today. What about the last iteration in the cycle between short-term and long-term historiography? Can we identify in Jewish law scholarship in recent years a return to an Elon-like *longue durée* framework, similar to the type of temporal framework that Guldi and Armitage champion in their manifesto, a kind of Jewish law ‘from Plato to NATO’ approach, one that would tell the story of Jewish law from antiquity to the present? I could not identify such a trend. There are, indeed, a few modern works that attempt to capture Jewish law, or certain aspects of it,

33 Dubber, “New Historical Jurisprudence.”

34 See *ibid.* See also Markus D. Dubber, “The Schizophrenic Jury and Other Palladia of Liberty: A Critical Historical Analysis,” *Comparative Legal History* 3 (2015): 307–24.

35 An interesting question, beyond the scope of this article, is what was the source of inspiration for this approach? Was it the influence of the nineteenth-century *Wissenschaft des Judentums*? Did this approach echo the methodology of the founding fathers of Jewish studies at the Hebrew University in the mid-twentieth century? Was it influenced by nineteenth-century German and English legal historians such as Savigny or Maine? See, generally, Myers, *Re-Inventing*.

over extended periods of time, but these works are usually written from a jurisprudential or philosophical, as opposed to historical, perspective, and analyze the halakhah ahistorically to capture its essence as a legal system, rather than attempting to trace long-term historical trends.<sup>36</sup> One caveat to the preceding statement, however, is that while specific works on Jewish law tend to focus on specific periods in its history, some Jewish law scholars do write on different periods of Jewish legal history. Thus, while it is relatively rare to find English legal historians who publish works on both medieval and modern English legal history, one can certainly find Jewish law scholars writing on Jewish law during antiquity in one work and during the modern era in another.

### 3. Motivation

The interest in transnational or global history and the resurgence of interest in the *longue durée* approach is sometimes accompanied by a call to historians to use these broad frameworks to pose big historical questions, ones that would also be relevant to contemporary political or policy debates. Guldi and Armitage's manifesto, for example, argues that the focus of historians since the 1970s on narrow, short-term events and patterns made their work irrelevant, and that, by returning to a more ambitious type of historiography devoted to mapping broad historical trends, historians would be able to participate in contemporary political debates and influence politicians and policymakers dealing with problems such as global governance, climate change, or wealth inequality.<sup>37</sup>

Markus Dubber's legal history manifesto, inspired by Guldi and Armitage (as well as by works such as Thomas Piketty's *Capital in the Twenty-First Century*), also calls on historians (in his case, legal historians) to actively engage in present political controversies by pursuing topics that have normative and publicly significant implications.<sup>38</sup> In Dubber's case, it seems that 'political' is also understood as 'critical' or 'progressive' and identified with left-wing politics. This is also the case with other works that use broad spatial and temporal frameworks, for example, Kennedy's 'three globalizations' thesis. In the article in which Kennedy presented this thesis, he claimed (somewhat

36 See, for example, Joel Roth, *The Halakhic Process: A Systemic Analysis* (New York: Jewish Theological Seminary, 1986).

37 Guldi and Armitage, *The History Manifesto*, 61–87.

38 Dubber, "New Historical Jurisprudence," 11.

unconvincingly, I think) that one of its benefits was that it could enable “progressive elites in the periphery” to resist neoliberal western hegemony.<sup>39</sup>

In the early twentieth century, much of Jewish law scholarship was characterized by its strong normative, and also political, motivation. The study of the history of Jewish law was part of a wider project firmly embedded in Zionist ideology, the Jewish legal revival project.<sup>40</sup> The mid-twentieth-century Elonian paradigm was an offshoot of this project, and Elon’s explicit goal was to study Jewish law in order to use it as the basis of Israeli law. Today, however, Jewish law scholarship, certainly the kind of work on Jewish law produced by historians rather than legal scholars (especially outside Israel), is descriptive rather than normative; and while all historiographical research agendas are ultimately rooted in some presentist concerns that can be called ‘political,’ much of the political motivation of this scholarship is hidden or implicit.<sup>41</sup>

One can perhaps add that the contemporary image of Jewish law, at least in Israel, is not typically associated with a ‘critical’ approach (assuming we understand ‘critical’ in the American sense of the term and identify it with progressive political agendas rather than apply it to any approach that seeks to change the current status quo). In the early twentieth century, some Jewish law scholars were secular, and some were even committed to left-wing political agendas. Indeed, one of the leaders of the Jewish legal revival movement, Samuel Eisenstadt, was a devotee of both the Jewish legal revival project *and* Joseph Stalin. However, in the last few decades secular Jewish law scholars have almost totally vanished from the field (again, at least in Israel), and in recent years the notion of Jewish legal revival (as a political, as opposed to scholarly, project) has come to be identified with the political agenda of the right-wing Israeli national-religious party (currently called *Ha-Bayit ha-Yehudi*). This, of course, does not mean that scholars interested in Jewish law subscribe to the political agenda of this party; and certainly some

39 Kennedy, “Three Globalizations,” 24. For an additional discussion of legal history and contemporary politics see Christopher Tomlins, “‘Be Operational, or Disappear’: Thoughts on a Present Discontent,” *Annual Review of Law and Social Science* 12 (2016): 1–23.

40 See Likhovski, *Law and Identity*, 127–53.

41 One exception may be Jewish family law, which, in Israel, still has practical implications. Works on this topic are therefore often written with a view to the normative implications of the discussion.

parts of Jewish law scholarship, for example the 'Jewish political thought' project, are pursued by people with left-wing political leanings.<sup>42</sup> However, at least outside academia, the notion of Jewish law has come to be identified, in Israel, with right-wing politics.

#### 4. Communities of Knowledge

In the past, intellectual historians working on the history of science, the social sciences, and the humanities, often pursued their given topic using the biographical genre. Perhaps under the influence of Renaissance or Romantic-era notions of individual genius, historians sought to tell the story of the history of their discipline by reconstructing the life of "great men." They imagined the history of their chosen discipline as a relay race in which the baton of knowledge was passed in a linear fashion from one genius to the next.

However, in the 1960s and 1970s, historical interest shifted from the study of individual scientists, philosophers, and other thinkers to the study of communities of knowledge.<sup>43</sup> Two important milestones in this process were the publication of Thomas Kuhn's *The Structure of Scientific Revolutions* in 1962 and the publication of Michel Foucault's *The Order of Things*, first published in French in 1966.<sup>44</sup> In the 1970s and 1980s, this trend intensified under the influence of sociological accounts of academic communities (found in works such as Pierre Bourdieu's *Homo Academicus*) and of STS (science, technology, and society) scholarship.<sup>45</sup>

A related development was the linguistic or cultural turns in historiography. These turns led to the awareness that language, discourse, mental structures, and similar clusters of ideas shared by social groups were not natural and static, but socially-constructed and dynamic. Historians therefore began to study the history of shared ideas of groups, evident in their languages or common assumptions, rather than studying individuals.

42 On this project, see, generally, Julie E. Cooper, "The Turn to Tradition in the Study of Jewish Politics," *Annual Review of Political Science* 19 (2016): 67–87.

43 See, for example, John Tresch, "Cosmologies Materialized: History of Science and History of Ideas," in McMahon and Moyn, *Rethinking*, 153.

44 Thomas S. Kuhn, *The Structure of Scientific Revolutions* (Chicago: University of Chicago Press, 1962); Michel Foucault, *Les mots et les choses: Une archéologie des sciences humaines* (Paris: Gallimard, 1966).

45 See Pierre Bourdieu, *Homo Academicus*, trans. Peter Collier (Cambridge: Polity Press, 1990); Tresch, "Cosmologies," 158.

Sometimes the focus was on the ideas of groups of elite thinkers (local but also transnational groups such as the early modern ‘Republic of Letters’), as was the case with the contextualist histories of political thought produced by scholars belonging to the ‘Cambridge School.’ Sometimes, historians sought to recover ideas prevalent among ordinary people, as was the case with the French *histoire des mentalités* approach.<sup>46</sup>

Interest in the study of groups and their structures or styles of thought also appeared in works on legal history. Such an approach, influenced by Kuhn’s work, was especially evident in the historical accounts of American law produced by Critical Legal Studies scholars in the 1970s and 1980s. These accounts primarily sought to reconstruct the shared assumptions and blind spots of nineteenth- and twentieth- century American liberal legal thought.<sup>47</sup>

Interest in communities of knowledge in the study of Jewish law is not novel. Jewish law scholarship was always interested in analyzing the thinking and styles of religious learning of groups of thinkers associated with a given halakhic school or movement (in addition to those of specific leading rabbis). Examples in the literature are numerous. One body of work, for example, deals with medieval Ashkenaz.<sup>48</sup> Other examples address the jurisprudential ideas of the nineteenth-century Lithuanian yeshivas; the movement for the revival of Jewish law in early-twentieth-century Europe and Palestine; or Religious-Zionist thinkers in mandatory Palestine and the State of Israel.<sup>49</sup>

46 See, generally, “AHR Forum: Historiographic ‘Turns’ in Critical Perspective,” *American Historical Review* 117 (2012): 698–813.

47 William W. Fisher III, “Texts and Contexts: The Application to American Legal History of the Methodologies of Intellectual History,” *Stanford Law Review* 49 (1997): 1065–110.

48 See, for example, Ephraim E. Urbach, *The Tosaphists: Their History, Writings and Methods* (Jerusalem: Mosad Bialik, 1968) (Hebrew); Avraham Grossman, *The Early Sages of Ashkenaz: Their Lives, Leadership and Works (900–1096)* (Jerusalem: Magnes, 1981) (Hebrew); Yedidya Alter Dinari, *The Rabbis of Germany and Austria at the Close of the Middle Ages: Their Conceptions and Halacha-Writing* (Jerusalem: Mosad Bialik, 1984) (Hebrew) (collective portraits of the rabbis of medieval Ashkenaz).

49 See Norman Solomon, *The Analytic Movement: Hayyim Soloveitchik and his Circle* (Atlanta: Scholars Press, 1993); Shaul Stampfer, *Lithuanian Yeshivas of the Nineteenth Century: Creating a Tradition of Learning*, trans. Lindsey Taylor-Guthar (Oxford: Littman Library, 2012); Eliyahu Stern, *The Genius: Elijah of Vilna and the Making of Modern Judaism* (New Haven: Yale University Press, 2013), 115–42; Saiman, “Legal Theology” (Lithuania); Likhovski, *Law and Identity*, 127–53 (mandatory

It seems that today, however, there is more interest in the opposite approach: works that are biographical in nature. Scholars of Jewish law have always had an interest in writing biographies of halakhic figures, but in recent years there has been a spate of such biographies.<sup>50</sup> Sometimes the focus of such works is on the individual thinkers, but there are also dual biographies that compare the thought of two halakhic figures, and works that engage in contextual analysis placing the intellectual biography of the chosen subject within a wider community of more minor figures.<sup>51</sup>

Palestine); Alexander Kaye, "The Legal Philosophies of Religious Zionism, 1937–1976," (Ph.D. diss., Columbia University, 2013).

- 50 For early instances, see, for example, Amihai Radzyner, "A Forgotten Scholar: Ya'akov Shmuel Zuri and his Research in Jewish Law in the Light of Research in the Field," *Shnaton ha-Mishpat ha-'Ivri* 23 (2005): 281–84 (Hebrew) (discussing Zuri's early-twentieth-century talmudic biographies project); R. J. Zwi Werblowsky, *Josef Karo: Lawyer and Mystic* (Philadelphia: Jewish Publication Society of America, 1977). Some recent examples of biographies of early modern and modern-day halakhic scholars include Radzyner, "A Forgotten Scholar" (discussing the biography of Zuri himself); Benjamin Lau, *From 'Maran' To 'Maran': The Halachic Philosophy of Rav Ovadia Yossef* (Tel Aviv: Miskal–Yedioth Ahronoth, 2005) (Hebrew); Avinoam Rosenak, *Rabbi A. I. Kook* (Jerusalem: Merkaz Shazar, 2006) (Hebrew); Picard, *The Philosophy of Rabbi Ovadya Yosef*; Benjamin Brown, *The Hazon Ish: Halakhist, Believer and Leader of the Haredi Revolution* (Jerusalem: Magnes, 2011) (Hebrew); Aviad Yehiel Hollander, *The Halakhic Profile of Rabbi Shlomo Goren: Studies in the Adjudicatory Deliberations and Modes of Substantiation in his Halakhic Writings* (Ph.D. diss., Bar Ilan University, 2011) (Hebrew); Amir Mashiach, *Rabbi Shlomo Zalman Auerbach's Halakhic Philosophy in a Dynamic Era of Socio-Technological Transformation* (Ramat Gan: Bar Ilan University Press, 2013) (Hebrew); Stern, *The Genius*; Moshe HersHKoviz, *HaRav Herzog as a Jurist: Trends of Judicial Creativity in Monetary Laws According to the Halachic-Judicial Writing of HaRav Herzog* (Ph.D. diss., Bar Ilan University, 2014) (Hebrew); Wozner, *Legal Thinking in the Lithuanian Yeshivot*; Mor Altshuler, *Life of Rabbi Yoseph Karo* (Tel Aviv: Tel Aviv University Press, 2016) (Hebrew). On some of the methodological problems associated with writing such biographies, see Alyssa Gray, "Is Critical Rabbinic Biography Possible?" *Prooftexts* 23 (2003): 376–82.
- 51 See, e.g., Kahana, *From the Noda BeYehuda* (discussing two major eighteenth- and nineteenth-century halakhic figures, Rabbi Yechezkel Landau and Rabbi Moshe Sofer, comparing their thought and placing it within the large central European halakhic context by also discussing some more minor rabbinical figures of their time). See also *The Gdolim: Leaders Who Shaped the Israeli Haredi Jewry*, ed. Benjamin Brown and Nissim Leon (Jerusalem: Magnes, 2017) (Hebrew) (a collection of brief biographies of ultra-orthodox rabbis).

## 5. The Production and Dissemination of Knowledge

Traditional intellectual historians studied relatively few canonical texts produced by relatively few elite thinkers. The paradigmatic example has, perhaps, been the history of philosophy of the type taught in introductory courses, based on the study of a number of leading texts ordered in a linear chronological series and imagined as being in dialogue with each other. Moving beyond this traditional paradigm, intellectual historians now study, in addition to canonical texts, the works of minor writers – works that have created the context out of which canonical texts emerged. They also use sociological and anthropological tools to discuss the social and cultural conditions and attitudes associated with the production of knowledge – topics such as scientific personae; the relationship between teachers and students; daily life in the sites and spaces where knowledge was produced (for example, monasteries or laboratories); the material tools, the institutions, and the intermediaries and networks used to produce, represent, and disseminate knowledge, such as letters, books, encyclopedias, atlases, libraries, scientific collections, archives, museums, and learned societies; and the audiences of knowledge. They even venture into territories such as architectural history to study topics such as the emergence of the scholar’s study room as a defined space within the private house.<sup>52</sup>

In a similar way, intellectual historians of (modern) law study the history of legal scholarship and also the dissemination of legal knowledge through institutions providing that knowledge, such as universities (or the Inns of Court in England).<sup>53</sup> Other channels for the dissemination of legal knowledge,

52 See Antoine Lilti, “Does Intellectual History Exist in France?” in MacMahon and Moyn, *Rethinking*, 56, 61–65; Tresch, “Cosmologies,” 159; “Special Issue: Scientific Personae,” *Science in Context* 16.1–2 (2003); Gadi Algazi, “At the Study: Notes on the Production of the Scholarly Self,” in *Space and Self in Early Modern European Cultures*, ed. David Warren Sabean and Malina Stefanovska (Toronto: University of Toronto Press, 2012), 17–50 (an article which also includes a brief discussion of the “rooms of learning” of Jewish rabbis of early modern Europe); Samuel Moyn and Andrew Sartori, “Approaches to Global Intellectual History,” in Moyn and Sartori, *Global Intellectual History*, 3, 9–16.

53 On the history of legal education in the United States, see, for example, Bruce A. Kimball, *The Inception of Modern Professional Education: C. C. Langdell, 1826–1906* (Chapel Hill: UNC Press, 2009); Daniel R. Coquillette and Bruce A. Kimball, *On the Battlefield of Merit: Harvard Law School* (Cambridge, MA: Harvard University Press, 2015). Equivalent French examples can be found in the *Revue d’histoire des facultés de droit et de la culture juridique, du monde des juristes et du livre juridique*.

such as law libraries or academic law societies, but also the actual material objects that disseminate legal knowledge such as professional and popular law books, legal periodicals or non-legal literature, are studied as well.<sup>54</sup>

The scholarship on Jewish law shows a similar interest in the history of Jewish legal education. Such interest is evident, for example, in works that examine styles of learning in the yeshivas of Babylonia, medieval Europe, or modern eastern Europe.<sup>55</sup> Some scholars interested in Jewish law have also turned their attention to the study of Jewish scholarly culture, analyzing, for example, the conduct and everyday life of the sages of Babylonian Talmud, or those of modern yeshiva students.<sup>56</sup>

For the tables of contents of this journal online, see [www.univ-droit.fr/rhfd/sommaires](http://www.univ-droit.fr/rhfd/sommaires). On the Inns of Court, see, for example, Wilfrid R. Prest, *The Inns of Court Under Elizabeth I and the Early Stuarts, 1590–1640* (London: Longman, 1972); D. Lemmings, *Gentlemen and Barrister: The Inns of Court and the English Bar, 1680–1730* (Oxford: Clarendon, 1990).

- 54 See, for example, Angela Fernandez and Markus D. Dubber eds., *Law Books in Action: Essays on the Anglo-American Legal Treatise* (Oxford: Hart Publishing, 2012); Laura Beck Varela, “The Diffusion of Law Books in Early Modern Europe: A Methodological Approach,” in *Spatial and Temporal Dimensions for Legal History: Research Experiences and Itineraries*, ed. Massimo Meccarelli and Maria Julia Solla Sastre (Frankfurt Am Main: Max Planck Institute for European Legal History, 2016), 195, 202; *Juristische Zeitschriften in Europa*, ed. Michael Stolleis and Thomas Simon (Frankfurt am Main: V. Klostermann, 2006).
- 55 See, for example, Avraham Grossman, “The *Yeshivot* in Babylonia, Germany and France from the Ninth to the Eleventh Centuries,” in *Education and History: Cultural and Political Context*, ed. Rivka Feldhay and Immanuel Etkes (Jerusalem: Merkaz Shazar, 1999), 79–99 (Hebrew); Solomon, *The Analytic Movement*; Stampfer, *Lithuanian Yeshivas*; Saiman, “Legal Theology”; Wozner, *Legal Thinking in the Lithuanian Yeshivot*.
- 56 On antiquity, see, for example, Jeffrey L. Rubenstein, *Talmudic Stories: Narrative Art, Composition, and Culture* (Baltimore: Johns Hopkins University Press, 1999); idem, *The Culture of the Babylonian Talmud* (Baltimore: Johns Hopkins University, 2003); idem, *Stories of the Babylonian Talmud* (Baltimore: Johns Hopkins University, 2010) (reconstructing daily life in the rabbinic academies of Babylonia and discussing issues such as their size, academic hierarchies and leadership, notions of scholarly elitism and relationship with lay Jews, the nature of the debates in these academies, or topics such as academic shame and violence); Lapin, *Rabbis as Romans* (asking somewhat similar questions about the rabbinic movement of Roman Palestine), 64–97; Ta-Shma, *Ritual, Custom and Reality*, 94–111 (on halakhic professionalization in medieval Ashkenaz); Ephraim Kanarfogel, *Jewish Education and Society in the High Middle Ages* (Detroit: Wayne State University Press, 1992), 42–85 (the nature of education and study in the Tosafist academies of medieval

Interest in the transmission and dissemination of the law, including linking the history of Jewish law with the history of oral culture, the history of letter writing, the history of the book and of censorship, and the study of networks of knowledge, is also widely prevalent.<sup>57</sup> We also find works discussing the libraries of individual halakhic scholars, the libraries of modern yeshivas, and the historical formation of canonical halakhic texts.<sup>58</sup> Moving to the history of Jewish law in the twentieth century, we find works analyzing the teaching, research methodologies, and institutional history of scholarly communities devoted to the academic study of Jewish law.<sup>59</sup>

Ashkenaz); Daniel Boyarin, *Unheroic Conduct: The Rise of Heterosexuality and the Invention of the Jewish Man* (Berkeley: University of California Press, 1997), 127–50 (on rabbinic homosociality); Stern, *The Genius*, 143–65 (discussing various cultural aspects of the Vilna Gaon's life including "gastronomy, ergonomics and circadian rhythm").

- 57 On the transmission of knowledge in Jewish history, see, generally, Yaa-kov Elman and Israel Gershoni, eds., *Transmitting Jewish Traditions: Orality, Textuality, and Cultural Diffusion* (New Haven: Yale University Press, 2000). On print culture, censorship, and Jewish texts (including legal ones), see, for example, Amnon Raz-Krakotzkin, *The Censor, the Editor, and the Text: The Catholic Church and the Shaping of the Jewish Canon in the Sixteenth Century*, trans. Jackie Feldman (Philadelphia: University of Pennsylvania Press, 2007); Kahana, *From the Noda BeYehuda*; Levi Cooper, "Mysteries of the Paratext: Why did Rabbi Shneur Zalman of Liady Never Publish his Code of Law?" *Diné Israel* 31 (2017): 43\*–84\*. On modern orthodox censorship, see Marc B. Shapiro, *Changing the Immutable: How Orthodox Judaism Rewrites Its History* (Oxford: Littman Library, 2015). On book history, see, for example, Neil Netanel, *From Maimonides to Microsoft: The Jewish Law of Copyright Since the Birth of Print* (Oxford: Oxford University Press, 2016). On networks, see, e.g., Joshua Teplitsky, "A Rabbinic Republic of Letters: Communicating Knowledge and Constituting Law in Early Modern Europe" (unpublished paper); Marglin, "Mediterranean Modernity."
- 58 See, for example, Avraham Grossman, *Rashi*, trans. Joel Linsider (Oxford: Littman Library, 2012), 68–70; Kahana, *From the Noda BeYehuda*, 71–80; Binyamin Brown, "Response: The Classical Library of Lithuanian Rabbinic Scholarship and its Significance," in *Education and Religion: Authority and Autonomy*, ed. Immanuel Etkes, Tamar Elor, Michael Heyd, and Baruch Schwarz (Jerusalem: Magnes, 2011), 309–21 (Hebrew). For a theoretical discussion of the Jewish canon, see Moshe Halbertal, *People of the Book: Canon, Meaning and Authority* (Cambridge, MA: Harvard University Press, 1997).
- 59 Likhovski, *Law and Identity*, 127–53, 161–66; Amihai Radzyner, "Between Scholar and Jurist: The Controversy over the Research of Jewish Law using Comparative Methods at the Early Time of the Field," *Journal of Law and Religion* 23 (2007): 189–248; Amihai Radzyner, "'Jewish Law' between 'National' and 'Religious':

A related topic is that of the gender aspects of halakhic study.<sup>60</sup> Possible sub-topics here include the impact of women on the creation of Jewish law in various eras as an audience of the law, as readers of popular legal texts, as litigants, as family members of rabbinic decisors, or, in some senses and some eras, even as the creators of norms.<sup>61</sup>

Not all possible topics in this category have been properly explored. Both in general legal history scholarship and in the scholarship dealing with the history of Jewish law, there seems to be a need for more studies combining social and intellectual history by examining the history of legal consciousness – that is, the history of how laypeople of all kinds (women, but also other types of non-elite Jewish actors, and also perhaps non-Jewish actors) knew, understood, and interpreted Jewish legal norms.<sup>62</sup>

The Dilemma of the Religious-National Movement,” *Mehkera Mishpat* 26 (2010): 91–178 (Hebrew); Radzyner, “Jewish Law in London.”

- 60 See Rubenstein, *Culture of the Babylonian Talmud*, 102–22 (a chapter devoted to the wives of the talmudic sages of Babylon as well as to the erotic nature of Torah study); Boyarin, *Unheroic Conduct*, 151–85 (on Torah study as a system for the domination of women).
- 61 Avraham Grossman, *Pious and Rebellious: Jewish Women in Medieval Europe*, trans. Jonathan Chipman (Waltham, MA: Brandeis University Press, 2004), 154–73; Elisheva Baumgarten, *Practicing Piety in Medieval Ashkenaz: Men, Women, and Everyday Religious Observance* (Philadelphia: University of Pennsylvania Press, 2014). See, generally, “On Law, Spirituality and Society in Judaism: An Exchange Between Jacob Katz and Chava Weissler,” *Jewish Social Studies* 2.2 (1996): 87–115; Rosman, *How Jewish*, 168–81; Alieza Salzberg, “Feminist/Gender Interpretation of Rabbinic Literature,” in *Reconstructing the Talmud: An Introduction to the Academic Study of Rabbinic Literature*, ed. Joshua Kulp and Jason Rogoff (New York: Mechon Hadar, 2014), 194–202 (a brief summary of recent attempts to discover female voices in talmudic texts). On the creation of halakhic norms in modernity in the non-orthodox movements see generally Avinoam Rosenak, ed., *Reform Judaism: Thought, Culture and Sociology* (Jerusalem: Van-Leer, 2014), 161–286 (Hebrew).
- 62 See, for example, Amihai Radzyner, “The Wars of the Jews: The Shaping of the Criminal Law against Bigamy among Jews in Mandate Palestine,” in *One Law for Man and Woman: Women, Rights and Law in Mandatory Palestine*, ed. Eyal Katvan, Margalit Shilo, and Ruth Halperin-Kaddari (Ramat Gan: Bar-Ilan University Press, 2010), 151–98 (Hebrew); Rena N. Lauer, “Jewish Law and Litigation in the Secular Courts of the Late Medieval Mediterranean,” *Critical Analysis of Law* 3.1 (2016): 114–32.

## 6. Boundaries

The anthropology and sociology of the professions, and STS scholarship, have drawn our attention to the importance of the study of the history of ‘boundary work’ – that is, the effort of academic disciplines to mark and police disciplinary divisions, and to maintain the social prestige of those belonging to a given discipline. An example of such boundary work is found in the history of endeavors to distinguish science from magic, from technology, from religion, and from other types of knowledge classified as inferior.<sup>63</sup> In the study of legal history, too, interest in exploring the history of boundary-marking between law and related disciplines has emerged recently. One manifestation of such interest can be seen in works that analyze the history of the process by which modern law began to assume tasks that had been carried out in previous eras by other professions, such as the clergy.<sup>64</sup>

In the scholarship on Jewish law, one can also detect an interest in exploring various types of boundaries related to Jewish law. Some works are concerned with reconstructing the way Jewish law scholars understood the boundaries of the halakhah across the ages, and policed these boundaries against other bodies of Jewish knowledge such as kabbalah and hasidism.<sup>65</sup> Interest in an opposite process, namely how bodies of knowledge such as kabbalah interacted and were absorbed into the halakhah, is also evident.<sup>66</sup>

63 Tresch, “Cosmologies,” 163–66.

64 See, e.g., Shai J. Lavi, *The Modern Art of Dying: A History of Euthanasia in the United States* (Princeton: Princeton University Press, 2007); Orna Alyagon-Darr, *Marks of an Absolute Witch: Evidentiary Dilemmas in Early Modern England* (Farnham: Ashgate, 2011).

65 Leora Batnitzky, *How Judaism Became a Religion: An Introduction to Modern Jewish Thought* (Princeton: Princeton University Press, 2011) (discussing the gradual separation of Jewish belief, practice, and law in modernity); Kahana, *From the Noda BeYehuda* (discussing the ‘purification’ of the halakhah from non-halakhic bodies of knowledge in the thought of two eighteenth- and early-nineteenth-century central European halakhic figures); Shai Wozner, “The Reform Halakhah: Reflections on ‘Sane Halakhah’ of Rabbi Moshe Zemer,” in Rosenak, *Reform Judaism*, 261–62 (Hebrew) (discussing the jurisprudential aspects of determining the boundaries of the halakhah); Christine Hayes, “Introduction: Can We Even Speak of ‘Judaism and Law’?” in *The Cambridge Companion to Judaism and Law*, ed. Christine Hayes (New York: Cambridge University Press, 2017), 1–16 (a theoretical discussion of the role of law in Judaism).

66 See, generally, Kanarfogel, *Intellectual History*. On halakhah and kabbalah, see, for example, some of the articles in Jacob Katz, *Halakha and Kabbalah: Studies*

Other works discuss the interaction of the halakhah with non-Jewish bodies of knowledge such as medicine and science.<sup>67</sup>

Another type of boundary explored in the literature is that between legal history and legal theory.<sup>68</sup> Such explorations are also evident in works on Jewish law. This legal system can be studied to gain jurisprudential insights relevant to other legal systems, both ancient and modern.<sup>69</sup> Another, opposite

*in the History of Jewish Religion its Various Faces and Social Relevance* (Jerusalem: Magnes, 1984) (Hebrew); Moshe Hallamish, *Kabbalah: In Liturgy, Halakhah and Customs* (Ramat Gan: Bar Ilan University Press, 2000), 117–45 (Hebrew); Hagai Pely, “Halakhah, Pietism, Kabbalah and Revelation in Sixteenth Century Safed: A Study in R. Yosef Karo’s Works,” *Mehkery Yerushalayim be-Mahshevet Yisrael* 24 (2014/5), 201–34 (Hebrew). On Hasidism see, e.g., Izhak Englard, “Mysticism and Law: Reflections on *Liqute Halakhot* from the School of Rabbi Nahman of Bratslav,” *Shenaton ha-Mishpat ha-’Ivri* 6–7 (1979/80): 29–43; Ariel Evan Mayse, “The Ever-Changing Path: Visions of Legal Diversity in Hasidic Literature,” *Conversations* 23 (2015): 84–115; Maoz Kahana and Ariel Evan Mayse, “Hasidic Halakhah: Reappraising the Interface of Spirit and Law,” *AJS Review* 41 (2017): 375–408; Levi Cooper, “Jewish Law,” in *Hasidism: Sources and Interpretations*, ed. Marcin Wodzinski (Kraków & Budapest: Austeria Publishing House, forthcoming). On magic and the halakhah, see, for example, Suzanne Last Stone, “Rabbinic Legal Magic: A New Look at Honi’s Circle as the Construction of Law’s Space,” *Yale Journal of Law & the Humanities* 17 (2005): 97–123; Avigail Manekin Bamberger, “Jewish Legal Formulae in the Aramaic Incantation Bowls,” *Aramaic Studies* 13 (2015): 69–81.

67 See, for example, Ayelet Hoffmann Libson, “‘The Heart Knows Its Own Bitterness’: Authority, Self, and the Origins of Patient Autonomy in Early Jewish Law,” *American Journal of Legal History* 56 (2016): 303–25; Westreich, “Medicine and Jewish Law.”

68 See, generally, Maksymilian Del Mar and Michael Lobban, “Introduction,” in *Legal Theory and Legal History*, ed. Maksymilian Del Mar and Michael Lobban (Farnham: Ashgate, 2014), xi–xxxv; “Symposium: Jurisprudence and (Its) History,” *Virginia Law Review* (2015): 849–1202.

69 See, for example, Hanina Ben-Menahem, “The Judge-Agent Analogy in the Talmud,” in *Authority, Process and Method: Studies in Jewish Law*, ed. Hanina Ben-Menahem and Neil S. Hecht (Chur: Harwood Academic Publishers, 1998), 33–58; Robert M. Cover, “The Supreme Court, 1982 Term – Foreword: Nomos and Narrative,” *Harvard Law Review* 97 (1983): 4–68; “[Symposium]: The Philosophy of Jewish Law I,” *Jewish Law Annual* 6 (1987): 1–175; “[Symposium]: The Philosophy of Jewish Law II,” *Jewish Law Annual* 7 (1988): 1–251; Suzanne Last Stone, “In Pursuit of the Counter-Text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory,” *Harvard Law Review* 106 (1993): 813–94; Steven Wilf, *The Law Before the Law* (Lanham, MD: Lexington, 2008); Samuel J.

way to explore Jewish law is to use legal theories to better understand Jewish law norms and legal processes.<sup>70</sup> While much of the work on the relationship between Jewish law and legal theory is pursued by legal scholars who are interested in Jewish law for jurisprudential rather than historical reasons, interest in exploring the nexus between legal theory, legal history, and Jewish law has also recently appeared.<sup>71</sup>

## 7. New Fields of Law and New Sources

In the history of science, the general trend has been to move beyond a history focused on ‘science’ as a whole, or on paradigmatic scientific fields (such as physics or chemistry), to more marginal fields (the social sciences, psychoanalysis, or the Foucauldian “human sciences”). In recent decades, legal historians, too, have begun to move beyond ‘core’ fields of law such as constitutional, contract, tort, or criminal law to areas such as international law or tax law. Some of the recent work undertaken by legal historians on these new fields deals with their doctrinal, economic, and social history, while some of it explores their intellectual history.<sup>72</sup>

Levine, “Emerging Applications of Jewish Law in American Legal Scholarship: An Introduction,” *Journal of Law and Religion* 23 (2007–2008): 43–50; “[Symposium]: Nominalism and Realism in Halakha Revisited: Studies in the Philosophy of Halakha,” *Diné Israel* 30 (2015); Ari Z. Bryen, “When Law Goes off the Rails: or, Aggadah Among the *iusprudentes*,” *Critical Analysis of Law* 3.1 (2016): 9–29.

70 See, for example, Bernard S. Jackson, “*Mishpat Ivri, Halakhah* and Legal Philosophy: *Agunah* and the Theory of Legal Sources,” *JSIJ* 1 (2002): 69–107 (asking whether modern positivist concepts of “law” are relevant to the study of Jewish law); Wozner, *Legal Thinking in the Lithuanian Yeshivot* (analyzing the thinking of Rabbi Shkop, one of the leaders of the Lithuanian yeshiva world, in relation to general jurisprudential notions such as legal formalism); Adiel Schremer, “Toward Critical Halakhic Studies,” Tikvah Center Working Paper, 04/10, at: [https://www.academia.edu/2094149/Toward\\_Critical\\_Halakhic\\_Studies](https://www.academia.edu/2094149/Toward_Critical_Halakhic_Studies) (a realist reading of the halakhah showing the impact of policy considerations in medieval halakhic decisions).

71 Such an interest animated the conference in which this paper was first presented: “The Study of Law and History: Bridging Methodological and Disciplinary Divides,” organized by Suzanne Last Stone and Ari Mermelstein and held at Cardozo Law School in September 2016.

72 On the intellectual history of international law, see, for example, Martti Koskeniemi, *The Gentle Civilization of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge: Cambridge University Press, 2002). On the intellectual history of tax law, see, for example, Ajay K. Mehrotra, *Making the Modern American Fiscal State*:

Jewish law scholarship has long been interested in expanding its reach beyond the traditional legal fields of private law. As far back as the early and middle decades of the twentieth century, one can find scholarly interest in areas of law not usually associated with Jewish law: public law generally, and specific sub-fields of public law such as criminal or tax law.<sup>73</sup> This interest in the study of non-traditional areas of Jewish law was sometimes informed by a desire to show the contemporary relevance of Jewish law to the Israeli legal system. Today there is far more work on Jewish public law, found both in discussions of the 'Jewish political tradition,' as well as in works on democracy, human rights, and social justice in Jewish law.<sup>74</sup> This attempt to expand research beyond Jewish private law is also evident in recent works on public international law or copyright law. Such works discuss the history of Jewish legal norms, but they also deal with the intellectual history of these sub-fields of law.<sup>75</sup>

A related topic is the pursuit of new sources. Historians, of course, are always looking for new sources that can be used to reconstruct the past. Sometimes these are newly discovered sources, and sometimes they are existing sources that are suddenly put to new use by asking new questions about them.<sup>76</sup> Legal historians, too, are always on the lookout for fresh

*Law, Politics, and the Rise of Progressive Taxation, 1877–1929* (New York: Cambridge University Press, 2013). See also Assaf Likhovski, *Tax, Law, and Social Norms in Mandatory Palestine and Israel* (New York: Cambridge University Press, 2017).

- 73 See, for example, Simcha Assaf, *Post-Talmudic Criminal Law* (Jerusalem: Sifriyah Mishpatit, 1922) (Hebrew) and more recently Aaron Kirschenbaum, *Jewish Penology: The Theory and Development of Criminal Punishment among the Jews Throughout the Ages* (Jerusalem: Magnes, 2013) (Hebrew) (criminal law); Jacob Bazak, *Taxation in Jewish Law* (Jerusalem: Muze'on le-Misim, 1964) (Hebrew) (tax law).
- 74 On the 'Jewish political thought' project, see Cooper, "'The Turn to Tradition.'" On democracy, human rights and social justice see, for example, Aviezer Ravitzky and Benny Porat, eds., *Reflections on Jewish Democracy* (Jerusalem: IDI, 2010) (Hebrew); Hanoch Dagan and Benny Porath, eds., *Pursuing Justice: Society and Economy in Jewish Sources* (Jerusalem: IDI, 2016) (Hebrew).
- 75 See, for example, Arye Edrei, "Law, Interpretation, and Ideology: The Renewal of the Jewish Laws of War in the State of Israel," *Cardozo Law Review* 28 (2006): 187–227; Amos Israel-Vleeschhouwer, "The Attitudes of Jewish Law Towards International Law: Analyzing the Jewish Legal Materials and Processes" (Ph.D. diss., Tel Aviv University, 2012) (Hebrew); Netanel, *From Maimonides to Microsoft*.
- 76 For example, in their important 2007 book *Objectivity*, historians of science Lorraine Daston and Peter Galison used images found in scientific atlases as a source to

sources. For example, a recent issue of the law review *Critical Analysis of Law* was devoted to “Arts and the Aesthetic in Legal History.” Articles published in this issue discussed topics such as the use of nineteenth-century English novels as a source for the study of the history of imprisonment for debt, or the use of nineteenth-century impressionist paintings as a way to explore changing attitudes to pollution and environmental regulation.<sup>77</sup>

What about the use of new sources for the study of Jewish law, generally, and legal thought, specifically? Historians of Jewish law are no different from other legal historians, and the quest to use new sources has always been a major aspect of scholarly innovation in Jewish studies, in general, and also the study of Jewish law. Examples include the Dead Sea Scrolls, the materials of the Cairo Geniza, and, more recently, the so-called European Geniza.<sup>78</sup> One recent development highly relevant for the study of Jewish law has been the growing interest in the use of the rabbinic court records of Jewish communities, the *pinkasim*, for the study of Jewish law.<sup>79</sup> Thanks to their more practical nature, these records are highly important for the doctrinal and social history of Jewish law. However, these characteristics make them less relevant for the intellectual history of this legal system.

The use of literary sources to study Jewish law is also not novel. Scholars have long been aware of the relevance of Jewish literature of various sorts to the study of the history of Jewish law – as evident, for example, in the debate

trace changes in our understanding of the concept of scientific objectivity. See Lorraine J. Daston and Peter Galison, *Objectivity* (Cambridge, MA: MIT Press, 2007).

77 See Roy Kreitner, Anat Rosenberg, and Christopher Tomlins, “Arts and the Aesthetic in Legal History,” *Critical Analysis of Law* 2 (2015): 314–21; Anat Rosenberg, “The Realism of the Balance Sheet: Value Assessments Between the Debtors Act and The Picture of Dorian Gray,” *Critical Analysis of Law* 2 (2015): 363–82; David B. Schorr, “Art and the History of Environmental Law,” *Critical Analysis of Law* 2 (2015): 322–49. Another recent example of the creative use of non-conventional sources is Peter Goodrich, *Legal Emblems and the Art of Law: Obiter Depicta as the Vision of Governance* (New York: Cambridge University Press, 2014).

78 See the “Books within Books: Hebrew Fragments in European Libraries” project, available online at: [www.hebrewmanuscript.com](http://www.hebrewmanuscript.com).

79 See Berkovitz, *Protocols*; Edward Fram, *A Window on Their World: The Court Diary of Rabbi Hayyim Gundersheim, Frankfurt am Main, 1773–1794* (Cincinnati: Hebrew Union College Press, 2012).

on Halakhah and Aggadah as twin sources for understanding Jewish law.<sup>80</sup> They have also discussed halakhic sources using law and literature tools.<sup>81</sup>

## 8. The Digital Revolution

In the last few decades, the digital revolution has changed the nature of historical research. The projects devoted to the mass-scanning of books and archival sources, the growing interest in the use of big data to study the past, and the appearance of tools to mine these data, such as Google Ngrams (tools that allow one to quickly perform searches that would have taken months of intensive work in the past), are all examples of the transformation that is gradually occurring in the way historians work.

At first glance it may appear that the use of digital tools to mine big data is more relevant to topics such as climate history, economic history, the history of demographical changes, or similar topics based on the use of quantitative data. However, since legal records are one of the earliest types of record to have been digitized, it seems that this aspect is also relevant to legal historians – both historians interested in the social history of law (for example, the history of crime) and also intellectual historians who can use digital databases to follow changes in legal and political discourse.<sup>82</sup> Indeed, in *The History Manifesto*, Guldi and Armitage remark that the use of big data is especially appropriate “in law and other forms of institutional history.”<sup>83</sup> It is not surprising therefore that a recent issue of the *Law and History Review*

80 A classic discussion is Haim Nahman Bialik, “Halakhah and Aggadah,” in *Bialik: Collected Works* (18<sup>th</sup> ed., Tel Aviv: Dvir, 1956), 207–13 (Hebrew) Recent works that discuss (and deconstruct) this binary distinction include Rubenstein, *Talmudic Stories*; Stone, “Rabbinic Legal Magic”; “[Symposium]: Halakhah and Aggadah,” *Diné Israel* 24 (2007): 1\*–225\*; Barry Scott Wimpfheimer, *Narrating the Law: A Poetics of Talmudic Legal Stories* (Philadelphia: University of Pennsylvania Press, 2011); Yair Lorberbaum, *In God’s Image: Myth, Theology, and Law in Classical Judaism* (New York: Cambridge University Press, 2015), 61–88.

81 For a recent discussion, see, for example, Alyssa M. Gray, “Poverty and Community in R. Joseph Karo’s *Shulhan Arukh*: ‘Law and Literature’ and Halakhic History,” *Diné Israel* 29 (2013): 57\*–89\*.

82 See, for example, Assaf Likhovski, “‘Tyranny’ in Nineteenth-Century American Legal Discourse: A Rhetorical Analysis,” *Journal of Interdisciplinary History* 28 (1997): 205–23.

83 See Guldi and Armitage, *History Manifesto*, 94.

## 257\* Intellectual History of Law and Jewish Law Scholarship

was entirely devoted to the ways in which historians of law have made use of digital resources.<sup>84</sup>

Jewish law scholarship was one of the first areas of legal history to use digitized databases. The Responsa Project (*proyekt ha-shu"t*) was born in 1963, long before the days of Google Books, and its founder, Aviezri Fraenkel, was an early (perhaps the leading) pioneer of the full-text search method (storing and searching whole texts rather than manually indexing them using keywords).<sup>85</sup>

Today there are many other databases containing Jewish legal texts, such as the Friedberg Jewish Manuscript Society Portal, HebrewBooks.org, or *Otzar HaHochma*.<sup>86</sup> These databases are now mined to glean social and geographic information. For example, the *Da'at ha-Makom* Center for the Study of Cultures of Place in the Modern Jewish World has a number of projects exploring the spatial dimensions of the history of Jewish law using digital tools, creating, for example, maps of the transnational networks of *responsa* communication, or maps of the locations of the authors who were mentioned in the first international rabbinic journal, *Ha-Me'asef*, published in Jerusalem beginning in 1896.<sup>87</sup> Such projects are also found elsewhere.<sup>88</sup>

No one can doubt that the digital revolution has greatly increased the efficiency of historical research. It has also perhaps led to greater emphasis

84 "[Special Issue]: Digital Law and History," *Law and History Review* 34.4 (November 2016).

85 See Aviezri Fraenkel, "The Responsa Project: Past, Present and Future," *Diné Israel* 19 (1997–1998): 253–70 (Hebrew); Yaacov Choueka, "Against all Odds: The Amazing but Most True Story of Aviezri Fraenkel and his Special Favorite: The Responsa Project or The Multi-Faceted Contributions of Aviezri Fraenkel to Information Retrieval and the Related Areas," *The Electronic Journal of Combinatorics* 8.2 (2001), #14.

86 On potential uses of such databases, see Amos Israel-Vleeschhouwer, "Digital Jewish Legal Studies: A Poster Invitation" (unpublished paper, available at [www.academia.edu/9203587/Digital\\_Jewish\\_legal\\_studies](http://www.academia.edu/9203587/Digital_Jewish_legal_studies)).

87 See [www.daat-hamakom.com/team/1141-2/](http://www.daat-hamakom.com/team/1141-2/) (Zef Segal's project mapping the transnational connections between the American and European orthodox communities using the responsa literature); and [www.daat-hamakom.com/team/prof-menahem-blondheim](http://www.daat-hamakom.com/team/prof-menahem-blondheim) (mapping the communication network of *Ha-Me'asef*).

88 See, e.g. <https://footprints.ccnmtl.columbia.edu/> (mapping the movement of Jewish printed books).

on theoretical discussion of the sources rather than mere compilation of them. However, one might certainly ask whether this revolution has also led to major methodological breakthroughs in the study of history, legal history, or the study of the history of Jewish law. In one sense it might be argued that this is indeed the case. While previous generations of Jewish law scholars basically replicated the traditional halakhic responsa method, spending their time collecting as many sources as possible that were relevant to answering a given legal question, the fact that digitized databases now allow us to find all the relevant materials within minutes, rather than days or weeks, has provided scholars with an incentive to ask more sophisticated theoretical questions about the halakhic materials and to shift the focus of academic research on Jewish law from compiling sources to interpreting these sources in a theoretically sophisticated way.<sup>89</sup>

In another sense, however, the promise of digitization has not been fulfilled. For example, the use of textual analysis that digitization enabled is not widely prevalent in the study of Jewish law. Much (although not all) of the research in this field is still conducted in a traditional manner. This, perhaps, is the result of the fact that the majority of scholars of Jewish law have a significant background in yeshiva study. Traditional yeshiva study methods therefore still influence the scholarship in the field, and, hence, early texts are not read on their own terms but rather through the eyes of the later commentators; earlier sources from the talmudic era are often granted disproportionate weight; and the scholar will attempt to reconcile sources from different periods rather than focusing on rupture and disjunction. The influence of yeshiva methods, however, may have also had a more positive impact on Jewish law scholarship: the deep respect for texts may have been the reason for the early digitization of Jewish law sources evident in the Responsa Project.<sup>90</sup>

### III. Conclusion

Not all recent trends in works on the intellectual history of law generally are evident in works on the history of Jewish law. For example, a notable trend

89 But see Putnam, "The Transnational and the Text-Searchable" (discussing some of the problems that the digital turn has created, for example, the threat of cherry-picking and of more shallow knowledge of the sources and their context).

90 I am indebted to Ayelet Libson for this point.

in works on the intellectual history of early modern and modern Europe is conceptual history, the study of the history of the changing meaning of major cultural and political keywords such as ‘honor’ or ‘liberty’ (but also legal ones such as ‘citizenship’) over extended periods of time.<sup>91</sup> Conceptual historians often pursue collaborative lexicographical projects undertaken by large groups of scholars. In the German-speaking world, we find, for example, projects such as the *Geschichtliche Grundbegriffe*, which is a historical lexicon of political and social terms that includes some legal terms as well.<sup>92</sup> Conceptual history is also relevant, of course, to the study of Jewish history generally and also of Jewish law.<sup>93</sup> There has always been some interest in tracing the history of key concepts in Jewish history (and law) by legal scholars, philosophers, and cultural theorists.<sup>94</sup> However, there are currently no long-term collaborative projects focused on the conceptual history of Jewish law of the type found in German historiography.

While not all trends evident in the intellectual history of western law are found in the scholarship on the history of Jewish law, Jewish law scholarship seems nevertheless to echo many of these trends. In some of the conversations I had with people working in the field when preparing this article, I was told that Jewish law scholarship is “several decades behind” other areas of

91 See Jan-Werner Müller, “On Conceptual History,” in McMahon and Moyn, *Rethinking*, 74–93.

92 See, for example, Rolf Grawert, “Gesetz,” in *Geschichtliche Grundbegriffe: Historisches Lexikon zur politisch-sozialen Sprache in Deutschland*, ed. Otto Brunner, Werner Conze, and Reinhart Koselleck (vol. 2, Stuttgart: Klett-Cotta, 1975), 863–922. See, generally, Thomas Duve, “German Legal History: National Traditions and Transnational Perspectives,” *Rechtsgeschichte/Legal History* 22 (2014): 16, 19–20. For the Israeli equivalent (with a philosophical rather than historical emphasis) see *Mafté’akh: Lexical Review of Political Thought*, <http://mafteakh.tau.ac.il/en/>.

93 For a theoretical discussion of Jewish conceptual history see Guy Miron, “A People between Languages: Toward a Jewish History of Concepts,” *Contributions to the History of Concepts* 7 (2012): 1–27.

94 For legal, a-historical, projects see, for example, Berachyahu Lifshitz, *Law and Action: Terminology of Obligation and Acquisition in Jewish Law* (Jerusalem: Mosad Bialik, 2001) (Hebrew). On the Jewish political thought project see Cooper, “The Turn to Tradition.” For histories that deal with cultural concepts see, e.g., Daniel Boyarin, *Carnal Israel: Reading Sex in Talmudic Culture* (Berkeley: University of California Press, 1993); Ari Mermelstein, “Love and Hate at Qumran: The Social Construction of Sectarian Emotion,” *Dead Sea Discoveries* 20 (2013): 237–63; Libson, “‘The Heart Knows Its Own Bitterness.’”

historiography.<sup>95</sup> However, my impression is that this is not always the case. In some areas, such as digital humanities, Jewish law scholarship is actually well ahead of the curve, the Responsa Project being one of the first full-search digital databases available to legal historians. In other areas, one sees trends similar to those found in legal history generally, and in some areas, such as transnational legal history, there seems indeed to be a difference, perhaps because of the contrast between religious and modern legal systems that has resulted in a process of 'zooming-in' in Jewish law scholarship, while its opposite process, 'zooming-out,' has occurred in other sub-fields of legal history. Some areas do seem to call for more scholarly attention, for example the study of the history of legal consciousness, but in this regard the study of the history of Jewish law is not very different from the study of the history of other legal systems which is also still focused mostly on elite legal texts and elite legal thinkers.

Ultimately, however, the question whether the history of Jewish law does or does not follow trends and fashions found in the study of the history of other legal systems may not be very important. As one of the characters of S. Y. Agnon's story, "Edo and Enam," notes: "I'm not in the habit of expressing my views about matters on which I'm no expert, but I think I can say this: in every generation, some discovery is made that's regarded as the greatest thing that ever was. Eventually, it's forgotten, for meanwhile some new discovery comes to light..."<sup>96</sup>

95 See also Rosman, *How Jewish*, 11 (noting in a discussion of the methodology of Jewish historiography that it, too, had adopted recent methodological innovations "albeit with some tardiness").

96 S. Y. Agnon, "Edo and Enam," in *Two Tales by S. Y. Agnon*, trans. Walter Lever (New York: Schocken, 1966), 148–49.