7. The Mishnah and Roman Law: A Rabbinic Compilation of *ius civile* for the Jewish *civitas* of the Land of Israel under Roman Rule

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The Mishnah was created by and is based on traditions that were generated and transmitted by rabbis who lived in the Land of Israel at a time when it was part of the wider Roman Empire. We can therefore assume that the Graeco-Roman political, social, economic, and cultural context affected many aspects of the Mishnah's content, structure, and purpose. Since the Mishnah is the first known compilation of rabbinic law, Roman jurists' law and legal compendia constitute the most important comparative material. Roman jurists were active in Roman Palaestina and other parts of the Roman Empire at the time when the Mishnah developed. Their roles as informal adjudicators resembled the roles of rabbis as legal advisors to their fellow Jews. Some of the legal areas and issues dealt with by mishnaic rabbis have analogies in Roman jurists' law. Rabbis transmitted, collected, and edited their teachers' and predecessors' legal traditions at approximately the same time as collections of jurists' law were created. Both the Mishnah and collections of Roman jurists' law were eventually integrated into the larger corpora of rabbinic and Roman civil law, the Talmud Yerushalmi and Justinian's Digest. Rabbis are likely to have been aware of Roman legal practices and discussions, even if they did not know Latin or study at Roman law schools.[1]

1. See Catherine Hezser, "Did Palestinian Rabbis Know Roman Law? Methodological Considerations and Case Studies," in *Legal Engagement: The Reception of Roman*

In this essay I shall suggest that the most simple and straightforward answer to the question "What is the Mishnah?" is that it is a compilation of rabbinic *ius civile* for the Jewish *civitas* within the boundaries of a rabbinically defined Land of Israel. In the post-Hadrianic period, the Roman *laissez-faire* attitude toward legal adjudication may have caused rabbis to confirm and intensify their role as legal advisors to members of the Jewish populace, serving as sources of legal knowledge that constituted an alternative to jurists who advised on the basis of Roman law. After Caracalla's reform of 212 CE, which granted citizenship to all inhabitants of the Roman Empire, rabbis may have feared that the political integration of the Jews of the Land of Israel into the Roman *civitas* might lead to complete legal integration. Jews could be subjected to Roman civil law while the centuries-old Jewish legal tradition, oriented around the Torah as the most important aspect of post-70 CE Jewish identity, might become lost. These circumstances may have motivated the editors, traditionally associated with the patriarch R. Yehudah ha-Nasi at the beginning of the third century, to compile earlier traditions into a corpus that matched the general topics and forms of Roman civil law (e.g., property law, family law) but also added areas of specifically Jewish concern (e.g., holiday observance and purity rules). A Jewish alternative to Roman *ius civile* was created that could be further developed, interpreted, and applied to new circumstances by later generations of rabbis.

1. RABBIS AND ROMAN JURISTS

Especially after the Bar Kokhba revolt, when the rabbinic Land of Israel became part of the Roman province of Syria-Palaestina, Roman jurists would have been active in major cities such as Caesarea, and private law schools may have been established in the land already in the second century.[2] In the mid-third century, Gregorius Thaumaturgus travelled to Caesarea to study Roman law there rather than at Berytus.[3] Experts in Roman law would have

Law and Tribunals by Jews and Other Inhabitants of the Empire, ed. K. Berthelot, N. B. Dohrmann, and C. Nemo-Pekelman (Rome, forthcoming in 2021). For earlier comparative approaches to rabbinic and Roman law see especially Boaz Cohen, *Jewish and Roman Law. A Comparative Study*, 2 vols. (New York, 1966); David Daube, *Collected Works of David Daube: Talmudic Law* (Berkeley, 1992), including "The Civil Law of the Mishnah: The Arrangement of Three Gates." For a review of scholarship on rabbinic and Roman law until 2003 see Catherine Hezser, "Introduction," in *Rabbinic Law in Its Roman and Near Eastern Context*, ed. Catherine Hezser (Tübingen, 2003), 1–15. For more recent approaches see note 71 below.

PQ: can we omit "below" from "see note 71 below"?

2. Fergus Millar, *The Roman Near East, 31 BC–AD 337* (Cambridge, 1996), 374–77.

3. Benjamin Isaac, *Empire and Ideology in the Graeco-Roman World. Selected Papers* (Cambridge, 2017), 274 n. 65.

advised the Roman governor and his officials. They would also have offered their services to the Jewish and non-Jewish inhabitants of the province, who were free to choose the informal adjudicators they considered advantageous to their cases.[4]

Harries has pointed to the "judicial diversity" in Roman Palaestina in the first centuries, when various types of informal adjudicators functioned side by side to deliver "arbitration as a means of dispute settlement."[5] Both parties had to agree to the adjudicator and accept his judgment (see the tannaitic case story about R. Yose b. Ḥalafta and the two litigants in ySan 2.1, 17b). The religious basis of the judgment—based on Torah law believed to have been revealed by God—would have served as a motivation to obey it (see the following story about R. Akiba, who tells the litigant: "Know before whom you stand, before Him who spoke and brought the world into being," ySan 2.1, 17b). For cases involving Jewish litigants, rabbis would have tried to claim a monopoly in serving as adjudicators and legal advisors. That they were not always successful is evident from rabbinic narratives such as the one about a woman named Tamar who allegedly complained about rabbis to the governor's office in Caesarea (yMeg. 3.2, 74a). According to the story, "R. Ḥiyya, R. Yose, and R. Ami found Tamar guilty, and she went and brought [a complaint] against them to the proconsul in Caesarea". R. Abahu is said to have interfered on behalf of his colleagues, though the legal issue itself is not specified here.

Although the story is set in the time of the amora R. Abahu, appeals by Jews to the governor are likely to have happened in the second century already.[6] It is also likely that Jews consulted with Roman jurists, and not only in cases where non-Jews were involved. A basic knowledge of Roman civil law and legal practice could have been acquired by word of mouth and observation. If one of the legal parties thought that his or her case would be dealt with on better terms by a Roman adjudicator, that party may have approached a jurist rather than a rabbi. In fact, to be advised by a jurist and judged by Roman law may have been the unenforced default position in the first centuries CE already, despite the co-existence of indigenous (local) and imperial (empire-wide) legal systems and adjudication practices.[7]

4. Millar, *Roman Near East*, 528.

5. Jill Harries, "Courts and the Judicial System," in *The Oxford Handbook of Jewish Daily Life in Roman Palestine*, ed. C. Hezser (Oxford, 2010), 85 and 91 (quote).

6. Rudolf Haensch, "The Roman Provincial Administration," in *The Oxford Handbook of Jewish Daily Life in Roman Palestine*, ed. C. Hezser (Oxford, 2010), 80.

7. Kimberley Czajkowski and Benedikt Eckhardt, "Introduction," in *Law in the Roman Provinces*, ed. K. Czajkowski and B. Eckhardt in collaboration with M. Stroth-

Under the emperors Arcadius and Honorius in 398 CE, Jews in the eastern parts of the empire were expressly subject to Roman civil law: "The Jews, being Roman citizens, were subject to Roman law as administered by its courts." From that time onwards, rabbinic law was supposed to be used for religious and ritual purposes only.[8]

Unlike rabbis, almost all Roman jurists stemmed from the upper strata of society and were "of at least potential senatorial status."[9] Their views would therefore generally reflect the perspective of the wealthy. Frier and McGinn write: "Although Roman private law itself was nominally egalitarian . . . nonetheless there are solid reasons to believe that the outlook, values, and interests of the upper classes (from whose ranks the Roman jurists were overwhelmingly drawn) were crucially important in shaping both the overall texture and the specific rules of classical Roman family law."[10] This was true not only for family law but for Roman law in general. Jurists belonged to the leisured classes and were not paid for their legal services.[11] Only the scions of well-to-do families would have been able to obtain a higher legal education.

In his study of Mishnah tractate *Baba Metsi'a*, Hayim Lapin has argued that tannaitic rabbis either came from the upper strata of society themselves or chose "to identify themselves with the wealthy Jewish landholders of Roman Galilee."[12] He goes on to argue that "[r]abbis were also choosing . . . to sanction—and to the extent that the image of 'egalitarianism' is maintained, to mask—a set of unequal relationships between rich and poor" (Lapin, *Early Rabbinic Civil Law*). Cohen has pointed to the "rural origin" of tan-

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mann (Oxford, 2020), (1) emphasize recent scholarship's move toward "a more dynamic two-way process" between the Roman authorities and the empire's inhabitants, evident in many provinces at the time (Czajkowski and Eckhardt, "Introduction"), and (2) present an example from Egypt, where in 186 CE the gymnasiarch Chairemon appeals to the Roman prefect to have his daughter divorced "by the law," most likely the "Law of the Egyptians"; both local Egyptian legal traditions and Roman law were available to the inhabitants.

8. Shlomo Simonsohn, *The Jews of Italy: Antiquity* (Leiden and Boston, 2014), 150: the law was addressed to Eutychianus, praetorian prefect in the East.

9. Olivia F. Robinson, *The Sources of Roman Law: Problems and Methods for Ancient Historians* (London and New York, 1997), 8.

10. Bruce W. Frier and Thomas A. J. McGinn, *A Casebook of Roman Family Law* (Oxford, 2004), 6.

11. Bruce W. Frier, *The Rise of the Roman Jurists: Studies in Cicero's Pro Caecina* (Princeton, 1985), 33.

12. Hayim Lapin, *Early Rabbinic Civil Law and the Social History of Roman Palestine* (Atlanta, 1995), 240.

naitic rabbis before R. Yehudah ha-Nasi.[13] Yet combining this alleged rural origin with the assumption of a wealthy rabbinic elite is problematic, since wealthy landowners lived in cities in antiquity. As I have argued elsewhere, most rabbis are likely to have belonged to the so-called middling strata of society in the first two centuries.[14] Only very few tannaim are described as landowners and owners of slaves. Even if references to professions are less common in tannaitic than in amoraic texts, cognomens indicate that several tannaim were craftsmen.[15] Unlike Roman jurists' law, the Mishnah seems to reflect a broader socio-economic perspective that is not limited to the highest strata of society. In fact, local Jewish aristocrats may have preferred to be judged in accordance with Roman law, such as Tamar (a wealthy widow?) in the story above. Like Roman jurists, rabbis did not charge their "clients" for their occasional legal advice. Their income came from ordinary professions. We may assume that like Roman jurists, they would have considered it an honor and privilege to provide halakhic guidance, a practice that would have increased their reputation as scholars among their local fellow Jews.

The forms of the legal traditions transmitted by legal scholars were based on their social function of *respondere*: to provide informal legal advice to anyone who approached them.[16] As Leesen has pointed out, this function was closely linked to the casuistic nature of Roman jurisprudence: "Roman jurists were not primarily concerned with the development of a coherent system of private law; . . . their major legal activity being *respondere*, i.e. giving legal advice or *responsa* in court cases and legal disputes."[17] This legal

13. Shaye J. D. Cohen, "The Place of the Rabbi in the Jewish Society of the Second Century," in *The Significance of Yavneh and Other Essays in Jewish Hellenism* (Tübingen, 2010), 296.

14. Catherine Hezser, *Jewish Slavery in Antiquity* (Oxford, 2005), 294–96: very few rabbis (R. Yehudah ha-Nasi, R. Gamliel) are presented as slaveholders in Palaestinian rabbinic texts; tasks carried out by household slaves in upper-class families (e.g., cooking and serving food) are associated with rabbis themselves. Students seem to have carried out some of these tasks (*shimush ḥakhamim*), thereby replacing slaves. On the "middling groups" see Ben-Zion Rosenfeld, *Social Stratification of the Jewish Population of Roman Palestine in the Period of the Mishnah*, 70–250 CE (Leiden and Boston, 2020), 91–140, who distinguishes between the "low middle class" and the independent farmer but does not discuss the merchant as a distinct category.

15. Catherine Hezser, *The Social Structure of the Rabbinic Movement in Roman Palestine* (Tübingen, 1997), 261, for references.

16. Catherine Hezser, "The Codification of Legal Knowledge in Late Antiquity: The Talmud Yerushalmi and Roman Law Codes," in *The Talmud Yerushalmi and Graeco-Roman Culture*, vol. 1, ed. P. Schäfer (Tübingen, 1998), 581–98.

17. Tessa G. Leesen, *Gaius Meets Cicero: Law and Rhetoric in the School Controversies* (Leiden and Boston, 2010), 21.

advice was given *ad hoc*. Private citizens approached jurists with their specific legal problems and asked them for advice. Interestingly, Leesen refers to Cicero's work *De oratore* (1.239–40) as evidence for the proposition that as a jurist, Cicero gave "advice that served the cause of the citizen who consulted him" (Leesen, *Gaius Meets Cicero*). If that was the case, rabbis may well have competed with Roman jurists in attracting litigants, especially those from the upper strata of society.

Did tannaitic rabbis cater to the legal and religious needs of rural Jews while Roman jurists offered their services in the cities? After the Bar Kokhba revolt, rabbis may have been busy helping rural Jews accommodate to Roman territorial control and changed circumstances, as Avery-Peck has argued. In the Mishnah's division of agriculture, "rabbis do more than regulate how Israelites are to plant, harvest, process, and eat the crops they grow for sustenance."[18] They show them how holiness continued to pertain to the land (in the sense of the land being God's possession) and sanctification continued to apply to its products despite the Roman devastation.[19] But rabbis also discuss defunct institutions such as the Temple, as well as tithes for priests who had lost their ritual duties.[20] Lapin therefore emphasizes the "ideal" nature of the Mishnah's legal regulations, which may have been detached from actual social practice.[21]

Cohn has argued that the rabbinic imagination of the institution of the Temple served to establish rabbis as authorities in their own right after 70 CE.[22] (Imaginary) topics concerning the Temple cult would have aligned rabbis with Roman jurists, who dealt with issues related to the imperial cult. According to Witte, "Roman law also established the imperial cult . . . The Roman emperor was to be worshipped as a god and king in the rituals of the imperial court and in the festivals. . . . The Roman law itself was viewed as an embodiment of an immutable divine law, appropriated and applied through the sacred legal science of imperial pontiffs and jurists."[23] While rabbis as-

18. Alan J. Avery-Peck, "The Division of Agriculture and Second Century Judaism: The Holiness of the Devastated Land," in *The Mishnah in Contemporary Perspective: Part One*, ed. A. J. Avery-Peck and J. Neusner (Leiden and Boston, 2002), 41.

19. Avery-Peck, "The Division of Agriculture," 42.

20. Avery-Peck, "The Division of Agriculture," 43.

21. Lapin, *Early Rabbinic Civil Law*, 237. See also Jack N. Lightstone, *Mishnah and the Social Formation of the Early Rabbinic Guild: A Socio-Rhetorical Approach* (Waterloo, 2002), 67.

22. Naftali S. Cohn, *The Memory of the Temple and the Making of the Rabbis* (Philadelphia, 2013), 116.

23. John Witte, *God's Joust, God's Justice: Law and Religion in the Western Tradition* (Grand Rapids, 2006), 9.

serted legal control over their fellow Jews based on their Torah knowledge, jurists applied, developed, and interpreted the Roman legal tradition to guide their fellow citizens.

Rabbis and jurists seem to have been involved in similar types of legal activities. Their foremost function was to "respond" to the legal issues and cases that were brought to them.[24] Jurists "presented opinions on questions of law to private citizens" as well as to magistrates and judges (*respondere*); they interpreted laws and formulas, "occasionally arguing cases as advocates themselves (*agere*)"; and they "drafted legal documents, such as contracts and wills (*cavere*)."[25] Both rabbis and jurists taught students: "The jurists were also engaged in the systematic exposition and teaching of law. In performing this task, they composed opinions when their students raised questions for discussion based on hypothetical cases. These opinions were almost equal in terms of influence to those formulated for questions arising from actual cases and indirectly helped develop Roman law in new directions."[26]

Relations between rabbis and their students, as presented in rabbinic sources, are strikingly similar to those between jurists and their students. Schiller has pointed out that "the young man frequently took residence as a house guest in the family of a renowned jurist."[27] He would therefore be able to observe his teacher's actions and listen to and memorize the advice he gave to his clients. Furthermore, "[t]he young man accompanied the jurist to the places in Rome where jurists gathered for discussion and disputation of controversial legal problems and to respond to legal queries from private persons."[28] Similarly, disciples of rabbis are said to have lived with their masters and to have accompanied them wherever they went.[29] Rabbis must have been familiar with jurists' practices, imitated them in real life, and fulfilled partially analogous functions in Jewish society.

Similarities between Roman jurists' functions of *respondere*, *agere*, and *cavere* and the ways in which rabbis present themselves in the Mishnah (and Talmud Yerushalmi) are striking. Case stories, according to which rabbis

24. Catherine Hezser, "Roman Law and Rabbinic Legal Composition," in *The Cambridge Companion to the Talmud and Rabbinic Literature*, ed. C. E. Fonrobert and M. S. Jaffee (Cambridge, 2007), 149; Cohn, *Memory of the Temple*, 20.

25. George Mousourakis, *Roman Law and the Origins of the Civil Law Tradition* (Heidelberg and New York, 2015), 71.

26. Mousourakis, *Roman Law*, 71.

27. A. Arthur Schiller, *Roman Law: Mechanisms of Development* (The Hague, 1978), 398.

28. Schiller, *Roman Law*, 398.

29. Hezser, *Social Structure*, 332–52.

were approached by litigants and provided their responses to controversial issues, are a common feature of the Mishnah, as Moshe Simon-Shoshan has shown.[30] As I have argued elsewhere, very similar legal narratives appear among the responsa of second- to third-century CE Roman jurists such as Q. Cervidius Scaevola and Julius Paulus Prudentissimus, transmitted in Justinian's *Digest*, the early Byzantine compilation of Roman civil law.[31] Rabbis' and Roman jurists' decisions in legal matters were transmitted in much the same form. Babusiaux points out that "the basic narrative structure, the story or the case, is inspired, if not taken over from the rhetorical concept of *narratio*."[32]

As members of the elite, Roman jurists possessed rhetorical training "and therefore also used their fundamental rhetorical skills as a basis in their legal writing."[33] Hidary has argued that rabbis were also knowledgeable in the arts of rhetoric and used these skills in legal proceedings: "We see that both Roman and rabbinic legal professionals shared much of the same educational training and emphasis on rhetorical ability."[34] In general, rabbinic case stories tend to be shorter and more concise than Roman case stories. They lack explicit questions that are constitute one part of the tripartite structure of the latter narratives.[35] Whether rabbis formulated such stories because they had gained formal rhetorical training, or whether they imitated Roman legal traditions they had observed or learned informally in conversations, remains an open question.[36]

The juridical functions of *agere* and *cavere* also have analogies in the Mishnah. Rabbis not only gave legal advice but could also function as judges who decided cases in court settings, as tractate *Sanhedrin* suggests. While the existence of a rabbinic high court (or "sanhedrin") after 70 CE has been questioned by scholars, individual rabbis may have held private courts or

30. Moshe Simon-Shoshan, *Stories of the Law: Narrative Discourse and the Construction of Authority in the Mishnah* (Oxford, 2012), 167–93. See also Arnold Goldberg, "Form und Funktion des Ma'ase in der Mischna," *Frankfurter Judaistische Beiträge* 2 (1974) 1–38; Catherine Hezser, *Form, Function, and Historical Significance of the Rabbinic Story in Yerushalmi Neziqin* (Tübingen, 1993), 283–303.

31. Hezser, "Codification of Legal Knowledge," 588–92.

32. Ulrike Babusiaux, "Legal Writing and Legal Reasoning," in *The Oxford Handbook of Roman Law and Society*, ed. P. J. du Plessis, C. Ando, and K. Tuori (Oxford, 2016), 177.

33. Babusiaux, "Legal Writing," 177.

34. Richard Hidary, *Rabbis and Classical Rhetoric: Sophistic Education and Oratory in the Talmud and Midrash* (Cambridge, 2016), 234.

35. See Hezser, "Codification of Legal Knowledge," 588–89, for examples.

36. On the use of classical legal rhetoric in literary contexts, e.g. by Shakespeare, see Quentin Skinner, *Forensic Shakespeare* (Oxford, 2014).

served as judges in local courts alongside other Jewish and non-Jewish judges.[37] Evidence of rabbinic judges is generally limited to amoraic sources.[38] Yet Büchler's categorical distinction between rabbis and local judges is not persuasive.[39] More likely is Goodman's suggestion that both rabbinic and non-rabbinic legislation and jurisdiction was based on "the law *as it was actually practiced*."[40] Even if the rabbis of the Mishnah were critical of judges who took the same position as advocates, "the Mishnah does not ban advocates altogether" and permits the granting of legal advice to litigants.[41] The granting of legal advice and assistance in procedural matters is something mishnaic rabbis identify with.

The jurists' third function of drafting legal documents (*cavere*) also has analogies in the Mishnah.[42] Documents and their proper formulations and usages are frequently mentioned in both tannaitic and amoraic texts. A rabbinic innovation was the *prosbol*, a type of document that was allegedly introduced by Hillel (mShev 10.3). This document protected the right of the creditor and allowed him to collect debts even during the sabbatical year. The Mishnah provides legal guidance on the proper format, formulation, dating, and signature of the document (mShev 10.4). Rabbis also discussed the "correct" formulation of wills (mBB 8.7), the writing of betrothal documents (mKid 1.1), and the validation of marriage documents by witnesses' signatures (mKet 2.3; 5.1). Their advice on drafting documents was not limited to family matters but included the purchase and manumission of slaves (mKid 1.1–2; mGit 1.4). The phenomenon that the acquisition and dismissal of wives and slaves is discussed together seems to be due to their status as non-kin dependents of the householder.[43] Bauman's comment on Roman jurists will have applied to rabbis as well: "In the specific area of *cavere,* the

37. H.-P. Chajes,. "Les juges juifs en Palestine." *Revue des Études Juives* 39 (1899): 39–52; David Goodblatt, *The Monarchic Principle. Studies in Jewish Self-Government in Antiquity* (Tübingen, 1994); Hezser*, Social Structure*, 276–77.

38. Hezser, *Social Structure*, 276.

39. Adolf Büchler, *The Political and the Social Leaders of the Jewish Community of Sepphoris in the Second and Third Centuries* (London, 1909), 21.

40. Martin Goodman, *State and Society in Roman Galilee, A.D. 132–212* (Totowa, N.J., 1983), 159–60.

41. Hidary, *Rabbis and Classical Rhetoric*, 226.

42. On the meaning of *cavere* versus *agere* see Schiller, *Roman Law*, 273–74.

43. Hezser, *Jewish Slavery*, 69–82; Sandra R. Joshel and Sheila Murnaghan, "Introduction: Differential Equations," in *Women and Slaves in Graeco-Roman Culture: Differential Equations*, ed. S. R. Joshel and S. Murnaghan (London and New York, 1998), 1–21.

drafting of private documents, the jurists' services must have been in great demand."[44] While *cavere* and *agere*, "[i]n the sense of advising on the procedure of or conducting private suits" (Bauman, *Lawyers in Roman Republican Politics*), must have occupied at least some jurists' and rabbis' time, there is much more evidence in the surviving documents for their function of *respondere*, providing legal advice to private citizens.

2. THE MISHNAH AS RABBINIC CITIZEN'S LAW (*IUS CIVILE*) FOR THE JEWISH *CIVITAS*

Although rabbinic civil law is vastly expanded in the late antique Talmud Yerushalmi, the Bavot tractates of the Mishnah already contain much civil law, and civil law is also part of discussions in other tractates.[45] Such discussions deal with damage done to a neighbor's property,[46] theft[47] and fraud,[48] employment law concerning laborers and tenants,[49] slave law including manumission,[50] the formulation and use of documents and witnesses,[51] and family law involving gifts and inheritances.[52] Almost all of these topics were also addressed by Roman jurists, whose decisions and discussions are recorded in Justinian's Codex as well as in earlier collections of individual jurists' traditions.

In Roman society, civil law (*ius civile*) "denotes the law of a given *civitas* or of the citizens; with reference to Rome, it is the *ius civile proprium Romanorum*."[53] According to Harries, "in the ancient Mediterranean world,

44. Richard A. Bauman, *Lawyers in Roman Republican Politics: A Study of the Roman Jurists in Their Political Setting, 316–82 BC* (Munich, 1983), 4.

45. See Lapin, *Early Rabbinic Civil Law*, 119–235, on civil law in mBava Metsi'a.

46. Jacob Neusner, *A History of the Mishnaic Law of Damages*, 5 parts (Eugene, Ore., 2007; previously published Leiden, 1985).

47. Bernard S. Jackson, *Theft in Early Jewish Law* (Oxford, 1972).

48. Jacob Neusner, *The Economics of the Mishnah* (Chicago and London, 1990), 82–83.

49. David Farbstein, *Das Recht der freien und unfreien Arbeiter nach jüdisch-talmudischem Recht verglichen mit dem Antiken, speciell mit dem römischen Recht* (diss., Bern, 1896); Ben-Zion Rosenfeld and Haim Perlmutter, *Social Stratification of the Jewish Population of Roman Palestine in the Period of the Mishnah, 70–250 CE* (Leiden and Boston, 2020), 71–88.

50. See Hezser, *Jewish Slavery in Antiquity.*

51. Catherine Hezser, *Jewish Literacy in Roman Palestine* (Tübingen, 2001), 297-309.

52. Reuven Yaron, *Gifts in Contemplation of Death in Jewish and Roman Law* (Oxford, 1960); Jonathan S. Milgram, *From Mesopotamia to the Mishnah: Tannaitic Inheritance Law in Its Legal and Social Contexts* (Tübingen, 2016).

53. Adolf Berger, *Encyclopedic Dictionary of Roman Law* (Clark, N.J., 2004), 527.

law and citizenship in general went together."[54] She quotes the Roman jurist Gaius, who stated in the second century CE: "What each people establishes for itself as law (*ius*) is unique to that citizen body and is called the citizens' law, because it is the law unique to that citizen community (*civitas*)" (Gaius, *Institutes* 1.1). Rather than assuming that Roman law was forced on new citizens in the provinces, Czajkowski and Eckhardt describe the situation more distinctly: "People were not made citizens to promote a Roman legal order, but the possible recourse to that order was part and parcel of their elevated status. Quite without provident planning, they did become carriers of the Roman legal system; by exercising their privilege or recourse to it, they therefore helped propagate the idea of Rome as the ultimate guarantor of justice."[55]

The rabbinic editors of the Mishnah may well have considered their compilation of the citizens' law as "appertaining to the *civitas*"[56] of the Jews of the rabbinically defined Land of Israel, in contrast to natural or international law, *ius gentium*, the law of all peoples. As such, the Mishnah would have stood in continuation to Torah law, which Seth Schwartz calls "the constitution of the Jews of Palestine"[57] that governed Jews before the incorporation of their land into the Roman Empire: "Before the rise of Rome, the Mediterranean was a mosaic of many cities and citizenships, all with their own laws. Even after the Roman conquest of the eastern provinces from the second century BCE, many cities were classified as 'free' and retained their previous laws and distinctive civic identities, although these were gradually eroded over time."[58]

This view of a pluralistic legal landscape with many local legal traditions associated with indigenous identities dominates scholarship on law in the Roman provinces nowadays. To some extent, this pluralism seems to have continued even after 212 CE. Czajkowski and Eckhardt reckon with "the survival and even thriving of local legal orderings" even after the extension of Roman citizenship to inhabitants of the provinces.[59]

In 212 CE, all inhabitants of the Roman Empire received Roman citizenship and at least theoretically, "the [Roman] *ius civile*, written and un-

54. Jill Harries, "Roman Law from City State to World Empire," in *Law and Empire: Ideas, Practices, Actors*, ed. J. Duindam, J. Harries, C. Humfress, and N. Hurvitz (Leiden, 2013), 47.

55. Czajkowski and Eckhardt, "Introduction," 9.

56. Harries, "Roman Law," 47.

57. Seth Schwartz, *Imperialism and Jewish Society: 200 B.C.E. to 640 C.E* (Princeton, 2001), 56.

58. Harries, "Roman Law," 47.

59. Czajkowski and Eckhardt, "Introduction," 4.

written, was the law of the Roman *civitas*, the Roman citizen body and that citizen community was now coextensive with the population of an empire extending from Hadrian's Wall to the Sahara and the Euphrates."[60] Interestingly, the compilation of the Mishnah, associated with rabbinic circles around the patri arch R. Yehudah ha-Nasi, broadly coincides with the Roman emperor Caracalla's extension of Roman citizenship to inhabitants of the Roman provinces (*Constitutio Antoniana* of 212 CE).[61] Imrie has emphasized the prominent role that Roman jurists obtained under the Severan emperors—a period that he calls "something of a golden age for jurists"—including "significant administrative positions, and even rising to the praetorian prefecture."[62] At that time, rabbis may have feared that Jewish integration into the Roman *civitas* might imply their subjection to Roman civil law, if not forcefully then at least voluntarily, and would bring about a loss or gradual fading of traditional Jewish law based on the Torah and rabbinic jurisdiction.[63]

The compilation of the Mishnah at the beginning of the third century CE may then be understood as a rabbinic attempt to create a specifically Jewish collection of citizen's law that could serve as a viable alternative to Roman *ius civile* within a rabbinically defined Land of Israel. It needs to be stressed that rabbinic halakhic rules always pertained to the boundaries of what rabbis called the Land of Israel, not the entire Roman province of Syria-Palaestina.[64] They thus defied Roman administrative boundaries and continued earlier local territorial traditions just as they maintained and developed their indigenous legal tradition when Roman law "infiltrated" their space. In both domains, territorial and legal, adjustments were made.[65]

Rabbinic reactions to Roman legal imperialism had certain analogies in other provinces of the Roman Empire that "had their own pre-existing local

60. Czajkowski and Eckhardt, "Introduction," 4.

61. On Caracalla's reform and its various rationales (fiscal, military, administrative) see Alex Imrie, *The Antonine Constitution: An Edict for the Caracallan Empire* (Leiden and Boston, 2018).

62. Imrie, *The Antonine Constitution*, 35.

63. On the concept of the Oral Torah and its relationship to the Written Torah see Martin S. Jaffee, *Torah in the Mouth: Writing and Oral Tradition in Palestinian Judaism 200 BCE–400 CE* (Oxford, 2001), 5 and 51, who dates it to the mid-second to early third century CE.

64. On the rabbinic perception of Eretz-Israel and the connection between rabbinic halakhah and these geographical boundaries see Eyal Ben-Eliyahu, *Identity and Territory: Jewish Perceptions of Space in Antiquity* (Berkeley and Los Angeles, 2019), 86–109.

65. For territorial adjustments to rabbinic boundaries in light of the Roman division of space and changing demographics see Ben-Eliyahu, *Identity and Territory*, 104.

legal orderings that were not eliminated with the coming of empire."[66] Czajkowski and Eckhardt emphasize "local agency . . . in the uptake, interpretation, integration or indeed rejected [*sic*] of Roman law in the provinces and indeed the construction of the various local legal cultures under Rome."[67] In her study of the legal situation in Judaea until Hadrian, Czajkowski compares the "tardiness" in the uptake of Roman legal institutions with Egypt.[68] Future comparisons between rabbinic and other local legal traditions may yield further analogies.[69]

To serve as a viable local alternative to Roman civil law, rabbinic civil law would have had to cover some of the same areas that Roman jurists' law dealt with and include other areas that were of particular interest to a Jewish constituency (e.g., regulations on Sabbath and holiday observance, purity rules, etc.). Being more or less familiar with the casuistic jurisprudence of Roman jurists in the East and having given Torah-based legal advice to their Jewish compatriots since the destruction of the Temple, rabbis may have "conceived of their traditional system of practice as law in imitation of Roman notions of the law" and "mimicked the style of presenting legal material in a heterogeneous manner."[70]

Only a few of the legal areas covered by both rabbis and Roman jurists can be addressed here.[71] One such area is property law. Mishnaic rabbis

66. Czajkowski and Eckhardt, "Introduction," 10.

67. Czajkowski and Eckhardt, "Introduction," 10.

68. Kimberley Czajkowski, "Law and Romanization in Judaea," in *Law in the Roman Provinces*, ed. K. Czajkowski and B. Eckhardt in collaboration with M. Strothmann (Oxford, 2020), 84–100. The study is based on Josephus and the New Testament. The later rabbinic period is not dealt with here.

69. The papers in the volumes edited by Kimberley Czajkowski and Benedikt Eckhardt in collaboration with Meret Strothmann, *Law in the Roman Provinces* (Oxford, 2020), and by Werner Eck in collaboration with Elisabeth Müller-Luckner, *Lokale Autonomie und römisch Ordnungsmacht in den kaiserzeitlichen Provinzen vom 1. bis 3. Jahrhundert* (Munich, 1999), provide a good basis for such a comparison.

70. Cohn, *Memory of the Temple*, 36. See also Beth A. Berkowitz, *Execution and Invention: Death Penalty Discourse in Early Rabbinic and Christian Cultures* (Oxford, 2006), 162; Simon-Shoshan, *Stories of the Law*, 81–82.

71. Other scholars have already conducted comparisons in specific areas and pointed to the likely impact of Roman on rabbinic law in the land of Israel, even if rabbinic rules are not identical and may lack the complexity of jurists' law. See, e.g., Orit Malka and Yakir Paz, "*Ab hostibus captus et a latronibus captus*: The Impact of the Roman Model of Citizenship on Rabbinic Law," *Jewish Quarterly Review* 109 (2019): 141–72; Orit Malka, "Disqualified Witnesses between Tannaitic Halakha and Roman Law: The Archaeology of a Legal Institution," *Law and History Review* 37 (2019): 937–59; Yair Furstenberg, "Between the Literature of Early Halakhah and the Roman Law: The History of Mish-

dealt with issues concerning theft and the receipt of stolen goods;[72] damage to another person's property;[73] the sale, lease, and safekeeping of goods;[74] and debts, loss, and negligence.[75] Property law, including damages, was also an important area of Roman civil law.[76] Obviously, property law was of great significance for the economy of the Roman Empire and its provinces. Epstein summarizes the broader questions that Roman property law tried to answer: "First, how is property acquired? Second, what is the property so acquired? Third, how is that property protected? Fourth, how is that property transferred? Fifth, how are divided interests created in property? Sixth, how are unintentional mergers of property sorted out?"[77] The property types dealt with in both Roman and rabbinic law included real estate as well as movable property such as material objects, animals, and slaves. One could be the individual or partial owner of these goods. Possession could be acquired, transferred, or lost. In the interest of stable possession rights, legal remedies were applied when property was unlawfully seized or stolen. As Epstein has pointed out, "endless complications could arise" in property law cases.[78] Jurists and rabbis would deal with the specific cases that litigants presented to them.

Some scholars have argued that rabbinic property law, especially in the Mishnah, mostly deals with minor cases of movable property of a low value.[79] This phenomenon might seem to be linked to our discussion above

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nah Bava Metsia" (Hebrew), *Te'udah* 31 (2021): 541–74; Jonathan A. Pomeranz, "The Rabbinic and Roman Laws of Personal Injury," *AJS Review* 39 (2015) 303–31; Nathalie B. Dohrmann, "Law and Imperial Idioms: Rabbinic Legalism in a Roman World," in *Jews, Christians, and the Roman Empire. The Poetics of Power in Late Antiquity*, ed. N. B. Dohrmann and A. Y. Reed (Philadelphia, 2014), 63–78.

72. Boaz Cohen, "The So-called Jüdisches Hehlerrecht in the Light of Jewish Law." *Historia Judaica* 4 (1942): 145–53.

73. Neusner, *History of the Mishnaic Law of Damages*.

74. Lapin, *Early Rabbinic Civil Law*, 155–232.

75. Samuel Greengus, *Laws in the Bible and in Early Rabbinic Collections: The Legal Legacy of the Ancient Near East* (Eugene, Ore., 2011), 188–235.

76. See Herbert Hausmaninger and Richard Gamauf, *A Casebook on Roman Property Law* (Oxford, 2012), for examples; Bernhard Erwin Grueber (2004). *The Roman Law of Damage to Property: Being a Commentary on the Title of the Digest Ad Legem Aquiliam (IX. 2)* (Clark, N.J., 2004).

77. Richard A. Epstein, "The Economic Structure of Roman Property Law," in *The Oxford Handbook of Roman Law and Society*, ed. P. J. du Plessis, C. Ando, and K. Tuori (Oxford, 2016), 513.

78. Epstein, "Economic Structure," 515.

79. Jacob Neusner, *Judaism and Society: The Evidence of the Yerushalmi* (Chicago, 1983), 121.

concerning the relatively lower socio-economic status of (most) rabbis and their followers in comparison with Roman jurists who belonged to the upper strata of Roman society and would have been consulted by wealthy estate owners. Yet the property law issues addressed in Roman case stories are not limited to real property in land. As far as movable property is concerned, Roman jurists dealt with lost cows (Paul, Digest 41.2.3.13) and buried money (Papinian, Digest 41.2.44 pr.) just as rabbis did. Rabbis, like Roman jurists, discussed the acquisition, transfer, and loss of slaves[80] and real property.[81] While rabbis would have been more familiar with the lower-value movable property cases concerning most of their Jewish clientele, they also occasionally dealt with the transfer of real estate and slaves, which members of the upper strata of Jewish society would have possessed.

When discussing property law in the Mishnah, a focus on case stories may be too limited. Lapin has noted that "[i]n tannaitic corpora, property and status cases together make up just over a third of the total number of cases," whereas most case stories deal with issues of purity and ritual.[82] Besides case stories, legal discussions on property issues need to be taken into consideration. While case stories are not exact transcripts of cases brought before rabbis, but rather greatly reduced and abstracted mnemonic versions created for the purposes of transmission and later discussion, legal statements and discussions may not be merely theoretical but rather based on issues that were relevant in daily life.

In any case, Roman jurists also dealt with issues that had "little practical significance": "It was those problems that interested them, not the practical significance of the cases."[83] Cases, on the other hand, "were stated abstractly to include only those features that were relevant to a legal problem."[84] Both jurists and rabbis problematized and conceptualized issues known from daily life, such as possession, fault, damage, intention, and negligence: "The genius of the Roman jurists lay not in finding new concepts, but in seeing the legal significance of familiar ones."[85] The same can be said about the rabbis. Individuals learned in law were assumed to be able to give advice in ev-

80. See Hezser, *Jewish Slavery in Antiquity*.

81. Jacob Neusner, *Judaism: The Evidence of the Mishnah* (Eugene, Ore., 1981), 146, 254.

82. Hayim Lapin, *Rabbis as Romans: The Rabbinic Movement in Palestine, 100–400 CE* (Oxford and New York, 2012), 105.

83. James Gordley, *The Jurists: A Critical History* (Oxford, 2013), 10.

84. Gordley, *The Jurists*, 10.

85. Gordley, *The Jurists*, 10.

eryday life matters: "numerous everyday problems not needing court proceedings required settlement by a man on the spot, preferably one trained in public consultation," such as the jurists—and by extension—rabbis.[86]

Only a few examples of property law topics that both Roman jurists and mishnaic rabbis dealt with can be provided here. Roman jurists argued that a householder could acquire possession through his slave or dependent son. According to the jurist Paul, "through a slave or a son-in-power [*in potestate*] we acquire possession," even of a purchase that was made with parts of the slave's *peculium* his master did not know about.[87] On the one hand, slaves are here treated as humans who can take possession; on the other hand, they are equated to minor sons, unable to own property themselves. Watson has argued that possession (the act of taking hold of or seizing an ownerless object) by a third party on behalf of the householder was a Roman innovation.[88]

Mishnaic and other tannaitic texts suggest that rabbis were familiar with the distinction between possession and ownership. The Mishnah states that objects found by minor children, wives, and Canaanite slaves, all dependents of the householder, belong to the householder, who would be considered their rightful owner (mBM 1.5). By contrast, finds of adult children, divorced wives, and Israelite slaves belong to their finders. In comparison with Roman law, the distinction between Israelite and Cannanite, that is, Jewish and non-Jewish slaves, is unusual here.[89] Only in the case of Canaanite slaves, slaves of a non-Jewish origin, would servile possession lead to the householder's ownership of the objects.

Elsewhere, no such distinctions between different types of slaves are made. Although rabbis do not use the term *peculium*, the Tosefta states: "the son who does business with what belongs to his father, and likewise the slave who does business with what belongs to his master, behold, they [the proceeds] belong to the father, behold, they [the proceeds] belong to the master" (tBK 11.2).[90] The Roman *peculium* was property which the

86. Bauman, *Lawyers in Roman Republican Politics*, 114.

87. Commentary on the Praetor's Edict, book 54, quoted and translated in Hausmaninger and Gamauf, *Casebook on Roman Property Law*, 53 case 25.

88. Alan Watson, "Acquisition of Possession per Extraneam Personam," *Tijdschrift voor Rechtsgeschiedenis* 29 (1958): 22–42; Watson, "Acquisition of Possession and Usucaption *per servos et filios*," *Law Quarterly Review* 78 (1962): 205–27.

89. On the general lack of distinction between slaves of Jewish and non-Jewish origin in rabbinic texts see Paul McCraken Flesher, *Oxen, Women, or Citizens? Slaves in the System of the Mishnah* (Atlanta, 1988), 36; *Hezser, Jewish Slavery in Antiquity*, 36.

90. On the *peculium* see Boaz Cohen, "Peculium in Jewish and Roman Law." *Proceedings of the American Academy for Jewish Research* 20 (1951): 135–234; Elias J. Bicker-

pater familias gave to his slave (or dependent son) to invest in business.[91] According to Frier and McGinn, "[p]articularly slaves, but also children, actively traded with their *peculia*, in effect operating as managers of quasi-independent 'firms' although still within the ambits of the *familia*."[92] Ultimately, the proceeds belonged to the householder. Whether this Tosefta passage refers to money that the master has given to his slave for the explicit purpose of doing business with it or whether a *peculium*-like allocation of money is envisioned here remains uncertain. Since the slave is owned by the master, everything he possesses belongs to the master. According to a statement attributed to R. Meir, "the hand of a slave is like the hand of his master" (yPe'ah 4.6, 18b; yKid. 1.3, 60a): he is a means through which his master takes possession and acquires things.

The use of slaves (or other dependents) as intermediaries was legally (and probably also morally) advantageous for householders. In certain circumstances they could avoid having to pay damages if the damage occurred while the slave was in charge. If the owner of cattle commissioned a slave (or minor son or messenger) to transfer a cow to a prospective borrower and the cow died en route, the borrower was not liable to pay damages to the owner (mBM 8.3), even if the slave was his own. The borrower is liable to pay damages only if he explicitly asked the owner to use an intermediary for the transfer or agreed to it, that is, if he was responsible for the employment of the intermediary in whose custody the cow died (mBM 8.3).

Interestingly, Roman law also stipulates that a master is liable for a slave's actions or damage incurred through him, if the master authorized the action: "Such liability occurred, and gave a legal motivation to the injured party, whenever a slave acted under definite authorization . . . The liability incurred was limited . . . by the extent of authorization."[93] Similarly, the Mishnah rules that the borrower is liable to pay damages to the owner of the cow which dies in transit only if he authorized a slave (or minor son or messenger) to bring him the cow.

The slave himself—like minor children—could handle property but not own it, since he lacked the capacity of *dominium*, ownership: "The object

man, "The Maxim of Antigonos of Socho," in Bickerman, *Studies in Jewish and Christian Histo*ry. A New Edition in English including *The God of the Maccabees*, ed. A. Tropper (Leiden, 2007), 543–62.

91. William L. Westermann, *The Slave Systems of Greek and Roman Antiquity* (Philadelphia, 1955), 83.

92. Frier and McGinn, *Casebook of Roman Family Law*, 263.

93. Westermann, *Slave Systems*, 83.

itself was taken by the slave *domini animo sed servi corpore*."[94] In specific circumstances he could be authorized to act in his owner's name (*domini nomine*): "Under specific consent of his owner for a definite case or under a wider authorization which would include a given transaction a slave was able to deal in the master's name (*domini nomine*) with third parties, either for the purpose of acquiring or of alienating property for his master."[95] In the mishnaic case, the intermediary's function is more limited: the slave is merely in charge of the transfer of the property. If the owner of the cow authorized his own slave to accomplish the transfer and the cow died, the loss would be his own; if the borrower authorized either his own or the owner's slave, he would be liable to pay damages to the owner. These and other legal issues are discussed in more complex ways in Roman legal texts. As I have already argued elsewhere, a knowledge of Roman law is indispensable for understanding many of the Mishnah's (and Talmud Yerushalmi's) legal issues properly.[96]

3. RABBINIC AND ROMAN LEGAL COMPILATION

Not only the content of rabbinic legal discussions but also some of the literary forms used to transmit rabbinic halakhah have equivalents in Roman legal texts. Legal narratives, foremost amongst them case stories, have already been discussed extensively.[97] The structures of rabbinic and Roman case stories are very similar and have a similar *Sitz im Leben*, namely, rabbis' and jurists' role of *respondere*—responding to legal problems others brought before them. This is not to say, however, that the issues addressed in case stories happened in real life. The formulations are elliptical and abstract; some scenarios would have been invented for theoretical legal discussion. Roman case stories usually include a specific question and tend to be more detailed. Yet the structure of case description (*casus*)—question or, in the case of rabbinic case stories, the general statement that someone went and asked a certain rabbi (*quaestio*)—the jurist's or rabbi's case decision or legal advice (*responsum*) are very similar. Such case stories became primary forms of transmitting legal advice in societies with informal adjudicators who administered case law.

94. Westermann, *Slave Systems*, 83.

95. Westermann, *Slave Systems*, 83.

96. Hezser, "Did Palestinian Rabbis Know Roman Law?" (forthcoming).

97. Hezser, *Form, Function, and Historical Significance*, 283–303; 1998: 588–94; Simon-Shoshan, *Stories of the Law*, 114–16, 176–93.

Falcón y Tella emphasizes that Roman jurists were scholars who practiced jurisprudence (*prudentia iuris*), rather than legislators who issued laws.[98] This practice was not initiated by the government but arose out of the scholarship and practice of the jurists themselves. Falcón y Tella stresses "the principle of spontaneity, of the isolating of private law from political power and of aversion to the extension of bureaucracy."[99] The scholastic basis and independence from politics were shared by rabbinic halakhah, as was the multifarious nature of the rulings that emerged in this context. Roman law "is a 'case-specific' law, formed by case law, the product of disagreements and controversies."[100] General principles and declarations of rights are missing. What we find instead are "abstract, precise and clear" case decisions and formulae that take specific legal circumstances into account.[101]

Also important is Falcón y Tella's emphasis on the religious basis of Roman jurisprudence: "Both the lawful . . . and the unlawful . . . depended on the will of the Gods. The virtues of the citizen, of *paterfamilias*, and of the jurist . . . determined by the law itself, were religious in character."[102] Private law, dealt with by jurists, focused on the family and dealt with issues such as status, property, inheritance, loans, contracts etc.[103] As jurisconsults, jurists rather than legislators "played the fundamental role in the process of formation and creation of law. The jurisconsult, via *iurisprudentia*, adapted the scope of the existing law to new needs and requirements . . . Law was basically shaped by the judgments of the jurisconsults, those judgments constituted the principle and almost the only source of law."[104] The similarity to rabbinic halakhah is striking. Like Roman law, rabbinic law was based on earlier "existing law," the Torah, that was interpreted and adapted to new circumstances. It had a religious basis and traced its own rules and moral values to Moses at Sinai. Both jurists' law and rabbinic halakhah emerged in scholastic contexts which combined theoretical discussions with practical applications. This scholastic context and practice are crucial for understanding the emergence, transmission, and compilation of rabbinic and Roman law.

98. María José Falcón y Tella, *Case Law in Roman, Anglosaxon and Continental Law* (Leiden and Boston, 2011), 7–10.

99. Falcón y Tella, *Case Law*, 8.

100. Falcón y Tella, *Case Law*, 8.

101. Falcón y Tella, *Case Law*, 8.

102. Falcón y Tella, *Case Law*, 8–9.

103. See the contributions in Part IV of David Johnston, ed., *The Cambridge Companion to Roman Law* (Cambridge, 2013).

104. Falcón y Tella, *Case Law*, 10.

We lack direct information about the development and compilation of the Mishnah. By studying the Mishnah within the context of Roman legal scholarship and the compilation of jurists' law, we can extend our knowledge of these processes. At the very beginning stands the rabbi and legal scholar who develops new rules and decisions based on his interpretation of earlier legal traditions and in the context of Graeco-Roman culture. Classicists have pointed out that "Greek influence on Roman law cannot be denied" and that philosophical ideas, both popular and academic, had an impact on Roman jurisprudence.[105] Similarly, the rabbis of the Mishnah discussed and developed law (*halakhah*) in the context of Hellenism, especially Stoic philosophy, which Josephus associates with Pharisees.[106] The rabbis applied their legal scholarship when others approached them for advice and transmitted their rulings as case stories, rules, and legal hypotheses.

Ibbetsen distinguishes between the legal science practiced by jurists until 200 CE and the period of "authority" from that time onwards: "[A]fter the deaths of Papinian, Paul, and Ulpian, the three great jurists of the late second and early third centuries, imperial power came to dominate all aspects of the law."[107] The beginning of the third century CE constitutes "a major watershed": "the scientific work of jurists seems to come to a very sudden halt."[108] From that time onwards, there are no more "juristic works revealing any real originality of thought" (Ibbetsen, "Sources of Law"). The late second to early third century CE was also a major turning point as far as rabbinic literature is concerned. It marked the end of the tannaitic period, the emergence of the first patriarch R. Yehudah ha-Nasi, and the assumed time of the editing of the Mishnah. Although the later amoraim continued to develop *halakhah*, they considered the traditions of their tannaitic predecessors authoritative. Around that time, the notion of the Oral Torah was introduced.[109] Jurists and rabbis of the third and fourth centuries venerated their predecessors and were eager to compile and preserve their legal traditions for later generations.

As far as the first and second centuries CE are concerned, it seems that Roman jurisprudence was largely unregulated and did not need authoriza-

105. Laurens Winkel, "Roman Law and its Intellectual Context," in *The Cambridge Companion to Roman Law*, ed. D. Johnston (Cambridge, 2015), 14.

106. Josephus, Life 2.12; Steve Mason, *Flavius Josephus. Translation and Commentary*, vol. 9: *Life of Josephus* (Leiden, 2011), 21.

107. David Ibbetsen, "Sources of Law from the Republic to the Dominate," in *The Cambridge Companion to Roman Law*, ed. D. Johnston (Cambridge, 2015), 26.

108. David Ibbetsen, "Sources of Law," 40.

109. Jaffee, *Torah in the Mouth*, 5, 51.

tion by imperial authorities. According to Pomponius, "men who had confidence in their knowledge gave opinions to those who consulted them" (Justinian's Digest 1.2.2.49).[110] Augustus established the *ius respondendi* in principle but did not grant it to anyone in particular to avoid authorizing contradictory decisions.[111] Tiberius allegedly authorized Sabinus, who was of a lesser social status than other jurists, and Caligula and Nero conferred the right to certain *heads* of legal schools "for political reasons."[112] Hadrian, however, "abolished the *ius respondendi*" and "recommended them [i.e., jurists] to give advice on their own authority."[113] Legal expertise "was by custom not to be sought but to be self-evident, and so he would be delighted if anyone who trusted his own abilities should prepare himself for giving opinions to the people."[114] Rabbis seem to have gained significance within Jewish society of Roman Palaestina after the Bar Kokhba revolt, when Roman emperors encouraged self-declared legal experts to set themselves up and offer their services to the public without requiring special authorization to do so.

Also interesting is the phenomenon of legal disagreement amongst both jurists and rabbis. Robinson writes: "This freedom to disagree persisted until the end of the classical period and beyond, even under Diocletian."[115] Sometimes a *communis opinio* was reached by following a specific jurist's view or by imperial enactment on issues that were considered particularly important. The second century CE jurist Gaius reckons with the possibility that the *responsa prudentium*, the decisions of the jurisprudents, may disagree. In such cases "it is permitted for the judge to follow whichever decision he wishes" (Gaius 1.7). Only if all jurists consent is the judge bound to follow that ruling.[116] The rabbinic view that sages' opinions are of equal value (see tSot 7.12 concerning disputes between the schools of Hillel and Shammai: "all these words have been given by a single Shepherd") seems to echo that sentiment.

The earliest stages of compilation of "classical" Roman jurisprudence seem to have coincided with the development of the tannaitic tradition in the second century CE. Justinian's *Digest* refers to collections of the most famous second-century jurists' legal traditions such as the *Institutes* of Gaius,

110. Translation with Robinson, *Sources of Roman Law*, 8.
111. Leesen, *Gaius Meets Cicero*, 26.
112. Leesen, *Gaius Meets Cicero*, 27.
113. Leesen, *Gaius Meets Cicero*, 28.
114. Robinson, *Sources of Roman Law*, 12.
115. Robinson, *Sources of Roman Law*, 34.
116. Leesen, *Gaius Meets Cicero*, 29.

the *Sentences* of Paul, and the *Rules* of Ulpian. Of these, only Gaius's *Institutes* have survived in manuscript form. They were discovered in a palimpsest at Verona that has been dated to the fifth century CE.[117] According to Schiller, Gaius's "work was an elementary text for beginning law students, dating from the middle of the 2nd century."[118] The late antique versions of the fourth and fifth centuries CE have excerpted, paraphrased, supplemented, and altered a no-longer-existing earlier text.[119] This is also the case with the *Sentences* of Paul, excerpted in the Digest. They were "an anthology made from the writings of the jurist Paulus by a compiler about the turn of the 4th century, to which later editors added further materials from time to time to keep the work up to date . . . The writer drew his extracts from the writings of Paul, condensing the material, bringing it up to date."[120] Further alterations occurred in the following two centuries.

Besides such compilations of individual jurists' traditions, encyclopedic collections with materials attributed to different jurists were created in the fourth and fifth centuries CE. The *Fragmenta Vaticana* of the fourth century CE combine and juxtapose the traditions of the "classical" jurists Papinian, Paul, and Ulpian by presenting excerpts from their individual collections of private law on topics such as sales, gifts, and guardianship.[121] The individual and partly contradictory views and decisions are listed thematically, without being commented upon or harmonized. The transmission of disputes on particular legal issues (*disputationes* and *quaestiones*) suggests that the collection served educational as well as jurisdictional purposes. It is assumed that the editors of this by-now-fragmentary work aspired to create a comprehensive collection of private law covering all legal areas. Another collection of jurists' law, probably created around 300 CE, is the *Iuris Epitomae* of Hermogenianus, a post-classical jurist and *magister libellorum* of Diocletian.[122] Besides case decisions, the compilation contains disputationes and quaestiones—discussions of legal problems.

Just as the views and decisions of the "classical" Roman jurists of the second century CE are available only in later collections and compilations of the early Byzantine period, the Mishnah as a collection of tannaitic traditions of first- and second-century rabbis has been preserved as part of the

117. Schiller, *Roman Law*, 43–44.

118. Schiller, *Roman Law*, 43.

119. Schiller, *Roman Law*, 45.

120. Schiller, *Roman Law*, 46.

121. Theodor Mommsen, ed., *Fragmenta Vaticana: Mosaicarum et Romanarum Legum Collatio* (Berlin, 1890).

122. Detlef Liebs, *Hermogenians Iuris Epitomae. Zum Stand der römischen Jurisprudenz im Zeitalter Diokletians* (Göttingen, 1964).

Talmud Yerushalmi (and later Bavli). Lieberman has argued that the Mishnah was composed and "published" orally throughout late antiquity until its integration in the Talmud.[123] The Tosefta as a variant but partly overlapping collection of tannaitic traditions may be viewed in the context of variant compilations of jurists' law in Roman society of the third to fifth centuries CE.

The literary development of Roman jurists' law reveals complex processes of transmission, excerption, recombination, supplementation, and reformulation that were conducted for several centuries by compilers, editors, and scribes. At a time when the notion of an "original" version of a text was unknown, late antique scholars created variant compilations of the legal traditions of their venerated predecessors that served their own purposes.[124] This phenomenon resulted in various collections of "classical" private law that were partly overlapping and partly different. Excerpts from already circulating collections were integrated into the large "encyclopaedic" compendia of the Talmud and *Digest* in early Byzantine times.

To properly understand the processes of transmitting, collecting, selecting, excerpting, recombining, ordering, reformulating, supplementing, harmonizing, and commenting upon earlier material, the development of the Mishnah (and of the Tosefta and Talmud Yerushalmi) has to be examined in the context of the development of Roman private law, from the pre-Justinian collections and compilations of legal traditions associated with the second-century "classical" jurists to the creation of Justinian's Digest. The pre-Justinian compilations arranged the collected material in certain thematic orders which would have served the specific purposes of those who created them. Different collections with partly shared material seem to have circulated side by side. While the Roman legal editors seem to have mostly relied on written material (which, except for Gaius's *Institutes*, is lost to us), they may have supplemented this material with oral traditions and student notes. The practice of *respondere*, as well as the discussion of legal cases in school settings, were oral practices based on jurists' rhetorical training.[125]

123. Saul Lieberman, *Hellenism in Jewish Palestine* (2nd ed. New York, 1962), 83–99.

124. Catherine Hezser, "The Mishnah and Ancient Book Production," in *The Mishnah in Contemporary Perspective*, vol. 1, ed. J. Neusner and A. J. Avery-Peck (Leiden and Boston, 2002), 175.

125. Clifford Ando, "Introduction: The Discovery of the Fact," in *The Discovery of the Fact,* ed. C. Ando and W. P. Sullivan (Ann Arbor, 2020), 5, points to aspects of legal argumentation learned during rhetorical training; his distinction between Roman and "Semitic" argumentation and reference to Roman jurisprudence as a "Western triumph" seems biased, however, and is not backed by a comparative analysis.

For a comparative study of the editorial procedures of rabbinic and Roman legal compilations, König's and Woolf's definition of encyclopaedism as a set of shared practices rather than a genre seems most suitable: the editors "made use of shared rhetorical and compilatory techniques to create knowledge-ordering works of different kinds, works that often claimed some kind of comprehensive and definitive status."[126] They refer to "an encyclopaedic spectrum, with different texts drawing on shared encyclopaedic markers to different degrees and for very different purposes."[127] The Mishnah would have been at a different stage of this spectrum than the later and much more comprehensive Talmuds. Similarly, the compilers of the *Fragmenta Vaticana* were at a different stage in comparison with the editors of the *Digest*. The "common ground" of the compilers was "a spectrum of shared techniques," such as "[n]ote-taking, excerption and recombination, cross-referencing," that is, scholastic methods that emerged in late antiquity.[128]

Although the ideal was comprehensiveness, variant legal compilations existed side by side (cf. the Mishnah and Tosefta, Talmud Yerushalmi and Bavli). König and Woolf point out that "the ordering work of the encyclopaedist is always in tension with the inherent miscellaneousness of the materials he or she must deal with."[129] This is a phenomenon that scholars of the Mishnah and other rabbinic works know well. Last but not least, the compilatory efforts of rabbis and jurists must be seen within the context of Roman and early Byzantine culture and society of the third to fifth centuries CE, when rabbis and jurists distinguished themselves from their "classical" predecessors whose legal knowledge they held in high esteem. The later scholars realized that the preservation of this knowledge required the use of scholastic methods, an area that came easier to them than casuistic jurisprudence itself.

4. Mutual Awareness?

In view of the many striking similarities in rabbis' and jurists' roles as legal advisers, their engagement in legal discussions and the teaching of students, the similar private law topics they dealt with, their use of similar forms of

126. Jason König and Greg Woolf, "Introduction," in *Encyclopaedism from Antiquity to the Renaissance*, ed. J. König and G. Woolf (Cambridge, 2013), 1.

127. König and Woolf, "Introduction."

128. König and Woolf, "Introduction." 6.

129. König and Woolf, "Introduction." 8.

transmission, and the creation of compilations in which the traditions of (first- and) second-century rabbis and jurists are preserved and considered "classical" by their late antique successors, it is quite obvious that at least from the late second century CE onwards rabbis in Roman Palaestina were aware of the activities of Roman jurists in their vicinity. From the Roman perspective, rabbinic legal advice in "minor" civil law matters seems to have been tolerated as part of the pluralistic legal landscape of the eastern provinces where local "indigenous" legal traditions continued in Roman imperial times. Perhaps Roman jurists and provincial officials were even aware of the amalgamation of Roman law by local adjudicators, a process which they probably would have welcomed.[130]

As pointed out above, the post-Hadrianic stance of *laissez-faire* in jurisprudential matters enabled legal scholars to function as legal advisors on the sole basis of their expert knowledge. Rabbis who lived in or near cities would have been familiar with Roman jurists' practice of *respondere* and offered a similar service to their fellow Jews, based on their own legal heritage of the Torah. While the Torah constituted an alternative to Roman law, it had to be developed and adapted to solve legal problems in a changed political, socio-economic, and cultural environment. Neusner has claimed that mishnaic rabbis developed their own "system" of *halakhah* in distinction from biblical law: "There is no system of civil laws and institutions in the priestly and holiness codes."[131] While one may argue with Neusner's use of the term "system," the innovative nature of the Mishnah is obvious. Inspired by biblical values and concerns, the Mishnah is a compilation of rabbinic "citizen's law" that was probably meant as an alternative to and in many ways imitates Roman *ius civile*. If Romans were aware of Jewish provincial assimilation to Roman legal practices, their tolerance of rabbinic legal autonomy in private law matters would be understandable. R. Yehudah ha-Nasi's purported closeness to Roman officials[132] and the rabbis' greater involvement in city life from the turn of the second to third century CE onwards[133] would have facilitated such an alignment. Similarities between rabbinic and Roman law are especially evident in the Talmud Yerushalmi,

130. The tannaitic story about Roman officials checking on R. Gamaliel's legal teaching (yBK 4.3, 4b par. Sifre Deut. 344) and praising it (exceptions notwithstanding) might reflect general awareness of rabbinic jurisdiction amongst Roman provincial authorities.

131. Neusner, *Evidence of the Mishnah*, 199.

132. Lapin, *Rabbis as Romans*, 23.

133. Hezser, *Social Structure*, 158–64.

which expands on the Mishnah's discussion of civil law issues and approximates jurists' law in its complexity.

The study of the Mishnah in the context of Roman law is still in its early stages, despite the important contributions made to this issue in the past. Areas that would merit more detailed and comprehensive studies are rabbinic and Roman legal education, the role of the dispute form in rabbinic *halakhah* and Roman jurisprudence, and the development of the Mishnah and Talmud Yerushalmi in the context of Roman legal compilations and scholastic practices of the second to fourth centuries CE.