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Rabbinic Literature and Roman-Byzantine Legal Compilations

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Abstract

It remains uncertain whether interest and influence or ignorance and indifference are the right words to describe the relationship between rabbinic literature and Roman-Byzantine legal compilations. The chapter surveys the mostly separate study of the Talmud Yerushalmi and Justinian's Corpus Juris Civilis and discusses scholarly theories about their compositional history. It argues that comparative (machine-assisted) analysis may be more likely to reveal structural and conceptual similarities rather than direct impact or mutual dependence. It proposes to ask questions for which sufficient evidence exists and to refocus on the analysis of the texts.

1. Introduction

The subject of this chapter poses a methodologically unique challenge. Innocent as it may first sound, the connective “and” which stands between “rabbinic literature” and “Roman-Byzantine legal compilations” insinuates a historically significant relationship. It remains uncertain, however, whether and to what extent the surviving evidence suggests that the creators of Palestinian rabbinic texts and those responsible

for the Roman-Byzantine legal compilations showed any interest in each other's affairs. At least from the Roman-Byzantine point of view, their relationship may best be characterized by ignorance and indifference.

This observation has two key consequences as far as the present [chapter](#) is concerned. Firstly, the study of rabbinic literature and of Roman-Byzantine legal compilations have largely been carried out in isolation from each other and on their own terms. Secondly, the comparative study of the two corpora is more likely to produce important insights into structural and conceptual analogies than suggesting direct impact and mutual dependence. I wish to acknowledge that scholars who approach the comparative challenge from the direction of rabbinic literature still dominantly focus on identifying evidence for the exchange of ideas and institutions via direct contacts between Judaism and Rome. This chapter will present the achievement of scholars aiming at generating historical insights. At the same time, it will point toward research avenues where comparison is used as a powerful tool for describing compositional, legal, and conceptual characteristics of texts.

For the purpose of this chapter, I will primarily focus on the Talmud Yerushalmi and Justinian's *Corpus Juris Civilis* ("Body of Civil Law"). I will provide a brief overview of available sources and study materials, theories about the compositional history of these texts, and their afterlife in reception history and contemporary scholarship. The reason for focusing on the Yerushalmi and Justinian's

Corpus is their thematic, geographic, and temporal proximity. They are legal texts which originated from the Eastern Roman Empire in late antiquity. Setting the parameters by thematic, geographic, and temporal proximity guarantees laboratory conditions for comparison. The more control variables we have for our intellectual experiments, the clearer the picture of similarities and differences becomes. Still, cultural contact needs to be established independently from textual evidence, and one should avoid the methodological fallacy of arguing for cultural contact on the basis of textual similarities.

I suggest reversing the discussion of the Yerushalmi and Justinian's Corpus for the following reasons. Justinian's Corpus has a stronger textual foundation than the Talmud Yerushalmi thanks to the exceptional manuscript evidence of the Codex Florentinus. The cultural context, reception history, compositional and conceptual structure of Justinian's Corpus probably feel more familiar to the reader.

Understanding how the Corpus works and what questions scholars have asked about Roman-Byzantine legal compilations provides a good baseline for approaching the Yerushalmi and Palestinian rabbinic legal literature. Research topics dealt with by scholars of rabbinic legal texts have generally been addressed a few decades earlier in Roman legal scholarship. Being aware of this time gap and the existence of similar investigations into Roman law may help to ask better questions, accelerate debates, and identify exciting new research avenues in rabbinic legal scholarship. As the

reader may also find information about scholarship on rabbinic literature in other chapters of this Handbook, more room is given here to discuss Justinian's Corpus.

2. The Components of Justinian's Corpus

Justinian's Corpus, compiled in the first half of the sixth century, consists of four major parts: (1) the *Codex Constitutionum* with imperial ordinances, (2) the *Digesta* or *Pandectae* containing civil law compiled from the juristic works, (3) the *Institutiones*, providing an outline of legal institutions, and (4) the *Novellae*, a collection of new *ad hoc* legislation. The publication of these legal materials and the corresponding legal educational reform was part of Justinian's efforts to restore Rome's ancient imperial glory.

Justinian's *Institutes* were published together with the *Codex* and the *Digest* in 529 C.E. The text follows a multilevel thematic structure initiated by the jurist Gaius in his own *Institutes* (ca. 165 C.E.) and quotes earlier sources to illustrate the historical development of rules culminating in what is presented as the most refined version of Justinian's law. The so-called "institutional framework" divides Roman law into three areas: the law of persons, the law of things, and the law of actions. In an imperial pronouncement in the *Constitutio Imperatoria*, Justinian explains that the clear hierarchical structure of the *Institutes* was designed to give law students "an elementary framework, a cradle of the law, not based on obscure old stories" (Const. Imp. 3 in Birks and McLeod 1987: 33).

Justinian's *Codex* sought to replace previous sources of imperial law. The *Codex Gregorianus* from the late third century C.E. collected imperial legislation from well over a century, while the *Codex Hermogenianus* included laws from the period of 293 to 294 C.E., when the eastern and western parts of the empire were both formally ruled by two coemperors according to emperor Diocletian's design. These two codices were both unofficial collections of imperial legislation. The *Codex Theodosianus* was commissioned by the eastern Roman emperor Theodosius II and his western coemperor Valentinian III in 429 C.E. and published in 438 C.E. Theodor Mommsen's edition (1905) of the 16-book long Codex reconstructed books 1–5 according to the *Bevuarium Alarici*, published by the Visigothic king Alaric II in 506 C.E., and relied on the witness of the Turin manuscript (Ms. Turin A. II. 2) for the remaining eleven books. Collections of essays edited by Jill Harries and Ian Wood (2010) and Detlef [Liebs \(2002\)](#) as well as monographs by John F. [Matthews \(2000\)](#) and Boudewijn [Sirks \(2007\)](#) reignited interest in the *Codex Theodosianus* as a source for writing the history of the divided empire. It remained the foundation of legal development in the West even after the time of Justinian I.

As far as the empire's eastern part is concerned, Justinian's Code successfully wiped out the *Codex Theodosianus*. The first version of Justinian's Code was published in 529 C.E. after the emperor's editors sifted through previous codices to remove rules no longer in force. Only a small fragment (P. Oxy. XV 1814) testifies the

existence of this first version which was republished in twelve books in a new version in 534 C.E., a year after Justinian's *Digest* and *Institutes* ([Corcoran 2008](#)). The publication of the original text of the *Codex* with Fred H. Blume's English translation, edited by Bruce W. Frier (2016), and the publication of David J. D. Miller's annotated English translation of the *Novellae*, edited by Peter Sarris (2018), are landmark scholarly achievements. They have given a new momentum to research focusing on Justinian's Corpus and its historical context.

The *Digest*'s significance still overshadows other components of Justinian's Corpus. It includes more than nine thousand thematically arranged quotations of jurists' law with over a million words. It documents a thousand years of Roman legal development in civil law and provides the foundation of current legal systems in the Western world. It was published together with the *Institutes* in 533 C.E., only three years after its creation had been commissioned by Justinian in the imperial pronouncement *Deo auctore*.

The single most important textual evidence for the *Digest* is the *Codex Florentinus*, a very early copy created only a couple of decades after the official publication of the text in 533 C.E. The manuscript's extraordinary antiquity gave the *Florentinus* almost unquestionable authority in Byzantine and medieval times. As Charles M. Radding and Antonio Ciaralli have put it, "all manuscripts in the medieval university tradition thus became *codices descripti*—copies of a still existing

manuscript—making their inclusion in the edition [of Mommsen] unnecessary” ([Radding and Ciaralli 2007](#): 173) The medieval philological tradition approached the text of the manuscript with measured philological criticism and created minor variant readings in the so-called vulgate (“common”) versions of Justinian’s Corpus. Theodor Mommsen considered and mostly rejected these variant readings in favor of *Florentinus*. His edition acknowledged only those textual emendations of medieval scholars that could be confirmed by early textual evidence. Even though some argue that more credit is due to the medieval philological engagement with Justinian’s Corpus ([Radding and Ciaralli 2007](#): 209), the *Codex Florentinus* as it is basically reproduced in Mommsen’s edition (1872–95) remains *the* textual witness of the *Digest* which constitutes the basis of the English translation edited by Alan [Watson \(1998\)](#).

3. Scholarship on Justinian’s Codex

The Justinianic legal corpus gradually sank into oblivion after the death of emperor Justinian in 565 C.E. In the Greek-speaking Byzantine Empire, the complex and voluminous text of the *Digest* proved to be inaccessible to the Byzantine jurists, who were more interested in legal practice than in legal science. Justinian’s Corpus was abridged to serve the practical needs of the law schools and courts. Emperor Leo III enacted a summary of Justinian’s codification in the *Ecloga Legum* (“Select Passages”) in 741 C.E. In the late ninth and early tenth century, Justinian’s Corpus

was adapted, updated and abridged in the practical compilations known as the *Eisagoge* (“Introduction”) and its revised version, the *Procheiros Nomos* (“Useful Law”) ([Schminck 1986](#) and [Bochove 1996](#)), which are available in English in the translation of Edwin [Freshfield \(1926 and 1928\)](#).

The most important document of the period is the *Basilika*, which was initiated by emperor Basil I and completed by his son Leo the Wise in 890 C.E. The *Basilika* is a revised and reordered Greek paraphrase of Justinian’s Corpus in sixty books, which omits obsolete laws and presents the material in a supposedly more orderly fashion. It was published in seventeen volumes by the Groningen School of Byzantine Law under Herman Scheltema’s supervision ([Scheltema et al., 1955–1998](#)). The *Basilika* was further abridged, for example, in the *Hexabiblos* (“Six books”, created in 1345 C.E.), which was instrumental in preserving some form of Roman law in the Greek-speaking world (Lokin and Stolte 2011 and [Stolte 2015](#)).

Contrary to the *Institutes*, the *Codex* and the *Novellae* which, according to Radding, “had been in continuous use throughout the early Middle Ages” ([Radding 1988](#): 8), the *Digest* was a difficult source on account of its breadth and complexity, which was studied to a more limited extent. As Wolfgang Müller notes, the *Digest* “completely disappeared in the Latin West. After Pope Gregory the Great last cited it in a letter of 603, the sources remained silent for almost half a millennium” ([Müller 1990](#): 1). The revival of the study of Roman law in the eleventh century has been

customarily related to the “rediscovery” of the *Digest* in Pisa ([Conrat 1891](#) and [Kantorowicz 1938](#)). The revival of Roman law is usually associated with the late eleventh-century Bologna-based jurist Irnerius, who developed a curriculum of Roman law independent from the study of canon law and Lombard customary law ([Radding 1988](#): 159–71 and [Ascheri 2013](#): 20–8). The “four doctors” of Bologna, Bulgarus, Martinus Gosia, Jacobus de Boragine, and Hugo de Porta Ravennate, followed Irnerius’ glossing technique. The glossators’ work, which is curiously similar in both format and style to those used by the Jewish commentator Rashi (1040–1105 C.E.) and the Tosafists of the twelfth and eleventh centuries for rabbinic law, were preserved in the monumental collection completed by Accursius in 1230 C.E. His *Glossa Ordinaria* had been preserved on the margins of manuscript editions of Justinianic texts before being published in printed format by Denis Godefroy in 1583, coining and immortalizing the term *Corpus Juris Civilis*.

Another group of Roman legal scholars in the Italian peninsula known as the Commentators became dominant in the thirteenth to fifteenth centuries. Unlike the Glossators, who worked according to strict exegetical principles and concentrated on the sources of Roman law, the Commentators – such as Bartolus (1314–57) and Baldus (1327–1400) – sought to adapt Roman law to contemporary circumstances ([Stein 1999](#): 71–4). Franz Wieacker asserts that:

“the Commentators were able to transform the law of Justinian into the *ius commune*, a common law for the whole of Europe, and to apply to the rich variety of the non-Roman laws in Europe their ways of thinking about law”.

([Wieacker 1995](#): 57)

The quotations from Roman jurists in the *Digest* were first exposed to text-critical scrutiny by the legal humanists of the sixteenth century. They wanted to reconstruct the “true” and “eloquent” original text by either relying on “conjecture” ([Stein 1999](#): 77) or consulting the wording of related laws in Justinian’s *Codex*. The humanist intervention had a contradictory impact on the study of Justinianic texts. Some sixteenth-century scholars such as François Duaren, François Connan, or Hugues Doneau set out to develop civil law as a science in the spirit of Cicero’s call for a “civil law transformed into science” (Cicero, *De Oratore* 1.41.185–42.191 and [Moatti 2015](#): 247–55). Others like Alberico Gentili dismissed the humanist ideals and sought to accommodate Roman law to local customary law in the spirit of the Commentators, Bartolus and Baldus. In most parts of Europe, the Bartolist approach, which emphasized the practical application of the *ius commune* in local legal practice, became dominant. From the Bartolist powerhouses of Italy and France, the center of legal learning moved to the Dutch provinces, which were gradually gaining independence ([Stein 1999](#): 99–101).

Natural law thinkers of the seventeenth century envisioned a geometrical order which they wished to rediscover in (or impose upon) Justinian's disorderly *Corpus*. The most notable efforts are the *Corpus iuris reconcinnatum* ("The Repaired Legal Corpus") by Gottfried Wilhelm Leibniz ([Armgardt 2014](#)) and the *Pandectae Justinianae in Novum Ordinem Digestae* ("Justinian's Encyclopaedia Arranged in a New Order") by Joseph Pothier (1748–1752). Codes from the eighteenth century were based on the geometrical ideals of Leibniz and Pothier and occasionally referred to Roman sources as they sought to unify diverse local laws, remove obsolete rules, and settle disputed legal matters. Pothier's work is directly related to the French *Code Civil* (1804), which subsequently motivated the project of a unified code for all German-speaking lands.

This latter project was advocated by Karl-Friedrich von Savigny in his 1814 pamphlet "Of the Vocation of Our Age for Legislation and Jurisprudence" ([Savigny 1975](#)), which is the beginning of the modern era of Roman legal scholarship. His *System of Modern Roman Law* is a text-critical analysis of medieval witnesses to provide a solid foundation for restoring the law of the classical Roman jurists (Savigny 1979). The discovery of Gaius's *Institutes* by Barthold Niebuhr in Verona in 1816 strengthened Savigny's and other scholars' text-critical efforts, which reached a climax toward the end of the nineteenth century. It was at this time that Theodor Mommsen published his edition of Justinian's *Corpus*, and Otto Lenel reconstructed

the *Praetor's Edict* and the sources cited in the *Digest* ([Lenel 1883](#) and 1889). The texts published by Mommsen and Lenel have remained standard editions in Roman legal scholarship until today. Savigny's efforts in restoring classical law thrived in the nineteenth-century German Pandect science with the landmark publication being Rudolf von Jhering's *The Spirit of Roman Law* (1852–58). The Pandectists had an enormous impact on the German Civil Code, which came into force in 1900 and marked the end of the most influential period of Roman legal scholarship.

In most European countries, Roman law with its envisioned geometrical system has retained its status as the entry to legal learning. The study of Roman law has lost its immediate practical value, however, and become a mere academic discipline. In the first half of the twentieth century, text-critical interest was dominant. Justinian's Corpus was exposed to meticulous inquiry by scholars who wished to purify the sources of the classical jurists from what they thought to be nonclassical Byzantine interpolations. Since the criteria for identifying nonclassical elements in the classical jurists' texts by either style or legal doctrine proved to be unverifiable, the so-called "hunt for interpolations" ([Lenel 1925](#): 17–38) eventually lost its momentum.

While Roman law is still a core subject at the universities of Oxford and Cambridge, scholars from English-speaking countries mostly engage in its study on the basis of a historical or classicist background. Notable exceptions are Scotland, South Africa, and the American state of Louisiana, where law is primarily based on

the Roman tradition. Common law scholars occasionally use Roman sources to stimulate legislative change. Peter Birks wished to provide English private law with a more orderly framework partly inspired by Roman law ([Birks 2000](#)). More recently, Neal Wiley investigated how Justinianic sources motivated Supreme Court decisions in the United States ([Wiley 2016](#)). In the civilian tradition, some envision the European Union as a possible central force for a unified European legislation based on the Roman legal tradition. An important contemporary voice in this regard is Reinhard Zimmermann, who promotes this pan-European direction ([Zimmermann 1996](#) and 2001).

4. Sources and Scholarship on the Talmud Yerushalmi

Unlike the leading role Justinian's Corpus played in the history of the Western legal tradition, the Talmud Yerushalmi (= Palestinian Talmud) has been side-lined in favor of the Talmud Bavli (= Babylonian Talmud) in the Jewish legal tradition since the Middle Ages. The Talmud Yerushalmi has been used primarily to provide additional evidence and parallels for the study of the Talmud Bavli. North African Talmudic scholars of the eleventh century such as Rabbi Hananel of Kairouan and Alfasi of Fez as well as the twelfth-century Moses Maimonides used the Yerushalmi for the explanation of the Bavli's text. Additionally, Talmudic scholars from the twelfth century onward, known collectively as the Tosafists, produced explanations to the Bavli's text and drew support for their arguments from the Yerushalmi ([Urbach 1955](#):

543) in a manner similar to that of the medieval Glossators of Justinian’s Corpus. It was not until the thirteenth century that one of the Yerushalmi’s tractates (tractate Sheqalim) received a commentary of its own, arguably by Rabbi Meshullam in Normandy ([Stemberger 2011](#): 187).

The first printed edition of the Yerushalmi was produced in Venice in 1523–1524 by Daniel Bomberg, who primarily used the only complete manuscript of the Yerushalmi, MS Leiden, which is dated to 1289 ([Sussman 2001](#): ix-x and xiv-xvi). With the exception of tractate Berakhot (“Blessings”), tractates in the first order of the Mishnah (Zeraim or “Seeds”) discuss laws about agricultural activity in the Land of Israel. These tractates did not receive commentaries in the Bavli, presumably for the reason that they had no relevance for the Babylonian Jewish community living outside of the Land of Israel. Some talmudic tractates, therefore, only appear in the Yerushalmi, which attracted special attention from talmudic scholars of the mid-sixteenth century. The first comprehensive commentary was produced by the eighteenth-century scholar Rabbi Moshe Margolies, whose *Penei Moshe* (“The Face of Moses”) is one of the two most important traditional commentaries on the Yerushalmi. The other is David Fränkel’s *Qorban ha-‘Eidah* (“Community Sacrifice”), also from the eighteenth century. With few exceptions, traditional Talmud scholarship has remained focused on the Bavli and uses the Yerushalmi as a supplementary resource only.

Günter Stemberger lists modern commentaries on the Yerushalmi produced by scholars working according to secular academic standards ([Stemberger 2011](#): 188). Examples are Israel Lewy's commentary on the first six chapters of tractate Bava Qamma (1895–1914) and Saul Lieberman's *Ha-Yerushalmi ki-fshuto* ("The Yerushalmi in its Literal Meaning", [Lieberman and Katz 2008](#)). In a brief monograph with the title *Talmud shel Qisrin* ("The Talmud of Caesarea"), Lieberman suggests that while the majority of the Yerushalmi's tractates were produced in Tiberias before 429 C.E., the tractates of order Neziqin ("Damages") were produced by rabbis in Caesarea earlier than the rest of the tractates considered to originate from Tiberias ([Lieberman 1931](#)). The legal context of the Rabbinic movement in Roman Palestine was the subject of the work by Jean Juster (1914) in French and the two-volume work by Alfredo Mordechai Rabello (1987) in Italian with a shorter version produced for the *Aufstieg und Niedergang der römischen Welt* series (1980). The collection of Roman imperial laws concerning Jews by Amnon Linder (1987) in Latin and English is another excellent source to consult.

As academic Talmud scholarship has dramatically expanded in the last few decades, scholars have started to look at less chartered territories. Palestinian sources, which were historically overshadowed by the Bavli, have received more attention, and they are now studied in their own right. Ishay [Rosen-Zvi \(2008\)](#) and Amram [Tropper \(2010\)](#) provide an overview of the explosion of recent research concentrating on the

Mishnah. To a lesser extent, the Yerushalmi has also received more attention than before as the main literary source on Jews and Judaism in Roman-Byzantine Palestine in late antiquity. The Yerushalmi's text was the subject of two major research projects: the first one, conducted in Berlin under the leadership of Peter Schäfer and Hans-Jürgen Becker, produced a synoptic edition of the major text witnesses ([Schäfer and Becker 1991–2001](#)); the second project, conducted in Jerusalem by Yaakov Sussman, led to the publication of a critical edition of the MS Leiden text ([Sussman 2001](#)). Heinrich Guggenheimer's English translation ([2000–2012](#)) sought to replace the maligned translation completed by Jacob [Neusner \(1982–1994\)](#). The Yerushalmi's German translation and commentary, initiated by the late Martin Hengel in 1975 ([Avemarie et al., 1975–2021](#)), remains the only translation in any modern language which was created according to the highest academic standards, taking manuscript variants into account.

Gerd Wewers's philological and theological account of the Bavot tractates of the Yerushalmi provides a systematic comparison between these tractates and the rest of the *Yerushalmi* ([Wewers 1984](#)). Based on [Liebermann \(1931\)](#) and [Wewers \(1984\)](#), [Hezser \(1993\)](#) examines the *Form, Function, and Historical Significance of the Rabbinic Story in Yerushalmi Neziqin*, providing the first historical-critical examination of the important legal form of the case story in these allegedly earliest tractates of the Yerushalmi. The three-volume collection of articles edited by Peter

Schäfer and Catherine Hezser, which was published under the title *The Talmud Yerushalmi and Graeco-Roman Culture* (1998–2002), is possibly the most comprehensive collection of scholarship on the Yerushalmi within its Graeco-Roman cultural environment produced in recent decades. It contains the first systematic comparison between the Talmud and Roman law codes, with particular focus on Justinian’s Digest, taking the literary forms, editing processes, and social contexts of rabbis’ and jurists’ rendering of legal advice into account ([Hezser 1998](#): 581–641). Catherine Hezser also wrote about Rabbinic literacy (2001) and the social structure from which it emerged (1997), and she edited a volume with contributions about Rabbinic law in its Roman and Near Eastern context (2003). In recent years, Kartell Berthelot has conducted a European Research Council project on *Jerusalem and Rome*, which included the interdisciplinary study of the perception of Roman law by Jews and other inhabitants of the Roman Empire ([Berthelot et al., 2021](#)).

While the study of the Bavli has remained the main focus in rabbinic scholarship in Israel and is nowadays examined within its Persian Sasanian context, the study of the Yerushalmi is crucial for our knowledge of Jewish and rabbinic culture and society in the Land of Israel in late antiquity. Studies on the Bavli’s text nowadays examine the parallels in the Yerushalmi and evaluate the differences between Palestinian and Babylonian rabbinic society. Among the many monographs accounting for differences between the Yerushalmi and the Bavli, between the Jewish

community in Roman Palestine and Sassanid Persia, Christine Hayes' *Between the Babylonian and Palestinian Talmuds* (1997) and Richard Kalmin's *Jewish Babylonia between Persia and Roman Palestine* (2006) stand out.

5. The Reconstructed Compositional History of the *Digest*

The speed and magnitude of the work undertaken by the *Digest's* editorial committee, appointed by Emperor Justinian and headed by the jurist Tribonian, almost stands beyond belief. According to the imperial pronouncements in Latin and Greek, the *Constitutio Tanta* and the *Dedoken*, the committee revised “nearly two thousand books and nearly three million lines” (Const. Tant. 1, [Watson 1998](#): xxxvii). One quotation follows another, carefully truncated to subject and arranged in a designed order. The effort is staggering which would be quite impossible even in our era with the available power of modern technology.

A key area of scholarly interest is the supposed intervention of the compilers of the *Digest* in the quoted sources ([Buckland 1924](#): 343–64; [Wieacker 1988](#): 154–82). It was assumed that the hand of the compilers could be detected beyond the minimal evidence of section titles, the order of the sources, and references. The investigation of the quoted materials for editorial interventions was encouraged by the instruction to the editorial committee in the imperial pronouncement *Deo auctore* by which Justinian commissioned the creation of the *Digest* in 529 C.E.:

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

(Deo auctore 7, [Watson 1998](#): xxxiv-xxxv)

The era of “interpolation hunting” was followed by strong opposition ([Lenel 1925](#)) before a cautious conservative approach has become dominant which holds that editorial intervention was mostly stylistic, and the compilers did not make substantive changes ([Kaser 1972](#), [Johnston 1989](#)). Sources which predate the *Digest*’s wording can be used as independent witnesses to these cases, but such cases and sources are scarce. One notable example is the *Collatio Legum Mosaicarum et Romanarum* (“*Comparison of Mosaic and Roman Law*”) by the hand of a presumably “Christian jurist in Italy in the early 390s” who was versed in both Roman and biblical legal

cultures ([Frakes 2011](#): 149). Some scholars of the *Digest* suggest that the editorial efforts concentrated on the methodical processing of a vast library instead of meddling with the sources (Hofmann 1900; [Pugsley 2006](#)).

By a leap from text to history, the *Digest*'s literary design has been credited to Tribonian who supposedly crafted the layout of thematic sections based on the *Codex* and Emperor Julian's *Perpetual Edict* ([Tuori 2007](#): 135–179). Friedrich Bluhme's classic *Massentheorie* suggested that Tribonian created a method by which the source masses and their constituent groups had been systematically read, truncated, and arranged in thematic sections ([Bluhme 1820](#), [Honoré 2006](#)). According to this reconstruction, the two sides of the design, that is, the thematic structure and the allocated juristic works in the source masses, "merely" had to be put together, allowing a speedy and reliable processing of the sources which culminated in the *Digest*'s 9,132 quoted fragments. The model advocated by Bluhme and Honoré is not entirely convincing. The *Digest* shows some structural affinity with the 45 titles of the *Praetor's Edict* ([Lenel 1883](#): xvi-xxvi) and the 12 books of the revised second version of Justinian's *Codex*, but the similarities are not comprehensive enough to account for the *Digest*'s thematic arrangement.

Tribonian's design is generally related to the *Law of Citations* by Emperor Valentinian III, who wished to achieve a reliable and transparent operation of the law. It was issued in 426 C.E. and is preserved in the *Codex Theodosianus* (Cod. Theod.

1.4.3; see [Kaser 1967](#): 230–231 and [Bretone 1992](#): 243–244). The *Law of Citations* authorized the use of works by the second- and third-century jurists Papinian, Paul, Gaius, Ulpian, and Modestinus, and it provided a mechanistic calculation according to authority in case their opinions clashed on a particular matter. The restrictive and inflexible nature of the mechanism is thought to have been improved by Tribonian's committee members, who were inclusive in their use of sources and thorough in their presentation of the fragments. According to Bluhme's ground-breaking theory about Tribonian's editorial team, three separate committees worked on their own to excerpt and truncate sources according to preconceived thematic subjects ([Bluhme 1820](#)). Eventually, the sections produced by the subcommittees were put together to create the thematic sections.

David Pugsley has been a unique voice among scholars interested in reconstructing the historical development of the *Digest* ([Pugsley 1995–2000](#)). Based on a reevaluation of the literary and contextual evidence, he has suggested that Tribonian rediscovered Emperor Constantine's law collection in the imperial library of Constantinople and convinced Justinian that the priceless collection should be made public in some form. As an emperor of great ambitions, Justinian commissioned the creation of the *Digest* and a corresponding reform of legal education. Pugsley suggests that the law schools had been using annotated commentaries by the jurists Ulpian on the works by Sabinus and on the *Praetor's Edict* to present the positions of

the five jurists prioritized by the *Law of Citations*. The law schools presumably created collections of fragments arranged under thematic titles from these annotated commentaries. The “collection of inscription-less fragments” ([Pugsley 2006](#): 196) was a convenient but generally disorganized teaching material. However, it provided a thematic design for the *Digest* which had already been familiar to the law schools.

The description of the *Digest*'s text needs to be clearly distinguished from the scholarly accounts about the *Digest*'s compositional history. The former is a fact, the latter is well-educated speculation. When I now turn to the Talmud Yerushalmi, which presents a more complicated literary profile with virtually no contextual evidence about its history, the literary description and historical reconstruction of the Justinianic sources will offer a valuable reference point. Keeping in mind that the chasm between text and history is virtually unbridgeable, the *Digest*'s reconstructed compositional history can be used as an orientation point, according to which the literary evidence of the Yerushalmi is examined.

6. The Hypothetical Compositional History of the Talmud Yerushalmi

Drawing conclusions from the text to its possible historical development is even more complicated for the Talmud Yerushalmi than for Justinian's *Institutes* and *Digest*. We have no internal or external evidence about the historical circumstances, the identity of the creators of the text, and the processes that led to its composition. Rav Sherira

Gaon's famous *Epistle* from tenth-century Babylonia ([Lewin 1921](#) and [Schlüter 1993](#)) speculates about the authors and historical circumstances of rabbinic works from a distance of several centuries after the supposed creation of the documents. Sherira relies on the careful examination of the literary evidence and provides no indication that he has access to contextual historical information. Sherira is virtually in the same position as modern-day scholars, who try to distill historical knowledge from internal literary evidence.

The Yerushalmi's meticulous quotation technique projects a hierarchy of sources. The quoting formulas introduce quotations from the Hebrew Bible, distinguish between tannaitic teachings from inside (*mishnayot*) and "outside" of the Mishnah (*baraitot*) and mark amoraic teachings after the Mishnah's text was closed (*memrot*). The material evidence of the Dead Sea Scrolls, the Cairo Genizah fragments, and medieval manuscripts support the idea that the Hebrew Bible and the Mishnah have a textual history independent from the *Yerushalmi* ([Tov 2001](#): 21–154). Even though the Yerushalmi editors may not have had access to written copies of these earlier texts, the literary characteristics of the Yerushalmi suggest that the Hebrew Bible and the Mishnah were available to them as independent source texts.

The Yerushalmi applies hermeneutical techniques to the text of the Mishnah which are based on the techniques developed for the interpretation of the biblical text ([Samely 1991](#) and 2002). The Yerushalmi adopts the Mishnah's method and applies it

to the text of the Mishnah itself. The *Yerushalmi* approaches the Mishnah in segmented parts and expects an intimate acquaintance with the Mishnah comparable only to the Bible. The reader is expected to identify what *is* and what is *not* from the Mishnah. On the one hand, the *Yerushalmi* assumes that readers recognize where the mishnaic quotations begin and end. On the other hand, the *Yerushalmi* assumes that readers recognize whether the quotation comes from “outside” the Mishnah text, even though the quoted tannaitic authority may regularly appear in the Mishnah.

It is debated in what form *baraitot* (as well as *memrot*) were available to the editors of the *Yerushalmi* and how they used these sources for the composition of the text. The Tosefta, a collection of tannaitic teachings arranged in the order of the Mishnah, and the tannaitic commentaries to the biblical books of Exodus, Leviticus, Numbers, and Deuteronomy include many of the *baraitot* quoted in the *Yerushalmi*. In a similar fashion, the biblical commentaries from the amoraic period provide parallels to many of the *Yerushalmi*’s *memrot*. In the absence of material evidence (manuscripts or fragments) and literary references, it seems unlikely that *baraitot* and *memrot* were preserved and transmitted in edited collections. Unlike Otto Lenel, who tried to reconstruct lost juristic works in his [Paligenesia \(1889\)](#) according to the quotations preserved in the *Digest*, Michael Higger’s modern collection of *baraita* ([Higger 1938–1948](#)) is not the reconstruction of a lost literary document. Higger does

not make historical claims and merely presents a useful study tool ([Higger 1942](#): 93–8).

In David Weiss Halivni's view, *baraitot* and *memrot* are genuine records of legal rulings which were memorized and transmitted without explanations. In a historical reconstruction of the Talmud Bavli's editorial process, Halivni posits that the anonymous redactors composed elaborate discursive passages in order to justify the snippets of apodictic rules they had received from previous generations ([Halivni 1986](#): 76–92 and 2013: 145–54). He uses the term *stammaim* to denote the anonymous compilers of the Talmud and associates the anonymous voice of the Bavli's text with the Bavli's editors ([Halivni 2013](#): 3–24). The term *stammaim* has misleading connotations which blur the difference between the Talmud's anonymous voice (*stam*) and the unidentified editors responsible for the Talmud's compilation (*stammaim*). For dating purposes, the term relates to postamoraic times. Halivni seems to merge the historical process of editing the Talmud with the literary phenomenon of anonymous comments on and harmonization of amoraic traditions.

Daniel Boyarin and Shamma Friedman supplement Halivni's understanding by attributing greater creativity to the anonymous editors of the Bavli. Like Halivni, they also associate the editors with the quoting-narrating voice ([Boyarin 2007](#): 339–42 and [Friedman 2010](#): 58). There seems to be a certain obsession with dating which entices scholars to make the leap from the perceived literary persona to an enigmatic group of

historical people. When Robert Brody contests the (late) dating of the historical composition of the *Bavli*, he notes that “it is often necessary to distinguish between the nucleus of the *memra* and the anonymous layer or comment referring to it” ([Brody 2009](#): 227). As Moulie Vidas adds, “the different styles of presentation—Aramaic vs. Hebrew, brief vs. verbose, anonymous vs. attributed—[are not] indicators of different periods but as different conventions for transmitting material with different functions” ([Vidas 2014](#): 47). Brody correctly dissociates literary features from the historical creators of the text, but similarly to his fellow Talmud scholars, he fails to uproot the mistaken idea that text can be translated into history without the external evidence about the historical context. Treating the editorial process with Hans-Jürgen Becker as an open-ended one may sound underwhelming, but it is the one which drives our attention from history back to the text itself ([Becker 1999](#)).

Scholars like Yaakov Sussman and Christine Hayes offer a different strategy to answer the enigma of the compositional history of the Talmuds, which avoids the problem of identifying historical “authors”. According to them, the Yerushalmi and Bavli should be seen as snapshots of a literary continuum of a cumulative commentary enterprise which was shaping over many generations and centuries. According to this explanation, the fact that the Yerushalmi has a thinner editorial layer and a less worked-out structure compared to the Bavli is simply due to the fact that the Yerushalmi preserves an earlier phase in the crystallization of Talmud. Hayes, who

takes Yaakov [Sussman \(1990: 96–105\)](#) as the point of departure for her own explanation, explains the different nature of the two Talmuds by reference to “the enormous time lag between the completion of the two works and the intense and vigorous development of the Bavli that occurred particularly in the later part of the period (perhaps into the seventh century)” ([Hayes 1997: 21](#)). Even though the Hayes-Sussman theory is compelling in its elegant simplicity, it refrains from describing the Yerushalmi as:

“a genuine ‘talmud’ (study) of the Mishnah [which] is composed primarily of comments, glosses, and explanations of the Mishnah—around which it revolves. ... For the Bavli, on the other hand, the Mishnah is but a point of departure for lengthy and involved debates and dialectical discussions”.

([Hayes 1997: 21](#))

What Hayes writes about the Bavli also applies to the Yerushalmi. Pace Sussman and Hayes, the difference is more to do with the literary surface than with the nature of the enterprise.

Following the lead of Jacob Neusner, scholars in the 1970s abandoned the idea of writing biographies of rabbinic authorities as they had become disenchanted with the historical reliability of the stories about their lives scattered in rabbinic literature. ([Green 1978: 77–96](#)). Scholars in the 1980s and 1990s abandoned the idea of

reconstructing the intellectual profile of rabbinic authorities as they had become disenchanted with the reliability of attributions of quoting formulas ([Kraemer 1989](#), [Stern 1994](#)). It is probably time to give up on the possibility that the compositional history of rabbinic texts could be written based on the literary evidence of the texts themselves.

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

7. Conclusions

Scholars of Roman and rabbinic legal texts used to try to unlock their unfamiliar structure and ascertain the reliability of quotations in their primary sources. Due to the lack of evidence, this type of investigation has now been largely abandoned.

Romanists have come to the conclusion that the “interpolation hunting” cannot reconstruct the “original” and “genuine” voice of the jurists. The hunt ended in the common opinion that in most cases there is no reason to doubt that the *Digest*’s quotations are reliable. Most scholars assume that the intervention of the compilers was minimal ([Johnston 1989](#)). Due to a lack of external evidence, incoherence in style and logic could not be translated into evidence about the interpolating activity of the compilers. As Wolfgang Kaiser writes, “clarity about the alterations and omissions made by the compilers can be achieved only in those cases in which the same text has not only survived in the Digest but is also attested elsewhere” ([Kaiser 2015](#): 128). In rabbinic scholarship, textual criticism has reached a similar conclusion. The variations in wording and contradictory attributions of the same quotations at distinct parts of the rabbinic corpus have been acknowledged to be “commonplace ... [and] often insignificant” ([Vidas 2014](#): 65). Such variations in wording and attribution generally do not affect the logic of the text passages where they appear, the law and its justification effectively stay the same.

Resources for the comparison between rabbinic literature and Roman-Byzantine legal compilations are abundant. An excellent one-stop resource is the “Judaism and Rome” website which presents the achievements of a European Research Council-funded project on “Rome’s political and religious challenge to Israel and its impact on Judaism” led by Katell Berthelot (also see the book publication [Berthelot 2021](#)). This is probably the pinnacle of traditional historical comparative scholarship in this field which will provide ammunition for scholars interested in identifying cultural exchange and historical influence between Judaism and Rome.

This traditional investigation will continue as it should, but it will hopefully engage more critically with its own historical assumptions. I first voiced my skepticism about a still widespread obsession with historical influence at a conference held in Cambridge on the topic of “Talmud and Christianity” in 2016 which struck a chord with some colleagues but upset more. I was not convinced that we ask the right questions, when we hurry to talk about history before we understand how the texts actually work. We have computer-assisted methods at our disposal, which allow us to analyze texts at a superhuman scale. These so-called digital humanities methods are based on the idea of “big data”. They use machine-assisted statistical analysis of entire corpora known as “natural language processing”. They allow researchers to gather quantifiable information about structural and linguistic patterns ([Ribary and](#)

[McGillivray 2020](#)). These methods could be used to refocus on the evidence we actually have, namely, the *texts*. They could supercharge a much-needed structuralist turn in the comparative study of rabbinic literature and Roman-Byzantine legal compilations. We could eventually start asking the right questions – those we have the evidence to answer.

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