LEIB MOSCOVITZ

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Texts and Studies in Ancient Judaism
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From Casuistics to Conceptualization

Mohr Siebeck

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To Mom and Dad

Preface

Most legal rulings in the earlier strata of rabbinic literature, like the rulings in other ancient legal systems, are formulated as case law, and deal with mundane, physical objects – cows, doors, spoons, and the like. With the passage of time, however, we are witness to the increasing use of explicit concepts and general principles in rabbinic literature. Many of these concepts and principles are abstract, and address philosophical or quasi-philosophical issues such as the legal status of change, causation, and potentiality. Indeed, explicit legal conceptualization is one of the principal pillars, qualitatively if not quantitatively, on which the edifice of later rabbinic law rests.

The development of rabbinic legal conceptualization has not been systematically studied to date, although it is widely acknowledged to be an important desideratum for diverse aspects of rabbinic scholarship. The present study seeks to fill this void by systematically surveying and illustrating the development of all major aspects of abstraction and conceptualization in rabbinic legal thought – literary, historical, or conceptual – beginning with the earliest and concluding with the latest and most sophisticated forms of conceptualization.

Each chapter of the book addresses a particular conceptual phenomenon, beginning with its earliest manifestations and concluding with its latest manifestations. The theoretical and methodological underpinnings of the study of legal conceptualization in general and this study in particular are discussed at some length in the first chapter, while the final chapter provides a linear, summary, chronological description of the development of rabbinic conceptualization, tying together the loose ends left by the previous chapters' essentially thematic approach to the study of rabbinic conceptualization. This chapter also addresses some of the broader aspects and implications of rabbinic conceptualization which are not discussed in the previous chapters.

It is impossible to meaningfully analyze rabbinic conceptualization without illustrating the various aspects of this phenomenon "hands on." Accordingly, we discuss examples of almost all of the conceptual phenomena discussed here. To make these examples as comprehensible as possible, I have included parenthetical explanatory material where necessary. (Such material has been included in ordinary parentheses rather

than square brackets, which are used for transliterations of Hebrew and Aramaic terms instead.) Philological notes on these examples – generally, comments on variant readings – have been limited to the barest minimum, although such variants have obviously been scrutinized in the course of preparing this study.

I am extremely grateful to Professors Robert Brody and Jeffrey Rubenstein for reading and critically commenting on an earlier draft of this entire volume, and to Professors Shamma Friedman, Moshe Koppel, and Chaim Milikowsky for their enlightening comments on various parts of this study. Professor Bernard S. Jackson graciously provided me with detailed comments on an unpublished lecture which served as the basis for part of this book. This volume has been much improved by the suggestions of these scholars, although it goes without saying that I bear sole responsibility for the contents and especially the shortcomings of this study. I also acknowledge the comments of participants in various scholarly conferences where I had the opportunity to discuss some of the issues analyzed in this volume; many of the formulations in this study are clearer and more precise thanks to their suggestions.

I owe a very special debt of gratitude to Professor Chaim Milikowsky, who, in addition to commenting on part of the manuscript, provided me with much sage advice and unceasing encouragement in connection with this project. I cannot imagine how this volume would ever have been completed if not for his support and guidance.

Many thanks to Professors Martin Hengel and Peter Schäfer for including this book in their series *Texts and Studies in Ancient Judaism*.

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I am greatly indebted to my wife and children for their forbearance during the many hours spent working on this book rather than with them.

Finally, I would like to thank my parents for everything they have given me throughout the years. While words cannot adequately express my debt to them, the dedication of this book to them may serve at least as a token expression of my boundless gratitude.

Ramat-Gan, December 2001 Leib Moscovitz

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Abbreviations

Abbreviations of mishnaic and talmudic tractates and scholarly periodicals generally follow those in Strack and Stemberger, *Introduction*, pp. 373–375; for other abbreviations see the following list.

b (prefixed)	Bavli
b. (separate)	ben
DS	*Diqduqei Soferim*
DSH	*Diqduqei Soferim Ha-Shalem*
m (prefixed)	Mishnah
MM	*Meqorot U-Masorot*
R.	Rav, Rabbi
t (prefixed)	Tosefta
TK	*Tosefta Ki-Fshutah*
TR	*Tosefet Rishonim*
y (prefixed)	Yerushalmi
YK	*Ha-Yerushalmi Ki-Fshuto*
//	parallels

Chapter 1

Introduction

Basic Concepts

The terms *casuistic(s)*, *abstraction*, and *conceptualization* figure prominently in this study. Unfortunately, scholars of rabbinics often use these terms in a variety of different ways (usually, without attempting to define them), while students of other disciplines frequently use these terms in ways which are not necessarily appropriate to the study of rabbinic conceptualization. Accordingly, we begin by explaining how these and other, related terms are used in this study, analyzing them in light of those phenomena in rabbinic literature which are typically conceived of as casuistic, conceptual, abstract, and the like. The identification of such phenomena is often simple and straightforward,[1] although this is not always the case; hence we attempt to clarify in broad, general terms how these expressions are used, without providing fully unambiguous definitions of these notions.

By *casuistics*[2] we refer to case law. Actually, there are two types of casuistics, and it is important to distinguish between them: (1) casuistic *formulation* of the law, i.e., formulation of the law concerning particular cases, rather than in the form of general principles; and (2) casuistic *conception* of the law, i.e., rendering legal decisions in a fashion which ultimately depends on local, ad hoc considerations (even if these are used in conjunction with more rigid, rule-based considerations),[3] rather than

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1 One cannot help recalling in this context Justice Potter Stewart's famous statement, originally made about a rather different definiendum, that "I know it when I see it."

2 This term should be distinguished from the similar term *casuistry*, which frequently denotes a particular approach to ethics (i.e., case ethics); see generally Jonsen and Toulmin, *The Abuse of Casuistry*, pp. 11–12. See also Posner, *Overcoming Law*, p. 522, and Sunstein, *Legal Reasoning*, p. 32, who compare casuistry in moral and religious thought to analogical reasoning in law, i.e., reasoning from case to case, rather than ad hoc conception or case-based formulation of legal rulings, as casuistics is defined here. Needless to say, the term *casuistics* is not used here, as the term *casuistry* sometimes is, to denote sophistry or specious reasoning, legal or otherwise.

3 Since these rule-based considerations cannot determine the law on their own. Indeed, the use of untrammeled casuistics is rare, as various scholars have noted; see e.g. Sunstein, *Legal Reasoning*, pp. 21–23; pure casuistics and rule-based decision-making lie at opposite ends of a continuum, and numerous intermediate possibilities exist (see further the next note and chapter 2, n. 1).

through the formal, mechanical application of general principles to specific cases.[4] Accordingly, laws formulated casuistically might be predicated on the application of implicit principles (*implicit conceptualization*), although casuistically formulated laws are often conceptually casuistic as well. Here we shall attempt to distinguish between these two senses of the term *casuistic(s)* whenever it is not clear which meaning is intended. (The following remarks, for example, deal primarily with casuistic formulation of the law.)

This definition of casuistics as case law requires some further clarification. While the hallmark of case law is specificity,[5] this is a relative notion: a law about dogs might seem specific when compared to a law about animals, although this law might seem general when compared to a law about chihuahuas. Nevertheless, casuistic legal formulation can generally be identified by one (admittedly subjective) criterion: the fact that such rulings are not sufficiently generalized to enable us to ascertain their full, though implicit, scope.[6]

Such insufficient generalization may find expression in two ways. Sometimes it is impossible to determine how far a particular ruling should be extended; e.g, mMQ 1.1–6 (abbreviated here):

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[4] Sometimes the law might be determined through the discretionary interpretation or application of extremely broad principles (e.g., minimizing damage to the public; see below, n. 24, and the references there). Nevertheless, even rulings of this sort are deemed conceptually casuistic here, since the relevant principles are incapable of direct, mechanical application to the relevant cases, which must therefore be decided on an essentially ad hoc basis.

[5] Strictly speaking, a case is an event or incident; by definition, a case is unique in all of its particulars, even if a particular case can be described in terms general enough to encompass other, similar cases (cf. Burton, *Introduction*, pp. 11–12). Here, however, we adopt the criterion of specificity, rather than the actual past occurrence of a particular incident, in light of the nature of rabbinic case law, where rulings about concrete, historical events ("Mr. Jones broke a blue vase on 1 January 2002," etc.) are rare. Most seemingly casuistic rulings in this literature deal with theoretical possibilities which, by their very nature, are capable of recurrence and hence are somewhat general (e.g., "if one's clay pitcher broke in the street, one must compensate people injured by the shards"). Moreover, some rather specific, and hence presumably casuistic, rulings in tannaitic literature are formulated in essentially apodictic, non-conditional fashion, e.g., "One must remove Median beer and Edomite vinegar from one's house on Passover" (rather than, say, "if Median beer was found in one's house on Passover, penalty X applies"); see mPes 3.1.

[6] In formulating matters this way, I assume that many and perhaps most casuistic rulings were envisioned by their authors as instantiating broader principles, or at least as capable of being applied to other, closely related cases, even if the exact scope of these notions is unclear and indeterminate (possibly for the lawgivers or jurists themselves). See further below, "Implicit Conceptualization," especially p. 32, and the discussion of implicit conceptualization in chapter 2.

1. We may irrigate a field...on the intermediate days of a festival...whether from a spring which is newly emerged or not newly emerged. But we may not irrigate it from rain water or from a swipe...
2. Moles and mice may be trapped in a tree-field or white field in an unusual way during the intermediate days of a festival.

These rulings do not provide us with sufficient information to determine what the law would be regarding other, closely related cases – say, trapping mosquitos rather than mice, or irrigating a field with a hose connected to a faucet rather than from a spring – and hence we consider them casuistic.

Elsewhere it is possible to plausibly determine the full, though implicit, scope of a particular ruling, although the ruling is formulated in less general terms than it could and perhaps should have been. Insufficient generality of this sort, too, is a sign of casuistic formulation. For example, mBQ 3.1–2:

1. If one left a jug in a public domain and someone else came and tripped over it...and was injured by it, the owner of the jug is liable for the injury...
2. If one spilled water in a public domain and someone was injured by it, (the person who spilled the water) is liable for the injury to (the person injured).

While this passage speaks of jugs and water, it is clear from the way that these laws are formulated that the items mentioned here represent a broader category of objects – obstacles – even though that category is not mentioned here by name. Such rulings, too, are casuistically formulated, although they are obviously not conceptually casuistic.[7]

Casuistic legal formulation is often characterized by two other features aside from specificity. First, casuistically formulated rulings usually address tangible and mundane entities – chickens and eggs, doors and gates, and the like. Second, the reasons for casuistic legal rulings are usually[8] not specified by the relevant literary sources, whether rabbinic or non-rabbinic.[9]

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[7] See the discussions of implicit conceptualization cited in the previous note.

[8] For exceptions in rabbinic literature see chapter 5, "Tannaitic Explanation."

[9] Frederick Schauer has suggested that the use of reasons is intimately and organically associated with conceptual thought and formulation: "To give a reason is...to generalize. Reason-giving is therefore in tension with...case-by-case determination,

Defining the terms *concept* and *conceptualization* is also rather problematic. For purposes of the present discussion,[10] however, we may define *concepts* as classes or categories[11] – in short, as groups of objects, cases, or other entities. The difference between concepts and casuistics is thus the difference between the general and the particular – or, perhaps more precisely, between the more general and the more particular, since these notions are often relative and lie along a continuum,[12] with the level of generality varying from concept to concept. This definition of *concept* corresponds in large measure to that proposed by Paton, whose comments are worth citing here:

> The term 'concept' has many meanings...For the purpose of jurisprudence, concepts may be defined as those 'categories of classification' which are rigidly determined as a matter of law...A concept for our purposes is a category that is so rigidly defined that its application is definite...Concepts may be built up out of perceptions of fact...Other concepts may be created of more abstract factors – e.g. corporate personality...[13]

We wholeheartedly endorse Paton's observations, with two minor modifications. First, Paton's claim that concepts are "rigidly determined as a matter of law" and that a concept must be "so rigidly defined that its application is definite" does not accord with the actual use of concepts in law,[14] whether rabbinic or otherwise, as legal concepts are frequently

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and...recognition of the power of the particular. Conversely, reason-giving is the kin of abstraction" ("Giving Reasons," p. 658, and cf. ibid., pp. 635, 638–642).

[10] Numerous definitions of concepts have been suggested by students of other disciplines. As Paul Thagard has observed (*Conceptual Revolutions*, p. 13), "A critical survey of all the different accounts of concepts that have been offered in philosophy, psychology, and AI would take a volume in itself." However, most of these definitions are irrelevant to the present study (see below, "Rabbinic Conceptualization and Related Disciplines"). Useful surveys about concepts and their definitions in other disciplines are found in Weitz, *The Opening Mind*, pp. ix–48, especially pp. 3, 4, 25; idem, *Theories of Concepts*; Thagard, *Conceptual Revolutions*, pp. 13–33; Stephen Laurence and Eric Margolis, "Introduction," in *Concepts: Core Readings*, ed. Eric Margolis and Stephen Laurence (Cambridge, Mass., and London: MIT Press, 1999), pp. 1–77.

[11] In contrast to some scholars, we use these terms interchangeably.

[12] Cf. Jackson, *Essays*, p. 34 (and cf. ibid., p. 64), who defines principle as any formulation of more general application than the text from which it is inferred. Cf. also idem, "Modern Research," pp. 152–153, 155.

[13] Paton, *Text-Book*, p. 177.

[14] Paton himself was aware of this, although he seems to attribute this primarily to historical and functional considerations: "[I]t is ridiculous to expect that even a concept can remain absolutely definite and static...Today we adopt a more functional view...[a

marked by varying degrees of indeterminacy. Nor does this suggestion accord with more modern and ostensibly more well-founded notions about the character and use of concepts in other disciplines, notably philosophy and cognitive science, where such notions may be fuzzy and ill-defined.[15]

Second, the present study does not consider all phenomena in rabbinic literature which may formally be defined as concepts, as we are concerned primarily with significant concepts and conceptualization (these terms will be defined at greater length below).[16] Accordingly, while a door is no less a concept than causation,[17] since "door" denotes an entire class of objects, as it includes structures of various sizes and shapes, the present work is generally more concerned with metaphysical concepts such as causation and potentiality than with mundane, physical concepts such as doors and spoons (although we discuss concepts of this sort where relevant).

The notion of *conceptualization*, too, is rather complex. Conceptualization includes virtually all processes associated with concepts, including the implicit generation, explicit formulation, and use of concepts in various legal capacities. Thus, conceptualization includes such phenomena as demarcating the boundaries of existing concepts; subsuming particular cases under such categories (*classification*); explicitly formulating legal rulings governing entire classes of objects or other entities (*generalization*); applying concepts in various ways, such as drawing inferences or raising objections from rulings with similar and possibly identical conceptual underpinnings; and analysis of existing concepts. Moreover, while the term *conceptualization* is most frequently used to denote *explicit conceptualization*, whereby the procedures described above are performed explicitly, we also find *implicit conceptualization*, whereby casuistic formulations are assumed to reflect the implicit use of concepts or legal

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concept's] development is guided as much by a desire to do justice in the individual case as by any *a priori* logic which deals with the 'inherent properties' of a concept" (ibid., p. 178). Of course, other scholars view matters differently; see the following text and the next note.

15 See especially Weitz, *The Opening Mind*, pp. 25–48, and the literature surveyed there.

16 See below, text at n. 159. This distinction between ordinary concepts and significant concepts (the latter is obviously a vague, relative, and flexible notion) finds expression, inter alia, in the way that we refer to such entities. Cf. Schauer, "Exceptions," p. 884, n. 39: "[W]e often use the words 'concept' ...to mark the fact that some word...*is but the name of something far more complex*. Consider why 'the concept of law' or 'the concept of equality' or 'the concept of justice' do not sound as odd as 'the concept of penguin' or 'the concept of subway'" (emphasis added).

17 Pace Schauer, ibid. As we shall see, concrete notions such as "door" do play a role in rabbinic conceptualization, though a comparatively minor one (qualitatively, if not quantitatively); see e.g. below, chapter 3, "Tannaitic Classification," and cf. Frändberg, "Essay," p. 84, and Simpson, "Analysis of Legal Concepts," pp. 343 and 347.

principles. Accordingly, the relationship between these different types of conceptualization is best described, using Wittgenstein's famous phrase,[18] as a family relationship. Indeed, one might well define conceptualization as the antithesis of casuistics – those forms of legal thought and expression which do not address the tangible and the specific.

These definitions of casuistics and conceptualization may be illustrated by comparing some casuistic formulations in rabbinic literature with the conceptual equivalents (actually, explanations)[19] of these rulings found in later rabbinic sources:[20]

Casuistic Ruling	Conceptual Explanation
One may not sow vegetables during the rainy season under a tree worshipped idolatrously, because the leaves fall and turn into fertilizer	Multiple causation is forbidden (*zeh we-zeh gorem 'asur*)
A shroud woven for a corpse may not be used	Designation is legally significant (*hazmanah milta*)
Lost scattered fruit belongs to the finder	Unwitting despair is significant (*ye'ush she-lo mi-da'at hawei ye'ush*)
If one threw something from a private domain to another private domain and there is a public domain between them, he is liable for Sabbath violation	An object intercepted (by the air) is considered as if it had come to rest (*qelutah ke-mi she-hunḥah dameya*)

The most important concepts for our purposes are *abstract concepts*. For our purposes, such concepts may be defined as notions which are intangible and incapable of mental visualization.[21] Abstract concepts

[18] See Wittgenstein, *Philosophical Investigations*, §§65–67.

[19] Since many and perhaps most conceptual formulations in rabbinic literature are explanations; see e.g. below, at n. 35.

[20] The examples here are taken, respectively, from m'AZ 3.8 and b'AZ 48b; bSan 47b (both the casuistic ruling and the conceptual explanation appear there); mBM 2.1 and bBM 21b; mShab 11.1 and bShab 4a and parallels. (To simplify matters, the Talmud's conceptual explanations have not always been translated literally here.)

[21] Obviously, mental imagery cannot always provide us with a complete or fully accurate representation of a concrete concept. Thus, the concept of a dog can be

include three principal types of notions (although the dividing line between these categories is not always clear): (1) psychological concepts, such as intention and desire; (2) legal concepts, such as rental, acquisition, and negligence; and (3) metaphysical concepts, such as change, inevitability, causation, and potentiality.

The various processes associated with abstract thought are termed *abstraction*. (Unlike other scholars, we distinguish between the terms *abstraction* and *conceptualization*.) Accordingly, abstraction includes such phenomena as the isolation of essential qualities from concrete objects, thereby facilitating the formal definition of such entities for legal purposes in a manner which may differ from their standard lexical definitions (e.g., defining a "pit" for legal purposes as any obstacle, not just a hole in the ground) and the adoption of afactual perspectives on reality for legal purposes[22] (e.g., treating a moving object as if it had stopped in midair). Other types of abstract thought, which cannot be described here in greater detail, also constitute abstraction.[23]

Another notion which figures prominently in this study is *principles* or *legal principles*, i.e., non-casuistic legal assertions – general statements capable of application to a variety of cases. (This use of the term *legal principle* differs from that frequently found in jurisprudential literature, largely under the influence of the distinction between rules and principles made famous by Ronald Dworkin.)[24] Principles often invoke concepts, and they may treat such concepts in a variety of ways. Thus, principles may define a concept, classify particular cases or entire concepts under other concepts, or predicate particular legal results or requirements of concepts – for example, "(the performance of) commandments requires intention," or "ritual slaughter (takes effect) only at the end (of the act of slaughter)."

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visualized by forming a mental picture of either a chihuahua or a German shepherd, although neither of these mental pictures includes the entire class of dogs (cf. e.g. Steven Pinker, *How the Mind Works* [New York and London: Norton, 1997], pp. 296–297). Our point here is simply that particular examples of non-abstract concepts can be mentally visualized, which is not the case with abstract concepts. See further Bob Hale, *Abstract Objects* (Oxford: Blackwell, 1987), pp. 45–67. (In light of the goals of the present study – the analysis of conceptualization in rabbinic literature – the objections of various philosophers to the definition of abstract concepts proposed here would not apply; see ibid., pp. 46–47.)

22 See generally below, chapter 4.

23 See further chapter 9, "Abstraction and Abstract Issues."

24 See mainly Dworkin, *Taking Rights Seriously*, pp. 22–31, and cf. ibid., pp. 71–80. (Dworkin's distinction between rules and principles has, of course, been criticized by other scholars, although these criticisms are generally irrelevant to the present discussion, in light of the definition of the term *principle* adopted here.) To be sure, assertions of the sort that Dworkin termed legal principles are also found in rabbinic literature; see below, nn. 164–167 and the accompanying text.

Likewise, legal principles may predicate a particular legal status of a concept – for example, "designation [=concept] is (halakhically) *significant*" [legal status], or "multiple causation [=concept] is *forbidden*." Still other principles resort to implicit generalization without explicitly mentioning concepts, e.g., "we raise (things) to a higher degree of sanctity" (*ma'alin ba-qodesh*); this statement applies to a wide variety of cases, even though it mentions no concepts. Needless to say, legal principles, like the concepts they invoke, may reflect various degrees of generalization.

Not all legal formulations in rabbinic literature fall neatly under the categories of casuistics and conceptualization. Thus, we find various types of intermediate phenomena – *proto- or quasi conceptualization*,[25] whereby different views or casuistic rulings are associated with one another or used inferentially, albeit without the explicit formulation, and perhaps also without the implicit assumption, of a shared legal principle. Statements of this sort differ from casuistic formulations in that they do not address individual cases, although they differ from pure conceptualization in that they do not explicitly formulate the law in terms of general principles.

Summarizing, then, all of the terms and concepts considered above denote highly complex and variegated entities, whose definitions are often subjective, relative, and intuitive. The notions of concept and conceptualization, in particular, include a wide range of diverse phenomena, which cannot easily be subsumed under a single, readily definable heading.[26]

The Significance of Rabbinic Conceptualization

A proper understanding of rabbinic legal conceptualization[27] is important for numerous aspects of rabbinic scholarship – and, I daresay, for the study of legal history and science in general. First, conceptualization shows us how the talmudic rabbis[28] thought, and especially the types of inference

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[25] The reason that I describe these phenomena as proto- or quasi conceptualization is that the exact historical and conceptual relationship between these types of reasoning and "true" conceptualization is not always clear.

[26] As pointedly noted by Weitz (*The Opening Mind*, p. 25), "The concept of concept is a family of concepts" (and cf. idem, *Theories of Concepts*, p. 261).

[27] For the sake of brevity, I usually speak below of rabbinic conceptualization rather than rabbinic legal conceptualization, as this study deals with legal conceptualization unless otherwise indicated.

[28] I.e., those rabbis whose teachings are recorded in or who participated in the redaction of the principal legal corpora of rabbinic literature – the tannaitic midrashim, the Mishnah, the Tosefta, and the two Talmudim. Elsewhere in this work, too, the expressions "the rabbis" and "rabbinic" refer to the rabbis as defined here.

(inductive, deductive, analogical) in which they engaged – in short, their modes of logic and reasoning.[29] Indeed, conceptualization (at least certain forms of conceptualization) is one of the most unique features of rabbinic thought and literary composition, and in many ways it reflects what is distinctively talmudic about talmudic literature.[30]

Second, rabbinic conceptualization manifests (non-exegetical) rabbinic thinking at its most creative and sophisticated. Creativity, almost by definition, entails the association of disparate and unrelated notions: the more unanticipated and surprising the association, the more creative the idea of conjoining these notions[31] (and this applies to the creativity of entire thought-systems,[32] especially legal systems,[33] no less than to the creativity of an individual). And it is precisely such unanticipated combinations, which occur frequently in rabbinic literature (at least in certain strata of this literature), which make rabbinic conceptualization so creative.

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[29] Cf. the suggestive remarks of Wieacker (*History*, p. 6) about the affinities between the legal approaches and other types of thinking practiced during a particular period. Note also Fuller, *Legal Fictions*, p. 132: "If we define science as the conscious generalization of experience, then the law was the first of the sciences [!]. In the words of Ihering...'[I]t is not too much to say that it was in the field of the law that the human mind was first compelled to mount to abstraction; the first rule of law, whatever it may have concerned, was the first onset of the mind to conscious generality of thought, the first occasion and the first attempt to lift itself above the sensuously obvious.'"

[30] This identification of conceptualization with Talmudism has been neatly expressed by Richard Posner in an interesting obiter dictum (*Overcoming Law*, p. 83; but note idem, *Problematics*, p. 129): "What [the scholar] does...in a legal system...which is oriented toward case law is to...try to find the pattern in the cases or, failing that, to impose one of his own [!]. *Doctrinalists are law's Talmudists*" (emphasis added).

[31] Cf. Hofstadter, *Fluid Concepts*, p. 75 (and cf. ibid., pp. 63, 86), and compare Hofstadter's earlier observations in his *Metamagical Themas: Questing for the Essence of Mind and Pattern* (New York: Basic Books, 1985), chapter 12 (particularly pp. 249, 251) and chapter 24. The affinity between conceptualization and thought in general has been given poignant literary expression in Jorge Luis Borges' famous story "Funes the Memorious," available in idem, *Labyrinths: Selected Stories and Other Writings*, ed. Donald A. Yates and James E. Irby (New York: New Directions, 1962), pp. 59–66 (see especially p. 66).

[32] Cf. Silberg, *Ba'in Ke-'Eḥad*, pp. 86–87 (in an essay on "The Aspiration for the Abstract in Israel and the Nations"): "The intensity of the quest for conceptual abstraction is the criterion par excellence for [assessing] the degree of cultural development of any historical period" (translation mine). Cf. also Vaihinger, *Philosophy*, p. 55: "This method of abstract generalization is one of the most brilliant devices of thought...This device is not only the basis of scientific progress but of the whole practical progress of mankind [!]."

[33] Cf. Paton, *Text-Book*, p. 177: "The intellectual maturity of a legal system may be tested by the degree of abstract generality it achieves in its concepts."

Conceptualization also reveals what categories existed in the rabbis' legal universe – not just concrete, physical, mundane entities such as chickens and eggs, doors and gates, but also (at least during certain periods and among certain scholars) abstract entities such as intention, potentiality, imminence, and causation. Perhaps even more important, conceptualization reveals what categories were not utilized in rabbinic literature, even though the use of such categories might have been expected. (I refer mainly to concepts used in other legal systems, and especially legal systems contemporary with rabbinic law, such as Roman law.)[34]

The analysis of rabbinic conceptualization can also shed light on our understanding of rabbinic exegesis, since one of the principal functions of conceptualization is the interpretation of earlier rabbinic sources.[35] To be sure, conceptualist exegesis differs from other types of rabbinic exegesis, in that it focuses on legal rather than textual or philological issues, and it deals with the interpretation of rabbinic sources ("inner-rabbinic exegesis") rather than the Bible. Nevertheless, conceptual exegesis is also an important form of exegesis, aside from whatever light it might shed on other types of rabbinic interpretation. In particular, the study of rabbinic conceptualization may shed light on one of the fundamental questions about rabbinic exegesis: to what extent was such exegesis influenced by atextual considerations (here, conceptual assumptions)?[36]

The study of rabbinic conceptualization also has important ramifications for the study of rabbinic jurisprudence. Thus, the analysis of rabbinic conceptualization can shed light on the question of how formalistic an approach to law the rabbinic sources adopted, and how much the rabbinic approach to law has in common with the common law. Rabbinic conceptualization also has other features in common with general jurisprudence (e.g., the use of legal analogy and legal fiction), and these are accordingly considered in this study. And it goes without saying that the study of rabbinic conceptualization can shed light on the content and historical development of rabbinic law proper.

The analysis of rabbinic conceptualization is also important for the philological, historical, and literary study of rabbinic literature. Scrutiny of the conceptual approaches adopted by the different works of rabbinic literature may contribute to a more precise characterization of both the

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[34] See further below, "Rabbinic Conceptualization and Related Disciplines," especially text at n. 148.

[35] Cf. De-Vries, *Toledot*, pp. 142–156 (passim), and cf. the next note.

[36] Cf. De-Vries, ibid., and see especially Moscovitz, "Le-Ḥeqer Dinei Ta'arovet," pp. 311–312, 339. Note also Rubenstein, "*Sukka*," pp. 156, 162, 164 (although I do not agree with his analysis of the example discussed there; see Moscovitz, "Kulho Sevira Leho," n. 91 and the accompanying text).

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