

LEIB MOSCOVITZ

Talmudic Reasoning

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Mohr Siebeck

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Leib Moscovitz

Talmudic Reasoning

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.

Table of Contents

Preface	VII
Table of Contents	IX
Abbreviations	XIII
<i>Chapter 1 Introduction</i>	1
Basic Concepts	1
The Significance of Rabbinic Conceptualization.....	8
Previous Scholarship.....	11
Methodological Considerations	15
Dating the Sources	16
The Periodization of Rabbinic Literature.....	18
General Methodological Problems.....	20
Considerations Specific to the Study of Conceptualization	25
Conceptualism and Functionalism	27
Implicit Conceptualization	30
Rabbinic Conceptualization and Related Disciplines.....	33
Conceptualization and Biblical Exegesis	37
The Present Study	39
Desiderata.....	45
<i>Chapter 2 Casuistics and Generalizations: Tannaitic Beginnings</i>	47
Tannaitic Casuistics	47
Explicit Tannaitic Generalizations.....	50
Introduction	50
Generalizations Introduced by Special Terminology	52
Principles Without Special Terminology	59
Implicit Conceptualization: Methodological Considerations.....	63
Non-Principled Tannaitic Thought	68
Implicit Principles: Extrapolation	73
Implicit Principles: Induction	75
Problematic Induction	76
Plausible Induction	84
Why Casuistics?.....	91

Amoraic Casuistics and Generalizations	94
Conclusions	96
<i>Chapter 3 Classification and Legal Definition</i>	<i>98</i>
Introduction	98
Tannaitic Classification.....	101
Legal Definitions	101
Implicit Classification.....	103
Subsumptive Classification	104
Comparison-Based Classification.....	110
Post-Tannaitic Subsumptive Classification	123
Post-Tannaitic Comparison-Based Classification.....	129
Linguistic Aspects	130
Conceptual Aspects.....	133
Comparison-Based Classification with Conceptual Analogues	137
“Code Word” Classification	141
Reductionist Classification.....	144
Introduction	144
In Tannaitic Literature	147
In PT	150
In BT.....	154
Classification and Biblical Hermeneutics.....	159
Conclusions	160
<i>Chapter 4 Legal Fictions</i>	<i>163</i>
Introduction	163
Legal Fictions and Referential Classification.....	164
Conceptual and Non-Conceptual Fictions	168
Implicit Fictions	170
The Present Study	172
Tannaitic Fictions	173
Post-Tannaitic Fictions.....	179
Introduction.....	179
Stylistic Aspects	180
Hermeneutic Character.....	182
Types of Post-Tannaitic Fictions	187
Multiple Application of Post-Tannaitic Fictions	189
Conclusions	197
<i>Chapter 5 Aspects of Rabbinic Explanation</i>	<i>200</i>
Introduction	200
Superfluous Explanation	202
Tannaitic Explanation	217

Enthymematic Explanation	218
Conceptual Character	223
Post-Tannaitic Explanation	224
General Observations	224
Exegetical Validity	226
<i>Chapter 6 Legal Analogy</i>	228
Introduction	228
Principled and Non-Principled Analogies	230
The Present Study	232
Tannaitic Legal Analogy	234
Introduction	234
Ordinary Tannaitic Analogies	236
Problematic Tannaitic Analogies	239
Post-Tannaitic Legal Analogy: Introduction	246
Terminology	247
Between Analogy and Explicit Principles	249
Conceptually Trivial Post-Tannaitic Analogies	255
Post-Tannaitic Analogies of Uncertain Conceptual Character	256
Non-Principled Post-Tannaitic Analogy	260
Identification	260
Functions	265
Justification	268
Conclusions	272
<i>Chapter 7 Association and Conceptual Citations</i>	274
Introduction	274
Conceptual Citations	276
Associations	280
<i>Chapter 8 Post-Tannaitic Concepts and Legal Principles</i>	293
Introduction	293
Linguistic Aspects	295
Introductory Terminology	295
Nominalization	299
Terminology for Abstract Concepts	299
Fixed Formulations	301
Between Anonymous and Attributed Principles	303
Types of Concepts and Principles	313
Tannaitic Concepts vs. Post-Tannaitic Concepts	313
Types of Post-Tannaitic Principles	314
Contextual Considerations	321
Analogical Extension of Legal Principles	324

Multiple Application	327
Exceptions	337
The Influence of Legal Principles	339
Conclusions	341
<i>Chapter 9 Coda</i>	343
Introduction	343
Rabbinic Conceptualization: A Chronological Perspective	344
Tannaitic Conceptualization	345
Amoraic Conceptualization (PT and BT)	346
The Anonymous Stratum in BT	350
Between PT and BT	351
Abstraction and Abstract Issues	352
Broader Conclusions	355
Rare and Missing Types of Conceptualization	359
The Sources of Rabbinic Concepts	361
Rabbinic Attitudes Toward Conceptualization	362
The Impact of Rabbinic Conceptualization	364
Conclusion	365
Bibliography	367
Index of Sources	375
Index of Modern Authors	389
Index of Hebrew and Aramaic Terms	392
Subject Index	396

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
<i>DS</i>	<i>Diqduqei Soferim</i>
<i>DSH</i>	<i>Diqduqei Soferim Ha-Shalem</i>
m (prefixed)	Mishnah
<i>MM</i>	<i>Meqorot U-Masorot</i>
R.	Rav, Rabbi
t (prefixed)	Tosefta
<i>TK</i>	<i>Tosefta Ki-Fshutah</i>
<i>TR</i>	<i>Tosefet Rishonim</i>
y (prefixed)	Yerushalmi
<i>YK</i>	<i>Ha-Yerushalmi Ki-Fshuto</i>
//	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

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 untrammelled 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):

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 usually⁸ not specified by the relevant literary sources, whether rabbinic or non-rabbinic.⁹

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 categories¹¹ – 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

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

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 (<i>zeh we-zeh gorem 'asur</i>)
A shroud woven for a corpse may not be used	Designation is legally significant (<i>hazmanah milta</i>)
Lost scattered fruit belongs to the finder	Unwitting despair is significant (<i>ye'ush she-lo mi-da'at hawei ye'ush</i>)
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 (<i>qelutah ke-mi she-hunḥah dameya</i>)

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 purposes²² (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).”

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 conceptualization²⁷ 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 rabbis²⁸ thought, and especially the types of inference

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 notions³¹ (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.

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-Ehad*, 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

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-Heqer 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).

Index of Sources

Numbers in italics indicate passages which are cited only in the footnotes.

Hebrew Bible

Ex.		9:10–13	216
12:22	<i>264</i>	19:14	149
21:18	213	19:14–15	103
21:19	213	19:14–18	161
21:33–34	37	19:16	149
21:35	145	19:21	<i>254</i>
22:5	144	19:6–7	<i>254</i>
		19:8	<i>254</i>
Lev.		30:4–16	319
4:27	78		
6:10	<i>238</i>	Deut.	
11:33	333	4:2	329
11:38	<i>61</i>	19:16–19	145
13:47–59	85, 88	22:10	<i>103</i>
15:25–30	<i>261</i>	22:11	85
16:12–13	138	23:25–26	<i>254</i>
19:9	101, <i>104</i>	24:1	<i>313</i>
19:23	74	25:5	112
21:14	151 f.	25:5–10	<i>313</i>
22:28	286	25:7–9	151
23:2	<i>104</i>	25:10	153
25:29	<i>122</i>	26:2–10	237
27:32	<i>241</i>	26:3	237
		26:3 ff.	326
Num.		26:12–14	237
5:12–28	185	26:13	237

Rabbinic Literature

<i>Mishnah</i>		Pe'ah	
Ber		1.4	55
2.1	<i>299, 308, 329</i>	4.10	101
6.7	222 f.		

Dem		Bik	
3.6	219	2.6	71 f.
		2.10	186, 302
Kil		Shab	
1.9	84	2.5	221
4.4	114, 165	3.3	283
5.1	104	7.1	53
5.2	175, 181	7.2	55, 107, 211
8.2–3	103	10.5	77 f., 86
9.1	85	11.1	183 f.
Shevi		13.5	56
1.3	173	16.8	86
5.6	56, 222	19.6	120
5.8	222	24.2	47
5.9	317		
7.1	53, 55	‘Er	
8.1	53	1.1	76 f.
10.7	84 f.	1.4	193
		1.8	220
Ter		1.8–9	70
1.1	89	1.10	70, 84, 109
2.1	86	3.1	84, 288
2.4	317	3.2	57
2.4–6	283	5.1	172
4.8	177	6.7	145
4.10	163, 175, 176	7.2	98, 113 f.
8.1	243	7.11	61
9.6	102	8.1	223
9.7	325	8.7	111
10.2	284	9.2	116
11.1	219 f.	9.3	71
		10.8	165
Ma‘as		Pes	
1.1	54	1.6–7	235
3.7	68	7.4	216, 318
Ḥal		7.6	216
1.1–2	84	8.8	119 f.
1.4	89	9.4	216
3.8–9	86	10.3	307
‘Orl		Sheq	
1.7	105	3.3	119
2.1	150	4.7	71
2.10	62	6.4	62
2.11	331		
3.1	74	Yoma	
3.7	301	1.1	153

Yoma (<i>continued</i>)		Sot	
5.1	138	4.2	184 f., 186
8.2	59		
		Git	
Suk		1.6	61
1.1	76 f.	2.1	233
1.2	120, 122, 167	2.5	57
1.9	264	3.1	304
		5.4	89
Bez		7.9	104
1.1	142		
		Qid	
RH		1.6	133
3.7	308	1.7	57
3.8	55, 57	3.5	89
4.8	73		
		BQ	
MQ		1.1	107 f.
1.1	47	1.4	145
		2.4	261
Ḥag		3.1–2	49
2.6	120	4.4	57
3.1	326	5.7	161
3.2	203	7.2	68
3.4	70	7.4	68
		9.1	54, 223
Yev		9.2	89
4.4	54, 112	9.11	151
4.12	153	10.2	299
6.4	151		
8.4	313	BM	
10.1	169	2.1–5	49
11.5	134	3.4	267
15.1–2	68 f.	4.9	68
		7.2–6	254
Ket		7.8	252
3.9	223	8.4	86
4.3	54		
12.2	113, 155	BB	
		3.3	109
Ned		5.5	48
5.6	109	7.3	74
6.1–6	48	9.8	186
10.1	319		
10.7	240	Mak	
11.9	223	1.4	132, 145
		3.1	106
Naz		3.2	209
5.1	52, 109		
5.1–3	236, 241		

Shevu		Kar	
6.1	113	3.5	338
		3.5–6	353
‘Edu		4.3	106
1.12	68	5.4–8	280
3.1	147 f., 150, 153	Me’i	
8.6	208, 313	4.4	106
Zev		Kel	
1.1	237	1.1	107
2.1	138	3.3	222
3.2	138	3.3–4	105
3.3	59	4.4	48
7.1	120	15.5	56
8.3	317	17.11	288
8.4	173	17.15	60, 223
8.6	173	25.9	62, 206 f., 313
8.9	173, 174	27.1	106
8.11	238	’Ahi	
8.12	205	2.1	101
11.2	313	3.1	147 f.
11.3	218	3.4	109
Men		3.7	109
3.3	203 f.	6.1	103
3.4	235	6.6	237
11.3	53	7.1	113
11.7	62	7.2	103, 133
12.4	327	7.3	289
Hul		10.4	179
2.1	309	10.5	179
3.1	57	12.5	172, 178, 195
4.1	113	14.5	172, 178
5.3	68, 89, 286	15.8	183
7.5	88	Par	
12.1	102	4.4	254
Bekh		12.2	257
1.2	203, 223	Toh	
2.6	311	2.8	133
2.9	201	4.3	116
9.8	241	5.3–6	86
Arakh		8.6	60
5.2	56	Miq.	
9.3	122	2.2	245
Tem		7.1	264
7.5	74, 75		

Miq (<i>continued</i>)		2.2	209
8.5	167	2.17	104
10.1–4	183	2.22	120 f.
10.6	167		
		MS	
Nid		2.17	266
5.4	84	4.5–6	71
		Bik	
Makh		1.7	237
2.5–9	86		
3.8	60, 61	Shab	
6.1	61	1.1	191
6.5	105	1.1–2	102
		1.4	116
Zav		1.6	116
4.5	78	5.2	115
4.7	77 f.	10.15	109, 127
5.11	122	15.5	119
		15.6	123
‘Uq		15.8	79 f.
1.1	103	15.10	238 f.
3.5	71	15.11	52
3.7	121		
3.10	84 f.	‘Er	
		1.5	178, 196
Tosefia		1.12	174
Ber		4.2	208
5.17	58	4.4–5	172
		4.5–6	175
Dem		5.5	68
4.6 ff.	86	5.11–18	145
4.10	87	5.19	120
		6.13	114
Ter		6.26	111
1.1	313	7.1	191
2.12	181		
3.1	54, 121	Pes	
5.11	176	3.18	266
6.13	87	4.2	318
7.7–8	86	6.2	318
9.2	173	6.10	54, 123
		8.4	208
Shevi			
1.2	123	Sheq	
		2.10	281
Kil			
4.7	84, 109	Yom	
5.1	103	4.9	118
Ma’as			

Suk		BM	
1.12	173	1.10	133
		2.1–15	49
Beḡ		2.2	49
1.2	143	3.7	115
1.3	88	4.2	121
RH		BB	
2.5	57	2.8	104
2.16	73		
		San	
Meg		7.7	272
1.6	223	7.11	235
2.7	58		
		Mak	
MQ		5.4	106
1.12	115		
		‘Edu	
Ḥag		1.6	68
3.4–13	326		
		Zev	
Yev		1.1	238
2.4	121	1.8	244
5.8	355	2.5–6	52
6.9	173	4.1	235
7.5	118	4.4–5	205
8.6	80, 82	4.7–8	205
10.6	123	8.15	173
11.11	109	8.20	173
12.2	112	8.22	173
13.4	71	12.17	209
Ned		Men	
6.5	240	4.9	205
		4.11	205
Git		4.13–14	205
5.5–6	110	10.31	140
		11.14	174
Qid		Bekh	
1.5	102	1.8	205
1.7–8	102	1.9	204
BQ		Tem	
2.2	261	1.12	106
2.4	220 f.		
3.2	53		
6.14	161	Kar	
7.18	118	1.5	209
10.8–10	115	3.1	280
		3.4	280

Kar (<i>continued</i>)		1.17	87
3.5	280		
		<i>Halakhic Midrashim</i>	
Kel BQ		Mekhilta	
2.10	222	Ex. 21:29, 36	261
4.8	311		
		Mekhilta de-R. Simeon b. Yohai	
Kel BB		Ex. 21:29, 36	261
3.13	206		
		Sifra	
'Ahi		Hovah, 7.11.3	237
1.5	54	Zav, 2.3.9–10	233
1.7	101	Shemini, 8.10.3	311
5.5	237	Mezora', 5.9	261
5.7	178	Beḥuqqotai, 5.13.2	242
7.12	237		
9.3	172	Sifrei Num.	
9.3–4	178	7	118
11.10	178, 182	75	244
11.11	179	124	254, 264
15.5	118		
		Sifrei Deut.	
Neg		64	153
2.12	111	181	261
		231	103
Par			
12.9	257	Midrash Tanna'im	
		Deut. 22:10	103
Miq		Deut. 33:11	242
1.17–19	236, 242 f.		
2.3	87	<i>Palestinian Talmud</i>	
2.6	87	Ber	
4.10	173	2.1, 4b	249
7.4	173	3.6, 7a	224, 300
		5.4, 9d	257
Toh		6.1, 10a	285
3.14	116	7.1, 11a	263 ff., 268, 270
5.8	105		
6.2	87	Pe'ah	
6.3–4	87	4.3, 18c	297
6.17	236	6.6, 19c	180
7.2	111		
		Dem	
Makh		3.4, 23d	294, 316
3.2	61	6.6, 25d	171
Zav		Kil	
4.4	78	2.9, 28a	224
		4.4, 29b	165
Yad		5.2, 29d	181

Kil (<i>continued</i>)		7.2, 9b-c	109
7.4, 31a	72	7.2, 9d	107, 108
8.2, 31c	272	7.4, 10d	123
		8.1, 11a	285
Shevi		10.2, 12c	355
2.2, 33d	355	11.1, 12d	189, 190, 197
6.1, 36d	181	11.1, 12d-13a	184
9.1, 38d	130	11.3, 13a	181
		11.5, 13b	181
Ter		12.1, 12c	275
1.1, 40a-b	61	12.4, 13d	249 f.
2.5, 41d	283	19.6, 17b	95
3.4, 42a	362		
4.9, 43a	177	'Er	
4.12, 43a	87, 309	1.1, 18b	76 f., 181, 188, 198, 311
5.2, 43c	171		
7.5, 44d	88	1.3, 19a	196
8.2, 45b	242	1.6, 19b	180
9.4, 46d	270	1.9, 19c	189
10.6, 47c	130	3.3, 21a	142
		6.10, 24a	181
Ma'as		8.6, 25a	198
1.7, 49b	142	10.1, 26b-c	180
2.4, 49d	208 f.	10.9, 26b	180, 181, 187, 191
MS		Pes	
3.6, 54b	181	1.1, 27b	261
		5.2, 32a	298
'Orl		5.2, 32b	180, 187
2.1, 61d	150	5.4, 32c	126
2.3, 62a	283	6.1, 33b	275
2.7, 62b	187	8.2, 35d	130
2.7, 62c	332	8.8, 36b	171, 355
		10.3, 37c-d	307 f.
Bik			
2.2, 65a	297	Yoma	
3.3, 65c	62	5.2, 42b	138
		5.8, 43b	324
Shab			
1.1, 2b-c	190	Sheq	
1.1, 2c	131, 180, 184, 188, 190	1.7, 46b	171
1.1, 2d	180, 188		
2.3, 4d	134	Suk	
2.5, 5a	221, 316, 355	1.1, 51b	76 f.
2.5, 5a-b	135	1.10, 52c	189
3.3, 5d	283 f.		
3.6, 6b	143	Bez	
4.2, 7a	105	1.1, 60a	142
6.1, 7d	105	1.3, 60b	142
		4.1, 62b	142

Meg		1.4, 51c	180
4.12, 75d	62	2.1, 51d	224
		2.3, 52a	188
Ḥag		3.5, 52d	244
2.3, 78a	224	8.1, 57a	171, 355
2.5, 78b	297	9.5, 58a	213
MQ		Qid	
1.7, 80d	283	2.1, 62b	224
		3.2, 63d	188
Yev		3.8, 64a	259
1.1, 2c	151	4.9, 66a	136
2.1, 3c	297		
2.11, 4a	96	BQ	
3.1, 4c	147, 153	1.1, 2a	107
3.1, 4c–d	151	2.5, 3a	156, 320 f.
4.8, 5d	297	2.6, 3a	260 ff.
4.9, 6a	151	4.2, 4b	261, 262
6.4, 7c	151		
6.6, 7c–d	81 ff.	BM	
11.1, 11c	286, 292	5.3, 10b	122
11.6, 12a	134	5.5, 10b	202
13.6, 13d	224	7.9, 11c	252 ff., 269, 272
15.4, 15a	169	8.10, 11d	74, 316
		9.3, 12a	202
Sot		San	
3.6, 19b	150	1.3, 19b	181
9.5, 23d	188	7.1, 24b	224
Ket		8.2, 26a	130
7.1, 31b	180	8.6, 26b	185
9.4, 33a	201	9.1, 26d	286 f., 292
		9.3, 27a	213
Ned		Shevu	
2.4, 37b	123	1.8, 33b	62
4.2, 38c	298	2.1, 33d	300
6.1, 39c	95		
6.8, 39d	224	‘AZ	
Git		1.1, 39b	283
2.3, 44b	249 f.	2.1, 40c	255 f.
4.9, 46b	294, 316	5.11, 45a	187, 332
5.9, 47b	257		
6.7, 48a	127	<i>Babylonian Talmud</i>	
7.1, 48c	355	Ber	
7.4, 48d	96	12a	213, 295
7.6, 49a	188	13a	308, 317
8.3, 49c	189, 190, 197	20b	133, 137, 140 f.
		25a	266
Naz		25b	165

Ber (<i>continued</i>)		138b	133
26a	296	142a	115, 171
28a	62	150a	133
33b	166	154b	294
49a	317		
50b	270	‘Er	
62a	246	3a	187, 190, 193 f.
Shab		9a	301
4a	180, 302	9b	128
4b	316	10b	317
4b–5a	180	11b	191 f.
5a	188, 270	12a	186
5b	131, 295	12b	128, 147, 157
6a	248	15a	125
7a	197	15b	321
7b	180, 182, 191	20b	127
8b	127	24a	325
10a	296	25a	127, 179, 188
15b	146	30b	125, 288 f.
22a	325	31b	270, 317
28b	202	32b	170, 189, 190
31b	115, 125, 221 f.	33b	189, 190
42a	299, 316	36b	275, 300, 316
43b	127, 128, 296	45b–46a	143
50a	295	49a	317
52b	207	49a–b	155, 158
58b	207	50a	294
71a	296	68a	289 f., 305
71b	315	68b	181
72b	210 f.	71a	145
73a	95	76b	170, 189, 190
73b	210, 294	80b	182, 187
75a	300	87a	180, 186
91a	212	89a	179, 182, 188
93a	78, 247, 321	95a	180
93a–b	316	95b	308
93b	247	101b	191
94b	225, 247		
97a	165	Pes	
100a	191	9a	315, 322, 324
101a	188	13b	166, 189
105a	297	25b	294, 299
105b	315	26b–27a	331 f.
112a	129	27a	331
112b	325	34a–b	325 f.
122b	123, 297	35b	302
124b	143	35b–36a	277
128b	294	44a	88
135b	137	46b	296
		55a	140

Pes (*continued*)

59b	316
63a	319
63b	124
64b	127, 317
67b	122
79a	216
79a	310
80a-b	215 ff.
84a	213, 295
93a	208, 209
97a	126
98a	125, 202, 298, 315
114b	307 f.

RH

13b	317
26a	301
28a	96
28a-b	329 f.
28b	308
28b-29a	205
31b	296

Yoma

6b	216, 318
9a	302
10b	68
11b	191 f.
31a	125
42a	248
48a	138
50b	319
73b	302

Suk

4b	169, 182, 188, 197
7a	157
9b	122
13a	189
14a	206, 324
15a	321
18a	128
19a-b	264
19b	133
22a	180
22a-b	178, 182, 194 ff.
37a	126
50b-51a	214

Bez

2a-b	143
3b	301
4a	208
4b	208
10a	290, 291
37b	290, 291, 306

Ta'an

27a	212, 214
-----	----------

Ḥag

6a	285
19b	133
24b	203

Yev

7a	315
17b	296
22a	166
29b	318
30a	204
32b-33b	355
35b	209
37b	124
38a	124, 322
38b	186, 188, 324
39b	233
44a	153
48b	133
52b	226 f., 320
59a	295
61b	315
62a	225
64b	79
82a	88
88a	169, 298
89b	294
90b	294
103b	182, 189
104b	317
114a	301
116a	317
116b	69

Ket

8a	295
12b	302
17b	127
19b-20a	131 f.

Ket (<i>continued</i>)		53a	90
34a	342	70b	355
34b	95	87b-88a	270
39b	201		
41a	145	Qid	
43b	79	2b	259
51a	188	2b-3a	72
69a	146, 154	6b-7a	354
79a	142	7a	258 f.
100b	130	7b	213
		13b	209
Ned		33b	266
6b-7a	297	42b	315
7a	298	48a	319
28b-29a	259	48b	315, 317
30b	48	49b	98, 128
33a	301	50b	294
35b	320	58a	189
61a	130	59a	331
62b	301	59a-b	136, 207, 362
68a	319 f.	59b	206, 324
69b	294	62b	301
75a	320	64b	137
75b-76a	240	65b-66a	96
87a	137, 140	66b	242
		79a	245
Naz		80a	315
6b-7a	95		
10a	281	BQ	
42a	137	2a	108
53a	149	15a	225
		17b	295
Sot		18b	158
18a	295	19a	158
25a-b	185 f.	20a-b	330
38b-39a	257	22a	144, 155, 156, 321
		27b	294
Git		27b-28a	315
13b	294	29b	202
15b	233	48a	95
19a	249 f., 271	55b-56a	64
20a	202	66a	56
23a	270	67a	297
25a	247, 271	71b	342
25a-26a	304 ff.	73b	132
33a	315	75b	127
34a	299	93b	55, 56
36b	168	93b-94a	284 f.
40b	133	95a	168
47a	294, 297, 316	98a	247

BQ (<i>continued</i>)		78a	127
98b	68	80a-b	332
101a	299		
101a-b	75	Shevu	
104a	125	21b	301
110a	159		
110b	151, 156	Mak	
116b-117a	72	2b	145
		16a	124
BM		18b	326 f.
5b	317	19b-20a	189, 190
6a	133		
10b	154	‘AZ	
12a	302	41b	324
21a	125	47a	214
21b	126, 127	48b	331 f.
22b	125	72a	129
41a	317	73a	181, 187, 301
90b	270	76a	271
92a	320		
93a	252 ff., 269	Zev	
96a	295	3a	247, 267, 333 ff.
104a-b	281	6a	319
106b	79	7b	319
117b	281	9b	213
		14a-b	127
BB		18b	187, 194
2b	294	31a	212
22b	202	47a	301
37a	317	48b-49a	256
71a	294	56b	210
94a ff.	267 f., 340	59b	285
102b	175	92b	138
109b	88, 309	93a	302
129b	140	107b	208, 209
139b	146		
146b	278	Men	
149a	146	7b	139
162b	265	9a	212
175b	203, 209	13b	127
		15a-b	256
San		23a	187, 209
41a	127	24a	355
47b	300, 316	26b	139
60a	298	31a	130
61a	299	64a	212, 316
61b	210	69a	95, 207
65a	127	102b	175
71b	301		
77b	96		

Ḥul		‘Arakh	
10a	322	23a	281
12b–13a	61	31a	122
16a	129		
28b	309 ff.	Tem	
53b	181	4b	294
58a	332	11a	303
58b	187	26b	298
69a	315	30b	331 f.
72b–73a	183, 188		
74b	281	Kar	
81b	127	3b	127
85a–b	68	14b	286, 287, 338 f.
92b	281	28a	298
100a	301, 318		
100b	187	Me‘i	
103b	355	3b	324
108a	187	21a	142
118b	131		
119a	301	Nid	
123b	128	2b	245
125a	148	15b	324
125a–b	147	35b	281
125b	148	36a	281
		42a	156, 158
Bekh		64a	79
17b	311 f.		
22a	301	Minor Tractates	
23a	301	Gerim	
40a	187	2.5	165

Classical Texts

Justinian		Ulpian	
<i>Digest</i>		<i>Regulae</i>	
50.17.202	92	2.5	188
Gaius			
<i>Institutes</i>			
4:37	168		

Index of Modern Authors

Numbers in italics indicate passages which are cited only in the footnotes.

- Abramson, S. 301
 Aderet, A. 120
 Adler, Y. 11, 122, 177
 Albeck, Ch. 15, 22, 50, 83, 85, 86, 89, 90, 140, 148, 185, 213, 235, 255, 310, 311
 Albeck, Sh. 63 ff., 91, 92, 341, 360 f.
 Alchourrón, C. 337, 338
 Alon, G. 11, 27
 Amiel, M. A. 11, 12, 51, 58, 92, 113, 145, 161, 299, 300, 302
 Assis, M. 150, 261
 Atlas, S. 100, 164, 167, 168
 Azar, M. 52, 86
- Bacher, W. 275
 Barak, A. 102
 Bar-Asher, M. 218
 Ben-Shalom, I. 242
 Berkovits, D. 300
 Berkovitz, E. 12
 Blidstein, G. (Y.) 42, 309
 Blumenfeld, Y. M. 12, 232, 233, 247, 248, 250, 260
 Borges, J. L. 9
 Braverman, N. 53, 218
 Brewer, S. 228, 229, 230, 231, 238
 Brody, R. (Y.) 18, 26, 230
 Burton, S. 2
- Carr, E. 20
 Cohen, A. 18, 86, 272, 312, 313, 342
 Cohen, B. 13, 65, 91, 93, 272, 362
 Cohen, F. 31
 Cohen, N. 65
 Collier, C. 31
- Daiches, I. 262
 Daube, D. 52, 65, 105, 126
- De-Vries, B. 10, 12 f., 37, 51, 52, 53, 58, 68, 171, 297, 303, 304, 305, 308, 314, 321, 328, 339, 356
 Dünner, J. 12, 262, 361
 Dworkin, R. 7, 42, 48, 230, 337, 338
- Edrei, A. 169
 Efrati, Y. 50, 53, 58
 Eisenberg, M. 231
 Elitzur, Y. 16
 Ellinson, E. G. 360
 Elman, Y. 16, 19
 Elon, M. 12
 Endicott, T. 102
 Englard, I. 15, 26, 35, 36, 63 f., 65
 Epstein, J. N. 50, 52, 53, 71, 86, 105, 109, 147, 213, 218, 307, 312, 313, 332
 Etz-Chaim, Y. 86
- Francus, I. 142
 Frändberg, Å. 5
 Frankel, Z. 50, 53, 58, 65, 70, 82, 223, 232, 234, 235, 236, 263, 278, 307
 Freimann, A. H. 261, 320
 Friedman, S. 13, 16, 17, 18, 19, 22, 24, 25, 26, 83, 105, 106, 169, 214, 217, 225, 248, 251, 269, 274, 276, 277, 278, 279, 280, 301, 303, 308, 319, 327, 352, 354
 Fuller, L. 9, 31, 121, 163, 165, 166, 172, 182, 189, 337
- Gafni, I. 22
 Gesundheit, R. Jacob 310
 Gilat, A. 2, 91
 Gilat, Y. 14, 15, 65, 67, 97, 106, 107, 115, 152, 153, 243
 Ginzberg, L. 27, 67

- Glicksberg, D. 27
 Goldberg, A. 13, 14, 35, 52, 53, 86,
 116, 147, 148, 184, 269, 276, 288,
 291, 299, 303, 305, 313, 339, 342,
 361
 Goldin, J. 65
 Golding, M. 121
 Goodhart, A. L. 31, 32
 Gordis, R. 110, 185
 Goshen-Gottstein, A. 37
 Gottlieb, G. 32, 47, 207, 231
 Greenspan, N. S. 12, 91, 92, 232, 363
 Grey, T. 64
 Grodzinski, R. Chaim Ozer 171
 Gulak, A. 300
 Guttel, N. 57
 Guttman, J. 225, 354
- Hale, B. 6
 Halivni, D. 18, 24, 33, 108, 109, 132,
 133, 136, 143, 156, 157, 186, 191,
 203, 217, 222, 225, 234, 236, 246,
 247, 259, 269, 277, 279, 282, 303,
 307, 310, 319, 323, 324, 347, 355
 Hallpike, C. 93, 113, 143 f.
 Harris, J. W. 42
 Hart, H. L. A. 32
 Havlin, S. Z. 3, 47
 Hayes, C. 14, 22, 27, 238, 352
 Heller, R. Aryeh Leib 188, 302
 Hempel, C. G. 139, 200, 219
 Henshke, D. 113, 162, 168, 279
 Hoeflich, M. 34
 Hofstadter, D. 9
 Holyoak, K. 270
- Ilan, Y. 358
- Jackson, B. S. 4, 15, 31, 35, 64, 65, 91,
 93, 108, 217, 229, 233, 337, 344,
 347
 Jacobs, L. 167, 247, 310, 354
 Jonsen, A. 1, 34
- Kaddari, M. Z. 52, 101
 Kahana, M. 241
 Kalchheim, S. 15, 302
 Kashner, M. 12, 232, 260, 262
 Katz, J. 26
 Klawans, J. 120
- Knohl, I. 71
 Kosman, A. 15, 275, 281, 282
 Kosovsky, M. 248
 Kuhn, T. S. 337
- Lakoff, G. 113
 Larenz, K. 98, 351, 361
 Laurence, S. 4
 Lieberman, S. 29, 52, 58, 73, 87, 102,
 110, 113, 115, 122, 142, 150, 153,
 171, 176, 179, 181, 185, 189, 190,
 196, 197, 202, 203, 208, 213, 235,
 240, 257, 265, 281, 291, 301, 307,
 311, 320
 Lifshitz, B. 296, 321
 Lipton, P. 226
 Llewellyn, K. N. 231
- Maccoby, H. 149, 161
 McCormick, N. 31, 201, 219, 230
 Macuch, M. 35
 Margolis, E. 4
 Marmor, A. 121
 Melamed, E. Z. 50, 86
 Mielziner, M. 162, 247
 Milikowsky, Ch. 301
 Millikan, R. 361
 Montrose, J. L. 31
 Moore, M. 31, 32, 34, 67
 Morag, S. 86
 Moscovitz, L. 10, 15, 17, 22, 26, 65,
 68, 69, 71, 81, 85, 87, 88, 111, 126,
 130, 133, 204, 209, 214, 224, 234,
 249, 258, 263, 264, 275, 278, 279,
 280, 282, 284, 287, 288, 291, 299,
 301, 320, 340, 347, 361, 362
 Murray, J. 268
- Na'eh, S. 105, 224, 296
 Neusner, J. 98, 353
 Nussbaum, M. 337
- Olbrechts-Tyteca, L. 268
 Olivier, P. 117, 163, 164, 165, 166,
 168, 170, 172, 175, 182, 188, 190,
 194
 Ong, W. 93
 Oppenheim, Ch. 51, 58, 203, 222, 223
- Paton, G. 4, 9, 75

- Patterson, E. 190
 Perelman, Ch. 268
 Pinker, S. 7, 34, 64
 Posner, R. 1, 9, 34, 268
 Preuss, J. 119

 Radin, M. 100
 Ratner, B. 263
 Raz, J. 32, 231, 233
 Reines, R. Isaac Jacob 232
 Rolland, R. 365
 Rosenthal, D. 233, 251, 269, 279, 336, 363
 Rosenthal, E. S. 25, 26, 122, 202, 303, 320, 363
 Ross, A. 207
 Rubenstein, J. 10, 14, 15, 22, 38, 68, 77, 100, 105, 107, 108, 109, 116, 117, 123, 142, 161, 162, 170, 225, 271, 275, 276, 277, 278, 280, 295, 296, 299, 347, 350, 356, 363

 Safrai, Z. 17
 Salmon, W. 221
 Sarfatti, G. 161
 Schauer, F. 3, 5, 32, 34, 66, 100, 200, 201, 217, 223, 230, 337
 Schneider, C. 47
 Schremer, A. 363
 Schulz, F. 35, 50, 65, 92, 102, 107, 158
 Segal, E. 94, 95
 Shapiro, M. 11
 Shiber, B. 64
 Shochetman, E. 94
 Silberg, M. 9, 12, 73, 91, 92, 94, 210, 354, 364
 Silman, Y. 259, 335
 Simpson, A. W. B. 5, 31, 32, 112, 208
 Solomon, N. 11, 35, 100, 105, 300
 Soloveitchik, R. Chaim 11, 197, 302
 Soloveitchik, H. 28
 Spiegel, Y. 140
 Stein, P. 35, 92

 Steiner, G. 44
 Steinsaltz, A. 300
 Stemberger, G. 41, 93, 235, 302
 Stern, S. 22
 Stone, J. 32, 34, 337
 Strack, H. L. 41, 93, 235, 302
 Sullivan, K. 42
 Sunstein, C. 1, 47, 92, 93, 228, 337
 Susskind, R. 31, 200, 219, 315
 Sussmann, Y. 11, 14, 17, 18, 21, 23, 25, 37, 41, 44, 71, 81, 94, 130, 246, 269, 308, 350, 352

 Tabory, Y. 307, 309
 Thagard, P. 4, 226, 270
 Toulmin, S. 1, 34

 Unna, A. 42, 91, 110, 113, 117, 218
 Urbach, E. E. 13, 27, 30, 36, 37, 50, 51, 56, 63, 64, 65, 66, 67, 68, 91, 97, 125, 126, 142, 217, 232, 247, 263, 276, 296, 303, 305, 307, 314, 326, 327, 342, 356

 Vaihinger, H. 9, 163, 166, 174
 van Fraassen, B. 206

 Walton, D. 219
 Wasserman, R. Elhanan 188
 Watson, A. 28, 35, 36, 50, 92, 102, 107, 145, 155, 217, 353
 Weiss, A. 143
 Weiss, M. 234, 236, 300
 Weitz, M. 4, 5, 8
 Werblowsky, R. J. Z. 30, 37
 Wieacker, F. 9, 19, 34
 Winkel, L. 35
 Wittgenstein, L. 6, 358 f.

 Zaccaria, G. 228
 Zuckerman, M. S. 291, 297
 Zuri, Y. S. 65, 96, 100, 122, 159, 168, 225, 247, 276, 303, 353

Index of Hebrew and Aramaic Terms

This index includes terms which introduce conceptual formulations, as well as terms which denote concepts and principles. Numbers in *italics* refer to terms which appear only in the footnotes.

'*bd* 130 f. See also '*aved*
'*mr* 22, 224. See also '*amar*
'*sh* 111, 130 f. See also '*asu* '*oto*;
na'aseh ke-
'*zl* 211. See also *betar...* '*zl*

'*af...ken* 95, 96, 248, 249
'*af hakha* 248, 255, 270
'*al da'ateh de-Rabbi X* 263
'*al hada* 263
'*al titmah* 265
'*alma* 201, 202, 329 ff.
'*amar* 263, 295, 306. See also '*mr*;
Rabbi X 'omer...
'*amerinan* 295 f.
'*ameru davar 'eḥad* 282, 288
'*ani ro'eh* 173
'*asu 'oto ('otah)* 130, 142
'*at ro'eh* 181
'*at shema' minah* 248
'*ata le-qammeh de-Rabbi X* 95
'*ata 'ovada qumei Rabbi X* 95
'*ateya* 281, 285
'*av* 105, 107 ff.
'*av ha-tum'ah* 313
'*avad*. See '*aved*
'*aved* 180, 275, 279
'*aved 'awir...ke-mammash* 184
'*aved leh* 130
'*aved mehallekh ke-manniah* 131
'*avruḥei 'ari* 301
'*azeda* 281

ba'einan 295
bal tosif 330
bari we-shema bari 'adif 323
be-'eino (be-'ayin) 143

be-mai qa-mippalgei 225
be-...megomot shanah Rabbi X 281
be-qiv'a 319
be-qufya 319
bererah 171, 290, 296, 297, 298, 300,
304 ff.
beriyah 301
be-shittat 281
betar... '*zl* 295, 315. See also '*zl*
bilah 296, 317
binyan 'av 235
bi-qevi'uta 319
bittul reshut 145
bizzui miḥwah 325

da'ata 275
damei 110, 130 f., 133, 181
dan 235
davar 'aḥer 178, 217
davar ha-gorem le-mamon 81, 342
davar she-'ein mitkawwen 302
de-'amar 274
de-ha 210
de-ḥayesh 275
de-'it (let) leh 275
de-kawwatah 248
de-la ke-Rabbi X 281
delama 95
de-Rabbi X 281
de-Rabbi X 'amar 274, 279
devarim she-ba-lev 98, 128
dibberu ḥakhamim ba-howeh 50. See
also *lo dibberu...* '*ella ba-howeh*
dibbura milta 299
dineh 130
doresh leshon hedyot 281
dwn 111

- 'edim zomemim* 145
'ein 123, 211 ff., 296 ff.
'ein 'issur ḥal 'al 'issur 12, 302. See also *'issur ḥal 'al 'issur*
'ein safeq mozi mi-dei waddai 322 ff.
'ein zeri 'ah le-heqdesh 326
'eino be-'eino 143
'eino din 240
'eizehu 101 f.
garnei 360
gemar melakhah 42
ger she-nitgayyer ke-qatan she-nolad damei 166
gerama 64, 314, 360
gererah 296
get 104, 313
gezerah shawah 228, 234, 235, 264
gezerat ha-katuv 38, 241
gillui da'ata be-gita milta 299
girei 300
gmr 256
god 'assiq ('aḥit) 188
ha mani 281
ha Rabbi X...ha Rabbi Y 281
ha tu lamah li 203
hada 'amerah 202
haiden Rabbi X 278
hakha namei 246, 248, 270, 325, 326
hakhḥashah tehillat hazamah 131 f.
ḥalaq 94
ḥalut (shem) 300
han 'ashkaḥnan 278
hanei lamah li 137
harei... 101, 104, 111, 133, 166
ḥatikhah 'azmah na'aset nevelah 318
ḥavot remi 195 f.
hawah leh 123 f., 130, 131, 181
hawei 123 f., 127, 128, 129, 146, 154, 297, 298
hawwun ba'yin meimar 81
ḥazaqah 79, 104, 313, 317
ḥazi nezeq 145
hazmanah 25, 300, 314
hazmanah milta 6, 98, 303–304
ḥazuta milta 75, 299
hefqr beit din hefqr 168
hei Rabbi X 278
hekha de-gali gali 38
hekhsher tehillat tum'ah 131
hen hen divrei Rabbi X 280, 282
heqqesh 228, 234
hezzeq she-'eino nikkar 90
hi (copula) 124. See also *Rabbi X hi*
hi da'ateh 76, 280
ḥiddush 38
hilkheta 140
hirhur ke-dibbur damei 137, 140 f.
hishwah middotaw 94
ho'il 296
ho'il we- 217
hokheah 299
ḥoqeqin le-hashlim 180, 188, 191 ff.
ḥosheshin le-zera' ha-'av 302
hu (copula) 124
'i 'attah ('attem) modeh (modim) 235
'ibba'ya leho 319
'iqqar 211
'iqri 159
'issur ḥal 'al 'issur 12, 353. See also *'ein 'issur ḥal 'al 'issur*
'issur kolel 339
'issur mosif 339
'issur neḥasim 154 ff.
'it le- 296
'ittemar 225
karmelit 116, 299
katotei mikhtat shi'ureh 182
kawwanah 25, 299, 360
kayyoze bo 136
ke- 110 f., 120, 130
ke-da'ateh 280, 285
ke-hada 95
ke-'illu 110, 120
keizad 52
kelal 'amar Rabbi X 52 ff.
kelal 'ameru 53 ff.
kelal gadol 'ameru 53, 55
kelalo shel davar 53 ff.
ke-mah de-'at (hu) 'amar... 248
ke-man de- 130, 180
ke-mi she- 130, 180
ke-middat Rabbi X 235, 280
ke-Rabbi X 281
ke-she-timmaze 'omer kelal 52
ke-X hu 130
ki-de-mikhtat damei 182

- ki ha de-Rabbi X* 95
kol 53 ff., 96
kulho sevira leho 275, 282, 285

lamah li le-mitnei 137
lavud 165
law 'af 'al gav 248
law be-perush 'ittemar 'ella mi-kelala 'ittemar 22
le-fi she- 217
le-hagdil Torah u-le-ha'adira 215, 216, 269
le-'inyan 129
le-khol davar 54, 121, 122
le-mah...domeh 237
le-shitato 65, 186, 244, 281
le-ta'ameh 280, 285
let le- 296
lev beit din 168
lmd 256
lo dibberu... 'ella ba-howeh 69 f. See also *dibberu ḥakhamim ba-howeh*
lo la-kol 'amar Rabbi X 129

ma'alın ba-qodesh 8, 62
ma'amar 226 f., 318
ma'aseh 313
mah... 'af 235
mah 'at 'aved leh (lah) 130
mah bein X mah bein Y 269
mah 'inyan 271
mah li...mah li... 235
mah mazinu 225, 235
mah nishtanah 235
maḥashavah 313
mai Rabbi X 278
mai shena X mai shena Y 269
man sham 'at leh de-'amar 276
man tena 278, 281
man tenitah 281
mani matnita 281
mazinu 266
mehallekh ke-'omed damei 131
mehashevin me-'avodah la-'avodah 298
melakhah she-'einah zerikhah le-gufah 299, 302, 315
mena 'amena lah 195, 247, 266
metaqqen keli 115
mevattel kis ḥavero 202

mi damei 271
mi 'ikka midei 264
midei de-hawah 246, 248
mi-din 248
mi-divreihem lamadnu 235
milta 297, 298 f.
mippenei she- 217
mi-qufya 319
mishnah lo zazah mi-meqomah 205
mi-shem. See *mi-shum*
mi-shum 104, 105 ff., 111, 124, 150, 154. See also *shem*
mi-shum she- 217
mit'asseq 73
mizwot zerikhot kawwanah 360
mo'alın be-'isarot 298
mozi me-ḥavero 'alaw ha-re'ayah 302
mu'ad 260 ff.
muqzeh 142, 296, 299, 303
mushba' we-'omed me-har Sinai 302

na'aseh ke- 130, 139, 142, 171, 320, 321
na'aseh ke-'omer 167 f.
niddah 261
nidon ke- 111, 131
nir'in divrei X be...nir'in divrei Y be... 94
nolad 143

'ohel 103
'oqei mamona be-ḥezqat mareh 302

panim ḥadashot ba'u le-kan 325
pe'ah 104
pesiq resheh we-la yamut 300
pi tiqrah yored we-sotem 188

qal wa-ḥomer 118, 235, 240
qarui 159
qaryeh raḥamana 159
qashya 338
qb' 211
qedushah 313
qedushah rishonah qiddeshah...le-'atid la-vo 301
qedushat damim nidḥah 298
qelosh 193 f.
qelutah ke-mi she-hunḥah dameya 6, 180

- geruyah* 159
qiddushin 259
qinyan 'aggav 168
qinyan perot ke-qinyan ha-guf damei 137

Rabbi X hi 279, 281. See also *hi* (copula)
Rabbi X 'omer ('amar) ... Rabbi Y 'omer ('amar) 209, 224
raḥamana qaryeh 159
ro'eh 'ani 173
ro'in...ke-'illu 173 ff., 180 f.
ro'in...she-'im 173, 174
rubbo ke-kullo 137

sham'inan leh le-Rabbi X de-'amar 276
shaweh le- 94
shawwinhu 146, 168
shawyuh 146, 168
she- 178, 204, 206, 217 f.
she-harei 217
she-ken 217
she'at (ha-)kosher 313
shem 105 ff., 111, 124, 148, 150, 300.
 See also *mi-shum*
shema' minah 201, 202, 267
shemah 124, 127 f., 129, 297
shemeh. See *shemah*
shetar ha-'omed ligavot ke-gavui damei 185
shi'buda de-'orayeta 209
shittah 275, 281
shittat 281
svr 22, 224, 225, 275, 281, 295

ta'am 217, 224
ta'ama 202, 224
tenai beit din 168
tenei ken 82
teyuvta 338
to'ar 105, 106
tokh kedei dibbur ke-dibbur damei 137, 140
toladah 105

tolin 'et ha-qalqalah ba-mequlqal 87, 309
torah qare'ah 159

'ubbar (law) yerekh 'immo 303
'uf hakha. See *'af hakha*
u-tenei ken 82
u-zerikha 137

we-'at shema' minah 248
we-hakha. See *'af hakha*
we-hilkheta 140
we-khen 136
welad ha-tum'ah 313

yad 313
yei'asu 138
yeivah 255, 261
yesh 123, 211 ff., 296 ff.
yesh bilah 317
yesh binyan be-kelim (qarqa') 123, 297
yesh diḥui be-damim 298
yesh me'ilah be-qonamot 298
yesh qinyan le-goy 297
yesh setirah be-kelim (qarqa') 123, 297
yesh she-lo li-shemo me-'avodah la-'avodah 298
yesh shevaḥ sammemanim 'al ha-ẓemer 75, 299
yesh yad le- 297
yesh yedi'ah la-ḥaẓi shi'ur 297
ye'ush 299
ye'ush she-lo mi-da'at hawei ye'ush 6
ylf 139, 256
yokhiaḥ 235, 240

zakhin le-'adam she-lo be-fanaw 61
zeh ha-kelal 51 ff., 223
zeh we-zeh gorem 6, 98, 299, 302, 331 f., 360
zeri'ah 325
zerikha 137
zerorot 300
ziqah 226 f., 296, 297
zot 'omeret 202

Subject Index

Numbers in italics refer to material which appears only in the footnotes.

- a fortiori inferences 118, 235, 240
- Abbaye 14
- abstract attributes 353
- abstract concepts and principles 10, 93, 142, 160, 247, 256, 272, 299, 314, 316, 331 f., 348, 350, 353 f.
See also abstract attributes;
 abstract formalistic
 conceptualization; abstraction
 defined 6 f.
 difficult to formulate 87 f., 92. *See also* brevity, desire for
 implicit 247
 in tannaitic literature 55, 59 ff., 78, 87 f., 90, 97, 223, 345, 353
- abstract formalistic conceptualization 247, 333 ff., 349
- abstraction 7, 116, 160, 163, 197, 208, 285, 317, 352 ff.
 defined 7
 in tannaitic literature 353
- acquisition 354
- action concepts 115, 125 f., 160, 223, 353
- admixtures 88 f.
- agency 309, 315
- Aqiba, R. 58
- amoraim. *See also* anonymous stratum (BT); conceptual citations, chronological provenance
 and casuistics 94 ff.
 and generalizations 96
 teachings 12 f., 20, 51, 272, 277 f., 341, 346 ff.
 conceptual character 312 f.
- analogies 10, 26, 34, 36, 90, 137, 228 ff., 274
 attitudes of rabbis towards 271
 biblical paradigm based 238, 242, 244, 247, 256
 and classification 257
 competing 231
 conceptual character 228 ff.
 and explicit principles 249 ff., 341, 350 f. *See also under*
 reformulated as legal principles
 functions 228, 231, 233
 heuristic function 270
 non-principled 194, 230 ff., 260 ff.
 justification for 268 ff.
 precedential 237, 264, 265 f.
 and principles. *See under* explicit principles; reformulated as legal principles
 problematic 240 ff.
 rabbinic attitudes towards 271
 reformulated as legal principles 229, 250 ff., 272, 330, 336 f., 350 f.
 relational 240, 256
 status-based 257 f.
 tannaitic 234 ff., 346, 349
 trivial 255 f.
 of uncertain conceptual character 256 ff.
 verbal (*gezerah shawah*) 228, 234, 235, 264
- analogues, defined 228
- analytic school of Talmud study 11, 35, 105, 145, 364 f.
- ancient law 91, 93
- anonymous stratum (BT) 13, 17 ff., 24, 44, 180, 214, 224 f., 246, 247, 277 f., 289, 303 ff., 350 f., 357
- chronology 17 ff., 357
- conceptual character of principles in 180, 246, 247, 350 f.
- principles generally occur in 341, 357

- anonymous stratum, BT (*continued*)
 and PT 251 ff.
 reformulates attributed material
 127, 156, 251, 306 f.
- Aramaic. *See* language, change as
 indicator of anonymous material
- 'ashgara, stylistic 130, 222, 335
- asseverative *kaf* 110, 116
- association, as stylistic and
 organizational technique 89,
 233, 280, 351
- associations 274 ff., 280 ff.
 chronological provenance 282
 conceptual character 283 ff.
 and conceptual citations 278 f.
 negative 281
 why used 291 f.
- attributed material (BT). *See*
 anonymous material
- attributes, abstract 353
- attributions, reversed in PT and BT
 307, 308
- baraitot, BT 16, 83, 281
- base laws
 defined 165
 and legal fictions 183 ff.
- "beat and thrown down" 195 f.
- Begriffsjurisprudenz* 168
- Beit Shammai and Beit Hillel, basis for
 disputes 65
- betrothal 259
- biblical exegesis 37 ff., 106, 123,
 149 f., 153, 162, 238, 335, 355,
 362. *See also* biblical paradigm
 based analogies
 and classification 159
- biblical paradigm based analogies 238,
 242, 244, 247, 256
- bleeding, post-menstrual 261
- breadth of knowledge vs. depth of
 knowledge 363
- brevity, desire for 220, 273, 279, 292,
 361
- BT
 and PT 23, 133, 251 ff., 344, 351 f.
 reformulates sources it cites 16, 83,
 281. *See also* reformulation of
 rabbinic teachings
- case-based reasoning, defined 228
- case-law rulings 68 f., 91 f. *See also*
 casuistics
- casuistic conception of the law 1, 49
- casuistic formulation of law 1, 3, 49,
 94 ff.
 conceptual character 1 f., 47 f., 68 f.
- casuistic rulings, minimum plausible
 generalization of 279, 341
- casuistics. *See also* casuistic conception
 of the law; casuistic formulation
 of law
 in ancient law 91
 case-law origins 68 f., 91 f.
 defined 1 f.
 types of 1 f., 47 f.
 used throughout rabbinic literature
 94, 356 f.
 why used 91 ff.
- casuistry 1
- catch phrases 143, 301 ff., 327, 333,
 335 f. *See also* fixed formulations
- "category," terms for 62, 105 ff.
- causation 6, 8, 98, 314, 331 f., 360
- change 284 f.
- circumcision 79 ff.
- classificandum, defined 99
- classification 98 ff., 298, 315
 and biblical hermeneutics 159
 "code word" 116 f., 141 ff.
 comparison-based. *See*
 comparison-based classification
 and conceptual analogues 132,
 137 ff., 144
- consistent 54 f., 71 f., 84 f., 103,
 121, 250
- defined 5, 98
- differential 106 f.
- formalistic character 128 f., 146,
 160 f.
- implicit 89, 103
- inconsistent 71 f., 121, 140, 189
- reductionist 144 ff.
- referential 117 ff.
- subsumptive. *See* subsumptive
 classification
 tannaitic 54, 84 f., 89 f., 101
- cognitive science 5, 33 f., 113, 143 f.,
 361

- comparative law 35. *See also* Roman law
- comparison-based classification
 - defined 99
 - and extension of concepts 113 ff., 137
 - post-tannaitic 129 ff.
 - and reclassification 135 f.
 - and subsumptive classification, relation between 99, 111, 117, 130, 131 f., 146, 155, 158 f.
 - tannaitic 110 ff.
- compensatory entities 150 f.
- concepts. *See also* principles
 - abstract. *See* abstract concepts
 - defined 4 f.
 - directly prescriptive 104 f., 313 f.
 - mediate 105
 - origins 362
 - through misinterpretation 362
 - through resolving contradictions 338 ff.
 - post-tannaitic 313 f.
 - and principles 7 f., 293
 - significant 5, 40, 357 f.
 - tannaitic 313 f.
 - terminology for 299 ff.
 - use of 98
- conceptual analogues (classification) 132, 137 ff., 144
- conceptual citations 274, 276 ff.
 - chronological provenance 277 ff., 289
- conceptual descriptions 129, 211 ff., 267, 289, 362
- conceptual metonyms 116, 141 ff., 300 f.
- conceptual *sugyot* 327 f., 340, 351, 359 f.
- conceptualism. *See* formalism
- conceptualization
 - abstract formalistic 247, 333 ff., 349
 - and adjudication, not used for 96, 161, 340, 355, 362, 364
 - chronology 12 ff., 345, 356
 - defined 5
 - development 12 ff., 344
 - and explanation 12, 200, 291, 294, 336 f., 347, 355 ff., 361
 - explicit. *See* explicit conceptualization and functionalism 27 ff.
 - functions 12
 - impact 339 ff., 364 f.
 - implicit. *See* implicit conceptualization
 - influence 339 ff., 364 f.
 - literary aspects. *See* literary aspects of conceptualization
 - patterned (tannaitic) 85 ff., 96
 - post-tannaitic, tannaitic roots of 356
 - rabbinic attitudes towards 362 ff.
 - rare and missing types 359 f.
 - reasons for use 361
 - rulings, not used for issuing 96, 161, 340, 355, 362, 364
 - significance 8
 - and stylistic considerations 119 f., 122, 135, 165, 175, 177, 182, 198, 272, 336, 340, 351
 - tannaitic 73 ff., 345 f., 356
 - and theology 27
 - and thought in general 9
 - used throughout the rabbinic period 14, 345, 356
 - uses, not for legal rulings 96, 161, 340, 355, 362, 364
- consistency, conceptual 186. *See also* classification, consistent
- constitutive processes 169, 245
- contextual change. *See* transfer
- contradictions, solved through conceptualization 135 f. *See also* exceptions
- damage, indirect 64, 360
- damage, non-noticeable 90
- deductive-nomological explanation 200
- definitions, legal 84, 99, 360. *See also* classification
 - by enumeration 101 f.
 - tannaitic 101 f.
- deictic terminology 101, 112
- depth of knowledge vs. breadth of knowledge 363
- designation 6, 8, 25, 98, 314
- despair 6

- dialectic
 - talmudic 36, 135, 232, 246, 294, 328, 357 f.
 - tannaitic literature, rare in 346
- didactic function of conceptualization 135, 206, 210 f., 214, 272, 336, 340, 351, 355 f.
- directly prescriptive concepts 104 f., 313 f.
- discretion, in application and interpretation of the law 42 f., 48, 72, 80
- Donoghue v. Stevenson* 31 f.
- doors 114
- duress 188
- Dworkinian principles 42, 48, 230, 337
- effect conceptualization 318, 320, 355
- Eliezer, R. 236
- enthymematic explanation 218 ff.
- erroneous consecration 241 f.
- '*eruv* 61, 114, 172, 358
- ethics 34
- exceptions 337 ff.
- exegesis, biblical 37 ff., 106, 123, 149 f., 153, 162, 238, 335, 355, 362. *See also* biblical paradigm based analogies and classification 159
- exegesis, rabbinic 10, 28, 339 f., 356
- explanandum, defined 200
- explanation 98, 200 ff., 350
 - amoraic 225
 - BT 225
 - conceptual character 201
 - deductive-nomological 200
 - defined 200
 - enthymematic 218 ff.
 - and generalization, relation between 201, 223
 - hermeneutic validity 68, 226 f.
 - mechanism 207, 210
 - missing 3, 49, 217
 - PT 224
 - status-based 207 ff.
 - subjective character 206
 - superfluous 202 ff.
 - tannaitic 217 ff.
- explicit conceptualization. *See also* abstract concepts and principles; conceptualization
 - defined 5
 - and implicit conceptualization, relation to 356
 - extension of physical concepts 113 ff.
 - extensional fictions 188
 - extrapolation 66 f., 73 ff.
- family relationships 6
- fictional hollowing 191 ff.
- fictions 10, 26, 28, 34, 148, 163 ff.
 - anonymous vs. attributed 180
 - extensional 188
 - fact-based 174 f., 177, 187, 193
 - and formalism 168 ff., 183, 185 f., 190
 - hermeneutic character 182 ff.
 - inconsistent 189 f.
 - interchange with non-fictional formulations 172
 - law-based 175 ff.
 - multiple application 189 ff., 198
 - neglective 174 f., 187, 193
 - post-tannaitic 179 ff.
 - privative 175 f., 187, 193
 - redefinitional 177, 187
 - tannaitic 173 ff.
 - compared with post-tannaitic fictions 198 f.
- fire, damages for 144, 156 f., 320 f.
- fitness, legal 288
- fixed formulations 143, 222, 301 f. *See also* catch phrases
- formalism 34, 63 f., 100, 121, 198, 270 ff., 338, 354. *See also* classification, formalistic character
- fourth generation amoraim 14, 19, 23, 126, 273, 305, 333, 344, 351, 352, 354
- fourth generation tannaim 90
- functionalism 27 ff., 70 ff., 92, 100, 168 ff., 182, 338, 357 f.
 - and fictions 168 ff., 183, 185 f., 190
- "fuzzy" reasoning 272, 337, 341, 348, 350 ff., 358
- generalizations
 - defined 5, 50
 - and explanation 201, 223

- generalizations (*continued*)
 possible to varying degrees 31, 75, 200, 221
 tannaitic 50 ff., 223
 hermeneutic validity 57
 terminology 50 ff.
 gonorrheics 76 f.
 goring oxen 260 ff.
 "grand unified theory" approach to
 conceptualization 158, 193, 336, 339, 354, 358

 half damages 145
ḥalizah 112, 151 ff., 243
 halves, legal status of 309 ff.
 Hebrew. *See* language, change as
 indicator of anonymous material;
 tannaitic Hebrew
 heuristic analogy 270
 hollowing, fictional 191 ff.

 implication 201 f.
 implicit classification 257
 implicit conceptualization 2, 5, 13, 15, 30 ff., 99, 226, 228 f., 356
 and explicit conceptualization,
 relation between 356
 tannaitic 63 ff.
 impurity, public, legal status of 215 f., 318
 incense, sacred 138 f.
 inconsistency, indicator of casuistic
 thought 69 ff.
 indeterminacy 5, 102, 360
 induction 31, 66 f., 75 ff.
 innovation vs. tradition 363
 intention 7, 25, 241 f., 290, 299, 307 f., 329 f., 353, 360
 interchangeable expressions 25 f., 127, 302 f. *See also* stylistic
 variegation
Interessenjurisprudenz 28, 168

 Johanan, R. 348
 Joshua, R. 236
 Judah, R. 70, 90
 jurisprudence
 general 10, 34 f.
 rabbinic 10
 justification 201

 juxtaposition of similar cases 233

kaf, asseverative 110, 116
 killer wife 80

 language, change as indicator of
 anonymous material 24, 254, 304, 357

 law
 ancient 91, 93
 unity 272
 legal definitions. *See* definitions, legal
 legal domains
 casuistically treated 358
 conceptually treated 358
 defined 36
 fictionally treated 172
 multiple 55, 59 ff., 90 f., 100, 112, 121 f., 126, 128 f., 140 f., 250, 310 ff., 328, 348. *See also*
 fictions, multiple application;
 multiple application of legal
 principles; "grand unified theory"
 approach to conceptualization
 legal fiction. *See* fictions
 legal institutions
 analysis of 137 ff., 144 ff., 317 ff., 355
 classification 137 ff., 145 f. *See also*
 reductionist classification
 defined 144
 legal principles. *See* principles
 levirate 112, 151 ff.
 literary aspects of conceptualization.
 See conceptualization, stylistic
 considerations
 Lithuanian Talmudists 11
 lost rabbinic teachings 33, 225, 236

 "magnifying and glorifying the Torah"
 194, 215, 216, 269, 339, 361
maḥashevet Ḥazal 36 f.
 mechanism conceptualization 144, 318 ff., 355
 mediate concepts 105
 Megillah, reading 29
 metaphysical concepts. *See* abstract
 concepts and principles
 metonyms, conceptual 116, 141 ff., 300 f.

- minimalist speculative reconstruction 23
- minimum plausible generalization of casuistic rulings 279, 341
- minors, legal status of 29
- mnemonic function of conceptualization 119, 135, 291, 348
- multiple application of legal principles 100, 122, 126, 128 f., 139 f., 160 f., 165, 170, 310 ff., 327 ff.
See also fictions, multiple application
- and literary factors 193 f., 198, 336 in PT, rare 351
- multiple prohibitions 12, 353

- Near Eastern law 35
- negligence 64
- nomic isomorphism 139
- nominal forms 61 f., 104, 115, 120, 126, 145, 160, 299, 351, 353
in tannaitic literature, rare 346, 353
- nominalism, legal 170 f., 259, 335
- non-minimalist principles 286 ff., 296, 329 ff., 348, 352, 358
- non-principled reasoning 193 f., 229, 260 ff., 283 ff., 335, 337, 341.
See also analogies, non-principled
- nonstandard category classification 109 f., 114
post-tannaitic 124 f.
- nullification of prohibited foodstuffs 176

- omnisignificance, conceptual 238
- ontological status conceptualization 255, 272, 285, 310 f., 316, 345, 349, 353 f. *See also* abstract formalistic conceptualization
- tannaitic, unattested 90, 97
- '*oqimta* 270
- orality 93, 225
- overgeneralization 57, 75, 85, 316. *See also* non-minimalist principles
- overshadowing 147 ff.
- oxen, goring 260 ff.

- paradigmatic interpretation of biblical concepts 161 f.
- partitions 84, 109, 114, 157 f., 186
- periodization of rabbinic literature 18 ff., 344
- Persian law 35, 357
- phenomenological-typological comparison 23
- philology, and study of rabbinic literature 10, 25
- philosophical discourse, absent from rabbinic literature 353
- philosophy 5, 33 f., 107, 353
- pit, biblical 7, 37 f., 108, 161, 165
- polysemy, conceptual 301, 321 ff.
- post-menstrual bleeding 261
- practical orientation of rabbinic law 93, 150, 155, 317 f., 353
- precedent 31. *See also* precedential analogy
- precedential analogy 237, 264, 265 f.
- presumptions, legal 79 ff., 167 f., 317, 323
- principles. *See also* concepts
and analogy 249 ff., 272, 350 f.
and concepts, relation between 293
conceptual character, not necessarily principled 286, 288 f., 335 f.
in conceptual *sugyot*, mentioned only at beginning 330 f.
defined 4, 7
discretionary 42, 94
extension. *See also* multiple application of legal principles through analogy 324 ff. through transfer 216.
hermeneutic validity 337, 342. *See also* explanation, hermeneutic validity
- origins
through misinterpretation of other principles 362
through reformulation of analogies 229, 250 ff., 272, 330, 350 f., 362
- post-tannaitic
and tannaitic principles 342
types 314 ff.
- systemic 41
- tannaitic. *See* concepts, tannaitic; conceptualization, tannaitic; principles, post-tannaitic, and

- tannaitic principles
- principles (*continued*)
- types 293
- prohibitions, multiple 12, 353
- proto-conceptualization 8, 275, 292, 349 f.
- prototype theory of concepts 113
- psychology. *See* cognitive science
- PT
 - and BT 23, 133, 251 ff., 344, 351 f.
 - date 17
 - explicit concepts and principles 293, 341, 351 f.
- qal wa-homer*. *See* a fortiori inferences
- quasi conceptualization 8, 275, 292, 349 f.
- Qumran law 35
- quotations, virtual 185
- rabbinic law, religious character 28
- rabbinic teachings, lost 33, 225, 236
- rabbinic theology 27, 36 f.
- ratio (decidendi)* 31 f.
- rationales, legal 201, 231 f.
- Rava 14, 19, 247, 305, 333, 354
- realia-related rulings 47, 56, 67 f., 345, 358
- realism, legal 170. *See also* nominalism, legal
- reasons for laws, not given 3, 49
- rebutted witnesses 145
- redactors
 - defined 21
 - impact on transmission of rabbinic teachings 21, 24
- reductionist classification 144 ff., 355
- referential classification 117 ff., 137, 164, 166 f.
 - multiple application of 122
 - post-tannaitic 134
- reformulation of rabbinic teachings 16, 21 f., 24, 83, 362. *See also* analogies, reformulated as legal principles; anonymous stratum (BT), reformulates attributed material
- relational analogies 240, 256
- retrospective determination of reality 171, 290 f., 298, 304 ff.
- reversed attributions 307, 308
- rhetorical flourish 194. *See also* “magnifying and glorifying the Torah”
- ritual baths 87
- ritual law 27
- Roman law 10, 28, 35 f., 50, 92, 102, 107, 145, 155, 158, 168, 188, 217, 347, 353, 357, 360 f.
- Sabbath laws 107
- saboraic period 14
- sanctity, increasing 8
- Sefer Yerushalmi 308
- significant concepts. *See* concepts, significant
- Simeon, R. 90
- slaughter, ritual 7, 309 f.
- source cases, defined 228
- sources, conflated 51, 96, 204 ff.
- speech nullifies speech 136, 362
- status-based analogies 257 f.
- status-based explanation 207 ff.
- stratificatory analysis 252 f., 330. *See also* anonymous stratum (BT)
- stylistic considerations. *See* conceptualization, stylistic considerations
- stylistic variegation 111, 130, 167, 263, 298, 299
- subsumption. *See* subsumptive classification
- subsumptive classification 98 f., 104 ff.
 - and comparison-based classification, relation between 99, 111, 117, 130, 131 f., 146, 155, 158 f.
 - defined 98 f.
 - post-tannaitic 123 ff.
 - in PT 123
- sukkah 76 f., 169, 172, 193 f., 358
- synonyms, conceptual. *See* interchangeable terms
- systematization, not found in rabbinic literature 30, 37, 50, 359 f.
- systemic principles 41
- tannaitic Hebrew, formulaic character 86
- target cases, defined 228
- tents, halakhic 103, 149, 161, 165 f.,

- 178, 179, 182, 355
 terminology, conceptual 15, 25 f., 92,
 terminology, conceptual (*continued*)
 118, 131, 247 ff.
 tannaitic literature, not found in 346
 theology 27, 36 f.
 theoretical cases 91, 155, 287, 318,
 321, 353, 354
 thought (opposed to action) 60 ff., 206,
 223
 tort laws 107
 Tosefta
 conceptual character 19, 54
 date 16 f.
 tradition vs. innovation 363
 transfer, literary and conceptual 13, 29,
 83, 84, 266, 309 ff., 321 ff., 336,
 349, 362
 transparency, legal 73 ff., 89, 210, 279,
 308
 unity of law 272
 verb forms 62, 104, 115, 120, 145, 299,
 353
 verbal analogy (*gezerah shawah*) 228,
 234, 235, 264
 vow nullification 319 f.
 zav 76 f.
 zavah 261 f.

Texts and Studies in Ancient Judaism

Alphabetical Index

- Albani, M., J. Frey, A. Lange* (Ed.): *Studies in the Book of Jubilees*. 1997. *Volume 65*.
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- Renner, Lucie*: see *Schäfer, Peter*
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