Introduction

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Throughout the nineteenth and most of the twentieth century, academic scholarship approached Jewish law as an autonomous system governed by its own rules and internal logic. In certain respects this approach bore similarity to methods of study in the traditional yeshivah, where the principles of law and legal theory were the dominant focus. Valuable efforts in the twentieth and twenty-first centuries to write a comprehensive history of Jewish law have centered on the evolution of legal concepts and contributions of leading halakhic authorities. But such works have not, as a rule, examined Jewish law either in light of the social, economic, and cultural forces that shaped its development or from the standpoint of performance and reception history.¹

With the rise of sociolegal studies, it has become a matter of wide agreement that neither law nor society can be studied in isolation. By emphasizing the interdependence of law and society, proponents of the school of legal realism underscore the importance attached to judicial decisions over prescriptive rules. While this change has encouraged greater receptivity to historical method, there has been relatively little notice of the social and cultural history of premodern law, in large part because of the priority assigned to the present. Historians, for their part, have long recognized the utility of legal sources for social and cultural history, but they have been slow to acknowledge the social history of law itself. The latter trend is generally attributed to the technical nature of law, which is widely perceived as daunting by nonspecialists.² Research in the history and development of Jewish law and practice typically

¹See Chaim Tchernowitz, *Toldot ha-Halakhah*, 3 vols. (New York, 1934), and *Toldot ha-Poseqim*, 3 vols. (New York, 1946), esp. vol. 3; Menachem Elon, *Jewish Law: History, Sources, Principles*, 4 vols. (Philadelphia, 1994).

²David Sugarman, "Promoting Dialogue between History and Socio-legal Studies: The Contribution of Christopher W. Brooks and the 'Legal Turn' in Early Modern English History," *Journal of Law and Society* 44 (2017): 37–60.

requires an awareness of the intellectual and social history of the period(s) under discussion—in both the Jewish community and general society—in addition to a mastery of the legal texts themselves. What makes the field especially challenging is that halakhic and allied rabbinic literature does not easily disclose its essence, nor does it openly reveal its historical development. Rarely does it offer overt evidence of the extent to which members of the community are observing requisite laws and practices.

This special double issue of *Jewish History*, titled “New Perspectives on Jewish Legal History,” explores the “legal turn” currently underway in Jewish historiography. The essays in this volume illustrate the value of studying Jewish law—its legal texts, concepts, decisions, and interpretations—in a range of historical contexts that include the social, the political, and the intellectual. We trust that the methods employed by the contributors to this volume constitute, in the aggregate, a step toward understanding how the law becomes the law. In the most expansive sense, this will have bearing on how Judaism, to which law is integral, is understood in terms of its historical development and its relationship to broader society and culture.

The central theme running throughout this volume is the nexus between legal ideas and their institutional expression. Insofar as law is here conceived as both a social and an intellectual enterprise, the distinction that is commonly drawn between external legal history and internal legal history is especially instructive. External legal history is concerned with the history of law as embedded in its context; it traces the sources that have contributed to the development of a legal system, particularly social, economic, political, and cultural factors. Historical method is employed to elucidate the social, economic, and cultural setting in which decision makers lived. Internal legal history, by contrast, is the history of law and legal rules; its sources are codes, legal expositions, court records, and legislation; its practitioners in late medieval and early modern Europe were scholars who were trained in law, judges who were assigned the task of judicial decision making, and lay officials who bore increasing responsibility for drafting communal legislation.³

Taken together, external and internal legal history invite engagement with (a) the history of legal ideas; (b) the success or failure of attempts to institutionalize those ideas in societal structures; and (c) efforts to account for the development of law by considering the historical context. Two aspects of historical context require greater attention: historicist trends that are internal to the law; and the various ways that the law is responsive to social, economic, cultural, and political changes. The two offer a perspective on the potential of the law to change, which can occasionally be discerned in the

³David Ibbetson, “What Is Legal History a History of?,” in *Law and History*, ed. Andrew Lewis and Michael Lobban (Oxford, 2004), 33–40.

emergence of novel legal mechanisms prompted by new conditions. These trends are visible most clearly when the process of legal decision making is investigated closely, and they are perhaps most pronounced when viewed within the continuum that links codificatory literature, rabbinic responsa, and judicial decisions of the courts.

Central to this approach is what legal historians have referred to as “legal consciousness,” defined as the “meanings of law circulating in social relations, . . . a type of social practice reflecting and forming social structures.”⁴ Legal consciousness presumes that the idea of a social framework endows the law with a range of concrete meanings that are collectively constructed. The essays in this volume, each in a different way, attempt to historicize this notion of “legal consciousness” both by highlighting the significance of regional variations in the theory and practice of Jewish law and by following the movement of law between theory and practice. This is the question of the interplay between law as prescribed and law as practiced.

The body of sources used by scholars specializing in Jewish legal history has expanded considerably in the last half century. Legal codes and commentaries have been the mainstay of Jewish legal scholarship. These offer the richest and most reliable resources for constructing or reconstructing the history of Jewish law. While the “law on the books” may be the point of departure for examining practical rulings, research on responsa, especially in the last half century, has identified other factors, including the social, economic, and ethical ramifications of a ruling, as crucial to the scholarly analysis. Many scholars of Jewish law have concluded that the responsa literature allows for the fullest understanding of halakhah because it alone represents the practical application of the law in light of the panoply of social, political, and moral concerns at work. The legal adjustments that the halakhah has undergone in rabbinic responsa point to the various ways Jewish law may have been practiced, though this is never certain, and to the symbiotic relationship between the law and the society in which it develops. In the last decade, heightened attention has focused on rabbinic and lay court records. These sources provide a significant step forward in the direction that was begun by research on responsa. Court records provide a window onto the socioeconomic conditions that prevailed in Jewish communities. These records reflect not only what prescribed law has to say about commercial and real property transactions, divorces, and inheritances but also how these fields of law were in fact practiced. In contrast to the responsa literature, which generally reveals only a modest level of tension between codified law and the halakhah

⁴*The New Oxford Companion to Law* (Oxford, 2008), 695. See also Susan S. Sibley, “After Legal Consciousness,” *Annual Review of Law and Social Science* 1 (2005): 323–68.

as applied, court records mirror the day-to-day functioning of Jewish communities in virtually all areas of life.

Rather than attempting to rank these sources relative to the value they offer legal historians, we maintain that each genre has a distinct and crucial role in the efforts of scholars to reconstruct Jewish legal history. Programatically speaking, the range of sources available to legal historians ought to be approached as components of a comprehensive legal corpus that is best understood as a compound entity. Although each was produced by a particular professional class (jurists, communal officials, and judges), embodied discrete functions, and entailed distinct levels of authority, none operated in complete isolation from the others. They were the product of interdependent constituencies, each with a vested interest in seeing the law serve as an instrument for the realization of social, religious, and political objectives, though the specific goals and means to their attainment varied widely. The interrelationship among these sources offers a key to understanding the intricate twists and turns of Jewish law in the medieval and early modern periods, as theoretical concepts came to be expressed in practical rulings.

The eight essays published in this volume concentrate on law and legal institutions in the medieval Islamic world and in medieval and early modern Europe. Among the salient points addressed in these essays are the appreciation of the role of law in constituting social, political, and economic relationships; the social dynamics of litigation; the heightened interest in practitioners of law; the impact of economic, demographic, and structural forces; and the importance of tracking the interplay between religious and legal traditions. It is not possible, of course, in a single volume to address systematically the myriad topics and methods that this discipline comprises. Instead, this volume contains discrete new studies, some overtly methodological, others more descriptive, each of which deals with the institutions, genres, and tenets of Jewish law in historical context, with a focus on the ways the rabbinic elite interacted with the laity. These studies range from the status and prerogatives of the Jewish court (and individual rabbinic authorities) in view of the legal and communal services they were expected to provide, to the reading of talmudic commentaries and halakhic codes as indicators of lay observance, to the development of customary literature that was meant to mediate between full-fledged legal codes and the needs and concerns of the less educated populace in their everyday religious lives.

Focusing on the consumers of medieval justice, Rachel Furst considers a thirteenth-century divorce suit adjudicated by the rabbinic court of Magdeburg as a window into the legal knowledge of lay litigants, their expectations of the judicial system, and the litigation strategies they developed. Her essay draws attention to the social significance of judicial records and the legal proceedings they document. Marc Herman, in an attempt to explain Moses Maimonides's divergence from the legal methodology of the Baghdadi geonim,

calls attention to Andalusian sources that prefigure and parallel Maimonidean approaches to law. These sources support the theory that the views of Maimonides emerged, at least in part, from earlier Andalusian thought and suggest that the impact of Andalusian Mālikī jurists can explain the divergent positions of Baghdadi and Andalusian rabbinic authorities.

Phillip Lieberman explores the role of “shopping” for legal opinions in Jewish communities of the medieval Islamic world. He discusses several of the strategies used to reduce competition between judicial rulings as well as the utilization of rabbinic responsa by local judges to strengthen their cases before the Jewish court. His essay offers a new appreciation for the social and legal role of responsa as testimony rather than as the definitive record of the court’s ruling. Also concentrating on courts, Pinchas Roth uses unpublished thirteenth-century rabbinic sources to reexamine patterns of adjudication in England. He concludes that rabbinic courts judged a wider range of legal disputes and exercised more extensive powers than is generally assumed on the basis of Latin documents alone. Roth’s essay reinforces the historical importance of rabbinic writings in general, and responsa in particular, alongside other more conventional documentation from the period. On a more cautionary note, Ephraim Kanarfogel considers trends in lay religious observance in medieval France and Germany. His contention is that in order to extract what can be considered reliable evidence of societal patterns from Tosafist writings, scholars must take account of the interpretive strategies and methods of medieval rabbinic authors. He also reminds readers that the precise textual histories of these writings are crucially important, as is the scope of the literature itself, and that historians must exercise extreme care before reaching broader conclusions.

Taking a fresh look at the production of ritual handbooks in medieval Germany, Rachel Zohn Mincer relates their proliferation to a host of social, economic, demographic, and cultural forces. These included the disruptions in the transmission of ritual practice that followed major changes in German-Jewish settlement patterns between the thirteenth and fifteenth centuries, greater geographical mobility, and a heightened orientation toward texts within the culture. She concludes that changes typically associated with the advent of print, including the growing reliance on written sources and the standardization of ritual practice, had begun to emerge substantially earlier. Edward Fram traces the history of the early modern codification of Jewish law from the sixteenth and early seventeenth centuries, when rabbinic authorities displayed ambivalence, to the mid-seventeenth century, when they embraced it more confidently. Alongside this temporal progression was the emergence of clear geographic differences in eastern and western Europe. In Poland, the *Shulḥan ‘Arukh* was a standard rabbinic text that generated commentaries and learned discussions of the law, whereas the frequent citation of the *Shulḥan ‘Arukh* by the Frankfurt am Main rabbinic court is taken

to exemplify how the sixteenth-century code had become an authoritative source in the west. Fram concludes by suggesting that the *Shulḥan 'Arukh* may have been used to accelerate the judicial process. Finally, Jay Berkovitz examines the competing roles of jurists and judges in the decision-making process in early modern Ashkenaz. Differences in their approaches to law, he suggests, were related to the slow transition from impermanent to fixed rabbinic-communal courts in western and central Europe, the deliberate development of communal traditions, and the role of the enlightened absolutist state. He concludes that regional forces influenced the distinct legal efforts and perspectives of judges and jurists, as did the discrete functions they were assigned, their particular training, and the institutional standing of rabbinic courts.

The editors hope that the studies published in this volume will not only inform readers about the particular subjects that stand at their core but also stimulate further thinking and research on these and related matters. The challenge of working in these areas and with such texts looms large, but given the astonishing productivity and finely nuanced writings of halakhists through the ages—as well as the highly significant impact that these writings frequently exercised on their own communities and beyond—this surely constitutes a worthwhile and enlightening pursuit.