Preface

The English section of this year's volume is devoted to the work of the legal philosopher, Ronald Dworkin. Each of the articles in the section either turns to Dworkin to re-evaluate core problems in Jewish law or uses rabbinic sources to challenge Dworkin's theory. This section reflects two interrelated developments within the academic study of Jewish law: a heightened attention to what may be called the 'meta-halakhic' or legal theoretical issues in Jewish law and a heightened appreciation of how legal theory intersects with history and philosophy of halakhah. Indeed, the contributors to this volume range across disciplines – Talmud, history, philosophy, and law – and their work exemplifies a new interdisciplinary approach in Jewish studies.

The attempt to evaluate Jewish law in terms of secular theories of jurisprudence is hardly new. Yet, the excitement generated over the last two decades by Dworkin's work within academic Jewish studies circles is unusual. Dworkin's theory of law has provided a new vocabulary with which to describe Jewish law and his theory has emerged as a major new conceptual tool to address problems in Jewish law that have long perplexed scholars. This phenomenon is all the more noteworthy because Dworkin does not purport to describe the concept of law, as such, but, rather, those concepts underlying the Anglo-American legal system. Yet, as the essays below show, Dworkin's theory of the Anglo-American common law tradition, with its emphasis on adjudication as interpretation and the phenomenology of the judge, provides a number of points of entry for scholars seeking to describe a religious legal system. Indeed, the affinity between Dworkin's theory and perfectionist systems already was hinted at by H. L. A. Hart when he famously termed Dworkin's theory of law 'The Noble Dream.'[1]

1 See H. L. A. Hart, "American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream," *Georgia Law Review* 11 (1977): 969-89.

Preface

1. Hercules and Dworkin's Theory of Law as an Interpretive Activity

Yaakov Elman's contribution, "Hercules within the Halakhic Tradition," illustrates the utility of descriptive theories of adjudication for the intellectual historian of the Talmud. Elman deploys Dworkin's construct of the ideal judge, Hercules, as a measuring yard for one of the most influential and creative rabbis of the Babylonian Talmud: the fourth-century amora Rava.[2] Central to Dworkin's theory of adjudication is the notion of law as integrity: that the law is seen as morally coherent, to the extent possible. Accordingly, the ideal of integrity will sometimes require Hercules to depart from past precedents in favor of more fundamental principles seen as underlying the law as a whole. Elman focuses, first, on the notion of coherence. Often, law is not seen as a coherent unity but, rather, as a composite of distinct legal domains, such as criminal law versus civil law, and legal reasoning is confined within a single domain. Roman and Sasanian law, Elman points out, maintain strict divisions between legal domains. In contrast, one of the striking features of the Babylonian Talmud, identified recently by Leib Moscovitz, is the tendency to transfer principles from one legal domain to another, including ritual, criminal, and civil law.[3] This practice implies that the law is viewed as a single unity. Elman identifies this striving for coherence and for the search for underlying principles rather than narrow historical precedents as a key aspect of Rava's oeuvre and he illustrates this through a meticulous examination of Rava's views on the case of one who worships idols out of 'love or fear' but does not accept the godhead. Rava's views here, as elsewhere, are

2 See Ronald Dworkin, "Hard Cases," in *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1977), 81-130.

3 See Leib Moscovitz, *Talmudic Reasoning: From Casuistics to Conceptualization* (TSAJ 89; Tübingen: Mohr Siebeck, 2002).

strikingly innovative. Herculean comprehensive interpretation, Elman shows, helps us to identify the sources of his innovation.

Azzan Yadin's contribution also takes up Dworkin's theory of adjudication as an interpretive activity. One of the principal attractions of Dworkin's interpretive theory for scholars of Jewish law is that it offers an alternative to authorial intention as a constraint on interpretation. Instead, the constraints on constructive interpretation follow from his famous chain novel analogy: the interpreter inherits all the previous chapters and must continue the novel in a way that maintains its coherence.[4] The interpreter is within a tradition and actively seeking to maintain it. In "The Chain Novel and the Problem of Internally Undermining Interpretation," Yadin argues that the constraints Dworkin proposes on uncontrolled interpretation do not work. Yadin offers two examples of biblical exegesis which meet Dworkin's criteria for legitimate interpretation, yet should not be possible under Dworkin's theory because they "undermine the authority of the very text from which the interpreter draws her own authority."[5] Yadin's first example is Paul's allegorical interpretation of Scripture to undermine the legal standing of Scripture for Gentiles. Paul's interpretation could be viewed as coherent in light of others already within the tradition and, thus, he fits the definition of one who is situated within a tradition and actively seeking to maintain it. Here, Yadin implicitly raises the very interesting question whether there are certain forms of reasoning based on analogy, such as allegory or metaphor, peculiarly suited to moving beyond a tradition or exporting ideas from one to another.[6] Yet, Yadin's second example is

4 See Ronald Dworkin, "How Law is Like Literature," in *A Matter of Principle* (Cambridge, Mass.: Harvard University Press, 1985), 146-66.

5 See below, p. 56.

6 See the interesting remarks of Zenon Bankowski on Dworkin and analogy in "Analogical Reasoning and Legal Institutions," in *Legal Knowledge and Analogy: Fragments of Legal Epistemology, Hermeneutics and Linguistics* (ed. Patrick Nerhot; Dordrecht, The Netherlands: Kluwer Academic Publishers, 1991), 198-216.

drawn from the heart of the rabbinic tradition itself: the famous interpretation of the biblical verse, "It is time to act for the Lord, they have forsaken your Torah," as an instruction to uproot Torah law itself.

2. Dworkin's One Right Answer Thesis

As Christine Hayes summarizes in "Legal Truth, Right Answers and Best Answers: Dworkin and the Rabbis," pursuant to Dworkin's 'one right answer' thesis, law is monist and not pluralist, judges have weak discretion, at best, and the legitimacy of a norm or ruling turns on authenticity – that is, on some criteria of character, content, or quality. Thus, Dworkin's theory contrasts famously with that of positivism, in which there is no one uniquely correct answer in hard cases, judges have strong discretion, and the legitimacy of a ruling turns on validity – that is, on the production of the norm or ruling in accordance with authorized or correct procedures. Which picture of law and legitimacy most comports with that held by the talmudic rabbis? After first clearing several methodological trees from the thicket, Hayes concentrates on the talmudic term '*din*' to designate a legal teaching or judicial ruling that is logically and theoretically 'correct.' The term is often contrasted with compromise, in which peace is valued over correctness, or with a decision that stops short of the line of the law – i.e., application of the law in its rigor. While full application of the law may be viewed as just, a more pious or generous result will be obtained by the relinquishment of certain rights and entitlements. The textual evidence suggests to Hayes that the rabbis endorse a formalist definition of the 'correct' law while still maintaining that formalism is often undesirable because the correct answer is not necessarily the ideal or best answer. It is precisely here, Hayes argues, that the talmudic rabbis and Dworkin part company. Dworkin does not recognize the conceptual distinction preserved by the rabbis between the logically or theoretically correct answer and the best answer. Preserving that conceptual distinction, Hayes argues, is advantageous in one sense: it

"lends rabbinic texts a certain transparency of motive and method that is sometimes lacking on a Dworkinian account."[7] Interestingly, this conceptual approach returns us full circle to legal pluralism versus legal monism in Jewish law – at the jurisprudential level. By maintaining a distinction between the correct answer and the best answer, the rabbis maintain two distinct notions of legitimacy: one grounded in validity and the other in authenticity.

3. Rules and Principles

The relationship between halakhah and the systems of rabbinic thought that have historically accompanied it, such as aggadah, kabbalah, or musar, has been a long-debated issue among scholars. Dworkin's theory that the law contains principles, and not only rules, has provided a new conceptual tool for analyzing that relationship. In "Maimonides' *Epistle on Martyrdom* in the Light of Legal Philosophy," Yair Lorberbaum and Haim Shapira set forth the problem with great clarity using the debate between Haym Soloveitchik and David Hartman on the proper classification of Maimonides' Epistle on Martyrdom as a foil. The Epistle resembles a responsum in its halakhic discussion but it also contains religious instruction, and it is replete with aggadic citations. In Soloveitchik's view, the Epistle was rhetoric and its conclusions deviated from talmudic halakhah; in Hartman's view, the Epistle in its entirety was halakhah, which is not exhausted by rules but also contains ethical, social, and religious principles often found within the aggadah. Lorberbaum and Shapira show how this internecine debate correlates with larger debates about the concept of law in general and of halakhah in particular. Soloveitchik's approach to the Epistle hinges on a concept of law that is positivist and formalist and excludes principles, purposes, or goals, whether social or religious, from the purview of the halakhah as such. Aggadah, too, is outside the realm of halakhah because it lacks

7 See below, p. 88.

the concreteness of rules. Indeed, Soloveitchik's conclusion that Maimonides deviated from talmudic halakhah in the Epistle is dependent on a theory about the nature of halakhah as a bounded set of rules. Hartman, by contrast, would include principles as integral to the halakhah and specifically to Maimonides qua halakhist, similar to Dworkin.

Benjamin Brown turns to the logical distinction between rules and principles identified by Dworkin to address the relationship between halakhah and musar. In "From Principles to Rules and from *Musar* to *Halakhah*: The Hafetz Hayim's Rulings on Libel and Gossip," Brown defines musar as a normative literature, as is halakhah, but while the latter is rule-centered, the former is principle-based. These principles take the form of a 'morality of aspiration,' or imperfect duty; it is a binding obligation to aspire to their performance. In Dworkin's theory of law, rules and principles are different types of norms within a single legal system. In contrast, Brown adopts the logical distinction between rules and principles in order to distinguish between different normative systems. Thus, Brown regards musar and other principle-based normative literature – much of the aggadah – as a separate system from halakhah. He explores the interrelationship between the two systems through the test case of the prohibition of libel. With rare exception, libel was classified within musar until the Hafetz Hayim undertook to reformulate it as halakhah – i.e., as rule-based, extrapolating the rules, however, from unconventional sources such as Bible, aggadah, and musar, from which ordinarily only principles were extracted.

Suzanne Last Stone
Arye Edrei