Preface

The first three essays in the English section of this volume are dedicated to a single theme: how arguments over the nature and operation of law unfold and take shape as a result of sectarian battles over the course of Jewish history. Disputes about law are often at the center of sectarian schisms and both historians and legal scholars have duly noted and analyzed them. Less attention has been paid, however, to the jurisprudential dimension of schisms, even though the sharpest battles are often contests over legal methodology. The essays that follow emphasize how central aspects of legal thought – from questions of judicial authority to the process of halakhic change to halakhic formalism and halakhic autonomy – were conceived during key breaks in Jewish history. At the same time, the essays that follow are self-consciously interdisciplinary: our authors bring to bear on their subject not only the perspectives of law and legal theory but also those of history, political theory, and literature.

Steven Fraade focuses on the polemics over the Jewish calendar in his essay "Theory, Practice, and Polemic in Ancient Jewish Calendars." In the post-biblical period, the Jewish world was split between those who assigned calendrical functions to the moon and those who assigned it to the sun. Needless to say, given Sabbath and festival requirements, the division was deeply fraught. As Fraade points out, error in calendrical reckoning was depicted in the *Book of Jubilees* as tantamount to breaking faith with the covenant. In the central Qumran community, the calendar was a key element marking off the community from the rest of Israel. Fraade juxtaposes two famous incidents involving a calendrical controversy over the date of the Day of Atonement, the one reported in the *pesher* on the prophecy of Habakkuk and the other in the mishnaic and toseftan tractates of Rosh HaShanah. In the

pesher, the confrontation between the Wicked Priest and the Teacher of Righteousness is violent, as there are only two alternatives: either the calendar is right or it is wrong. By contrast, the early rabbinic narrative deploys the notions of judicial authority and legal validity to arbitrate between the competing views of Rabban Gamliel and Rabbi Joshua over the proper date of the Day of Atonement. Their shared understanding of the overarching rules of the practice – here, of the nature of judicial authority and of what constitutes a valid decision – allows the two disputants to remain within a single community, despite disagreement over substance.

The second essay in this series is Arye Edrei's "From Orthodoxy to Religious Zionism: Rabbi Kook and the Sabbatical Year Polemic." Edrei concentrates on the legal philosophic aspects of the polemics over observance of the sabbatical year through a close analysis of Rabbi Kook's famous 1910 ruling permitting circumvention of sabbatical restrictions. In contrast to the early rabbinic narratives about calendar disputes, detailed by Fraade, in the sabbatical controversy there is deep disagreement about the rules of the practice itself. Indeed, Rabbi Kook, Edrei argues, departed from two fundamental principles of Orthodox jurisprudence developed in the nineteenth century on the heels of the rise of the Reform movement. In response to the demands of the Reform movement for change, Orthodox halakhah in Western and Central Europe was shaped around the Ḥatam Sofer's famous motto: "Innovation is forbidden by the Torah." By contrast, Rabbi Kook openly formulated his ruling as an innovation, insisting that halakhic authorities had the obligation to innovate in response to changing reality such as settlement of the land of Israel. Orthodoxy in Western and Central Europe also was characterized by its definition of membership in the Jewish community in terms of allegiance to halakhah. The question of the boundaries of the community occupies a critical conceptual role in modern halakhic jurisprudence. Specifically, must a halakhic authority include Jews who abrogate halakhah within the target population he is considering when formulating his ruling? While

a large number of Orthodox leaders excluded such Jews from the target population, asserting that "they are not our responsibility," Rabbi Kook held that all Jews who were committed to the Jewish people must be considered part of the target population. Accordingly, the sabbatical laws must be redesigned in a manner that enables all Jews living in Israel, regardless of their subjective commitment to halakhah, to observe the law. As Edrei points out, Rabbi Kook's legal philosophy emphasizes the responsibility of the jurist to maintain the halakhah as a "functional normative system for all Jews." His ruling thus lays the foundation for a new branch of Religious Zionist halakhah.

In the final essay of this series, "From Politics to Law: Modern Jewish Thought and the Invention of Jewish Law," Leora Batnitzky argues that the very concept of Jewish law is a modern invention, developed in reaction to the rise of liberal Judaism but paradoxically intensifying its premises. Modern legal thought is characterized by an attempt to claim autonomy for law, in which law is distinct from politics or morality. But this very claim to autonomy has political implications. It is premised on the relationship of law to liberal democracy and, with it, the modern relegation of religion to the private sphere within the political formation of the nation-state. Batnitzky argues that that the concept of Jewish law, particularly in the thought of the founder of German-Jewish Orthodoxy, Samson Raphael Hirsch, is based on the same premises and can only be understood in the context of the modern nation-state. Beginning with Mendelssohn, Jewish law in modernity was defined in apolitical terms – in stark contrast to the laws of the state. Liberal Judaism eventually extended Mendelssohn's conception of Jewish law as a voluntary system, emphasizing its spiritual, universal essence. This paved the way for liberal Judaism's jettisoning of those aspects of the tradition that did not conform to the universal essence, including Jewish law. Hirsch, too, followed Mendelssohn in emphasizing a unity of religious outlook, rather than political life, as the continuous thread of Judaism. And, as with Mendelssohn, his formulation of Jewish law located the political realm firmly within the

non-Jewish state, not within Jewish law or Judaism. Indeed, Batnitzky argues, modern Orthodox conceptions of halakhah along formalist lines, such as Hirsch's presentation of Jewish law as given in its entirety at Sinai and henceforward elaborated from within through a process of discovery, go hand in hand with the modern concept of law as apolitical because it essentially denies that the judge exercises political judgment. Batnitzky also points to Hirsch's refusal to include Jews who did not follow the law in his definition of the Jewish community, a phenomenon which Edrei also associated with Hirsch, in addition to noting that it was a characteristic element of Orthodox jurisprudence. Paradoxically, Batnitzky notes, this very redefinition of the Jewish community as confined to those who are loyal to Jewish law elevates autonomous choice – a modern premise of liberal Judaism – over political identity and destiny. Thus, in the modern period, law and religion come to share a common apolitical structure, in stark contrast to premodernity and also to postmodernity, where we witness the return of political theology.

We move from these three essays, which focus on the jurisprudential aspects of sectarian splits and their attendant polemics, to Haim Shapira's analysis of the jurisprudential aspects of a less heated controversy within the early rabbinic community. In his essay, "The Debate over Compromise and the Goals of the Judicial Process," Shapira turns to contemporary jurisprudence to illuminate the more fundamental dispute over the nature of judicial process underlying the tannaitic debate about the role of compromise. Is the task of the judge to secure social peace by resolving the disputes of private individuals or to instantiate justice in society? This age-old question, starkly dramatized in the *Oresteia* and now animating the contemporary debate over alternative forms of dispute resolution, has its parallel in the divergent tannaitic positions.

An important aim of our journal is to foster an intellectual community engaged in ongoing, collegial debate about Jewish law and thought, and we can hardly think of a better way to do so than to

dedicate space to continuing discussion and debate over topics and points of views that appear in our volumes. This is why we are particularly delighted to present the final two essays by Richard Hidary and Christine Hayes. In last year's volume of *Diné Israel*, we presented Christine Hayes's article, "Legal Truth, Right Answers and Best Answers: Dworkin and the Rabbis," in which Hayes argued that the talmudic rabbis, in some cases, seem to share Dworkin's conception of a single right answer to a legal question, yet did not equate the right answer with the best answer. Richard Hidary's essay in this volume, "Right Answers Revisited: Monism and Pluralism in the Talmud," takes issue with Hayes's conclusion that one could ascribe to the rabbis the view that there exists a single, correct answer to a legal question in theory. Christine Hayes clarifies and expands her position in "Theoretical Pluralism in the Talmud: A Response to Richard Hidary." As she succinctly puts it, the core of their debate is whether recorded instances of pluralism in practice imply any commitment to pluralism in theory.

We hope that the articles presented in this issue also will stimulate continuing debate and discussion in the pages of future volumes of *Diné Israel*.

Arye Edrei
Suzanne Last Stone
Editors