Religion, Law, and the Dynamics of Intellectual Transmission: Weimar Jurisprudence among Religious Socialists in Israel

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Weimar legal philosophy enjoyed a surprising prominence in Israeli religious communes. Established by Orthodox Jews, these communes, known as religious kibbutzim, represented a small minority of the kibbutzim—socialist Zionist communes—in mid-twentieth century Israel.[1] The religious kibbutz was a strange hybrid. In the words of one of its leading intellectuals, Moshe Unna, the religious kibbutzim were "determined by three principles: religion, Jewish nationalism and Socialism."[2] The unprecedented coalescence of these ideologies threw up a host of philosophical, theological, and political challenges. As might be expected, religious kibbutz intellectuals addressed these challenges by reference to canonical bodies of Jewish law (*halakha*) as well as staples of socialist and Zionist ideology. Less predictably, these intellectuals also brought to bear the language of jurisprudence, in particular the jurisprudence of Weimar Germany. The goal of the religious kibbutzim was national Jewish regeneration, social

1. For studies of the kibbutz movement in English, see Melford E. Spiro, *Kibbutz: Venture in Utopia* (New York: Schocken Books, 1971); and Henry Near, *The Kibbutz Movement: A History* (Oxford ; Portland, Oregon: The Littman Library of Jewish Civilization, 2007). On the Religious Kibbutz Movement, see Aryei Fishman, *Judaism and Modernization on the Religious Kibbutz* (Cambridge; New York: Cambridge University Press, 1992).

2. Moshe Unna, "The Elements of the Religious Kibbutz," in *The Religious Kibbutz Movement: The Revival of the Jewish Religious Community*, ed. Aryei Fishman (Jerusalem: Religious Section of the Youth and Hehalutz Department of the Zionist Organization, 1957), 195.

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revolution, and cosmic redemption, so they had little in common with the legal bureaucracies of modern European states. And yet, the legal philosophy developed by Weimar's liberal constitutionalists provided one of the intellectual frameworks for the radical Jewish socialism of the kibbutz movement.

This article explores the application of Weimar jurisprudence to the discourse of the religious kibbutz in three main areas: the role of law in society, the distinction between law and politics, and the political use of lacunae in the law. It addresses the historical question of how and why kibbutz thinkers came to use the work of Weimar jurists in deciding questions unique to the utopian Jewish societies that they were trying to build. The appearance of Weimar thought on the religious kibbutz might expand our understanding of legal and historical phenomena in general, beyond the study of Israel or Judaism. The basic fact that Weimar jurists were familiar to religious kibbutz thinkers—while being an intriguing example of the propensity of legal ideas to pass through political and social boundaries—is not unduly remarkable in itself. Legal ideas, like all ideas, are as mobile as the people who generate and use them. The large migration of German Jews to British Palestine in the 1930s made its mark on many areas of Zionist life in Palestine and, as I will elaborate, helped to shape the legal culture of the State of Israel. What does bear serious consideration, however, are the precise ways in which the religious kibbutz thinkers applied Weimar thought to their idiosyncratic concerns. In their hands, the theories of Gustav Radbruch and Hans Kelsen became versatile and unpredictable tools. Religious kibbutz thinkers sometimes employed particular legal ideas in mutually exclusive ways, or to support conclusions that their originators explicitly rejected. They also applied them to fields of life, such as the nature of religious authority and the relationship between divine law and nationalism, which were typically beyond the scope of the liberal democratic Weimar jurisprudence that was most attractive to religious kibbutz thinkers. The specific details of this story of the migration of ideas demonstrate the fluidity of legal thinking and the capricious instability of currents of thought as they are displaced into new linguistic, geographical, and cultural contexts.

To many Jews, the religious kibbutz was an oxymoron. Before World War II, most Orthodox Jews were neither Zionist nor socialist, and few Zionist socialists were Orthodox. There were enough exceptions to this rule, however, to constitute a movement.[3] In the aftermath of World War I,

3. For an overview of the Religious Kibbutz Movement, see Aryei Fishman, *Judaism and Modernization on the Religious Kibbutz* (Cambridge: Cambridge University Press, 1992).

several groups of religious youth immigrated to Palestine with a view to establishing socialist religious communes. The first religious kibbutz (*Tirat Zvi*, named for the early religious Zionist leader Rabbi Zvi Hirsch Kalischer) was formed in 1937. Eleven more were established by 1949 and more followed in later years. Although for most of Israel's history fewer than 5% of Israeli Jews lived on a kibbutz, the kibbutz played a powerful role in the romantic imagination of the Zionist movement.[4] There were many fewer members of religious kibbutzim, but they too represented the possibility for a kind of social renewal that was attractive to many like-minded Orthodox Jews. The religious kibbutz offered the picture of a form of life that fully integrated the dream of Jewish political independence, the goal of a socialist utopia, and the commitment to a divinely ordained way of life. In fact, kibbutz members believed that these three facets of their ideology were indispensable to each other. The Torah, they believed, could only be expressed in its fullest way in a Jewish state built upon the principle of equality.

As religious kibbutz intellectuals contemplated the composition of their society, they mobilized the language of jurisprudence. Some of these thinkers had quite diverse influences and they drew on different jurisprudential traditions, including those of the United States.[5] They found the theories of contemporary German jurists particularly helpful, however, as they worked through three fundamental questions. The first question was whether law should have any role on the kibbutz at all. By its nature, the radical equality on the kibbutz made it almost anarchic. Its members, at least in the early years, preferred to organize themselves on the basis of spontaneous relationships rather than rigorous normative structures. This raised the question of whether the complex tasks of agricultural production, self-governance, and communal religious practices should be organized informally or whether a more rigid governing structure was necessary. The second question was about the relationship of the religious kibbutzim to rabbinic authorities. On the one hand, a devotion to halakhic precedent, and to

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For historical relationships between the Orthodox Jews and Zionism, see Aviezer Ravitzky, *Messianism, Zionism, and Jewish Religious Radicalism* (Chicago: University of Chicago Press, 1996). For the history of the kibbutz in general, see Melford E. Spiro, *Kibbutz: Venture In Utopia* (New York: Schocken Books, 1971); Henry Near, *The Kibbutz Movement*, 2 vols. (Oxford: Littman Library of Jewish Civilization, 1992–997).

4. Statistics of the kibbutz populations are recorded in Near, *The Kibbutz Movement*, 2:364.

5. Alexander Kaye, "Eliezer Goldman and the Origins of Meta-Halacha," *Modern Judaism* 34 (2014): 309–33 shows that American jurisprudence, particularly the writings of Benjamin Cardozo, were also formative in the legal thought of the religious kibbutz philosopher Eliezer Goldman.

participation in the wider community of Orthodox Jews in Israel, required some kind of fealty to religious authorities outside the kibbutz. On the other hand, kibbutz members were reluctant to subordinate themselves to the Orthodox rabbinical establishment which, by and large, explicitly opposed the credo of kibbutz society, including the axioms of socialism and, often, Zionism. The third question pertained to the place of halakha on the kibbutz. The novelty of kibbutz society opened up a host of unprecedented halakhic challenges and raised the question of how and whether halakhic texts could be applied to these new situations. In response to this challenge, kibbutz thinkers sought answers in theories of legal interpretation. Here too, they had recourse to the language of modern legal theory, and made use of specific innovations of Weimar legal discourse. These three questions—about the role of law on the religious kibbutz in general, the relationship between the kibbutz and rabbinical authority, and the place of halakhic interpretation in kibbutz life—will be discussed in turn.

The Role of Law on the Religious Kibbutz

The most foundational of these questions pertains to the role of law on the kibbutz. Initially, the kibbutzim were resistant to the very idea of formal law. An early sociological study of Israeli communities concluded that the kibbutzim "had no distinctly legal institution" and that their system of internal control should be considered as "informal rather than legal."[6] The relationship between kibbutz society and law was perhaps a reflection of the tortured relationship between utopian experiments and law in general. Some utopian thinkers have been skeptical of legal institutions.[7] After all, in a perfect society, why would there have to be formal rules backed by coercive force to get people to act in a way that they (presumably) would want to act anyway?[8]

The tension between utopia and legalism was one the reasons that members of the religious kibbutzim were skeptical of law. Indeed, Eliezer Goldman, a kibbutz philosopher and halakhic thinker observed that kibbutz

6. Richard D. Schwartz, "Social Factors in the Development of Legal Control: A Case Study of Two Israeli Settlements," *The Yale Law Journal* 63 (1954): 76.

7. Austin Sarat, Lawrence Douglas, and Martha Merrill Umphrey, ed. *Law and the Utopian Imagination,* Amherst Series in Law, Jurisprudence, and Social Thought (Stanford, California: Stanford University Press, 2014).

8. Some scholars, however, have questioned the connection between anarchy and utopia. Miguel Angel Ramiro Avilés, "The Law-Based Utopia," *Critical Review of International Social and Political Philosophy* 3 (2000): 225–48.

members harbored "a disgust of anything that has the whiff of law."[9] Goldman noted that the kibbutz, like other revolutionary communities, had a desire to "free oneself from law and to set society exclusively on the foundation of conscience, good will, the voluntary basis of moral society."[10] Indeed, the skepticism of the kibbutz was enhanced by its socialist orientation. After all, Marx himself expressed the belief that law was nothing but a "bourgeois prejudice," part of the ideological superstructure of society, which was destined, along with the state, to wither away in a communist future.[11] Similarly, Moshe Unna observed that many kibbutz members were concerned that a legal structure in and of itself would undermine the spontaneity of kibbutz relationships and thereby impede the spiritual awakening that was the goal of the community. Many members believed, he wrote, that the kibbutz "is dependent in its essence on the free will of its members and on the spiritual spark created when the will meets with the idea… [They claim that] law will bind the will and put out the fire."[12] Unna noted the belief of some members that law is only needed when there is a "pathological condition in the relations between men and in social life in general."[13] On the religious kibbutz utopia, it was claimed, law should simply be unnecessary because "when the relations between men are perfect, there is no need for the workings of law."[14]

Moshe Unna was among the kibbutz intellectuals who rejected this widespread blunt antinomianism. Unna wrote articles over a number of decades, beginning in the 1940s, arguing that law had a place on the kibbutz. In an article first published in 1946, he insisted that law is not, in fact, only a medicine for a sick society, but is also a basic necessity for any social body. Extending the corporeal metaphor, he argued that law is akin to "a skeleton in the body of a creature. It shapes the fixed form of the body, strengthens it and gives the powers working within it a handle

9. Eliezer Goldman, "Ha-yesod ha-mishpati be-haye ha-kevutzah," in *Amudim: Hoq u-mishpat veha-hevrah ha-qibutsit: proti-kol mi-mei ha-iyun sh-ne'erkhu be-be'erot yitshaq me-yamim 25-26 tishrei 5724* (Be'erot Yitshaq: Ha-qibuts ha-dati, 1964), 17. Unless otherwise noted, all translations are my own.

10. Ibid.

11. Karl Marx and Friedrich Engels, *The Communist Manifesto*, ed. Jeffrey C. Isaac and Steven Lukes (New Haven: Yale University Press, 2012), 83.

12. Moshe Unna, "Hoq u-mishpat ba-qevutsa," in *Shutafut shel emet: qovets ma'amarim be-darkhei ha-qevutsah ha-datit* (Tel Aviv: Moreshet, 1964), 135. This article was first published in the religious kibbutz journal, *Alonim*, in 1946.

13. Yizhak Maor, quoted in Moshe Unna, "Mahut ha-yehasim ha-notzrim a"y ha-mosad shel hoq u-mishpat ba-hevrah ha-kelalit be-tokh ha-qevutzah u-ben ha-qevutsah la-medinah," in *Amudim: Hoq u-mishpat veha-hevrah ha-qibutsit: proti kol mi-yemei ha-iyun she-ne'erkhu be-be'erot yitshaq 25-26 tishrei, [5]764* (Be'erot Yitshak: Ha-qibuts ha-dati, 1964), 4.

14. Ibid.

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for intentioned and harmonious action."[15] For Unna, law was required to support the particular kind of justice toward which the kibbutz was working. No society, he wrote, can sustain itself without law. "Law forms society and is inextricably linked to its order of life and its outlook. Law is a function of society and activates its vital forces. These forces will degenerate if they are not able to be activated."[16]

Unna pointed out that, whereas it might have been possible for the kibbutz in its earliest years to survive as an anarchic society governed by the mutual relations and goodwill of its members, this was no longer the case. The original "personal-social foundations" of the kibbutzim had been eroded as they grew from small families to larger communities. Indeed, "classes" had arisen within the kibbutz itself, as distinctions arose between new and old members, or between manual laborers and others. Although Unna did not mention it, the kibbutz movement also fell short in the application of its principles of gender equality. Indeed, according to one historian, "The gap between the declarations of equality made by the religious kibbutzim and the reality on the ground thus was blatant from their very founding."[17] Unna argued that law was the antidote to these unfortunate developments. Law did not undermine the spontaneous ideals of the kibbutz; it sustained them. "Human society cannot remain in the realm of enthusiasm and desire," he wrote.[18] "[The kibbutz] can remain true to the ideal only if it knows how to transform the flame into building blocks and to chain the will which desires to ascend to heaven and to conquer it."[19]

Unna's defense of law against his more anarchic colleagues was not based solely on these pragmatic arguments, but also on his reading of Jewish sources. He associated antinomian utopianism with the Greek tradition, according to which law only became necessary with the decline of society. In one place, Unna explicitly referred to Ovid's account of the "golden age," a lawless utopia at the beginning of history when people were inherently good and did not need a coercive legal regime to keep social order.[20] Unna contrasted this with the Jewish approach, in which all of humanity

15. Unna, "Hoq u-mishpat ba-qevutsa," 133.

16. Ibid.

17. Lilach Rosenberg-Friedman, "Orthodox, Zionist, Socialist, Female: A New Identity for Women in the Early Religious Kibbutzim," in *Dynamics of Gender Borders: Women in Israel's Cooperative Settlements*, ed. Silvie Fogiel-Bijaoui and Rachel Sharaby (Berlin; Boston & Jerusalem: De Gruyter Oldenbourg & Hebrew University Magnes Press, 2017), 42.

18. Unna, "Hoq u-mishpat ba-qevutsa," 135.

19. Ibid.

20. Unna, "Mahut ha-yehasim," 5. For Ovid's "Golden Age," see Ovid, *Metamorphoses: A New Verse Translation*, trans. D. A. Raeburn (London: Penguin, 2004), 9.

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(even non-Jews who are not bound by the Torah,) are governed by the Seven Noahide Laws. Not for nothing, he wrote, are judges in the Bible referred to as "gods" [*elohim*].[21] They are meant to "demonstrate the qualities of God which relate to the world and to human society in that they are tools for the legal nature of creation and its order."[22] In these comments, Unna was drawing on a prominent strand in the Jewish tradition, which gives law pride of place, and finds its origins in a primordial era, before human society, and even before creation itself.[23] It is important to note, however, that Jewish sources could plausibly have yielded exactly the opposite conclusion. It would not have been hard for Unna to offer a reading of the tradition that supported a more antinomian position. After all, the Garden of Eden, the biblical utopia, was notably free of laws.[24] Indeed, kabbalistic literature paints law as the unfortunate consequence of Adam's sin, and promises a return to a lawless utopia in the messianic age.[25]

Alongside his references to the Jewish tradition, Unna also supported his position by drawing on Weimar jurisprudential debates. Echoes of Weimar thought are already apparent in Unna's paradoxical claims that law both "forms society" and is "a function of society." The order of precedence, both historical and theoretical, between the state and the law, had been a central preoccupation of Weimar constitutional thinkers.[26] Unna's reliance on Weimar theorists, though, became far more explicit in a speech he delivered in 1964. By that time, the question of the role of law on kibbutzim had developed very practical ramifications, because the state itself was seeking to formalize their legal status. Despite the prominence of the kibbutz in the Zionist ideological landscape, no specific law defined the kibbutz in the eyes of the state.[27] The legal definition of the kibbutz had

21. See Exodus 21:6. Traditional Jewish commentaries, such as Rashi, Ramban, and Ibn Ezra, take *elohim* in this verse to refer to the judge or the court.

22. Unna, "Hoq u-mishpat ba-qevutsa," 132.

23. Steven Robert Wilf, *The Law Before the Law* (Lanham, MD: Lexington Books, 2008).

24. Except, arguably, for God's prohibition on eating from the tree of knowledge.

25. See, for example, Gershom Scholem, "The Crisis of Tradition in Jewish Messianism," in *The Messianic Idea in Judaism and Other Essays on Jewish Spirituality* (New York: Schocken Books, 1972), 49–77. Even those who were not experts in kabbalistic literature would likely have known about this theme from the writing of Gershom Scholem, whose seminal article on the topic, "*Mitzvah ha-ba'ah ba-averah*", was published in 1937.

26. Arthur Jacobson, *Weimar: A Jurisprudence of Crisis* (Berkeley: University of California Press, 2000), 2 ff.

27. For the legal structure of the kibbutz and its relationship to the state, see J. Weisman, "The Kibbutz: Israel's Collective Settlement," *Israel Law Review* 1 (1966): 99–131; Allan E. Shapiro, "Law in the Kibbutz: A Reappraisal," *Law & Society Review* 10 (April 1976): 415–38; and Lionel Kestenbaum and Allan E. Shapiro, "Law and the Kibbutz in Process: Adapting Liability Rules to Communal Society," *Israel Law Review* 25 (1991): 61–106.

not changed since the period of the British Mandate, when kibbutzim were considered to be one kind of "cooperative society," along with groups such as pension funds, consumer societies, and mutual insurance groups.[28] By the 1960s, however, this situation had become untenable. Kibbutzim were not like other voluntary associations. They were towns and agricultural communities that housed thousands of people, none of whom owned any private property. This caused legal complications. If, for example, a kibbutz member was sued for damages or for the repayment of a debt incurred prior to membership in the kibbutz, there would be no way to retrieve payment, because the member legally owned no assets. But this legal situation seemed ridiculous, considering that the member was part of a community that provided them with food, clothing, and housing. As a result of the incongruity between the legal status and the real situation of kibbutz members, pressure grew for the kibbutzim to enter into a new and specially designed legal relationship with the state.[29]

Unsurprisingly, this question aroused controversy. In 1964, the religious kibbutzim convened a special symposium to address it.[30] Although the symposium was prompted by new pressure to change the legal status of the kibbutzim, the more general question of the relationship between law and the kibbutzim, which had preoccupied their members for the previous 20 years at least, loomed large in the proceedings. Unna's contribution to the symposium went directly to the root of the matter. "What is the place of law in the life of a society?" he asked. "What is the idea that stands behind it?"[31] Unna presented the answers to this question proposed by two schools of jurisprudence. He called these schools "formalistic" and "substantive." The formalistic school holds that "the law is meant to preserve the order that a particular society has created… The measure of the value of law is its ability to preserve the social order and nothing more." According to the substantive school, by contrast, law does not support a society blindly, but rather measures its values against the standards of morality

28. Cooperative societies were defined by the Cooperative Societies Ordinance, 1933, which in turn was based on a similar colonial law that the British had enacted in Imperial India: the Indian Cooperative Societies Act, 1912. Weisman, "The Kibbutz," 115.

29. Despite this state of affairs, organized legislation covering the kibbutzim was not forthcoming. For decades, the courts had to deal with the legal problems arising from the kibbutz with creative judicial interpretation. Kestenbaum and Shapiro, "Law and the Kibbutz in Process."

30. The proceedings were collected in a special issue of the journal of the religious Zionist kibbutz movement, *Amudim* (May 1964), under the title *Hoq u-mishpat veha-hevrah ha-qibutsit: proti-kol mi-mei ha-iyun sh-ne'erkhu be-be'erot yitshaq me-yamim 25-26 tishrei 5724*. [Law, Justice, and Kibbutz Society: Protocols of the Conference at Kibbutz Be'erot Yitzhak on the 25-26 Tishrei 5724]. (The Hebrew date corresponds to 13-14 October 1963).

31. Unna, "Mahut ha-yehasim," 5.

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and justice. In setting these two schools against each other, Unna was transplanting a perennial Weimar debate to the context of 1960s Israel. In his understanding, the two approaches corresponded to the views of Hans Kelsen and Gustav Radbruch. The debate between these two giants of legal thought dominated German legal philosophy for years, and spilled over into legal scholarship elsewhere in the world.

Kelsen was, according to one contemporary, "the leader of juristic thought in central Europe."[32] He was tremendously influential and made many practical contributions to the field of law, including the Austrian constitution and the foundations of post-World War II international law. His greatest work, *The Pure Theory of Law* (1934), originated in the Weimar period and was refined over the ensuing years.[33] Kelsen aimed to produce a theory of law that was purely scientific, separate from any other realm of human thought, "purified of all political ideology and every element of natural sciences."[34] In his vision of law, the job of the judge is not to determine what the law should be, but rather what the law actually is. In other words, legal validity depends not on morality but on whether the law was produced according the procedures defined by the law itself. The assertion that the source of law's authority is internal to the legal system became known as the separability thesis. It stands in opposition to the theory of natural law, according to which it is the task of the human lawmaker to create a legal system as close as possible to an a priori moral law. Criticisms of natural law theory arose in the very beginnings of the Enlightenment but it was not until the late nineteenth and early twentieth centuries that a school of jurisprudence advocated a total separation between law and morality. This was known as the theory of legal positivism and Kelsen was perhaps its most celebrated proponent. There is little doubt that Unna understood the "formalistic" approach to law, in which "the law is meant to preserve the order that a particular society has created and determined," to be Kelsen's position.[35]

In contrast to Kelsen, Radbruch resisted the complete separation between law and morality. He maintained that law must always be oriented

32. Roscoe Pound, "Fifty Years of Jurisprudence, Part III," *Harvard Law Review* 51 (1937): 449.

33. Hans Kelsen, *Reine Rechtslehre* (Leipzing and Vienna: Deuticke, 1934); and Hans Kelsen, *Reine Rechtslehre*, Second edition (Vienna: Deuticke 1960).

34. Hans Kelsen, *Introduction To the Problems of Legal Theory: A Translation of the First Edition of the Reine Rechtslehre or Pure Theory of Law*, trans. Bonnie Litschewski Paulson and Stanley L. Paulson (Oxford, New York: Clarendon Press; Oxford University Press, 1992), 1.

35. Unna, "Mahut ha-yehasim," 5.

toward the value that it is designed to uphold: justice.[36] Radbruch's *Philosophy of Law*, published in 1932, was considered by many to be one of the most important works on legal philosophy in the early twentieth century.[37] He served as Weimar Germany's Minister of Justice from 1921 to 1923, a period that overlapped with the time that Unna was studying at the Agricultural University of Berlin and, simultaneously, at the Hildesheimer Rabbinical Seminary (1920–22). This was a time of severe political turbulence, during which jurisprudence played a significant role in the national conversation. Jurists debated the basis for the validity of the constitution, its relationship to the people and the government, and the power of the president to override it.[38] Radbruch was a prominent personality in these debates. After Walter Rathenau, the Jewish, socialist democratic foreign minister, was assassinated by a right-wing group, Radbruch was instrumental in passing the *Republikschutzgesetz* (Defence of the Republic Law) in 1922, which gave the government increased powers in battling extreme violent political organizations. Because of his support for social democracy, Radbruch was removed from his University position when the Nazis came to power in 1933.

Radbruch's rejection of the separation of law and morality intensified after World War II, when some legal theorists in Europe and America claimed that legal positivism had, in principle, no way to resist the rise of violent authoritarian regimes. By divorcing law from morality, they argued, there was no legal basis on which to challenge morally repugnant acts, such as those of the Nazis. (There is an irony in this criticism of positivism, since one of the reasons that Kelsen had divorced law from moral values in the first place was in order to bolster the stability of Europe's new and precarious democratic constitutions by insulating law, protecting it

36. For a fuller discussion of this point, see Edwin W. Patterson, ed., *The Legal Philosophies of Lask, Radbruch and Dabin* (Cambridge, MA: Harvard University Press, 1950), 91–93.

37. Gustav Radbruch, *Rechtsphilosophie* (Leipzig: Quelle & Meyer, 1932). On the context of Radbruch's thought and the reception of his *Rechtsphilosophie*, see Hasso Hofmann, "From Jhering to Radbruch: On the Logic of Traditional Legal Concepts to the Social Theories of Law to the Renewal of Legal Idealism," in *A Treatise of Legal Philosophy and General Jurisprudence*, ed. Enrico Pattaro, Damiano Canale, Paolo Grossi, Hasso Hofmann, and Patrick Riley et al. (Dordrecht: Springer Netherlands, 2009), 301–54.

38. For the significance of jurisprudence in Weimar, and an overview of key jurists, see Peter Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law : The Theory & Practice of Weimar Constitutionalism* (Durham NC: Duke University Press, 1997); Jacobson, *Weimar: A Jurisprudence of Crisis*; and David Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelson, and Hermann Heller in Weimar* (Oxford: Oxford University Press, 2003).

from being undermined by appeal to national values or morality.) Kelsen and other positivists vigorously disagreed that legal positivism apologized for Nazi rule. True, they believed that legal validity could not be established on moral grounds, but they also believed that lawful acts could still be subject to moral judgment. Individuals and society as a whole had the responsibility of determining what was right and what was wrong; people should not do things that are morally repugnant, even if they happen to be legally valid.[39] Nonetheless, in the post-war context, Radbruch emphasized even more strongly his differences with the positivists and the centrality of justice to the definition of law.[40] "Where there is not even an attempt at justice," wrote Radbruch, "… the statute is not merely 'false law', it lacks completely the very nature of law. For law ['s] very meaning is to serve justice."[41]

Radbruch's contention that the very meaning of law is "to serve justice" made his legal philosophy appealing to Unna, as he tried to convince his fellow kibbutz members that law should not be seen as a rigid system that would stifle the spirit of the kibbutz, but rather as a framework that could promote its values. Unna drew on Radbruch to argue that "law has to serve the transcendent principle of justice."[42] He quoted Radbruch directly on this point: "The accepted position is that 'law is the entirety of general regulations for the shared life of men,' according to the definition of Prof. Radbruch."[43] Therefore, he argued, law cannot be formalistically applied to society; it must arise from the ethical basis of society itself. Unna went on to emphasize his agreement with Radbruch's idea—against Kelsen—that the authority of law is derived ultimately from moral standards that lie beyond the law itself. He quoted Radbruch again: "The

39. For a discussion of this debate in the terms of Kelsen and Radbruch, see Frank Haldemann, "Gustav Radbruch Vs. Hans Kelsen: A Debate on Nazi Law," *Ratio Juris* 18 (2005): 162–78,

40. There is some debate if Radbruch's theory of law fundamentally changed after the war or if it just altered its emphasis. Stanley L. Paulson, "Radbruch on Unjust Laws: Competing Earlier and Later Views?" *Oxford Journal of Legal Studies* 15 (1995): 489–500. For a fuller analysis of the relationship between law and justice in Radbruch's thought, see Torben Spaak, "Meta-Ethics and Legal Theory: The Case of Gustav Radbruch," *Law and Philosophy* 28 (2009): 261–90.

41. Gustav Radbruch, "Gesetzliches Unrecht und übergesetzliches Recht," *Süddeutsche Juristen-Zeitung* 1 (1946): 105–108. Quoted in: Stanley L. Paulson, "Lon L. Fuller, Gustav Radbruch, and the 'Positivist' Theses," Law and Philosophy 13, no. 3 (1994): 313–59, 317.

42. Unna, "Mahut ha-yehasim," 5.

43. Unna, "Mahut ha-yehasim," 4. Unna appears to be translating into Hebrew the following sentence from Radbruch's *Rechtsphilosophie*: "Wir…bestimmen in diesem Sinne das Recht als den *Inbegriff der generellen Anordnunger für das menschliche Zusammenleben*." [Emphasis in the original.] Gustav Radbruch, *Rechtsphilosophie* (Leipzig: Quelle & Meyer, 1932), 33.

law must constitute a just order. In this way alone is it possible to justify the claim of being a binding authority. From here flows the coercive power of the law."[44] Although this time Unna did not cite the origin of the quotation, which he had translated into Hebrew, it appears to be his paraphrase of a key term in Radbruch's *Rechtsphilosophie*: "Only morality can establish the binding force of law."[45]

In effect, then, Unna used the Radbruch–Kelsen debate as a way to convince his fellow members of the religious kibbutz that law was not necessarily inimical to the kibbutz way of life. He acknowledged that Kelsen's positivist approach to law may indeed stifle kibbutz values, by setting up a formalized normative structure that would be divorced from social principles. He wanted to persuade his colleagues, however, that Kelsen's approach to law was not the only one. Radbruch had set forth a jurisprudence in which law was an expression and fulfillment of the principles upon which a society was formed. Unna contended that this second approach to law would promote the goals of kibbutz society and should be encouraged.

The fact that Unna could quote "Professor Radbruch" without explanation or qualification, and that he described his opinion as the "accepted position," imply that both Unna and presumably also some of his audience at the religious kibbutz colloquium were familiar with the world of German jurisprudence, or at least its most famous representatives like Radbruch and Kelsen. Unna's personal background in Germany, which he held in common with many other religious kibbutz members, might explain why he had a familiarity with Radbruch and Kelsen. A wider societal context makes even more sense of the appearance of these thinkers in Israel during this period. Around 100,000 German-speaking Jews immigrated to Palestine between 1933 and the outbreak of World War II. (Many German Jews, like Unna, who immigrated in 1927, had arrived even earlier.) They had a significant effect on Palestine's economic and social life, particularly in the fields of industry, architecture, literature, and intellectual life.[46] German Jews in Palestine were also disproportionately

44. Unna, "Mahut ha-yehasim," 5. When the speech was published, the quotation was put in quotation marks, but no reference was given.

45. "Nur die Moral vermag die verpflichtende Kraft des Rechts zu begründen." Gustav Radbruch, *Rechtsphilosophie*, 2nd ed., ed. Ralf Dreier and Stanley L. Paulson, (Heidelberg: C.F. Müller, 2003), 47.

46. Yoav Gelber, "The Historical Role of the Central European Immigration to Israel." *Leo Baeck Institute Year Book* 38 (1993): 323–39; Judith Baumel, "'Bridges between Yesterday and Tomorrow': The Role of 'Diaspora Culture' in the Life Story of Heroines of the Fifth Aliyah," *Cathedra* 114 (2004): 121–48; Judith Tydor Baumel-Schwartz, "Bridges Between Yesterday and Tomorrow: The Role of 'Diaspora Culture' in the Stories of Fifth Aliyah Heroines," in *Identity, Heroism and Religion in the Lives of Contemporary Jewish Women* (Bern: Peter Lang, 2013), 19–62; and Osnat Roth-Cohen

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represented in the field of law. Indeed, almost all of Israel's supreme court justices, and many leading jurists, had received a legal education in Germany.[47] Weimar jurisprudence was therefore well known among Israeli lawyers and legal theorists. Kelsen's legal positivism in particular was tremendously influential among Israeli legal theorists. It was the bedrock of early constitutional writing such as that of Benjamin Akzin, a professor of constitutional law and international relations at the Hebrew University.[48] Kelsen himself contributed an article to first issue of the *Israel Law Review*.[49] Indeed, his connection to Israel was not purely intellectual. Kelsen's daughter, Maria Kelsen Feder, moved to Palestine with her husband in the 1930s and Kelsen later apparently entertained moving to Israel himself.[50]

Another facet of Kelsen's legal philosophy may also have made him attractive to Israeli jurists, particularly in Israel's first decades. Weimar jurisprudence was, if nothing else, a "jurisprudence of crisis."[51] For its short existence, the Weimar Republic had to assert its novel democratic liberalism against constitutional, political, and economic threats from fascists, communists, and everyone in between. For Kelsen and his colleagues, law was a tool for constitutional survival. Only a *Rechtsstaat*, a state founded on law rather than charisma or military power, could successfully navigate these overwhelming challenges. Kelsen's separation between law and both politics and morality created a space for state building based on reasoned procedure rather than on the exercise of power or the assertions of historical privilege. It is possible that Israeli jurists felt that they were also beleaguered—by military emergency, political infighting, massive immigration, and the host of challenges that attended the establishment of their own new state—and looked to Kelsen's jurisprudence of crisis as a dependable civic foundation.[52] It is perhaps because of Kelsen's prominence in Israel that

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and Yehiel Limor, "The German (Fifth) Aliyah and the Development of Israel's Advertising Industry," *Israel Studies Review* 32 (2017): 126–45.

47. Fania Oz-Salzberger and Eli Salzberger, "The Secret German Sources of the Israeli Supreme Court," *Israel Studies* 3 (1998): 159–92.

48. See, for example, Benjamin Akzin, *Torat ha-mishtarim*, Pirsumim be-mada'ei ha-ruah veha-hevrah (Jerusalem: Mifal ha-shikhpul, Bet ha-hotsa'ah shel histadrut ha-studentim shel ha-universitah ha-ivrit, 1963).

49. Hans Kelsen, "On the Pure Theory of Law," *Israel Law Review* 1 (1966): 1–7.

50. Benjamin Akzin, "Hans Kelsen: In Memoriam," *Israel Law Review* 8 (1973): 325–29, 326.

51. Jacobson, *Weimar: A Jurisprudence of Crisis*.

52. Naturally, Kelsen's positivism was not the only resource for Israeli jurists and constitutionalists as they contended with these issues. They drew on aspects of American jurisprudence and, for Ben-Gurion in particular, Russian political thought. Pnina Lahav, *Judgement in Jerusalem: Chief Justice Simon Agranat and the Zionist Century* (Berkeley: University of

Unna assumed that many of his fellow kibbutz members were not resistant to law per se, but rather to Kelsen's account of law. It was for this reason that Unna appealed to Radbruch as another German jurist of comparable prominence, to support an alternative jurisprudential outlook. It was through these dynamics that one of the basic debates in Weimar legal theory was transposed into an entirely different context, as the voices of Weimar jurists echoed across the differences between inter-war Germany and Israeli religious farming communes.

So far, this article has focused on the relationship between utopianism and the need for a formal normative framework. It has shown how the debate between natural and positivist legal philosophies informed that debate on the kibbutz, how the German incarnation of that debate was transported to the kibbutz context through channels of migration, and how it melded with Jewish and socialist concerns to create a new jurisprudence for the religious kibbutz. The remainder of the article will deal with two further questions, which are unique to the world of the religious kibbutz, even though they provide insights into law and history more broadly. These questions are, first, how to form a relationship with established rabbinic authorities who were hostile to the kibbutz way of life, and, second, how to apply ancient halakhic rules in a social context unprecedented in Jewish history. Addressing these issues, religious kibbutz thinkers developed an approach that combined a reverence for tradition with an iconoclastic openness to the reinterpretation of ancient sources. Here too, Weimar jurisprudence proved to be a productive resource, but in ways different from the foregoing example. Whereas Unna argued against Kelsen's approach to law in order to support his vision of the religious kibbutz, his colleague Simha Friedman relied on Kelsen to support that very vision.

Resistance to Rabbinic Authority

A central plank of Zionist ideology was the "negation of the exile," the rejection of what Zionists perceived as the weak, passive, and demeaning elements of the Jewish Diaspora, and the regeneration of strong and productive Jews on the soil of their homeland.[53] Left-wing religious Zionists added another element to this "negation": their desire to redeem

California Press, 1997); and Nir Kedar, *Mamlakhti'ut: ha-tefisah ha-ezrahit shel david ben-gurion* (Beersheba; Jerusalem: Mekhon Ben-Gurion Le-heqer Yisra'el, Ben-Gurion University in the Negev; Yad Yitshak Ben Tsvi, 2009).

53. Eliezer Schweid, "The Rejection of the Diaspora in Zionist Thought: Two Approaches," *Studies in Zionism* 5 (1984): 43–70; and Michael Walzer, "The State of

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religion from the diasporic religiosity of their parents.[54] They believed that the "exilic" halakha that they had inherited from their parents was a fossil, alienated from real life. They wanted halakha to flow organically from natural patterns of life, without the need for legal fictions and loopholes that were common in halakhic practice, (as they are in many legal traditions.)[55] They criticized rabbinic authorities for their unwillingness to adapt halakha to modern circumstances. The true nature of halakha, they believed, would allow for independent Jewish life in the Land of Israel with no tension between halakhic requirements and life as it was lived. This would become possible, they believed, in a religious socialist commune in which the Torah could be liberated from its exilic shell and absorbed into all aspects of life.

The ideology of the religious kibbutz, therefore, produced a complex approach to Jewish law, which was riven with internal tensions. On the one hand, members of the kibbutz manifested a reverence for the chain of history, through which, they believed, halakha had been transmitted from Sinai, through their parents, to their own generation. Religious kibbutzim served only kosher food in their communal dining rooms, stopped their agricultural work on the Sabbath, and provided religious education for their children. The religious kibbutz members took pride in the fact they could implement halakhic rules about grafting trees, milking cows on the Sabbath, the right way to deal with the "sanctified" first-born animals, and how to observe the sabbatical year. For centuries, these areas of halakha had been irrelevant to the lives of most Jews, and were studied only as a practice of religious devotion. On the kibbutz, they became a practical template for life.

On the other hand, religious kibbutz members were eager to reform halakha. The kibbutz ideal was to be a "*talmid hakham* and *halutz*," an individual who is both a scholar of Torah and revolutionary pioneer.[56] This led to a way of life that Shmuel Haim Landau, a hasidic Zionist who was one of the early spiritual figureheads of the religious kibbutz movement, called a

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Israel and the Negation of Exile," in *Israel in the World: Legitimacy and Exceptionalism*, ed. Emanuel Adler (London: Taylor & Francis, 2013), 24–31.

54. Religious Zionism comes in many forms. For an overview, see Dov Schwartz, *Faith at the Crossroads: A Theological Profile of Religious Zionism* (Leiden; Boston: Brill, 2002); and Dov Schwartz, *Religious-Zionism: History and Ideology* (Boston: Academic Studies Press, 2009).

55. On the use of loopholes in rabbinic law, see Elana Stein, "Rabbinic Legal Loopholes: Formalism, Equity and Subjectivity" (PhD diss., Columbia University, 2014).

56. Akibah Ernst Simon, *Talmid Chacham und Chaluz* (Hamburg: Zeire Misrachi, 1934). See also Fishman, *Judaism and Modernization on the Religious Kibbutz*, 112–14.

"Holy Rebellion."[57] This was a paradoxical philosophy, which called for a skeptical revision of contemporary religious orthodoxies in the service of fulfilling the underlying values of the Torah. Their confidence in the capacity of the Torah to encounter modern life gave members of the religious kibbutz license to divert from halakhic precedent when they deemed it necessary. This delicate balance between halakhic conservatism and iconoclasm complicated the relationship of the religious kibbutzim to the wider Orthodox community, particularly when it came to their deference to the rabbinic establishment.

Most members of the kibbutz wanted to maintain their relationship to other Orthodox Jews. Failure to do so would not only have challenged their self-understanding, but would also have made it impossible for them to carry out their goal of being a bridge between the religious and secular elements of the Zionist community. Their desire to remain connected with the Orthodox community is illustrated by the events of Hanukkah of 1957, when a number of religious kibbutzim joined regional secular kibbutzim in a holiday celebration. The celebration was held on a secular kibbutz that raised pigs. One religious kibbutz member complained in *Amudim*, the journal of the religious kibbutz movement, that this was a compromise too far: "If we have reached the sad situation whereby all the good relations with our neighbors did not prevent them from turning our valley into a pre-eminent region for raising that impure animal, we must ask ourselves again: What is the limit to the price that we have to pay for good relations?"[58]

On that occasion, the editor of the journal defended the participation with their secularist neighbors. "Our fundamental approach," he wrote, "is to welcome joyfully the opportunity to meet with our neighbors. … Unfortunately, there are Jews who raise pigs and violate the Sabbath, but they are still Jews! Only when we meet them as brothers can our neighbors feel how proper are our ways."[59] The concern behind the complaint, however, was well taken. Members of the kibbutz by and large wanted to maintain their place in the Orthodox community, despite their revolutionary orientation. To do so, they had to preserve their commitment to the interpretive community of the Orthodox halakhic world.[60] To be sure, the

57. See the brief introduction to Landau in Arthur Hertzberg, *The Zionist Idea: A Historical Analysis and Reader* (Philadelphia: Jewish Publication Society, 1997), 432–38.

58. S Shimshon, "How Shall we Celebrate?" *Amudim* 152 (n.d.). Quoted from Fishman, *Judaism and Modernization on the Religious Kibbutz*, 190 fn. 9.

59. Ibid.

60. The factors determining the place of a given Jewish group within the Orthodox community are complex, but a commitment to the "interpretive tradition" of halakha is among the most important. David Hartman, *A Heart of Many Rooms: Celebrating the Many*

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kibbutz intellectuals frequently pursued creative readings of traditional texts, but wherever possible, they avoided straying too far from received interpretations.

Despite their desire to remain within Orthodox Judaism, members of the religious kibbutz knew that most Orthodox rabbis neither understood nor approved of their revolutionary goals. "Our rabbis," noted one kibbutz member, "have not been touched by any revolution; they are unfamiliar with national life, and lack a perspective of statehood."[61] There were occasions on which the religious kibbutzim consulted with rabbis. Many kibbutzim, for example, used a machine for automatically milking cows on the Sabbath – milking by hand is forbidden – which was designed in consultation with national rabbinic leaders like the Ultra-Orthodox Rabbi Avraham Yeshayah Karelitz, and Israel's Ashkenazic Chief Rabbi, Isaac Herzog.[62] Often, however, the halakhic opinions of establishment rabbis were at odds with the needs of life on the religious kibbutz. As Moshe Unna observed, "[Rabbis would] tend to answer a questioner who saw the need to break new ground in halakha because of changing circumstances: 'Better not to do it.'"[63]

Religious kibbutz thinkers developed a variety of techniques for preserving their participation in the halakhic interpretive community, while asserting independence in their revolutionary way of life. One of the most prominent techniques involved distinguishing carefully between matters of halakha, in which they generally accepted rabbinic authority, and politics, in which they reserved the right to follow their own path. This distinction relied on a pillar of the kind of legal positivism championed by Kelsen: the separation between law and politics.[64] Such a separation had the effect of both limiting and enhancing the law. It enhanced the law by protecting it from the interference of powerful political interests. At

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Voices Within Judaism (Woodstock, VT: Jewish Lights Publishing, 2001); and Tamar Ross, *Expanding the Palace of Torah: Orthodoxy and Feminism* (Waltham, MA: UPNE, 2004).

61. From the protocol of the Meeting of the Central Religious Committee, December 12, 1946. Fishman, *Judaism and Modernization on the Religious Kibbutz*, 149.

62. See Refael Auerbach, Shimon Weiser, and Shemuel Emanuel, eds., *Ha-qibuts be-halakha* (Jerusalem: Qevutsat Sha'alvim, 1984), especially 214–15. Significantly, perhaps, the solution to milking on the Sabbath seems to have first been implemented on Kibbutz Hafets Hayim, a religious kibbutz that was founded not by members of ha-Po'el ha-Mizrahi but by members of the ultra-Orthodox party Po'alei Agudat Yisra'el.

63. Moshe Una, *Ha-qehilah ha-hadashah: iyunim be-mishnah ha-qevutsah ha-datit: asupat ma'amarim 1940-1983* (Tel Aviv: Ha-qibuts Ha-me'uhad, 1984), 63.

64. For the relationship between the separability thesis and other aspects of Kelsen's positivism, see Martin Van Hees, "Legal Positivism and the Separability Thesis," in *Legal Reductionism and Freedom*, Law and Philosophy Library (Dordrecht: Springer Netherlands, 2000), 27–43.

the same time, it prevented the law from exceeding its bounds and interfering in political deliberations. It was discussed previously that Moshe Unna emphasized Radbruch's idea of law based on justice, in opposition to the separability thesis of Kelsen. This argument was helpful in convincing the members of the religious kibbutz that law could play a play a productive role in their community, without undermining its commitment to justice and equality. When it came to staking a claim to the autonomy of the kibbutz relative to rabbinic authority, however, Kelsen's positivism was a powerful tool. Indeed Unna's colleague, Simha Friedman, used it to justify equivocal attitude of many members of religious kibbutzim toward to rabbinic authority.[65] Whereas Weimar thought was an essential resource for kibbutz intellectuals, they did not pursue absolute consistency in their adherence to one or another school of Weimar jurisprudence. Rather, they drew on Weimar legal theory in the ways that most supported their vision of a halakhic communalist renaissance.

Simha Friedman, a proponent of the idea that political and halakhic authority were distinct, was born in Bohemia in 1911 and moved to Nuremberg with his family when he was a child. He studied at the Friedrich Wilhelm III University of Berlin, (later Humboldt University,) and at the Hildesheimer Rabbinical Seminary, also in Berlin, before immigrating to Palestine in 1939 and joining Kibbutz Tirat Zvi in 1943. He worked for decades as a teacher, educational administrator, lecturer of Talmud in Bar-Ilan University and, from 1969 to 1977, as a member of Knesset, Israel's Parliament. Friedman proposed a legal philosophy that allowed the religious kibbutz to balance their loyalty to the rulings of Orthodox rabbis while allowing them to retain their independence:

> If the competent authorities make a ruling based on the interpretation of halakha, we will under no circumstances contravene it. For we realize that even if there is room for differences of opinion with regard to halakha, there has to be a recognized body to make decisions and an instant at which such decisions become operative. As in the case of every law once a decision has been taken it must not be flouted. Here we find ourselves accepting the Socratic principle that the law is binding even when it is not convenient. Laws cannot be obeyed only as long as they suit one; otherwise they cease to be laws.[66]

65. Kelsen is, of course, not the only legal positivist. And the theory of positivism is not the only basis on which to distinguish law from politics. Given Friedman's context, however, Kelsen's theory is the most likely source for Friedman's analysis.

66. Simha Friedman, "The Extension of the Scope of Halakhah," in *The Religious Kibbutz Movement: The Revival of the Jewish Religious Community*, ed. Aryei Fishman (Jerusalem: Religious Section of the Youth and Hehalutz Dept. of the Zionist Organization, 1957), 39.

Although Friedman appears to be calling for total subordination to rabbinical rulings, he is actually subtly limiting the scope of their authority. This is clear from the reason that Friedman gave for his belief that "competent authorities" may "under no circumstances" be disobeyed. Classical Orthodox arguments in favor of rabbinical authority tend to draw on teachings like the biblical exhortation that "you shall not turn aside from what they tell you, to the right or to the left."[67] Alternatively, they attribute the authority of the rabbis to their greater scholarship, or their religious standing. Friedman made none of these arguments. Rather, he made reference to the importance of legal procedure, the value of legal predictability, and the authority of recognized legal institutions, (or, in his words, "competent authorities"). These elements of the rule of law in the modern state owe a debt to the doctrine of legal positivism, which justifies legal authority by prioritizing institutional hierarchy over the political telos of the law.[68] The impression that Friedman downplayed traditional sources of rabbinic authority is only strengthened by the fact that Friedman supported his position by the "Socratic principle," that a properly authorized law is binding, and not by reference to any Jewish legal source.[69]

Friedman's formal recognition of institutional halakhic authority is subtly subversive. In emphasizing institutional process, Friedman implicitly de-emphasized another potential source of rabbinic authority, such as charismatic or spiritual authority. Were it recognized, such authority would be vested in an individual rabbi rather than the rabbinical system as a whole. As such, it might pertain to any utterance of the rabbi, whether it was halakhic in the strict sense or not. Such an approach to rabbinic authority had, indeed, arisen in the first half of the twentieth century.[70] Known as *da'as torah*, the doctrine attributed authority in *all* areas to influential rabbis; not only in the areas of their halakhic expertise but also in questions of politics and other aspects of life. According to one historian, this amounted to a kind of "political infallibility" for certain rabbis.[71] *Da'as torah* was

67. Deuteronomy 17:11.

68. For the history of how halakha was reconstructed by religious Zionists in the image of a legal system of a sovereign state, see Alexander Kaye, *The Invention of Jewish Theocracy: The Struggle for Legal Authority in Modern Israel* (New York: Oxford University Press, 2020), especially ch. 4–6.

69. Friedman was presumably thinking of Plato's *Crito*, in which Socrates obeys the law even at the cost of his own life.

70. See Lawrence Kaplan, "Daas Torah: A Modern Conception of Rabbinic Authority," in *Rabbinic Authority and Personal Autonomy*, ed. Moshe J. Sokol (Northvale: Jason Aronson, 1992), 1–60; Benjamin Brown, "Jewish Political Theology: The Doctrine of Daat Torah as a Case Study," *Harvard Theological Review* 107 (2014): 255–89; and Chana Kehat, *Mishe-hafkha ha-torah le-talmud torah: temurot ba-ide'ah shel talmud torah ba-idan ha-moderni* (Jerusalem: Karmel, 2016), 237–60.

71. Brown, "Jewish Political Theology," 257.

certainly not a popular ideology on the religious kibbutz itself. In the wider Orthodox community, however, it had a lot more traction. Friedman was trying to walk a fine line whereby he could convince more conservative Orthodox rabbis to deem the religious kibbutzim as part of their religious community, while at the same time reserving the halakhic autonomy of the kibbutz. To do this, he signaled his principled acceptance of recognized halakhic authorities, but only in the area of halakhic judgment strictly defined. He refused to adopt the position of unlimited deference to rabbinical authority in areas outside of halakhic decision making. The key to Friedman's position was his Kelsenian distinction between law and politics, or what he called "public interest." For all his obedience to halakhic authorities when it came to the law, Friedman insisted that anything outside of that realm was beyond the scope of their authority. Friedman's justification of rabbinic authority, according to which rabbis should be obeyed because they were part of a recognized institutional structure, was the very basis on which that authority was limited. In halakhic matters, rabbinical opinion was law. In political matters, it was insignificant.

Distinguishing between halakha and politics was not purely a theoretical concern for Friedman; it had practical applications. A key example of such an application was the debate over women's military service. Israel legislated conscription for most of its citizens in 1949. (In practice, especially in the early years, non-Jews were generally not called up for army service, with some exceptions.) A major debate broke out almost immediately over the question of the conscription of women. The Prime Minister, David Ben-Gurion, along with most secular politicians, strongly endorsed women's conscription, whereas most religious parties, as well as Israel's chief rabbis, opposed the conscription of women.[72] Their position was supported by concerns over specific halakhic rulings pertaining to the use of weapons by women, as well as more general concerns about perceived compromises to female "modesty" in a military environment.[73] The disagreement was so severe that it helped to bring about the dissolution of the coalition government in late 1952.[74]

72. Zerah Warhaftig, *Huqah le-yisra'el: dat u-medinah* (Jerusalem: Mesilot, 1988), 221–61.

73. The question of whether halakha permits women to carry weapons is based on the Biblical instruction that "a woman must not put on man's apparel [*kli*]." (Deut. 22:5. JPS Translation.) Already in ancient times, the Targum translated *kli* as weapon. See Onkelos at ibid. The prohibition was elaborated upon in medieval times. For example, "Women should not wear men's accessories, so women should not wear a turban or hat, or armor or the like." Maimonides, *Mishneh Torah, Laws of Foreign Worship* 12:10.

74. Asher Cohen and Bernard Susser, *Israel and the Politics of Jewish Identity: The Secular Religious Impasse* (Baltimore: Johns Hopkins University Press, 2000), 25–27.

Almost alone among Orthodox Israeli Jews, the religious kibbutz movement supported the drafting of women into national service. The religious kibbutz supported conscription for women because it accorded with their values of Jewish nationalism and egalitarianism, as well as with the ethos of the importance of participating in wider society, outside the confines of Orthodox circles. From the halakhic perspective, they justified their position, which contradicted rulings by every leading rabbi in Israel, by asserting that this question was a matter of policy and not halakha, and was therefore not justiciable by halakhic authorities. Friedman put it best. The ruling against the conscription of women into national service was no more "than the expression of a certain point of view on a matter of public interest," he wrote. "And on matters of public interest we had just as much right to voice opinions as [the Chief Rabbi]."[75] Friedman's nuanced position was made possible by a positivist approach to halakhic authority. His very endorsement of the authority of halakhic institutions and procedures created room to construe some rabbinic decisions as outside of halakhic procedure and therefore as non-authoritative.

Innovation in Legal Interpretation

Balancing communal autonomy and respect for religious authorities was only one of the challenges for the religious kibbutz as it navigated between tradition and revolution. Another question they had to consider, and the final question that this article will discuss, was the place of precedent in their own halakhic decision making. From the perspective of kibbutz thinkers, a tremendous chasm separated their lives in the socialist communes of a sovereign Jewish state and the "exilic" lives of their forebears. They believed that exilic halakha had limitations in its applicability to their new lives. In exile, Jews almost everywhere constituted a small minority in a state run by others. This situation had evolved over time into a necessary condition for the operation of halakha. By and large, Orthodox Jews could only practice their religion in the context of non-Jewish society, where they could find a non-Jew who would perform acts, such as lighting fires on the Sabbath, that were essential for the running of the community but forbidden to Jews by halakha.[76] In the Diaspora, it was generally also

75. Friedman, "The Extension of the Scope of Halakhah," 50. It should be noted that the decision of which matters are "legal," and which are "political" may itself be construed as a political decision. Dworkin, for one, argued that the realms are not neatly separable. Ronald Dworkin, *Law's Empire* (Cambridge, MA: Harvard University Press, 1986).

76. For the classic historical account of this phenomenon, see Jacob Katz, *The "Shabbes Goy": A Study in Halakhic Flexibility* (Philadelphia: Jewish Publication Society, 1989).

non-Jews who kept the national infrastructure in operation on the Sabbath, while Jews rested. But in the State of Israel, Jews made up a majority of the population. Should Jewish-staffed hospitals, the police force, and the electrical grid shut down every Saturday? It remained an open question whether the halakhic corpus, designed for individuals and small communities, could be applied on the scope of an entire state.

The response of the religious kibbutz community may be contrasted with that of Ultra-Orthodox rabbis on the one hand and mainstream religious Zionist rabbis on the other. Ultra-Orthodox rabbis were defined by their resistance to modernity.[77] They had theological reservations about the Zionist movement, rejecting the religious significance of the state, and they were fearful of assimilation into the secular majority of Israeli society.[78] Halakhically speaking, they viewed their situation in Israel, a self-proclaimed Jewish state, no differently from the situation of Jewish communities elsewhere in the world. Unsurprisingly, they were resistant to anything that appeared to alter the halakhic status quo. Clearly, this was not an attitude shared by the religious kibbutz movement. By contrast, mainstream religious Zionist rabbis did believe that the existence of a Jewish state had theological significance and halakhic ramifications. They also recognized that a creative approach was needed for halakha to be able to make itself applicable to the unprecedented circumstances of a modern Jewish state. Even they, however, were generally reluctant to make extreme changes, and demanded a clear adherence to halakhic precedent.[79] On the whole, they believed that halakhic responses to the new circumstances of Jewish sovereignty already existed somewhere in the halakhic canon and just needed to be discovered. It is a perennial question of legal philosophy whether judges discover the law or make it. Mainstream religious Zionist rabbis adhered to the former position because they believed that that halakha is the product of divine revelation and is therefore "omnisignificant" and, necessarily and uniquely, a complete law.[80] As Moshe Zvi Neriah,

77. Ironically, but inescapably, this rejection was itself a modern phenomenon. Jacob Katz, *A House Divided: Orthodoxy and Schism in Nineteenth-Century Central European Jewry* (Hanover: Brandeis University Press, 1998); and Haym Soloveitchik, "Rupture and Reconstruction: The Transformation of Contemporary Orthodoxy," *Tradition* 28 (1994): 64–130.

78. Aviezer Ravitzky, *Messianism, Zionism, and Jewish Religious Radicalism* (Chicago: University of Chicago Press, 1996).

79. A conservative outlook, however, concealed radical change on a structural level. Kaye, *The Invention of Jewish Theocracy*.

80. For the history of Jewish approaches to the significance of the text of the Torah, and the hermeneutic theories associated with them, see Jay M. Harris, *How Do We Know This?: Midrash and the Fragmentation of Modern Judaism* (New York: SUNY Press, 2012). In some Jewish circles, the modern period brought an ideological intensification of the supreme

a leading religious Zionist rabbi, put it in early 1950s, the Torah, has "the ability to solve any problem in any generation, including the questions of the State of Israel."[81] For Neriah and others like him, this meant that halakhic answers to contemporary questions should be found in ways that troubled the existing structure and practice of halakha as little as possible. As one example, in searching for halakhic solutions to problems of the modern state, religious Zionist rabbis widely applied the principle of *piku'ah nefesh*, which stipulates that the preservation of life takes precedence over almost any other halakhic rule. They stretched the rule to apply not only to the survival of an individual but to the survival of the entire state. (This justified, for example, border patrol on the Sabbath, whose importance justified the suspension of some details of Sabbath observance.) This halakhic strategy was innovative in its own way, in that it widened the application of an established halakhic practice. It was conservative, however, in the respect that it denied that the circumstances of the State of Israel were different enough to require the creation of genuinely new halakhic positions.

For thinkers on the religious kibbutz, and other progressive Orthodox thinkers in the same circle, this approach fell woefully short of what was required. For one thing, the frequent employment of the principle of *piku'ah nefesh* implied that the very existence of a Jewish state was an unfortunate and tragic emergency, which required the suspension of the normal operation of halakha. This implication was hardly compatible with a Zionist sensibility. A more fundamental criticism was that the conservative approach of most religious Zionist rabbis was only effective because most citizens of Israel, including most Jews, totally ignored them, and were oblivious to their rulings. Safe in the knowledge that power stations, sewage plants, and embassies would continue to operate on the Sabbath at the hands of people who had no interest in their halakhic rulings, the mainstream religious Zionist rabbis were able to be more restrictive.[82]

The features of both Ultra-Orthodox and mainstream religious Zionist rabbinical thinking were challenged by members of the religious kibbutz. According to Eliezer Goldman, rabbis who failed to recognize the novelty

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significance of the text. Yaakov Elman, "The Rebirth of Omnisignificant Biblical Exegesis in the Nineteenth and Twentieth Centuries," *JSIJ - Jewish Studies: an Internet Journal* 2 (2003): 199–249.

81. Moshe Tsvi Neriah, *Kuntrus ha-vikuah: hilkhot shabbat ve-hilkhot medinah* (Jerusalem: Or olam, 1952), 4. For more on this position, see Kaye, "Eliezer Goldman and the Origins of Meta-Halacha."

82. Yeshayahu Leibowitz, *Torah u-mitsvot ba-zeman ha-zeh: hartza'ot u-ma'amarim 5703-5714* (Tel Aviv: Masada, 1954), 86–100.

of their era were "living in a kind of Alice's wonderland."[83] However eager they were to remain part of the interpretive community of halakhic authority, members of the religious kibbutz called for flexibility in their interpretation of halakhic texts. In the words of Moshe Unna: "If we wish to free ourselves from exilic reality, it is inconceivable that a certain estrangement will not take place between us and the formulations of the Shulhan Arukh [an important code of Jewish law]."[84] This bold position was understood by Unna not as an abandonment of the Torah but as its fulfillment. Because he was entirely convinced in the power of the Torah to respond to current problems in an organic way (rather than though the forced hermeneutics of the likes of Neriah), and because he was certain that his own community represented the Torah with integrity, Unna trusted that the actions of the religious kibbutz would be what the Torah, at its deepest level, required.[85]

This is where Weimar jurisprudence once again manifested in the kibbutz conversation. Simha Friedman in particular subtly but directly drew on of one of Hans Kelsen's most important works in his engagement with the question of halakhic interpretation. As described, one of the main disagreements between mainstream religious Zionist rabbis and the religious kibbutz was whether precedent could provide the halakhic answer to any case, no matter how much society changed, or whether halakha may have to develop new response to new circumstances. Put differently, this is the question of whether there can be lacunae in the law, a question with which Kelsen engaged deeply. When it came to the distinction between law and politics, as discussed, Friedman implicitly concurred with Kelsen in separating politics from law. With regard to the question of halakhic interpretation, Friedman employed Kelsen's oeuvre in even more detail. This time, however, even when using Kelsen's own legal examples, he came to different conclusions than Kelsen himself.

Friedman objected to the claim that the halakhic canon contains answers to any question, past or future, even to "hard cases" in times of great social change. In a 1957 article, he claimed that halakha is silent on many aspects of the new socio-political circumstances of Jewish life in the State of Israel. "Reality is never static," he wrote. "The new Jewish society that has come into being in the Land of Israel is of a very dynamic character, and it is

83. Eliezer Goldman, "Ha-halakha veha-medinah," in *Mehqarim ve-iyunim: hagut yehudit be-avar uva-hoveh*, ed. Daniel Statman and Avi Sagi (Jerusalem: Magnes Press, 1996), 422.

84. Fishman, *Judaism and Modernization on the Religious Kibbutz*, 147.

85. For more on Unna's thought, see Mikhael Benadmon, *Mered ve-yetsirah ba-hagut ha-tsi'onut ha-datit: Moshe Una u-mahapekhaat ha-qibuts ha-dati*, Mahshavot: sidrat mehqarim be-mahshevet yisra'el le-zikhro shel Izidor Fridman (Ramat Gan: Bar-Ilan University, 2013).

changing with unprecedented rapidity. . . How, then, can Jews live in accordance with religious law when they are constantly being faced with situations which were not formulated in halakha?"[86] He proceeded to offer an unusual illustrative example.

> When electricity was first installed in Prussia, some time towards the close of the last century, a case was brought against a man for leading a wire from the main cable to his house. The prosecution charged him with the theft of public property. In defense he pleaded that his action did not constitute theft, since theft, under Prussian law, was defined as *Entwendung von Gegenständen*, i.e. the actual removal of physical objects, whereas in this respect electricity was not an "object." The court upheld the plea and discharged the accused. The logical implication of the court's action was that the law was found wanting, and that it required alteration to meet the changed conditions brought about by technological progress.[87]

Friedman's example concerned a case in which a Prussian court, many years earlier, had ruled that the illicit use of electricity, a new technology at the time, could not be prosecuted because the law defined as theft only the removal of "objects," a category that did not include electricity. This judgment could plausibly have been cited in support of either of two opposite conclusions. It is possible to read the case as good precedent, approving of the court's decision to confine itself to existing law, even in the face of new technologies and social conditions. Conversely, it is possible to read the case as a *reductio ad absurdum* argument for the need for creative judicial interpretation when the law fails to reflect the conditions of real life. In that reading, the outcome of the judgment is so obviously wrong that the case could only be a cautionary tale, and an argument for greater judicial innovation.

Friedman used this historical case to argue for the second conclusion: that when new circumstances arise the old law inevitably becomes insufficient. As Friedman put it, "Here we have a phenomenon common to every type of law: no law can be so drafted as to provide for every future contingency. This applies also to the formulation of the laws contained in the Torah."[88]

86. Friedman, "The Extension of the Scope of Halakhah," 38. This article was based on a speech originally delivered by Friedman at the Jerusalem Community Center in 1954. In 1957, the same year as its publication in English, it was published in Hebrew in the religious kibbutz journal *Amudim*. The translation here is based on the English version and the page numbers also refer to it.

87. Friedman, "The Extension of the Scope of Halakhah," 39. Friedman does not cite the original case, but it can be found here: *Entscheidungen des Reichsgerichts in Strafsachen* (Berlin: Veit & Comp., 1880), 29:111.

88. Friedman, "The Extension of the Scope of Halakhah," 39.

A question for the historian is why Friedman used the example of a case from nineteenth century Prussia in his argument about halakha in the State of Israel. Of all the examples Friedman could have used to illustrate his point, why did he chose a case so remote from his readers, in a judicial system that no longer even existed? And how did Friedman have such intimate knowledge, down to the precise legal formulation in the original German, of the Prussian judge's ruling? It cannot be a coincidence that Hans Kelsen referred to this precise case in his own discussion of whether there can be "gaps in the law": matters on which the law is silent. This is the same question that Friedman was exploring with regard to halakha. Kelsen mentioned the Prussian case in print as early as 1934, and later incorporated the example into the discussion of legal gaps in his monumental *Pure Theory of Law*.[89] Friedman possibly encountered this case when he was a student in Berlin during the Weimar period.

Significantly, however, Kelsen used the case to illustrate a position very different from Friedman's. Kelsen maintained that, by definition, there cannot be gaps in the law—he called them "so-called gaps in the law"—and that everything is either legally permitted or legally forbidden.[90] If the law does not restrict a given act, then that act is by definition legally permitted.[91] The fact that the law does not forbid the theft of electricity, for example, does not mean that the law has a gap; it simply means that taking electricity without paying for it is permitted by law. When people claim that there is a gap in the law, Kelsen claimed, what they really mean is that "the absence of such a legal norm is regarded as politically undesirable." In other words, the law does exist, but it is rejected "as being inequitable or unjust according to the opinion of the law-applying organ."[92] But judging the legitimacy of a law on the basis of justice would be to fall afoul of the principle of the separation of law and morality, an axiom of Kelsen's positivism. So, for Kelsen, the Prussian court acted correctly. If the Prussian legislature wanted to change the statute so that it outlawed the theft of electricity, then future cases might have a different outcome. In the meantime, for Kelsen, the electricity filcher may be unjust, selfish, or politically offensive, but his action was lawful and his acquittal was the correct judicial outcome.

Friedman used the same case to make the opposite argument. He believed that halakha did not yet have sufficient resources to govern life

89. Josef L. Kunz, "The Vienna School and International Law," *New York University Law Quarterly Review* 11 (1933): 370–422; Hans Kelsen, *Pure Theory of Law*, trans. from the Second (Revised and Enlarged) German Edition by Max Knight (Berkeley; Los Angeles: University of California Press, 1967), 246.

90. Kelsen, *Pure Theory of Law*, 245.

91. Ibid., 246.

92. Ibid.

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in the Jewish state, and wanted to empower rabbis to be creative in developing halakha to meet its modern challenges. For those who believed that the answer to any legal question was already present in the halakha, waiting to be discovered, Friedman's position was contentious. He defended it by pointing to the case of the Prussian electricity theft as an example of how laws can fall behind societal change. Friedman thought that the case clearly demonstrated his point by showing that "the law was found wanting," and that the law "required alteration to meet the changed conditions brought about by technological progress."[93] Kelsen and Friedman, then, read the case in opposite ways. The former contended that there can, by definition, be no gap in the law, whereas the latter thought that legal gaps are inevitable.[94]

What conclusions can be drawn from the unexpected presence of Weimar legal ideas in Israel's religious kibbutzim? Legal ideas are often "transplanted," or "diffused" from one jurisdiction to another, perhaps especially during intellectually fertile moments like the early years of building a new state.[95] In that respect, the conjunction between Weimar jurisprudence and halakhic debate on the religious kibbutz is not unique. This particular meeting of legal cultures, however, does involve aspects that offer new insights into the general phenomenon. Jurists have typically been drawn to observe legal diffusion on the level of the state, as it occurs in national legislatures and prominent judicial verdicts. The appearance of Weimar jurisprudence on the religious kibbutz, by contrast, reinforces the insights of many scholars of law and the humanities that legal ideas flow through channels of social exchange that are not necessarily associated with the sovereign state. As new technologies are accelerating and intensifying the de facto existence of legal pluralism in global context, it pays to think about not only its practical consequences (such as conflicting

93. Friedman, "The Extension of the Scope of Halakhah," 39.

94. It is possible to read Friedman in a way that does not contradict Kelsen outright. Friedman argued that the law should be changed to become aligned with principles of justice, but he may have agreed with Kelsen that until such a change has taken place, the acquittal of the electricity thief was legally legitimate, if morally wanting. At the very least, however, it can be stated that Friedman used Kelsen's example in a very different way than Kelsen himself. Kelsen was interested in the question of legal legitimacy; Friedman in judging law by the standards of morality.

95. Alan Watson, *Legal Transplants: An Approach to Comparative Law* (Athens, GA: University of Georgia Press, 1993); David A. Westbrook, "Theorizing the Diffusion of Law: Conceptual Difficulties, Unstable Imaginations, and the Effort to Think Gracefully Nonetheless," *Harvard International Law Journal* 47 (2006): 489–505. For the Israeli context, see Assaf Likhovski, "Argonauts of the Eastern Mediterranean: Legal Transplants and Signaling," *Theoretical Inquiries in Law* 10 (2009): 619–51.

jurisdictions), but also its social and theoretical underpinnings.[96] How do legal ideas cross social boundaries unmediated by the state apparatus, and what happens when they do? In this respect, the religious kibbutz provides a novel case study for recent research that has begun to revisit the normative and theoretical consequences of legal pluralism today.

In addition, this study of the religious kibbutz illuminates the complex dynamics between religious groups and legal thinking in the modern world. Scholars have observed the explicit and subtle ways in which state law regulates religion, altering it in the process.[97] They have also noted similarities between the analytical structures of theological and legal systems, particularly as they coincided in nineteenth- and twentieth-century European states.[98] The appearance of Weimar jurisprudence on the religious kibbutz adds another dimension to these inquiries. It shows that law can be a resource for religious thinkers not only because of associations between law and theology, but because the internal logic of the law offers theoretical frames that can be helpful for religious thinkers, particularly those who are struggling to articulate the relationship between old canons and new circumstances. Certainly, the intellectual dynamics of religious societies are not somehow reducible to routine debates among legal philosophers. Indeed, the ideas of the thinkers religious kibbutz intellectuals did not neatly map onto one jurist or another. They followed Kelsen's ideas in some instances, Radbruch's in others, and even used Kelsen's own examples to argue for conclusions that he rejected. Still, well-trodden legal arguments about the basis of normative authority and the law's claim to

96. For a recent attempt at re-envisioning the consequences of legal pluralism, see Paul Schiff Berman, *Global Legal Pluralism: A Jurisprudence of Law beyond Borders* (Cambridge; New York: Cambridge University Press, 2012), and the collection Paul Schiff Berman, ed., *The Oxford Handbook of Global Legal Pluralism*, (Oxford: Oxford University Press, 2020).

97. See, for example, Winnifred Fallers Sullivan, *The Impossibility of Religious Freedom* (Princeton: Princeton University Press, 2005); and Elizabeth Shakman Hurd, *Beyond Religious Freedom: The New Global Politics of Religion* (Princeton: Princeton University Press, 2015). Some have called for the "juridification of religion" to be investigated in its own right. Helge Årsheim and Pamela Slotte, *The Juridification of Religion?* (Leiden; Boston: Brill, 2017).

98. Paul W. Kahn, *Political Theology: Four New Chapters on the Concept of Sovereignty* (New York: Columbia University Press, 2011). This theological aspect of law is, perhaps, especially strong when it comes to Weimar jurisprudence. It was, after all, a Weimar jurist who coined the term "political theology." Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. George Schwab (Chicago: University Of Chicago Press, 2006). The theological predispositions of Jewish jurists in Weimar may also have informed their theories. Reut Yael Paz, *A Gateway Between a Distant God and a Cruel World: The Contribution of Jewish German-Speaking Scholars to International Law* (Leiden; Boston: Martinus Nijhoff Publishers, 2012).

being an autonomous social category, not to mention legal hermeneutic techniques, appeared on the religious kibbutz not only because of the German connections of kibbutz thinkers, but also because the highly theorized Weimar legal debates provided effective tools that helped them hammer out their own existential dilemmas. In this respect, the jurisprudence of the religious kibbutz should join other recent case studies in opening up new avenues through which to explore the role of legal language in the histories of modern global religious communities.[99]

99. See, for example, Winnifred Fallers Sullivan, "The Rule of Law," in *At Home and Abroad: The Politics of American Religion*, ed. Elizabeth Shakman Hurd and Winnifred Fallers Sullivan (New York: Columbia University Press, 2021), 183–95, which explores why members of an American evangelical community assume that the "rule of law" should have a place in the community's regulatory institutions as a judicial axiom.