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## Jewish Legal Theory and American Constitutional Theory: Some Comparisons and Contrasts

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# Jewish Legal Theory and American Constitutional Theory: Some Comparisons and Contrasts

By SAMUEL J. LEVINE\*

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I thank Professor Greenawalt for the opportunity to present my paper to the seminar, and I thank him and the seminar participants for their helpful comments and encouragement. In addition, I received comments and encouragement from Rabbi Berman, Steven Friedell, Martin Golding, Lawrence Lessig, Irving Breitowitz, Rabbi Shalom Carmy, Rabbi David Pahmer, Geoffrey Miller, Irene Merker Rosenberg, Kathleen Sullivan, and Jim Fleming.

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### Introduction

In 1993, Professor Suzanne Stone wrote of “a growing body of legal scholarship that is turning . . . to the Jewish legal tradition to advance debate in contemporary American legal theory.”<sup>1</sup> Stone documented “the startling increase of citations to Jewish sources in public American legal discourse” during the decade preceding her article.<sup>2</sup> This trend has continued as scholars have employed concepts from Jewish law in the analysis of such areas as health law,<sup>3</sup> criminal law,<sup>4</sup> legal ethics,<sup>5</sup> legal interpretation,<sup>6</sup> and constitutional amendment.<sup>7</sup> Despite this trend, however, scholars differ in their views toward the

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1. Suzanne Last Stone, *In Pursuit of the Counter-Text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory*, 106 HARV. L. REV. 813, 814 (1993).

2. *Id.* at 816 (citation omitted).

3. See, e.g., Dena S. Davis, *Method in Jewish Bioethics: An Overview*, 20 J. CONTEMP. L. 325 (1994); Joshua Fruchter, *Doctors on Trial: A Comparison of American and Jewish Legal Approaches to Medical Malpractice*, 19 AM. J.L. & MED. 453 (1993); Daniel J.H. Greenwood, *Beyond Dworkin's Dominions: Investments, Memberships, the Tree of Life, and the Abortion Question*, 72 TEX. L. REV. 559 (1994); Marc D. Stern, “*And You Shall Choose Life*”: *Futility and the Religious Duty to Preserve Life*, 25 SETON HALL L. REV. 997 (1995).

4. See, e.g., Irene Merker Rosenberg & Yale L. Rosenberg, “*Perhaps What Ye Say Is Based Only on Conjecture*”: *Circumstantial Evidence, Then and Now*, 31 HOUS. L. REV. 1371 (1995).

5. See, e.g., Gordon J. Beggs, *Proverbial Practice: Legal Ethics from Old Testament Wisdom*, 30 WAKE FOREST L. REV. 831 (1995); Russell G. Pearce, *To Save a Life: Why a Rabbi and a Jewish Lawyer Must Disclose a Client Confidence*, 29 LOY. L.A. L. REV. 1771 (1996); Arthur Gross Schaefer & Peter S. Levi, *Resolving the Conflict Between the Ethical Values of Confidentiality and Saving a Life: A Jewish View*, 29 LOY. L.A. L. REV. 1761 (1996).

6. See, e.g., Benjamin L. Apt, *Aggadah, Legal Narrative, and the Law*, 73 OR. L. REV. 943 (1994); Shael Herman, *The “Equity of the Statute” and Ratio Scripta: Legislative Interpretation Among Legislative Agnostics and True Believers*, 69 TUL. L. REV. 535 (1994); Irene Merker Rosenberg & Yale L. Rosenberg, *Advice from Hillel and Shammai on How to Read Cases: Of Specificity, Retroactivity and New Rules*, 42 AM. J. COMP. L. 581 (1994).

value and validity of applying principles of Jewish law to American legal theory.

Professor David Dow, who has argued that Jewish law can be used to resolve the counter-majoritarian difficulty,<sup>8</sup> writes that "the normative ontology of the systems of Jewish and American law are so nearly identical that the Judaic resolution of certain theoretical difficulties can be wholly transplanted to the American domain."<sup>9</sup>

Others appear less optimistic. Professor Steven Friedell, for example, who has compared Jewish legal attitudes with feminist jurisprudence,<sup>10</sup> observes that "Jewish law has policies and purposes that are unique and that make the application of Jewish law in a modern legal system difficult."<sup>11</sup> Similarly, Stone notes one of the fundamental differences between the Jewish and American legal systems: "Jewish law is not only a legal system; it is the life work of a religious community. The Constitution, on the other hand, is a political document."<sup>12</sup> Therefore, Stone warns, American theorists "should be cautious not to derive too many lessons from the counter-text of Jewish law."<sup>13</sup> Conversely, Stone asserts that "[t]he Jewish legal tradition is being subtly reinterpreted to yield a legal counter-model embodying precisely the qualities many contemporary theorists wish to inject into American law."<sup>14</sup>

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7. See Professor Sanford Levinson's discussion of why the book he edited on constitutional amendment includes a chapter on changes within Jewish law. Sanford Levinson, *Introduction: Imperfection and Amendability*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 8 (Sanford Levinson ed., 1995) (discussing the inclusion in the book of Noam J. Zohar, *Midrash: Amendment Through the Molding of Meaning*).

The last several years have seen a similar increase in Jewish law courses in American law schools. Professor Jeffrey Roth has cited a February 1994 survey that documented 33 courses in Jewish law at 28 American law schools. See Jeffrey I. Roth, *Fraud on the Surviving Spouse in Jewish and American Law: A Model Chapter for a Jewish Law Casebook*, 28 *CASE W. RES. J. INT'L L.* 101, 101 n.1 (1996). In addition, Roth has noted the significance of the formation of the American Association of Law Schools Section on Jewish Law. *Id.* at 101. As a result of the increased interest in Jewish law in American law schools, Roth has called for a casebook on Jewish law and proposed a model chapter on the subject of wills.

8. David R. Dow, *Constitutional Midrash: The Rabbis' Solution to Professor Bickel's Problem*, 29 *HOUS. L. REV.* 543 (1992).

9. *Id.* at 544.

10. Steven F. Friedell, *The "Different Voice" in Jewish Law: Some Parallels to a Feminist Jurisprudence*, 67 *IND. L.J.* 915 (1992) (book review).

11. Steven F. Friedell, *Book Review: Aaron Kirschenbaum on Equity in Jewish Law*, 1993 *B.Y.U. L. REV.* 909, 919 (1993).

12. Stone, *supra* note 1, at 894.

13. *Id.* at 893-94.

14. *Id.* at 814.

This Article explores some of the ways in which Jewish law may shed light on issues in American constitutional theory. While acknowledging that there are fundamental differences between a religious legal system and a secular one, the Article attempts to show that certain conceptual similarities between American law and Jewish law allow for meaningful yet cautious comparison of the two systems.

Part I provides a broad historical and analytical overview of interpretation in Jewish law. As I am mindful of Stone's observations, one of the aims of Part I is to provide a framework through which to consider the Jewish legal system on its own terms, before applying it to American legal theory.<sup>15</sup> Many of the issues discussed in Part I find their parallels in American legal interpretation. Some of the similarities are addressed expressly, while others are more implicit.

Part II of the Article offers a specific conceptual framework for comparing Jewish law with American law. It considers questions of flexibility in legal interpretation in the two legal systems. In particular, Part II compares and contrasts the notion of "rules and standards" in Jewish law and American constitutional law. One of the goals of Part II is to provide a further example of how Jewish law can be used to address some important issues in contemporary American constitutional theory.

Finally, this Article concludes with the hope that the current turn to the Jewish legal model in American legal scholarship will continue, but through a principled and accurate view of the Jewish legal system, in order to allow for illuminating comparative study.

## **I. An Introduction to Interpretation in Jewish Law, with References to American Constitutional Theory**

Professor Menachem Elon has aptly summarized the "one basic norm and one single supreme value" of Jewish law: "the command of [G-d] as embodied in the Torah given to Moses at Sinai."<sup>16</sup> The term

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15. This Article as a whole (Part I in particular) is prompted in part by Professor Lawrence Lessig's comment on the inclusion in a book on constitutional amendment of Noam Zohar's essay on changes within Jewish law. *See supra* note 7. In acknowledging the value of Zohar's essay in relation to American legal theory, Lessig laments that "there is no way that lawyers can properly enter the world of Judaic interpretation through a single essay." Lawrence Lessig, *What Drives Derivability: Responses to Responding to Imperfection*, 74 TEX. L. REV. 839, 842 (1996). It is my hope that this Article will at least contribute to the ability of legal scholars to understand Jewish legal theory better.

16. MENACHEM ELON, *JEWISH LAW: HISTORY, SOURCES, PRINCIPLES* 233 (Bernard Anerbach & Melvin J. Sykes trans., Jewish Publication Soc'y 1994); *see also* AARON KIRSCHENBAUM, *EQUITY IN JEWISH LAW: HALAKHIC PERSPECTIVES IN LAW* 10 (1991) ("The ultimate legal principle (*Grundnorm*) is the rule that the Torah, the Five Books of

“Torah,” in this sense, refers to the entire corpus of revealed law that Moses received at Sinai. Part of the Revelation at Sinai consisted of the Written Torah—the Five Books of Moses. Because it is a written text, in order to be understood, the Written Torah must be interpreted. To facilitate its interpretation, G-d revealed to Moses an Oral Torah as well.<sup>17</sup> Moses was given specific details of some of the laws, obviating the need for human interpretation of the text with respect to those details.<sup>18</sup> Thus, those details, albeit an interpretation of the text, were part of the revealed Torah. In addition, the Oral Torah included a number of techniques through which the text of the Written Torah is interpreted.<sup>19</sup> Among the most important techniques were the hermeneutic rules, which comprise a system of legal interpretation through a specialized method of literary analysis.

Laws and principles mandated by both the Written and Oral Torah have the authority of being *d'oraita*, a Talmudic adjective form of the Aramaic translation of “Torah.”<sup>20</sup> To describe a law or legal principle as *d'oraita* is roughly equivalent to describing a law or principle in American law as being based in the Constitution. The serious nature of interpretation of the Torah is underscored by the fact that the substantive interpretation itself takes on constitutional authority—*d'oraita*. For example, the Torah states that on the Sabbath, it is for-

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Moses, is of binding authority for the Jewish legal system. Parallel to this Written Torah is the Oral Tradition, which Jewish theology traces back to Moses from [G-d.]”). According to the medieval scholar Maimonides, two of the thirteen fundamental principles of Judaism are that Moses received both the Written and Oral Torah from G-d at Sinai and that the Torah has immutable authority. See Maimonides, *Introduction to Perek Chelek*, in INTRODUCTION TO COMMENTARY ON THE MISHNA 107, 144-46 (Mordechai Rabinowitz, ed., 1961).

17. The Oral Torah was transmitted orally, from generation to generation, through a carefully administered educational system. See MISHNA, *Avoth* 1:1; MAIMONIDES, *Introduction to MISHNE TORAH* [hereinafter MAIMONIDES, CODE OF LAW]. As a result of persecution and exile, the Oral Torah was ultimately recorded in writing. See TALMUD BAVLI, *Gittin* 60a, especially the Tosafoth Rid commentary. The Talmud is the written, authoritative compilation of the oral traditions and interpretations. See MAIMONIDES, *Introduction to the Mishna*, in INTRODUCTION TO COMMENTARY ON THE MISHNA, *supra* note 16, at 1, 85 [hereinafter, MAIMONIDES, *Introduction to the Mishna*]. It is comprised of the Mishna, which was compiled in the Land of Israel around the year 188 C.E., and the Gemara, which was compiled in Babylonia around the year 589 C.E. See ARYEH KAPLAN, *THE HANDBOOK OF JEWISH THOUGHT* 187, 237 (1974). A version of the Gemara was compiled in the Land of Israel as well (Talmud Yerushalmi), but the Babylonian Talmud, or Talmud Bavli, is more complete and more authoritative. See MAIMONIDES, *Introduction to the Mishna*, *supra*, at 84.

18. See MAIMONIDES, *Introduction to the Mishna*, *supra* note 17, at 37.

19. See *id.* at 37-38; ELON, *supra* note 16, at 318-70.

20. See NACHMANIDES, *Commentary to Maimonides, Book of Commandments*, especially commentary to Chapter 2.

bidden to engage in *melakha*<sup>21</sup>—usually translated as “work.”<sup>22</sup> Other than an express prohibition against lighting a fire on the Sabbath,<sup>23</sup> the text of the Torah offers no details of what work is forbidden.<sup>24</sup> Thus, it became necessary for legal authorities to interpret the term “*melakha*” to determine what actions or activities are forbidden on the Sabbath. Once the authorities determined that writing, for example, is one of the activities prohibited on the Sabbath,<sup>25</sup> the law against writing became *d’oraita*, and it carries the same import as the law against lighting a fire, which is spelled out in the text.

This quality of legal interpretation in Jewish law finds its parallel in American constitutional interpretation. If the Supreme Court, through interpreting the Constitution, determines that there is a substantive right to abortion, then this right itself is understood to be part of constitutional law. As a result of the Court’s interpretation, for most practical purposes there is no qualitative difference between the right to free speech or free exercise of religion, which have been part of the text of the Constitution for 200 years, and the more recently articulated right to an abortion. Similarly, an interpretation of the text of the Torah, which expounds on or clarifies the law, extends beyond the text the range of what laws and principles are considered *d’oraita*.<sup>26</sup>

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21. See *Exodus* 20:10.

22. See, e.g., THE HOLY SCRIPTURES 173 (Jewish Publication Society 1955).

23. See *Exodus* 35:3.

24. There are less explicit descriptions of activities prohibited on the Sabbath in *Exodus* 16:29 and *Numbers* 15:32-36.

25. See TALMUD BAVLI, *Shabbath* 73a.

26. If the Supreme Court were to overrule *Roe v. Wade*, 410 U.S. 113 (1973), or if Congress and the States were to pass an amendment to the Constitution contrary to the rights recognized therein, the right to obtain an abortion would lose its constitutional basis. A similar though more limited dynamic exists in Jewish law as well. If the Sanhedrin (High Court) interprets the revealed law in a certain way, that interpretation becomes the authoritative definition of what the Torah requires. However, a later Sanhedrin has the authority to interpret the law differently. The later interpretation overrules the earlier one, replacing it as the authoritative definition of the Torah’s laws. See *infra* text accompanying notes 145-87.

In Jewish law, legal interpreters lack the authority to “amend” the Torah. See *Deuteronomy* 13:1; MAIMONIDES, CODE OF LAW, *supra* note 17, at Laws of Yesodei Ha-Torah 9:1, Laws of Mamrim 2:9. In this way, however, they are no different than American judges. The Supreme Court does not amend the Constitution when it interprets its provisions. It is only through the legislative process that the actual text of the Constitution may be changed. In Jewish law, the courts’ role as legislators is distinct from their role as interpreters, and there are broad limitations on their legislative power. See *id.* at Laws of Mamrim 2:9. One basic limitation is that judicial “legislation” may not contradict the substance of the Torah’s laws. See *id.*; ELON, *supra* note 16, at 478-81.

This Part explores a number of themes in the interpretation of Jewish law, including sources and methods of interpretation, expansion and limitation through interpretation, authority in interpretation, and precedent. Many of the issues addressed in this Article find parallels, to varying degrees, in American legal interpretation, some of which will be discussed. This Part also demonstrates, if only implicitly, some of the difficulties involved in trying to compare a religious legal system with a secular one.

### A. Sources and Methods of Interpretation

There are three basic sources and methods of legal interpretation in Jewish law.<sup>27</sup>

#### 1. *Interpretations Revealed to Moses at Sinai*

As noted above, certain interpretations were revealed to Moses through the Oral Torah, and therefore need not be derived. In the *Introductions to Commentary on the Mishna*, Maimonides compiled a list of numerous places in which the Talmud concludes that details of textual laws were given as part of the Oral Law to Moses at Sinai.<sup>28</sup> Maimonides divides this list into two categories. One category consists of details that cannot be derived through logical or textual analysis.<sup>29</sup> It is understandable that if there are no means to interpret a vague law, a definition must somehow be supplied. Maimonides notes that in these cases, the Talmud states the details of the law without even attempting to explain why the law is as stated.<sup>30</sup>

The other category includes definitions which, although presented to Moses at Sinai, could have been derived as well.<sup>31</sup> In these cases, the Talmud undertakes an analysis in order to derive the definition based on the text of the Torah.<sup>32</sup> Nevertheless, Maimonides notes, these definitions, recorded in the Talmud over hundreds of years, are never actually subject to debate or doubt.<sup>33</sup> The aim of the Talmudic exercise is only to show that the laws find support in the written text.

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27. See generally MAIMONIDES, *Introduction to the Mishna*, *supra* note 17, at 30-40; RABBI ZVI HIRSCH CHAJES, *Introduction to the Talmud*, in *COLLECTED WRITINGS OF RABBI ZVI HIRSCH CHAJES* 281, 284-91 (1985).

28. MAIMONIDES, *Introduction to the Mishna*, *supra* note 17, at 34-36.

29. See *id.* at 33.

30. See *id.*

31. See *id.* at 31-32.

32. See *id.* at 32-33.

33. See *id.* at 31.



## 2. *Exegetical Interpretation of the Text*

There are many different methods of textual hermeneutics employed throughout the Talmud and other works of *halakhic* interpretation.<sup>34</sup> Most of these methods involve a specialized form of literary analysis. On one level, the logic of these methods is often accessible to us; in fact, some of the methods find their parallels in American constitutional and statutory interpretation. Yet the ultimate determination of which method to apply under which circumstances is not always apparent, and the conclusions of law are based on an internal logic specific to a unique and lost art.

## 3. *Logic and Observation*

A final source of legal interpretation is reasoning which originates in logic and observation rather than in textual interpretation. Sometimes this type of reasoning is used to determine how to interpret properly the text itself, while at other times it is used to extrapolate a principle from a text or to extend a clearly stated principle to new situations. In addition, logic and observation are occasionally used as a source of law, largely independent of any text.

## 4. *Methods of Interpretation in Practice*

To understand how these sources and methods of interpretation are used in practice, it is helpful to look at some specific laws. For example, the Torah contains a *mitzva*,<sup>35</sup> a commandment, to eat the paschal lamb on the first night of Passover.<sup>36</sup> Two of the central verses relating to this *mitzva*, presented in the context of the exodus from Egypt, state in part: "All of the assembled Nation of Israel shall slaughter [the paschal lamb on the fourteenth day of the first month],"<sup>37</sup> and "they will eat the meat [of the paschal lamb] on that night."<sup>38</sup>

Some details of these laws, which cannot be derived from either textual or logical analysis, were revealed to Moses at Sinai.<sup>39</sup> One basic detail not supplied by the text relates to the method in which the

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34. For an extensive discussion of these methods, see ELON, *supra* note 16, at 318-70.

35. The plural of *mitzva* is *mitzvot*.

36. See, e.g., Exodus 12:8; TALMUD BAVLI, *Pesachim* 99b. In Jewish law and religion, the calendar date begins and ends at night. Thus, the fourteenth day of the first month of the year is the eve of Passover, while that night is the fifteenth of the month, the first night of Passover.

37. Exodus 12:6.

38. *Id.* at 12:8.

39. See *supra* notes 16-25 and accompanying text.

meat must be prepared before it is eaten. The Torah commands to “slaughter” the animal, but it does not elaborate on the method of slaughtering. The Talmud concludes that, because the details of ritual slaughtering cannot be deduced through textual or logical analysis, they were therefore revealed to Moses at Sinai, as part of the Oral Torah.<sup>40</sup>

Once the method of preparing the meat is determined, the next question involves how to fulfill the commanded action of eating the meat. The text, however, does not specify the quantity of meat that must be consumed. In fact, there are a number of both positive and negative *mitzvot* in the Torah relating to the consumption of food,<sup>41</sup> but the Torah does not quantify how much food must or must not be eaten in each case. Nor does there seem to be a system of logical and/or textual analysis through which it would be possible to interpret the word “eat.” The Talmud concludes that the definition of eating falls within the category of laws revealed to Moses at Sinai through the Oral Torah.<sup>42</sup>

Another question is when must the meat be eaten. Although the Torah expressly states that the meat must be eaten at “night,” it does not define until what time the technical term “night” extends. Nor did the Oral Torah supplement the Written Torah in this case by providing a definition of “night.” Therefore, legal authorities relied on textual hermeneutics to arrive at a definition.<sup>43</sup> Rabbi Elazar ben Azaria looked to another context in which the phrase “that night” is found. He noted that just a few verses later, in the same discussion of the exodus, G-d said to Moses, “I will pass through Egypt on that night.”<sup>44</sup> The definition of the phrase “that night” in the second verse can be obtained by examining a third verse, in which G-d stated that “at midnight, I will pass into the land of Egypt.”<sup>45</sup> The third verse supplies details not included in the second verse, indicating that the time period at which “that night” ends is midnight. Rabbi Elazar thus concluded that the paschal lamb may be eaten until midnight.<sup>46</sup>

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40. See CHAJES, *supra* note 27, at 287 (citing generally to TALMUD BAVLI, *Hullin*).

41. See, e.g., discussion *infra* notes 64-82 and accompanying text.

42. See TALMUD BAVLI, *Eruvin* 4a-4b.

43. See TALMUD BAVLI, *Berakhoth* 9a; TALMUD BAVLI, *Pesachim* 120b.

44. *Exodus* 12:12.

45. *Id.* at 11:4.

46. “Midnight” in this context is defined not as 12:00 a.m., but as the mid-point between sunset and sunrise on the first night of Passover. See MAIMONIDES, COMMENTARY ON THE MISHNA, *Berakhoth* 9b.

The majority of the Sages disagreed with Rabbi Elazar, based on a different method of hermeneutics. The Sages also relied on other verses, but instead of looking to verses that include the term "that night," they looked to verses that relate directly to the commandment of eating the paschal lamb. They observed that the text of the Torah further commanded that the meat be eaten "with haste."<sup>47</sup> The use of the phrase "with haste" in the context of the exodus is understood by the Sages to refer to the point in time in which the Nation of Israel was to proceed with haste.<sup>48</sup> The identity of this point in time is derived from yet a third verse. G-d told Moses that on the night of the exodus, the Nation of Israel should not leave their houses "until morning."<sup>49</sup> The arrival of morning, then, is the time at which they would leave their houses and proceed "with haste" in order to flee Egypt. Thus, the Sages interpreted the phrase commanding to eat the paschal lamb "with haste" as teaching that it may be eaten until morning.<sup>50</sup>

There are also a number of laws relating to the paschal lamb which are derived through the third method of interpretation, originating in logic and observation, which are then applied to understand the text or to derive legal principles. One such interpretation relates to further details of the preparation of the meat from the paschal lamb. In order to prepare this meat for the *mitzva*, one must comply with the general laws of *kashruth*,<sup>51</sup> which apply to any food that is eaten and include the command "not to eat the blood" of an animal.<sup>52</sup> Although it was revealed to Moses to what extent the blood must first be removed from the animal before the meat may be eaten,<sup>53</sup> there were no guidelines for how to remove the blood. To arrive at such a method, the authorities relied on logic and observation. Based on observations of the physical nature of objects, the au-

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47. *Exodus* 12:11.

48. See TALMUD BAVLI, *Berakhoth* 9a; TALMUD BAVLI, *Pesachim* 120b.

49. *Exodus* 12:22.

50. Although the Sages held that, in principle, the paschal lamb could be eaten until morning, in practice they held that a person should eat the meat before midnight, to avoid the possibility of violating a commandment. See TALMUD BAVLI, *Berakhoth* 9a. One of the sources of authority for Rabbinic legislation is *Leviticus* 18:30, which is understood to require legal authorities to insure adherence to the laws by instituting preventive safeguards. See TALMUD BAVLI, *Yevamoth* 21a. In the case of the paschal lamb, the Torah not only mandates eating meat, but adds a prohibition against leaving over the meat until morning. See *Exodus* 12:10. Thus, to guard against violation of this prohibition, the Sages advised that the meat be eaten before midnight, far in advance of the morning hour.

51. *Kashruth* is the noun form of the adjective *kosher*.

52. See, e.g., *Leviticus* 3:17.

53. See CHAJES, *supra* note 27, at 284.

thorities determined a method of "salting" the meat to draw out the blood.<sup>54</sup>

Finally, through logic and observation, the Talmud analyzes one of the two verses originally cited above relating to the paschal lamb, in order to extrapolate a general legal principle. The Torah commands "all of the Children of Israel" to slaughter the paschal lamb on the eve of Passover.<sup>55</sup> The Talmud notes that, in practice, not every individual slaughtered a lamb on that day;<sup>56</sup> indeed, given the various regulations regarding sacrifices, it would have been physically impossible for every individual to slaughter a different animal on that day. Every individual did eat from a paschal lamb that night, however, with most eating animals slaughtered by a much smaller number of individuals.<sup>57</sup> The Talmud therefore looked for a legal principle to reconcile the commandment that each individual slaughter a lamb with the practice that most individuals did not themselves perform this act. The Talmud concluded that through the principle of agency, the majority of individuals could appoint those who actually performed the act of slaughtering to be their agents for this act.<sup>58</sup> Thus, employing logic and observation to recognize the impossibility of interpreting the law to require each individual to slaughter a lamb personally, the Talmud extrapolated the legal principle of agency by interpreting the text.

## B. Interpretative Expansion and Limitation

### 1. *Mitzvot*

As a general rule, in terms of interpretation, it may be useful to divide the legal segments of the Torah into two categories. The first category is the *mitzvot*, which mandate or prohibit certain activities. While it is often necessary to define the scope of each of the *mitzvot*, the activities are largely well-defined; if the text of the Torah does not provide a working definition, the Oral Law ordinarily provides the necessary information.<sup>59</sup> Thus, authorities who interpret the Torah have a limited role as well as limited discretion in defining these activities. Although a certain level of interpretation will be necessary to apply these laws to new circumstances or to interpret vague terms that are not explained by the Oral Law, the revealed and hermeneutically

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54. *See id.* at 313.

55. *Exodus* 12:6.

56. *See* TALMUD BAVLI, *Kedushin* 41b.

57. *See id.*

58. *See id.*

59. *See supra* notes 17-19 and accompanying text.

derived laws present a broad and clear understanding of what activities are mandated or prohibited.

In addition to the fact that the basic details of *mitzvot* often do not require interpretation, the discretion of interpretive authorities to limit the application of these laws is itself broadly limited. It is true that, in a sense, any interpretation may, upon application, function as a limitation. However, the license to interpret and perhaps limit the *mitzvot* extends only to questions of applying the *mitzvot* to new circumstances or interpreting vague terms. There is no license to conclude, based on a consideration of what may appear to be the rationale behind a commandment, that a clearly expressed and defined commandment should not apply under unusual circumstances or to particular individuals.

These ideas may be understood through an examination of one of the *mitzvot*. In a number of places, the Torah mandates eating matzo on Passover.<sup>60</sup> In fact, the matzo is to be eaten on the first night of Passover, together with the paschal lamb.<sup>61</sup> To allow for the proper observance of this commandment, many questions of interpretation had to be answered.

The most basic question involves the definition of "matzo." Without guidelines, it would be meaningless to suggest a definition for a mysterious food. There would not seem to be a system of logical or textual analysis through which to interpret the word. It appears elementary that there was no question, at the time of the commandment, as to what food qualified as matzo. It is possible that at the time and place of the commandment, matzo referred to a clearly identifiable food. In comparison, a criminal statute discussing cocaine does not have to provide a technical definition of cocaine.<sup>62</sup> In the absence of a widely recognized definition, Moses would presumably have been instructed, with sufficient detail, that matzo was a baked mixture of grain and water that did not leaven. Implicit in this basic information would have been a definition of the leavening process as well. With

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60. See, e.g., *Exodus* 12:8, 15, 18, 20; *Leviticus* 23:6; *Deuteronomy* 16:3, 8.

61. See *Exodus* 12:8.

62. Similarly, in Professor Kent Greenawalt's hypothetical, when Georgia, the head of the household, tells Kent, the housekeeper, to buy "soupmeat," the range of choice for soupmeat "may have been narrowed by past understandings or in some other way. If . . . Georgia and Kent have established together that a certain kind of meat is what they will use for soupmeat in the household, then Georgia's reference to soupmeat may be taken to refer . . . to the precise kind of meat involved." Kent Greenawalt, *From the Bottom Up*, 82 *CORNELL L. REV.* (forthcoming July 1997) (manuscript at 6, on file with author); see also Transcript of Proceedings, *Northwestern University/Washington University Law and Linguistics Conference*, 73 *WASH. U. L.Q.* 800, 940-52 (1995).

regard to these details, there was neither a need for nor the possibility of interpretation.

With the subject matter of the commandment somewhat clearly defined, the next set of questions might involve the nature of the commanded action. These questions, as well as the answers, are the same as those related to the commanded action of eating the paschal lamb. First, the Torah did not articulate what quantity of matzo must be consumed in order to fulfill the requirements of the commandment; it simply stated that all individuals must “eat” matzo on Passover. The quantity of matzo to be eaten, like all of the Torah’s laws involving quantities and measurements,<sup>63</sup> was revealed to Moses at Sinai, and is the quantity applicable to most *mitzvot* that involve eating—including the *mitzva* to eat the paschal lamb.

In addition, the Torah did not state until what time the matzo may be consumed. The answer to this question was not clear from the text and not revealed to Moses at Sinai and therefore had to be derived through textual exegesis. In fact, the analysis is identical to the one relating to the proper time frame for eating the paschal lamb, because the Torah commands that the paschal lamb be eaten together with the matzo.<sup>64</sup> As a result, the time frame is the same for both foods, and the same dispute in the Talmud concerning the time frame for the meat arose with regard to the matzo.<sup>65</sup>

The revealed Written and Oral Torah, along with textual exegesis, thus provide the details necessary to fulfill the commandment to eat matzo on the first night of Passover. Yet even when the details of a *mitzva* are resolved, it seems inevitable that circumstances will arise that are not explicitly covered by the revealed law. It will then be necessary to interpret the *mitzva* to determine whether the parameters of the *mitzva* extend to the unaddressed circumstances.

One category of new circumstances relating to a *mitzva* involves destruction or unavailability of the subject matter of the *mitzva*. The Torah commands one to eat the paschal lamb together with matzo, as well as with *marror*—a bitter herb.<sup>66</sup> With the destruction of the Temple in Jerusalem, it became impossible, for a number of reasons, to prepare the paschal lamb. Thus, with regard to the commandment to eat the paschal lamb, under present circumstances, the subject matter

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63. See TALMUD BAVLI, *Eruvin* 4a-4b.

64. See *Exodus* 12:8.

65. See *supra* text accompanying notes 43-50.

66. See *Exodus* 12:8.

of the *mitzva* no longer exists. As it is currently impossible to eat the paschal lamb, the *mitzva* cannot technically be observed.

A more difficult question for legal authorities after the destruction of the Temple related to whether the Torah's commandments to eat matzo and to eat *marror* remained intact. The answer was once again the subject of a dispute in the Talmud. The crux of the dispute was based on textual interpretation. Rava observed that, in addition to the verse that commands eating matzo and *marror* together with the paschal lamb, another verse in the Torah commands eating matzo on the first night of Passover,<sup>67</sup> without mention of either the paschal lamb or *marror*.<sup>68</sup> In interpreting the Torah, there is a strong presumption against superfluity.<sup>69</sup> Thus, the additional verse's commandment to eat the matzo must indicate an additional law. Rava concluded that the second verse teaches that the obligation to eat the matzo exists independent of the presence of the paschal lamb.<sup>70</sup> In contrast, Rava held, because the command to eat the *marror* is found only in conjunction with the paschal lamb, when the paschal lamb cannot be eaten, there is no independent obligation to eat the *marror*.<sup>71</sup>

Rav Acha bar Yaakov, however, focused on the first verse, and concluded that the obligation to eat matzo is also dependent on eating the paschal lamb.<sup>72</sup> With regard to the other verse noted by Rava, Rav Acha agreed that the verse cannot be superfluous but interpreted the verse to teach a different law relating to eating matzo.<sup>73</sup> Rava, in turn, held that the law which Rav Acha deduced from the second verse can be derived from the logical extension of yet another verse.<sup>74</sup> In Rava's view, then, the second verse regarding the matzo remained apparently superfluous and thus had to teach an otherwise unknown law—the law that the obligation to eat matzo exists independent of eating the paschal lamb.<sup>75</sup>

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67. See *id.* at 12:18.

68. See TALMUD BAVLI, *Pesachim* 120a.

69. See, e.g., *id.*

70. See *id.*

71. See *id.* Although the Torah's command to eat the *marror* is dependent on the paschal lamb, in the absence of the paschal lamb there is still a Rabbinically mandated requirement to eat *marror* on the first night of Passover. Rabbinic legislative authority extends not only to enacting laws to protect against the violation of *mitzvot*, but also to enacting affirmative laws. See MAIMONIDES, CODE OF LAW, *supra* note 17; ELON, *supra* note 16, at 481-83.

72. See TALMUD BAVLI, *Pesachim* 120a.

73. See *id.*

74. See *id.*

75. Outside of the Land of Israel, a rabbinically mandated seder is conducted on the second night of Passover as well, at which the matzo and *marror* again must be eaten.

Another new circumstance could involve a somewhat reversed situation, in which an object is discovered which had not been known to exist but apparently may be suitable as the subject matter of a *mitzva*. In the case of matzo, one such circumstance involves the type of grain acceptable in the ingredients of matzo. The revealed law did list a number of grains suitable for matzo,<sup>76</sup> but did not address all grains and indeed could not have meaningfully discussed those grains not identifiable in the part of the world where the Torah was given. Thus, the Talmud records that the legal authorities considered whether an unaddressed grain could be used for matzo.<sup>77</sup> Faced with the need to interpret the law, the authorities noted that a grain could be used for matzo only if it could potentially undergo the chemical reaction of leavening.<sup>78</sup> They then performed an experiment on the grains in question, and, through a comparison to the grains that were known to be suitable, observed whether the unaddressed grains could undergo the same chemical reaction.<sup>79</sup> If so, those grains were determined to be suitable for matzo.<sup>80</sup>

A similar question arose in post-Talmudic times with regard to *marror*. The Talmud lists a number of vegetables suitable to fulfill the commandment to eat *marror* on the first night of Passover.<sup>81</sup> The list consists of a number of leafy vegetables, all of which were common in the Middle East in the times of the Talmud. In later centuries, however, Jews were dispersed to many parts of the world, including areas with colder climates that were not conducive to growing the leafy vegetables. In a sense, it would seem that the inability to obtain the vegetables listed in the Talmud presents a situation of destruction of the subject matter of the *mitzva*. However, some legal authorities suggested that it would be proper to use an available bitter vegetable, even if it was not one of those listed in the Talmud. For example, in

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76. See TALMUD BAVLI, *Pesachim* 35a; TALMUD YERUSHALMI, *Chalah* 1:1.

77. See TALMUD BAVLI, *Pesachim* 35a; TALMUD YERUSHALMI, *Chalah* 1:1.

78. The Talmud derives this rule from *Deuteronomy* 16:3.

79. See TALMUD BAVLI, *Pesachim* 35a; TALMUD YERUSHALMI, *Chalah* 1:1.

80. See TALMUD BAVLI, *Pesachim* 35a; TALMUD YERUSHALMI, *Chalah* 1:1.

81. Although the Torah's commandment to eat *marror* is currently no longer in effect due to the destruction of the Temple and the resulting situation wherein the *marror* can no longer be eaten together with the paschal lamb, the question of which vegetables can be used for *marror* continues to have practical ramifications. Rabbinic legislation mandates eating *marror* on the first night of Passover, even in the absence of the paschal lamb. See *supra* note 71.



the colder climates, the practice of using an available bitter vegetable, horseradish, developed to fulfill the commandment to eat *marror*.<sup>82</sup>

A similar category of unaddressed circumstances necessitating legal interpretation includes circumstances that actually were not in existence at the time that the Torah was given. Such circumstances usually arise through scientific discovery, and have been particularly common in the past century. One issue that has presented legal authorities with many questions is the application of electricity to the laws of the Torah.

The question of electricity is particularly relevant to the laws of the Sabbath. As noted above, a number of activities, which fall under the category of *melakha*, are prohibited on the Sabbath. The Written Torah appears to list explicitly only one such activity, lighting a fire,<sup>83</sup> but through a combination of the revealed Oral Torah and textual interpretation, legal authorities arrived at a total of thirty-nine categories of *melakha*, all of which include many sub-categories.<sup>84</sup> These categories and sub-categories are considered *d'oraita* laws, and are part of the Torah's definition of *melakha*.<sup>85</sup>

Twentieth century legal authorities were required to interpret the many categories of *melakha* to determine whether various uses of electricity were permitted on the Sabbath.<sup>86</sup> Some prohibited the active use of electricity based on the finding that causing the flow of an electric current is sufficiently similar to lighting a fire.<sup>87</sup> Others held that completing an electrical circuit falls under the category of "build-

82. See generally Arthur Schaffer, *The History of Horseradish as the Bitter Herb on Passover*, 8 GESHER 217 (1981). Professor Schaffer also cites conflicting opinions holding that even in the absence of the leafy vegetables, horseradish may not be substituted.

The inability to obtain one of the vegetables listed in the Talmud has some similarities to Greenawalt's example of a housekeeper who, due to certain factors, chooses to buy chicken instead of following instructions to buy soupmeat. See generally Greenawalt, *supra* note 62, manuscript at 19-23. While in the case of *marror* it was impossible to use the proper vegetable, Greenawalt's discussions still seem relevant, including issues of "changed circumstances," "radically changed circumstances," "carrying out" a directive, and a directive's "losing force." *Id.*

Thus, even if the *mitzva* to eat *marror* is considered technically to "lose force" in the absence of the proper vegetable, it is clearly only a temporary loss of force, until the proper vegetable is available. See *id.* at 22. Similarly, while the Torah's commandments to eat from the paschal lamb and the *marror* have temporarily lost force in the absence of the Temple, when the Temple is rebuilt it will again be possible to fulfill these commandments.

83. See Exodus 35:3.

84. See TALMUD BAVLI, *Shabbath* 73a.

85. See *supra* text accompanying notes 20-21.

86. See generally Michael J. Broyde & Howard Jachter, *The Use of Electricity on Shabbat and Yom Tov*, 21 J. HALACHA & CONTEMP. SOC'Y 4 (1991).

87. See *id.* at 12.

ing” a vessel or of “completing” a vessel so that it can serve its function.<sup>88</sup>

Turning on an electric light is even more likely to fall directly under one of the categories of *melakha*. In terms of the prohibition against burning a fire, the analogy of a glowing filament to a burning fire is very strong. Alternatively, the Talmud extends another *melakha*, cooking, to non-food objects, when the objects are softened as a result of heat.<sup>89</sup> Turning on an electric light may thus involve “cooking” the filament.<sup>90</sup>

Questions about the status of electricity in Jewish law relate to matzo as well. In addition to the requirements for matzo listed above, the Talmud lists a number of conditions that must be met for matzo to be suitable for fulfillment of the *mitzva* to eat matzo on the first night of Passover. One such condition is that the person who bakes the matzo must intend, when preparing the matzo, that the matzo be eaten in fulfillment of the commandment.<sup>91</sup> When it became technologically possible to bake matzos with machines rather than by hand, legal authorities had to determine whether the intention requirement could be satisfied through a machine. Some argued that because a machine cannot have intent, the matzos baked by machine are not suitable for the *mitzva*.<sup>92</sup> Others argued that the intention requirement is satisfied if the individual who pushes the button to start the machine has the proper intent.<sup>93</sup>

The example of the commandment to eat matzo on Passover thus offers some insight into the nature of interpreting *mitzvot*. While many of the basic details of the *mitzvot* were revealed through the Written and Oral Torah and thus were not subject to interpretation, other details were not included in the revealed law. When certain details of a law are not clear, there is a definite need for interpretation. In addition, when circumstances arise that were not addressed by the details given with the law, the *only* way to apply the law in a meaningful way is through interpretation. This interpretation has the power

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88. See *id.* at 12-13.

89. See *id.* at 13.

90. It should be noted that beyond the Torah's categories of *melakha*, there are a number of Rabbinically mandated prohibitions on the Sabbath, instituted by the Rabbis in their role as legislators. Although the discussion here relates specifically to interpretation of laws in the Torah, a number of Rabbinically mandated laws may also be interpreted to prohibit the active use of electricity on the Sabbath. See *id.*

91. See TALMUD BAVLI, *Pesachim* 38b.

92. See Hershel Schachter, *Ma'ase U'grama B'halakha*, 1 BEIT YOSEF SHAUL 70 (1985).

93. See *id.*

either to extend or to limit the parameters of the law, vis-a-vis the new circumstances.

There are, however, extensive checks on the extent to which legal interpretation can place limitations on the scope of a commandment. The Talmud records a dispute concerning whether interpreters may limit the applicability of a *mitzva* based on a consideration of the apparent rationale underlying the *mitzva*.<sup>94</sup> Rabbi Shimon held that it is proper to determine the reason for a particular commandment and then to determine whether this reason applies under a given set of circumstances; if the reason does not apply, then the commandment does not apply.<sup>95</sup> Rabbi Yehuda, however, whose opinion is followed, held that a *mitzva* must always be observed, even if the apparent reason for the *mitzva* does not seem relevant under the circumstances.<sup>96</sup>

Thus, the Talmud concludes that, absent express support in the Written or Oral Torah, legal authorities may not find *mitzvot* inapplicable under circumstances that are simply unusual but not new. If the law on its face is concrete to the extent that it covers a set of circumstances, there is no room for interpretation. Authorities are precluded from suggesting that because the rationale that appears to be the basis of a commandment does not apply to a given individual or social setting, then the commandment itself does not apply.

The Talmud records the dispute between Rabbi Shimon and Rabbi Yehuda with respect to a number of commandments. For example, the Torah discusses the laws concerning the taking of security on a loan. The Torah requires that if a creditor takes an item of clothing as security from a poor person who possesses only one set of clothes for each day and night, then the creditor must go to the debtor's house and return the clothing each time it is to be worn.<sup>97</sup> The Torah also states that a creditor may never take the clothing of a widow as security.<sup>98</sup> Rabbi Shimon held that the rationale for the second law was based on the first law.<sup>99</sup> He deduced that the reason the Torah prohibited taking a widow's clothes as security is that, if the widow is poor, the creditor will have to go daily to the widow's house, holding her clothes in his hands, and concluded that the Torah prohibited such conduct to prevent the appearance of impropriety.<sup>100</sup> Rabbi

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94. TALMUD BAVLI, *Sanhedrin* 21a.

95. *See id.*

96. *See id.*

97. *See Deuteronomy* 24:13.

98. *See id.* at 24:17.

99. *See* TALMUD BAVLI, *Bava Metzia* 115a.

100. *See id.*

Shimon concluded that if a given widow is not poor, and therefore the rationale he found for the commandment does not apply, then the commandment itself does not apply, and the creditor may take a piece of the widow's clothing as security.<sup>101</sup>

Rabbi Yehuda, however, held that the applicability of a *mitzva* does not depend on the reason for the *mitzva*.<sup>102</sup> The Torah's words are clear on their face: it is prohibited to take the clothing of a widow as security for a loan.<sup>103</sup> When the words of a commandment are clear, the commandment is applied as stated, even under unusual circumstances. Unlike electricity, which raised new questions of interpretation regarding the Sabbath and matzo, there already existed widows, clothing and loans at the time that the Torah was given. Perhaps the law prohibiting taking a widow's garment appears particularly sensible if the widow is poor. Perhaps it was also unusual at the time the Torah was given for a widow to possess more than a single garment for either day or night. Even if these propositions are correct, the *mitzvot*, when stated clearly and unequivocally, are not dependent on circumstances such as these.<sup>104</sup>

Nor is the applicability of definitely stated *mitzvot* dependent on individual psychological factors. For example, the Torah states that eating the matzo is to be a reminder of the haste with which the Nation of Israel fled Egypt;<sup>105</sup> because the people had to hurry, there was no time to allow the bread to leaven, resulting in the unleavened matzo. Yet, one may suggest additional reasons for the commandment to eat matzo on Passover. Indeed, a central part of the Passover seder is the explanation for why matzo is eaten. Some of these reasons focus on eating matzo, symbolic of the bread of the poor, to evoke feelings of the hardships suffered in slavery in Egypt. It is possible, however, that an individual would feel, on a personal level, that eating matzo does not contribute to the commemoration of slavery. To the contrary, an individual may enjoy the taste of the matzo. Such an individual is nevertheless required to eat matzo on Passover, be-

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101. *See id.*

102. *See id.*

103. *See Deuteronomy 24:17*

104. The attempt to discover a rationale for *mitzvot* is generally considered a noble pursuit. For example, Maimonides writes that it is proper to contemplate the *mitzvot* and if possible to suggest reasons for them. *See* MAIMONIDES, CODE OF LAW, *supra* note 17, at Laws of Temurah 4:13. Nevertheless, Maimonides stresses that if an individual is unable to discover a rationale for a particular *mitzva*, he or she should recognize that there is still a Divine rationale for it. *See id.* at Laws of Me'ilah 8:8.

105. *See Deuteronomy 16:3.*

cause the obligation to perform the *mitzva* is not dependent on the apparent rationale for the *mitzva*.<sup>106</sup>

Thus, it can be stated as a general rule that interpretation cannot restrict the scope of a *mitzva* to fewer circumstances than are implied by the plain meaning of the *mitzva*. At most, if the *mitzva* is not clear or if a new circumstance arises, Rabbinic authorities may logically decide not to extend the *mitzva* beyond the scope of its plain meaning.

There is, however, an exception to the rule that the application of a clearly stated *mitzva* is not dependent on the relevance of its rationale to a given set of circumstances. The Talmud states that if the Torah itself expressly states the reason for a *mitzva* in the text of the *mitzva*, then the application of that *mitzva* is regulated by the relevance of the reason.<sup>107</sup> For example, the Torah commands a king not to obtain "too many" horses.<sup>108</sup> While the phrase "too many" must be interpreted, the command on its face clearly prohibits categorically the acquisition of too many horses. In the text of the command, however, the Torah supplies the rationale for this commandment; it continues, "lest he return the nation back to the Land of Egypt, to obtain horses."<sup>109</sup> The Talmud notes that in discussing most *mitzvot*, the Torah does not provide a reason; in the rare case that a reason is given, that reason qualifies the law.<sup>110</sup> Thus, the command stating that "a king should not obtain too many horses lest he return the nation to Egypt" is understood to mean that "a king should not obtain too

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106. A similar analysis applies to *marror*. As noted above, it is preferable to use for *marror* the vegetables listed in the Talmud. See *supra* text accompanying notes 81-82. One of these vegetables is romaine lettuce, which has a bitter root. Some individuals, faced with the choice of eating romaine lettuce or horseradish, may feel that the best way to fulfill the *mitzva* of eating bitter herbs is to eat the food which is more bitter, the horseradish. Although these individuals correctly note that the rationale for the *mitzva* to eat bitter herbs on Passover is to recall the bitterness of slavery in Egypt, the text of the commandment does not indicate that it is preferable to eat a more bitter food. Therefore, the Talmud's authoritative list of preferable foods should be followed over a food that may seem to better match the rationale of the *mitzva*.

In a sense, questions about the relationship between a *mitzva*'s rationale and its performance relate to issues of the spirit of the law and the letter of the law. Jewish belief certainly recognizes the importance of the spirit of the law. Thus, even in the absence of an express textual requirement or prohibition, certain activities can be required or prohibited. See, e.g., 2 NACHMANIDES, COMMENTARY ON THE TORAH 115-16, 376 (Chaim Chavel ed., 1960) (commenting on *Leviticus* 19:2 and *Deuteronomy* 6:18). The principle expressed by Rabbi Yehuda seems to be that, ordinarily, the spirit of the law may not supplant the letter of the law, to relieve a person from an obligation or prohibition.

107. See TALMUD BAVLI, *Sanhedrin* 21a.

108. *Deuteronomy* 17:16.

109. *Id.*

110. See TALMUD BAVLI, *Sanhedrin* 21a.

many horses *if* he will thereby return the nation back to Egypt.” If it is clear that he will not lead the nation back to Egypt, then this commandment does not limit how many horses he may obtain.<sup>111</sup>

Nevertheless, there is one caveat. In theory, the Talmud does license restricting the scope of certain *mitzvot* to fewer situations than implied by the plain meaning of the *mitzvot*. In practice, however, the Talmud does not seem to recommend that a person be so confident that the rationale that the Torah gives for a *mitzva* truly does not apply.<sup>112</sup> In fact, the Talmud notes that the wise Solomon felt that he was not in danger of returning to Egypt if he obtained too many horses.<sup>113</sup> As the Bible records, however, Solomon obtained many horses and as a result, returned to Egypt.<sup>114</sup> The case of Solomon illustrates the danger that a person may erroneously believe that the rationale behind a *mitzva* does not apply and may then unjustifiably conclude that the *mitzva* does not apply.<sup>115</sup>

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111. Interestingly, the rules about when *mitzvot* may or may not be limited through interpretation may parallel Judge Easterbrook's rule of when a statute should or should not be interpreted. Judge Easterbrook wrote that

[U]nless the statute plainly hands courts the power to create and revise a form of common law, the domain of the statute should be restricted to cases anticipated by its framers and expressly resolved in the text. Unless the party relying on the statute could establish either express resolution or creation of the common law power of revision, the court would hold the matter in question outside the statute's domain. The statute would become irrelevant, the parties (and court) remitted to whatever other sources of law might be applicable.

Frank A. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 544 (1983). The cases Easterbrook considers to be within the domain of a statute may parallel those cases in which *mitzvot* are applied as stated, with no possibility of restricting the scope of the *mitzva* based on interpretation. The cases that he considers to be outside the statute's domain may parallel the new or unaddressed circumstances, which require interpretation of the *mitzvot*, though in these scenarios Easterbrook opts for non-application. Finally, Easterbrook's discussion of a statute's handing the court the power to revise the common law may parallel the cases in which the reasons for the *mitzvot* are expressly incorporated into the *mitzvot*, allowing for restrictive interpretation.

112. See TALMUD BAVLI, *Sanhedrin* 21a.

113. See *id.*

114. See 1 Kings 10:29. To use Greenawalt's terms, at best it may be said that Solomon "innocently" or "justifiably" failed to comply with the commandment, as he may have reasonably believed, based on the express rationale for the commandment, that the commandment was inapplicable to him. Greenawalt, *supra* note 62, manuscript at 36-37. However, with regard to most commandments for which the Torah does not reveal the rationale, failure to comply based on a presumed rationale is never justified. Nor would such behavior be considered a "mistaken" failure to comply; it would simply be a case of disobedience. See *id.*

115. Indeed, the Talmud cites the case of Solomon to explain why the Torah did not reveal the rationale behind most of the *mitzvot*. See TALMUD BAVLI, *Sanhedrin* 21a. The Talmud observes that Solomon, one of the wisest and most righteous of individuals, nonetheless erred in believing that the rationale of the *mitzva* did not apply to him. See *id.* The

## 2. Principles

The other category of laws found in the Torah includes those that do not discuss what actions a person must or must not undertake, but instead prescribe various legal principles for the way society should function. Generally, these laws relate more to monetary or “civil” matters,<sup>116</sup> while *mitzvot* usually refer more to ritual or technically “religious” matters. It should be remembered, however, that although Jewish law differentiates between monetary and ritual law, it is less than accurate to use the term “religious law” exclusively for ritual law. As implied by the very phrase “Jewish law,” as well as by the fact that the Torah contains both monetary and ritual laws, these two areas of law together comprise the law of the Jewish religion. Moreover, many areas of “civil law,” such as marriage, involve religious ritual—often *mitzvot*—as well as monetary principles.<sup>117</sup>

On the whole, however, most of what we would categorize as monetary matters can at least be analyzed and interpreted with little reference to ritual law. Compared with *mitzvot*, these matters usually require considerably more interpretation and allow for considerably more discretion on the part of interpreters. This increased interpretation and discretion result from both the form and the substantive nature of the monetary laws.

In terms of form, these laws are often expressed as general legal principles, without much specific elaboration in the revealed Oral Law. The principles, therefore, must be interpreted to establish concrete rules for society. In the category of *mitzvot*, although certain concrete details are revealed in both the Written and Oral Law, some details are left to interpretation. For example, the revealed law was specific in stating that matzo is an unleavened, baked mixture of grain and water, and in setting the quantity of matzo that must be eaten on the first night of Passover.<sup>118</sup> Yet, the revealed law was general enough to be open to interpretation with regard to the time limit for eating the matzo and questions related to new circumstances.<sup>119</sup> Thus, with regard to the form of the law, it seems that the central difference

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Talmud reasons that, had the Torah given the rationale for other commandments, it would have led others to commit similar errors. See *id.*; see also MAIMONIDES, BOOK OF COMMANDMENTS, negative commandment 365.

116. The term “monetary law” is a rough translation of the Hebrew term *dinei mammon*, which refers to a broad range of civil laws, including commercial law, contract law, and other laws implemented for social welfare.

117. See *infra* notes 138-41 and accompanying text.

118. See *supra* notes 60-63 and accompanying text.

119. See *supra* notes 64-80 and accompanying text.

between monetary laws and *mitzvot* is the level of generality. Because monetary laws are more general, they require more interpretation.

It is possible that this difference in form is itself an expression of the difference in substantive nature between *mitzvot* and monetary law. *Mitzvot* involve ritualistic activities that reflect an often unarticulated and sometimes undiscernible Divine will. Therefore, while some interpretation is possible, through textual analysis or use of the internal logic of *mitzvot*, there are limits to the understanding attainable through any method of rational human interpretation. In contrast, while the monetary legal principles in the Torah also express Divine will, they are readily comprehensible through human logic. Given general monetary principles, humans can employ a meaningful and broad form of rational interpretation to construct a legal system that applies those principles.

This difference in substantive nature may likewise account for the difference in discretion available to interpreters in the two areas. With regard to *mitzvot*, when the Torah does not reveal the Divine rationale for a *mitzva*, interpreters do not have the discretion to restrict the scope of the *mitzva* based on the rationale.<sup>120</sup> When considering monetary principles, however, interpreters deal with a Divine yet rational system, subject by its nature to broad and extensive rational interpretation. Because the system is inherently rational, it may be interpreted, applied, and restricted through an exploration of the rationale underlying the principles. If interpreters find that the rationale behind a particular principle does not apply in a given case, they have the discretion to decide that the principle itself does not apply.<sup>121</sup>

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120. See *supra* text accompanying notes 94-115.

121. In discussing levels of abstraction in law, Bernard Jackson has written that Ronald Dworkin . . . attributes to "legal principles" the role of guidance only; unlike rules, they do not dictate the outcome of problems to which they apply. Interestingly, the strict distinction proposed by Dworkin between "principles" and "rules," and with it the strict distinction between the roles of guidance and determination, has been heavily attacked in jurisprudential literature, on the grounds that they are matters of degree rather than quality.

Bernard S. Jackson, *Modern Research in Jewish Law: Some Theoretical Issues*, in MODERN RESEARCH IN JEWISH LAW 136, 153 (Bernard S. Jackson ed., 1980) (citations omitted).

In Jewish law, monetary laws generally provide guidance, while ritual laws generally dictate outcomes. In a sense, however, this distinction is largely one of degree, as even ritual laws often require further interpretation. Yet, on a fundamental level, the distinction is one of quality, as ritual law is not only more specific and concrete, but leaves relatively little room for judicial discretion. As the sixteenth century scholar Rabbi Judah Loew of Prague (Maharal) put it:

The monetary laws and . . . the ritual laws are distinct from one another . . . [and] with regard to the monetary laws, it is necessary to understand the [logical] source of the law . . . which depends on a logical understanding of the basis of the law . . .



Here again, it is helpful to look at some specific laws to illustrate how monetary principles are interpreted. The Torah's system of tort law discusses not only liability for damages caused directly by a person's actions but also the liability for damages caused by a person's property.<sup>122</sup> The framework for the laws of the latter category is based largely on a few verses in Exodus which list four general tort scenarios: (1) a person digs a pit in which another person's animal falls and dies;<sup>123</sup> (2) one person's ox gores another's ox, killing it;<sup>124</sup> (3) a person sends an animal to graze in someone else's field; and (4) a fire consumes someone's field.<sup>125</sup> The Torah also lists the various forms of compensation appropriate to each of these cases. These scenarios, which are clearly broad examples rather than a comprehensive list, themselves require much interpretation.

Any student of the law will recognize that there are numerous issues that must be resolved to arrive at even a basic framework for adjudicating cases covered by these principles. The Talmud engages in interpretation of many of the conceptual principles that can be gleaned from these examples, and through a combination of textual hermeneutics and logical analysis arrives at certain concrete laws. A look at even a few of these issues reveals certain parallels to issues common in American tort law. The Talmud's discussion of damages caused by an animal addresses, for example, such issues as the duty of care imposed on owners of specific animals and how far the duty extends.<sup>126</sup> The Talmud extends the example of the digging of a pit to scenarios involving people who place various obstacles in a public place.<sup>127</sup> Regarding the fire scenario, the Talmud discusses questions of causation.<sup>128</sup> In addition, the Talmud contains an extensive analysis of systems of compensation for each kind of tort.<sup>129</sup> Finally, in the real world, there is an endless variety of complex fact patterns to

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a logic that is not written in the Torah. Those monetary laws which are written in the Torah are only the basic rules of law, but not every dealing between individuals is written in the Torah.

MAHARAL, DEREKH HACHAYIM 21.

Greenawalt's analysis of "abstract and specific purposes" of directives also appears to be relevant to this discussion. Greenawalt, *supra* note 62, manuscript at 24-26.

122. See Exodus 21:28-36, 22:4-5.

123. See *id.* at 21:33.

124. See *id.* at 21:35.

125. See *id.* at 22:6.

126. See generally TALMUD BAVLI, *Bava Kama*, chs. 1-6.

127. See *id.* at ch. 3.

128. See, e.g., *id.* at 22a-24a.

129. See generally TALMUD BAVLI, *Bava Kama*.

which the general legal principles must be applied; the Talmud is filled with considerations of many of them.<sup>130</sup>

Because the Talmudic discussions are all an attempt to apply the principles found in the text of the Torah, there are certain constraints on the discretion available to interpreters. The conclusions must fit broadly within the framework set by the text. Yet within this framework there is much room for human logic to decide such concrete issues as what standard of care should be required toward specific animals. Conclusions in such matters are possible only through identifying the conceptual principles underlying the textual laws and applying them to the myriad of scenarios not present in the text. In contrast to *mitzvot*, which generally are not interpreted through an examination of the conceptual issues behind the rituals, tort law can only be applied through consideration of the conceptual principles behind the generally stated rules.

Another example of the Torah's monetary laws is the law of bailments. The Torah provides general principles for bailments, listing different types of bailments and the corresponding duties of care required. The first scenario listed in the Torah involves a bailee who is liable if the goods are lost or destroyed as a result of the bailee's "negligence," but not if the goods are "stolen." The Talmud interprets this scenario as referring to a gratuitous bailee. In the Torah's second scenario, the bailee is liable for stolen goods as well, but not in a case of duress. This scenario, according to the Talmud, refers to a bailment for hire or a rental agreement. In the final scenario, the Torah states that a person who borrows an object is liable even in the case of duress.<sup>131</sup>

Again, the Talmud engages in extensive interpretation in order to apply these general principles to more concrete situations. There are many basic variables within each of the Torah's scenarios, such as the nature and quantity of the goods. The text contains terms, such as "negligence" and "duress," whose definitions will depend in part on these variables. Arriving at definitions may involve a certain degree of textual analysis but will depend largely on rational conceptions of fairness and justice.<sup>132</sup>

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130. See generally *id.*

131. See *Exodus* 22:6-14; see also TALMUD BAVLI, *Bava Metzia* chs. 3, 7, 8.

132. In addition, the definition of "negligence" or "duress" is largely measured by the common standards of care, which may vary according to time and place. Thus, interpretation of these principles usually follows Cardozo's prescription:

[W]e look to custom . . . for the tests and standards that are to determine how established rules shall be applied. . . . The master in the discharge of his duty to

Moreover, unlike the *mitzvot*, which are definite and permanent reflections of Divine will and logic, not subject to human modification, the Torah's monetary laws are essentially guidelines which not only depend in part on human logic, but can be modified by human will. Ritual areas are considered to be in G-d's province; *mitzvot* are statements of what actions and activities must or must not be performed. While many of the *mitzvot* relate to the way a person treats others, the duty to perform the *mitzvot* is ultimately a duty to G-d. Therefore, it is outside human discretion to relieve a person of this duty. Monetary issues, in contrast, are subject to human convention. Therefore, the Talmud states individuals have broad discretion over monetary matters.<sup>133</sup>

For example, a creditor has the discretion to forgive a debt, even if that debt is mandated by the Torah.<sup>134</sup> Similarly, if a person sustains damages to himself or to property because of a pit that has been dug in a public place, the Torah states that the person who dug the pit is liable.<sup>135</sup> Yet the victim has the discretion to forgive the debt.<sup>136</sup>

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protect the servant against harm must exercise the degree of care that is commonly exercised in like circumstances by men of ordinary prudence. The triers of the facts in determining whether that standard has been attained, must consult the habits of life, the everyday beliefs and practices, of the men and women about them.

BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 60, 63 (1921).

133. See, e.g., TALMUD BAVLI, *Bava Metzia* 84a. The difference between ritual and monetary obligation is roughly similar to the difference between criminal and civil liability. A guilty criminal defendant has committed a crime against the people of the state. Therefore, it is the people of the state, and not the individual victim of the crime, who prosecute the criminal defendant. While the victim may often be in a position to prevent a criminal prosecution by refusing to testify, the ultimate decision of whether to prosecute a defendant is in the discretion of the prosecutor, as the representative of the people. The victim may not "forgive" the crime; it was committed against the people as a whole, not against the victim on a personal level. Similarly, ritual obligations, though they may manifest themselves in actions that relate to other people, are ultimately obligations toward G-d.

By contrast, a victim of a tort may forgive civil obligation. The State has an interest in the satisfaction of civil liability, and failure to pay the damage award may result in criminal prosecution by the State, but if the plaintiff forgives the liability, the State has no grounds to prosecute. In Jewish law, if a defendant fails to fulfill a monetary obligation, the defendant thereby violates ritual prohibitions, such as those against stealing or withholding wages. If the plaintiff forgives the obligation, however, there are no grounds for a violation of ritual law.

Similarly, adjudication of questions of monetary law will often determine whether there is a violation of ritual law. As the twentieth century scholar Rabbi Shimon Shkop observed, "The law against stealing prohibits taking something that, according to monetary law, belongs to someone else; the law against withholding a worker's wages refers to that which must be paid according to monetary law." SHIMON SHKOP, *SHA'AREI YOSHER* 5:1.

134. See, e.g., MAIMONIDES, *CODE OF LAW*, *supra* note 17, at Laws of Sales 5:11.

135. See *Exodus* 21:33-34.

136. See, e.g., MAIMONIDES, *CODE OF LAW*, *supra* note 17, at Laws of Sales 5:11.

Likewise, individuals have discretion to place conditions on activities relating to monetary matters. In the case of the gratuitous bailment, according to the Torah's guidelines, the bailee is liable if the goods are lost or destroyed as a result of the bailee's negligence but not if the goods are stolen. The bailee and bailiff have discretion, however, to contract that the bailee will be liable if the goods are stolen as well.<sup>137</sup>

In contrast, in ritual areas, individuals do not have the same discretion in relation to the performance of the dictates of the Torah. For example, the Torah's prescription for divorce proceedings includes the requirement that a husband give his wife a *get*, or writ of divorce.<sup>138</sup> That the wife may not marry again until she has received a *get* is a ritual matter; her duty not to remarry without obtaining a *get* is owed not to her husband but to G-d. Therefore, the husband does not have control over the ritualistic mechanics of a *get*. The husband may not "forgive" the requirement of a *get* by allowing his wife to remarry without obtaining a *get* from him.

Similarly, a condition may not be placed on the ritual characteristics of a *get*. Therefore, a husband could not give his wife a *get* with the stipulation that she may not marry a particular man. Even if she were to agree to a such a stipulation, the *get* would not be valid. This is because the ritual law defines a *get* as that which permits a woman to marry whomever she wants;<sup>139</sup> it is not within the province of a particular husband and wife to change the ritual function of a *get*. In the same way, a person does not have discretion to decide to eat a smaller quantity of matzo than the amount required by the Torah.

It should be noted, however, that ritual areas sometimes have monetary characteristics as well, which may be subject to conditions. In the case of the *get*, for example, the mechanics of conveying the physical *get* are based on monetary principles. Although a husband may be compelled under certain circumstances to give his wife a *get*, ritual law does not dictate the details of the monetary aspect of the conveyance of a *get*. Therefore, a husband may place certain conditions on the conveyance of the *get*. In fact, the Talmud records that in the time of King David, before going to battle, husbands would present their wives with a *get*, subject to their not returning from battle within a stated period of time.<sup>140</sup> This would prevent the possibility of

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137. See TALMUD BAVLI, *Bava Metzia* 84a.

138. See *Deuteronomy* 24:1.

139. See TALMUD BAVLI, *Gittin* 81a-81b.

140. See TALMUD BAVLI, *Kethuboth* 9b.

a wife becoming an *agunah*, a woman prohibited from remarrying because she does not know if her husband is still alive.<sup>141</sup>

Finally, monetary laws are considered in the province of humans to such an extent that they are often developed independent of any text, depending wholly on human custom and convention.<sup>142</sup> Many monetary laws are based largely on observation of business custom and human nature. The details of how best to form a legal structure to manage these human practices are totally within the discretion of human authorities, subject only to the Torah's general commands for justice and fairness.<sup>143</sup>

### C. Authority in Interpretation

In one sense, Jewish law does not recognize the unique authority of a particular individual or body to interpret the law. Because the source of Jewish law is the Torah, which represents the revealed will of G-d, legal interpretation is a discipline aimed at discovering G-d's will in issues and cases for which the Torah has not provided compre-

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141. The distinction between monetary and ritual law is important in applying the Talmudic rule *dina de-malkhuta dina*—the law of the land is the law. Under Jewish law, the secular law of a valid government is binding, to the extent that it relates to monetary law. The law of the land does not have authority, however, to contradict ritual law. See ELON, *supra* note 16, at 132-37; Rabbi Hershel Schachter, "Dina de-malkhuta Dina": Secular Law as a Religious Obligation, 1 J. HALACHA & CONTEMP. SOC'Y 103 (1981).

The rule that a secular law has the authority to regulate only monetary issues complicates the drafting of *get* laws, which are designed to insure that a husband will grant a *get* to his wife if the couple undergoes a civil divorce. Under Jewish law, without obtaining a *get*, the woman may not remarry. See Deuteronomy 24:1-2; TALMUD BAVLI, *Kedushin* 2a. Statutes must be drafted carefully to affect only the monetary aspects of the conveyance of a *get*, not the ritual laws involved. Similar restrictions apply to prenuptial agreements, through which a future husband agrees to certain terms to insure that, in the event of divorce, he will provide his future wife with a *get*. As noted above, a husband may agree to conditions on the monetary aspects relating to the conveyance of the *get* but not to conditions affecting the ritual validity of the *get*. For a discussion of the legal and religious issues relating to *get* laws, see generally IRVING A. BREITOWITZ, BETWEEN CIVIL AND RELIGIOUS LAW: THE PLIGHT OF THE AGUNAH IN AMERICAN SOCIETY (1993), and Irving A. Breitowitz, *The Plight of the Agunah: A Study in Halacha, Contract, and the First Amendment*, 51 MD. L. REV. 312 (1992).

142. See CHAJES, *supra* note 27, at 312.

143. Cf. CARDOZO, *supra* note 132, at 62-63 ("General standards of right and duty are established. Custom must determine whether there has been adherence or departure. . . . Innumerable . . . are the cases where the course of dealing to be followed is defined by the customs, or, more properly speaking, the usages of a particular trade or market or profession.") (citation omitted).

As a nineteenth century scholar noted, the Torah allows judges to interpret most laws of monetary litigation according to their own judgment, subject only to a single general rule that "you shall judge your fellow with justice." Israel Lifschitz, *Commentary to Bava Bathra*, in TIFERETH YISRAEL 10:8 (citing *Leviticus* 19:15).

hensive details. Even in monetary matters, and even in those areas of monetary law based largely on human custom and behavior, the goal of an interpreter is to arrive at what would be considered a just result according to Divine will. This element of religious morality, so central to Jewish law, suggests that there should not be an interpretive authority in Jewish law. As Joseph Raz has written, “[m]orality is not based on authority.”<sup>144</sup>

As indicated by its very title, however, Jewish law is not simply a “religiously based system[ ] of moral theorizing.”<sup>145</sup> Jewish law consists of a detailed legal system, regulating both public and private life, to a far greater extent than would be acceptable in American law. In short, Jewish law presents at least guidelines for virtually every aspect of ideal societal and personal behavior. As a practical matter, then, there is a definite need for an authoritative interpretation of the law to determine how society should function.

The tension between Jewish law’s emphasis on the search for “Truth,” or G-d’s will, and the need to adapt the theoretical law to the practical needs of a functioning society, expresses itself in some of the principles relating to authority in Jewish law. The tension, in fact, is grounded in the interpretation of the following passage in the Torah:

[W]hen there is a matter of law that you are unable to decide . . . you will go up to the place that G-d will choose. And you will approach the . . . judge who will be in those days and you will inquire, and [he] will tell you the law. And you will act according to that which [he] tell[s] you.<sup>146</sup>

Based on the presumption against superfluity, the Talmud asks why the Torah adds the phrase “who will be in those days” in reference to the judge who is to be approached. The Talmud also asks rhetorically whether it would be possible for a person living in a certain generation to approach any judge other than one who lives in “those days.” The

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144. Joseph Raz, *Why Interpret?* 13 (Oct. 19, 1995) (unpublished manuscript, on file with author).

145. Charles Fried, *The Artificial Reason of the Law or: What Lawyers Know*, 60 *TEX. L. REV.* 35, 58 (1981). As Fried characterized it,

The closest moral philosophy has come to the forms and methods peculiar to law has been some religiously based systems of moral theorizing, such as the Talmudic or Thomistic. . . . Where they assume the function of public judgment with public—sometimes even coercive—consequences . . . they begin to display the very characteristics that I ascribe to law. Indeed, they become just specialized systems of law.

*Id.* Though Judge Fried ultimately recognizes a Talmudic “system of law,” it seems odd that he appears reluctant to do so, stating only that the Talmudic system *begins* to “display the . . . characteristics” of law.

146. *Deuteronomy* 17:8-10.

Talmud interprets the verses to teach that a person should recognize that the judges of each generation are entrusted with the responsibility and authority to interpret the law.<sup>147</sup> In fact, even if the courts in a certain generation do not appear to be of the same caliber as those of another generation, each court must rely on its own interpretation of the law.<sup>148</sup> Therefore, as legal conclusions must be based on an understanding of truth, a court need not accept as inherently authoritative another court's interpretation.

Maimonides codified this principle in his *Code of Law*. He wrote that if one court arrives at a legal ruling based on a certain reasoning, a later court has the discretion to adjudicate the same issue differently, based on its own reasoning.<sup>149</sup> As a source, Maimonides cited the verse "to the judge who will be in those days" and commented that "you are required to approach only the court in your day."<sup>150</sup>

Yet, while granting a court discretion to disagree with the ruling of an earlier court, the Torah also limits the discretion of an individual judge to disagree with the court's ruling. The Torah states that the court's ruling is authoritative: "according to the teaching which they instruct you and according to the law which they tell you, you will act; do not veer from that which they tell you, to the right or to the left."<sup>151</sup> In fact, the Torah prohibits rulings that contradict the court's ruling.<sup>152</sup> The Talmud explains that this law was required to maintain unity in the Nation.<sup>153</sup>

Again, Maimonides codified these laws, in a discussion of the judicial structure and the method of adjudicating questions of interpretation in Jewish law.<sup>154</sup> In its ideal state, the judiciary of the Jewish legal system consists of a hierarchy of courts, which includes lower courts, higher courts, and the Sanhedrin.<sup>155</sup> The difference in judicial function is based primarily on jurisdiction.<sup>156</sup> Unlike the American judicial system, ordinarily there is no formal process to appeal a lower court decision to a higher court.<sup>157</sup> Instead, certain matters are in the

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147. See TALMUD BAVLI, *Rosh Hashana* 25b.

148. See *id.*, especially the Tosafoth commentary.

149. See MAIMONIDES, *CODE OF LAW*, *supra* note 17, at Laws of Mamrim 2:1 (quoting *Deuteronomy* 17:8-10).

150. *Id.*

151. *Deuteronomy* 17:11.

152. See *id.* at 17:12.

153. See TALMUD BAVLI, *Sanhedrin* 88b.

154. See MAIMONIDES, *CODE OF LAW*, *supra* note 17, at Laws of Sanhedrin chs. 1, 5.

155. See *id.*

156. See *id.*

157. See *id.* at 6:1-5.

exclusive jurisdiction of the lower courts, while other matters are in the jurisdiction of the higher courts.<sup>158</sup>

The Sanhedrin, in this system, had a unique status. In addition to having jurisdiction over issues of a certain level of importance, the Sanhedrin was the final arbiter of all questions of law.<sup>159</sup> When a question arose that could not be answered by a lower court, the question was then referred to a higher court.<sup>160</sup> If the higher court could not arrive at a decision—"a matter of law that you are unable to decide"—then the question was presented to the Sanhedrin for a decision.<sup>161</sup> The decision reached by the majority of the Sanhedrin was binding on the entire nation. Thus, as a practical matter, the Sanhedrin was the ultimate authority of legal interpretation.<sup>162</sup>

Another Medieval scholar, Nachmanides, elaborated on the Talmud's rationale for the principle that the Sanhedrin's ruling is not subject to dispute.<sup>163</sup> Nachmanides explained that, in giving courts the authority to interpret the Written Torah, G-d knew that there would be disagreements.<sup>164</sup> Indeed, Nachmanides noted an inherent difference between legal reasoning and the logic of exact sciences, such as engineering.<sup>165</sup> While it is possible in engineering to prove demonstrably, with mathematical precision, that a particular theory is correct, legal reasoning often involves issues that can be resolved logically in more than one way. The role of a legal interpreter is to examine the evidence motivating each of the possible conclusions, and to determine which conclusion appears most accurate.<sup>166</sup>

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158. See MAIMONIDES, CODE OF LAW, *supra* note 17, at Laws of Sanhedrin chs. 1, 5.

159. See *id.* at Laws of Mamrim 1:1.

160. See *id.* at 1:4.

161. *Id.*; see also *Deuteronomy 17:8*.

162. See MAIMONIDES, CODE OF LAW, *supra* note 17, at Laws of Mamrim 1:1.

163. See NACHMANIDES, *Introduction to Commentary on Rif*.

164. See *id.*

165. See *id.*

166. See *id.* Cardozo similarly recognized that certain cases lend themselves to more than one viable interpretation and that in these cases a judge must balance different considerations to arrive at a conclusion:

It is with these cases that I have chiefly concerned myself in all that I have said to you. In a sense it is true of many of them that they may be decided either way. By that I mean that reasons plausible and fairly persuasive might be found for one conclusion as for another. Here come into play that balancing of judgment, that testing and sorting of considerations of analogy and logic and utility and fairness . . . .

CARDOZO, *supra* note 132, at 165-66. Professor Owen Fiss also has noted that interpretation is not an exact science: "[T]he meaning of a text does not reside in the text, as an object might reside in physical space or as an element might be said to be present in a



The possibility of numerous logical conclusions can be problematic. While in theory, proponents of each of these conclusions have a logical claim to a correct interpretation, in practice, there must be one rule of law for society to follow. If all logical conclusions are accepted as valid rulings, Nachmanides wrote, there will no longer be a single "Torah" for the nation to follow; instead, it will be replaced by "many Torahs."<sup>167</sup> To prevent this possibility, and to provide for a unified rule of law, G-d commanded that when there is indecision about an issue, the High Court functions as the ultimate and unifying decisor.<sup>168</sup>

The tension between legal interpreters' search for the truth and the need for a practical method of establishing the law is expressed perhaps most dramatically in a narrative in the Talmud that for centuries has received the attention of scholars of Jewish law, and more recently has been examined by a number of contemporary American legal scholars.<sup>169</sup> The Talmud refers to a dispute between Rabbi

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chemical compound, ready to be extracted if only one knows the correct process . . . ." Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 744 (1982).

The imprecise nature of legal decision necessitates what Cardozo called "the serious business of a judge." CARDOZO, *supra* note 132, at 21. Cardozo criticized those judges whose "notion of their duty is to match the colors of the case at hand against the colors of many sample cases spread out upon their desk," *id.* at 20, and wrote that, according to such a view, "[t]he man who had the best card index of cases would also be the wisest judge," *id.* at 21. According to Cardozo, judges must decide cases "when the colors do not match, when the references in the index fail, when there is no decisive precedent." *Id.*

A contemporary scholar of Jewish law, who is also a professor of American law, has updated Cardozo's observation in applying it to Jewish law. Rabbi J. David Bleich writes that effective decision-making in Jewish law "lies precisely in the ability to make judgment calls in evaluating citations, precedents, arguments, etc. It is not sufficient . . . to have a full command of relevant sources. If so, in theory at least, the decisor *par excellence* would be a computer rather than a person." 4 J. DAVID BLEICH, *CONTEMPORARY HALAKHIC PROBLEMS* at ix (1995).

167. See 2 NACHMANIDES, *supra* note 106, at 423 (commenting on *Deuteronomy* 17:11).

168. See *id.*; cf. Fiss, *supra* note 166, at 747 ("[A] hierarchy of authority for resolving disputes that could potentially divide or destroy an interpretive community is one of the distinctive features of legal interpretation.").

In the poetic language of Robert Cover,

It is the problem of the multiplicity of meaning . . . that leads at once to the imperial virtues and the imperial mode of world maintenance. . . . Let loose, unfettered, the worlds created would be unstable and sectarian in their social organization, dissociative and incoherent in their discourse, wary and violent in their interactions. The sober imperial mode of world maintenance holds the mirror of critical objectivity to meaning, [and] imposes the discipline of institutional justice upon norms . . . .

Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 16 (1983). Cover identified similar arguments in *The Federalist* for a national supreme court. See *id.* at 41.

169. Stone has referred to this narrative as "possibly the most frequently cited talmudic passage in modern literature." Stone, *supra* note 1, at 855. Stone's article focuses on Rob-

Eliezer and the majority of Sages. In order to demonstrate that he was correct, the Talmud states, Rabbi Eliezer summoned a number of miraculous events, culminating in a Heavenly voice declaring that Rabbi Eliezer's view was correct.<sup>170</sup> The Sages responded by noting that, the Heavenly voice notwithstanding, the Torah instructs that in adjudicating a matter, the majority view is followed.<sup>171</sup> The law is "not in heaven," but instead was given to humans to determine.<sup>172</sup> Therefore, the law was interpreted according to the view of the majority of Sages, against the view of Rabbi Eliezer.

This narrative has been analyzed in numerous ways, but on a basic level, the narrative serves as an illustration of the tension between searching for truth and following conventions of decision-making. If the Heavenly voice is viewed as reflecting the Divine "opinion" regarding the dispute, then Rabbi Eliezer was the one who seems to have accurately interpreted the Divine will. Indeed, as Rabbenu Nissim Gerondi (Ran), a medieval legal authority, explained, the Sages acknowledged that Rabbi Eliezer's opinion was "closer to the truth."<sup>173</sup> Yet, they followed the majority opinion.<sup>174</sup> Ran explained that "the determination of the law was entrusted to the sages of each generation," regardless of whether their determination is consistent with the "truth."<sup>175</sup>

This narrative need not suggest, however, that the majority opinion was in some sense "false." As Nachmanides noted, legal reason-

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ert Cover's use of sources from Jewish law in many of his later pieces, including *Nomos and Narrative*, which cites the aforementioned narrative in a footnote. See Cover, *supra* note 168, at 23 n.66.

170. See TALMUD BAVLI, *Bava Metzia* 59b.

171. See *id.* (analyzing *Exodus* 23:2).

172. *Id.*; see also *Deuteronomy* 30:12. Fiss has used similar imagery, stating that "to search for the brooding omnipresence in the sky [ ] is to create a false issue." Fiss, *supra* note 166, at 746 (citation omitted). Fiss attributes this imagery to Justice Holmes, who wrote that "[t]he common law is, not a brooding omnipresence in the sky, but the articulate voice of some sovereign." *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 222 (1916) (Holmes, J., dissenting), quoted in Fiss, *supra* note 166, at 746 n.15.

173. RAN, DERASHOT 112 (Leon A. Feldman ed., 1973).

174. See *id.* (citing TALMUD BAVLI, *Bava Metzia*, 59b).

175. *Id.* The process of arriving at an authoritative conclusion in Jewish law thus depends on what is called in contemporary American legal scholarship an "interpretive community." See STANLEY FISS, *IS THERE A TEXT IN THIS CLASS?* (1980); Fiss, *supra* note 166. To a certain degree, then, Fiss's observations that "[j]udicial interpretations are binding, whether or not they are correct," *id.* at 755, and that "[a]n interpretation is binding even if [it is] mistaken," *id.* at 758, are applicable to Jewish law. Yet, it appears more accurate to say that in Jewish law, there may exist more than one correct "truth." See generally Michael Rosensweig, *Eilu ve-Eilu Divrei Elokim Hayyim: Halakhic Pluralism and Theories of Controversy*, in *RABBINIC AUTHORITY AND PERSONAL AUTONOMY* 93 (Moshe Sokol ed., 1992).

ing can result in more than one logically viable solution.<sup>176</sup> This principle is illustrated by another Talmudic passage, which recognizes the possibility of a rejected yet viable opinion. The Talmud records a number of disputes between two schools, the School of Hillel and the School of Shammai. The Talmud follows the opinions of the School of Hillel, which represented the majority view, yet the Talmud states that “these and these are both the words of the Living [G-d].”<sup>177</sup> Thus, according to the Talmud, when there is a dispute in Jewish legal interpretation between two logical points of view, both opinions may be authentic reflections of the Divine will.<sup>178</sup>

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Fiss made his observations in the context of depicting legal reasoning as a system of “bounded objectivity” rather than of “nihilism.” Fiss, *supra* note 166, at 745-46. In a similar vein, Rabbi Rosensweig has written that

[P]luralism is not a blank check. There are objective limitations to a sincere interpretation of sources. . . . [M]ost . . . debates [in Jewish law] revolve around details and the application of principles, not the principles themselves. . . . R. Moshe Feinstein in the introduction to his [*Responsa*] cautions about the need for *yirat shamayim* (fear of [G-d], i.e., piety) and intellectual rigor to insure valid conclusions.

Rosensweig, *supra*, at 120.

Rabbi Feinstein’s emphasis on piety reflects a common theme in discussions of decision-making in Jewish law, dating back to the Talmud. Rabbi Feinstein recognized the importance of proper interpretation, due to the fact that the interpretation is religiously binding on others, as an articulation of Divine will. Although American law does not contain this aspect of Divinity, interpretation of American law is similarly binding. Thus, Fiss has suggested that “the authoritative quality of legal interpretation . . . creates a strong critical environment; it provides unusually strong incentives to criticize and defend the correctness of the interpretation. Something practical and important turns on judicial interpretations. They are binding.” Fiss, *supra* note 166, at 757.

176. See *supra* text accompanying notes 163-66.

177. TALMUD BAVLI, *Eruvin* 13b. This concept is somewhat similar to Cover’s view, regarding *Bob Jones University v. United States*, 461 U.S. 574 (1983), that “within the domain of constitutional meaning, the understanding of the Mennonites assumes a status equal (or superior) to that accorded to the understanding of the Justices of the Supreme Court.” Cover, *supra* note 168, at 28.

178. Cover similarly wrote of “a multiplicity of coherent systems” and of “interpretive efforts or traditions, each of which is independently defensible, or even ‘right.’” Cover, *supra* note 168, at 17 n.45.

In Jewish law, there is an important difference in practice between a view that is viable and “true” but rejected, and one that is inherently “false.” Although the interpretation of the Sanhedrin is binding on all judges, as a result of persecution and exile there was not always a functioning Sanhedrin in Talmudic times. When there is no Sanhedrin, the majority interpretation is followed by most of the Nation, but those who are qualified to offer their own opinion on the matter may follow that opinion. Thus, the Talmud states that despite the majority’s rejection of their views, in matters that were not determined by a Sanhedrin, both the School of Shammai and Rabbi Eliezer—as well as those who fell under their jurisdiction—followed their own views. See Elchanan Wasserman, *Kuntrus Divre Soferim*, in *KOBETZ SHIURIM* 112 (Eliezer Wassermann ed., 4th ed. 1989).

In this sense, it may be said, using Cover’s terms, that Jewish law “acknowledge[s] the nomic integrity of each of the communities that have generated principles and

Similarly, the opinion of the Sages who disagreed with Rabbi Eliezer was an authentic expression of Divine will and a viable view, which was followed because it was held by the majority. The fact that Rabbi Eliezer's opinion was "closer to the truth" does not invalidate the Sages' opinion. In deciding an unclear law, human interpreters may strive to attain the view closest to the truth, but may not rely on Heavenly assistance. Instead, they must follow the dictates of human logic.<sup>179</sup> If more than one view appears logical, it is because they are both potentially viable solutions; to attain a unified legal system, interpreters follow the Torah's instruction to accept the majority view.<sup>180</sup>

#### D. Precedent

A final issue related to Jewish legal interpretation involves the question of precedent in Jewish law. In those areas of law which actu-

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precepts. . . . [E]ach 'community of interpretation' that has achieved 'law' has its own *nomos*." Cover, *supra* note 168, at 42.

Additionally, even when an opinion is rejected by a Sanhedrin, it still may have future value if it is a viable interpretation. As noted above, a later Sanhedrin has the authority to disagree with the interpretation of an earlier Sanhedrin. *See supra* note 26. Thus, a later Sanhedrin may endorse as correct an interpretation that had previously been rejected.

*Cf.* Gerald Graff, "Keep off the Grass," "Drop Dead," and Other Indeterminacies: A Response to Sanford Levinson, 60 TEX. L. REV. 405, 410 (1982) ("[T]he practice of interpretation doesn't depend on interpreters' possessing godlike powers to arrive at an 'ultimately provable right answer' that closes the books on further argument about the meaning of a text. Therefore the lack of such godlike power doesn't entail indeterminacy . . .").

179. Elaborating on Ran's analysis above, the eighteenth century scholar Rabbi Aryeh Leb Heller wrote that the Torah is properly interpreted according to human logic and that an interpretation is considered "true" if determined to be so through human reasoning. ARYEH LEB HELLER, INTRODUCTION TO KETZOT HACHOSHEN.

180. In fact, some Medieval legal authorities such as Ritva have explained that as part of the Revelation to Moses, G-d provided for the existence of different yet viable interpretations. *See* RITVA, COMMENTARY TO THE TALMUD, *Eruvin* 13b. As noted above, together with the Written Law, certain details of laws were revealed orally to Moses at Sinai, while other laws were left open to interpretation. *See supra* notes 17-19 and accompanying text. Ritva suggested that Moses was told that many of these laws have more than one viable interpretation, and that each generation must interpret these laws for itself, according to its own reasoning. *See* RITVA, *supra*, at *Eruvin* 13b; *see also* TALMUD YERUSHALMI, *Sanhedrin* 4:2.

Alternatively, it is possible to understand the Talmudic narrative as suggesting that, on a level of Divine logic, Rabbi Eliezer's opinion was indeed "true" and the opinion of the Sages was "false." This appears to be the view of Ran and Rabbi Feinstein, who write that, at times, a binding decision may be in conflict with a transcendental "truth." Nevertheless, human logic is followed, as it produces a "practical truth," regardless of any theoretical or Divine "truth." The analysis in note 178, *supra*, applies in this conceptual framework as well, as there may be more than one correct practical "truth," even though there is a single transcendental "truth."

ally involve revelation rather than interpretation,<sup>181</sup> the “interpretation” of the Torah has immutable Divine authority. In actual interpretation of the law, however, just as the search for truth ideally does not respect a specific interpreter as inherently authoritative, there should be no reliance on precedent in trying to arrive at the truth. Moreover, there would not seem to be a practical need to accept precedent, even to the extent that society must accept one particular interpretive view out of many viable opinions. Indeed, Maimonides allows—and requires—each generation to interpret the law through its own reasoning.<sup>182</sup>

Authorities in Jewish law, however, observed that in the Talmud, legal authorities who lived after the compilation of the Mishna did not dispute the rulings of those who lived before them.<sup>183</sup> According to the principle articulated by Maimonides, the later authorities should have had discretion to offer their own views on matters of legal interpretation. Apparently, although not strictly bound by precedent, the later authorities nevertheless accepted as binding upon themselves the decisions of the earlier authorities. Similarly, when the Talmud was compiled, later authorities accepted as binding the legal decisions found in it.<sup>184</sup> In practice, then, the laws of the Mishna and the Talmud gained the immutable authority that had previously applied only to the revealed law.

There are a number of possible motivations for this acceptance by the later authorities. They may have acknowledged that the preceding generations were more likely to accurately interpret the Torah. Such an acknowledgement may have been based in a simple recognition that practically, those closer in time to the Revelation at Sinai are likely to have a better understanding of the meaning of the law. A more mystical or religious-based version of this argument is that since the Revelation, there has been a gradual diminishing of the spiritual nature of humanity; as earlier generations are spiritually superior, so is their interpretation of religious law.

Alternatively, just as the need arises for Restatements in American law to codify the common law, there may have been a feeling that,

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181. See *supra* text accompanying notes 27-58.

182. See Zerah Warhaftig, *Precedent in Jewish Law*, 6-7 SHENATON HA-MISHPAT HA-IVRI 105 (1979-80).

183. See JOSEPH KARO, KESEF MISHNA, on Maimonides, Laws of Mamrim 2:1.

184. See *id.*; Joseph B. Soloveitchik, *Two Types of Tradition*, in SHEURIM L'ZEKHER ABBA MORI 124, 136-37 (1983). Some have suggested additional points in history at which it appears that legal authorities accepted as strongly persuasive precedent the opinions of those who preceded them. See KAPLAN, *supra* note 17, at 237-41.

at certain times, the developing law should be codified uniformly. While a Restatement may not have the same immutable authority as the Mishna or the Talmud, it is significant that each of these codifications of Jewish law reflected hundreds of years of legal development. Perhaps at some point in the future of American legal history, there will be a similar call for a binding codification of much of the interpreted law.

The Jewish legal system has evolved over thousands of years, developing in a variety of settings ranging from the Land of Israel in the period of the Temple to contemporary America. Many laws were clearly defined at the Revelation at Sinai or required a limited amount of interpretation but are now largely unchanging. Other laws depend to varying degrees on the customs of society, and thus are continuously reinterpreted, as fundamental principles are applied to changing situations. Finally, even those laws which appear to be well-defined often require interpretation in order to be applied to unanticipated scenarios involving new technology or the unavailability of materials essential for ordinary fulfillment of the law.

There is currently no Sanhedrin to decide questions in Jewish law. Nor is it always clear which is the majority view. As a result, contemporary authorities in Jewish law possess a wide range of autonomy.<sup>185</sup> Rabbi Moshe Feinstein, who is generally regarded as the preeminent authority on Jewish law in the latter half of the twentieth century, stated unequivocally that a legal decisor is not only permitted but required to interpret the law independently.<sup>186</sup> Citing the Talmud, he noted that "a judge must rely on his own judgment" and is prohibited from accepting a ruling which he considers to be incorrect.<sup>187</sup>

With this increased autonomy comes increased responsibility. When a new question arises, contemporary authorities cannot rely on a high court to decide the issue. Moreover, emerging technology increasingly presents legal authorities with issues for which there is no clear precedent. The role of the interpreter of Jewish law is to apply the laws and methods that have come before to new issues in an attempt to conform as closely as possible to the will of G-d.

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185. See MAIMONIDES, CODE OF LAW, *supra* note 17, at Laws of Mamrim 1:4-5.

186. See MOSHE FEINSTEIN, IGROTH MOSHE, III Yore Deah 88 (citing TALMUD BAVLI, *Bava Bathra* 130b).

187. *Id.*

## II. Rules and Standards in Jewish Law and American Constitutional Law

One issue of constitutional debate that can be traced through American legal history relates to how much flexibility should be employed in interpreting the Constitution. A similar debate is found in Jewish legal history. While some contemporary American legal scholars have engaged in textual analysis in comparing approaches to flexibility in interpretation in the two legal systems, a more useful comparison would focus, instead, on conceptual principles of interpretation.

The debate in American legal thought regarding flexibility in interpretation has taken various forms, as has the terminology theorists have used to describe the debate.<sup>188</sup> For the purposes of this Article, terminology distinguishing between a jurisprudence based on rules and a jurisprudence based on standards is particularly useful. First, Kathleen Sullivan has employed such terminology in an illuminating analysis of current Supreme Court jurisprudence.<sup>189</sup> More significantly, this terminology is readily adaptable to Jewish law. In fact, a contemporary scholar of Jewish law has used similar terminology to trace different views of the proper level of flexibility for interpreting Jewish legal principles.<sup>190</sup>

### A. Pharisees, Sadducees, Catholics, and Protestants

A number of scholars comparing the Jewish legal system with the American legal system have considered the similarities between Biblical interpretation in Jewish law and American constitutional interpretation.<sup>191</sup> These scholars have noted that a basic issue in both legal systems is the question of how to interpret an authoritative text. Some scholars have further tried to demonstrate that certain issues arising in Biblical textual interpretation sometimes find their analogues in American law.<sup>192</sup> Despite the apparent logic of these theories, a careful look at the nature of textual interpretation in the two

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188. See, e.g., MARC KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 303-04 nn.1-3 (1987); Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 382 n.16 (1985); various works cited in Kathleen M. Sullivan, *The Supreme Court, 1991 Term: Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 57-58 nn.230-31 (1992).

189. See generally Sullivan, *supra* note 188.

190. See YITZCHAK ADLER, LOMDUS: A SUBSTRUCTURAL ANALYSIS 21-24 (1989).

191. See generally SANFORD LEVINSON, CONSTITUTIONAL FAITH (1988); Cover, *supra* note 168; Dow, *supra* note 8; Thomas C. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1 (1984); *Interpretation Symposium*, 58 S. CAL. L. REV. 1 (1985).

192. See *id.*

systems reveals the problems that arise in drawing too close an analogy.

Professor Sanford Levinson has been a leading proponent of comparing Biblical textual interpretation with constitutional textual interpretation. In his convincing depiction of the Constitution as a "sacred object" in "American Civil Religion," Levinson compares competing views of constitutional interpretation with different strains of Biblical interpretation.<sup>193</sup> He develops the thesis that the different approaches to constitutional interpretation parallel the different approaches in Christianity to interpretation of Scriptures.<sup>194</sup> Levinson posits that those who favor an interpretation more faithful to the text of the Constitution are similar to the Protestant reformers, who emphasized the centrality of Scriptural text alone as the basis of their religious behavior and belief.<sup>195</sup> Conversely, constitutional interpreters favoring a more flexible understanding of the text reflect an attitude closer to that of Catholics, who read the Scriptures with an emphasis on the oral tradition taught by the Church.<sup>196</sup>

Levinson traces back to 1798 the dichotomy between "protestant" and "catholic" constitutional interpretation.<sup>197</sup> In *Calder v. Bull*,<sup>198</sup> Justice Chase stated that the Court could find a particular act of Congress unconstitutional even though there was no express restraint on such an act in the text of the Constitution (a "catholic" result).<sup>199</sup> Justice Iredell, however, stated that the Court could not place such a limitation on legislative power absent textual constitutional support (a "protestant" result).<sup>200</sup>

Levinson finds the dichotomy in modern jurisprudential attitudes as well.<sup>201</sup> He contrasts Justice Black's "protestant" approach in *Griswold v. Connecticut*,<sup>202</sup> with Justice Harlan's "catholicism" in *Poe v. Ullman*.<sup>203</sup> Black argued that Connecticut's prohibition on contraceptives for married couples did not violate the Constitution because there was no provision in the Constitution granting a right to privacy

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193. LEVINSON, *supra* note 191, at 18-53.

194. *See id.*

195. *See id.*

196. *See id.*

197. *Id.* at 35-36.

198. 3 U.S. (3 Dall.) 386 (1798).

199. *See id.* at 387-89.

200. *See id.* at 399 (Iredell, J. concurring).

201. *See* LEVINSON, *supra* note 191, at 31-35.

202. 381 U.S. 479, 507 (1965) (Black, J., dissenting).

203. 367 U.S. 497, 522 (1961) (Harlan, J., dissenting).



that would invalidate the legislation.<sup>204</sup> Harlan's view of tradition allowed for a reading of the Constitution that recognized rights beyond those expressly stated in the text.<sup>205</sup>

In an effort to support Levinson's thesis, Professor Thomas Grey has ascribed to religions other than Christianity the phenomenon of "catholic" and "protestant" attitudes toward an authoritative text.<sup>206</sup> For example, according to Grey, orthodox Sunni Islam believes that the Koran should be supplemented by oral tradition.<sup>207</sup> Certain Islamic modernizers, however, are skeptical of the authenticity of the oral tradition and stress the authority of the writings.<sup>208</sup>

Grey also applies Levinson's theory to Judaism and Jewish law, arguing that the views of the Sadducees and Pharisees paralleled those of the Protestants and Catholics, respectively.<sup>209</sup> In Grey's description of the ancient debate, the Pharisees transmitted an oral tradition to supplement the Written Torah, while the Sadducees considered only the written law as binding.<sup>210</sup> Levinson, in turn, cites Grey approvingly, and notes a revival of this debate in Judaism, when the ninth century Karaite community rebelled against Rabbinic Judaism's reliance on the Oral Torah.<sup>211</sup> Levinson concludes that the differences between Karaite Judaism and Rabbinic Judaism, like those between Protestantism and Roman Catholicism, can serve as a basis of comparison for his analysis of "protestant" and "catholic" interpretations of the Constitution.<sup>212</sup>

Levinson and Grey have thus identified a broadly similar tension within different religions, including the American "Civil Religion," regarding the manner in which an authoritative text may be interpreted. Yet, a careful study of these tensions within Jewish law suggests that parallels to constitutional textual interpretation are less than precise.

First, the very portrayal of Sadducean practice rooted in the Biblical text and Pharisaic practice relying more heavily on tradition appears inaccurate. In his work on the controversy between the Pharisees and the Sadducees, Professor Louis Finkelstein analyzed

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204. See *Griswold*, 381 U.S. at 508.

205. See *Poe*, 367 U.S. at 496.

206. Grey, *supra* note 191, at 6-7. Grey commented on Sanford Levinson, *The Constitution in American Civil Religion*, 1979 SUP. CR. REV. 123, which Levinson later developed as part of *Constitutional Faith*.

207. See Grey, *supra* note 192, at 7.

208. See *id.*

209. See *id.* at 6-7.

210. See *id.* at 7.

211. See LEVINSON, *supra* note 191, at 25.

212. See *id.*

some of the recorded debates between the two sects.<sup>213</sup> Finkelstein concluded that, in fact, of the two competing interpretations, that of the Pharisees was more often closer to the literal Biblical text.<sup>214</sup> For example, in considering one of the points of dispute, relating to the Temple service on Yom Kippur, Finkelstein noted that the Pharisees' interpretation was consistent with the plain meaning of the Biblical verses.<sup>215</sup> The Sadducees, however, "violated the written word" and "were guided in their interpretation of the law solely by the actual custom."<sup>216</sup> In this area, then, the Sadducees resemble constitutional "catholics" rather than constitutional "protestants."<sup>217</sup>

More fundamentally, the very nature of these controversies within Jewish legal history would not seem likely to provide a helpful model for the dichotomy in American legal tradition described by Levinson and Grey. As Finkelstein wrote of the Pharisees and Sadducees, "[n]either sect determined its views by such artificial and spurious principles as 'literal' and 'liberal' interpretation of Scripture."<sup>218</sup> Moreover, unlike the ongoing debate that Levinson shows exists in American constitutional interpretation,<sup>219</sup> any dispute in Jewish history regarding the supremacy of oral interpretation proved to be short-lived. There remains no substantial segment of the Jewish people that follows the text over the oral tradition. Thus, Finkelstein's conclusions, together with the realities of Jewish legal history, belie an analogy to literal and expansive constitutional textual interpretation.

## B. Rules and Standards—A Basic Framework

A more accurate description of the tension in Jewish law relating to discretion in legal interpretation might focus on the broader issue of interpretation of legal principles, rather than the issue of the literary and exegetical interpretation of the Bible as an authoritative text. Such an alternative analysis might also allow for a more useful comparison to American legal theory. Indeed, Kathleen Sullivan's formulation of the question of judicial discretion in interpreting the Constitution is an apt description of questions of flexibility of inter-

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213. See LOUIS FINKLESTEIN, *THE PHARISEES* 101 (1962).

214. See *id.*

215. See *id.* at 119, 654-57.

216. *Id.* at 120.

217. Similarly, in a dispute relating to the calendar, which Finkelstein called "the most bitter and the most prominent" of the controversies, the Sadducees again rejected the literal interpretation of the Biblical text. *Id.* at 647-48.

218. *Id.* at 101.

219. See LEVINSON, *supra* note 191, at 36.

pretation in Jewish law as well. Sullivan wrote that “[b]ecause virtually nobody really believes the no-judicial-legislation argument in its strongest and most naive form, the real question is not whether the Court should exercise discretion in constitutional interpretation, but rather how much.”<sup>220</sup> Similarly, virtually no authorities in Jewish law have really believed the argument, in its most naive form, that the Biblical text should not be interpreted. After all, the Bible is full of laws that are impossible to practice without meaningful interpretation of Biblical passages. For example, as noted above,<sup>221</sup> the Bible prohibits the performance of *melakha* on the Sabbath. The term “*melakha*,” usually translated in English as “work,” is just as ambiguous in the ancient Hebrew form of the word as in the English translation. Other than an express prohibition against lighting a fire on the Sabbath, the Bible offers no details of what work is forbidden. The only means of deriving a definition of the term *melakha* is therefore through an oral tradition or based on exegetical principles of interpretation.

Because it is clear that the Bible cannot be understood and applied without interpretation, a basic question of interpretation in Jewish law, as in constitutional law, revolves around how much discretion is available to interpretive authorities. Although constitutional disputes sometimes involve the interpretation of a particular word in the text of the Constitution, Sullivan has observed that “the constitutional interpretation debate converges with pervasive jurisprudential debates over the relative merits of the choice of legal form, because in these debates the amount of judicial discretion has been thought to depend on the form in which legal directives are addressed to judges.”<sup>222</sup> Similarly, in Jewish law, disputes in legal interpretation occasionally focus on the interpretation of the Biblical text. Yet, regardless of how closely the questions relate to Biblical interpretation, the underlying and conceptual basis of the disputes often depends on more fundamental questions of how to understand the form and interpretation of legal directives.

Sullivan shows how splits between Justices in the 1991 Supreme Court Term relating to constitutional interpretation can be analyzed in the context of “rules and standards.”<sup>223</sup> In addition to being an effec-

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220. Sullivan, *supra* note 188, at 56-57.

221. See *supra* text accompanying notes 21-22.

222. Sullivan, *supra* note 188, at 56-57.

223. *Id.* at 57.

tive way to understand contemporary American legal theory,<sup>224</sup> the distinction between rules and standards is particularly helpful in discussing questions in Jewish law related to flexibility in interpreting legal principles. A discussion of Jewish law in such a context may, in turn, help illuminate certain issues in American legal thought.

In discussing the different methods of interpreting legal directives, Sullivan delineates two categories of judges: those who consider laws to be "rules," and those who interpret laws as "standards."<sup>225</sup> Basic to Sullivan's framework is the notion that "[r]ules, once formulated, afford decisionmakers less discretion than do standards."<sup>226</sup> Before discussing the relative merits of interpreting legal directives either as rules or as standards, Sullivan first sets down functional definitions for the different categories.<sup>227</sup> When a legal directive operates as a rule, according to Sullivan, it minimizes the decision-maker's discretion by requiring a specific decision when certain facts are present in a case.<sup>228</sup> Although a rule is an expression of a background principle or policy, once formulated, the rule operates independently.<sup>229</sup> Thus, the rule, as formulated, is applied to the operative facts, even when such an application, under the circumstances, would contradict the principle or policy underlying the rule.<sup>230</sup> A standard, on the other hand, relates the decision directly to the background principle or policy underlying the legal directive.<sup>231</sup> Thus, when treating a legal directive as a standard, a decision-maker has more discretion, "tak[ing] into account all relevant factors or the totality of the circumstances."<sup>232</sup>

A contemporary scholar of Jewish law, Rabbi Yitzchak Adler, has articulated a similar dichotomy to categorize different ways of interpreting legal directives in the Jewish legal system.<sup>233</sup> One view, paral-

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224. *See id.*

225. *See id.*

226. *Id.*

227. *See id.*

228. *See id.*

229. *See id.*

230. *See id.*

231. *See id.*

232. *Id.*

233. *See ADLER, supra* note 190, at 21-24. I am mindful of Stone's observation that "[t]he Jewish legal tradition is being subtly reinterpreted to yield a legal counter-model embodying precisely the qualities many contemporary theorists wish to inject into American law," Stone, *supra* note 1, at 814, and I have been careful to avoid falling into the path she has described. While my use of the terminology of rules and standards is based on the works of contemporary American legal theorists, my use of the principles reflected in this terminology to describe Jewish law is based on the works of Adler, a contemporary Jewish

lel to Sullivan's description of "rules," is that legal directives must be applied as formulated. This position holds that, although certain conceptual constructs may have formed the foundation for the legal directive, there is no license to reinterpret the directive in light of its conceptual basis.<sup>234</sup>

The competing view, which parallels Sullivan's description of "standards," is that the conceptual ideas which form the basis of legal directives are a part of the law, to be applied together with the stated directives. Under this view, while it is true that legal directives are usually expressed in definite form, this is largely for the sake of convenience and simplicity. In applying the directive, it is necessary to interpret it not in terms of its simplistic formulation, but through understanding the more complex policies behind the law.<sup>235</sup>

The rules/standards dichotomy is important in the analysis of constitutional law not only because it helps us understand some of the major issues in contemporary American jurisprudence, but also because it is useful in tracing some of the continuing conflicts in constitutional interpretation, such as those that Levinson discusses. In fact, Pierre Schlag has equated constitutional "textualists" with those who favor viewing legal directives as rules.<sup>236</sup> Conversely, Schlag argues, a decision-maker who interprets the Constitution with more flexibility, and who is sensitive to considerations other than the text of the Constitution, sees a legal directive as a standard, to be applied in light of the values represented by the directive.<sup>237</sup> If Schlag's equations are accurate, they suggest a further advantage to analyzing Jewish legal interpretive principles in terms of rules and standards.

Through the rules/standards dichotomy, Jewish law can serve as an analogue to both Sullivan's analysis of American law, as well as, broadly, to Levinson's catholic/protestant dichotomy. At the same time, this formulation of Jewish law is preferable to Levinson's discus-

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scholar, who analyzes the Jewish legal system on its own terms. Therefore, although I express the hope that interpretation in the Jewish legal tradition can shed light on views of interpreting the Constitution, my discussion of the Jewish tradition is based on Jewish legal scholarship rather than on a reinterpretation of the Jewish tradition to match any desired view of American legal theory.

234. See ADLER, *supra* note 190, at 21-22.

235. See *id.* at 22. Interpreting directives as standards involves applying legal *principles* conceptually, which differs from restricting the application of *mitzvot* based on their rationale. See *supra* text accompanying notes 94-115.

236. Schlag, *supra* note 188, at 390-91.

237. See *id.* at 392-93.

sion of Pharisees and Sadducees because it is more consistent with the historical realities of Jewish Biblical interpretative debate.<sup>238</sup>

### C. Rules and Standards in American Constitutional Law

While Levinson referred to Justice Black's "protestant" approach to the Constitution,<sup>239</sup> Black can likewise be pictured as a justice who favors absolute rules. Black's words in *Rochin v. California*<sup>240</sup> reflect the rule-based approach: "[F]aithful adherence to the specific guarantees in the Bill of Rights insures a more permanent protection of individual liberty than that which can be afforded by the nebulous standards stated by the majority."<sup>241</sup> In writing the majority opinion and formulating what Black called "nebulous standards," Frankfurter stated: "In dealing . . . with human rights, the absence of formal exactitude, or want of fixity of meaning, is not an unusual or even regrettable attribute of constitutional provisions."<sup>242</sup> Thus, Frankfurter's view provided a standard-based contrast to Black, parallel to the "catholic" contrast provided by Harlan in Levinson's framework.<sup>243</sup>

Furthermore, Levinson's own analysis of the views of Black and Harlan, in *Griswold* and *Poe* respectively,<sup>244</sup> is consistent with an explanation of the differing views in terms of rules and standards. Elaborating on his dissenting opinion in *Griswold*, Black later wrote that he could not grant protection to married couples to use contraceptives, absent a "specific provision," granting such a right.<sup>245</sup> Black argued in *Griswold* that if the law granting certain rights does not address a specific set of facts, the rule should not be interpreted to

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238. See *supra* text accompanying notes 214-219.

239. The rules/standards dichotomy can be traced back as far as Levinson's catholic/protestant dichotomy, to *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798). See *supra* text accompanying notes 197-200. Justice Chase, whom Levinson described as a "catholic" interpreter of the Constitution, employed a standard-based view, looking to the reasons that motivated the constitutional clause under consideration. See *Calder*, 3 U.S. at 388-89. Justice Iredell, a "protestant" in Levinson's framework, responded with a rule-based approach, looking for "fixed standards" and delineating "but two lights, in which the subject can be viewed: If the Legislature pursue the authority delegated to them, their acts are valid. If they transgress [sic] the boundaries of that authority, their acts are invalid." *Id.* at 399 (Iredell, J., concurring).

240. 342 U.S. 165 (1952).

241. *Id.* at 175 (1952) (Black, J., concurring); see also Sullivan, *supra* note 188, at 26 n.19 (classifying Black and Frankfurter's views in *Rochin* as consistent with their favoring rules and standards, respectively).

242. *Rochin*, 342 U.S. at 169.

243. Levinson similarly writes of Frankfurter's nontextualist view, which recognized the "unwritten Constitution." See LEVINSON, *supra* note 191, at 33-34.

244. See *supra* text accompanying notes 202-205.

245. HUGO BLACK, A CONSTITUTIONAL FAITH 9 (1968).

apply to those facts.<sup>246</sup> In *Poe*, Harlan rejected such rules-based jurisprudence, declaring that “[d]ue process has not been reduced to any formula; its content cannot be determined by reference to any code.”<sup>247</sup> Instead of relying on a rule or formula, Harlan based his interpretation of the Fourteenth Amendment on “the balance . . . built upon postulates of respect for the liberty of the individual . . . between the liberty and the demands of organized society.”<sup>248</sup> Thus, he understood and applied the Due Process Clause in light of the principles of respect for individual liberties upon which it was based.<sup>249</sup>

The debate between those who favor a jurisprudence of rules and those who view legal directives as standards has continued. For example, in *Immigration and Naturalization Service v. Chadha*,<sup>250</sup> the Court held that granting veto power to one house of Congress was a violation of the presentment and bicameralism clauses.<sup>251</sup> Chief Justice Burger’s majority opinion focused on the constitutional text, holding that the clauses of the Constitution were precise rules, not to be considered “empty formalities.”<sup>252</sup> Justice White dissented, criticizing Burger’s approach as grouping together all legislative vetoes, rather than properly considering the standards represented by the constitutional clauses and applying them to the different circumstances, which vary with the “form or subject” of each veto.<sup>253</sup>

Sullivan has shown that the rules/standards dichotomy can be used to explain many of the debates between Justices on the current Supreme Court.<sup>254</sup> In *Michael H. v. Gerald D.*,<sup>255</sup> for example, Justice Scalia, a strict “protestant” in the interpretation of the constitutional text, used a rule-based view to formulate the legal principle at issue in

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246. See *Griswold*, 381 U.S. 479, 507 (1965) (Black, J., dissenting); see also BLACK, *supra* note 245, at 9.

247. 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

248. *Id.*

249. Schlag offers a similar description of the differing views of Holmes and Cardozo regarding the obligation of a driver who approaches an unguarded railroad crossing. See Schlag, *supra* note 188, at 379. In *Baltimore & Ohio Railroad Co. v. Goodman*, 275 U.S. 66, 70 (1927), Holmes posited a rule that the driver must stop and look, while in *Pokora v. Wabash Railway Co.*, 292 U.S. 98, 104-06 (1934), Cardozo relied on a standard, holding that the driver must act with reasonable caution.

250. 462 U.S. 919 (1983).

251. See *id.*; see also Schlag, *supra* note 188, at 393 (identifying the rules/standards dichotomy in *Chadha*).

252. *Chadha*, 462 U.S. at 958 n.23.

253. *Id.* at 974 (White, J., dissenting).

254. See Sullivan, *supra* note 188, at 77-79.

255. 491 U.S. 110 (1989).

the case.<sup>256</sup> Scalia stated the issue as whether the Due Process Clause had been interpreted as “relating to the rights of an adulterous natural father.”<sup>257</sup> Justice Brennan’s dissent offered a broader standard, which described “parenthood” as the “interest” being protected.<sup>258</sup> In their concurring opinion, Justices O’Connor and Kennedy also rejected Scalia’s strict adherence to a rules-based mode of legal interpretation, quoting Harlan’s dissenting opinion in *Poe* and echoing White’s criticism of Burger’s opinion in *Chadha*.<sup>259</sup> They argued that Scalia’s approach did not pay sufficient attention to particular circumstances, but instead “foreclose[d] the unanticipated by the prior imposition of a single mode of . . . analysis.”<sup>260</sup>

Sullivan’s discussion of the rules/standards dichotomy in the 1991 Supreme Court Term is perhaps most significant in her analysis of the different views expressed in the complex and controversial case of *Planned Parenthood v. Casey*.<sup>261</sup> In their plurality opinion joined by Justice Souter, Justices O’Connor and Kennedy again quoted Harlan in *Poe*, and echoed both Justice White’s thoughts in *Chadha* as well as their own opinion in *Michael H.*<sup>262</sup> They wrote that liberty is interpreted by judges through “reasoned judgment” and is “not susceptible of expression as a simple rule.”<sup>263</sup> Scalia again attacked this balancing, standard-based approach, calling it “nothing but philosophical predilection and moral intuition.”<sup>264</sup>

Sullivan aptly summarizes the standard-based plurality opinion: “*Casey* simply abandoned a rule that *all* regulatory burdens on adult abortions are coercive no matter how great or how small in favor of a standard that takes into account the quantity of impact on pregnant

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256. See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1184 (1989) (“[I]t is perhaps easier for me than it is for some judges to develop general rules, because I am more inclined to adhere closely to the plain meaning of a text.”); see also George Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 YALE L.J. 1297, 1299 (1990); Eric J. Segall, *Justice Scalia, Critical Legal Studies, and the Rule of Law*, 62 GEO. WASH. L. REV. 991, 993 (1994) (“[Scalia’s] well-known preferences for textualism, originalism, and traditionalism derive in large part from, but are also secondary to, his passion for strict legal rules that he believes will provide greater certainty and uniformity to the law.”).

257. *Michael H.*, 491 U.S. at 127 n.6.

258. *Id.* at 139 (Brennan, J., dissenting).

259. See *id.* at 132 (O’Connor, J., concurring).

260. *Id.*

261. 505 U.S. 833 (1992).

262. See *id.* at 843-901 (plurality opinion).

263. *Id.* at 849.

264. *Id.* at 1000 (Scalia, J., concurring in part and dissenting in part).



women.”<sup>265</sup> In contrast, Sullivan notes, Scalia relied on a rule-based view, arguing in part that the Court would strike down “‘a state law requiring purchasers of religious books to endure a 24-hour waiting period, or to pay a nominal additional tax of 1 [cent].”<sup>266</sup> Scalia thus ignored the plurality’s quantitative analysis of the actual effect of the law, rejecting its careful consideration of the impact of a law in favor of a rule.<sup>267</sup>

In many opinions issued since the publication of Sullivan’s article, the Justices have continued to split along the lines of rules and standards. For example, in interpreting the Establishment Clause in *Board of Education of Kiryas Joel Village School District v. Grumet*,<sup>268</sup> Justice O’Connor continued to emphasize the need for balancing the effects of laws, writing that “[e]xperience proves that the Establishment Clause . . . cannot easily be reduced to a single test.”<sup>269</sup> She repeated this statement in *Rosenberger v. Rector and Visitors of the University of Virginia*,<sup>270</sup> rejecting “categorical answers” to Establishment Clause questions.<sup>271</sup>

The dissenting opinion in *Rosenberger* adopted the rigid logic of a rule-based attitude. The dissent cited the view that “[a]lthough Establishment Clause jurisprudence is characterized by few absolutes, the Clause does absolutely prohibit government-financed . . . indoctrination into the beliefs of a particular religious faith.”<sup>272</sup> Having stated a precise rule, the dissent asked a question that epitomizes the rule-based approach: “Why does this Court not apply this clear law to these clear facts . . . ?”<sup>273</sup>

#### D. Rules and Standards in Jewish Law

The corpus of Jewish law comprises a complex legal system, encompassing both civil (or monetary) and religious (or ritual) legal principles. For a number of reasons, it is not always easy or even productive to attempt to classify specific laws as “civil” or “religious”

265. Sullivan, *supra* note 188, at 34.

266. *Id.* at 34 n.69 (citing *Casey*, 505 U.S. at 988 (Scalia, J., concurring in part and dissenting in part)).

267. *See id.*

268. 114 S. Ct. 2481 (1993).

269. *Id.* at 2499 (1993) (O’Connor, J., concurring in part and concurring in the judgment).

270. 115 S. Ct. 2510 (1995).

271. *Id.* at 2526 (O’Connor, J., concurring).

272. *Id.* at 2539 (Souter, J., dissenting) (quoting *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 385 (1985)).

273. *Id.*

laws. First, on a theological level, the entire Jewish legal system is considered to be religious in nature. Even those laws which involve civil principles are reflections of Divine will regarding the manner in which society should function. Second, analytically, many laws governing civil matters also involve religious duties and obligations, complicating any classification of these laws into a single category.<sup>274</sup> Third, all laws, including those which involve purely civil or religious matters, share a common methodological framework. Legal principles such as conditions and agency, for example, are as relevant to religious acts and obligations as they are to civil issues of property or contract law.

The very factors that sometimes make it difficult to categorize the Jewish legal system into separate civil and religious areas may, however, also facilitate a structural and conceptual analysis of Jewish law. Because civil and religious law share much common ground, it is possible to apply many of the same legal principles, in a similar manner, to both settings. For example, to address a question regarding the application of conditions to contract law, Jewish law may look to the way conditions are used in relation to a certain religious obligation. Thus, the Jewish legal system can be viewed, through a variety of analytical methods, as a unified system, with principles that can be applied uniformly to understand and classify different laws.

One method that can be used to analyze the Jewish legal system parallels Sullivan's method of analyzing constitutional law, which divides interpretation of legal directives into rule-based interpretation and standard-based interpretation. A number of legal directives in Jewish law have been open to different interpretations by legal authorities. The different interpretations can often be understood in terms of whether the interpreting authority viewed a particular directive as a "rule," which is to be applied as formulated without further consideration of the conceptual framework that motivated the law, or as a "standard," a simplistic formulation of more complex principles that govern the application of the law.

Rabbi Adler has explored the dichotomy between rule-based legal interpretation and standard-based interpretation by classifying legal directives into three categories: (1) general laws; (2) laws of

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274. In Rabbi Adler's terminology, this phenomenon presents a category of "dual classification." ADLER, *supra* note 190, at 18-20; *see also supra* text accompanying notes 116-43.

equivalence; and (3) laws of quantification.<sup>275</sup> An example of each of these types of law and of the conceptual analysis applicable to each should help illustrate some of the parallels and differences between Jewish legal interpretation and American legal interpretation.

### 1. *General Laws*<sup>276</sup>

The Talmud states the following law: When agency may not be employed for a given activity, conditions may not be placed on the performance of that activity.<sup>277</sup> The application of this law to the case of the nazirite<sup>278</sup> illustrates the two ways of viewing a legal directive. Although a nazirite may not appoint an agent to observe the prohibitions required by the nazirite oath, it is clear from the Talmud that a person may place certain conditions on the oath.<sup>279</sup> Thus, at first glance, the laws relating to the nazirite seem to contradict the principle that when an agent cannot be appointed, conditions may not be applied. In resolving the apparent contradiction, Medieval authorities took one of two basic approaches, evidently relying on either rule-based interpretation or standard-based interpretation.

Some authorities viewed the Talmudic principle as a rule, to be applied precisely as stated.<sup>280</sup> These authorities accepted the law as formulated, holding that in any case in which a person may not appoint an agent to perform a particular activity, the person may not place conditions on the performance of the activity.<sup>281</sup> According to this reasoning, if a person may not appoint an agent for the performance of the nazirite obligations, that person should be precluded from placing conditions on the performance of those obligations. These au-

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275. See ADLER, *supra* note 190, at 21-30. The application of Sullivan's terms of rules and standards to Jewish law is my own; Rabbi Adler does not use these terms. In fact, Rabbi Adler refers to what I call "legal directives" or "laws" as "rules." He then delineates the two possible ways of interpreting these "rules": applying them either precisely as stated or through uncovering the conceptual bases for the rules.

To avoid the obvious confusion that would result in using Sullivan's terminology together with that of Rabbi Adler, I have chosen to use uniform terminology for both legal systems. I have chosen to use Sullivan's terminology because of its common use in contemporary American legal scholarship. As noted above, and as the present analysis should make clear, Sullivan's terminology is adaptable to the Jewish legal system and consistent with the scholarship described by Rabbi Adler.

276. Rabbi Adler discusses general laws in the English section of his book, *supra* note 190, at 22-24, and more extensively in the Hebrew section, *id.* at 77-85.

277. See TALMUD BAVLI, *Kethuboth* 74a.

278. The Bible states that a man or woman who takes the nazirite oath may not drink wine, come in contact with dead bodies, or take a shave or haircut. See *Numbers* 6:3-6.

279. See TALMUD BAVLI, *Nazir* 11a, the Tosafoth commentary.

280. See ADLER, *supra* note 190, at 22-24 (English section), 77-78 (Hebrew section).

281. See *id.*

thorities noted, however, that although agency is inapplicable to the observance of the prohibitions incumbent on a nazirite, a nazirite may appoint an agent to bring the sacrifice required at the end of the nazirite period.<sup>282</sup> Due to this limited power of agency, the nazirite's ability to place certain conditions on the observance of the other nazirite obligations does not violate the Talmudic principle.

Others suggested a different approach, based on a consideration of the conceptual basis of the law that precludes conditions when agency does not apply.<sup>283</sup> These authorities viewed the Talmudic principle as a general expression of the relationship between agency and conditions in Jewish law.<sup>284</sup> The common ground of these two legal functions is that the authority either to appoint an agent to perform an activity or to place conditions on the performance of an activity indicates a certain level of control in regard to that activity. The Talmudic principle is then understood as teaching, generally, that if a person does not have the authority to appoint an agent to perform a given activity, then the person likewise does not possess the requisite level of control over that activity to impose conditions on its performance. According to these authorities, however, the Talmudic law should be applied not as stating a definite rule but only as reflecting the standard by which authority and control are generally measured and related.<sup>285</sup> By viewing the legal directive as a standard, these authorities allow for exceptions to the law when the rationale underlying the law does not apply.<sup>286</sup> One such case is the nazirite.

An individual has broad control over the observance of the nazirite laws. After all, a person has the autonomy to choose voluntarily whether and when to take the nazirite oath. Using a standard-based interpretation of the Talmudic principle, we can understand that such control similarly enables a person to place conditions on the oath. While it is true that a nazirite may not appoint an agent to observe the prohibitions, this fact does not indicate a lack of control over the activities. Rather, it is technically impossible to appoint an agent in the context of the nazirite oath because the oath imposes personal modes of behavior on the individual that simply cannot be performed by an agent.<sup>287</sup> Therefore, according to these authorities, the Tal-

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282. *See id.*; *see also Numbers* 6:14-21.

283. *See ADLER, supra* note 190, at 22-24 (English section), 77 (Hebrew section).

284. *See id.*

285. *See id.*

286. *See id.*

287. *See supra* note 278. For example, if a nazirite drinks wine, the nazirite obviously violates the prohibition on this activity, even if an "agent" refrains from drinking wine.

mudic principle should not be applied to the nazirite as stated; the case of the nazirite represents an exception.<sup>288</sup> Once the Talmudic law is viewed as an expression of the conceptual framework relating to individual control over an activity, its application to the nazirite allows for the imposition of conditions even though agency cannot apply.

The example of the nazirite laws offers a look at the way Jewish legal directives can be viewed through the rules/standards dichotomy. The laws regarding the nazirite have been debated by classical authorities in Jewish law in a way that parallels Sullivan's analysis of constitutional interpretation. In addition, the application of the laws of agency and conditions to the nazirite helps illustrate the conceptual consistency within the Jewish legal system. The case of the nazirite, who takes it upon himself or herself to refrain from certain activities, may be seen as paradigmatic of religious or ritual areas of Jewish law. Yet, the case of the nazirite also involves the legal principles of agency and conditions, which are an important part of Jewish civil law, and, indeed, central to many areas of American law. The conceptual analysis relating to agency and conditions is identical in both Jewish religious law and Jewish civil law and, therefore, could theoretically be adaptable to secular legal systems as well.

## 2. *Laws of Equivalence*<sup>289</sup>

The Talmud draws the following legal equivalence in the context of monetary adjudication: an admission is equivalent to the testimony of one hundred witnesses.<sup>290</sup> Although Jewish law ordinarily requires the testimony of two witnesses for the adjudication of a monetary obligation, while excluding the testimony of a party to a case, an individual's admission to an obligation is accepted as dispositive.<sup>291</sup> The Talmud thus recognizes a certain equivalence between an individual's admission and the testimony of two witnesses.<sup>292</sup> Yet, Jewish legal authorities have debated the interpretation of this law.

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Thus, nazirite requirements differ fundamentally from obligations which can be performed by an agent on behalf of the principal.

288. See ADLER, *supra* note 190, at 22-24 (English section), 77 (Hebrew section).

289. Rabbi Adler discusses laws of equivalence in the English section of his book, *id.* at 24-27, and in the Hebrew section, *id.* at 86-93.

290. See, e.g., TALMUD BAVLI, *Bava Metzia* 3b.

291. See *id.*

292. For the purposes of a monetary obligation, two witnesses are thus as effective as one hundred witnesses. The language of the Talmud, equating an admission to one hundred witnesses, is an emphatic way of teaching that an admission is clearly sufficient.

Some authorities have interpreted the Talmud's statement of equivalence as a rule, to be applied precisely as formulated, indicating that an admission has an effect identical to that of the testimony of witnesses.<sup>293</sup> Others have understood the law as a general expression of the fact that a confession shares certain legal properties with the testimony of two witnesses, not as a statement of absolute equivalence between an admission and the testimony of witnesses.<sup>294</sup>

One of the legal ramifications of the debate involves the question of when an obligation vests if it is realized through a confession. Legal authorities split over the two possible answers to this question. One view is that an admission works retroactively, and therefore the obligation vests from the time that, according to the admission, the obligation originated.<sup>295</sup> The other view is that the obligation vests only from the time that the admission itself occurs.<sup>296</sup> These two views seem to diverge along the lines of the rules/standards dichotomy.

If the Talmudic statement equating an admission with the testimony of witnesses is interpreted as a precise rule, then the equivalence is to be taken literally. The rule-based view would hold that, although on one level there are clear differences between an admission and the testimony of witnesses, in terms of legal effect they share identical properties. According to a rule-based reading of the Talmud's formulation of the law, an admission, like two witnesses, is a form of sufficient testimony, but also a unique situation in which a party to a case is permitted to testify because the testimony is against monetary self-interest. Therefore, just as an obligation realized through the testimony of witnesses vests retroactively from the time that, according to the testimony, the obligation arose, an admission has the same retroactive effect.

According to a standard-based interpretation, however, this law is a general statement of equivalence, articulating the legal similarities between an admission and the testimony of witnesses vis-a-vis the standard required to adjudicate a monetary obligation. The Talmud does state that, like the testimony of witnesses, an admission is sufficient to impose a monetary obligation.<sup>297</sup> Yet, authorities applying a standard-based approach may view this law through a conceptual in-

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293. See ADLER, *supra* note 190, at 88-90.

294. See *id.*

295. See BEITH SHEMUEL, EVEN HA'EZER 38:31.

296. See CHELKAT MECHOKEK, EVEN HA'EZER 38:22.

297. See TALMUD BAVLI, *Bava Metzia* 3b.

terpretation, allowing for flexibility in considering the precise nature of the equivalence between an admission and witnesses. These authorities would hold that the testimony of a party to a case is never admissible, even against that party's monetary interests.<sup>298</sup> Rather the legal effect of an admission stems from its status as the granting of a gift on the part of the admitting party. Obviously, the benefactor's obligation for a gift can vest only from the time of the granting of the gift. Therefore, these authorities hold, an obligation realized through an admission does not vest retroactively.

### 3. *Laws of Quantification*<sup>299</sup>

Many areas of the Jewish legal system involve specific measurements or quantities. For example, the Torah prohibits eating or drinking on Yom Kippur and mandates a strict punishment for an individual who violates this prohibition.<sup>300</sup> The Talmud, in turn, quantifies the amount of food that must be consumed to warrant such a harsh punishment.<sup>301</sup>

The Talmud also states that the prohibition against eating or drinking on Yom Kippur is not violated through the consumption of foods or objects that are spoiled or inedible, such as pure vinegar; in legal terms, consumption of these objects is not considered "eating" or "drinking," since it does not conform to the ordinary manner of eating or drinking.<sup>302</sup> Yet the Talmudic law which states that drinking pure vinegar does not violate the prohibition against drinking on Yom Kippur is open to interpretation. The application of the law may again depend on the rules/standards dichotomy in interpreting legal directives.

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298. See ADLER, *supra* note 190, at 88-90.

299. Rabbi Adler discusses laws of quantification in the English section of his book, *id.* at 28-30, and in the Hebrew section, *id.* at 94-100.

300. See *Leviticus* 23:29.

301. See TALMUD BAVLI, *Yoma* 73b. For eating, the quantity is *kotheveth hagasah*, roughly between one and two ounces, while for drinking, the quantity is *melo lugmav*, the amount of liquid that would fill one cheek. See MAIMONIDES, CODE OF LAW, *supra* note 17, at Laws of Yom Kippur 2:1. While the precise quantity of *melo lugmav* varies according to the individual, it is generally around 1.5 fluid ounces. Consumption of these quantities subjects the individual to the harsh Biblical punishment. The Talmud also records a prohibition against the consumption of any amount of food or drink on Yom Kippur, though consumption of a smaller quantity violates a lesser prohibition, and thus does not incur the same harsh punishment. See TALMUD BAVLI, *Yoma* 73b. There is a dispute in the Talmud whether the lesser prohibition is of Biblical or Rabbinic origin. The prevailing opinion is that the prohibition is of Biblical origin. See MAIMONIDES, CODE OF LAW, *supra* note 17, at Laws of Yom Kippur 2:3.

302. See TALMUD BAVLI, *Yoma* 81a-81b.

The question arose among Medieval legal authorities as to whether it is permissible to drink a quantity of pure vinegar substantially larger than the ordinary quantity prohibited on Yom Kippur.<sup>303</sup> Rabbenu Yerucham wrote that the exemption for eating or drinking spoiled or inedible objects applies only when small quantities are consumed.<sup>304</sup> Drinking a large quantity of vinegar, however, violates the prohibition against drinking.<sup>305</sup> Maimonides is of the opposite opinion, holding that regardless of how much vinegar is drunk, there is no violation of the Biblical prohibition.<sup>306</sup>

This dispute can be understood in terms of the rules/standards dichotomy. Maimonides views the Talmudic laws for eating and drinking on Yom Kippur as formal rules. One rule is that a person may not drink a certain quantity on Yom Kippur.<sup>307</sup> Another rule, generally applicable in Jewish law, is that eating or drinking a spoiled or inedible object does not qualify as eating or drinking.<sup>308</sup> When these rules are applied formally, as stated, they produce the logical conclusion that regardless of how large a quantity of vinegar one actually drinks on Yom Kippur, there is no violation of the prohibition. The prohibition as formulated prohibits only consumption that fits the legal definition of eating or drinking. Therefore, the exemption as formulated excludes the consumption of pure vinegar from the legal category of drinking.

Rabbenu Yerucham, however, interprets the two laws as reflections of the standard of behavior that the Torah and the Talmud mandate on Yom Kippur. The Torah states that on Yom Kippur, as part of the process of repentance, a person must undergo a certain amount of affliction.<sup>309</sup> The Talmud explains that fasting on Yom Kippur is the primary way to observe this affliction.<sup>310</sup> Rabbenu Yerucham therefore interprets the laws of fasting in the context of the standards of affliction required on Yom Kippur, understanding that fasting must be

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303. See JOSEPH KARO, BEITH YOSEF: LAWS OF YOM KIPPUR 612.

304. See *id.*

305. See *id.*

306. See *id.*; see also MAIMONIDES, CODE OF LAW, *supra* note 17, at Laws of Yom Kippur 2:5 (holding that a person who drinks even a large quantity of pure vinegar on Yom Kippur does not violate the Biblical prohibition). It should be noted that Maimonides holds that there is still a Rabbinic prohibition against drinking large quantities of vinegar. See *id.*

307. See *Leviticus* 23:29.

308. See MAIMONIDES, CODE OF LAW, *supra* note 17, at Laws of Yom Kippur 2:5.

309. See *Leviticus* 23:27.

310. See TALMUD BAVLI, *Yoma* 74b.



connected with affliction.<sup>311</sup> Thus, he understands the Talmudic law exempting vinegar from the prohibition on drinking to be based on the principle that, generally, drinking vinegar or consuming other inedible foods will not remove the affliction resulting from fasting.<sup>312</sup> However, if one drinks a sufficiently large quantity of vinegar, the satiety resulting from the sheer amount of liquid consumed will in fact remove the affliction of fasting.<sup>313</sup> Therefore, consumption of such a quantity is prohibited on Yom Kippur.

To a certain degree, the application of the rules/standards dichotomy to laws of quantification in the Jewish legal system resembles the rules/standards debate in *Casey*.<sup>314</sup> As Sullivan explained, the standard-based plurality opinion in *Planned Parenthood v. Casey* considered regulations on abortions in the context of the impact that the regulations would have on pregnant women.<sup>315</sup> Similarly, Rabbenu Yerucham views the laws regarding fasting on Yom Kippur, including the exemption for drinking pure vinegar, in the context of the effect that drinking vinegar would have on the fulfillment of the Biblical imperative to afflict one's self on Yom Kippur.<sup>316</sup>

In contrast, Justice Scalia's rule-based opinion in *Casey* discussed a hypothetical case in which a state law imposed minor restrictions on the purchase of religious books and concluded that the laws would clearly be unconstitutional, regardless of the actual nature of their effect on religious practice.<sup>317</sup> Similarly, Maimonides held that the laws of Yom Kippur, when viewed as strict rules, yield the conclusion that drinking even a large quantity of vinegar does not violate the prohibition against drinking because it simply does not conform to the legal definition of drinking.<sup>318</sup> Interpretation of the laws as rules leaves no room for consideration of whether drinking a large quantity of vinegar is conceptually inconsistent with the fulfillment of the Biblical command requiring affliction on Yom Kippur.

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311. See ADLER, *supra* note 190, at 29-30 (English section), 98 (Hebrew section).

312. See *id.*

313. See *id.*

314. 505 U.S. 833 (1992).

315. See Sullivan, *supra* note 188, at 34.

316. See ADLER, *supra* note 190, at 29-30 (English section), 98 (Hebrew section) (citing and explaining Rabbenu Yerucham).

317. See 505 U.S. at 988 (Scalia, J., concurring in part and dissenting in part).

318. See ADLER, *supra* note 190, at 29-30 (English section), 98 (Hebrew section) (citing and explaining Maimonides).

### E. Reasons for Rules or Standards

Many contemporary American legal theorists who have acknowledged and discussed the rules/standards debate have identified arguments for and against each of the positions. Duncan Kennedy was one of the first scholars to offer a systematic analysis of the relative pros and cons for rules or standards.<sup>319</sup> Schlag relied heavily on Kennedy's work and dedicated much of his article to dissecting Kennedy's propositions.<sup>320</sup>

This Article aims not to analyze the relative merits of the various arguments but rather to analyze the application of these arguments to the rules/standards dichotomy that exists within Jewish law. Sullivan's more recent discussion of the arguments for rules or standards, which draws from many earlier sources and presents the arguments and counter-arguments in a clear and considered manner, provides a helpful framework for such an analysis.

Sullivan has identified four central categories of argument that can be offered to support each side of the rules/standards debate. One argument in favor of rules is that they produce "fairness as formal equity," preventing arbitrary decisions by "requir[ing] decisionmakers to act consistently [in] treating like cases alike."<sup>321</sup> Another reason to employ rules is based on their "utility," affording both private actors and judges certainty and predictability.<sup>322</sup> Third, Sullivan identifies advocates of the Rule of Law who argue that rules promote "liberty" by setting in advance the extent of governmental authority.<sup>323</sup> Finally, rules are seen by some as important for "democracy" because they "allocate roles or power among competing decisionmakers."<sup>324</sup>

Sullivan suggests that the arguments for standards can be placed in the same four general categories, though the categories are then viewed from the opposite perspective.<sup>325</sup> In contrast to "fairness as formal equality," standards offer "fairness as substantive justice";

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319. See Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1687-1701 (1976).

320. See Schlag, *supra* note 188, at 383-430; see also John P. Goebel, *Rules and Standards: A Critique of Two Critical Theorists*, 31 DUQ. L. REV. 51 (1992) (concluding that Schlag's argument fails to replace Kennedy's convincing position); KELMAN, *supra* note 188, at 40-63.

321. Sullivan, *supra* note 188, at 62.

322. See *id.* at 62-63.

323. See *id.* at 63-64.

324. *Id.* at 64.

325. See *id.* at 66.

standards enable decision-makers to explore among cases relevant similarities and differences which would not be discovered through the strict application of rules.<sup>326</sup> Similarly, standards may be better suited for “utility,” increasing productivity because they “allow decisionmakers to adapt [the law] to changing circumstances.”<sup>327</sup> In contrast to the value of “liberty,” some scholars argue that standards contribute to the value of “equality” by serving “redistributive purposes.”<sup>328</sup> Finally, in response to the claim that rules promote “democracy,” it is arguable that in reality rules favor “judicial abdication of responsibility,” while standards promote “deliberation” by forcing decision-makers to “face up to [their] choices.”<sup>329</sup>

A number of the arguments for rules or standards are relevant to the Jewish legal system in a similar if not identical manner. The fact that other arguments do not apply to Jewish law may help illustrate some of the basic differences between the Jewish and American legal systems, as well as some of the limitations on their comparison.

The first two categories of argument seem readily applicable to Jewish law. As in American law, the arguments for a rule-based approach in Jewish law can include the claim that rules help produce “fairness as formal equity,” by resulting in a uniformity of decision in cases that share broadly similar facts. Similarly, rules offer “utility” and are economical<sup>330</sup> because they are relatively simple to apply<sup>331</sup> and do not require the difficult analysis sometimes necessary for the application of standards.<sup>332</sup>

The arguments in favor of standards are likewise applicable in the context of Jewish law. In a standard-based approach, there is an emphasis on the important and relevant details of each individual case.<sup>333</sup> The result is “fairness in substantive justice,” as each case is considered on its specific facts. The “utility” of standards in Jewish law is also apparent. Standards give the decision-maker the opportunity to engage in “flexibility and a degree of interpretive license” when the situation so demands.<sup>334</sup>

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326. *Id.*

327. *Id.*

328. *Id.* at 67.

329. *Id.*

330. *See* ADLER, *supra* note 190, at 21.

331. *See id.* at 24.

332. *See id.* at 30.

333. *See* Sullivan, *supra* note 188, at 66.

334. ADLER, *supra* note 190, at 30.

Yet it is difficult and probably unproductive to try to apply to Jewish law the other two types of argument that Sullivan identifies for rules or standards. Concepts of both "liberty" and "equality" have their place in the Jewish legal system, but their definition in Jewish law would likely differ substantially from the way they are understood in American legal and political thought.<sup>335</sup> Arguments based on notions of "democracy," particularly those based specifically on the American system of government, are even less likely to apply to the Jewish legal system.

Many of these difficulties relate to the fact that the Jewish "legal system" consists of more than civil law. Equally important to the system is the corpus of religious law, and a central characteristic of the system as a whole is the religious element present in all areas of Jewish law.<sup>336</sup> Indeed, without recognizing the religious basis of the entire Jewish legal system, it is impossible to understand the fundamental source and authority of the civil law.

As a result of religious principles, Jewish law imposes many duties and obligations on the individual that are inconsistent with Western definitions of "liberty" and autonomy.<sup>337</sup> Similarly, questions of "equality" within the Jewish legal system often involve religious issues concerning the individual's place and role in the world, depending on each individual's unique relationship to G-d. Many of these religious considerations, which can define an individual's role in society, run counter to basic assumptions underlying the American notion of "equality."<sup>338</sup>

The difficulties that would arise in applying to the Jewish legal system the goals of "democracy" raised by Sullivan are symptomatic

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335. See SOL ROTH, *HALAKHAH AND POLITICS: THE JEWISH IDEA OF THE STATE* 97 (1988). For a general discussion of the different concepts of "liberty" found in Western and Jewish thought, see *id.* at 93-103.

336. See *supra* text accompanying note 274.

337. As Rabbi Sol Roth has written, "Judaism's . . . characterization of its conception of freedom is a direct consequence of its supreme concern with *duties* or *obligations*." ROTH, *supra* note 335, at 97; see also *id.* at 93-103.

Robert Cover writes of the difference between the Jewish legal system and the American legal system in terms of an approach to civil rights. Cover writes that unlike the American system, the Jewish legal system places on individuals an obligation not only to recognize the rights of others, but to realize those rights. Robert M. Cover, *Obligation: A Jewish Jurisprudence of the Social Order*, 5 J.L. & RELIGION 65 (1989).

It should be noted that some scholars identify a similar affirmative duty on Congress to protect constitutional human rights. See, e.g., Charles L. Black, Jr., *Further Reflections on the Constitutional Justice of Livelihood*, 86 COLUM. L. REV. 1103, 1107 (1986).

For a discussion of human rights in Jewish law, see ROTH, *supra* note 335, at 117-26.

338. See ROTH, *supra* note 335, at 52-55.

of the problems that arise in attempts to classify Jewish law in terms of modern political theory. One problem results from the unique structure of the American political/legal system. The arguments relating rules and standards to issues of "democracy" focus on the role of the judiciary as one of the three branches of government. Understanding the precise place of judges within a Jewish political system requires a complex analysis, but it is clear that these judges play a much different role from that of their counterparts in the American system.

Apart from the unique nature of the American political structure, a more fundamental problem complicates attempts to classify "the Jewish legal system" within the categories of Western democratic thought. The basic source for all Jewish thought, relating to religious, legal or political matters, is a single religious guide, the Torah. In fact, even a delineation of these different elements of the social structure is difficult, as the Torah does not seem to distinguish between religious, legal and political arenas. Instead, it prescribes a complex and comprehensive system of the interrelated and intertwined areas of religious, legal, and political life that together form Jewish society. A classification of this system within Western democratic political theory does not easily emerge.<sup>339</sup>

Thus, the first two classes of argument described by Sullivan in favor of rules or standards are readily applicable to the Jewish legal system, while there does not appear to be a systematic way to apply to Jewish law the other two types of arguments presented. The differences in applying the arguments may result from the fundamental differences that exist in the nature of Sullivan's arguments.

The first two arguments, which relate to conceptual properties of law, discuss the pros and cons of the rules or standards largely in terms of the relationships of the judge and the individual to the law.<sup>340</sup> Such an analysis is just as relevant to the Jewish legal system as to the American legal system because the two systems share a sufficiently similar conceptual basis. Regardless of their specific roles within the larger socio-political structures, judges and individuals in both legal

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339. While the society described by Jewish law may be consistent with some of the "fundamental principles of democracy, namely representative government and rule by majority. . .," ROTH, *supra* note 335, at 141, many aspects of Jewish law are inconsistent with Western democratic ideals. Indeed, within the vast amount of scholarship in Jewish law, there have not been many attempts to categorize the Jewish legal system within a particular political system. *See id.* at 1 (finding that "while Jewish social philosophy [is] an area of philosophic activity that has been largely neglected in the course of the history of Jewish thought . . . [p]olitical philosophy elicited even less interest").

340. *See* Sullivan, *supra* note 188, at 62-63, 66.

systems will form their relationships to the law in part based on whether laws are conceptually viewed as rules or as standards.

The other two arguments discussed by Sullivan involve the place of the judge and the individual within society.<sup>341</sup> To apply these arguments to Jewish law, comparisons between the Jewish and American legal systems must go beyond considerations of legal concepts to considerations of larger socio-political issues. Comparisons in these areas of the Jewish legal system are particularly difficult and will likely be unsuccessful, in large part due to the religious nature of the Jewish socio-political structure. Indeed, while the Jewish and American legal systems may be well-suited for conceptual comparisons, it appears that attempts at larger socio-political comparisons would fail to account for what certain scholars have noted to be the uniquely religious nature of Jewish law.<sup>342</sup>

#### **F. Problems with Rules and Standards in American Constitutional Law**

There are certain problems associated with attempts to categorize constitutional interpreters as “rule-based” or “standard-based.” On a practical level, some may argue that the very practice of assigning to judges such labels is flawed because each individual judge does not always follow a single interpretive approach. Even those judges who in most cases fit into one category of decision-makers, occasionally issue decisions that place them in the other category. This inevitable inconsistency on the part of almost all judges complicates and perhaps even calls into question the validity of attempts to classify them.

On a more philosophical level, the classification of decision-makers into these two categories is disturbing because it seems to eliminate a certain degree of both autonomy and analytical thinking in legal interpretation. If an individual’s legal views all stem from the choice of which approach to utilize—rule-based or standard-based—then the individual’s autonomy is limited by one initial decision. After the choice has been made to follow one approach, the applicable legal directive will often be interpreted mechanically, with no need or possibility for further decision based on the facts of a specific case. Similarly, if an individual decides that all laws should be interpreted through the same approach, rather than based on a consideration of

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341. *See id.* at 62-67.

342. *See supra* notes 11-14 and accompanying text.

each law's specific characteristics, there is less need and opportunity for careful and productive legal reasoning.<sup>343</sup>

Sullivan does not ignore the fact that “[n]o Justice is perfectly consistent on the rules/standards choice.”<sup>344</sup> Indeed, Sullivan cites many examples of such inconsistencies, some of which are found within the same 1991 Court Term. For example, she writes that although she has categorized Justices O'Connor, Kennedy and Souter as favoring standards, the latter two Justices sometimes favor rules.<sup>345</sup> In one case,<sup>346</sup> Sullivan notes, Kennedy “[went] flat out for [the] bright-line rule[ ]” in “advocat[ing] an approach to resolving content censorship claims that was even more categorical than the strict scrutiny rule: namely, per se invalidation.”<sup>347</sup>

Justice Souter has also shown an occasional acceptance of rules over standards. Perhaps the most obvious example of this phenomenon is *Rosenberger v. Rector and Visitors of the University of Virginia*,<sup>348</sup> in which Souter wrote the dissenting opinion. Justice O'Connor advocated a standard-based approach in her concurring opinion, warning against categorical answers and simple tests in construing the Establishment Clause.<sup>349</sup> In direct contrast, Souter interpreted the Establishment Clause in absolute terms and asked, as if in amazement, why the Court was unwilling to apply the clear law to the clear facts.<sup>350</sup>

Sullivan has uncovered inconsistencies in the approaches of many other Justices. She observes that although Justice Stevens “most consistently advocates standard-like approaches,”<sup>351</sup> in his opinion for the majority in *Quill Corp. v. North Dakota ex rel. Heitkamp*,<sup>352</sup> he reaf-

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343. Indeed, Schlag has suggested that “[t]he arguments we make for or against rules or standards tend to be pretty much the same regardless of the specific issue involved. . . . The . . . substantive context in which the arguments arise hardly seems to influence their basic character. The arguments are drearily predictable, almost routine . . . .” Schlag, *supra* note 188, at 380.

344. Sullivan, *supra* note 188, at 103 n.529.

345. *See id.* at 92 n.482.

346. *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 124-28 (1991).

347. Sullivan, *supra* note 188, at 92 n.482 (discussing Kennedy's concurring opinion in *Simon & Schuster*).

348. 115 S. Ct. 2510 (1995).

349. *See id.* at 2526, 2528 (O'Connor, J. concurring) (quoting *Kiryas Joel*, 114 S. Ct. 2481, 2499 (1994) (O'Connor, J., concurring in part and concurring in judgment)).

350. *See id.* at 2539 (Souter, J., dissenting).

351. Sullivan, *supra* note 188, at 113 n.567.

352. 504 U.S. 298 (1992).

firms a bright-line holding.<sup>353</sup> In *Quill Corp.*, Stevens acknowledged that “bright-line tests . . . appear[ ] artificial at [the] edges,” but favored the test because of “the benefits of a clear rule.”<sup>354</sup>

Sullivan also identifies inconsistencies in the approaches of Justices White, Blackmun, Scalia and Thomas.<sup>355</sup> In fact, in *Forsyth County v. Nationalist Movement*,<sup>356</sup> the Justices of rules and standards reversed their roles in reviewing a county ordinance permitting a government administrator to vary the fee for assembling and parading.<sup>357</sup> The majority, consisting of Justices who ordinarily favor standards, (Blackmun, Stevens, O’Connor, Kennedy and Souter), adopted a bright-line test, holding that “[a] tax based on the content of speech does not become more constitutional because it is a small tax.”<sup>358</sup> Conversely, the typically rules-favoring Justices (Rehnquist, White, Scalia and Thomas) would allow for an adjustable permit fee scheme at the discretion of the county administrator.<sup>359</sup>

Despite these occasional inconsistencies, Sullivan does identify at least general trends within the views of the different Justices. Having demonstrated these trends, Sullivan searches further for the reasons underlying the Justices’ choices of which approach to adopt in the rules/standards dichotomy. Sullivan engages in an extensive analysis of two “perspectives” of why a particular Justice chooses one approach over the other. The first perspective, which she describes as “tempting,” offers a “political explanation.”<sup>360</sup> Sullivan acknowledges that rules often correspond to extreme ideological poles, while standards are more conducive to intermediate positions.<sup>361</sup> Yet, she rejects the notion that rules or standards are inherently more similar to either conservative or liberal political views.<sup>362</sup> Instead, Sullivan prefers a second perspective, which she terms the “jurisprudential perspective.”<sup>363</sup> According to this theory, “[all judges] aim at maintaining judicial legitimacy,” but they disagree as to which approach better serves this goal.<sup>364</sup> Sullivan develops, through an examination of rules

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353. See Sullivan, *supra* note 188, at 123.

354. *Id.*

355. See *id.* at 113 n.567.

356. 505 U.S. 123 (1992).

357. See Sullivan, *supra* note 188, at 51.

358. *Forsyth County*, 505 U.S. at 136.

359. See *id.* at 141 (Rehnquist, C.J., dissenting).

360. Sullivan, *supra* note 188, at 96.

361. See *id.*

362. See *id.*

363. *Id.*

364. *Id.* at 112.



and standards, two differing conceptions of the judicial role, as reflected in attitudes towards “history, knowledge and power.”<sup>365</sup>

Regardless of which perspective best describes why a decision-maker favors rules or standards, the entire exercise of seeking to explain a judge’s choice results in a somewhat unsettling conclusion. If we accept the theory that individual judges choose one approach over the other based on general perspectives of law, then we largely reject the judge’s role as an impartial arbiter whose decisions are based on the specific facts of each case. A judge need only decide the broader question of rules against standards; once this decision is made, the decision in an individual case is often already determined. There may be little need for or even possibility of a careful analysis of the facts and legal issues involved in a particular case.<sup>366</sup>

### G. A Potential Solution from Jewish Law

Perhaps a potential solution to the different problems that arise from categorizing decision-makers into rules-based judges and standards-based judges can be found in the way the categories of rules and standards apply to Jewish law. Rabbi Adler’s statement at the conclusion of his analysis of rules and standards in the context of laws of quantification is instructive:

It should be noted that one is not restricted to accepting one or the other of these two views relative to all cases. Rather, these theories define two ways of viewing any prescribed quantity measure, and in each particular case an independent decision will have to be made as to the nature of the quantitative measurement.<sup>367</sup>

The rules/standards dichotomy appears to apply conceptually to Jewish law in a manner that parallels the way it applies to American law. Yet, as this quotation suggests, in Jewish law individual decision-makers do not necessarily view all laws through the same approach, based on a set perspective of the role of the judge. Rather, because the choice of rules or standards describes a method of interpreting laws, Jewish decision-makers who apply the rules/standards dichotomy tend

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365. *Id.* at 112-21.

366. Schlag has put this observation in stark and sarcastic terms, suggesting the possibility that “much of legal discourse (including the very fanciest law-talk) might be nothing more than the unilluminating invocation of ‘canned’ pro and con arguments about rules and standards.” Schlag, *supra* note 188, at 380. A disturbing corollary to this discovery is that, if individual judges are generally consistent in their choice of rules or standards, we can frequently—if not usually—predict the outcome of a case, without looking to the specific facts of the case.

367. ADLER, *supra* note 190, at 30.

to focus on the nature of the individual law. Instead of assuming that a decision-maker must choose in advance between rules and standards, scholars of Jewish law have recognized that individual laws may possess certain properties that make them more likely to be understood by particular decision-makers in terms of either rules or standards.<sup>368</sup>

Employing such an approach, these scholars have not been troubled by the problems that American legal scholars have encountered in analyzing the rules/standards dichotomy. When the focus is on the law rather than on the individual decision-maker's perspective, there is no reason to expect a decision-maker to choose consistently one side of the rules/standards option. Instead, it is to be expected that the same authority will interpret some laws as rules and other laws as standards, depending on the authority's understanding of the nature of each individual law.

Moreover, the decision-maker's choice of placing laws into categories is far from predetermined. To the contrary, the decision-maker who has not made a general choice between rules and standards will have to examine carefully each law to determine its nature. This decision may depend, in part, on the specific facts of the case in which the law is to be applied. Thus, in each case, the decision-maker both retains autonomy and is required to engage in extensive legal analysis, considering both the unique nature of each legal directive and, at least to some extent, the specific facts of the case.

Indeed, in discussing the views of individual Supreme Court Justices, Sullivan appears to allude to an approach based more on individual laws and cases than on general and predetermined considerations. Having recognized the reality that "[n]o Justice is entirely consistent," Sullivan explains that "[m]uch depends on the nature of the constitutional claim at issue."<sup>369</sup> As support, she cites many examples of inconsistencies in the approaches of a number of Justices.<sup>370</sup> These examples seem to indicate that, at times, Justices pay closer attention to the specific laws and facts of cases than to concerns related to rules or standards. Ultimately, however, Sullivan categorizes the Justices in terms of whether, for the most part, they favor rules or standards.<sup>371</sup>

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368. *See id.*

369. Sullivan, *supra* note 188, at 113 n.567.

370. *See supra* text accompanying notes 255-67.

371. *See* Sullivan, *supra* note 188, at 122.

There may be a number of reasons why the approach to rules and standards in Jewish law cannot be applied to the American legal system. Perhaps American decision-makers have in fact generally favored either rules or standards, without considering the individual laws before deciding which method to apply. Indeed, Sullivan and others have made convincing arguments that many debates throughout American legal history can be understood through the lens of the rules/standards dichotomy.

Rejecting the possibility of applying to American law an approach such as that in Jewish law based on past American constitutional jurisprudence may not be entirely convincing. First, as a matter of historical reality, many Justices have been far from consistent in their choices of rules or standards. Indeed, as Sullivan pointed out, in the 1991 Term alone there were many notable exceptions to the rules and standards analysis. One of the advantages of the approach used in Jewish law is that these inconsistencies do not pose a problem, as there is no need to view the Justices in terms of general views and troubling exceptions.

Moreover, even if the American rules/standards approach proves to be a moderately accurate descriptive device for American jurisprudential debates, perhaps the problems presented by this approach should motivate consideration of a different approach. The fact that one theory is able to describe accurately a given set of facts does not disqualify other theories that may have certain advantages over the first theory.

At the very least, even if the current rules/standards approach described by Sullivan and others is the most accurate way to describe past jurisprudential attitudes, it would seem possible that the problems in the current approach might lead us to look to a different method for both judges and scholars to follow in the future. Such a method could maintain the structure of rules and standards yet avoid some of the troubling results from the current emphasis on the decision-makers' choosing to apply uniformly one of the options. The approach in Jewish law might provide a basis for such a method.

Perhaps there is a fundamental reason that the approach from Jewish law is not likely to offer a plausible alternative for American law. This reason may relate to Sullivan's explanation for the choice of either rules or standards in the American legal system. It is notable that, in her general discussion of reasons for rules or standards, Sullivan actually offers four possible arguments for rules, and four parallel

arguments for standards.<sup>372</sup> Two of these arguments, the ones that are somewhat universal to systems of laws and judges, are applicable in the context of both the Jewish legal system and the American legal system. The other two arguments, which are unique to Western thought and American political structure, are unlikely to have particular relevance to Jewish law.<sup>373</sup>

Significantly, in discussing specifically why American judges choose either rules or standards, Sullivan offers only two perspectives, both of which relate uniquely to the American political system. One perspective is explicitly political, to such an extent that Sullivan called it "the political perspective." Decisions in Jewish law relating to rules and standards are not based on politically liberal or conservative philosophy.<sup>374</sup> The other perspective, which Sullivan finds more convincing, relates to judges' aims of maintaining judicial legitimacy.<sup>375</sup> The issues Sullivan describes, of the judge's role in relation to American "history, knowledge, and power," also involve specifically the American political system, and are without parallel in the Jewish legal system's treatment of rules and standards.

Therefore, accepting Sullivan's identification of the two perspectives that will likely best explain the decisions of American judges, it is understandable that she and other American legal scholars must continue to adhere to the current rules/standards approach. Any attempt to apply a different approach, such as the one in Jewish law, to the American legal system would require that judges no longer base their decisions on considerations of the American political structure, as articulated in Sullivan's perspectives.<sup>376</sup>

It can perhaps be suggested that if American judges were to place less emphasis on their role in the American political system, they might be able to apply the Jewish legal approach to rules and standards. The result could be judges and scholars who pay less attention to political and ideological concerns and more attention to the nature of the individual laws being interpreted and the specific facts of the cases being decided.

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372. *See id.* at 62-67.

373. *See supra* text accompanying notes 335-41.

374. *See Sullivan, supra* note 188, at 96-112.

375. *See id.* at 112-21.

376. Indeed, Segall begins his article discussing Scalia and rules with a quotation from Mark Tushnet that "law is politics, all the way down." Mark Tushnet, *Critical Legal Studies: A Political History*, 100 *YALE L.J.* 1515, 1526 (1991), *quoted in Segall, supra* note 256, at 992.

## Conclusion

It is not surprising that many issues that arise in an analysis of Jewish law find their parallels in American legal theory, particularly in constitutional theory. The two legal systems both stem from a fundamentally binding legal text, which must be interpreted if it is to serve as the legal basis for a living society. The fact that Jewish law regulates a religious as well as socio-political system, however, places certain limitations on comparisons between Jewish law and American law. Nevertheless, although it is Divine in origin and principle and its decisions represent the will of G-d, Jewish law is ultimately interpreted and decided by humans. Conversely, despite their secular origins, the Constitution and American law comprise the basic beliefs of the United States, upon which all other institutions of the country are founded.

Jewish law and American law are thus sufficiently similar to allow for a meaningful yet cautious analysis of comparisons and contrasts between the two legal systems, on many different conceptual levels. The analysis may relate to broad issues of interpretation, such as questions of legal authority, as well as specific interpretive frameworks, such as the rules/standards dichotomy. In many areas, principles in Jewish law illuminate principles in American constitutional theory, providing a counter-model from which American scholars can better appreciate the American legal system.

The analysis of rules and standards in the two systems is important because the rules/standards dichotomy is itself a useful way of understanding each system on its own terms; as a result, the subsequent analysis of each system in light of the other is even more illuminating. Yet, the rules/standards dichotomy is but one of numerous conceptual frameworks for understanding the American legal system. It remains to be seen if other such frameworks can be effectively applied to Jewish law as well.

In addition, perhaps a more challenging question relates to comparing and contrasting substantive areas of Jewish law and American law. Again, it is not surprising that the two legal systems, both forming the basis for a living society, share many broad parallels in terms of substantive law, such as questions relating to torts and contracts. In these areas, however, it appears that the religious nature of Jewish law may place greater constraints on a helpful comparative analysis. Hopefully, the recent increase in the use of Jewish law in American legal discourse will continue into the future, in a principled and accurate manner, allowing scholars to further investigate these questions.