

The Justification for Controversy Under Jewish Law

Jeffrey I. Roth

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Jeffrey I. Roth

This article evaluates the role of dissent in a system of sacred law. The author demonstrates that Jewish law accommodates expression of minority positions, although controversy and dissent challenge its notion of an ancient and unbroken oral law tradition. Professor Roth exposes the shortcomings of explanations for controversy that condemn dissent or treat it as an aberration. He proposes a multifaceted justification for controversy that affirms the dissenter's indispensable contribution to Jewish law. Professor Roth concludes with a survey of the valuable functions dissent performs in the Jewish legal system.

INTRODUCTION: THE NATURE OF THE PROBLEM

Controversy is a fact of Jewish law¹ and a challenge for Jewish legal

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Unless otherwise noted, translations are by the author. Published English translations of sources are cited where available for the convenience of the reader, although original Hebrew sources were consulted in the preparation of this Article. Citations to the Babylonian Talmud [hereinafter also Talmud Bavli] refer to the multivolume English translation edited by I. Epstein and published by the Soncino Press from 1935 to 1948. The Soncino translation has been reprinted many times in a variety of formats. Citations will note specific tractates, page numbers, and translators as necessary. References to other Hebrew sources adhere to title pages, using transliterated spelling that may differ among sources. Where useful for locating sources, citations include first and last names of authors, Hebrew and English versions of titles, and other necessary information. Where publication is dated according to the Hebrew calendar only, the Hebrew year is given. The Hebrew year runs from fall to fall; for comparison purposes, Hebrew year 5748 runs from September 1987 through September 1988.

1. "Jewish law" is a translation for the Hebrew term *halakhah*.

The term *halakhah* is used to designate both the system of Jewish law in its broadest sense, and also, a statement of a single rule of law. It is derived from the Hebrew word meaning "to go." Thus, the term connotes the way in which Israel goes, the path it follows. M. ELON, 1 HA-MISHPAT HA-IVRI 143 (1973). It encompasses the entire subject matter of Jewish law, including public and private law—civil, criminal, administrative, religious, ritual, and moral law.

More limited in their meanings are the terms Biblical law, Talmudic law and rabbinic law. Each designates a successive historical phase in the evolution of Jewish law. The result is an amalgam of all three with its own characteristics; it cannot be identified with any single one of them.

The modern Hebrew term *mishpat ivri* ("Hebrew law") also has a more limited connotation, being confined to those areas of Jewish law that correspond to the subject matter of modern legal systems. *Id.* at 146.

The state of Israel has incorporated into its legal system miscellaneous elements of Jewish law

theory. The authorities of Jewish law often disagree among themselves. Support for contradictory legal positions, all justified by citations to the same legal sources, is common. The "controversy among authorities"² is the central unit in the study of Jewish law. Even after ruling on a disputed legal point, the authorities preserve dissenting opinions in their works for future study.

Yet differences of opinion about law challenge a basic tenet regarding the origin and authenticity of Jewish law: the belief that God's revelation of law to Moses at Sinai was two-fold in nature, written and oral. In this view, God revealed a written law, the Five Books of Moses, together with an oral law, explanations necessary for the proper performance of the written commandments.³ This oral law constitutes the corpus of Jewish legal teaching which has been transmitted from master to disciple in an unbroken chain reaching back to the original revelation.⁴ But if the initial, two-part revelation was *complete*, and the chain of transmission *unbroken*, then how is it possible for the legal sages—the links in the chain—to disagree about the law? The pedigree of the oral law and the authority of the sages as its interpreters are at stake in answering this question.

Scholars who respond to the question make undesirable concessions too often. They typically argue either that controversy grew out of errors that distorted the oral law in the process of transmission,⁵ or that controversy originated in historical events that prevented the Jewish legal system from operating normally.⁶ However, by conceding that legal controversy is a sign that something has gone wrong and needs to be corrected, they undermine the legitimacy of dissent in Jewish law. The suggestion that, ideally, authorities should not disagree about the law provides a handy rationale for suppressing the expression of dissenting points of view. This rationale for suppression can be combined with other arguments against dissent—including its potential for causing sch-

as a matter of legislative or judicial policy, but Israeli law is the law of a modern, secular nation state, and not Jewish law. For a discussion of the relationship between Jewish law and Israeli law, see I. ENGLARD, *RELIGIOUS LAW IN THE ISRAEL LEGAL SYSTEM* (1975). Roth, *Responding to Dissent in Jewish Law: Suppression versus Self-Restraint*, 40 RUTGERS L. REV. 31, 32 n.1 (1987).

2. In Hebrew, *mahaloker*; in Aramaic, *pelugta*. On these terms, see Daube, *Dissent in the Bible and Talmud*, 59 CALIF. L. REV. 784, 786-87 (1971).

3. See, e.g., M. MAIMONIDES (1135-1204), *MISHNEH TORAH: THE BOOK OF KNOWLEDGE* 1b (M. Hyamson trans. 1965).

4. See *id.* at 1b-3a. Maimonides provides a list of outstanding scholars "who received the Oral Law each from his predecessors in unbroken succession." *Id.* at 3a. These authorities comprise the major links in a chain of transmission that spanned forty generations, commencing with the original revelation of the oral law to Moses and continuing until the death of Rav Ashi, one of the editors of the Babylonian Talmud, early in the fifth century.

5. See *infra* notes 59-78 and accompanying text.

6. See *infra* notes 79-91 and accompanying text.

isms, confusing the public and weakening their respect for authority and tradition—to jeopardize freedom of debate under Jewish law.

This Article presents legal controversy as an inherent and desirable feature of the Jewish legal process. It reconciles the existence of such controversy with the oral law tradition without impairing confidence in the authenticity of the oral law. It explains the origins of halakhic controversy in a manner that accommodates dissent by the authorities of Jewish law and legitimates the conduct of the dissenters among them. In addition, the Article identifies the valuable functions controversy and dissent perform in the Jewish legal system to demonstrate why the authorities of Jewish law should actively promote the expression of dissenting opinions by their colleagues.

The Article is divided into four parts. Part I illustrates the Jewish legal process in operation with a case study of a controversy. Part II critically examines explanations for the origins of halakhic controversy that undermine the value of dissent. Part III argues from Jewish legal theory that the expression of nonconforming legal positions is both legitimate and desirable. Part IV buttresses the theoretical conclusion by providing a functional justification for dissent in Jewish law, showing the beneficial role that dissent plays in the study, development and application of Jewish law.

I

A CASE STUDY IN CONTROVERSY AND DISSENT: RELEASE FROM COMBAT DUTY

Jewish partisan forces were defeated by Roman legions, first in the year 70 and again in 135, ending two prolonged military challenges to the supremacy of Rome.⁷ A Jewish army took the field again eighteen centuries later, in 1948, upon the establishment of the state of Israel. In the interim, the authorities of Jewish law debated the issue of release from military combat duty.

A verse in Deuteronomy charges that prior to battle, the officers address their troops in the following words: "What man is there that is fearful and faint-hearted? let him go and return unto his house, lest his brethren's heart melt as his heart."⁸ The soldiers released pursuant to this provision return home for noncombatant duties, such as repairing roads and supplying food and water for the frontline troops.⁹

7. After the destruction of Jerusalem and the Second Temple in the year 70, a small group of Jewish partisans held out against the Romans in the desert fortress of Masada until the year 73. See Y. YADIN, *MASADA* 11 (1966). For a history of the second revolt, the Bar Kokhba War, see 2 G. ALON, *THE JEWS IN THEIR LAND IN THE TALMUDIC AGE 570-637* (G. Levi trans. 1984).

8. *Deuteronomy* 20:8 (Jewish Publication Society 1917).

9. *MISHNAH, Sotah* 8:2 (H. Danby trans. 1933); see also 3 *THE CODE OF MAIMONIDES*

Three sages of Jewish law who lived during the second century disagreed over the interpretation of the verse. Their opinions are recorded in the Mishnah.¹⁰ The first, Akiva, understood the words "fearful and fainthearted" literally to mean a conscript is entitled to release if "he cannot endure the armies joined in battle or bear to see a drawn sword."¹¹ His contemporary, Jose Hagalili, construed the words with reference to sins. In his view, exemption is available to the recruit who is afraid that he will be harmed in battle as punishment for having sinned.¹² The third sage, Jose ben Halafta, citing examples of persons who have violated *Biblical* laws, stated: "such a one it is that is fearful and fainthearted."¹³

The study of the Mishnah recorded in the Talmud supplies a useful elaboration of these positions.¹⁴ Jose Hagalili agrees with Akiva that a

(MISHNEH TORAH): BOOK FOURTEEN, THE BOOK OF JUDGES, *Kings and Wars* 7:9, at 226 (A. Hershman trans. 1949) [hereinafter M. MAIMONIDES, MISHNEH TORAH].

The Mishnah is a compilation of concise statements about Jewish law, edited and arranged by Rabbi Judah Hanasi around the end of the second century. It reflects the development of Jewish law by sages (Heb. *Tanna'im*) active mainly in the land of Israel during the preceding two centuries. Danby's translation contains a useful introduction at xiii-xxxiii.

The MISHNEH TORAH, a code of Jewish law, is divided into fourteen books, including the Book of Judges. Each book is subdivided into treatises, such as "King and Wars." The treatises are further subdivided into chapters and *halakhot* ("laws"). Unless otherwise indicated, subsequent references to MISHNEH TORAH cite a specific treatise, chapter, and law within Hershman's translation of the Book of Judges. On the codes of Jewish law generally, see *infra* note 22 and accompanying text.

10. MISHNAH, *Sotah* 8:5 (H. Danby trans. 1933). On the Mishna, see *supra* note 9.

11. MISHNAH *Sotah* 8:5. Akiva was the spiritual mainstay of the second revolt against Rome; many of his students enlisted in the military ranks, and he was martyred at its unsuccessful conclusion. For brief biographical notes on Akiva, Jose Hagalili, and Jose ben Halafta, see M. MIELZINER, INTRODUCTION TO THE TALMUD 29-30, 33 (5th ed. 1968).

12. MISHNAH, *Sotah* 8:5. Jose Hagalili is "Jose the Galilean" in English.

13. *Id.* The Mishnah refers to Jose ben Halafta as Rabbi Jose.

14. The Talmud, an encyclopedic compendium of the oral law, reflects the study and development of Jewish law by sages (Heb. *Amora'im*) who were active for three centuries after the Mishnah was compiled around the year 200. The Talmud is essentially silent on the process of its own composition. According to the traditional account, Rav Ashi (d. 427), principal of the school at Sura in Mesopotamia (Heb. *Bav'li*, hence Babylonia) for 60 years, began the editorial process. A successor, Ravina (d. 499), continued the editing, and after his death, a group of scholarly redactors (Heb. *Savora'im*) polished the work for the next century and a half. See 6 S. BARON, SOCIAL AND RELIGIOUS HISTORY OF THE JEWS 19-21 (1958) (by 650, the editing of the Talmud was complete, but copies were scarce for another century). For surveys of theories of modern researchers explaining how, why, and by whom oral debates in the Babylonian academies of Jewish law were transformed into a literary work, see, e.g., J. KAPLAN, REDACTION OF THE BABYLONIAN TALMUD (1933); FORMATION OF THE BABYLONIAN TALMUD (J. Neusner ed. 1970).

The Talmud is composed of two strata, the Mishnah and the Gemara. For an explanation of the Mishnah, see *supra* note 9. The Gemara, by far the bulk of the Talmud's contents, is an extensive running commentary on 37 of the 63 tractates of the Mishnah, along with discussion of many related and tangential matters.

Although the Babylonian Talmud (Heb. *Talmud Bavli*) is usually referred to as "the Talmud," legal sages in Israel by the end of the fourth century had compiled an earlier Talmud known as the Jerusalem or Palestinian Talmud (Heb. *Talmud Yerushalmi*). For a comparison of the two

soldier who is literally scared of battle may return home for noncombatant duty. However, unlike Akiva, he derives this law from the last words of verse, "lest his brethren's heart melt as his heart." In addition, Jose Hagalili draws the exemption more broadly than Akiva, holding that a soldier who is afraid on account of his transgressions also may return home.¹⁵

The Talmud also reveals a difference in the positions of Jose ben Halaftha and Jose Hagalili. By confining his examples to Biblical laws, Jose ben Halaftha meant that release was available only to a soldier who was afraid for having transgressed Biblical laws, but not *rabbinic* enactments. By contrast, Jose Hagalili, who refers to fear of sins generally, holds the exemption is equally available to one afraid for having violated either rabbinic enactments or Biblical laws.¹⁶

The positions can be summarized as follows, based on the Talmud's report of the study of the Mishnah:

- (1) Two sages concur that release is available to the soldier who is literally afraid:
 - (a) Akiva, who derives it from the words, "What man is there that is fearful and fainthearted?"
 - (b) Jose Hagalili, who derives it from the words, "lest his brethren's heart melt as his heart."
- (2) Two sages, Jose Hagalili and Jose ben Halaftha, concur that release is available to someone who is afraid on account of Biblical transgressions.
- (3) One sage, Jose Hagalili, holds that someone who is afraid on account of rabbinic transgressions may return home.

Who then is entitled to exemption from combat duty as "fearful and fainthearted?" Neither the Mishnah nor the Talmud states a conclusion. After the destruction of Jerusalem in the year 70, inquiring sages could no longer refer a disputed legal question to the High Court of Jerusalem, the Great Sanhedrin, for a ruling. The High Court of seventy-one members, which met on the Temple Mount to debate unsettled questions of Jewish law, had authority to decide the law by consensus or majority vote and issue final, binding rulings.¹⁷ The destruction of Jerusalem

Talmuds, see L. GINZBERG, ON JEWISH LAW AND LORE 3-57 (1955). The Jerusalem Talmud is an ancillary source of law used to explain the contents of the Babylonian or fill lacunae in its coverage.

On the authority of the Talmud as a source of Jewish law, see Roth, *supra* note 1, at 42-49.

15. TALMUD BAVLI, *Sotah* 44b, at 223-24 (A. Cohen trans. 1936)

16. *Id.*, *Sotah* 44b, at 223.

The duties imposed by Jewish law fall into two categories based on their derivation: (i) Biblical laws, arising from verses in the Five Books of Moses, and (ii) rabbinic laws, originating in the legal activities of post-Mosaic authorities. Halakhic authorities dispute the criteria for distributing laws between the two classes. See I. HERZOG, THE MAIN INSTITUTIONS OF JEWISH LAW 2-11 (2d ed. 1965); THE PRINCIPLES OF JEWISH LAW 9-10 (M. Elon ed. 1975).

17. MISHNAH, *Sanhedrin* 1:6, 11:2 (H. Danby trans. 1933); TOSEPHTA, *Sanhedrin* 7:1, at 425 (M. Zuckerman ed. 1970) (in Hebrew); TALMUD BAVLI, *Sanhedrin* 88b at 586 (J. Shachter & H.

destroyed the national legal center on the Temple Mount and the locus of final authority in Jewish law. Thereafter, the sages of the law, in the land of Israel and in the diaspora, continued to exercise a localized authority in their communities, but no individual or assembly succeeded to the undisputed authority of the High Court to settle controversial questions of Jewish law for the legal system as a whole.¹⁸

The existence of an unsettled controversy among the sages creates a need to extract, from the variety of their opinions, a rule to govern conduct. This is the calling of the halakhic authority (Heb. *posek*) of each community, a legal scholar recognized by the community as possessing the expertise and other qualities that enable him to decide cases and answer unsettled questions of Jewish law for them.¹⁹ Canons of decision-making, which the legal sages developed over the course of time, govern the process of deciding the law.²⁰ The canons are not applied mechanically; rather, authorities must make many subjective judgments, including an assessment of the relative merits of the halakhic authorities whose positions are under review.²¹

In addition to deciding individual cases, some halakhic authorities perform an additional function by composing codes of Jewish law. From the give and take of legal debate, the authors of the codes extract normative rulings, which they present to the reader in concise, unembellished form, free of distracting polemics.²² These works are not codes in the continental, civil law sense because they do not supersede preexisting law

Freedman trans. 1935); see also M. MAIMONIDES, *MISHNEH TORAH, Rebels* 1:3, *supra* note 9, at 139.

18. See Roth, *supra* note 1, at 38-42 (discussing role of High Court of Jerusalem and loss of final authority in Jewish law).

19. These qualities ideally include demonstrated mastery of the sources of Jewish law and the ability to apply them sympathetically to contemporary local conditions, along with impeccable religious piety in conduct and beliefs and a personality that is self-effacing when being offered an honor, but courageous when a question of principle is involved. On the problems that are involved in identifying authorities of Jewish law, see Roth, *supra* note 1, at 34-35.

20. For a collection of canons of decision, see Sperber, *Conflict of Opinions*, in 5 *ENCYCLOPEADIA JUDAICA* 890 (1972) (for example, in a controversy between a majority of the sages and a minority, the majority view is preferred; in a controversy over a biblical law, the stricter position is adopted; over a rabbinic enactment, the more lenient position is adopted; when earlier and later authorities conflict, opinion of a later authority takes precedence over that of an earlier authority; and many others).

21. See 1 J. BLEICH, *CONTEMPORARY HALAKHIC PROBLEMS* xvii (1977), describing halakhic decisionmaking as follows:

[Deciding the law is] the product of highly specialized skills. It is in choosing between conflicting precedents and opinions that the consummate expertise of the decisor becomes apparent He must carefully weigh and balance opinions and decisions, assigning weight not merely on the basis of sheer number but also on the relative stature of the scholars whose opinions are under consideration, and must at the same time assess the complexities and relative importance of any number of component factors.

A specific enumeration of the "component factors" halakhic authorities take into account remains a scholarly desideratum.

22. The earliest attempts at codification date from the centuries following the completion of

nor do they become the exclusive source of law.²³ A Jewish code of law resembles a restatement of the law.²⁴ It sets forth the author's view of the law, arranged systematically, stated concisely, and striving for completeness. The author's conclusions are based on a thorough review of prior authorities, filtered and refined by his legal insight, especially in doubtful or unresolved cases. The author aims to make access to the law easier, to guide practitioners of the law, and to promote greater uniformity in practice among widely scattered Jewish communities. Acceptance of

the Talmud. For a survey of the history of efforts to codify Jewish law and descriptions of the major works, see THE PRINCIPLES OF JEWISH LAW, *supra* note 16, at 120-46.

A major achievement in codification is the Mishneh Torah of Rabbi Moses Maimonides (1135-1204). For a detailed analysis of the work, see I. TWERSKY, INTRODUCTION TO THE CODE OF MAIMONIDES (*Mishneh Torah*) (1980). On the structure of the code, see *supra* note 9.

The more recent, comprehensive code, SHULHAN ARUKH ("The Set Table"), is the work of Rabbi Joseph Caro (1488-1575), a Spanish authority who settled in Safed, Israel. For his biography, see R. WERBLOWSKY, JOSEPH KARO: LAWYER AND MYSTIC (1963). A Polish authority, Rabbi Moses Isserles ("Rema," 1520-1572), wrote critical glosses known as *Mappah* ("The Tablecloth") to cover the omission from Caro's code of Ashkenazic laws and customs. Publishers incorporated the glosses into the text of Caro's code and published the work of both authors as a single book known as the SHULHAN ARUKH. For a discussion of the composite work and its legal impact, see I. TWERSKY, *The Shulhan Aruk: Enduring Code of Jewish Law*, in STUDIES IN JEWISH LAW AND PHILOSOPHY 130 (1982).

Caro's code distributes Jewish law into four divisions: *Orah Hayyim*—prayer, Sabbaths, and festivals; *Yoreh De'ah*—dietary, ritual, and moral law; *Even Ha-Ezer*—family law and divorce; and *Hoshen Ha-Mishpat*—courts, property law, and torts. For a list of the topics treated in each division, see G. HOROWITZ, THE SPIRIT OF JEWISH LAW 738-40 (1953). Each division is subdivided into chapters and paragraphs. Subsequent references to provisions in the SHULHAN ARUKH will note whether the author is Caro or Isserles and cite the relevant division, chapter, and paragraph. For an English translation of a few chapters in the fourth division and a synopsis of selected commentaries, see J. CARO, CODE OF HEBREW LAW: SHULHAN 'ARUK, HOSEN HAMISHPAT (C. Denburg trans. 1955).

23. Cf. J. MERRYMAN, THE CIVIL LAW TRADITION 27 (1985) (distinguishing role of codification in civil law states and common law states); R. SCHLESINGER, COMPARATIVE LAW: CASES, TEXT, MATERIALS 269-93 (4th ed. 1980) (discussing the impact of codes in civil law countries); A. WATSON, THE MAKING OF THE CIVIL LAW 131 (1981) (existing law ceases to have force upon adoption of civil code).

24. See Kirschenbaum, *Towards a Restatement Of Jewish Law*, in JEWISH LAW IN LEGAL HISTORY AND THE MODERN WORLD 97, 115-16 (B. Jackson ed. 1980); cf. Friedmann, *Problems of Codification of Civil Law in Israel*, in 2 JEWISH LAW ANNUAL 88, 90 n.13 (1979) (observing that codes Mishneh Torah and Shulhan Arukh resemble nonbinding private restatements, which from frequent usage and tradition, may come to represent the true law). For a useful comparison of codes and the American Law Institute's restatements of the law, see Fleming, *The Restatements and Codification*, in 2 JEWISH LAW ANNUAL 108 (1979).

Justice Elon's characterization of Jewish codes as "compilations" is less helpful. M. ELON, HAMISHPAT HA-IVRI 946-47 (1973); see also THE PRINCIPLES OF JEWISH LAW, *supra* note 16, at 122. While a compilation presents the texts of statutes arranged according to subject matter and provides prima facie evidence of the texts, Jewish codes are not based on statutory law and make no effort to present the original texts of the underlying sources. Their concern is to articulate the substance of the final rulings, and halakhic authorities regard them as providing more than merely prima facie evidence of the law. See *id.* at 122 ("from the standpoint of the validity attaching to such compilatory work and the possibility of deciding in terms of it, it has been regarded *not merely as constituting presumptive evidence, but as carrying also the authority of a proper codex*") (emphasis added).

the code depends on the personal authority and stature of the author and the quality of his work.²⁵

The twelfth century codifier, Moses Maimonides, who devoted four chapters in the final treatise of his code to the laws of warfare,²⁶ offers his resolution of the dispute regarding exemption from military combat duty. He states: "Who is the man that is fearful and fainthearted? To be understood literally, that he does not have in his heart the ability to stand in the military ranks."²⁷ In keeping with the purpose and form of his code, Maimonides does not cite any source for the rule, nor does he mention any contrary points of view.²⁸

The task of identifying the sources of a codifier and reconstructing his probable *ratio decidendi* is performed by later commentators, known as "arms bearers."²⁹ The chief arms-bearer for Maimonides, Joseph Caro, cites Akiva as the authority upon whom Maimonides relied for his ruling.³⁰ Caro attempts to explain why Maimonides adopted Akiva's position over the others. Since, according to the Talmud, Jose Hagalili agrees with Akiva that someone who is literally afraid of battle is entitled to the exemption, then two of the three sages, a majority, adhere to that

25. No single code has ever been accepted as authoritative by all Jewish communities. Sephardic Jewry adheres to Caro's rulings in his *Shulhan Arukh*, Ashkenazic Jewry follows the glosses of Isserles when they run counter to Caro's rulings, and Yemenite Jewry regards Maimonides' code as their primary post-Talmudic authority. The situation guarantees a certain measure of pluralism in legal usage. See *THE PRINCIPLES OF JEWISH LAW*, *supra* note 16, at 130-32, 140-44 (discussing reasons for the initial, general opposition to the codes and its eventual dissipation); H. ZIMMELS, *ASHKENAZIM AND SEPHARDIM* 1-58 (1976) (discussing the origins of the split between Ashkenazic and Sephardic Jewries, and the role played by allegiance to different codes); Eliash, *Ethnic Pluralism or Melting Pot? The Dilemma of Rabbinical Adjudication in Israeli Family Law*, 18 *ISRAEL L. REV.* 348 (1983) (discussing the state of Israel's problems in the administration of Jewish family law to a diverse population of Ashkenazim and Sephardim).

26. M. MAIMONIDES, *MISHNEH TORAH, Kings and Wars* chs. 5-8, *supra* note 9, at 217-30.

27. M. MAIMONIDES, *MISHNEH TORAH, Kings and Wars* 7:15 (author's translation); cf. *MISHNEH TORAH*, *supra* note 9, at 227 (A. Hershman trans.) ("who is not *physically fit* to join the ranks in battle") (emphasis added). The Hershman translation suggests some physical impairment for military service, rather than incapacitating psychological terror. The Hebrew is *eyn b'lebo koah*, literally, "does not have strength in his heart."

28. Other halakhic authorities criticized Maimonides for omission of his sources and alternative legal positions. See, e.g., *BOOK OF MISHNAH TORAH: WITH RABD'S CRITICISM AND REFERENCES* 18 (S. Glazer trans. 1927) (criticism of Rabbi Abraham ben David ("Rabad," 1125-1198) that Maimonides aimed to improve but did not; he "abandoned the path of all authors who preceeded him," who quoted the authorities on whom they relied, permitting their sources to be weighed in assessing their positions); RABBI SOLOMON LURIA ("Maharshal," 1510-1574), *YAM SHEL SHLOMO, Bava Kama*, Introduction (Hebrew year 5720) (in Hebrew) (Maimonides' code is like a dream without an interpretation, since he does not bring any proof to support his views; further, how can his positions be refuted, if one cannot determine what sources he relied on in reaching his conclusions?); see also I. TWERSKY, *INTRODUCTION TO THE CODE OF MAIMONIDES*, *supra* note 22, at 61-81, 97-175 (discussing Maimonides' purpose in adopting the abbreviated form of his work).

29. In Hebrew, *nosei kelim*. See *THE PRINCIPLES OF JEWISH LAW*, *supra* note 16, at 132.

30. Caro, *Kesef Mishnah*, in M. MAIMONIDES, *MISHNEH TORAH, Hilkhoh Melakhim* 7:15 (in Hebrew). Caro was himself the author of a code; see *supra* note 22.

view. Only Jose ben Halafta disagrees. In taking Akiva's position, Maimonides resolved the legal controversy by applying the primary canon of decision—the position agreed to by a majority of sages prevails over the position of the minority.³¹ In short, Maimonides shaped the disputants into a three judge panel to consider the issue of release from combat duty. Akiva spoke for the majority, Jose Hagalili concurred in part and dissented in part, and Jose ben Halafta dissented.

Maimonides' ruling in favor of Akiva's position has a double impact. First, he endorses Akiva's position as authoritative, and second, he marks the other positions as dissents. A reading of the Mishnah without Maimonides' ruling reveals the conflict of opinions but does not disclose who was dissenting from whom. While controversy is a necessary precondition for dissent, the mere existence of a difference of opinion does not by itself permit any position to be characterized as a dissent. Only after a halakhic authority determines "the law" can the positions he rejected be denominated "dissents" according to his view.

The initial question—who is entitled to release from combat duty under the cited verse from Deuteronomy?—can be answered with a much greater degree of certainty if Maimonides' ruling is taken into account. Yet, given the nature of authority and the lack of finality in Jewish law in the absence of a functioning High Court,³² even Maimonides' ruling does not settle the issue. Not every subsequent authority of Jewish law felt bound to accept Maimonides' conclusion. His determination of the law generated its own line of dissents and concurrences.

In the thirteenth century, a learned scholar wrote a manual of instruction for youth which listed the 613 commandments contained in the Five Books of Moses and surveyed the additional laws associated with each commandment.³³ Commandment Number 526, "the priest

31. Majority rule is the only canon of decision derived from interpretation of a Biblical verse, *Exodus* 23:2. See M. MIELZINER, *supra* note 11, at 121-22 (explaining derivation). On the canons of decision, see *supra* note 20 and accompanying text.

32. See *supra* notes 17-18 and accompanying text.

33. SEFER HA-HINUKH (E. Hacoen ed., Hebrew year 5718) (in Hebrew). Although some scholars attribute the book to Rabbi Aaron Halevi of Barcelona (13th century), it appeared anonymously, and other scholars doubt the attribution. See *id.* at 1-2.

The notion that the Five Books of Moses contain 613 commandments (248 positive, 365 negative) finds its first literary expression in the Talmud, where it is attributed to a third century sage, Rabbi Simlai. TALMUD BAVLI, *Makkot* 23b, at 169 (H. Lazarus trans. 1935). No enumeration is given in the Talmud, but in post-Talmudic times, an extensive literature sought to identify the commandments and pinpoint their source verses in the Bible. See L. JACOBS, A TREE OF LIFE: DIVERSITY, FLEXIBILITY AND CREATIVITY IN JEWISH LAW 16-17 (1984) (referring to the literature). An official list cannot be said to exist; authors dispute some particulars in each other's lists. Maimonides' *Sefer Ha-Mitzvot* is an important exemplar of the genre. He prepared it as a checklist in anticipation of writing his code. Often printed as a forward to the code, it contains a statement of the author's criteria for inclusion and exclusion of commandments from his list. For an

annointed for battle,"³⁴ provided the anonymous author with his occasion to discuss the laws of warfare and the exemptions from combat duty. He writes that the man who is afraid on account of his sins returns home from the front.³⁵ He does not mention any release for the recruit who is literally afraid. The author does not cite any authorities who support or contradict his position nor does he give any explanation for his view. Acting as our own arms-bearers for the author, we can identify the authority on whom he relied as Jose Hagalili.

The author's departure from Maimonides' position is striking. It is more than likely that he was aware of the latter's ruling which had appeared at the end of the twelfth century. Maimonides' code forms the very basis of the author's enumeration of the 613 commandments, and many of the associated laws that he cites are taken verbatim from Maimonides' code.³⁶ While according Maimonides his due rank as a foremost authority and codifier, the author displays a measure of independence from the latter's views. On this issue, he dissents from Maimonides' ruling, without opinion.

Some six centuries after Maimonides' ruling, a Lithuanian Talmudist of the first rank, Rabbi Aryeh Loeb ben Asher, wrote a full-fledged dissent, with opinion.³⁷ In his view, the positions of Akiva and Jose Hagalili cannot be combined to form a majority. While these sages agree that the exemption is available to someone who literally is frightened of combat, each derives the rule from a separate phrase in the verse. Since they do not agree on the source of the exemption, their positions cannot be combined to form a majority,³⁸ as Caro suggested Maimonides had done.³⁹ Loeb holds that the more justifiable combination consists of Jose Hagalili and Jose ben Halafta. Both agree on release for fear of *Biblical* sins, and both derive the rule from the *same words* in the same verse. Akiva's view, then, is the view of a single individual. Under the canons of decision, the view of Akiva prevails against a single colleague,

English translation, see THE COMMANDMENTS: SEFER HA-MITZVOTH OF MAIMONIDES (C. Chavel trans. 1967).

34. See *Deuteronomy* 20:1-4 for the Scriptural verses that form the basis of the duties imposed on the "priest annointed for battle."

35. SEFER HA-HINUKH, *supra* note 33, at 318.

36. The author of *Sefer Ha-Hinukh* acknowledges his debt to Maimonides in the introduction to his work. *Id.* at 7. For a discussion of the relationship between the contents of *Sefer Ha-Hinukh* and Maimonides' code, see *id.*, Introduction, at 4-5.

37. RABBI ARYEH LOEB BEN ASHER (c. 1695-1785), SHA'AGAT ARYEH, New Series, No. 14, § 2, at 48 (Warsaw, Hebrew year 5634) [hereinafter SHA'AGAT ARYEH], noted in S. ZEVIN, L'OR HA-HALAKHAH 31 n.39 (2d ed., Hebrew year 5717) (in Hebrew).

38. See Shilo, *Majority Rule*, in THE PRINCIPLES OF JEWISH LAW, *supra* note 16, at 163-64 (discussing the role of majority rule in the determination of halakhah: "If a majority of scholars should arrive at the same conclusion but each for a different reason, some scholars hold this to be a majority opinion which is binding while other scholars hold the contrary view . . .").

39. See *supra* text accompanying notes 30-31.

but not against two,⁴⁰ as here. Thus, Loeb concludes, Caro's explanation "does not say anything," and Maimonides' ruling "requires further study."⁴¹

Rabbi Moses Margalio, a contemporary of Rabbi Aryeh Loeb, evaluated Maimonides' ruling further in his commentary on the Jerusalem Talmud. Margalio objects to Maimonides' ruling for the same reason that Loeb did—Akiva's view should not prevail against two colleagues holding a contrary opinion.⁴² But Margalio offers a possible justification for Maimonides' ruling. He notes that Jose ben Halafta was a student of Akiva's. Accordingly, in weighing the three authorities in the Mishnah, Maimonides may have declined to treat the student on par with the teacher and thus did not count Jose ben Halafta's opposition to Akiva.⁴³ Having eliminated Jose ben Halafta from the equation and leaving only Jose Hagalili to oppose Akiva, Maimonides properly applied the canon of decision that Akiva prevails over the view of a *single* colleague. Akiva therefore prevails without the need to combine the partially congruent views of Akiva and Jose Hagalili to form a majority, as Caro suggested.

The reception Maimonides' ruling received may be summarized as follows:

- (1) Two authorities concur with Maimonides and hold that he was right to rule in accordance with Akiva's position:
 - (a) Caro.
 - (b) Margalio but only after raising an objection and answering it.
- (2) Two authorities dissent from Maimonides' ruling:
 - (a) The author of *Sefer Ha-Hinukh*, without opinion; he adopts the position of Jose Hagalili.
 - (b) Rabbi Aryeh Loeb, with opinion; he argues in favor of the position of Jose ben Halafta.

Rabbi Aryeh Loeb would surely deny that he has "dissented" from Maimonides' ruling; he would insist that he has merely "raised a question" about it.⁴⁴ Loeb is a "latter-day" authority and, as such, displays a marked deference toward an "early" authority such as Maimonides.⁴⁵

40. TALMUD BAVLI, *Erubin* 46b, at 323 (I. Slotki trans. 1938).

41. SHA'AGAT ARYEH, *supra* note 37, at 48.

42. M. MARGALIO (d. 1780), MAREH HA-PANIM, *Sotah* 8:9, noted in S. ZEVIN, *supra* note 37, at 31 n.39. Was this a case of two independent researchers making the same discovery simultaneously, as often happens in the natural sciences, or did Margalio know of Rabbi Aryeh Loeb's difficulty with Maimonides' ruling?

For a biographical sketch of Margalio, see L. GINZBERG, *supra* note 14, at 42-43 (at the age of 70, he enrolled as a university student in botany, in order to understand better the laws of agriculture contained in the Jerusalem Talmud).

43. See Roth, *supra* note 1, at 75-86 (discussing reasons why a halakhic authority might discount the opinion of a student that contradicts the views of his teacher).

44. This is the distinction, in Hebrew, between *holek* (literally, dissent), which Loeb would deny that he has done, and *maksheh* (literally, question), which he would acknowledge he did.

45. The appearance in 1565-1566 of Caro's *Shulhan Arukh* marks the temporal dividing line

Avoiding a direct contradiction of an early authority, Loeb never says Maimonides is "wrong" but tepidly concludes that Maimonides' ruling "requires further study."⁴⁶

Rabbi Aryeh Loeb's probable characterization of his position should not obscure the fact that he has written a dissent. His words certainly read like a dissent from Maimonides' position.⁴⁷ He disagrees with Maimonides' reasoning, his application of the canons of decision, and his conclusion, and he provides a rationale for adopting the view of Jose ben Halafta which Maimonides rejected. His criticism is no less a dissent because he implicitly acknowledges that Maimonides may have had other reasons for ruling as he did, although Loeb is unable to fathom those reasons. In view of his stature relative to Maimonides, the fact that he dissents without directly negating the latter's position does not render Loeb's tract any less of a dissent, albeit a respectful one. Indeed, his deferential attitude toward the early authorities in general only emphasizes the element of dissent in this case.

If Rabbi Aryeh Loeb refuted Maimonides' ruling, then it appears that we have come full circle. The original question—who is entitled to release from combat duty under Jewish law as "fearful and faint-hearted?"—remains unanswered. Each of the three positions recorded in the Mishnah is endorsed by one or more of the later authorities. If the issue were not academic but had urgent practical importance—for example, if a combat unit governed by Jewish law presently required an answer in order to administer properly the system of Biblical exemptions from combat duty—the army's command would inquire of the halakhic authority in its jurisdiction. The authority would issue a practical ruling based on careful review of the sources just discussed, weighing the sources in light of contemporary local conditions.

between the two categories. On the Shulhan Arukh, see *supra* note 22. Thus, the "early authorities" (Heb. *Rishonim*) were active from about the year 1050, when the academies in Babylonia closed and the Gaonate ceased, until about the year 1550. The "latter-day authorities" (Heb. *Aharonim*) include scholars from about the year 1550 until the present. See Roth, *supra* note 1, at 74-91 (discussing reasons why later authorities tend to defer to the views of their predecessors).

46. SHA'AGAT ARYEH, *supra* note 37, at 48.

47. A full statement of Rabbi Aryeh Loeb's objections reads as follows:

But what shall I do, for Maimonides wrote in *The Laws of Kings*, chapter 7, "Who is the man that is fearful and fainthearted?—to be understood literally . . ." Hence he decided according to R. Akiva and not according to R. Jose Hagalili and R. Jose [ben Halafta]. This itself is questionable—how could he have abandoned the position of the two and decided according to the one? For it is established, the view of R. Akiva does not prevail as a matter of law against two colleagues. Now I have seen [the explanation for Maimonides' ruling suggested by Joseph Caro in his work] *Kesef Mishnah* . . . and it does not say anything. For even so, it would be appropriate to decide according to R. Jose Hagalili and R. Jose [ben Halafta] who both interpret the verse as referring to a man who is afraid on account of his [Biblical] sins; for as to [R. Jose Hagalili's agreement that] "fearful" is to be understood literally, he derives that from different words [than R. Akiva, namely,] "lest his brethren's heart melt like his." The words of Maimonides require further study.

SHA'AGAT ARYEH, *supra* note 37, at 48.

The case of exemption from combat duty is a good example of controversy in Jewish law. The number of conflicting positions is not excessively large, nor is the time frame, spanning two millennia, uncharacteristically long. A question of law that does not elicit differences of opinion among the sages in the Mishnah and Talmud, that finds early and latter-day authorities in agreement, or that is settled definitively by a ruling in a code that satisfies everyone, is the exception, rather than the rule.

Further, "Jewish law" is not found in any single position, but rather in the complete picture in which all the positions are represented, with their gradations of disagreement and shadings of controversy. Jewish law is not a fixed body of set rules with a ready answer to every question. Instead, Jewish law consists of a variety of opinions from which a ruling can be derived by competent authority. For this reason, teachers of Jewish law do not attempt to gloss over the disputes in order to convey a harmonious whole to their students. In the preceding case study, a person who had been taught only Akiva's position or Maimonides' ruling but was unaware of the other views in the Mishnah or the controversy over the ruling, would be an unreliable source of answers to legal questions and would not qualify as a halakhic authority in any community.

The case study suggests the following lines of inquiry. Akiva, Jose Hagalili, and Jose ben Halafta were links in the chain of transmission of the oral law. They received from their teachers traditions regarding the interpretation of Scripture and the laws to be derived from it, and in turn they passed on these traditions to their students. In light of this common foundation, what is the origin of their controversy? If they are faithfully reporting what they heard from their teachers, then how did the teachers' difference of opinion develop? Is it possible that one or more of them, or their teachers, did *not* transmit an accurate rendition of the oral law but an erroneous version? If so, how is one to determine which is the true law?

Can the continuation of the controversy from Maimonides to Rabbi Aryeh Loeb be attributed to the system's inability, following the abolition of the High Court, to produce a final ruling on a disputed point of law? If the normal institutions of Jewish law, including the High Court, were restored, then would controversy and dissent be eliminated? If the persistence of controversy is nothing more than a sign that Jewish law is operating under abnormal conditions, then does controversy serve any legitimate functions in Jewish law, or is it an undesirable by-product of the legal process that must be tolerated under current conditions but should not be encouraged? The remainder of this Article addresses these questions.

II

EXPLANATIONS FOR CONTROVERSY THAT UNDERMINE
THE VALUE OF DISSENT

The authorities of Jewish law diligently study their predecessors' differences of opinion and generate disputes of their own. They cannot help noticing the pervasiveness of controversy as a feature of the halakhic process. In addition, opponents of the oral law tradition point to the multiplicity of halakhic disputes as proof of their position that the oral law did not originate in revelation at Sinai but was created later by the halakhic sages themselves.⁴⁸

Despite this attack, the authorities of Jewish law are not overly self-conscious about the number of their differences of opinion, nor are they preoccupied by the need to reconcile controversy with the oral law tradition. They seldom regard the existence of controversy as a problem to be solved. For instance, the Talmud, a veritable storehouse of legal disputes, contains a few brief passages that treat controversy as a phenomenon,⁴⁹ but it does not record a sustained effort by the sages to explain or justify it. For later authorities who attempted to explain the existence of controversy, the Talmudic passages suggested a variety of approaches to the problem but not fully articulated solutions. Using the passages as springboards, these authorities selected themes from the Talmud and elaborated upon them to arrive at their own explanations. They did not all reach the same conclusion.

It is not surprising that halakhic authorities disagree over the correct explanation for disagreements in Jewish law. However, what is needed is not so much a uniform explanation for controversy as a convincing justification of it. Any explanation that does not legitimize the authorities of Jewish law and the procedures they use to accomplish their mission—particularly the halakhic controversy with its expression of a variety of dissenting points of view—creates as many problems for Jewish law as it solves, calling into question the conduct of the very individu-

48. See, e.g., SALMON BEN JERHAM (10th century), BOOK OF THE WARS OF THE LORD (original Hebrew title: SEFER MILHAMOT HA-SHEM), in KARAITES ANTHOLOGY: EXCERPTS FROM THE EARLY LITERATURE 71, 75-77, quatrains 2, 7, 9, 10-11, 13 (L. Nemoy trans. 1952):

I have looked again into the six divisions of the Mishnah/ and behold, they represent the words of modern men. . . . I have set the six divisions of the Mishnah before me. . . . And I saw that they are very contradictory in content,/ This one Mishnaic scholar declares a thing to be forbidden to the people of Israel, while that one declares it to be permitted. . . . I said, Perhaps one of the two did not know the right way While anon the scholars issue a decision,/ Agreeing neither with the one nor with the other, but contradicting both./ Had I been among them . . . I would not have accepted the words of these 'others' and 'scholars.'/ Rather would I have weighed the word of the Lord with them,/ And I would have judged accordingly every word which they had contrived. . . . Thine escape has been cut off by this argument, else answer me, if thou canst.

49. See, e.g., *infra* notes 66, 80, 105, 114 and accompanying text.

als who are responsible for the development, application and transmission of the law.

Parts II and III of this Article analyze the various proposed explanations from this perspective, in reverse order of acceptability. The solutions surveyed in Part II are unsatisfactory explanations for halakhic controversy because they disparage the performance of halakhic authorities and undermine the value of controversy and dissent in Jewish law. The minimizing approach is the worst offender in this regard, followed by explanations that attribute controversy to errors in the transmission of the oral law or historical events that befell the Jewish nation. Maimonides explained the origins of halakhic controversy without justifying its persistence. By contrast, the explanations presented in Part III defend controversy and dissent as legitimate phenomena and justify the conduct of authorities who generate halakhic disputes when they advocate dissenting legal positions. Part III will show why these are satisfactory solutions for the problem of controversy in Jewish law.

A. *The Minimizing Approach*

An attempt is sometimes made to minimize the importance of controversy in Jewish law. The purpose is to deflate the strength of the challenge to the oral law tradition that is posed by the multiplicity of halakhic disputes. The minimizers characterize halakhic controversies as nothing more than arguments over incidental details of the performance of the commandments.⁵⁰ They view these arguments as minor matters when compared with the fundamentals of Jewish law about which consensus exists. Instead, they argue that the wide areas of agreement about fundamentals of the law prove the reliability of the oral law tradition, while the areas of conflict over small details are insufficient to prove the reverse.

Some minimizers argue that halakhic controversies are more apparent than real and evaporate upon a correct understanding of the subject matter.⁵¹ Others dismiss the disputes as trivial matters, extrinsic to

50. See, e.g., ABRAHAM IBN DAUD (1110-c.1180), *THE BOOK OF TRADITION (SEFER HA-QABALLAH)* 3-4 (G. Cohen trans. 1967); DAVID NIETO (1654-1728), *MATEH DAN: KUZARI SHENI* 3, 5, 55-67 (1958) (in Hebrew); see also BENJAMIN DE VRIES, *MEVO LA'TALMUD U'LEHALAKHAH* 14-16 (1965) (adopting minimizing approach to explain halakhic controversies in Israeli textbook for high school students).

51. SAADIA BEN JOSEPH GAON (c. 882-942), *PERUSH RAV SAADIA GAON L'VERESHIT* 187-88 (M. Zucker trans. 1984) (Hebrew translation from Arabic of part of SAADIA BEN JOSEPH GAON, *PERUSH AL HA-TORAH* ("Commentary to the Torah")) (citing apparent controversies arising when, for purposes of debate, one sage contradicts another only to provoke him to clarify his position; or when two sages cite separate aspects of the same rule, so that one appears to permit in a case where the other would prohibit; or when two sages, each of whom has heard only part of a rule, recite that part as if it were the complete rule).

humanity's ultimate search for religious knowledge.⁵² Some denigrate the halakhic process by charging that halakhic authorities deliberately manufacture disputes to serve their own dialectical ends.⁵³ In this view, the authorities generate controversies to demonstrate their cleverness to each other while creating a body of law so complex and so arcane that their services become indispensable to the nation, since they are the only ones who can decipher the law and apply it.

The minimizing approach is not a satisfactory solution to the problem of controversy in Jewish law. Depicting the legal sages as quibblers over details, players of mind games, or pedants who intentionally make things difficult does not contribute to their stature. Nor does charging that they are preoccupied with matters that are incidental to humanity's ultimate quest for religious knowledge lead to an appreciation of their work.

The minimizing approach misrepresents the character and concerns of the halakhic process by focusing on consensus and slighting conflict. While there are areas of agreement among halakhic authorities, they tend to take them for granted. Instead, halakhic authorities direct their attention to the areas of controversy, the unsettled legal questions which comprise the essential focus of the halakhic process.

The minimizing approach makes a questionable distinction between fundamentals of the commandments, on the one hand, and incidental details, on the other. This distinction is a necessary prelude to characterizing the details as unimportant. But "details" are not unimportant in Jewish law, since fulfillment of halakhic duties generally requires as an initial matter observance of the details of performing the commandments. Details are so vigorously and often debated precisely because

52. *E.g.*, PROFAT DURAN (c. 1350-1415), MA'ASEH EFOD 6 (J. Friedlander ed. Hebrew year 5625) (arguing that those who claim humanity's highest objective is striving to know the Lord through an inquiry into His commandments do not have in mind the controversies recorded in the Talmud; in terms of attaining humanity's ultimate purpose, such controversies are a small matter).

I am indebted to I. TWERSKY, INTRODUCTION TO THE CODE OF MAIMONIDES, *supra* note 22, at 99 n.5, for suggesting the relevance to our topic of Duran's work and the other works that Professor Twersky lists in the cited note.

53. For example, Isaac Samuel Reggio made a characteristic statement of the charge: And anyone who has eyes to see can see that the purpose [of the post-Talmudic legal commentators] was not to get at the essentials of the law, but to initiate controversies, and to make points regarding disputes found in the Talmud, to contradict one of the parties and support the other. If you ask, who led them to trod this path? you will find the Talmud itself the reason for this, for what the Talmud did to the Mishnah, they sought to do to the Talmud. They worked day and night, not to answer questions raised by predecessors and to arrive at the legal conclusion, but to investigate [trivial matters, such as] what so-and-so's objection is based on and how he could have posed it in another manner, and why he posed his question in this language, and why he didn't utilize some other passage for support . . . All of the foregoing is called sophistry [Heb. *pilpul*] and many have already declaimed against this practice.

I. Reggio ("Yashar," 1784-1855), *Behinat Ha-Dat: Perush Ve-He'arot*, commentary and notes in ELIJAH BEN MOSES DEL MEDIGO (1460-1497), BEHINAT HA-DAT 34-35 (1833) (in Hebrew).

they are so important.⁵⁴

One proponent of the minimizing approach recognized that details are important and in doing so, inadvertently demonstrated the untenability of his own position. In the introduction to his book, David Nieto quoted with approval a passage from Abraham Ibn Daud, stating that the sages never disputed the fundamentals of the commandments, but only the incidental details.⁵⁵ Nieto also presents an example given by Ibn Daud to illustrate this point: The Mishnah opens with a dispute over the correct time for reciting the *Shema*⁵⁶ in the evening, but it records no controversy concerning the underlying duty to recite the *Shema*, so complete was agreement on that fundamental point.⁵⁷ Later in his book, however, Nieto uses the same example to prove the *necessity* of the oral law to provide details of the commandments and to defend the sages who argue over such details against the charge of hair-splitting:

We are obligated to read the *Shema* morning and evening, as it is written, 'You shall speak of them . . . when you lie down and when you rise up.' [Deut. 6:7] Now since the Torah has defined the time, we naturally must consider when morning and evening start and finish. We must know if morning begins when the morning star rises or at sunrise, and similarly if evening begins when the sun sets or when the stars come out. If so, this question is not extraneous but *necessary and fundamental* for [performing] the command of reading the *Shema*. On the contrary, without [answers to these questions] we would not know what to do.⁵⁸

If "details" are necessary and fundamental to performance, then the premise of the minimizing approach to controversy—that details do not matter much—is invalid.

Even if details were unimportant, it does not necessarily follow that controversy over details is itself a trivial matter. Controversy would be unimportant only if it occurred rarely and concerned few details. But in the actual state of affairs, halakhic sages have subjected to controversy virtually every "detail" of the law. These disputes over details occur despite the fact that *the function of the oral law was to supply the details*. The sheer weight of the number of controversies makes it impossible to

54. See, e.g., Wurzbarger, *The Oral Law and the Conservative Dilemma*, 3 TRADITION 82, 86-87 (1960) (emphasis added):

Because Traditional Judaism is committed to the divinely revealed law *in its totality*, it must object to the cavalier treatment accorded to the minutiae of the law. Alterations cannot be condoned on the ground that they allegedly affect not the essence but only relatively trivial details. Traditional Judaism cannot brook *any* departure from the divine will.

55. D. NIETO, *supra* note 50, at 3-4 (quoting A. IBN DAUD, *supra* note 50, at 3-4).

56. This prayer consists of the Biblical verses *Deuteronomy* 6:4-9, 11:13-21 and *Numbers* 15:37-41. See DAILY PRAYER BOOK 75-78 (P. Birnbaum trans. 1949). For the dispute in the Mishnah, see MISHNAH, *Berakoth* 1:1, at 2 (H. Danby trans. 1933).

57. D. NIETO, *supra* note 50, at 3-4 (quoting A. IBN DAUD, *supra* note 50, at 3-4).

58. D. NIETO, *supra* note 50, at 59 (emphasis added).

sidestep the issue by minimizing the significance of controversy as a phenomenon in Jewish law.

Finally, the minimizers' arguments implicitly threaten freedom of debate. If controversy is not important, then there is no reason to encourage it. If debating the "details" distracts attention from fundamental concerns, such debates ought to be limited. If dissenters are quibbling over incidental matters, then whether they are prevented or inhibited from speaking will not matter much. Arguments of this sort, if used to justify the imposition of limits on debate, endanger the vitality of the halakhic process.

In sum, the minimizers offer an unacceptable approach to controversy in Jewish law. Their arguments impair the stature of halakhic sages, underestimate the importance of details to the practice of Jewish law, and jeopardize freedom of debate. The weaknesses of the minimizers' positions require that a different approach be taken to explain controversy and justify the expression of dissent in Jewish law.

B. *Faults in the Chain of Transmission*

The most frequently suggested explanation of the phenomenon of halakhic controversy blames errors in the transmission of the oral law. An examination of the premises underlying this approach reveals its fundamental flaws.

1. *Blaming Weak Links in the Chain for Inadvertent Errors*

A legal system that is dependent upon oral transmission from one generation to the next is vulnerable to faults in the chain of transmission. An error may slip into the tradition, or an omission may cause a gap, and the effect may be compounded over the course of time. As a result, two or more alternative versions of the tradition may enter into circulation. In an extreme case, the original teachings may be lost completely and replaced by a debased and inauthentic substitute. The shortcomings of the weakest links in the chain of transmission jeopardize both the uniformity and the reliability of an oral tradition.⁵⁹

59. The discussion is limited to inadvertent errors, although an oral tradition may also be compromised by deliberately falsifying reports of what has been heard. The classical sources of Jewish law naturally stress the extreme fidelity of the teachers of the oral law to the formulations of their predecessors. See, e.g., TALMUD BAVLI, *Sukkah* 28a, at 122-23 (I. Slotki trans. 1938) (Rabbi Johanan ben Zakkai "never in his life said anything which he had not heard from his teacher . . . and so did his disciple R. Eliezer conduct himself after him."). The suggestion that intentional tampering may have occurred in the transmission of the oral law cannot be made from within the confines of the halakhic system, because such a possibility contradicts a constitutional principle on which the system is based—the trustworthiness of the rabbinic sages as witnesses to the contents of the oral law. See Cohen, *Introduction*, in A. IBN DAUD, *supra* note 50, at lviii (probity of oral tradition depends on probity of its bearers). When a critic levels such a charge from outside the halakhic system, there are two strong responses. First, the public nature of the transmission process

The difficulties of committing an entire body of knowledge to memory and then transmitting it intact over the course of centuries appear so obvious that the very notion of the oral law tradition may seem like a fable. But transmission errors should not be assumed merely because of modern skepticism about a person's capacity to memorize large quantities of data. The ancients engaged in learning by rote and actively cultivated the faculty of memory.⁶⁰

The earliest rabbinic sages, who were teachers as well as legal authorities, nevertheless recognized the vulnerability of the oral law tradition. They regarded forgetfulness as an obvious and serious source of potential problems. Each succeeding generation seemed capable of remembering less than its predecessors.⁶¹ Even a student with a good memory might be responsible for introducing an error into the chain of transmission. The student may simply misunderstand what the teacher said.⁶² Absence from the lecture hall or inattention to the lecture may cause a student to miss important points of law.⁶³ In addition, a national tragedy that distracts legal scholars from their labors may result in forgetting important laws. In a dramatic example, three thousand laws were forgotten during the period of mourning for Moses.⁶⁴

serves as a check against deliberate distortion. Second, the principle of majority rule reduces the risk of distortion, at least to the extent that the possibility of a conspiracy among a majority of the sages to falsify the tradition is deemed untenable. See, e.g., SAADIA BEN JOSEPH GAON, *THE BOOK OF BELIEFS AND OPINIONS* 157 (S. Rosenblatt trans. 1948); Zucker, *Le-Ba'ayat Ha-Mahaloket B'Masoret (The Problem of Controversy in Tradition)*, in 3 SALO WITTMAYER BARON JUBILEE VOLUME 319, 322-23 (1974) (in Hebrew).

60. See B. GERHARDSSON, *MEMORY AND MANUSCRIPT* 71-170 (E. Sharpe trans. 1961). He elaborates:

Knowing the basic text material in the oral Torah by heart is an elementary accomplishment, presupposed of every teacher and pupil at the more advanced stage [during the period of the Mishnah and Talmud]. . . .

To have the wording of the most important collections of texts at one's disposal [by heart] is in fact regarded by the Rabbis [of that period] as being nothing more than *elementary knowledge*.

Id. at 101, 106.

Where vestiges of the traditional system of learning persist, prodigious feats of memory are possible even today, and these evoke a sense of how the system might have operated in ancient times. See, for example, the report of a celebration that was held in Brooklyn, New York, on March 19, 1979, to honor 12-year-old Aron Bursztyn, winner of a national competition for the memorization of the Mishnah. Aron successfully committed to memory 1335 paragraphs of that work. The runner-up, Shalom Perl, also 12 years old, was reported to have "1,200 Mishnayot [paragraphs of the Mishnah] under his belt . . ." 13 *Jewish Observer* 39 (1979).

61. TALMUD BAVLI, *Eruvin* 53a, at 370 (I. Slotki trans. 1938) ("We, said R. Ashi, are like a finger in a pit as regards forgetfulness.").

62. E.g., TALMUD BAVLI, *Shebu'oth* 26a, at 140 (A. Silverstone trans. 1935). For discussion of this passage, see *infra* note 72.

63. E.g., TALMUD BAVLI, *Bezah* 24b, at 126 (M. Ginsberg trans. 1938) (reporting that Levi was absent from a lecture when Rabbi Judah retracted a point of law he taught the previous day, causing Levi later to state the law incorrectly and maintain the position that his teacher had retracted).

64. TALMUD BAVLI, *Temurah* 15b-16a, at 107, 109 (L. Miller trans. 1948); see also *id.* 16a, at

The question is whether the pitfalls of the oral tradition, which may have plagued individual students, also beset the system as a whole, persisting over time and impairing the uniformity of the oral law itself. Some authorities say the answer must be yes,⁶⁵ based on their interpretation of a report in the Talmud concerning the students of Hillel and Shammai in the first century. The report, attributed to Rabbi Jose, states: "When there increased the students of Shammai and Hillel who did not sufficiently attend [upon their teachers], controversies increased in Israel and the Torah became like two Torahs."⁶⁶

The report completely lacks details. It does not identify the students of Hillel and Shammai by name, state how their attendance on their teachers was insufficient, describe how this led to a multiplication of controversies, or give any examples of the controversies that resulted. The authorities who cite the report to explain the origins of controversy in Jewish law therefore must combine the report with the general pedagogic concerns expressed by the rabbinic sages in *other* contexts.⁶⁷ Based on this synthesis, they allege a nexus between insufficiently attending upon teachers and the origins of halakhic controversy. Impatient students leave the tutelage of their rabbis before having mastered their lessons. They are prone to forgetfulness. Their formulations tend to be inexact. They may have remained long enough to hear the fundamentals of the laws but not the details. They may have been present when general rules were expounded but left before the exceptions were stated. They will mistake their partial knowledge of the oral law for complete knowledge. If they recognize gaps in their learning, they may fill them in from unreliable second-hand sources. Naturally they will engage in disputes with each other and with their better trained colleagues who attended longer

110 (listing other conclusions, analogies, and specifications forgotten during the period of mourning for Moses).

65. *E.g.*, RABBI JAIR HAYYIM BACHARACH (1639-1702), HAVVOT YA'IR, Responsum No. 192, at 103a, (1894); D. NIETO, *supra* note 50, at 62-63; Zucker, *supra* note 59, at 319 (citing fragment of a medieval manuscript that author attributes to the 10th century authority, Rabbi Jacob ben Ephraim).

66. TALMUD BAVLI, *Sanhedrin* 88b (author's translation); *see also* TALMUD BAVLI, *Sanhedrin*, at 586 (H. Freedman trans. 1935) ("But when the disciples of Shammai and Hillel, who [the disciples] had insufficiently studied, increased [in number], disputes multiplied in Israel, and the Torah became as two Torahs.").

The sentence concerning the students appears in the body of a larger report by Rabbi Jose concerning the resolution of conflicts by the High Court of Jerusalem. *See also* TOSEPHTA, *Sanhedrin* 7:1, *Hagigah* 2:9, *supra* note 17, at 425, 235 TALMUD YERUSHALMI, *Sanhedrin* 1:4, at 8b (alternative versions of Rabbi Jose's report containing small variations in language). The sentence concerning the students also appears in Talmudic literature as an independent passage, separately from Rabbi Jose's report. TOSEPHTA, *Sotah* 47b, at 321; TALMUD YERUSHALMI, *Hagigah* 2:2, at 10b; TALMUD BAVLI, *Sotah* 47b, at 253 (A. Cohen trans. 1936). On the Talmud Yerushalmi (Jerusalem Talmud), *see supra* note 14.

67. *See supra* notes 61-64 and accompanying text.

upon their teachers, heard more, and retained what they heard.⁶⁸

Under this explanation for the origins of controversy in Jewish law, the aim of the halakhic process is to sift through the mass of opinions, sort out the erroneous viewpoints from the authentic ones, and attempt to reconstruct the laws that have been distorted or lost in the process of transmission. The archetypal sage is Othniel ben Kenaz, who through the strength of his dialectical powers was able to restore 1,700 *a fortiori* arguments, linguistic analogies, and scribal tabulations that were forgotten during the period of mourning for Moses.⁶⁹ His work serves as a model for all subsequent scholars of Jewish law, for their primary function, in this view, is to restore the oral law to its original, pristine condition.

2. *Shortcomings of the Weak Link Theory*

While highlighting the very real difficulties of preserving an oral tradition intact, the theory that weak links in the chain of transmission are responsible for controversy in Jewish law has fundamental shortcomings. First, it assumes that the rabbinic sages either took no steps to remedy the situation or that their actions were ineffectual. Yet the same sources that reveal the sages' awareness of the problems also disclose their ways for overcoming these problems. The Talmud recommends strong measures to combat forgetfulness.⁷⁰ Instruction in the oral law was conducted publicly, in small groups or larger assemblies, and a painstaking, repetitious procedure for transmitting the oral law was instituted in earliest times.⁷¹ Students and teachers engaged in a considerable amount of give and take which afforded many opportunities to uncover problems, clarify ambiguous points, and resolve contradictions.⁷² When conditions finally

68. See *supra* note 65 for citations to the authorities whose arguments are summarized in this paragraph.

69. TALMUD BAVLI, *Temurah* 16a, at 110 (L. Miller trans. 1960); see also E. DEL MEDIGO, *supra* note 53, at 37-38 (Del Medigo's text and Reggio's accompanying commentary).

70. E.g., TALMUD BAVLI, *Erubin* 53a, 54a, 54b, at 370, 374, 383 (I. Slotki trans. 1938) (recommending students use exact language in their formulations of the oral law, employ mnemonic devices, and repeat lessons four hundred times, if necessary, in a loud, clear voice and not in an undertone).

71. See TALMUD BAVLI, *Erubin* 54b, at 381-82 (I. Slotki trans. 1938) (describing laborious procedure employed to transmit oral law from Moses to Aaron, the elders and the people); see also Baumgarten, *Form Criticism and the Oral Law*, 5 J. STUDY OF JUDAISM IN PERSIAN, HELLENISTIC & ROMAN PERIOD 34, 36-37 (1974) (suggesting that procedure for transmitting the oral law attributed to Moses reflects method of teaching oral law that rabbinic sages used in Mishnaic times).

72. A proponent of the weak-link theory cites the following incident, reported at TALMUD BAVLI, *Shevu'oth* 26a, at 140 (A. Silverstone trans. 1935), to illustrate misunderstanding as a cause of controversy:

As the case of R. Kahana and R. Assi: when they rose from [the lecture of] Rab, one said, "I swear that thus said Rab," and the other said, "I swear that thus said Rab." When they came [again] before Rab, he would agree with one of them; then the other would say to him, "Did I, then, swear falsely?" He would reply to him, "Your heart deceived you."

threatened to break the chain of transmission, the sages committed the oral law to writing.⁷³

Second, if serious and widespread forgetfulness went unchecked, the probable result would have been the disappearance of the oral law tradition, not the scrupulous maintenance of a debased version of the tradition. It seems unlikely that those students who were forgetful, inattentive or frequently absent were the ones who went on to become teachers of the oral law and to occupy important positions as links in the chain of transmission. On the contrary, the ideal teacher was praised for being the first to arrive at the academy in the morning and the last to leave at night and for never sleeping or even dozing at his post.⁷⁴ Absent direct evidence that students' problems in mastering the oral law went unchecked and pervaded the system, impairing the body of the oral tradition itself, the weak link theory fails to account adequately for the pervasiveness of controversy in Jewish law.

Third, attributing controversy to faults in the chain of transmission is objectionable because it injures the reputation of the rabbinic sages.⁷⁵

Zucker, *supra* note 59, at 322. In fact, the incident demonstrates the reverse—how students sought and received immediate clarification from their teacher to dispel an error and eliminate a controversy *before* it could cause a problem in the transmission of the oral law. See also TALMUD BAVLI, *Berakoth* 27b, at 166-67 (M. Simon trans. 1958) (reporting case of student who approached two teachers privately to seek an answer on a point of law and received contradictory answers; he was told by the second to wait until the scholars gathered in their assembly when the question would be discussed and resolved publicly).

73. When the sages committed the oral law to writing is a subject of controversy. See H. STRACK, *INTRODUCTION TO THE TALMUD AND MIDRASH* 18-20 (1931) (listing one group of authorities, including Maimonides, who maintain the commission of the oral law to writing occurred at the end of the 2nd century, when Rabbi Judah Hanasi compiled the Mishnah and reduced it to writing, and a second group of authorities, including Rashi, who hold the oral law remained oral until the 6th century when the Talmud was redacted by the scholars known as *Savora'im*). In addition, some authorities believe the learning process was not completely oral, *even before* the compilation of the Mishnah. *E.g.*, M. MAIMONIDES, *MISHNEH TORAH: THE BOOK OF KNOWLEDGE* 2b (M. Hyamson trans. 1965) (teachers and students of the oral law transcribed personal notes which they consulted in private as an aid to retention); see also H. STRACK, *supra*, at 12-20; B. GERHARDSSON, *supra* note 60, at 157-63.

74. TALMUD BAVLI, *Sukkah* 28a, at 122 (I. Slotki trans. 1938) (referring to Rabbi Johanan ben Zakkai).

75. Maimonides rejected the explanation for this reason. M. MAIMONIDES, *MISHNAH IM PERUSH RABBENU MOSHE BEN MAIMON* (J. Kafah ed. 1963) (in Hebrew) (explanation which attributes controversies of the sages to their errors, forgetfulness, or inattentance upon their teachers "is debased, exceedingly strange and absolutely incorrect; it does not accord with general principles; it casts aspersions on the men from whom we received the Torah; and it is a complete nullity"). For Maimonides' explanation, see *infra* notes 92-104 and accompanying text.

In his monumental Responsum Number 192, Jair Hayyim Bacharach marshalled an extraordinary number of arguments and texts from rabbinic sources to refute Maimonides' position and to show that forgetfulness did play a role in the transmission of the oral law. Bacharach was not enamored of forgetfulness, but he felt compelled by the sources he cited to acknowledge its role:

It was Maimonides' intention to place a fence around forgetfulness . . . Would that we could strengthen it and establish it! . . . But in my humble opinion, it is impossible to escape from saying that forgetting did occur, whether in the explanation of Scriptural

Although the halakhic authorities of each generation have the important task of restoring the oral law to its initial condition, their predecessors are claimed to be the weak links in the chain who made the arduous labor necessary. Arguing that the earlier sages were only human and that a certain amount of slippage was to be expected does not avoid the negative implications. The rabbinic sages should have used whatever extra degree of care was necessary to safeguard intact the oral law that was placed in their charge. Further, the quantum of controversy would indicate a vast amount of forgetting, inattentiveness, and neglect, and not a small measure of slippage.

In addition, the explanation undermines confidence in the reliability of the oral law. If controversies originate in faults in the chain of transmission, then at least one party to each halakhic controversy must be proposing a rule that does not accord with the original contents of the oral law. It is also possible that the original rule has been lost so that all sides to the dispute are defending corrupt rules. For controversy to exist, these corrupt rules must be indistinguishable in appearance from authentic rules and equally supportable by proofs from Scripture. What certainty, then, is there that the controversy will be resolved by restoring the authentic rule? Some reassurance is possible if the majority of the sages are a party to the dispute and their position prevails, as a majority is less likely to have fallen into error than an individual. But on occasion an individual's view prevails over that of the majority;⁷⁶ on other occasions, a controversy is between only two individuals. Arguments against reliability are especially strong in these cases. The halakhic authority who adopts the weak link theory while maintaining the reliability of the oral law tradition advocates positions that are internally inconsistent.

Finally, the weak link explanation jeopardizes the legitimacy of dissent in Jewish law. In general, when a party to a halakhic controversy argues that an opponent's position is "wrong," he means either that it is

verses, or in the application of rules of interpretation, whether in matters referred to by our sages as "laws received by Moses from Sinai" or in all the other details of the laws recorded in all six orders [of the Mishnah and Talmud.]

J. BACHARACH, *supra* note 65, at 102a-b.

In viewing the issue from within the four corners of the rabbinic texts that discuss forgetfulness, Bacharach failed to address Maimonides' basic point—that we *cannot* accept faults in the chain of transmission as an explanation for controversy because the explanation shakes the foundations for allegiance to the oral law. The explanation cannot be reconciled with faith in the excellence and trustworthiness of the sages nor with submission to the halakhah as reliable, authentic, and authoritative. Hence, Maimonides' criticism that the explanation attributing controversies of the sages to their errors, forgetfulness, or inattentance upon their teachers "does not accord with general principles; it casts aspersions on the men from whom we received the Torah . . ." M. MAIMONIDES, *supra*, at 11.

76. *E.g.*, TALMUD BAVLI, *Abodah Zarah* 7a, at 29-30 (A. Mishcon trans. 1935); *id.*, *Yebamoth* 108a, at 748 (I. Slotki trans. 1936); *see also* 9 ENCYCLOPEDIA TALMUDIT, *Halakhah* 241, 259-60 & nn. 258-64 (1959) (in Hebrew).

unpersuasive in its reasoning (Heb. *sevarah*) or unsupported by proof-texts (Heb. *ra'ayot*). But if faults in the chain of transmission are responsible for differences of opinion, then the range of permissible counterarguments is expanded. One may charge that an opponent's position is "wrong" because it is debased, inauthentic, or corrupt, while maintaining that one's own position is the "true" one, correct and authentic. The frame of reference for halakhic controversy has been altered in a subtle but important way. Authoritativeness has become a question of pedigree and authenticity rather than logic and persuasiveness, with predictably negative consequences for the position that is rejected as "corrupt."⁷⁷ Arguments of this sort do not create an environment tolerant of vigorous expression of dissenting points of view.

Thus, attributing controversy to faults in the chain of transmission is an explanation that undermines the esteem of the sages, the reliability of the oral law, and the legitimacy of dissent. It does a great deal more harm than good and must be rejected.⁷⁸

77. Jewish law has a genuine antipathy to characterizing the legal position of any halakhic authority as corrupt or incorrect, preferring to explain halakhic controversies in a manner that permits all the positions to be right, depending on the circumstances. See, e.g., TALMUD BAVLI, *Ketuboth* 57a, at 336 (S. Daiches and I. Slotki trans. 1936) ("[It is preferable to assume] that two Amoraim [legal sages of the Talmud] differ in their own opinions rather than that two Amoraim should differ as to what was the view of another Amora.") and Rashi's accompanying commentary in Hebrew editions of the Talmud, beginning with the words *Ha Kamashma Lan*:

When two authorities disagree about what another authority said, one of them saying, "Thus said so-and-so," while the other claims, "Thus said so-and-so," one of them must be incorrect. But when the two authorities disagree in their own opinions about a decision or about whether a matter is prohibited or permitted, each one saying for himself "This reasoning seems more logical," neither of them is necessarily incorrect. Each one gives his own reasons, one finding a reason to permit, the other finding a reason to prohibit. The first authority reasons by analogy this way, the other reasons by analogy in a different way. [In such cases] it can be said that both [views] are the words of the living God. On some occasions, the reasoning of the first will apply; on other occasions, the reasoning of the second will apply; for the [appropriate] reasoning changes with small changes in external circumstances.

78. To explain Rabbi Jose's report concerning the students of Shammai and Hillel, see *supra* note 66 and accompanying text, one does not have to concede the existence of errors in the chain of transmission. The report does not expressly mention forgetting, inattentiveness, or any other fault in the chain of transmission as the reason for the multiplication of legal disputes. Rather, the students are said to have "insufficiently attended on" their teachers (Heb. *lo shimshu kol tzarkhan*). The meaning of the phrase is best understood in light of the fact that Jewish law has never been treated as a purely academic discipline. In the times of the Mishnah and Talmud, Torah studies included a sort of apprenticeship. In addition to listening to his lectures, students spent time outside the academy in their teacher's presence, observing his behavior, learning customs, manners and deportment, and rendering personal services to him. In its primary meaning, attending on a teacher refers to these apprenticeship aspects of the process. As a secondary meaning, "attendance" came to encompass the entire educational process, academics as well as apprenticeship. See L. GINZBERG, *supra* note 14, at 247-48 n.13 (discussing two meanings of "attendance on the sages"); G. ALON, *supra* note 7, at 476-78; M. AUERBACH, *HA-HINUKH HA-YEHUDI BI-TEKUFAT HA-MISHNAH VEHA-TALMUD* 96-110 (1982) (in Hebrew) (describing attendance on the sages).

The students of Shammai and Hillel who attended insufficiently on their teachers were not deficient in *learning* or in their ability to retain the oral law. See TALMUD BAVLI, *Sukkah* 28a, at

C. Controversy as a Historical Phenomenon

Although the development of Jewish law is intertwined with the course of Jewish history, halakhic authorities seldom seek historical explanations for the origin and evolution of a rule of law. Their approach to the principles of Jewish law is conceptual, dogmatic, and analytical, rather than historical.⁷⁹ Yet in their attempts to explain the origins of controversy, some have focused on historical circumstances to an uncommon degree and display a willingness to cite them as the causes of controversy or as contributing factors.

There are two reasons for this unusual attention to history. First, the period of the proliferation of controversy, roughly the first century, coincides with three of the most important events in Jewish history: the destruction of the Jewish state, the abolition of the High Court in Jerusalem, and the destruction of the Second Temple. These historical events had enduring significance for the nation. They preoccupied halakhic authorities who made discovering their meaning a central con-

123 (I. Slotki trans. 1938) (Hillel had eighty students—thirty who were as worthy as Moses, thirty who were as worthy as Joshua, and only twenty who were ordinary). Rather, their shortcomings were in the realm of *conduct and deportment*. Their great teachers knew when it was appropriate to make a legal concession to end a legal controversy:

And why do they record the opinions of Shammai and Hillel when these do not prevail?
To teach the generations that come after that none should persist in his opinion, for lo,
"the fathers of the world" [i.e. Shammai and Hillel] did not persist in their opinion.

MISHNAH, *Eduyoth* 1:4 (H. Danby trans. 1933). In addition, Hillel and Shammai were men who loved peace. *Id.*, *Aboth* 1:12, 1:15 (Hillel taught, "Be of the disciples of Aaron, loving peace and pursuing peace," and Shammai taught, "[R]eceive all men with a cheerful countenance"). By contrast, their students failed to absorb the peace-loving attitudes of their teachers and carried scholarly disputes to the point of bloodshed. TALMUD YERUSHALMI, *Sabbath* 1:7, at 3c. Their intransigence was a character fault they should have overcome in the course of attending on their teachers by emulating their conciliatory conduct.

The result of the students' failure was the creation of two distinct factions. (The version of the report in TALMUD YERUSHALMI, *Hagigah* 2:2, at 10b, states this expressly—the students of Shammai and Hillel divided into two factions [Heb. *kitot*].) Previously, the sages had coalesced into ad hoc blocs regarding each legal controversy as it arose, and the blocs dissipated once the controversy was resolved. After Hillel and Shammai, however, their students formed enduring parties that had an institutional life and took a position on every controversial point of law. A chasm of unresolved legal issues divided them. With neither side willing to yield and each side maneuvering to prevent unfavorable votes, the issues remained unresolved for several generations, until the assembly of sages met in Yavneh after the destruction of the Jewish state. TOSEPHTA, *Eduyoth* 1:1, *supra* note 17, at 454. Understood in this light, Rabbi Jose's report is not an explanation for the origins of halakhic controversy, as proponents of the weak-link theory argue, but rather an explanation for the appearance of *factions* in Jewish law. See J. BACHARACH, *supra* note 65, at 102a-b (interpreting the term "controversy" in the report to mean "factional strife"); for a further discussion of his view, see *infra* note 89.

79. See Rackman, *Halakhah: Orthodox Approaches*, in ENCYCLOPAEDIA JUDAICA YEARBOOK 134, 142 (1976) (suggesting historical approach as alternative to analytical approach typical of halakhic authorities); Jackson, *History, Dogmatics, and Halakhah*, in JEWISH L. ANN. 1 (Supp. II 1980) (suggesting historical approach to study of Jewish law).

cern. The quest naturally included attempts to relate these events to the contemporaneous emergence of controversy in Jewish law.

Second, the classical sources of Jewish law, such as the Talmud, depict controversy itself as a historical phenomenon. They do not suggest it always existed in its present form but instead portray its emergence and evolution over time. For example, the Jerusalem Talmud contains a capsule history of controversy in Jewish law.⁸⁰ In olden times, it relates, just one legal controversy existed in Israel, and it concerned a rule of ritual procedure—whether one performed the ceremony of laying on of hands on the festival sacrifice in the Temple. Judging from the parties to the controversy, who are identified in the Mishnah,⁸¹ one can infer that the controversy was both early, starting around 140 B.C.E., and longstanding, remaining unresolved for at least five generations. Hillel and Shammai introduced the next phase in the history of controversy; they increased the number of halakhic disputes to four. In addition to continuing the conflict over the laying on of hands, they added three additional disputes.⁸² The students of Hillel and Shammai initiated the third phase in the history of controversy with over three hundred legal disputes between their respective schools. This phase, characterized by the vast increase in the incidence of halakhic conflicts, continues at the present time. The Talmud anticipates a fourth and final phase when the Son of David will come to restore the legal harmony that existed in olden times. Because the Talmud thus recognizes controversy as a historical phenomenon, halakhic authorities feel free to seek explanations in the political and social environment in which the legal system operates.

Historical circumstances may be included in an explanation for controversy in one of two ways. First, they may serve as an adjunct to the theory that faults in the chain of transmission are responsible for differences of opinion.⁸³ Difficult times, persecution, and exile decrease the number of legal scholars, explain their inability to remain for extended periods at their studies, account for inattentiveness, and act as a catalyst for forgetfulness.⁸⁴ This approach not only *explains* why faults occurred

80. TALMUD YERUSHALMI, *Hagigah* 2:2, at 10b; see also MENAHEM BEN SOLOMON LE-BEIT MEIR ("Meiri," 1249-1306), BEIT HA-BEHIRAH, *Avot* 20-27 (B. Pereg ed., Hebrew year 5724) (surveying history of transmission of the oral law in an account that closely tracks the Jerusalem Talmud's account).

81. MISHNAH, *Hagigah* 2:2 (H. Danby trans. 1933).

82. See *id.*, *Eduyot* 1:1-3; TALMUD BAVLI, *Shabbath* 15a, 17a, at 60-63, 69-71 (H. Freedman trans. 1938).

83. See *supra* notes 59-78 and accompanying text.

84. See RABBI ISAIAH BEN MALI DI TRANI ("Tosafot Rid," c. 1180-1250), SEFER TOSAFOT RID, *Shabbath* 138b, at 9b (1861), cited in D. HALIVNI, MIDRASH, MISHNAH, AND GEMARA: THE JEWISH PREDILECTION FOR JUSTIFIED LAW 45-46 (1986) (when persecutions increased, students were unable to remain at their studies as required, and legal doubts and controversies proliferated); J. BACHARACH, *supra* note 65, at 103a (after Hillel and Shammai, exiles and troubles increased and

in the chain of transmission, but to a large extent *excuses* the legal scholars who allowed them to occur. The scholars' deficiencies become understandable in light of the conditions they had to endure. Their personal shortcomings were not responsible for the resulting problems.

Alternatively, historical factors may provide a complete explanation for the origins of controversy, without any reference to faults in the chain of transmission. In this view, there is nothing inherent in the study of the commandments or in the oral form of the tradition that predisposes the halakhic process to generate legal disputes. However, ever since the destruction of the Jewish state, and occasionally even earlier,⁸⁵ the Jewish legal system has been compelled by external forces to operate under abnormal conditions. These conditions, which include exile from the land and the loss of political independence, make controversy inevitable. The dispersion of the people and their legal sages to the many centers of the diaspora makes communication difficult and militates against consensus. In addition, each diaspora center has developed its own approach to the study of the Talmud, and each scholar charts his own path. With the style of analysis varying so radically from place to place, it is not surprising that contradictory conclusions of law develop.⁸⁶

Historical circumstances are responsible for another aberration in the Jewish legal system which has left a legacy of halakhic controversy: the decision to commit the oral law to writing to protect it from being forgotten during harsh times. Originally, when a difference of opinion arose, either the sages worked toward a consensus or the High Court resolved the issue by a vote and that was the end of the conflict. The final decision was added to the body of the oral law and transmitted, but the arguments of the parties to the dispute were not preserved. When, however, the sages reduced the oral law to writing in the Talmud, they transcribed the arguments of all sides for posterity. In this sense, writing

so did controversy caused by forgetting); D. NIETO, *supra* note 50, at 63-65 (harsh conditions created by two unsuccessful revolts against the Romans during the first two centuries prevented students from spending a long time at their studies; they concentrated on mastering the fundamentals, never having the time to learn the details; subsequent attempts to derive the details through logic or reasoning led to controversies).

85. See, e.g., Z. CHAJES (1805-1855), *THE STUDENT'S GUIDE THROUGH THE TALMUD* 114 (J. Shachter trans. 2d ed. 1960) (Hebrew title, *MEVO HA-TALMUD*) (exile of legal scholars around 140 B.C.E., pursuant to decrees of Syrian king Antiochus IV, prevented High Court from assembling to ascertain majority's view, resulting in continuance of controversy over the laying on of hands on the heads of sacrifices). Chajes acknowledges here a major problem confronting the historical explanation: the fact that some legal disputes, although few in number, existed earlier than the abolition of the Jewish state in the year 70. These include the four disputes between Hillel and Shammai, see *supra* note 82 and accompanying text, and several others. See Z. CHAJES, *supra*, at 115-16. His solution is to identify a distinct historical cause for the early disputes: the "exile of scholars" two centuries before the loss of political independence.

86. E. DEL MEDIGO, *supra* note 53, at 36 (text by Del Medigo and accompanying commentary by Reggio).

perpetuated the controversy indefinitely into the future. Further study and dissection of the recorded arguments by future generations of scholars led to even more controversies. This snowball effect is plainly evident in the commentaries and supercommentaries on the Talmud.⁸⁷

The disintegrative effects of the exile are compounded by the absence of the central organs of Jewish sovereignty, particularly the High Court of Jerusalem. Without an acknowledged authority to decide legal questions with finality, not only are disputes more likely to arise, but they are more likely to remain unresolved over time. In this vein, Maimonides wrote in his code:

So long as the Supreme Court was in existence, there were no controversies in Israel

After the Supreme Court ceased to exist, disputes multiplied in Israel: one declaring "unclean," [sic] giving a reason for his ruling; another declaring it "clean," giving a reason for his ruling; one forbidding, the other permitting.⁸⁸

However profound the impact of history on the development of Jewish legal institutions, the historical approach must be rejected as an unsatisfactory method of explaining the origins of controversy in Jewish law. Because the historical approach necessarily entails a consideration of beginnings and ends, its proponents cannot avoid arriving at an unduly harsh comparison between an idealized past and future, on the one hand, and the current state of affairs, on the other. Such a comparison undermines the value of dissent in Jewish law. If controversy commenced at a certain point in Jewish history, then it must have been

87. *Id.* at 35-36; see also M. MAIMONIDES, *THE GUIDE FOR THE PERPLEXED*, Part I, ch. 71, at 108 (M. Friedlander trans. 2d ed. 1956) (keeping the oral law unwritten "averted the evils which happened subsequently, viz., great diversity of opinions, doubts as to the meaning of written words, slips of the pen, dissensions among the people, formation of new sects, and confused notions about practical subjects."); 3 JOSEPH ALBO (c. 1380-1444), *SEFER HA-IKKARIM*, ch. 23, at 202-03 (I. Husik trans. 1946) (written word is inherently subject to divergent interpretations; writing of Mishnah and Talmud created doubts and controversies, requiring many commentaries to resolve them).

88. M. MAIMONIDES, *MISHNEH TORAH*, *Rebels* 1:4, *supra* note 9, at 139-40. According to the commentaries of Joseph Caro, David Ibn Abi Zimra, Abraham Di Boton, and Nahum Ash, which are printed in standard Hebrew editions of Mishneh Torah alongside Maimonides' text, Maimonides' source is the report of Rabbi Jose. That report attributes the increase in controversies to students of Shammai and Hillel. See *supra* notes 65-66, 78. Yet the substance of Maimonides' account differs from all four versions of Rabbi Jose's report. Maimonides does not mention these students but instead cites the abolition of the Supreme Court. He thus substituted a neutral historical explanation for one that blames controversy on weak links in the chain of transmission. See D. HOFFMAN, *THE FIRST MISHNAH AND THE CONTROVERSIES OF THE TANNAIM* 79-82 (P. Forchheimer trans. 1977) (suggesting that sentence regarding students of Shammai and Hillel is an interpolation in Rabbi Jose's report from another source, in which case Maimonides, by eliminating the sentence, restored both the original version of R. Jose's report and its internal consistency.) On Maimonides' reasons for rejecting an explanation premised on faults in the chain of transmission, see *supra* note 75.

preceded by a primeval epoch in which the legal system operated without differences of opinion.⁸⁹ Similarly, if the emergence of halakhic disputes was a consequence of the tumultuous events that led to the loss of political independence and the abolition of the High Court, then the promised restoration of the state and the Court, when realized, will be accompanied by a return to the original state of affairs, including the elimination of controversy as a phenomenon in Jewish law.⁹⁰

But to posit a controversy-free past, and to hope for a future free of legal disputes, disparages the disputatious operation of the halakhic process in the interim. The historical approach depicts halakhic controversy and dissent as undesirable aftereffects of the national catastrophe, in the same lamentable class of events as the destruction of the Temple and the exile of the people from their land. In addition, the historical explanation provides a basis for disparaging the entire subsequent course of development of Jewish law in the period of the exile. The proliferation of

89. It is difficult to imagine any legal system without controversy, however simple the society and whatever the degree of consensus. Cf. BENJAMIN DE VRIES, *MEHKARIM BE-SIFRUT HA-TALMUD* 172-78 (1968) (interpreting Rabbi Jose's report and concluding that, while controversy may have been kept to a minimum in certain periods, it was never completely absent).

Not all proponents of the historical approach believe that the Jewish legal system once operated without controversy. See, e.g., Z. CHAJES, *supra* note 85, at 114-16 (finding references in the Talmud to ancient legal disputes that predated the destruction of the state; interpreting the term "controversy," as used in Rabbi Jose's report, to mean a dispute that persisted unresolved from generation to generation, thus allowing for any number of early disputes that were quickly resolved but whose details have not been preserved); J. BACHARACH, *supra* note 65, at 102a-b (concluding that legal disputes were present almost from the beginning of Jewish history, at least as early as the period of mourning for Moses when some laws were forgotten). Bacharach reconciles his view with Rabbi Jose's report of "controversy" by interpreting the report to describe the origins of factions in Jewish law. Thus, he concludes, while legal disputes were present almost from the beginning of Jewish history, factional strife—the existence of organized parties arrayed against each other and preventing final rulings on disputed points of law—was a late development.

The version of Rabbi Jose's report in the Babylonian Talmud acknowledges the existence of some conflicts of opinion in early times: "Originally there were *not many* disputes in Israel . . ." TALMUD BAVLI, *Sanhedrin* 88b, at 585 (J. Shachter & H. Freedman trans. 1935) (emphasis added). But the three other versions of his report posit unanimity prior to the students of Shammai and Hillel: "In olden times, there were *no* controversies in Israel . . ." TOSEPHTA, *Hagigah* 2:9, *Sanhedrin* 7:1, *supra* note 17, at 235, 425; TALMUD YERUSHALMI, *Sanhedrin* 1:4, at 8b (emphasis added). For a possible explanation of this discrepancy, see Weiss, *L'She'elat Tiv Ha-Bet Din shel Shivim Ve-Ehad*, in LOUIS GINZBERG JUBILEE VOLUME 189 (1946) (Hebrew volume) (suggesting that version in Babylonian Talmud reading "not many disputes" is an emendation of an earlier version which read "no disputes" to allow for the ancient dispute over the laying on of hands on the heads of sacrifices). The fact that Maimonides, in his code, adopted the Jerusalem Talmud's version of no previous controversy may indicate that he had reservations regarding the wording in the Babylonian Talmud. See *supra* text accompanying note 88; see also NAHUM ASH, TSIYUNEI MAHARAN, *Mishneh Torah: Mamrim* 1:4.

90. MISHNAH, *Eduyoth* 8:7 (H. Danby trans. 1933) (statement of Rabbi Simeon that Elijah the Prophet will come "to bring agreement where there is matter for dispute"); TALMUD YERUSHALMI, *Hagigah* 2:2, at 10b (situation prior to proliferation of controversies will be restored "when the Son of David comes"). But see MISHNAH, *Aboth* 5:17 ("Any controversy that is for God's sake shall in the end be of lasting worth . . . Which controversy was for God's sake? Such was the controversy of Hillel and Shammai.").

halakhic disputes in the centuries after the destruction, in this view, is not evidence of a flourishing legal culture. Rather, it indicates that the deterioration of the legal system that followed the loss of statehood was never stanchd in the diaspora but continued at a rapid pace. Treating controversy as a historical phenomenon clearly fails to supply the justification for halakhic controversy and dissent that an adequate explanation should provide for law that sustains Jewish people.

Whether the exile in fact caused a "deterioration" in the study of Jewish law or the development of its institutions cannot be answered definitively. Since there is no way to know how the institutions of Jewish law would have evolved in an independent state, it is impossible to compare empirically the actual development of Jewish law in the diaspora with the course it would have taken if the loss of political independence had not occurred. Any purported comparison is no more than a subjective evaluation of what did develop against an ideal and speculative standard. It is certain that *specific* periods of *intense* persecution in the exile, whether the Crusades, the expulsion from Spain in 1492, or the Holocaust, severely inhibited the study of Jewish law in certain places for limited periods. But apart from instances of this type, the long expanse of history since the loss of statehood in the year 70 yields little evidence of the forgetting, lack of concentration, and inattendance upon teachers that the historical approach posits as inevitable consequences of exile, harsh conditions and troubled times. Instead, most evidence suggests a remarkable devotion to the study of Jewish law which sustains the people. A wide variety of diaspora centers, from Babylonia to Europe, from North Africa to North America, support intensive legal activity and produce a prodigious literary output that includes the Talmud, codes, responsa and their commentaries. Z. H. Chajes, in the first half of the nineteenth century, could write, with justice, that "although we have been subject to constant persecutions and wanderings for almost 1,800 years, we have, thank God, only increased our knowledge of His Torah, so that it adorns us like a crown."⁹¹ The premiss underlying the historical approach, that the study of Jewish law has deteriorated as a result of harsh historical events that befell the nation, is an unnecessary price to pay for an explanation of the origins of controversy.

D. Controversy as Inevitable but Regrettable

The two preceding explanations share a common feature. Each believes Jewish law without dissent is possible and preferable to the current state of affairs. If faults in the chain of transmission are responsible for controversy, then to the extent the chain of transmission can be

91. Z. CHAJES, *supra* note 85, at 46.

improved, differences of opinion will decrease. If weak links could be eliminated entirely, then controversy and dissent would disappear. Similarly, if historical or political factors are responsible, then reinstatement of central halakhic authority would end the dissension that has characterized the halakhic process since the abolition of the High Court. Explanations of this type delegitimize the operation of the halakhic process by repudiating the value of its inajor component, the halakhic controversy. A satisfactory explanation would recognize, first, that the halakhic process cannot operate without generating dissent, and second, that even if the elimination of dissent were possible, it would not be desirable.

Maimonides offers an explanation that fulfills the first requirement, but not the second.⁹² In the introduction to his commentary on the Mishnah, he classifies the contents of the oral law into five categories⁹³ which, for our purposes, represent two groups. The first consists of the laws revealed orally to Moses at Sinai, whether or not hinted at in the text of the written Torah.⁹⁴ These laws comprise the whole of the initial, original contents of the oral law. The second group consists of laws that originated, subsequent to the initial revelation, in the efforts of halakhic authorities.⁹⁵ The authorities either derive these laws through the interpretation of Biblical verses or create them by legislative enactment.

According to Maimonides, halakhic controversy can exist in the second group of laws only, but not in the first, because Sinaitic revelation and controversy are mutually exclusive concepts.⁹⁶ The laws Moses received orally at Sinai have been transmitted unchanged and complete over the course of time. They were not forgotten and never generated

92. M. MAIMONIDES, MISHNAH IM PERUSH RABENNU MOSHE BEN MAIMON 8-12 (J. Kafah ed. 1963) (in Hebrew).

93. Maimonides' five categories are the following:

(1.) Laws revealed orally to Moses at Sinai that are alluded to or hinted at in the written Torah;

(2.) Laws revealed orally to Moses at Sinai that are not evidenced by any hint in the written Torah (Heb. *halakhot l'Moshe mi'Sinai*);

(3.) Laws the sages derived from the written Torah by applying the recognized principles of interpretation (Heb. *midot*); see *infra* note 99;

(4.) Decrees enacted by the sages as preventive measures (Heb. *gezerot*); and

(5.) Ordinances the sages adopted to improve the social or religious order of mankind (Heb. *takkanot*). *Id.* See also J. B. Soloveitchik, *Two Types of Tradition*, in SHIURIM LE-ZEKHAR AVI MORI ZAL 220, 224-31 (Hebrew year 5743) (in Hebrew) (discussing the categories and their bearing on controversy in Jewish law).

94. Maimonides' first and second categories; see *supra* note 93.

95. Maimonides' third, fourth and fifth categories; see *supra* note 93.

96. See also E. DEL MEDIGO, *supra* note 53, at 30 (text by Del Medigo and Reggio's accompanying commentary). *But cf.* J. B. Soloveitchik, *supra* note 93, at 231-34 (certain rabbinic enactments in the second group also are *not* subject to controversy, namely, those rabbinic enactments that resemble in form "laws received orally by Moses at Sinai," in that they were transmitted from one generation of legal sages to next without a statement of their underlying reasons, *id.* at 233).

any disputes. In fact, if a rule elicits a difference of opinion among the sages, that proves that it was not part of the original contents of the oral law. In this manner, Maimonides totally vitiates the arguments against the authenticity of the oral law that are based on the prevalence of halakhic disputes.⁹⁷ The presence of disputes cannot disprove that the oral law stretches back in an unbroken chain to Sinai because halakhic disputes do not involve laws that were revealed at Sinai in the first place.⁹⁸

The second group of laws originates in the activities of legal sages of later generations. These scholars apply and adapt the laws originally revealed at Sinai to the contemporary conditions that confront them. To accomplish this, they engage in two activities—interpretation of the Torah and legislation.⁹⁹

In the course of these activities, differences of opinion occur. How disputes regarding the interpretation of biblical verses arise is perplexing at first blush because each halakhic authority begins with the same verses and the same rules of interpretation, yet some reach different conclusions. According to Maimonides, disputes are caused by differences in the sages' knowledge and understanding of the rules of interpretation and in their ability to apply them. If all of the sages possessed equal knowledge and ability, few, if any, disputes would arise regarding the correct interpretation of verses.¹⁰⁰

Disputes about proposed legislation are much easier to explain. These are policy differences over the desirability of suggested courses of action.¹⁰¹ Unanimity in the legislative sphere is exceedingly rare.

It is virtually impossible for the halakhic process, as Maimonides depicts it, to operate without controversy and dissent. Controversy would be absent only if two unlikely conditions were met. First, all of the participants would have to possess equal reasoning ability and knowledge of general principles. Second, all of the participants would have to be of one mind in their evaluation of policy alternatives. Yet despite

97. For an example of such an argument against the authenticity of the oral law, see, *supra* note 48 and accompanying text.

98. In view of the great number of halakhic controversies, the price Maimonides pays for his mutually exclusive groups is a great reduction in the number of laws originally revealed at Sinai. See Blidstein, *Maimonides on "Oral Law"*, in 1 JEWISH L. ANN. 108, 109-12 (1978). Bacharach soundly took him to task for this. J. BACHARACH, *supra* note 65, at 103a (criticizing Maimonides because if laws revealed at Sinai are not subject to disputes, then "the majority, nay, virtually all, of the Oral Torah did not originate at Sinai!").

99. For a discussion of interpretation as a source of Jewish law and a description of the principles of interpretation that are utilized to derive laws from the text of the Bible, see THE PRINCIPLES OF JEWISH LAW, *supra* note 16, at 58-70. For a survey of the role of legislation by halakhic authorities in the development of Jewish law, see *id.* at 74-91.

100. M. MAIMONIDES, *supra* note 92, at 11-12.

101. *Id.* at 12.

Maimonides' acknowledgement of these facts, one detects something of a wistful quality in his analysis. He expresses no predilection for the vigorous give and take that characterizes halakhic debate. On the contrary, his models are Hillel and Shammai who agreed on almost everything.¹⁰² What accounts for their harmony, in his view, is the fact that they were very similar in their intellectual abilities and knowledge of general principles. Hence, they tended to derive the same conclusions from the same premises by applying the same rules of interpretation. Their students' intellectual attainments did not match those of their great teachers. However, the students are not to be blamed for this; not everyone is capable of ranking among the foremost intellectual lights of his era.¹⁰³

Given that halakhic authorities will naturally differ in knowledge, reasoning ability, and policy preferences, Maimonides concedes that controversy is a virtually inevitable consequence of the operation of the halakhic process.¹⁰⁴ But he falls far short of endorsing controversy and dissent as desirable features of the process, let alone articulating any rationale that justifies creating conditions that tend to promote them.

III

THE JUSTIFICATION FOR CONTROVERSY IN JEWISH LAW: CONTROVERSY AS INHERENT AND DESIRABLE

A satisfactory explanation for the origins of controversy in Jewish law would reconcile legal disputes and the oral law tradition without belittling halakhic authorities or undermining the reliability of the oral law. This explanation would disclose why controversy is a natural and inherent feature of the halakhic process, and why the authorities should encourage their colleagues to express their dissenting opinions. Viewed from within the confines of the Jewish legal system, explanations that bolster confidence in the authenticity of the oral law and buttress the esteem of its interpreters and transmitters, the argumentative legal sages, are preferable to approaches that minimize the importance of halakhic controversy or blame transmission errors and tragic historical circumstances.

Three satisfactory explanations for controversy are presented in this Part. Each takes, as its point of departure, a report in the Talmud that

102. See *supra* note 82 and accompanying text.

103. M. MAIMONIDES, *supra* note 92, at 12 (explaining Rabbi Jose's report: Hillel's and Shammai's students who caused controversy to proliferate were not deficient in their attainments in any absolute sense, and certainly not because they forgot their lessons or erred in repeating the tradition, but only in comparison to their illustrious teachers); see also D. HARTMAN, MAIMONIDES: TORAH AND PHILOSOPHICAL QUEST 112-13 (1976).

104. See I. TWERSKY, INTRODUCTION TO THE CODE OF MAIMONIDES, *supra* note 22, at 99 & n.5.

describes a controversy between the schools of Hillel and Shammai.¹⁰⁵ The dispute lasted for three years as the parties wrestled inconclusively with an unresolved legal point, each side steadfastly maintaining the correctness of its position. Finally, a Heavenly Voice was heard declaring, "[The utterances of] both are the words of the living God, but the *halachah* is in agreement with the rulings of Beth Hillel."¹⁰⁶

The report addresses two aspects of the halakhic process. The first is the possibility of direct divine intervention in the determination of law. This feature of the report must be evaluated against other sources which deny that miracles, voices, or signs have any role in the halakhic process.¹⁰⁷ The weight of authority discounts the possibility of divine intervention in legal debate.¹⁰⁸ At Sinai, God entrusted the further development and application of Jewish law to the legal sages of each generation. They must rely on their human faculties to determine the law and must not allow miracles or prophetic signs to influence their deliberations.

Second, the Heavenly Voice in the report characterizes the positions of both schools as equally constituting "the words of the living God." As seen from within the confines of the Jewish legal system, this part of the story deserves a broad construction because of the way it casts halakhic debate in a favorable light. From this perspective, the report should not be read narrowly to limit the characterization to the facts of the case, so that it applies only to the schools of Hillel and Shammai or to the controversy in question. The fact that the report does not disclose the legal issue which elicited the Heavenly Voice indicates that the subject of the report is the halakhic process itself and not the specific dispute that engaged the two schools. To bolster the respect due to halakhic authorities, the characterization should be read broadly to encompass all author-

105. TALMUD BAVLI, *Erubin* 13b, at 85-86 (I. Slotki trans. 1938). The schools are known as Beth Hillel and Beth Shammai.

106. *Id.* For an epilogue to the report, see *infra* note 118.

107. See, e.g., TALMUD BAVLI, *Erubin* 7a, at 35 (Rabbi Joshua does not recognize the authority of a divine voice in deciding legal disputes); M. MAIMONIDES, COMMENTARY ON THE MISHNAH 57-62 (F. Rosner trans. 1975) (prophet may participate in deciding halakhah like other sages, through argumentation, deduction, and reasoning, but not by performing signs). See also TALMUD BAVLI, *Baba Mezi'a* 59b, at 352-54 (S. Daiches & H. Freedman trans. 1935) (miracles performed on behalf of dissenter Rabbi Eliezer, and presumably indicating the "correctness" of his position, failed to sway majority of sages); Engard, *Majority Decision Vs. Individual Truth: The Interpretations of the "Oven of Achnai" Aggadah*, 15 TRADITION 137 (1975) (surveying rabbinic explanations of why the miracles performed for R. Eliezer did not influence the outcome of the debate).

108. See Elon, *The Sources and Nature of Jewish Law and its Application in the State of Israel*, 2 ISRAEL L. REV. 515, 555 (1967) (view that attributes to suprahuman authority certain influence in determination of halakhah "must be regarded as the opinion of individual scholars and it is clear that the dominant view was that of R. Yehoshuah [Joshua] who said that we do not pay regard to a Heavenly Voice"); E. BERKOVITS, NOT IN HEAVEN: THE NATURE AND FUNCTION OF HALAKHA 47-53, 73, 78-79 (1983) ("One pays no attention to the voice from heaven in matters of Torah-realization on earth." *Id.*, at 73.)

ities and all of the legal positions they advocate in their many disputes down through the ages.

Both the broad and the narrow interpretation of the report are achieved only with some difficulty, although the narrow constructionist needs to offer an explanation for only the single case. The broad constructionist must explain generally how two or more contradictory legal positions can all equally constitute "the words of the living God." Some commentators doubted whether the endeavor was possible or worthwhile.¹⁰⁹ Other authorities, however, met the challenge and provided answers that are much more than skillful exercises in logic and interpretation.¹¹⁰ Each answer provides a satisfactory explanation for controversy in Jewish law and a complete justification for halakhic dissent. The following sections of this Part outline three of the answers.

A. *The Choice Among Options*

In one view,¹¹¹ the initial revelation of the oral law to Moses did not consist of the communication of precisely formulated legal rules. Instead, the law was communicated as a series of options, allowing a range of permissible outcomes for every case that requires a decision. The halakhic process consists of selecting the most appropriate option. The final decision in any case is not preordained but left to the sages of each generation to decide as questions arise.¹¹² They must determine the law for their times, using their best judgment to select the most suitable

109. *E.g.* Reggio, *supra* note 53, at 37, 93 (attributing two contradictory positions to a Divine source results in one law canceling out the other, so that logically nothing remains); J. BACHARACH, *supra* note 65, at 102a-103a (finding it unlikely God would reveal His will as a range of alternatives, a pro and a con for every future legal issue with decisionmaking delegated to the legal sages of each era; rather, as God knew there would be uncertainty in the future, it is more likely that He revealed clear-cut laws to cover every possible contingency but that some laws were forgotten, leading to disputes among the sages).

110. *E.g.* RABBI YOM TOV BEN ABRAHAM ISHBILI ("Ritva," c. 1250-1330), HIDUSHEI HARITVA: ERUVIN 13b, at 107-08 (M. Goldstein ed., Hebrew year 5740) (broad construction); RABBI MEIR BEN EZEKIEL IBN GABBAI (c. 1480-1540), AVODAT HA-KODESH 169-71 (1901) (translated in part in G. SCHOLEM, THE MESSIANIC IDEA IN JUDAISM 298-300 1971) (broad construction); RABBI JUDAH BEN BEZALEL LOEW ("Maharal of Prague," c. 1520-1609), BE'ER HA-GOLAH 19-21 (1964) (narrow construction).

111. Y.T. BEN ABRAHAM ISHBILI, *supra* note 110, at 107-08.

112. A midrashic interpretation of a verse in the book of Psalms similarly depicts law as consisting of options, with final decisions delegated to the majority of legal sages:

The words of the Lord are . . . silver tried in the open before all men refined seven times seven. [Psalms 12:7] R. Yannai said: The words of the Torah were not given as clear-cut decisions. For with every word which the Holy One, blessed be He, spoke to Moses, He offered him forty-nine arguments by which a thing may be proved clean, and forty-nine other arguments by which it may be proved unclean. When Moses asked: Master of the universe, in what way shall we know the sense of a law? God replied: The majority is to be followed: when a majority says it is unclean, it is unclean; when a majority says it is clean, it is clean.

1 THE MIDRASH ON PSALMS, *Psalm* 12, § 4, at 173 (W. Braude trans. 1959) (footnotes omitted; emphasis in original).

legal option for their generation. In passing judgment, they are not creating new laws but are selecting among options included in the initial revelation.

Controversy and dissent are thus inherent parts of the halakhic process because God did not communicate, nor even contemplate, single, "correct" rules as part of the initial revelation. Disputes naturally occur because the sages differ over which option to adopt as the most suitable in any given case. Their robust debates, including the vigorous advocacy of dissenting points of view, serve the critical function of ensuring that they sift through all of the possible alternatives carefully, rather than in a perfunctory manner, so that the best one is finally selected. Nevertheless, all of the positions advocated in the course of the debate equally constitute "the words of the living God," since all were included as options in the initial revelation.

B. *The Continuing Revelation*

In a second view,¹¹³ all Jewish souls were present at Sinai, and each witnessed the revelation. While Moses, on the mountam top, heard God reveal the details of the law, the Israelites, assembled at the base of the mountain, heard God's will in a more general way. Each individual experienced the revelation from a unique position; hence, each received but a portion of the total.

The voice that thundered at Sinai did not cease after a single day but continues to speak across the ages. Revelation is a spring that flows continuously. Revelation is necessary because the human mind, relying solely on its own capacity to reason, cannot fathom the will of the infinite God. The teachers of Israel, its prophets and sages, partake in this ongoing revelation. The sages are the direct successors of the Biblical prophets, for their enactments, like the prophets' visions, originate in revelation and are not the products of logic or intellect.

Just like the initial Sinaitic revelation, the continuing revelation through the generations is received in a fragmented way. Each prophet or sage, depending on his or her unique perspective, receives an individual portion. This fragmented perception accounts for differences of opinion among halakhic authorities; each has a different perspective regarding the continuing revelation. All of their positions, however, reside within the great and continuing voice of revelation, because one God gave them all.¹¹⁴ This common source is proven by the fact that all

113. M. BEN EZEKIEL IBN GABBAI, *supra* note 110, at 169-71; see also R. SOLOMON LURIA, *supra* note 28, *Bava Kama*, Introduction.

114. An interpretation of a verse from *Ecclesiastes* affirms one divine source as the origin of all the conflicting positions advocated in halakhic disputes, and advises scholars to become conversant with all viewpoints:

the parties to a controversy, no matter how seemingly contradictory their positions, are able to find and to cite support in the same place: the Torah. All future teachings of the prophets and sages are implicit in the Torah given to Moses. The purpose of the halakhic process and the function of the prophets and sages are to transform what is potential in the Torah into something actual, to render explicit for their time and place what was implicit in the Torah at Sinai.

Expression of the variety of viewpoints therefore is necessary to disclose revelation in its fullness, since no one individual perceives it all. A sense of the complete revelation, in all its aspects, appears only in the give and take of halakhic debate. Unceasing revelation courses in the ebb and flow of the halakhic controversy—the arguments and counterarguments, proofs and refutations. The totality of such viewpoints comprises the complete revelation, which would be incomplete if any one were missing. For this reason, the editors of the Talmud not only recorded legal conclusions but also transcribed the debates. The Talmud is a record of the ongoing process of revelation and not just a code of law.

The various points of view appear contradictory because people lack the ability, with their finite reasoning, to integrate all the viewpoints into a unitary whole. Similarly, an individual cannot possibly perform at the same time two commandments that contradict each other. In order to know how to act in cases of halakhic dispute, therefore, people have a practical need for a final decision, one that authoritatively adopts one point of view and rejects the others. From the point of view of the Divine Lawgiver, however, all of the positions are part of a unitary whole without contradiction. All sides in halakhic controversy are “the words of the living God.”

C. *The Complex Reality*

In a third view,¹¹⁵ controversy in Jewish law mirrors two aspects of a complex reality—the physical reality of concrete objects and the psy-

“*The masters of assemblies*” [Ecclesiastes 12:11]: these are the disciples of the wise, who sit in manifold assemblies and occupy themselves with the Torah, some pronouncing unclean and others pronouncing clean, some prohibiting and others permitting, some disqualifying and others declaring fit.

Should a man say: How in these circumstances shall I learn Torah? Therefore the text says: “*All of them are given from one Shepherd*” [Ecclesiastes 12:11]. One God gave them; one leader [Moses] uttered them from the mouth of the Lord of all creation, blessed be He; for it is written: “*And God spoke all these words*” [Exodus 20:1]. Also do thou make thine ear like the hopper [funnel] and get thee a perceptive heart to understand the words of those who pronounce unclean and the words of those who pronounce clean, the words of those who prohibit and the words of those who permit, the words of those who disqualify and the words of those who declare fit.

TALMUD BAVLI, *Hagigah* 3b, at 10 (I. Abrahams trans. 1938) (emphasis in original; footnotes omitted).

115. J. BEN BEZALEL LOEW, *supra* note 110, at 19-21.

chological reality of the human intellect. Concrete objects in the real world are not simple and one dimensional, composed of a single element. Rather, they are multifaceted hybrids composed of a combination of often contradictory elements. Consequently, no matter is completely fit or unfit, pure or impure, permitted or prohibited; each object contains some measure of each quality and its opposite.

At the same time, every individual possesses a unique capacity to perceive this complicated real world. Some individuals will naturally perceive and focus on one aspect of reality, while others will perceive and focus on other, perhaps contradictory, aspects of the same reality.

The inherent complexity of matter combines with the varieties of human perception to shape the operation of the halakhic process. Jewish law reflects this complex, hybrid reality, both in the substance of its laws and in the operation of the halakhic process. The laws themselves are multifaceted. A law that proclaims a matter fit for use contains a basis for declaring the matter unfit; a law that prohibits an action contains a basis for permitting it.

The sages applying the laws will naturally differ in their opinions because they differ in their perceptions of the matter under consideration. One will perceive that aspect of an object that warrants prohibiting its use under Jewish law while another will perceive that aspect that tends to render its use permissible.¹¹⁶ Each will give reasons and support his views from the sources of Jewish law, resulting in halakhic controversy.

However, although the object under consideration is a hybrid, the elements which comprise its nature are not usually present in exactly equal measure. One feature will predominate. One aspect will be more fundamental to its nature than the others. The outcome of the halakhic controversy—the final ruling of clean or unclean, permitted or prohibited, fit or unfit—is based on this most fundamental aspect.¹¹⁷

The accuracy of the final decision is guaranteed by the collective nature of the halakhic process. The sages deliberate in assemblies in which all viewpoints are represented, freely expressed, and seriously con-

116. According to Rabbi Moses ben Noah Isaac Lipschutz (16th century), some halakhic authorities are by their nature strict, harsh, and severe, while others are merciful, easy-going, and lax. In approaching halakhic questions, the former are predisposed to find a reason to prohibit or condemn, while the latter tend to find reasons to permit and acquit. For Rabbi Lipschutz, then, halakhic controversy is a question not just of differing perceptions of the real world, but of fundamental psychological predispositions that shape and define individual personalities. See CHAIM HILLEL BEN-SASSON, *HAGUT VE-HANHAGAH* 29 (1959) (quoting RABBI MOSES BEN NOAH ISAAC LIPSCHUTZ, *LEHEM MISHNAH* 33b (Lublin, Hebrew year 5402)) (in Hebrew).

117. It is also possible that the elements are present in precisely equal measure, with none predominating. Such was the case debated by the schools of Hillel and Shammai that elicited the Heavenly voice. It is only in cases of this type that one may say that *both* positions represent "the words of the living God." J. BEN BEZALEL LOEW, *supra* note 110, at 20-21.

sidered.¹¹⁸ Each participant states his perception of the matter, disclosing, over the course of the debate, the full nature of the object in all its aspects. Through this collaboration, the sages come to recognize the most fundamental aspect of the matter under consideration, and they make the final halakhic determination accordingly.

Operating in this physical, intellectual, and legal environment, it is inconceivable that all of the sages should be of one mind. Hence, their differences of opinion are an inherent part of the process, and freely expressing them is essential to arriving at the correct halakhic outcome.

D. Hallmarks of a Satisfactory Explanation for Halakhic Controversy

There is no need to choose among the three preceding views of the halakhic process. A phenomenon characterized by so much diversity ought to be susceptible to a variety of equally valid depictions. But the three views do share a number of features that are essential to any satisfactory explanation for controversy in Jewish law. First, each reconciles the existence of legal disputes with the oral law tradition. Such disputes do not negate the unbroken chain of transmission if: (a) the oral law was initially communicated as a series of options; or (b) the oral law is conveyed along a continuing stream of revelation that began at Sinai and each sage perceives and expresses but a part of the whole; or (c) if the oral laws are multifaceted hybrids, containing within themselves both a basis for permitting and for prohibiting the disputed conduct.

Second, for the very same reasons, it is inconceivable that controversy will disappear as a result of improvements in the chain of transmission or in the historical conditions that confront the nation. Controversy is inherent in the nature of Jewish law; neither the personal deficiencies of the sages nor the external circumstances of the nation cause it to occur.

Third, each of the explanations contributes to the esteem of the legal sages and to an appreciation of the importance of their work. The expla-

118. If the sages restrict membership in their councils to colleagues they agree with, or if they divide into factions and create separate schools where contrary viewpoints are not represented, the halakhic process cannot operate properly. The report of the Heavenly Voice, *supra* notes 105-6 and accompanying text, is followed by an epilogue that explains why Hillel's school deserved to have its ruling endorsed as authoritative:

Since, however, "both are the words of the living God" what was it that entitled Beth Hillel to have the *halachah* fixed in agreement with their rulings?—Because they were kindly and modest, *they studied their own rulings and those of Beth Shammai*, and were even so [humble] as to mention the actions of Beth Shammai before theirs

TALMUD BAVLI, *Erubin* 13b, at 86 (I. Slotki trans. 1938) (emphasis added; footnotes omitted). The law was fixed according to Beth Hillel's rulings, not as a reward for their kindness, modesty, and humility, but because better law emanated from Hillel's school, where the disciples were trained to consider carefully both their own rulings and the dissenting opinions of the rival school before reaching a conclusion. The program of instruction at Hillel's school thus counteracted, to some extent, the negative consequences of the rift in Jewish law.

nations portray the sages as engaging in a task of the greatest significance, no matter whether it is described as: (a) clarifying and selecting among options; (b) expressing the revelation in its fullness; or (c) dealing with a reality that is so complex that it requires their collective efforts. The fact that their labors generate multiple points of view is not a demonstration of mere cleverness on their part but an indication of the effectiveness of their performance—a job well done.

Most importantly, each of these views of the halakhic process provides a rationale for arguing not just that the expression of dissenting viewpoints should be expected or tolerated, but also that it should be actively encouraged. Such encouragement is desirable because free expression of alternative legal positions is necessary to: (a) ensure selection of the best course of action; (b) provide a well-rounded picture of the continuing revelation with all of its nuances; or (c) guarantee an accurate halakhic outcome in the context of the complex reality that each sage confronts with his finite perception. Suppression of dissent is undesirable because it would impede the halakhic process from accomplishing these results.¹¹⁹

These explanations leave us with no reason to doubt the reliability of the oral law, no cause to disparage the sages or their performance, and no expectation that a change in the historical fortunes of the nation will or should cause any change in the operation of the halakhic process. Together, the explanations justify the actual operation of the halakhic process governed by the argumentative authorities who have been responsible for the study, development, and transmission of the oral law since its revelation at Sinai.

IV

THE FUNCTIONS OF DISSENT IN JEWISH LAW

Once the origins of controversy have been satisfactorily explained, a functional justification for controversy and dissent may seem unnecessary. Viewed from within the confines of the Jewish legal system, controversy and dissent appear as natural components of the system, together with a constellation of other features that include the revelation at Sinai, the oral law tradition, and the authority of the legal sages of each generation. From this perspective, as features that define the halakhic process, they require no further justification.

Even so, the attempt to identify the functions that controversy and dissent perform in the Jewish legal system is a worthwhile undertaking. If one can demonstrate that controversy and dissent foster the study, development, and application of Jewish law, then controversy and dis-

119. For discussion of suppression of dissent under Jewish law, see generally Roth, *supra* note 1.

sent receive additional justification in terms of the valuable benefits they provide the Jewish legal system. Further, a recognition of their positive role may serve as a benchmark for policy. Halakhic authorities should encourage their colleagues to express their dissenting opinions if controversy and dissent contribute positively to the development of Jewish law.

The following sections of this Part set forth the functional justifications for controversy and dissent in Jewish law.

A. Issue-Sharpening

Dissent directs attention to weaknesses in the majority position, forcing a careful scrutiny of its premises. The results are a more fully articulated justification for the majority position and a better understanding of the law. Justice William J. Brennan, Jr. highlighted this function of dissent when he wrote:

[T]he dissent demonstrates flaws the author perceives in the majority's legal analysis . . . keeping the majority accountable for the rationale and consequences of its decision . . . [V]igorous debate improves the final product by forcing the prevailing side to deal with the hardest questions urged by the losing side.¹²⁰

A story in the Talmud makes the same point. Rabbi Johanan, a third century scholar of Jewish law, was mourning the death of his colleague and study partner, Rabbi Simeon ben Lakish. The other sages devised a way to console him by sending him a capable replacement, Rabbi Eliezer ben Pedath. Thereafter, for every legal point that R. Johanan made, R. Eliezer cited additional authority that supported his position. But R. Johanan was not consoled; on the contrary, he felt his grief even more. He complained:

Are you as the son of Lakisha? . . . [W]hen I stated a law, the son of Lakisha used to raise twenty-four objections, to which I gave twenty-four answers, *which consequently led to a fuller comprehension of the law*; whilst you say, "A Baraita [oral teaching] has been taught which supports you:" do I not know myself that my [legal] dicta are right?¹²¹

Rabbi Johanan welcomed objections and shunned facile support for his

120. Brennan, *In Defense of Dissents*, 37 HASTINGS L.J. 427, 430 (1986).

121. TALMUD BAVLI, *Baba Metzia* 84a, at 482 (S. Daiches and H. Freedman trans. 1935).

The same recognition that a consideration of dissenting opinions is essential for a complete understanding of Jewish law is expressed in the introduction to the *ENCYCLOPEDIA TALMUDICA*, a multivolume work designed to distill and present the corpus of Talmudic jurisprudence, where the editors give the following justification for their decision to include dissenting opinions together with authoritative rules in the projected articles:

In order to gain a comprehensive knowledge of the Torah, it is insufficient for one to know the Halakhah as it is actually applied in Jewry; he must also gain an insight into the various opinions expressed over the generations in relation to the Law or subject matter in question, even though in actual practice such opinions have been rejected. For purposes of study, reflection, and comprehension, both are of equal weight. Although the ruling may not have been accepted, the reasoning may remain valid.

conclusions because he shared, with Justice Brennan, the recognition that animated dissent, by sharpening the debate, contributes to the clarity of the law.

B. Meeting the Needs of Hard Cases

Every legal system must confront the hard case—the set of facts to which application of a law will work an unusual hardship or impose an extraordinary loss, and for which an exception appears warranted to prevent an unjust or inequitable result. When encountering cases of this type, authorities of Jewish law have no central authority to which they can turn to obtain dispensations from the law. But halakhic authorities may themselves find the solution to the problem in a prior dissent. To cope with an emergency or to prevent an extraordinary loss, halakhic authorities are authorized to adopt the dissent as the rule of the case and to render a decision according to the dissent in order to mitigate the severity of the outcome.¹²²

The responsa of Rabbi Moses Isserles of Cracow provide an example.¹²³ Isserles was scheduled to perform the marriage ceremony of an orphan girl on Friday afternoon, before the commencement of the Sabbath at sundown. Jewish law prohibits performing marriages on the Sabbath.¹²⁴ In this case, the guests had assembled, the festive meal was prepared, and the bride had taken her ritual bath in preparation for the ceremony. But a snag in negotiations over the bride's dowry caused a delay and the groom reneged. He did not consent until after sunset to go through with the match. Isserles had to decide whether to send the guests home and postpone the wedding until Saturday night or to conduct the marriage then and there, on the Sabbath. The prospect of sending the guests home threatened to embarrass the bride and permanently blennish her reputation. Isserles decided to act according to the minority position of a twelfth century authority, Rabbenu Jacob Tam, who held

1 ENCYCLOPEDIA TALMUDICA xviii (M. Berlin & S. Zevin eds. 1959) (I. Epstein & H. Freedman trans. 1969).

122. MISHNAH, *Eduyoth* 1:5 (H. Danby trans. 1933); TOSEPHTA, *Eduyot* 1:4, *supra* note 17, at 455; TALMUD BAVLI, *Erubin* 46a, at 320 (I. Slotki trans. 1938); TALMUD BAVLI, *Niddah* 6a, 9b, at 33-34, 61-62 (I. Slotki trans. 1948). Authorities prior to the close of the Talmud could rule according to a minority position in an emergency so long as there had been no express ruling that the majority position was the *halakhah*; authorities after the close of the Talmud can rule according to a minority position only where the conflict between the majority and the minority is a conflict among post-Talmudic authorities and not a dispute among authorities recorded in the Talmud itself. See 9 ENCYCLOPEDIA TALMUDIT, *Halakhah* 241, 260-61 (1959) (in Hebrew) (discussion of these and other limitations on the principle).

123. MOSES ISSERLES ("Rema," 1520-1572), RESPONSA, NUMBER 125, at 488-95 (A. Ziv ed. 1970). For a synopsis and partial translation of the responsum, see S. FREEHOF, A TREASURY OF RESPONSA 113-17 (1973).

124. J. CARO, SHULHAN ARUKH, *Orah Hayyim* 339:4.

that a wedding may be performed on the Sabbath in the case of a childless man. Isserles justified relying on a dissent in this case because it was an emergency; he had to avoid an affront to the dignity of an orphan girl who had been waiting all day to become a bride.¹²⁵

C. Responding to the Challenge of Hard Times

While hard cases create problems for individuals, hard times confront the entire community, disrupting the normal operation of Jewish life and Jewish law. Halakhic authorities possess "emergency jurisdiction" (Heb. *hora'at sha'ah*) to deal with these situations.¹²⁶ Under extreme conditions characterized by a general breakdown in observance of law, habitual and widespread transgressions,¹²⁷ halakhic authorities are authorized to suspend regular laws, adopt temporary emergency measures, and impose extralegal sanctions.¹²⁸ The decision whether or

125. M. ISSERLES, *supra* note 123, at 491 ("It was an emergency, the girl was embarrassed, and [the dissenting view of] Rabbenu Tam is adequate to rely on in the case of an emergency. You have no greater emergency than this, [the threat of] an orphan girl, already of age, embarrassed and disgraced all her days."). See also Isserles, *Mappah, Orah Hayyim* 339:4 ("There are those who permit performing a marriage [on the Sabbath] where he has no wife and children [Rabbenu Tam] . . . and even though the law is not fixed so, still we rely on this in an emergency . . ."). See *supra* note 22 for an explanation of Isserles' glosses to Caro's code.

126. The Talmudic source for emergency jurisdiction and remedies is the dictum of Rabbi Eliezer ben Jacob: "I have heard that the Beth din [the court] may, [when necessary,] impose flagellation and pronounce [capital] sentences even where not [warranted] by the Torah; yet not with the intention of disregarding the Torah but [on the contrary] in order to safeguard it." TALMUD BAVLI, *Sanhedrin* 46a, at 303 (J. Shachter & H. Freedman trans. 1935). Maimonides, himself a physician, offers the following justification for such power:

Even as a physician will amputate the hand or the foot of a patient in order to save his life, so the court may advocate, when an emergency arises, the temporary disregard of some of the commandments, that the commandments as a whole may be preserved. This is in keeping with what the early Sages said: *Desecrate on his account one Sabbath that he be able to observe many Sabbaths.*

M. MAIMONIDES, *MISHNEH TORAH, Rebels* 2:4, *supra* note 9, at 141; (emphasis in original).

127. Maimonides and Caro posited widespread lawlessness as a precondition to the imposition of extralegal sanctions. M. MAIMONIDES, *MISHNEH TORAH, supra* note 9 *Sanhedrin* 24:4, at 73, *Rebels* 2:4, at 141; J. CARO, Shulhan Arukh, *Hoshen Hamishpat* 2:1. But see I. E. QUINT & N. HECHT, *JEWISH JURISPRUDENCE: ITS SOURCES AND MODERN APPLICATIONS* 172-78 (1980) (summarizing view of some halakhic authorities that extralegal sanctions can be imposed on an individual, even apart from any such general state of emergency, when the individual is a habitual offender or when his unpunished conduct might encourage others to violate the law).

128. The identity of the halakhic authorities authorized to exercise emergency jurisdiction is subject to dispute. Compare M. MAIMONIDES, *MISHNEH TORAH, Sanhedrin* 24:4-10, *supra* note 9, at 73-75 and J. CARO, Shulhan Arukh, *Hoshen Hamishpat* 2:1 (all Jewish courts possess emergency jurisdiction) with ISSAC ABRAVANEL (1437-1509), *PERUSH AL HA-TORAH, Deuteronomy* 17:8, at 159, 166 (Hebrew year 5724) and Denburg, *supra* note 22, at 21, n.6 (citing J. HABIB, NIMMUKEI YOSEF, *Sanhedrin* ch. 7, at 52b) (emergency jurisdiction is vested exclusively in Jerusalem High Court; local courts may not impose extralegal sanctions). In addition, according to Maimonides, the king has an executive prerogative to deal summarily with offenders when the needs of the hour demand it. M. MAIMONIDES, *MISHNEH TORAH, Kings and Wars* 3:10, *supra* note 9, at 214. On the "king's law," see A. SCHREIBER, *JEWISH LAW AND DECISION-MAKING* 236-37 (1979); *THE PRINCIPLES OF JEWISH LAW, supra* note 16, at 30-31. But see I. ABRAVANEL, *supra, Deuteronomy*

not to utilize this emergency jurisdiction is wholly within the discretion of the halakhic authorities of each age. The measures taken must respond to the needs of the hour,¹²⁹ and their purpose must be the ultimate strengthening of observance of the law.¹³⁰ The measures adopted are not binding precedents once the emergency passes.¹³¹ Notwithstanding the emergency, ethical restraints on the conduct of officials remain in effect to circumscribe their actions; the authorities must preserve individual self-respect and take no action that will impair human dignity.¹³²

Once halakhic authorities determine that contemporary conditions warrant an exercise of emergency jurisdiction, what should be the source of the temporary rules they implement to govern during the crisis? According to Rabbi Ephraim Luntshitz, halakhic authorities should draw temporary rules from the dissenting positions articulated in previously settled halakhic disputes.¹³³ The dissents constitute a pool of alternative rules, available to be pressed into service when hard times require temporary legal solutions.

Rabbi Luntshitz shares the view, mentioned earlier, that controversy and dissent are inherent parts of a multifaceted reality in which halakhic authorities arrive at a ruling in each case by weighing the component factors to determine which predominates.¹³⁴ Thus, for Rabbi Luntshitz, it follows that if circumstances change radically, an element previously in the minority might come to play the major role. This is what has happened when a halakhic authority exercises his emergency jurisdiction, suspending a law and substituting another. The authority

16:18, 17:8, at 154, 159 (king may not impose extralegal sanctions). Finally, a prophet, as part of his mission commanded by God, may temporarily suspend ordinary laws because of special circumstances. MOSES MAIMONIDES' COMMENTARY ON THE MISHNAH 57-59 (F. Rosner trans. 1975); see also 8 ENCYCLOPEDIA TALMUDIT, *Hora'at Sha'ah* 512 (1957) (in Hebrew); *infra* note 132.

129. Isserles, MAPPAN, *Hoshen Ha-Mishpat* 2:1.

130. See TALMUD BAVLI, *Sanhedrin* 46a, at 303 (J. Shachter & H. Freedman trans. 1935) (extralegal sanctions may be imposed, not with intention to disregard Torah, but to strengthen it); M. MAIMONIDES, MISHNEH TORAH, *Sanhedrin* 24:4, *supra* note 9, at 73 (extralegal sanctions may be imposed to build a fence around the law); *id.*, *Rebels* 2:4, at 141 (emergency measures may be adopted to bring the multitudes back to religion or save them from general religious laxity); J. CARO, Shulhan Arukh, *Hoshen Ha-Mishpat* 2:1. (exercise of emergency powers must be for the sake of Heaven).

131. M. MAIMONIDES, MISHNEH TORAH, *supra* note 9, *Sanhedrin* 24:4, *Rebels* 2:4, at 73, 141.

132. *Id.*, *Sanhedrin* 24:10, at 75. Halakhic authorities clearly understood the potential for abuse in the exercise of extralegal power. For this reason, they tended to restrict its exercise to a limited class of individuals, such as the outstanding personalities of each generation, who would possess personal qualities that reduced the possibility of abuse. See E. QUINT & N. HECHT, *supra* note 127, at 183-204.

133. RABBI EPHRAIM SOLOMON BEN AARON OF LENCZYCZA ("Ish Luntshitz," 1550-1619) [hereinafter E. LUNTSHITZ]. KELI YEKAR, *Deuteronomy* 17:11, printed in standard editions of the rabbinic Bible known as MIKRAOT GEDOLOT. For an evaluation of Luntshitz's career, see Bettan, *The Sermons of Ephraim Luntshitz*, in 8 HEB. UNION C. ANN. 443 (1931-32); see also CHAIM HILLEL BEN-SASSON, HAGUT VE-HANHAGAH 25-29 (1959).

134. See *supra* notes 115-18 and accompanying text.

has determined that under present abnormal conditions, the element formerly in the minority has come to predominate, and he must temporarily administer the law in a manner that recognizes this fact. The dissent becomes law for the duration of the emergency, that is, until conditions revert back to normal.¹³⁵

This view of emergency jurisdiction has important implications for the position of dissent in Jewish law. If the expression of dissenting points of view is inhibited, the number of options available to meet emergency conditions will be artificially restricted. If authorities entertain alternative positions until a disputed point of law is resolved but forget them once the halakhah has been finally determined, they will be less able to deal effectively with crisis. To prevent this, halakhic authorities should encourage the expression of dissenting points of view, and they should teach Jewish law in a manner that always conveys the dissenting positions as well as the final rules. Future halakhic authorities must be as conversant with dissenting positions as they are with authoritative rules, because in an unforeseen emergency, they may need to implement a temporary solution based on a dissent to meet the needs of the hour.¹³⁶

D. Providing Partial Self-Justification for Nonconforming Conduct

The variety of positions halakhic authorities advance in their legal debates provides a de facto measure of flexibility for the individual deciding on a course of action. A person should conform his or her conduct to the halakhah as finally determined rather than act according to a dissenting viewpoint. If the issue is still open to debate by the authorities, then a person should consult an authority in his or her jurisdiction for advice on how to act. One should not engage in halakhic forum-shopping, first deciding what to do and then attempting to locate an authority who agrees that the desired action is permitted.¹³⁷ But individuals sometimes

135. See E. LUNTSHITZ, *supra* note 133; cf. E. BERKOVITS, *supra* note 108, at 49 ("The minority view is kept in abeyance; it has been overruled conditionally, till such time [as] valid arguments would be found for its acceptance. The teaching of the minority is not suppressed; it may retain its theoretical validity.").

136. If the sage or prophet is unaware of any reasoning contrary [to the established ruling], then he will never declare pure [something which has previously been declared impure], even to meet the needs of the hour when he is obligated to do so. . . . Our rabbis correctly advised, "Make your ear like a funnel to acquire the words of those who render pure and those who render impure" [TALMUD BAVLI, *Hagigah* 3b], because in truth, *each individual has need to know all of the positions.*

E. LUNTSHITZ, *supra* note 133 (emphasis added); see *supra* note 114.

137. The Talmud addresses the necessity of adopting a principled and consistent approach to disputed questions of halakhah:

One who adopts the view of Beth Shammai only when they incline to leniency, and likewise the view of Beth Hillel only when they incline to leniency, is a wicked person. One who adopts the view of Beth Shammai only when they incline to strictness and likewise the view of Beth Hillel only when they incline to strictness, [is a fool] But one must either adopt the view of Beth Shammai in all cases . . . or the view of Beth Hillel in all cases.

fall short of this ideal standard. When they do, they may find solace and some measure of self-justification in the fact that a great halakhic authority, although in dissent, holds the view that their conduct is permitted.

This function of dissent operates *sub rosa*, in the mind and conscience of the individual who engages in nonconforming conduct, and normally does not leave a trace in the literature of the halakhic system. Occasionally, however, halakhic authorities express a view that seems to acknowledge its operation. Two examples follow:

(1) Reading "everyday documents" is prohibited on the Sabbath.¹³⁸ The prohibition covers business-related materials, such as promissory notes and account books, but authorities disagree whether it also covers ordinary letters such as friends send to each other.¹³⁹ Although a number of impressive authorities, including Maimonides and Nachmanides, held that the prohibition did not extend to letters, the codifiers, Jacob ben Asher and Joseph Caro, held otherwise.¹⁴⁰ Rabbi Solomon ben Abraham Adret (the *Rashba*) also held that such letters may not be read on the Sabbath, but he wrote that it was wrong to scold those who do read them since they are relying on the position of Nachmanides who held it is permitted.¹⁴¹

(2) At the *seder*, the festive meal that inaugurates the celebration of Passover, the nation's freedom is demonstrated in a variety of tangible ways. Slaves eat perched at the edge of their seats waiting to be recalled to work, while free persons eat at a leisurely pace and recline in comfort on pillows. Hence the participants in the *seder* must recline like free persons to demonstrate their freedom. But one medieval authority, Rabbi Eliezer Halevi, reasoned that however common it was in antiquity for princes and free persons to recline at their meals, it is not customary today, and the law ought to recognize this change at the contemporary

TALMUD BAVLI, *Hullin* 43b-44a, at 235 (E. Cashdan trans. 1960) (bracket in original). See also, e.g., Isserles, MAPPAH, Hoshen Ha-Mishpat 25:2 ("In a case where there is controversy among authorities, a person [i.e., the judge] must not say, 'I will decide as I please,' and if he does, he renders a false judgment.").

138. THE CODE OF MAIMONIDES (MISHNEH TORAH): BOOK THREE, THE BOOK OF SEASONS, *Sabbath* 23:19, at 154 (S. Gandz & H. Klein trans. 1961); see also TALMUD BAVLI, *Shabbath* 116b, at 572 (H. Freedman trans. 1938).

139. See J. CARO, BEIT YOSEF, *Orah Hayyim* 307.

140. JACOB BEN ASHER, ARBA'AH TURIM, *Orah Hayyim* 307; J. CARO, SHULHAN ARUKH, *Orah Hayyim* 307:13.

141. RABBI DAVID BEN SAMUEL HA-LEVI ("Taz"), TUREI ZAHAV, *Orah Hayyim* 307:13 (citing Rabbi Solomon ben Abraham Adret); see also J. CARO, BEIT YOSEF, *Orah Hayyim* 307 ("The *Rashba* wrote in a responsum, 'As to reading friendship letters on the Sabbath, you have already seen my view that it is prohibited. But as to one who is inclined to the view of Nachmanides [that it is permitted], we are not able to refute him . . . Therefore, if one conducts himself according to one of the great sages of Jewish law, where we have no convincing proof [against his view], we have no power to prevent it.'").

Passover feast.¹⁴² Hence, he held that in modern times, no one is obligated to recline at the *seder*. Caro, in his code, rules otherwise.¹⁴³ He also rules, however, that a woman does not need to recline unless she is "notable."¹⁴⁴ On this point, Isserles comments, "All of our women are considered notable, but they customarily do not recline because they rely on the *Ravyah* [Rabbi Eliezer Halevi]."¹⁴⁵ Isserles does not explain why women are *entitled* to rely on Halevi's view, which is a dissenting opinion, but he cites Halevi's position as a partial justification of their non-conforming practice not to recline.

E. Accommodating Social and Cultural Diversity

Wherever Jews live, they are subject to the diverse social and cultural influences of their host countries. If Jewish law were unable to acknowledge this diversity, the Jews would become increasingly divorced from their environment. Dissent in Jewish law provides one way to accommodate the diversity. Since halakhic authority is divided along territorial lines, a dissenting position that the halakhic authorities of one jurisdiction reject may be adopted as the rule in another jurisdiction. The availability of both the majority rule and its converse and perhaps intermediate positions as well, maximizes the number of options for local adaptations. To the extent they have discretion, the authorities of each jurisdiction will naturally tend to select the position that is best suited to the social and cultural conditions of their community and its surroundings.

The controversy between Caro and Isserles regarding the obligation of women to recline at the Passover table is again illustrative.¹⁴⁶ They disagree whether Jewish law, for this purpose, recognizes two categories of women—"notable women" who are obligated to recline, and women who are not notable and who are not required to recline. It was not happenstance that Caro affirmed the distinction and Isserles disavowed it. Caro wrote for Sephardic and oriental Jewry in Islamic lands where polygamy was allowed.¹⁴⁷ He was comfortable with a distinction between important and inferior wives. For Isserles, writing for the Jews of Christian Europe where polygamy was prohibited, such a distinction

142. RABBI ELIEZER BEN JOEL HALEVI ("Ravyah," c. 1160-1235), SEFER RAVYAH, § 525, at 154 (A. Aptowitzer 2d ed., Hebrew year 5724); see also M. KASHER, HAGADAH SHELEMAH 211-16 (3d ed. 1967) (in Hebrew) (suggesting that Halevi's opinion was shared by many of the legal sages of his era).

143. J. CARO, SHULHAN ARUKH, *Orah Hayyim* 472:2.

144. *Id.*, 472:4. The word for "notable" in Hebrew is *hashuva*, literally "important."

145. Isserles, *Mappah*, *Orah Hayyim* 472:4.

146. See *supra* notes 142-45 and accompanying text.

147. See Schereschewsky, *Bigamy and Polygamy*, in THE PRINCIPLES OF JEWISH LAW, *supra* note 16, at 366-71.

had no resonance.¹⁴⁸ His freedom to register a dissent from Caro's position allowed him to accommodate the sensibilities of European Jewry and to adapt this detail of Jewish law to their social and cultural environment.

F. Preventing Recovery in Civil Suits Where the Law is Unsettled

In a civil suit under Jewish law, the plaintiff has the burden of proving the facts he claims entitle him to recover. However, once the plaintiff satisfies this burden, the defendant may plead the unsettled state of the law as an affirmative defense. Conceding that the plaintiff is entitled to recover on the facts under the majority position, the defendant may counterpose his own reliance (Heb. *kim li*) on the contrary legal position of the minority of authorities. The defendant's plea requires the plaintiff to satisfy an additional burden of proof, this time regarding the law: the plaintiff must now convince the court that the minority line of authority which supports the defendant is wrong. If the plaintiff fails to persuade the court that the minority is in error, he cannot recover.¹⁴⁹

Some halakhic authorities disfavor this affirmative defense, regarding it as a dysfunction of dissent under Jewish law rather than a legitimate function. Because conflicts of opinion regarding the law are so common, they believe reliance on the plea might prevent recovery in virtually every civil case. For this reason, these authorities restrict the right to assert it.¹⁵⁰

The plea may be viewed in a more favorable light as a manifestation of pluralism in Jewish law.¹⁵¹ The legal theories the parties advocate to support their respective claims each represent "the words of the living God,"¹⁵² and some factual settings may find the component factors on which the court's decision should be based equally balanced. In such cases, when the defendant pleads *kim li*, a stalemate results that prevents the plaintiff from recovering. Thus, the plea embodies the recognition that, given the pluralistic nature of Jewish law, some legal problems will

148. Isserles, *Mappah, Orach Hayyim* 472:4 ("But all of our women are considered notable.")

149. See 3 M. ELON, HA-MISHPAT HA-IVRI 1062-63 (1973) (in Hebrew); I I. HERZOG, MAIN INSTITUTIONS OF JEWISH LAW 271-72 (1980); THE PRINCIPLES OF JEWISH LAW, *supra* note 16, at 134-35.

150. See, e.g., RABBI MOSES IBN HABIB (1654-1696), GET PASHUT, *Kelal Beth* 282-86 (A. Shalem ed., Hebrew year 5740) (defendant's plea of *kim li* will not be entertained if (1) defendant cannot cite more than one authority in his favor against all the other authorities who expressed an opinion on the point; or (2) if the authorities on which he relies are minor in comparison to the authorities in the majority that support the plaintiff's position; or (3) if the authors of the Shulhan Arukh, see *supra* note 22, are among the authorities whose position supports the plaintiff's recovery).

151. See H. Ben Menahem, *Towards a Jurisprudential Analysis of the Kim-li Argument*, in 6-7 SHENATON HA-MISHPAT HA-IVRI 45 (1979-80) (in Hebrew).

152. See *supra* notes 105-18 and accompanying text.

have two equally valid halakhic solutions, one favoring the plaintiff, the other favoring the defendant, denying the court any basis on which to modify the status quo.

G. *Making the Torah Great and Glorious*

Whatever the functional role of law in society, scholars of Jewish law never divorce it from its ultimate source, the Torah, the word of God. Their dissatisfaction with simple explanations and their attempt to extract from legal texts every nuance of meaning are rooted in a respect for the word of God and a desire to know it completely. They view the study of Jewish law as the study of God's word and will.

From a verse in the Book of Isaiah, the rabbis learned that "The Lord was pleased, for His righteousness' sake, to make the teaching [in Hebrew, *Torah*] great and glorious."¹⁵³ "Making the Torah great" involves making it larger, adding to its content. "Making the Torah glorious" entails honoring the Torah, embellishing it and adorning it. The give and take of halakhic authorities regarding disputed points of law accomplishes both of these functions. Each position in a legal dispute, along with its rationales, proofs, and contrary arguments, add to the edifice of the Torah—increasing the quantum of the material and its complexity. At the same time, the legal arguments of halakhic authorities adorn the Torah as much as brocade wrappers and silver ornaments.¹⁵⁴ The edifice that the legal sages build to honor God is not constructed out of stone and mortar but out of knowledge of the Torah. Knowledge grows with each generation, and the dissenter's contribution to this enterprise is pivotal to making the Torah great and glorious.

H. *Sustaining Interest in the Study of Jewish Law*

Most creative people probably find that participating in a debate is more interesting and more challenging than acting as a passive conduit to transmit a settled body of rules. A large measure of the intrinsic interest and satisfaction derived from studying Jewish law comes from the right to formulate and express innovative ideas—even when they run counter to the views of other authorities—and from the challenge of studying the resulting mass of conflicting opinions. The study of Jewish law is a creative process, affording many opportunities for self-fulfillment and for developing individual potential. It seems unlikely that the intense study

153. *Isaiah* 42:21 (Jewish Publication Society 1917); see TALMUD BAVLI, *Niddah* 51b, at 357 (I. Slotki trans. 1959).

154. See, e.g., RABBI MOSES CORDOVERO ("Ramak," 1522-1570), *THE PALM TREE OF DEBORAH* 108 (L. Jacobs trans. 1960) (scholar "should further accustom himself, when he debates words of Torah, to have the intention of adorning the *Shekhinah* [Divine Presence], to adorn and decorate Her for Beauty, and this is the meaning of *Halakhah* for Truth").

of Jewish law could have flourished over the centuries and engaged the attention of the best minds, in good times and bad, in friendly and hostile environments, if it had not allowed for the self-expression that comes from the right to challenge authority by articulating and defending novel legal positions.

CONCLUSION

In any legal system, dissent will sharpen the issues in legal debate, and skillful judicial craftsmen who take pride in their work will view their dissenting opinions as important and interesting additions to legal literature. But an extraordinary degree of legitimacy must attach to dissent in a legal system in which a rejected legal position may govern in a hard case or in hard times, justify nonconforming practices, or even prevent recovery in a suit where the plaintiff has satisfied the burden of proof as to the facts.

Dissent in Jewish law can perform so many important functions because of the belief that all the legal positions expressed by halakhic authorities, no matter how seemingly contradictory, emanate from the same divine source. For this reason, dissenting viewpoints are not "wrong" in any absolute sense; they are "also right." This element of rightness permits the dissent to replace the law on occasion, imparting to Jewish law a measure of flexibility and suppleness necessary to respond to the changing social and cultural conditions of the Jews, in all the countries where they reside and in all eras of their history.

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