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CALL FOR PAPERS

The field of jurisprudence lies at the nexus of law and politics, the practical and the philosophical. By understanding the theoretical foundations of law, jurisprudence can inform us of the place of legal structures within larger philosophical frameworks. In its inaugural edition, *The Journal Jurisprudence* received many creative and telling answers to the question, “What is Law?” For the second edition, the editors challenged the scholarly and lay communities to inquire into intersection between jurisprudence and economics.

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A Better Way to Fail: Teaching Critical Thinking to Chinese Lawyers¹

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“Ever tried. Ever failed. No matter. Try again. Fail Again. Fail Better.”
-Samuel Beckett, *Worstward Ho*, 1983

Introduction

In an issue of *The New Inquiry*, novelist Ned Beaman suggests that the phrase “Fail Better” is now experimental literature’s equivalent of the famous photograph of Che Guevara: “flayed completely of meaning and turned into a successful brand with no particular owner...[w]hen Beckett talks of failure he’s often talking about how language can’t withstand the weight of meaning we want to put into it, and in that sense his unintended ubiquity is ideal. What better argument for the feebleness of determinate meaning than the tawdry afterlife of ‘fail better.’” Like Beaman, I reduce this phrase to an aphorism along the lines of “Keep Calm and Carry On” but I do so to alert the reader to the dangers implicit in trying to “brand” any conventional legal communication pedagogy for U.S. law schools’ ever growing population of civil law trained foreign lawyers.² Those of us teaching legal writing to foreign lawyers could better serve our LL.M. students by exposing them to “U.S. legal sociolinguistic and cultural norms...”³ an undertaking that requires

¹ Although “failing better,” as I will describe it, cannot ensure predictable assessment outcomes, it may prove an effective method for helping students develop their critical thinking skills. While it is no teacher’s desire to see herself or her students fail, Beckett’s phrase captures something of the recursiveness of U.S. Legal Writing, not unlike the French “reculer pour mieux saute.”

² Beaman, Ned, “*Fail Worse*,” www.thenewinquiry.com

³ Catherine A. Lemmer, *A View from the Flip Side: Using the “Inverted Classroom” to Enhance the Legal Information Literacy of the International LL.M. Student*, Law Library Journal Vol. 105-4, 468 [2012-2025]. Lemmer argues We need to provide our students (even those who are practicing attorneys in their home countries) with training and exposure to the ‘U.S. legal sociolinguistic and cultural norms’ as a way to assist them in adjusting to these norms. This training comes from reading legal texts, writing documents, and researching the law.

continual experimentation. This essay is my first installment in an attempt to “fail better,” to better expose students to U.S. legal culture and better draw on their own critical thinking skills legal analysis.

I trace my decision to “fail better” to an experience with my 50 students from Temple’s LL.M. Rule of Law Program in Beijing.⁴ The students study U.S. law in English in our campus in China for 10 months before travelling to our Philadelphia campus for an intense Summer Semester of Legal Writing, Trial Advocacy, and Legal Ethics. The U.S. law program in Beijing is taught in English by U.S. Law Professors, who must negotiate considerable language difficulties and a heavy syllabus of doctrinal material. The professors evaluate students by means of one exam at the end of term. Add to this that virtually all the students speak Mandarin outside the classroom (and often to one another in the classroom) and it is no surprise that U.S. legal culture is largely gleaned through classroom English and less formal conversation with U.S.- trained lawyers in English.⁵ The bulk of their exposure to U.S.-style legal communication, then, takes place during the Summer Session in Philadelphia, close to the end of their Program. My focus is the legal communication that takes place in their course in Legal Writing and Communication.⁶

The training should also incorporate learning opportunities that reflect the real-life practice of the law. This substantive and professional exposure to U.S. legal English and legal culture is what students seek in U.S. LL.M. programs. Ironically, this is the very experience many international LL.M. programs fail to deliver.”

⁴ Temple’s Rule of Law Program in China “Is the first and only foreign law degree-granting program in China... over 260 students have graduated from Temple’s LL.M. program for Chinese judges, government officials, and attorneys.”

⁵ This is true even with the increasing number of students in the Program already working in firms or corporations where English is required. Doctrinal professors understand the value of incorporating more skills in the classroom, but time limitations make this difficult to manage.

⁶ In an earlier article, I explained that the students from Temple Law School’s Beijing Program “have entry level instruction in Legal English [to] provide them with enough legal terminology to conduct future reading and research in the more specific doctrinal areas of interest, and to develop legal skills such as briefing cases, but ... the development of these deceptively complex skills cannot be guaranteed in a pre-program.” Robin Nilon, *The Calculus of Plagiarism: Toward a Contrastive Approach to Teaching Chinese Lawyers*, 2 **S. C. J. INT’L L. & BUS.**, note. 14 (2006). Despite adequate qualifications, students come to this prestigious program without a grounding in U.S. legal culture. Students have difficulty adjusting to U.S.-style “classroom conventions” present in the Beijing Program, much as Foreign LL.M. students have trouble adjusting the U.S. classroom culture when they come to the U.S. to study, see Julie M. Spanbauer, *Lost in Translation in the Law School Classroom: Assessing Required Course work in LL.M. Programs for International Students*, 35 **INT’L J. LEGAL**

At one of the first summer session meetings, the students were shown a documentary – “The Road to *Brown*”- preparation for a criminal problem that pitted facts suggesting race discrimination against facts that stressed police and public safety concerns. The students concentrated on the film, taking notes, intent on understanding the legal and social history of the pre and post-Jim Crow U.S. Yet, when the film shifted to period cartoon depictions of black children cavorting and dancing Minstrel-style, the students laughed nervously. I admit now that I overreacted and concluded that students were laughing to cover their embarrassment⁷

I assumed the students were adopting a culturally specific defense mechanism based on behavior that I believed would be considered inappropriate in U.S. law schools. Rather than simply asking students to reflect on their reactions, and discussing those reactions, I continued force feeding information: “stuffing the duck.”⁸ I began then to think more carefully about my own failure in thinking I could compress such dense cultural information into one class session. Acquiring cultural information through coercion is a common stereotype about Chinese teaching methods; and here it was a method I was following. Clearly, the intertwined threads of history, culture, and racial politics could never be grasped in one “teaching moment,” but the *Brown* documentary could not

INFO. 396, 419-20 (2007) (arguing: “Regardless of how knowledgeable nonnative speakers may be about discipline-specific content areas, they may not be able to effectively communicate that knowledge, either in speaking or writing, because of their lack of familiarity with more general communicative patterns in U.S. academic and work environments. One of the communicative environments most unfamiliar to many ESL students when they arrive to study in the United States is, in fact, the American classroom.”)

⁷ Culturally-specific notions of laughter were taken into consideration, but I reacted before I had a time to think through my reaction. Nervous laughter can be a sign of discomfort in many other cultures, including Western culture. Our discomfort triggered our reaction as much as theirs did their reaction. See e.g. Ed. Wen-Shing Teng, *Handbook of Cultural Psychiatry*, Academic Press, 792, “[While] nervous laughing ... is one kind of coping mechanism commonly used by some Asian people. When a person is nervous, particularly in an embarrassing situation, instead of manifesting feelings and gestures of nervousness and embarrassment, he may laugh nervously. By bursting into laughter, a person may save himself embarrassment by concealing his feelings of nervousness. This culturally shaped behavior may look awkward or strange to outsiders, who are not familiar with it, and might interpret it as odd, while actually it is a culturally shaped defense mechanism.”

⁸ Pamela N. Phan, *Clinical Legal Education in China: In Pursuit of a Culture of Law and a Mission of Social Justice*, 8 Yale H.R. & Dev. L. J. 117, 126-7, N. 55, “Beginning in elementary school, Chinese students are expected to learn through a system the Chinese call “stuffing the duck” (tianya shi) cramming facts, figures, and theories into hours of classroom lectures, followed by hours of memorization at home.”

realistically have been understood in context unless that context was fore-grounded. I began to construct possible methods using students' considerable critical thinking skills in understanding the intersection of race and criminal justice in U.S. legal culture.

As others have observed, even native speakers of English must acquire a new language when learning U.S. law.⁹ It follows, of course, that foreign lawyers must add a “third language” of U.S. legal writing to their standard English and foreign legal writing language.¹⁰ Further, it is commonly assumed that Chinese students draw from an ancient pedagogy that relies on memorization and paramount attention to the teacher's position and opinions with regard to “legal article, legal principle, legal philosophy, the aforementioned “stuffing the duck.”¹¹ After that class, I vowed to rethink what little I knew about traditional Chinese pedagogy, especially the commonly held belief that Chinese students do not bother to think critically because ultimately the teacher will give them the answer.¹² Failing better, then, must entail new methods to teach U.S. critical analysis across a distinct and highly marginalized cultural border.

⁹ See Jill J. Ramsfield, *Is “Logic” Culturally Based? A Contrastive, International Approach to the U.S. Law Classroom*, 47 **J. LEGAL EDUC.** 161; Erie *supra* note 7, 417 (2007) (explaining that even for native speakers of English, the properties and conventions of U.S. legal writing registers and genres present “a new culture, a new English, and new rhetorical preferences. As such, international students have the additional task of learning the “new language” of U.S. legal writing registers and genres while they continue to build their command of Standard English (arguing that “it is [thus] important for those of us who teach these ESL students to understand that legal analysis in the U.S., which incorporates its own logical structure, adds another layer of cultural logic upon a language which itself incorporates a causal structure or logical organization.”)

¹⁰ *Id.*

¹¹ Matthew Erie, *Legal Education Reform in China through U.S.-Inspired Transplants*, 59 **J. LEGAL EDUC.** 60, 68 (2009), see also Pamela N. Phan, *Clinical Legal Education in China: In Pursuit of a Culture of Law and a Mission of Social Justice*, 8 **YALE H.R. & DEV. L. J.** 117, 126-7, n. 55 (2005) (explaining “[B]eginning in elementary school Chinese students are expected to learn through a system the Chinese call “stuffing the duck” (tianya shi), cramming facts, figures, and theories into hours of classroom lectures, followed by hours of memorization at home.”)

¹² Erin Ryan, Xin Shua, Yuan Ye, You Ran, & Li Haomei, *When Socrates Meets Confucius: Teaching Creative and Critical Thinking Across Cultures Through Multilevel Socratic Method*, 92 **NEB. L. REV.** 290, 332, (quoting a Chinese source describing the differences in learning styles as follows: “In China, the underlying assumption shared by law professors and students, consciously or unconsciously, is that students know nothing until teachers tell them. Before students understand the basic theory, it's not worthwhile to hear their premature ideas. Law professors teach us the right ideas and the standard answers.”)

This article urges a method of teaching critical thinking skills to students by strengthening audience expectations when legal and cultural concepts are moved into the fore-ground. In an effort to walk that tightrope between normative cultural views and the cultural relativism, I have experimented with a variety of interdisciplinary approaches based on contemporary writing theory and rhetoric. My essay chronicles my ever evolving efforts to help me, my Teaching Assistants (to whom I sometimes refer as “culture brokers” or “e-moderators”), and my students “fail better”--in virtual time and real time, working on the always unstable platform of critical thinking.

In Part II, I explain how Chinese students can better adapt to American legal education and ultimately promote a move from what Matthew Erie refers to as “thin” reasoning to “thick” reasoning, with the goal of reading, writing, and explaining legal materials in the social contexts in which they were written.¹³ This process relies on Teaching Assistants who serve as “culture brokers” and offers a bridge between me and the students that I can pass through yet keep the learning and cultural assimilation “learning based.”

In Part III I detail the approaches my Teaching Assistants and I used to help students adapt their own critical thinking skills through Blackboard Posts and real-time discussions and writing. I based my method on Gilly Salmon’s Five Stage model of E-learning’ adapted by me for use in a fairly limited period.¹⁴ Salmon’s five stage model “works through a structured and ‘scaffolded’ series of “e-tivities designed to encourage creativity and learning.”¹⁵ I demonstrate how students synthesized the scaffolded critical thinking during their “real time” study in Philadelphia when they prepared briefs and oral arguments for a target audience of a Federal Judge. It is at this stage that the interaction among the different

Students with different ideas do not usually have enough courage to express them because they expect them to be of little value. Students don’t even bother to critically think through what they are taught because we subliminally assume everything professors teach us is the ‘true and only answer.’ Chinese law professors often teach with an authoritative tone, suggesting ‘*This is the only accurate explanation to the problem; all other explanations are wrong.*’ For example, one professor highly proficient in international law told us outright that “polluting” his classes with discussion would bring nothing but superficiality and never reach the depth of theory or principle to which he aims his teaching.”

¹³ Erie, *supra* note 11 at 77-78.

¹⁴ Gilly Salmon, *E-tivities: The Key to Active Online Learning*, 2nd ed. London: New York, Routledge, (2013).

¹⁵ *Id.* at 12 (describing how “[W]orking with others online can be playful, liberating and releasing. Online participants are often more willing to try things out in a dynamic way than they would be face-to-face, which means that e-tivities can be more fun and still promote learning.”)

cultures of the courtroom, the classroom, and U.S. and Chinese argument styles must be navigated with best possible attention to context.

I conclude with the aspiration that learning thick reasoning will “fail” far better with methods that stress the socialization process rather than methods that approximate more formal approaches designed with U.S. students – already comfortable with U.S. culture – in mind.

Part II: “Thick” Reasoning as a Model for Critical Thinking

Although it would be facile to suggest that engaging students’ immersion in U.S. legal culture is simply a question of repairing their critical thinking skills, some concepts may certainly be interrogated. For example, Matthew Erie views the LL.M. Program at Tsinghua University School of Law as a test case in teaching critical reasoning to Chinese lawyers.¹⁶ He argues that much contemporary Chinese legal education has been informed by reform-minded Professors who have returned to China from study in the U.S., intent on emphasizing critical reasoning skills.¹⁷ In Erie’s view, however, these efforts fail to move beyond “thin” critical reasoning, e.g., test preparation (*yingshi jiaoyu*) to far more analytical “thick” reasoning.¹⁸

“Thin’ critical reasoning applies to the exercise of analytical reasoning as applied to legal materials to further the client’s interests. It has close affinities with formal logic....Thin critical reasoning informs many aspects of lawyering: conducting research including reading cases and statutes as well as examining evidence;

¹⁶ Erie, *supra* note 7 at 64 (explaining TULS is seen as one of the pioneering law schools in China today because of its experimentation with curriculum, teaching, and overseas connections....The U.S. exchange program for which it is most well-known is the LLM Program in U.S. law taught by Temple University’s Beasley School of Law, a program supported by a range of private and public donors including the U.S. State Department. Thus, TULS has strong ties to both the PRC government and the international community and, as such, provides fertile ground for the study of the cross-pollination of legal education reforms.”) Although Temple no longer receives as sizable a grant from the State Department, it continues to educate many of China’s future legal leaders.

¹⁷ Erie, *supra* note 11 at 77 (These educators “spent time in the U.S. either as graduate students or visiting professors and serve as ‘culture brokers’ who possess both transnational symbolic capital as well as ‘local knowledge. However, their effectiveness in adapting U.S. teaching approaches to China depends on a number of factors including the duration the Chinese educator spent abroad and the extent of his or her exposure to an involvement in U.S. law teaching.)

¹⁸ Erie, *supra* note 11 at 70-72.

developing (multiple and alternative) case theories; drafting memos or contracts; and oral advocacy and client consultation.¹⁹

Students may be lulled into false confidence with a combination of strong “thin” reasoning skills and high TOEFL scores as they begin studying in a U.S. law school, but the reasoning method taught in China rarely prepares them for law study in the U.S. or critical thinking in general.²⁰ The confidence that an already confident student may feel may be further boosted if they attend one of the special “pre-Programs” for incoming LL.M.s.²¹ But all told, none of this can substitute for a gradual yet intense acquisition of legal culture in context.

To synthesize materials into legal reasoning on a level expected by US lawyers or Judges, says Erie, a law student must develop a grasp of “thick” critical reasoning:

“Thick” critical reasoning widens the purview of analysis by focusing not only on policy per se but further, on politics and institutions of authority more generally, whether governmental, corporate, religious, or ideological. This form of critical thinking is not an explicit objective of instruction in formal educational institutions such as law school; more likely, it is acquired from repeated exposure to and immersion in diverse forms of cultural media outside the walls of the school. Thick critical reasoning forms the basis for political mobilization whether democratic, such as Kagan’s “adversarial legalism,” or socialist, as in classical Marxist thought.²²

Chinese students are likely to have internalized a great deal of critical thinking. Some of this thinking is in line with their cultural norms, which dictate that one forgoes criticism for those with greater authority than themselves.²³ Often, they have had little opportunity to showcase even constructive criticism simply because “thin” critical reasoning consistently bears fruit. Put more simply, for most Chinese educators, “thick” critical reasoning is not the chief determinant of their students’ successes.

¹⁹ Erie, *supra* note 11 at 77-78.

²⁰ Xiaoye You, *The choice made from no choice: English writing instruction in a Chinese University*, 13 **J. SECOND LANGUAGE WRITING** 97 (2004) (arguing that despite the development of Western writing pedagogies in China, “English writing is taught under the guidance of a nationally unified syllabus and examination system. Rather than assisting their students to develop thoughts in writing, teachers in this system are predominately concerned with the teaching of correct form and test-taking skills.”)

²¹ See e.g., Teresa Brostoff, Ann Sinsheimer & Megan Ford, *English for Lawyers: A Preparatory Course for International Lawyers*, 7 **J. LEGAL WRITING INST.** 137 (2001).

²² Erie, *supra* note 11 at 77-78.

²³ Erie, *supra* note 11 at 79.

My course posits that drawing out or navigating the borders of U.S.-style critical thinking and Chinese-style critical thinking depends, to a large degree, on the mentoring provided by a core group of Teaching Assistants or “culture brokers,” (a term that derives from anthropology in the mid-1900’s.)²⁴ Second and third year students are used in many research and writing classes for a variety of reasons and possess many of the qualities that I look for.²⁵ However, the students who elect to work with my constituency as a TA—foreign LL.M.s and SJDs who have completed my course and have made the transition into the JD Program -- are chosen because they share an interest in Chinese law, language, and culture. Most legal writing professors seek Teaching Assistants who can model what an excellent law student should be,²⁶ but a foreign legal Teaching Assistant (who may or may not be Chinese but was trained as a lawyer in a civil law country), is most valuable because she has had to interpret the language and culture of U.S.-style legal education, whatever her first language may be. Having graduated with a law degree from a foreign law school followed by an LL.M., JD, or SJD in U.S. law, the Assistant has learned first-hand the value of U.S.-style critical reasoning and communication, and the difficulty with which both are acquired.

A non-U.S. Teaching Assistant serving as an interlocutor may be best equipped to help students recognize and address the different cultural contexts our Chinese students encounter, both on-line and in real-time. The success of the collaboration among Professor/Student/Teaching Assistant depends on the students’ understanding that the Assistants have successfully absorbed the culture of the U.S. LL.M. Program. Finally, teaching assistant “war stories” embolden students to believe that they are a part of the process as well.

²⁴ **CLIFFORD GEERTZ**, *THE INTERPRETATION OF CULTURES* 89 (Basic Books 1973) (observing that culture is “an historically transmitted pattern of meanings embodied in symbols, a system of inherited conceptions expressed in symbolic forms by means of which men communicate, perpetuate, and develop their knowledge about and their attitudes toward life.”)

²⁵ See, e.g., Patricia Grande Montana, *A Contemporary Model for Using Teaching Assistants in Legal Writing Programs*, Hamline, 11-12: “I elected against an open application process and instead hand-picked some of my strongest students from the first-year class. They were strong students not only because they were outstanding writers and performed well in both Legal Writing I and Legal Writing II, but also because they demonstrated excellent oral presentation and time management skills, had pleasant and encouraging personalities, understood the program’s goals, and were very respectful of my authority.”

²⁶ See e.g., Ted Becker & Rachel Croskery-Roberts, *Avoiding Common Problems In Using Teaching Assistants: Hard Lessons Learned From Peer Teaching Theory And Experience*, 13 J. Legal Writing Inst. 267 (2007).

Part III: E-Tivities as a Method of Front-Loading Critical Thinking and Persuasion

1. The Problem

Especially in light of the reaction to the *Brown* documentary, I chose a “real-world” problem for the Summer semester, a problem posed squarely at the intersection of law and race. Philadelphia has a long, troubled history of allegations that the police force is insensitive to the civil rights of its citizens. In 1970, actions were brought in the Philadelphia Federal Court, in which various citizens and groups alleged that then Mayor Frank Rizzo’s Police Department had engaged in a “pervasive pattern of illegal and unconstitutional treatment [that] was said to be directed against minority citizens in particular.”²⁷ In 1973, after two trials, the District Court required the police “to submit to [the District] Court for its approval a comprehensive program for improving the handling of citizen complaints alleging police misconduct.”²⁸ The Third Circuit “upholding the District Court’s finding that the existing procedures for handling citizen complaints were ‘inadequate,’ affirmed the District Court’s choice of equitable relief.”²⁹ A divided Supreme Court reversed on grounds of federalism and “concerns respecting existence of a “live controversy.”³⁰ The problems giving rise to underlying the litigation remained, however, and were debated in Philadelphia political campaigns for decades.³¹

In 2010, a citizen class action suit was brought in Philadelphia Federal Court against the City, the Police Commissioner, and various officers, challenging the Police Department’s “stop and frisk” policy. The defendants alleged, *inter alia*, as follows:

The defendants have implemented and enforced a police and practice of stops, frisks, searches and detentions of persons, including plaintiffs, without probable cause and reasonable suspicion as required by the Fourth Amendment.

The stops, frisks, searches and detentions by the Philadelphia Police Department officers are often based on constitutionally impermissible considerations of race and/or national origin in violate of the Equal Protection clause of the Fourteenth

²⁷ *Rizzo v. Goode*, 423 U.S. 362, 366 (1976).

²⁸ *Goode v. Rizzo*, 506 F.2d 542 (3d Cir. Pa. 1974)

²⁹ *Id.*

³⁰ *Rizzo*, 423 U.S. 362 at 378.

³¹ See generally, Robert Beauregard, *Tenacious Inequalities: Politics and Race in Philadelphia*, *Urban Affairs Review*, 25 no. 3 420, March (1990); Carolyn T. Adams, *Race and Class in Philadelphia*, in George E. Peterson, Ed., *Philadelphia Mayoral Elections*, 133-32 in *Race and Class in Big-City Politics, Governance, and Fiscal Constraints*, Institute Press, Washington, D.C. (1994).

Amendment. The victims of such racial and/or national profiling are principally Black and Latino men.³²

The case was subsequently settled with the entry of a consent decree requiring *inter alia*, the appointment of a Police Monitor (Joanne Epps, the then Dean of the Temple Law School) and the reformation of the “stop and frisk” policy.

Philadelphia’s “stop and frisk” policy was based on Chief Justice Warren’s opinion in *Terry v. Ohio*.³³ There, the Supreme Court held that, for their own safety, police could, on less than probably cause, pat down, (“stop and frisk”) an individual whose behavior is “suspicious.”³⁴ The decision has spawned a wealth of case law and scholarship focused on whether Terry created a Fourth Amendment loophole that would allow race-based stops.³⁵

U.S. v. Thomas Smith

Drawing on this troubling history of race relations and law enforcement in Philadelphia thus seemed the ideal way to lead students into thick reasoning. Throughout the semester of this pilot Summer Program, students worked on a seemingly simple search and seizure problem. The facts as found by the Court may be paraphrased as follows:

Thomas Smith, who is African American, stands at 9:30 outside “Norm’s” bar in a “high crime” Philadelphia neighborhood with three Caucasian men. As they pass in their marked patrol car, police – who had received numerous citizen complaints of gun and drug crime outside the bar – order the four to disperse. The three Caucasians immediately run in different directions, one apparently holding something dark in his hand. The police do not pursue any of the three, but drive on, returning 10 minutes later to see Smith still standing outside the bar. As the police stop and get out of their patrol car, Smith begins to run, holding something in his waistband with both hands. With police in close pursuit, Smith continues to run for blocks, disregarding their repeated commands to halt. After hurtling a fence, Smith surrenders to the police, then throws a handgun to the ground, saying “Ok, you got me.” Smith is federally charged with possession of a firearm by a convicted felon. 18 U.S.C. §922(g)(1), 924(e)

In adapting the facts of a case from the docket from Eastern District of Pennsylvania, I

³² Complaint, *Bailey v. Phila.*, (Civ. No. 10-5952) (EDPA 2011).

³³ *Terry v. Ohio*, 392 U.S. 1 (1968).

³⁴ *Id.* at 24.

³⁵ See *Fla. v. J.L.*, 529 U.S. 266 (2000) (and cases therein cited); see also David Rudovsky, *Law Enforcement by Stereotypes and Serendipity: Racial Profiling and Stops and Searches without Cause*, 3 U. PA. J. CONST. L. 296 (2001); Tracey Maclin, *Terry v. Ohio Fourth Amendment Legacy: Black Men and Police Discretion*, 73 ST. JOHN’S L. REV. 1271 (1998).

hoped to preserve the “real world” context of an inner-city setting.³⁶ I crafted facts to enhance their ambiguity and make it inevitable that students would interpret events, not just recite them. The problem is rife with policy issues, e.g., racial profiling, the balance between individual liberties and governmental interest, and always shifting Fourth Amendment concerns. It is this balance that the students must strike as they take on their roles as prosecutors and defenders.

The students are provided with a series of 4th Amendment decisions – the “closed universe” of legal authority on which they will ultimately rely. *Terry v. Ohio* [392 (US 1 (1968))](4th Amendment allows police to conduct a stop and frisk based on articulable, reasonable suspicion); *Illinois v. Wardlow* [528 US 119 (2000)](defendant’s headlong, unprovoked flight from police in high crime area gives rise to reasonable suspicion justifying a *Terry* patdown); *Florida v. J.L.* [529 US 266 (2000)] (anonymous tip to police that a young black man standing at a bus stop was carrying a gun insufficient to warrant a *Terry* patdown); *California v. Hodari D.* [499 US 621 (1991)](seizure occurs when a defendant is physically restrained by police or submits to their show of authority); *U.S. v. Navedo* [694 f. 3d 463 (3rd Cir. 2012)] (mere flight from police insufficient to give rise to *Terry* patdown). Using these cases, students inevitably must discuss the problem of racially biased policing and the notion that racial profiling does not give rise to “reasonable suspicion.”

2. The Method

In the summers of 2014-2017, I piloted a developed a method based on Gilly Salmon’s Five Stage model of E-learning adapted by me for use in e-learning and in real-time. Despite the misgivings of some critics who object to models like Salmon’s as short on “flexibility and reflexivity,” I believe that with appropriate adjustments, this model would suit both a combination of on-line and real-time learning, and an on-line course.³⁷

The attraction of Salmon’s model’s lay not only in bringing content to my constituency, nor in the valuable interaction of my Teaching Assistants now functioning as “e-

³⁶ The fictitious “Norm’s Bar” was located within three blocks of the law school and student dorm.

³⁷ See e.g., Bernard Lisewski & Paul Joyce, *Examining the five-stage e-moderating model: designed and emergent practice in the learning technology profession*, 11 **ALT-J** 55, 59 (2003) (arguing for the dangers of creating a “grand narrative or totalizing explanation” and “commodified higher education environment.” The authors conclude that: “as a neophyte profession we need to establish a more self-reflexive, questioning, contestable, and research-based method of practice. Perhaps, given our relative youth as a profession it is understandable that the five-stage model of online interaction has become a dominant paradigm for one area of practice. However, this may simply be one of many that we yet to ‘receive’ and contest.”)

moderators.³⁸ Rather, the attraction lay in the way the model put these two features into play in different interactions.³⁹ Students in the Beijing Program draw on the technical support available through the Blackboard system, but the greater hurdle is the somewhat paradoxical student fears that they will not be able to meet their teacher's expectations, and concern that there is no real benefit in taking part in an on-line course for which they receive no credit. Salmon's on-line model affords different avenues for helping students assimilate to U.S. legal culture and communication in a process students come to see as integral to their success.

The Salmon "scaffolded" courses are structured in five-week modules or "Stages" of e-learning, with each week devoted to single stage. I altered her model to accommodate the specifications for e-learning and real-time learning, and then adapted it to my problem. Because my students might not be familiar with working on-line in discussion boards, the emphasis during Stage 1 is on making technology accessible to a wide range of students.⁴⁰ What I find most challenging in Stage 1 and Stage 2 is trying to convince students that I am not interested in a prepared script: the purpose at this point is nothing more than to establish an on-line identity, and to reach out through a post to at least one other participant.⁴¹

³⁸ **GILLY SALMON, *E-MODER@TING: THE KEY TO TEACHING AND LEARNING ON-LINE*** 4-5 (3rd ed. 2011) (describing the "e-moderator [electronic moderator] presides over an electronic online meeting or conference, though not in quite the same ways a moderator does....The essential role of the e-moderator is promoting human interacting and communication through the modelling, conveying and building of knowledge and skills. An e-moderator undertakes this feat through using the mediation of online environments designed for interaction and collaboration. To learn to undertake an e-moderating role, whether coming to it fresh or as a change to previous teaching, coaching, or facilitating practice, takes a mixture of new insights and some technical skills, but mostly understanding the management of online learning and group working....The tutor, teacher, trainer-whatever you wish to call him, her or them [I call them e-moderators when they work online] – operate in the boundary between the educational establishment [represented by the curriculum and the provided learning technologies] and the learning experience – they adopt a wide variety of roles.)

³⁹ *Id.* at 31 (describing "three types" [of interaction]: "interaction with 'content' (course materials or references), interaction between tutor and the student (Berge, 2007) and, third, the much wider interaction between groups of peers usually with the e-moderator as the mediator and supporter. It is the third kind that the model focuses on whilst seeking to integrate the other two.

⁴⁰ Salmon, *supra* note 38 at 35.

⁴¹ Salmon, *supra* note 38 at 68. In a more sophisticated version of this model, students create on-line identities through avatars. Salmon explains: "Virtual worlds are social

At Stage 3, some Professor feedback to selective “e-tivities”⁴² occurs. In Stages 4 and 5, the potential for discussions both demanding and controversial develops, and e-moderators can facilitate the collaborative efforts of the students by “weaving” and “summarizing” ideas.⁴³ With proper support from the Professor, e-moderators are engaging in high level (“thick”) reasoning with students in what Salmon calls a “constructivist” approach to learning.⁴⁴ The chief moderator – the Professor – assumes the responsibility to create the “sparks” that allow for more sophisticated and reflective learning.

The facts of *Smith*, with the overlay of U.S. cultural history, force the students into the “thick” areas of race relations and the judicial system. Each stage is accompanied by ungraded discussion sessions and in-class discussions with culture brokers and me. Students thus have the opportunity to make headway into the social, political, and legal issues that they will confront reading the law. In the limited set of examples that follow, I argue that thick reasoning skills develop – suggesting the methods described are worth the effort. With the vast scope of cultural influences to inform the practice of teaching foreign lawyers, we can begin to envision practices where every stage of the writing process offers opportunities for intercultural communication.

The moderator, e-moderators, and technical support staff facilitate early virtual communications. Every effort is made to ensure students have access to Blackboard

environments, not games; their participants each have at least one avatar (a virtual representation of themselves), able to move around in the 3D environment and interact with other avatars.”

⁴² Salmon, *supra* note 14 at 6 [Explaining (E-tivities) were first developed using text-based computer-mediated environments such as bulletin boards or forums. That’s the easiest place to start....Learning resources and materials (what people once called ‘content’) are involved in the design and delivery of e-tivities, but these are to provide a stimulus or a start (the ‘spark’) to the interaction and participation rather than as the focus of the activity. So e-tivities give us the final break point from the time-consuming ‘writing’ of online courses.”]

⁴³ Salmon, *supra* note 14 at 184-185.

⁴⁴ Salmon, *supra* note 38 at 53-54. Salmon’s view of social constructivism enable allows participants “to reflect on and discuss how they are networking and to evaluate the technology and its impact on their learning processes. These higher-level skills require the ability to reflect upon, articulate and evaluate one’s own thinking. Participants’ thoughts are articulated and put on view online in a way that is rarely demonstrated through other media. In that sense, the role of reflection contributes in a unique and powerful way to each individual’s learning journey” (Hunt 2001).

discussion posts and technology for synchronous and asynchronous communication, as well as all other interactive features available.⁴⁵

During this stage, discussion messages always clarify the purpose of the activity, or as Salmon renames it, “e-tivity.”⁴⁶ For instance, I posted this message to the students: “In one or two sentences, describe whether you have any expectations for this legal writing course. For example, what knowledge are you hoping to gain, and what skills are you hoping to develop?” Among the responses I received are the following:

As an in-house counsel, I expect to get some knowledge about how to do legal research more efficiently and obtain some skills that could help me continuously improve my language capability toward highly professional, precise and persuasive legal analysis and writing.

In the legal research course of many months ago, I always got the comment “less is more” from the professor. So I hope to be concise and to the point in my writing.

I am a public prosecutor and my job requires me to write a lot of legal documents. I want to learn more analyzing skills and writing skills to improve my work in the future.

From my personal angle alone, it is never suspicious that legal writing is greatly significant. Therefore, I would like to learn all of the knowledges about legal writing course.

I want to write materials clearly and sentences with words that don’t have to be deleted. But it seems really a long way to go. I hope to shorten my searching time and get relevant information quickly and precisely.

I hope to reinforce my writing skills as a professional legal practitioner. I hope to improve and perfect my English writing skills.

⁴⁵ Every class in Beijing has 2 elected class monitors whose job is to oversee the welfare and academic participation of their fellow classmates. It can be an effective way for a professor to “get the word out” in ways that might not be possible otherwise. There is no small irony that I have had to resist drawing the Beijing class monitors into the effort of bringing their fellow classmates into the mix when trying to assure group participation. It is surely a mark of ethnocentrism that I refused to have students police students, and it is surely a problem worth studying for its cultural contextual importance.

⁴⁶ Salmon, *supra* note 14 at 5.

I hope to grasp the essential skills of legal writing in order that I might communicate better with counterpart lawyers by drafting legal memos, opinion and other legal documents more logically and professionally.

I want to be a better storyteller in professional work. I am quite interested to learn how powerful writing and persuasion can be forged.

This short sampling demonstrates the diversity of responses: from the common but unrealistic wish to “perfect” one’s writing, to the far more Western notion of becoming a better “storyteller.” I chose to respond to the post regarding the Professor in Beijing who had remarked that the student should remember “less is more.” It suggested that students were being given excellent advice, but insufficient practice actually to begin the process of editing. I had students discuss the idea of “less as more” as a goal in writing. After some discussion, they concluded that the legal research class they had attended at the beginning of their program focused on finding cases and case briefing. Although the students could “tell” me what skills they had learned, it was not yet clear that they were proficient in “showing”. Why should less be more?

The discussion served as good preparation for teaching the skills of summarizing and paraphrasing. The earlier posts had been mandatory, but Teaching Assistants now posted a message to which students could respond or not: “X student responded to professor’s message by saying she wanted to “perfect” her English. Do you think this is a realistic goal? What help do you think you could use in improving you own writing”?

These discussion boards addressed concerns students could not easily raise in a conventional classroom setting with a Professor. Some students suggested that they would like to have help correcting grammar and punctuation. In response, the Teaching Assistants stressed that while these skills were greatly valued in the legal community, attention to audience, getting started, development, and organization were often far more difficult than learning grammar and punctuation and should be at least equally valued. The most common requests were for “models” of writing. E-moderators are usually more successful than moderators in explaining the questionable value of models.

Stage 2: Online Socialization

At this stage, participants benefit from e-moderators who are particularly suited to helping students work toward the always difficult transition from “telling” to “showing.” “e-moderators” use posts to encourage students get to know one another as members of a group that will learn and grow together. In addition, letting an e-moderator post questions

helped enormously is dispelling fears that students felt when addressing their teacher directly.⁴⁷

At this stage, e-moderators facilitate socialization in seemingly simple ways. For example, the e-moderator offers the simple instruction: “What are the most popular given names in your culture?” “What is the origin of your name?” “Does it have any special cultural significance?” This question can be broadened a bit, for example, by asking, “Do you have an ‘American name’?” “Was it chosen for you or did you choose it yourself?”⁴⁸ “Does it have any special significance – cultural or otherwise?”⁴⁹ As Salmon argues, however, these kinds of activities depend for their effectiveness on the e-moderators explicit directions and the degree to which she clarifies what does not need to be disclosed.⁵⁰

Stage 3: Information Exchange

At this stage, students are introduced to the concept of “stop and frisk,” and the seminal Supreme Court case *Terry v. Ohio*. In their first graded exercise, they are assigned the role of either defense lawyer or prosecutor, and must persuasively summarize and paraphrase the facts found by the suppression court in *U.S. v. Smith*. Anticipating that students have not yet practiced university or academic paraphrase and summary, Teaching Assistants offer on-line teasers to help orient students to the task. Significantly, students are largely unconcerned with the key question of whether the police based their actions on Smith’s

⁴⁷ Salmon, *supra* note 38 at 213 (Salmon explaining “Asking direct questions can sometimes be problematic. For instance, in traditional Chinese culture, asking questions (particularly of teachers and parents) is not generally encouraged. So being urged by the e-moderator to ask questions online may not translate naturally into action, and may need active and continuous – albeit sensitive – prompting and support. As a corollary, in some cultures, there can be an expectation that the teacher will “tell” and the students will learn what the teacher says. A preoccupation with assessment and ‘getting through the work’ can follow. All of these may translate into an expectation of authority by the e-moderator on the part of the participants. It’s impossible in a short time to change this. However, creating an atmosphere of equality and the e-moderator setting up structured activities will help.”)

⁴⁸ This is a common practice for English Language learners in China.

⁴⁹ Questions based on those suggested for Stage 2 by Gilly Salmon

⁵⁰ Salmon, *supra* note 38 at 213-214, “Salmon explains “Personal disclosure online as part of socialization into the group, which some of us may take for granted if we are used to the Anglo-American style, is again not necessarily the norm for all cultures. And some will be more generally reticent about articulating the thoughts online. Really good e-tivities exploring cultural differences at Stage 2 will help lay the ground for the valuing of all contributions. Make it clear that people do not need to disclose personal information, and avoid posting your own information based on marital status or career achievements, since they may otherwise ‘set the tone.’”

race. Although the defense lawyers see that the issue of race exists, they are far more concerned with issues of criminal procedure – a course that none of them has yet taken - - and the fundamental differences between the Judge’s role in the U.S. and in China.

Many of the students appeared reticent in exploring the “race question” at the heart of the fact pattern. Whether prosecution or defense, the issue would have to be framed. However, at this stage, I encouraged them to see the issue of race in America as a palimpsest – picking up layers and meaning as they read materials and analyze the problem and the facts. Accordingly, the Teaching Assistant’s discussion board offered the following post – a less direct approach to the fact pattern:

According to *Terry*, how would you determine the standard for a reasonable suspicion or probable cause to stop or/frisk a person walking on street? How much circumstantial evidence is needed for the police to find reasonable suspicion more objectively? Can the police officer make the conclusion depending more upon his own subjective perception? *How would a judge be able to determine a subjective perception of the police?* (my italics)

Notably, there was only one response to this post:

I think there should be some specific guidelines to help the police to decide in each specific situation. This kind of guideline may be made by experts, experienced policeman, also should be comprised with the spirit of criminal procedure law and the constitution. If every policeman performed with the police power according to the guideline rather than his own feeling, it can guarantee the objectiveness in some extent. In general, Judge should pay respect to the police guidelines in each case. But if judge don’t agree with the specific rules of the guideline, he can put the rule aside in a specific case.

No one responded to this post, I suspect, because of the ambiguity of the student’s message. Yet, the message that the e-moderator posted needed a good bit of unravelling by the students as well. Until very recently, Chinese Judges wrote very little that might compare to the judicial opinions and orders so common in U.S. legal culture. After reading *Terry*, and certainly after reading *Wardlow* (the next assigned case), students are aware that police, lawyers, and Judges must follow (not make) the law. Additionally, the student who wrote the sole post seems to be wrestling with his own cross-cultural misconceptions about the limits of the police in determining reasonable suspicion. In China, a Judge’s role is to gather facts and reach the correct decision. This, in addition to their understandably

limited grasp of U.S. criminal procedure (most knew only what we studied for this problem) led students to misunderstand the question.⁵¹

One option would have been explicitly to correct those misconceptions. Thick reasoning is much more likely to be acquired, however, by interrogating the cross-cultural implications of procedure in China and the U.S. Accordingly, the e-moderator posed these questions:

How would a police officer handle a “Terry-like” situation? Can you identify the U.S. Terry standard and compare the two jurisdictions. Are police in China encouraged to use objective or subjective methods of deciding when to question someone?

The e-moderator then focused on *Terry* and criminal procedure issues to help students think of ways they could set out the facts that would highlight or minimize the reasons for police suspicion. She was able to weave isolate points with the Terry standard and so lead the students to begin to create a checklist of significant facts. Additional facts were added over the course of several posts, giving students both considerable information to work with and an atmosphere of collaboration and shared knowledge. Students were thus encouraged to harness and refine their language without fear that perfect answers were required.

This experience underscored the differences between the Chinese and American English rhetorical styles. Chinese students understand the role played by persuasive technique in the adversarial system – at least in theory. When faced with a question of rewriting facts to favor one side or the other, however, the demands placed on their language often lead them down the wrong path: what students hope to find is a legal answer that will obviate the need to manipulate language and syntax. This is where they feel least comfortable and the first place the U.S. legal writer should be going when framing facts persuasively.

The assignment also demonstrated how difficult a skill is shadowing facts without overshadowing them. In the early stages of composition, the students resist summary and paraphrase, using as much original language as possible. During their formal study of English, they were not taught the skill of varying language to suit different audiences. They

⁵¹ Students have not studied criminal procedure at this point, and so, would rather discuss the law than wrestle with the language. We limit the discussion of the law to the cases assigned, and the outline of a motion to suppress evidence as a necessity, not in any desire to stifle their desire to learn. Discussion boards, Lexis CALI lessons, and other materials are available to answer legal questions outside the purview of the problem.

are frustrated by our failure to provide them with models and our insistence that they make (and learn from) their mistakes.⁵²

An atmosphere of trust is essential to overcoming these barriers to persuasive language. Examples of poorly expressed facts are placed on Blackboard (for all to review and discuss) and on Powerpoint to aid class discussions. A special effort is made to address the two categories of distortion most commonly found in the students' factual recitations – exaggeration or outright fiction. A typical example of defense counsel exaggeration:

Some ten minutes later, while Thomas Smith was still standing outside Norm's Bar and enjoying the music spread from the outside, the marked police vehicle suddenly roared back and the two fierce policemen got out of the vehicle, running to Thomas Smith with curses in their mouths.

I witnessed reactions to this exercise in a real-time class. The student laughter that grew as students read the Powerpoint slide was notably more confident than the laughter described at the beginning of this essay – a neat contrast to the student reaction to “The Road to *Brown*.” This was shared laughter that suggested to me that the students were beginning to learn from their own hyperbole. If this exercise were to take place online, it would have been preceded with a discussion of using emoticons and “Netspeak.”⁵³ With proper

⁵²See Spanbauer, *supra* note 6, 423 (arguing that for students educated in the ideology of collectivism, “It is not enough to simply provide models of examples of written analysis and to instruct students to use deductive or critical analytic paradigms in creating documents and arguments. It is also critical to explain why we use these models and though help students understand the models and instructions we provide by reference to their own system of legal writing and analysis so they can reflect up and consider how the two systems differ.”)

⁵³Salmon, *supra* note 38 at 64 (Explaining “I’ve used the term ‘Netspeak’ in this book for the kind of action-based communications I’ve tried to harness....Talking online, sometimes called ‘Netspeak,’ lacks the facial expressions, gestures and conventional that can be important in communicating face-to-face and in conveying personal opinions and attitudes. In most online platforms participants and e-moderators alike must always be alert to the potential for ambiguity. This phenomenon led to the development of ‘smileys’ or ‘emoticons’ as a substitute... [for example Netspeak uses <> to indicate an action, such as a giggle or a look. Get everyone to show an action in their own networks. Abbreviations for actions are fine if everyone understands them: for example, <g> for grin. It would be a good idea to explain new networks at least for the first two or three times you use them. If this exercise were to take place online, it would have been preceded with a discussion of using emoticons and “Netspeak.”)

guidance, students were beginning collaborate to recognize and correct their mistakes. In this way, the subtler tools of persuasion began to be employed.

During Stage 3, Teaching Assistants concentrate on those who might need more guidance or support. Students are required to write a short bench memo applying the five assigned cases. Simple sequenced assignments ask students to summarize cases and weave together a growing analysis. Salmon points to two techniques that support the five-stage model:

Weaving captur[es] key aspects of an earlier task that have not been discussed in sufficient depth and encourages additional exchanges.... Summarizing acknowledges participants' input and brings to discussion to an end, highlighting its key contributions. It may be produced by participants.⁵⁴

Students will be unsure of what makes writing clear and persuasive. Although it might seem preferable to suggest the "IRAC" rubric earlier in the Semester, efforts to use facts to scaffold persuasive writing helps students cross boundaries between the legal argument style they have been taught in China and what they are learning in the U.S.⁵⁵ My goal here is to work students through the tiers of assembling an argument (without resorting to models) that the instructor can then edit.⁵⁶ At the same time, the Teaching Assistants and

⁵⁴ Salmon, *supra* note 38 at 64.

⁵⁵ Contrastive rhetoric scholars have long debated how language culture translates into discourse. Among the most controversial is Robert Kaplan's 1966 article *Cultural thought patterns in inter-cultural education*. In T. Silva & P. K. Matsuda [Eds], *Landmark essays in ESL writing*. (11-25). Mahweh, New Jersey: Lawrence Erlbaum Associates, Inc. (2002). Here Kaplan categorized style by culture and geography, arguing that "Oriental" languages "would strike the English reader as awkward and unnecessarily indirect." (3). Criticism was plentiful and often harsh. Still, Kaplan's conclusions ushered in contrastive rhetoric as one way to approach how cultures learn argument and persuasion. More recently, scholars have asserted that Chinese pedagogy does value "conciseness" but those who embrace Intercultural rhetoric, e.g., Ulla Connor, see other facts less important in explaining Chinese writing style as "cultural orientations toward self, other, society, and social interactions." See Ulla Connor, *Contrastive Rhetoric: Cross-Cultural aspects of second language writing*. Cambridge: Cambridge University Press, 1996.

⁵⁶ See Spanbauer *supra* note 5, 420-421 citing to Benson & Heidish, *note* 72 at 317-318 (noting "[R]esearchers assert that 'teaching writing as a manageable and changeable process can be a powerful idea for many ESL students; the problem however, for writing teachers in getting ESL composition students to adopt a broader view of writing is in finding was to loosen their grip on the focus on the written product and its form, that which is so often viewed as the immediate measure of success in many writing classes.'" *See also*

I continue to create discussion posts and exercises that allow the students to interact and understand the links between IRAC theory and practice.

Although most of my students will be competent speakers, only some students will be proficient at structuring an essay.⁵⁷ Possibly the single most request that my Teaching Assistants and I receive is for “models” for the brief. From an earlier but still very useful article discussing, among other things, Chinese writers’ developmental style, I infer that my students frequently desire models of organization to practice -- or even copy --and strive for formal perfection in language because their competence in writing, organized units of thought is so delayed.⁵⁸ U.S. composition teachers must be mindful that many Chinese students have been taught to value correct sentences level writing over organized, revised academic writing.⁵⁹ Given that the students have a fundamental respect for judicial hierarchy, and are hard pressed to argue that published opinion should be distinguished, it is no surprise that the essays generated through Stage 3 are likely to contain elements of more traditional Chinese as well as Western learning techniques. In any case, ambiguities must be embraced and negotiated throughout.

Stage 4: Knowledge Construction

By Stage 4, students can no longer ignore policy issues as they search to find legal answers to questions. Yet they continue to be reluctant to address race. For instance, a student in the role of a prosecutor argued:

The Prosecutor is content to note that the case is controlled by Wardlow. Flight from police in a high-crime area at nighttime is enough for reasonable suspicion. Mr. Smith and Mr. Wardlow do the same thing. Both run from police for unprovoked reason.

⁵⁷ Bernard A. Mohan & Winnie Au-Yeung-Lo, *Academic Writing and Chinese Students: Transfer and Developmental Facts*, 19 **TESOL QUARTERLY** 515, 522 (1985) (“While English-speaking students may be competent speakers of the language, they are not necessarily competence at the discourse level is widespread.”)

⁵⁸ *See Id.*

⁵⁹ *See* Bernard A. Mohan & Winnie Au-Yeung-Lo, *Academic Writing and Chinese Students: Transfer and Developmental Facts*, 19 *Tesol Quarterly* 515, 528 (1985) (“Thus, the difficulties of Chinese students writing in English may be better understood in terms of developmental factors: Ability in rhetorical organization develops late, even among writers who are native speakers, and because this ability is derived especially from formal education, previous educational experience may facilitate or retard the development of academic writing ability. In other words, be should be aware of the late development of composition ability across the board and pay particular attention to students’ previous educational experience....”)

Students in the role of defense counsel seek refuge in *J.L.* and *Navedo*:

Fla. V. J.L. also can be applied in the present case. The core facts of J.L. case is an anonymous tip. Smith was seized because police received an anonymous tip.

There are some reasons for applying United States v. Navedo in the present. Like in Navedo, Smith ran from the police. This is not suspicious.

The Professor's goal here is to encourage students' thick reasoning so that they will understand on their own (not by copying models) that race is at the heart of this 4th Amendment problem.

These exchanges help students to explain, among other things:

- 1) Unlike in Smith, in *Wardlow* only one suspect fled.
- 2) How *Florida v. J.L.* addresses the questions of race.
- 3) Why the Court in *Navedo* stated that its decision would be the same regardless of whether or not the actions that gave rise to *Navedo*'s arrest took place in a "high-crime neighborhood."

During Stage 4, students must begin to manage their own construction of persuasive language.⁶⁰ The principles of critical analysis are engaged through active thinking and online interaction and include "critical analytical thinking including judging, evaluating, comparing and contrasting and assessing."⁶¹ As Salmon envisions it, the Professor as e-moderator create "sparks" to promote independent thought.⁶² The culturally provocative sparks "can introduce the idea that there may be multiple perspectives and solutions."⁶³

⁶⁰ Salmon, *supra* note 14 at 30.

⁶¹ *Id.*

⁶² Salmon, *supra* note 38 at 44. It is at this point that I recognized the wisdom of Salmons words: You may feel tempted to skip to Stage 4 from the start of your online programme! However, the previous stages are an important scaffold for success.

⁶³ *Id.*; see Salmon *supra* note 14 at 77-78. A telling example of improved skills occurred when the students viewed a video of Xi Jinping's 2014 New Year's Speech. I was confident that they would find his speech dull and unpersuasive and his manner wooden. I fully expected them to see their President as a speaker not to be emulated. I could not have been more wrong. Indeed, as students laughed during parts of the speech, I had not the slightest idea why. (Any more than I did not fully understand when they laughed at portions of "The Road to Brown.") They told me that it was a very Chinese speech and a very modern one. They were laughing because it was indicative of the kind of inclusiveness the President was seeking, which they found sophisticated, but, at the same time, a bit heavy-handed.

The students' final Smith assignment is the preparation of a persuasive memo or brief for the prosecution or the defense. Before their persuasive memoranda have been finalized, the students must present oral arguments to a Federal Judge. Preparing for oral argument provides an opportunity for the students to prepare their language and hone their thick reasoning skills. Students can benefit by expressing their concerns about the final product, but their ideas need not be seen as complete and correct. Although they know that the issue of race will arise, they seem to be unprepared to respond to the question that puts the issue most starkly:

How can it be reasonable to pursue the African American suspect but not the Caucasian suspect?

Students now readily discuss the race issue in class, in small groups, and on Blackboard's discussion board. By this Stage, they plainly understand that racial profiling could not comprise reasonable suspicion to stop and frisk Smith. And still, quite predictably, the discussions continue to reveal reluctance to discuss race in what was supposed to be a purely "legal" argument:

Police stop only Smith, who is black. But if his behavior is suspicious how does race matter?

Or a question directed to the inflexibility of "legal law":

American judges must follow legal law only. Why should judge care if Smith is not white?

To address their insecurities, a Teaching Assistant's discussion board offered the following post entitled "Feeling Confident":

Take turns sharing a strategy you have used to feel more confident in public speaking, and also point to a strategy one of your fellow students has described and why it might be useful.

He wanted to convey how much he disapproved of the rest of the world's war-mongering, but did so subtly. When I poked fun at the stiffness of this delivery, one student jumped up and gave a brilliant impromptu rendition of Chairman Mao's animated style, suggesting that if I preferred that kind of presidential rhetoric, then I could have it! After a brief rendition of a bit of President Ronald's Reagan "There you go again!" speech, we were able to come to terms with the relative successfulness of different styles of the rhetoric of politicians. Another student suggested rather gently that if I were more aware of Chinese rhetorical style, I would understand how much had been conveyed from the way the President used his fingers and tapped the table. A new understanding was being built.

Many students responded to this post by capturing the very ambiguity of “thick reasoning”:

My classmate says that she must believe her story but the story I want to tell cannot be proved 100%. Imagine, when you believe you are telling a truth to someone. What will be in your mind? I am not lying. I must prove that. Let them know the real story. They should believe me. Then you will have no time to be nervous.

The cultural implications of this post include the question: how certain does one have to be before making an argument?

Stage 5: Development

Presenting oral argument proved to be enormously helpful in moving students from thin to thick reasoning by requiring them to address issues of argument and audience expectations. This final section includes samples from draft briefs that students finalized after oral argument.⁶⁴ These materials, as well as discussion board postings, demonstrate the value of acquiring cultural dimension gradually, in a fully immersed English setting with Professor as moderator and Teaching Assistants as co-moderators.

As I reviewed the students’ final drafts, it was apparent that the race issue gave rise to abundant examples of thick reasoning. Once again, absent racial profiling, the police plainly had a reasonable basis to stop and frisk Smith. The question of whether race played a role in their decision to stop only Smith (and not his Caucasian counterparts) touches on law, policy, and equity, but only now was it addressed.

As I have shown, employing “thin” reasoning, students initially were reluctant to tread into deeper, more charged waters. By the time they wrote their final drafts, however, this had changed. As might be expected, those students in the role of defense counsel made greater use of the race issue:

One student offered the following “Question Presented”:

Is the flight from polices of an African American defendant, with failure to pursue three Caucasians by polices [a] sufficient [basis to suppress].

In reciting the facts, one student pointedly noted that although the police pursued Smith because he held something in his waistband:

⁶⁴ Using oral argument as a stage of the brief writing process will be discussed in a separate article.

10 minutes before [the officer] also saw my client's white friend holding something dark in his hand [while he] ran [but] does not do anything.

In arguing that the gun should be suppressed, a student stated that he:

cannot explain why [the officer] chased my client and not Caucasian holding something dark in his hand.

Another student asked:

If reasonable suspicion is based from the experiences of the officers, why was the behavior of my client suspicious, not the Caucasians?

Another student put it more succinctly:

The Terry investigation stop of a defendant by the police is not supported by reasonable suspicion if it is because of race.

Although the students assuming the prosecutor's role had greater difficulty with the race issue, they understood that they could not ignore it. One student stated the Question Presented as follows:

Whether the police pursuit of the defendant was based on race?

The same student sought to answer this question in his factual statement:

The Caucasian ran when the police told him to do so. The defendant run only when he thought the police might be searching him.

Another student argued as follows:

By waiting to run until the police walked toward him, the Defendant acted more suspiciously than the three Caucasian friends.

Finally, a prosecutor offered the following policy argument:

This case is about the general interests of crime prevention. The court needs to balance the interest against intrusion of undivided rights and the safety of the community.

Although not free of error, these analyses are both adversarial and reflect of thick reasoning—both essential to persuasion.

Over the course of the Semester the students have thus become more comfortable in the realm of uncertainty and “thick reasoning.” Students are taught paraphrase and synthesis

through multiple opportunities to put legal language into their own words. Although this method may not produce U.S. legal writers, it will likely produce Chinese lawyers with a commitment to improving their communication in English and improved awareness of the practice adversarial argument, written and spoken.

From their readings and discussions in class with “culture brokers” and with me; from conferences; from exchanges with the Judge; and from their own discussion groups on-line, the students have drafted arguments that reflect thoughtful and original analysis through their exercises in critical thinking.

The examples and ideas expressed here simply serve to shine light on the need for greater cultural context for Chinese students before they come to study in real-time in the United States. If our goal is to help students toward a necessarily gradual immersion in “thick” reasoning U.S.-style, then, I would suggest that it is the responsibility of the students’ other professors to take part in a collaboration of on-line and real-time “thick” reasoning exercises.

Conclusion

To help Chinese students begin to understand the foundations and purposes of U.S. models of legal communication, a classroom manner that is frank and pragmatic is a start. We must, however, make available to Chinese foreign nationals all the resources available to their U.S. counterparts. We must help them pass through the boundaries of culture with appropriate guides. Further, through new ways of delivering information – like those offered by Gilly Salmon’s model – we may help our students realize their goals as writers and communicators in a space that is “post-ideological.” In this way, “Failing better” might benefit the global legal community.

Leveraging Legal Indeterminacy: The Rule of Law in Jewish Jurisprudence

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I. INTRODUCTION

This article presents a unique way of thinking about the rule of law grounded in the Jewish legal tradition. It argues that that conceptualization of the rule of law can be used to address some of the salient challenges posed to law's rule by the indeterminacy thesis in Western jurisprudence.

Legal indeterminacy has been a perennial concern in Western jurisprudence for centuries. The indeterminacy thesis maintains that the totality of legal materials and methods available within a given legal system are often insufficient to determine single, uniquely correct answers to some important subset of the normative questions arising within that system. Officials charged with resolving such cases, then, must exercise some measure of personal discretion and subjective judgment in order to reach singular, final rulings. According to many scholars, such indeterminacy poses significant challenges to the legitimacy of legal and political systems. Normative justifications for coercive legal and political systems are often tied to a constellation of jurisprudential commitments subsumed under the heading, "the rule of law." The rule of law, however, is widely understood to entail substantial legal determinacy. Legitimacy requires that legal norms be largely democratic, prospective, stable, equally applied, and objective. There must be right answers to normative questions; those answers must be determined by democratic lawmaking; and officials must apply and enforce those standards rather than their own personal preferences. Legal indeterminacy, however, suggests that legal sources and methods admit many different yet justifiable answers to most normative questions, and that therefore, singular answers to legal questions are ultimately products of subjective post-hoc judicial choices rather than objective, preexisting, and generally applicable standards adopted through democratic processes.

The indeterminacy problem has been a central concern of many of the principal schools of Western jurisprudence. Scholars aligned with natural law theories, legal formalism, positivism, realism, integrative jurisprudence, and critical legal studies have all offered accounts of the nature of law, and descriptive and prescriptive claims about the goals and methods of legal decision making that have been prompted at least in part by the rule of law concerns arising from the indeterminacy thesis. In large part, these varied jurisprudential approaches have addressed the indeterminacy problem either by denying or seeking to substantially downplay the incidence of indeterminacy in the law, or else have capitulated to the indeterminacy challenge and admitted that the rule of law is mere fiction. Both approaches, however, fails to genuinely address the indeterminacy problem. Assuming – as many theorists do, and as legal practice often demonstrates – that legal indeterminacy is real, and assuming that the rule of law is an important feature of legal and political legitimacy, how might the two be reconciled?

This article suggests an alternative approach based on traditional Jewish jurisprudential responses to the indeterminacy problem. This approach, which I call “law-as-engagement,” locates the law and law’s rule not in a particular set of substantive norms, nor in decision makers’ unvarying commitment to objective, detached, and impersonal judicial processes. Instead, the rule of law obtains in the collective commitment of a self-identifying legal community to be engaged with the sources and methods of their legal traditions as the principle means of reaching normative judgments. In the Jewish tradition, this way of thinking about what it means for law to rule responds to universal jurisprudential concerns about legal indeterminacy, judicial subjectivity, legitimacy, and the seemingly intractable persistence of juristic disagreement about the rights answers to legal questions.

Importantly, law-as-engagement actually leverages the existence of legal indeterminacy as a persistent jurisprudential phenomenon to support rather than supplant the rule of law. Indeterminacy means that rather than being passive subjects of the law’s clear-cut commands, legal actors and decision makers have an active role to play in the construction of legal understanding. Indeterminate laws do not speak for themselves; they provide sources of normative guidance, but rely on committed and engaged human interpreters, students, and decision makers to develop applicable standards of conduct. In short, in streams of both the Jewish and Islamic legal traditions, indeterminacy is precisely what makes meaningful human and communal engagement with the sources and methods of a legal tradition possible.

This article proceeds in two main parts, aside from this introduction and a conclusion. Part II provides a brief historical and conceptual overview of jurisprudential approaches to dealing with the indeterminacy problem in Western legal thought. It begins by reviewing some of the major themes in rule of law thinking in Western jurisprudence, and then moves on to note the conceptual distinction between metaphysical and epistemological indeterminacy. This part then develops the indeterminacy problem by discussing some of the ways in which indeterminacy is understood to challenge to rule of law.

Part III explores a Jewish jurisprudential approach to addressing the indeterminacy problem. This part begins by reviewing traditional rabbinic sources that have affirmed the idea that the right answers to many legal questions are substantially indeterminate and uncertain. This part goes on to explain that rather than view indeterminacy as a theoretical and practical challenges to the possibility of a meaningful rule of law, some Jewish law scholars offered understandings of the nature of Jewish law and rabbinic adjudication that saw legal indeterminacy as a jurisprudential asset rather than a liability. For these theorists, indeterminacy enables legal actors and decision makers to become active participants in an interpretive process that keeps the law alive and relevant while also creating the conditions through which the law can meaningfully rule in peoples' commitment to engage the sources and methods of the jurisprudential tradition as the sources of both public and private norms and values.

II. THE INDETERMINACY PROBLEM IN WESTERN JURISPRUDENCE

Legal indeterminacy has played an important animating role in the development of American legal thought. But why does indeterminacy matter? Put simply, “[i]ndeterminacy matters because legitimacy matters,” and legitimacy matters because the conditions of legal legitimacy by definition provide normative justification for citizens’ “prima facie moral obligation” to obey the law.¹ In liberal Western regimes, legitimacy is largely tied to the constellation of principled commitments subsumed under the heading, “the rule of law.”²

¹ Ken Kress, *Legal Indeterminacy*, 77 Cal. L. Rev. 283, 285 (1989).

² See Jeremy Waldron, *The Concept and the Rule of Law*, 43 Georgia Law Review 1, 1 (2008) (“Open any newspaper and you will see the “Rule of Law” cited and deployed . . . as a benchmark of political legitimacy.”); Brian Z. Tamanaha, *On the Rule of Law: History Politics, Theory* 33 (2004) (“[L]iberal systems cannot exist without the rule of law.”). The importance of the rule of law as a marker for legal and political legitimacy is illustrated by the fact that political leaders as diverse as President Barack Obama, President Vicente Fox Quesada of Mexico, Iranian President Hassan Rouhani, Hugo Chavez of Venezuela, and

Core rule of law themes and concepts suggests that there is a close relationship between legal determinacy and objectivity and the rule of law.³ To the extent that law is indeterminate and subjective, then, this indeterminacy undermines important rule of law commitments, challenges the legitimacy of Western liberal legal and political systems, and calls into question citizens' moral obligation to obey the law and governments' moral right to enforce it.⁴ This part begins in section II.A by reviewing some of the most salient Western claims about what it means to have a rule of law. Next, in section II.B, we discuss

Chinese Premier Li Keqiang have all made reference to the Rule of Law as a benchmark justification, aspirational ideal, or criticism of political and legal actions and policies. *See, e.g., Remarks by President Obama in Address to the United Nations General Assembly*, The White House, Office of the Press Secretary (September 24, 2013), *available at* <http://www.whitehouse.gov/the-press-office/2013/09/24/remarks-president-obama-address-united-nations-general-assembly> (“Our overriding interest throughout these past few years has been to encourage a government that legitimately reflects the will of the Egyptian people, and recognizes true democracy as requiring a respect for minority rights and the rule of law, freedom of speech and assembly, and a strong civil society.”); James C. McKinley, Jr., *Protest Keeps Fox from Giving State of the Union Speech*, The New York Times (September 2, 2006), *available at* <http://www.nytimes.com/2006/09/02/world/americas/02mexico.html?fta=y> (“Mr. Fox . . . stressed that the rule of law was the basis of democracy.”); Scott Lucas, *Iran: Was Rouhani’s Speech on Revolution’s Anniversary Important? A Six-Point Guide*, EA WorldView (February 16, 2014), *available at* <http://eaworldview.com/2014/02/iran-rouhanis-speech-revolutions-anniversary-important-5-point-guide/> (“Rouhani emphasized the necessity of respecting and obeying the law by all people and authorities. He promised that The Government was trying to achieve the rule of law throughout the country and will stand against anyone breaking the law.”); *Venezuelan President Hugo Chavez’s Speech to the United Nations World Summit* (September 16, 2005), Global Policy Forum, *available at* <https://www.globalpolicy.org/international-justice/29676-venezuelan-president-hugo-chavez-speech-to-the-united-nations-world-summit.html> (criticizing United States policy for violating the rule of law); Lu Hui, ed., *Chinese Premier Vows “Zero-Tolerance” for Corruption*, Xinhuanet (March 3, 2014), *available at* http://news.xinhuanet.com/english/special/2014-03/13/c_133183102.htm (“China is a country under rule of law. No matter who he is, and how senior his position is, if he violates Party discipline and the law of the country, he will be punished to the full extent, because everybody is equal before the law,” Li said.”); *see also* Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* 1-2 (2004).

³ *See generally* Mathew H. Kramer, *Objectivity and the Rule of Law* (2007).

⁴ *See* Christopher L. Kutz, *Just Disagreement: Indeterminacy and Rationality in the Rule of Law*, 103 Yale L.J. 997, 1000 (1993) (“The rule of law is a necessary component of any liberal political regime and an attack on it also targets the coherence of liberalism.”).

two different senses in which scholars think about legal indeterminacy: metaphysical legal indeterminacy, and epistemological legal indeterminacy. Section II.C explicates the indeterminacy challenge to law's rule. It notes that both metaphysical and epistemological indeterminacy entail causal indeterminacy, and that causal indeterminacy in the law undermines many of the principle commitments underlying the rule of law as a mark of legal and political legitimacy.

A. Major Themes in Rule of Law Jurisprudence

Many scholars have observed that defining the meaning and requirements of the rule of law has been a perpetually elusive endeavor. "The rule of law has meant many things to many people,"⁵ and there are likely "as many conceptions of the rule of law as there are people defending it."⁶ It is possible, however, to identify some broad themes that run through much of the rule of law scholarship. In particular, Brian Tamanaha has three main rule of law themes.⁷ First, various rule of law theories embrace the idea that the rule of law functions at least in part to establish that the decisions and actions of the state and of state officials ought to be limited by law. Second, many theories embrace the idea that the rule of law contemplates law embracing various characteristics that relate to its quality of legality and distinguish it from other forms of social norms or official commands. Finally, rule of law theories often embrace a cluster of ideas about the nature of law, political authority, and official discretion associated with the famous aphorism, "a rule of law, not of men."

Tamanaha has noted that modern understandings of the rule of law rest on a desire to promote three objectives that oftentimes pull practical policy in very different directions. Each of these objectives helps preservation of individual liberty, the inherent right of each individual to pursue his or her own conception of the good.⁸

⁵ Ricardo Gosalbo-Bono, *The Significance of the Rule of Law and its Implications for the European Union and the United States*, 72 U. Pitt. L. Rev. 229, 239-40 (2010); Jeffrey Jowell, *The Rule of Law and its Underlying Values*, in *The Changing Constitution* (Jeffrey Jowell & Daniel Oliver eds., 7th ed. 2011).

⁶ Olufemi Taiwo, *The Rule of Law: The New Leviathan?*, 12 Canadian J. L. & Jur. 151, 152 (1999).

⁷ See generally Brian Z. Tamanaha, *On the Rule of Law: History Politics, Theory* 114-36 (2004).

⁸ Brian Z. Tamanaha, *On the Rule of Law: History Politics, Theory* 34-36 (2004).

First, the rule of law as basic formal legality promotes what Tamanaha refers to as “legal liberty,” or the freedom to act as one wishes within the bounds of the law. Formal legality allows citizens to pursue their own unique conceptions of the good life to the extent possible under social conditions by permitting them to predict what they can do without becoming subject to coercive government power. By requiring that laws be generally applicable, prospective, stable, and actually reflected in the conduct of government officials, the rule of law provides citizens with a definite safe private sphere within which they may exercise their personal liberty to freely pursue their own goals and aspirations.⁹

The rule of law also supports “political liberty,” or the freedom to be subject only to laws to which one has consented.¹⁰ Government by consent is an essential component of individual liberty; if one’s right to pursue his or her own conception of the good life is to be maintained even when limited by societal laws, laws that limit natural freedom must be made by those whose freedom they restrict. As Rousseau maintained, “obedience to a law one proscribes to oneself is freedom.”¹¹ By demanding that laws be created through democratic processes and that laws beyond the reach of ordinary politics guarantee the right to democratic participation in those processes, the rule of law helps preserve individual liberty.¹²

Moreover, thicker substantive conceptions of the rule of law help preserve “personal liberty” by designating fundamental individual rights that carve out a sphere of privacy and autonomy in which citizens exercise their individual liberty to pursue their own conceptions of the good.¹³

While these three kinds of liberty all serve to promote a more fundamental value – individual freedom – each also tends to pull definitions of the rule of law in different directions. The preservation of individual freedom through legal liberty and formal legality often cuts against the personal-liberty demand for the zealous policing of substantive individual rights, which at times might require retroactively recognizing certain fundamental interests.¹⁴ Indeed, in a system of substantive norms that severely restrict the

⁹ See Brian Z. Tamanaha, *On the Rule of Law: History Politics, Theory* 34 (2004).

¹⁰ See Brian Z. Tamanaha, *On the Rule of Law: History Politics, Theory* 34 (2004).

¹¹ Jean-Jacques Rousseau, *The Social Contract* 65 (Maurice Cranston trans. ed., 1968).

¹² See Brian Z. Tamanaha, *On the Rule of Law: History Politics, Theory* 34 (2004).

¹³ See Brian Z. Tamanaha, *On the Rule of Law: History Politics, Theory* 35 (2004).

¹⁴ This tension is well illustrated by judicial perspectives on the retroactivity doctrine for the application of newly recognized constitutional rights to previously settled criminal

scope of personal liberty, greater respect for legal liberty and procedural correctness only further inhibits the vindication of important individual rights.¹⁵ Likewise, the full realization of political liberty is often in tension with legal liberty and personal liberty. As Madison famously observed, an unrestricted democratic process tends to be unstable, unpredictable, and prone to the enactment of laws geared to serving special interests. Moreover, if left unchecked majorities tend to restrict the individual rights of various minority groups within the political system.¹⁶ Individual rights, too, cut against aspects of both political and legal liberty. The full realization of personal freedom merely results in a reversion to a pre-social compact state of nature, where neither democratic law making processes nor the qualities of formal legality hold any sway in the face of untrammelled freedom for each individual to pursue a different conception of the good. As Tamanaha puts it, “this conflict represents the battle between two contesting ideologies: collective self-rule in the interest of the community versus the desire of individuals to be left alone.”¹⁷ These unavoidable tensions are mediated and balanced by different political and legal regimes in different ways, resulting in widely disparate expressions of what the rule of law looks like in practice despite common appeals to similar “values and purposes that the Rule of Law is thought to serve.”¹⁸

Tamanaha further identifies several recurring themes in rule of law formulations that are related to but still distinct from the objectives of liberal rule of law theories discussed above. These themes include the idea that the rule of law serves to create a government limited by law that is above and independent of ordinary law making institutions;¹⁹ the notion that the rule of law seeks to secure a formally legalistic regime in which legal norms

cases. See Roger D. III Branigin, *Sixth Amendment - - The Evolution of the Supreme Court's Retroactivity Doctrine: A Futile Search for Theoretical Clarity*, 80 J. of Criminal L. & Criminology 1128, 1133-37 (1990).

¹⁵ See Brian Z. Tamanaha, *On the Rule of Law: History Politics, Theory* 37 (2004).

¹⁶ See generally James Madison, *Federalist no. 10* 42, 42-46, in *The Federalist Papers* by Alexander Hamilton, James Madison, and John Jay (Gary Wills ed., 1982).

¹⁷ Brian Z. Tamanaha, *On the Rule of Law: History Politics, Theory* 38 (2004).

¹⁸ Richard H. Fallon, “*The Rule of Law*” as a Concept in Constitutional Discourse, 97 Colum. L. Rev. 1, 7 (1997).

¹⁹ See Brian Z. Tamanaha, *On the Rule of Law: History Politics, Theory* 114-195 (2004).

possess qualities of law rather than ad hoc arbitrariness;²⁰ and the commitment to maintaining a rule of law, and not of men.²¹

The idea of the rule of law as means of placing limits on government power is perhaps the broadest, oldest, and most constant thread in rule of law theories. This emphasis is present in Greek, Roman, and medieval, as well as liberal rule of law theories, which understood law's rule to obligate governments to "operate within a limiting framework" that included both procedural and substantive restraints dictated by reason, justice, nature, and religion. The notion of formal legality, the value of public, prospective, generally applicable laws being the sine qua none of a legitimate legal system has also been a prominent theme on rule of law theories. This is especially true with respect to post-Enlightenment liberal theories, which had to develop substance-neutral conceptions of law's rule following the rejection of natural and religious law as legitimate bases for placing substantive limits on a society's ability to order and self-constrain itself through a consent-based legal and political system.²²

The association between law's rule and the notion that legitimate systems exhibit a "rule of law and not of men" is one of the most oft-repeated themes in rule of law theorizing. This conception, perhaps first expressed by David Hume, and later included in the Massachusetts's 1780 constitution by John Adams, intimates that in law "something other than the mere will of individuals deputized to exercise government powers must have primacy."²³ As Tamanaha puts it, this theme highlights important contrasts, emphasizing that "law is reason, man is passion; law is non-discretionary, man is arbitrary will; law is objective, man is subjective."²⁴ From this vantage, the rule of law enshrines the political and legal value of living under something better, something higher, than the fallible vagaries of human will. It envisions a system of social ordering secure against the potential abuses that result from "the familiar human weaknesses of bias, passion, prejudice, error, ignorance, cupidity, or whim"; a system in which human officials play a necessary but merely ministerial role.²⁵

²⁰ See Brian Z. Tamanaha, *On the Rule of Law: History Politics, Theory* 119-22 (2004).

²¹ See Brian Z. Tamanaha, *On the Rule of Law: History Politics, Theory* 122-26 (2004).

²² See Brian Z. Tamanaha, *On the Rule of Law: History Politics, Theory* 119 (2004).

²³ Ronald A Cass, *The Rule of Law in America* 3 (2001).

²⁴ Brian Z. Tamanaha, *On the Rule of Law: History Politics, Theory* 122 (2004).

²⁵ Brian Z. Tamanaha, *On the Rule of Law: History Politics, Theory* 122 (2004).

Richard Fallon has similarly identified three principal thematic purposes that animate rule of law theories. Like Tamanaha, Fallon notes that the rule of law is often understood as a means of insuring that people have advance knowledge of the legal consequences of their actions so that they might “plan their affairs with reasonable confidence.”²⁶ Additionally, Fallon observes that the rule of law is often understood as a check against varieties of official arbitrariness.²⁷ These elements are, of course, closely related. Limiting official arbitrariness, “a government of laws and not of men,” enables citizens to confidently plan their affairs and pursue their conceptions of the good secure that they will not be subject to arbitrary official power outside the dictates of prospective, public, generally applicable, and certain legal norms. Both themes are also closely bound up with the theme of limited government; to insure predictability and security through the cabining of official arbitrariness through legal norms is to conceptualize a government of limited legal power, power confined to legal limits that exist above and separate from ordinary law-making authority.

Fallon, as well as others have taken note of another important value served by the rule of law: The rule of law serves to “protect against anarchy and the Hobbesian war of all against all.”²⁸ In this sense, the rule of law is related to the idea of “law and order” in contrast to lawlessness and anarchy. As John Rawls explains, “the coercive powers of government are to some degree necessary for the stability of social cooperation.”²⁹ Even in a society where citizens generally agree with and abide by behavioral norms, whether informal customs or formal laws, there is likely to be uncertainty and suspicion about whether everyone is playing by the rules all the time. Such suspicion breeds distrust, which results in individuals increasingly seeing fit to skirt or break society’s norms in order to gain some advantage for themselves, since, for all they know, others are already doing the same. This in turn leads to instability, the breakdown of social order, and a return to a Hobbesian state of nature. The role of the rule of law, Rawls argues, “is precisely to overcome this instability.

²⁶ Richard H. Fallon, “*The Rule of Law*” as a Concept in Constitutional Discourse, 97 Colum. L. Rev. 1, 7 (1997).

²⁷ See Richard H. Fallon, “*The Rule of Law*” as a Concept in Constitutional Discourse, 97 Colum. L. Rev. 1, 8 (1997).

²⁸ Richard H. Fallon, “*The Rule of Law*” as a Concept in Constitutional Discourse, 97 Colum. L. Rev. 1, 7 (1997).

²⁹ John Rawls, *A Theory of Justice* 240 (1971).

By enforcing a public system of penalties government removes the grounds for thinking that others are not complying with the rules.”³⁰

Notably, the rule of law as law and order suggests a substantially different account of law’s rule than many of the other themes discussed above. On this account, the rule of law is not about government by consent, nor about limits on power, nor even about cabining official discretion to act in an arbitrary way. This rule of law theme cuts in the opposite direction; it gives a hearty imprimatur to strong government power and the ability of officials to act decisively to sanction violations of the law as a means of assuring every citizen that society’s institutions are working to insure that everyone is playing by the same rules.

B. The Indeterminacy Thesis: Metaphysical and Epistemological Indeterminacy

Indeterminacy theorists have identified two different senses in which law may be indeterminate. Some scholars have argued that law is metaphysically indeterminate, meaning that there are no uniquely correct answers to legal questions in at least some important subset of cases. While legal systems may recognize various jurisprudential materials and methods that offer justificatory reasons for reaching a variety of different normative conclusions, these “legal reasons” do not constitute any particular legal norms. Genuine legal rules and standards – definitive determinations as to the legal permissibility or efficacy of particular courses of conduct – simply do not exist. Other indeterminacy theorists have argued that even if there are indeed uniquely correct answers to legal questions, law is nevertheless epistemologically indeterminate. On this view, legal materials and analytic methods are insufficient to communicate objective knowledge of any metaphysically determinate legal truths. As a result, human understandings of the law inevitable reflect personal biases, and the legal process thus results in substantial prospective uncertainty among legal actors and officials about what the law is and requires in practice.

³⁰ John Rawls, *A Theory of Justice* 240 (1971).

Metaphysical Legal Indeterminacy

According to many legal theorists, especially those associated with the Critical Legal Studies movement, law is metaphysically indeterminate.³¹ Metaphysical legal indeterminacy concerns whether and to what degree there are correct answers to questions about what the law is and requires in specific cases. Thus, the metaphysical indeterminacy thesis holds that as to some significant subset of legal issues, the legitimate sources and methods of jurisprudence fail to determine and uniquely justify only one right answer. Put differently, metaphysical legal indeterminacy suggests that there is often no “fact of the matter about which judgment the legal materials decisively support.”³² Modest versions of this claim assert that at a minimum the class of legal reasons justifies at least two different answers to the limited range of questions typically termed “hard cases.”³³ More robust versions of the indeterminacy thesis go further. Some go so far as to argue that legal materials and methods can always justify virtually any legal conclusion, and thus are insufficient to ever justify any particular ruling.³⁴ In any case, the upshot of the metaphysical indeterminacy thesis is that while there may be numerous sources of law and myriad methods for interpreting, analyzing, and applying them, there are often no uniquely correct legal results. The “law” – understood as definitive assessments of the legal permissibility or efficacy of particular courses of conduct – does not exist.

Proponents of the metaphysical legal indeterminacy thesis have identified at least three causes for this phenomenon. According to some scholars, metaphysical indeterminacy is connected to general concerns about the nature of language and semantic meaning. On this view, legal truths do not exist because language itself – the medium through which law is necessarily constituted and communicated – is essentially indeterminate and lacks any objectively correct meaning.³⁵

³¹ Mark Tushnet, *Critical Legal Theory* 80, 81-83 in *The Blackwell Guide to Philosophy of Law and Legal Theory* (Martin P. Golding & William A. Edmundson eds. 2005).

³² Gerald Postema, *A Treatise of Legal Philosophy*, Vol 11: *Legal Philosophy in the Twentieth Century*, p. 227 n. 7 (2011).

³³ See generally Frederick Schauer, *Easy Case*, 58 S. Cal. L. Rev. 399 (1985).

³⁴ For an account of four different formulations as to the scope and degree of legal indeterminacy, see Jules L. Coleman & Brian Leiter, *Determinacy, Objectivity, and Authority*, 142 U. Penn. L. Rev. 549, 561-564 (1993). See also Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. Chi. L. Rev. 462 (1987).

³⁵ See generally Kent Greenwalt, *Law of Objectivity* 71-73 (1992); Ludwig Wittgenstein, *Philosophical Investigations* § 203 (G.E.M. Anscomb trans., 1953); Saul Kripke,

This “linguistic argument”³⁶ begins from the premise that the true meaning of semantic statements is “given by the conditions in the world under which the sentences would be true (i.e., the meaning is given by the truth-conditions).”³⁷ According to indeterminacy theorists, however, it is often the case that semantic statements can refer to a variety of very different real-world facts.³⁸ If the same words and phrases can refer to different truth conditions, however, it follows that no particular referent establishes the true meaning of such statements. Consequently, “language is indeterminate at the most basic level: there are no *objective* facts that make it the case that language means one thing rather than another.”³⁹ Moreover, if “[t]here are no facts in the world that determine – make it necessary – that any instance of language means one thing rather than another,” then “there are no facts in the world that determine – make it necessary – that any instance of legal language (such as a rule) means one thing rather than another.”⁴⁰ For many, this is not merely an epistemological problem, but a metaphysical one.⁴¹ Semantic indeterminacy does not mean merely that legal actors and decision makers do not or cannot know the true meaning of legal statements; it means that legal statements do not have true legal meanings at all.⁴² According to the metaphysical indeterminacy thesis, therefore, legal materials like statutes and court decisions do not express determinate legal norms. Rather, such materials are merely indeterminate semantic statements to which any number of different normative

Wittgenstein on Rules and private Language 55-113 (1982); Christopher L. Kutz, *Just Disagreement: Indeterminacy and Rationality in the Rule of Law*, 103 Yale L.J. 997, 1007-1014 (1993); Jules L. Coleman & Brian Leiter, *Determinacy, Objectivity, and Authority*, 142 U. Penn. L. Rev. 549, 567-72 (1993).

³⁶ See David Wolitz, *Indeterminacy, Value Pluralism, and Tragic Cases*, 62 Buff. L. Rev. 529, 537 (2014).

³⁷ Jules L. Coleman & Brian Leiter, *Determinacy, Objectivity, and Authority*, 142 U. Penn. L. Rev. 549, 568 (1993).

³⁸ See Charles M. Yablon, *Law and Metaphysics*, Book Review, 96 Yale L.J. 613, 627-628 (1987).

³⁹ Jules L. Coleman & Brian Leiter, *Determinacy, Objectivity, and Authority*, 142 U. Penn. L. Rev. 549, 568 (1993).

⁴⁰ David Wolitz, *Indeterminacy, Value Pluralism, and Tragic Cases*, 62 Buff. L. Rev. 529, 538-539 (2014). See also Jules L. Coleman & Brian Leiter, *Determinacy, Objectivity, and Authority*, 142 U. Penn. L. Rev. 549, 571 (1993) (“If language itself is indeterminate, then legal language is indeterminate a fortiori.”).

⁴¹ Cf. Alan R. Madry, *Legal Indeterminacy and the Bivalence of Legal Truth*, 82 Marquette L. Rev. 581, 583 (1999).

⁴² See Sercan Gurler, *The Problem of Legal indeterminacy in Contemporary Legal Philosophy and Lawrence Solum’s Approach to the Problem*, 57 *Annales* XL 37, 47-48 (2008).

meanings can be attached. They do not in and of themselves constitute or communicate any metaphysically extant legal standards.

Metaphysical legal indeterminacy has also been attributed to common features of legal language in particular. Prospective legal standards are often couched in what are vague, ambiguous terms.⁴³ Such vagueness is necessary, as it gives the law sufficient breadth and flexibility that enables prospective norms to achieve desired outcomes in future cases. As discussed earlier, H.L.A. Hart noted that such necessary vagueness and generality in legal formulations contributes to significant indeterminacy as to what norms and standards such general legal statements actually prescribe.⁴⁴ Even if we often have a fair sense of what many such terms mean definitionally, the normative import of general terms often becomes indeterminate when applied to marginal cases.

We may have a fairly certain sense of what “recklessness” or “due process” means or entails, or what kinds of things are prohibited by a regulation that reads “no vehicles in the park.” To use Hart’s terminology, each of these terms has a core of settled meaning.⁴⁵ Thus, driving 90 miles per hour through a school zone while intoxicated is undoubtedly “reckless”; summary executions without trial assuredly do not comport with “due process

⁴³ See Christopher L. Kutz, *Just Disagreement: Indeterminacy and Rationality in the Rule of Law*, 103 Yale L.J. 997, 1006 (1994) (“Vague terms cannot be eliminated from a legal system.”).

⁴⁴ See generally H.L.A. Hart, *The Concept of Law* 130-35 (2d ed. 1994). It is worth noting, moreover, that some scholars have argued that even seemingly specific and determinate norms can be indeterminate. Gary Peller, for instance, has attempted to demonstrate that the paradigmatic example of an unambiguous legal rule – the constitutional requirement that the President be at least thirty-five years old – can be indeterminate. Peller writes:

Even the seemingly determinate clause such as the minimum age for presidents remains indeterminate. It is possible the age of thirty-five *signified* to the Framers a certain level of maturity rather than some intrinsically significant number of years. If so, it is open to argument whether the translation in our social universe of the clause still means thirty-five years of age. It may be that a younger age should be used since children today, through mass media, are more worldly at an earlier age.

Gary Peller, *The Metaphysics of American Law*, 73 Cal. L. Rev. 1151, 1174 (1985). Of course, the opposite argument could be made as well, that today, a higher age should be used, since contemporary Americans live longer, remain in school longer, and gain worldly experience at a later age than their 18th century forebears. Additionally, appealing to a strictly textualist theory of constitutional interpretation in order to demonstrate that the text requires that the President be literally thirty-five years old does little to resolve the indeterminacy. As the discussion of the “infinite regress” argument below suggests, an appeal to textualism as the correct mode of constitutional interpretation is neither self-evident nor neutral. See *infra* pages 11-13. There are a variety of different theories of interpretation that might be used to produce several different understandings of the presidential age provision, and the fact that no one of these theories is specifically prescribed by the law itself suggests that the correct contemporary import of this rule remains undetermined by the law itself.

⁴⁵ See H.L.A. Hart, *The Concept of Law* 128-29 (2d ed. 1994).

of law”; and we would likely all agree that driving a sedan down a footpath violates the “no vehicles in the park” rule. However, the normative implications of these terms become far more uncertain when we seek to apply them to more marginal cases. Is driving 55 miles per hour on an uncongested highway in the rain “reckless”?⁴⁶ Does a judge’s permitting a victim of childhood sexual abuse to testify against the alleged perpetrator via video-conference in order to avoid the trauma of a face-to-face encounter comport with “due process”?⁴⁷ Are electric scooters, park maintenance trucks, or remote-controlled toy cars “vehicles”?

Ludwig Wittgenstein pointed out that terms like “recklessness,” “due process,” and “vehicles” are “family resemblance” concepts that categorize objects or actions that share certain properties.⁴⁸ While some referents undoubtedly fall within such classes, many others that “share some features of canonical members yet differ importantly as well” may or may not.⁴⁹ As applied to such marginal cases, these broad category-terms are vague and indeterminate. According to some proponents of the metaphysical legal indeterminacy, such vagueness does not merely make the correct legal rule epistemologically unclear; it

⁴⁶ See Christopher L. Kutz, *Just Disagreement: Indeterminacy and Rationality in the Rule of Law*, 103 Yale L.J. 997, 1006 (1994).

⁴⁷ See *Maryland v. Craig*, 497 U.S. 836 (1990) (5-4 decision holding that the presentation of testimony by an alleged child sex abuse victim through a one-way closed circuit television did not violate the defendant’s Sixth Amendment right to confront his accuser); *Coy v. Iowa*, 487 U.S. 1012 (1988) (6-2 decision holding that the use of a screen to block a sexual assault defendant from seeing an alleged victim while she testified against him in court violated defendant’s Sixth Amendment rights).

⁴⁸ See Ludwig Wittgenstein, *Philosophical Investigations* § 66-67 (G.E.M. Anscombe trans., 1958). Wittgenstein himself illustrates this idea with the term “games”: Consider for example the proceedings that we call “games.” I mean board-games, card-games, ball-games, Olympic games, and so on. . . . if you look at them you will not see something that is common to *all*, but similarities, relationships, and a whole series of them at that.” *Id.* at § 67. The indeterminacy of the term “games” when applied to new cases can be further illustrated by H.L.A. Hart’s famous query, “Is it still ‘chess’ if the game is played without a queen?” H.L.A. Hart, *The Concept of Law* 4 (2d ed. 1997). See Jules L. Coleman & Brian Leiter, *Determinacy, Objectivity, and Authority*, 142 U. Penn. L. Rev. 549, 565 (1993).

⁴⁹ Christopher L. Kutz, *Just Disagreement: Indeterminacy and Rationality in the Rule of Law*, 103 Yale L.J. 997, 1006 (1994).

actually precludes the possibility that legal statements express any particular norms entirely.⁵⁰

Scholars have also noted that metaphysical legal indeterminacy is also connected to “two very different, indeed, contrary” legal phenomena.⁵¹ On the one hand, metaphysical legal indeterminacy results from some questions being left without clear legally-determined answers due to manifest gaps in legal materials and methods.⁵² The limits of human foresight suggest that such gaps are virtually inevitable. No lawmaker or legislature can possibly anticipate every future contingency so as to prospectively formulate legal standards that will regulate all future cases in such a way as to achieve desired outcomes.⁵³ Every legal system will consequently be, to a greater or lesser extent, impoverished; cases will always arise for which the law has too few sources, too few interpretive canons, and too few methods of legal analysis to determine a result.⁵⁴ In such cases, a correct legal result simply does not exist.⁵⁵ While the number of gaps might in theory be reduced by enriching the class of legal reasons that can be brought to bear on future cases, according to many scholars legal lacunae cannot be eliminated entirely.⁵⁶ “There will always be gaps

⁵⁰ See Anthony D’Amato, *Aspects of Deconstruction*, 85 Nw. U. L. Rev. 113 (1990); Gary Peller, *The Metaphysics of American Law*, 73 Cal. L. Rev. 1151 (1985). Hart himself is probably the most famous proponent of this view. According to Hart, the indeterminacy of vague or ambiguous legal terms when applied to marginal cases means that there is in fact no law governing that case, and that judges faced with such questions must exercise their own discretion to create new rules. See H.L.A. Hart, *The Concept of Law* 124-136 (3d ed. 2012).

⁵¹ Jules L. Coleman & Brian Leiter, *Determinacy, Objectivity, and Authority*, 142 U. Penn. L. Rev. 549, 575 (1993).

⁵² See Jules L. Coleman & Brian Leiter, *Determinacy, Objectivity, and Authority*, 142 U. Penn. L. Rev. 549, 575 (1993).

⁵³ See Jules L. Coleman & Brian Leiter, *Determinacy, Objectivity, and Authority*, 142 U. Penn. L. Rev. 549, 567 (1993) (“Law is necessarily indeterminate because no matter how rich the set of authoritative standards and operations are, there will always be cases that fall under no binding standard; there will always be gaps.”).

⁵⁴ See Jules L. Coleman & Brian Leiter, *Determinacy, Objectivity, and Authority*, 142 U. Penn. L. Rev. 549, 575 (1993).

⁵⁵ See Perry Dane, *Jurisdictionality, Time, and the Legal Imagination*, 23 Hofstra L. Rev. 1, 40-41 (1994).

⁵⁶ See Jules L. Coleman & Brian Leiter, *Determinacy, Objectivity, and Authority*, 142 U. Penn. L. Rev. 549, 576 (1993) (“While enriching the set of sources will reduce the extent of indeterminacy, it can never eradicate indeterminacy altogether; it will always be possible to imagine a case in which no binding legal standard applies.”).

in the law,” and consequently, there will always be cases for which the law does not provide determinate answers.⁵⁷

While expanding the numbers of legal rules, principles, and decisional methodologies within a system may help reduce the incidence of indeterminacy owing to gaps, enriching the class of legal reasons creates its own problems. In an ironic catch-22, while having too little law results in indeterminate legal lacunae, having too much law produces contradictory standards that fail to determine uniquely correct answers to legal questions. “As a legal system enriches the set of available binding legal sources, judges will always have more than one norm or rule that is arguably applicable or controlling.”⁵⁸ The existence of inconsistent norms means that legal decision makers can often use the law to justify mutually exclusive rulings in the same case. If the same set of legal premises can reasonably and rationally produce opposing rulings, then no single conclusion can be said to reflect *the law* expressed by those sources.⁵⁹

Indeterminacy owing to internal contradictions between legal sources and methods was a common claim of American legal realists.⁶⁰ Karl Llewellyn, for example, argued that courts often relied on inconsistent canons of statutory interpretation,⁶¹ and pointed out that individual court precedents often stand for numerous very different rules.⁶² Similar arguments were put forth by scholars of the Critical Legal Studies movement who argued that the law is replete with internal inconsistencies and fails to present any unified, coherent vision of social ordering.⁶³ According to some Crit scholars, law is irredeemably

⁵⁷ Jules L. Coleman & Brian Leiter, *Determinacy, Objectivity, and Authority*, 142 U. Penn. L. Rev. 549, 567 (1993). *See id.* at 576 (“Thus, because there will always be gaps in the law, there will always be some degree of indeterminacy.”).

⁵⁸ Jules L. Coleman & Brian Leiter, *Determinacy, Objectivity, and Authority*, 142 U. Penn. L. Rev. 549, 567 (1993).

⁵⁹ *See* Christian Zapf & Eben Moglen, *Linguistic, Indeterminacy, and the Rule of Law: On the Perils of Misunderstanding Wittgenstein*, 84 Geo. L.J. 485, 492-495 (1996).

⁶⁰ *See* Brian Leiter, *American Legal Realism* 50, 51-52, in *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Martin P. Golding & William A Edmundson eds., 2005).

⁶¹ *See* Karl Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules and Canons about how Statutes are to be Construed*, 3 Vanderbilt L. Rev. 395, 401 (1950).

⁶² *See* Karl Llewellyn, *The Bramble Bush: The Classic Lectures on the Law and Law School* 68-77 (Steve Sheppard, ed. 1930).

⁶³ *See* Robert W. Gordon, *Critical Legal Histories*, 36 Stan. L. Rev. 57 (1984). *See generally* Mark Kelman, *A Guide to Critical Legal Studies* 15-113 (1987).

contradictory because it reflects *ad hoc* compromises between competing political interests rather than a unified vision of social ordering. Roberto Unger, for instance, observed that

[i]t would be strange if the results of a coherent, richly developed normative theory were to coincide with a major portion of any extended branch of law. The many conflicts of interest and vision that lawmaking involves, fought out by countless minds and wills working at cross purposes, would have to be the vehicle of an imminent moral rationality whose message could be articulated by a single cohesive theory.⁶⁴

To the extent that the class of legal reasons includes inconsistent standards, then, it can also be considered metaphysically indeterminate. If numerous inconsistent legal outcomes follow from inconsistent legal premises, then those premises do not constitute any determinate legal facts of the matter or legal truths.⁶⁵

Not all scholars have accepted that law is substantially metaphysically indeterminate. Many scholars have argued that law is metaphysically determinate, that there are in fact right answers to legal questions. Some of these theorists have argued that language is not nearly as indeterminate as semantic skeptics claim.⁶⁶ In practice, our uses of language do refer to particular things and not to others; we recognize that some words and sentences are correct and intelligible while other semantic statements are simply untrue. Perhaps such correct semantic meanings are merely matters of conventional usage rather than objective truth-conditions, but the fact remains that words, including legal statements, are generally

⁶⁴ Roberto M. Unger, *The Critical Legal Studies Movement*, 96 Harv. L. Rev. 561, 571 (1983). For other accounts of legal indeterminacy grounded in conflicts and tensions between competing legal standards, see Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 Harv. L. Rev. 1685 (1976); Michael Rosenfeld, *Deconstruction and legal interpretation: Conflict, Indeterminacy, and the Temptations of the New Legal Formalism*, 11 Cardozo L. Rev. 1211 (1990).

⁶⁵ See Jules L. Coleman & Brian Leiter, *Determinacy, Objectivity, and Authority*, 142 U. Penn. L. Rev. 549, 566 (1993); *id.* at 572-573 (“Since every outcome is implied by a formal contradiction, all outcomes are entailed by the set of legal reasons, and therefore all outcomes are warranted. No outcome is warranted uniquely, and the law is indeterminate.”).

⁶⁶ See Jules L. Coleman & Brian Leiter, *Determinacy, Objectivity, and Authority*, 142 U. Penn. L. Rev. 549, 571 (1993).

understood to mean relatively concrete things.⁶⁷ On this view, language in general, and even the inherently and purposefully vague terms of legal prescriptions communicate relatively determinate norms. In practice, American lawyers and judges have relatively clear ideas about what kinds of facts “freedom of speech,” “due process,” and “recklessness” refer to, and semantic bases for metaphysical legal indeterminacy may thus carry more weight in the realm of abstract theory than actual legal practice.⁶⁸

Furthermore, according to at least some theorists, perhaps most notably Ronald Dworkin, apparent gaps and conflicts within the law do not preclude the possibility of metaphysically determinate legal truths. As discussed earlier, one of the chief points of dispute between H.L.A. Hart and Dworkin was whether or not some “penumbral” cases require judges to exercise discretion and make law where no correct legal answers yet exist. According to Dworkin, the complete universe of legal rules, principles, and jurisprudential methods forms a “seamless web,” which, if properly understood, provides the “right” answer to each legal question.⁶⁹ The class of legal reasons, in other words, constitutes the existence and character of metaphysically determinate legal norms.⁷⁰ Michael Moore has taken a similar approach in positing a realist approach to law in the sense the law consists of a mind-independent reality of determinate norms and standards.⁷¹

Many post-Crit scholars have also questioned the scope and degree of legal indeterminacy. According to these scholars, the claims of radical indeterminacy theorists are drastically overstated. For instance, the pervasiveness of so-called “easy cases” – cases in which the outcome is not seriously contested or in doubt – and the relatively rare incidence of appellate litigation suggest that in the vast majority of cases the law does in fact determine a correct legal result.⁷² Moreover, scholars argue that even in so-called “hard cases” where

⁶⁷ See Kent Greenwalt, *Law of Objectivity* 72 (1992) (“No one denies that for ordinary cases, human beings have practical rules for adding and for describing standard instances of doors. If legal applications can achieve that degree of certainty, they are certain enough.”).

⁶⁸ See Jules L. Coleman & Brian Leiter, *Determinacy, Objectivity, and Authority*, 142 U. Penn. L. Rev. 549, 571-72 (1993).

⁶⁹ See Ronald Dworkin, *Taking Rights Seriously* 115-18 (1977).

⁷⁰ See John Stick, *Can Nihilism be Pragmatic?*, 100 Harv. L. Rev. 332, 363 (1986).

⁷¹ See Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. Cal. L. Rev. 277 (1985).

⁷² See Frederick Schauer, *Easy Cases*, 58 S. Cal. L. Rev. 399 (1985); Brian Leiter, *Legal Indeterminacy*, 1 *Legal Theory* 481, 485-488 (1995); Ken Kress, *Legal Indeterminacy*, 77 Cal. L. Rev. 283, 296-297 (1989) (“The pervasiveness of easy cases undercuts critical scholars’

the material and methods of the law do not unambiguously determine a single result, the scope of indeterminacy may be relatively limited. The fact that the class of legal reasons can be used to reasonably justify more than one ruling does not necessarily mean that it justifies any ruling.⁷³ In other words, while the law in hotly contested litigated cases may be “underdeterminate,” it does not necessarily follow that it is fully indeterminate. The smaller the solution set of legally justifiable answers to a given question, the less significant the challenge posed by legal indeterminacy to the rule of law and legal and political legitimacy.⁷⁴

Epistemological Legal Indeterminacy

Even if there are metaphysically determinate right answers to legal questions, the existence of legal truths is of little moment if the law remains unknowable or unknown to legal actors and decision makers. Numerous scholars have argued, however, that the law is largely epistemologically indeterminate; that the accepted interpretive and analytic methods for cognizing correct legal rulings do not in practice enable legal actors and decision makers to know the law as it really is.⁷⁵ As Ken Kress puts it the “metaphysical indeterminacy [discussed in the previous section] speaks to whether there is law; epistemic indeterminacy [discussed here], to whether the law can be known.”⁷⁶

Indeterminacy theorists have offered a number of different explanations for the existence of epistemological legal indeterminacy. Some accounts rely on general perspectives on hermeneutics, interpretation, and the construction of meaning that can then be applied to legal theory. One common starting point is the theory of “philosophical hermeneutics” developed by Hans Georg Gadamer.⁷⁷ According to Gadamer, we are all constantly trying

claim of radical indeterminacy. . . . The overwhelming majority of individuals’ actions give rise to determinate legal consequences.”)

⁷³ See Jules L. Coleman & Brian Leiter, *Determinacy, Objectivity, and Authority*, 142 U. Penn. L. Rev. 549, 561-563 (1993).

⁷⁴ See Lawrence B. Solum, *Indeterminacy* 488, 497-498, in *A Companion to Philosophy of Law and Legal Theory* (Dennis Patterson ed., 1996).

⁷⁵ See generally Brian Leiter, *Law and Objectivity* 969, 973-974, in *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Jules Coleman & Scott Shapiro eds., 2002).

⁷⁶ Ken Kress, *A Preface to Epistemological Indeterminacy*, 85 Nw. U. L. Rev. 134, 138 (1990).

⁷⁷ See Francis J. Mootz, III ed., *Gadamer and Law* (2007). Similar ideas rooted in the Thomas Kuhn’s *The Structure of Scientific Revolutions* and literary and interpretive theories of Stanley Fish have also been used by some legal scholars to support the subjectivity and

to make sense of the world around us, and we do so by interpreting worldly phenomena – constitutions, novels, television shows, billboard ads, and conversations with the mailman – and assigning them meaning. In doing so, however, we understand things as “part of the total human experience of the world”;⁷⁸ we interpret these things and give them meaning based on our own prior experience of the world. Each individual’s experiences furnish that person with inevitable prejudices – his or her experiential consciousness, what Gadamer calls a “horizon of understanding.”⁷⁹ According to Gadamer, interpretation and the construction of meaning takes place through the subjective lens created by this experiential horizon. The construction of meaning that produces understanding is thus essentially subjective, a product of unique individual perspectives and biases that are based on each interpreter’s own past experiences with the world.

This is a somewhat different claim than that of general semantic skepticism discussed above. While proponents of the general metaphysical indeterminacy of language might argue that semantic statements have no true meaning, this issue is rather beside the point from the perspective of epistemic indeterminacy. Even if texts have objective meanings, even if textual understanding is something to be discovered and not a constructive experience unique to every interpreter, “[o]ne of Gadamer’s central arguments . . . is that any inquiry or investigation believed to be without prejudice or bias is a denial of its own conditioned ways of understanding.”⁸⁰ The textual understanding derived through any particular interpretive methodology thus cannot be the “true” meaning of the interpreted text. Instead, every understanding is only each interpreter’s subjective conception of what the text means, a product of an interaction between the interpreter’s experiential self, the text, and his or her own interpretive methodology, which itself is applied only after it is

epistemic indeterminacy of legal interpretation and analysis. Stephen M. Feldman, *American Legal Thought from Premodernism to Postmodernism* 150-155 (2000).

⁷⁸ Hans-Georg Gadamer, *Truth and Method*, p. xi (Joel Weinsheimer & Donald G. Marshall, trans., 5th ed. 1986).

⁷⁹ Hans-Georg Gadamer, *Truth and Method* 143 (Joel Weinsheimer & Donald G. Marshall, trans., 5th ed. 1986).

⁸⁰ Stanley E. Porter & Jason C. Robinson, *Hermeneutics: An Introduction to Interpretive Theory* 85 (2011).

understood by the interpreter through the subjective lens of his own epistemological horizon.⁸¹

According to some legal theorists, Gadamerian hermeneutics and similar accounts of the subjective construction of meaning suggest “that there is no meaning independent of context and human choice, and thus every act of interpretation necessarily reflects . . . [the] particular standpoint” of the interpreter.⁸² When a legal official examines statutes or case law, understanding is produced only through the text’s being filtered through the perceptive lens of his or her own experiential horizon. A legal interpreter can only ever attain his or her own uniquely subjective understanding of what the law means.⁸³

Another, related line of thought focuses on what some scholars have called the “infinite regress argument.”⁸⁴ Broadly speaking, the infinite regress argument maintains that if all meaning is interpretive, then interpretation itself, which entails the construction of meaning, requires interpretation, and so on.⁸⁵ Take, for example, the judicial construction of a statute or application of precedent. Applying a statute or precedential ruling to answer a legal question or decide a case requires that the relevant statutes or precedents be interpreted in order to determine their meaning and normative import. Legitimate interpretation, of course, cannot be arbitrary, but must follow jurisprudentially accepted

⁸¹ See Stanley E. Porter & Jason C. Robinson, *Hermeneutics: An Introduction to Interpretive Theory* 86 (2011) (“Understanding happens through a gradual and perpetual interplay between the subject matter and the interpreter’s initial position – a fusion of one’s own horizon and the horizon of the text or other. Within this fusion, *Gadamer denies the possibility of any single and objectively true interpretation that could transcend all viewpoints.*”) (emphasis added).

⁸² Raymond A. Belliotti, *The Rule of Law and the Critical Legal Studies Movement*, 24 U. West. Ontario 67, 69 (1986).

⁸³ See Jan Engberg, *Statutory Texts as Instances of Language(s): Consequences and Limitations on Interpretation*, 29 Brooklyn J. Int’l L. 1135, 1141-1143 (2004). See generally Sanford Levinson, *Law as Literature*, 60 Tex. L. Rev. 373 (1982).

⁸⁴ See Ken Kress, *A Preface to Epistemological Indeterminacy*, 85 Nw. U. L. Rev. 134, 142-143 (1990); Dennis Patterson, *Interpretation in Law*, 4 Diritto & Questioni Pubbliche 241, 245 (2004); Dennis Patterson, *Normativity and Objectivity in Law*, 43 William & Mary L. Rev. 325, 339-340 (2001).

⁸⁵ Dennis Patterson, *Interpretation in Law*, 4 Diritto & Questioni Pubbliche 241, 245 (2004) (“[I] understanding a rule, a symbol, or a sign is a matter of an act of interpretation standing between the interpreter and the thing interpreted, there is no reason why this same logic should not apply to the interpretation itself.”).

canons of statutory interpretation, common law reasoning, and precedential analysis. In order for such analytic methods and decisional guidelines to be practically useful, however, they too must be interpreted and their meaning and import understood. There may be rules and accepted tools for determining how such interpretive canons and techniques should be understood and applied, but once again, these guidelines must be interpreted so that they can be understood and applied.⁸⁶ On this view, then, all interpretation ultimately entails subjective interpretive choice; there is no truly value-neutral and objective method of interpreting, and all meaning is thus subjective.⁸⁷

According to some scholars, then, all understandings and expressions of legal norms are essentially subjective. As many realist and Critical Legal Studies scholars argued, judicial constructions of what the law means and requires in specific cases are bound up with judges' individual perspectives, which form the interpretive lens through which they read, analyze, and understand the law.⁸⁸ This inevitably subjective lens through which all interpretation is conducted thus precludes, or at least seriously challenges the possibility of epistemic determinacy in law. "If a judge supplies the context for the interpretation of a legal rule [from within his or her own subjective lens], then the judge's conclusion will have been driven directly by the background he assumes."⁸⁹ While legal truths may exist in the metaphysical realm, in practice all we have are human understandings of the law, and these are always only subjective interpretive impressions of the implications of legal materials and methods rather than objectively accurate statements of the law itself.⁹⁰

Subjectivism also contributes to epistemological indeterminacy through the framing and characterization of factual circumstances, which in turn impact judicial views of the correct

⁸⁶ See William W. Fisher III, *Texts and Contexts: The Application to American Legal History of the Methodologies of Intellectual History*, 49 *Stan. L. Rev.* 1065, 1080 (1997).

⁸⁷ See Jeremy Waldron, *The Irrelevance of Moral Objectivity* 158, in *Natural Law Theory* (Robert P. George ed., 1992); Dennis Patterson, *Normativity and Objectivity in Law*, 43 *William & Mary L. Rev.* 325, 339-340 (2001).

⁸⁸ See Brian Leiter, *American Legal Realism* 50, 54-56, in *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Martin P. Golding & William A Edmundson eds., 2005).

⁸⁹ Christopher L. Kutz, *Just Disagreement: Indeterminacy and Rationality in the Rule of Law*, 103 *Yale L.J.* 997, 1015 (1993).

⁹⁰ See Stephen M. Feldman, *American Legal Thought from Premodernism to Postmodernism* 152-155 (2000); William N. Eskridge, *Gadamer/Statutory Interpretation*, 90 *Colum. L. Rev.* 609, 632-646 (1990).

legal resolution of actual cases.⁹¹ Like legal rules and principles themselves, the underlying facts of cases upon which the correct legal resolution may often turn are often susceptible to numerous different interpretations. “Confronted with the same factual material, various legal actors may easily reach different conclusions about the significance of a series of events.”⁹² Importantly, how a judge characterizes various facts, and the consequential legal relevance of those facts often plays a significant role in the outcome of cases.

The Supreme Court’s “commerce clause” jurisprudence offers one illustrative example. In one early 20th century case, the Court characterized the number of hours worked by railroad workers as having a direct impact on interstate commerce, and was therefore able to uphold a federal law regulating the maximum number of hours that could be worked by railroad employees.⁹³ Twenty-five years later, however, the Court characterized a federally mandated railroad workers pension program as not directly related to the regulation of interstate commerce, and therefore struck down the law as unconstitutional.⁹⁴ These characterizations of factual predicates as having particular legal implications were neither self-evident nor uncontroversial, and suggest that the fact that judges can and do

⁹¹ See Christopher L. Kutz, *Just Disagreement: Indeterminacy and Rationality in the Rule of Law*, 103 Yale L.J. 997, 1015-1017 (1993).

⁹² David B. Wilkins, *Legal Realism for Lawyers*, 104 Harv. L. Rev. 469, 482 (1990).

⁹³ See *Baltimore & Ohio Railroad Co. v. Interstate Commerce Commission*, 221 U.S. 612 (1911) (upholding a federal law setting maximum hours for railroad workers as a regulation of interstate commerce).

⁹⁴ See *Railroad Retirement Board v. Alton R.R. Co.*, 295 U.S. 330 (1935) (holding a required railroad pension program unconstitutional in part by characterizing the program as a “social welfare” measure rather than as means of controlling interstate commerce). These two cases provide one of the many examples of how courts’ characterization of facts – in these cases, whether similar facts have direct or indirect effects on interstate commerce – can have a determinative impact on judicial rulings. Similar examples are indicated by the Supreme Court’s decisions in *Heart of Atlanta Motel Inc. v. United States*, 379 U.S. 241 (1964) (upholding the application of Title VII of the Civil Rights Act to an Atlanta hotel by characterizing its business as a function of interstate commerce due to the large volume of out-of state guests hosted in the hotel) and *Katzzenbach v. McClung*, 379 U.S. 294 (1964) (upholding the application of Title VII to an Alabama barbeque joint under the commerce clause by characterizing its business as impacting interstate commerce due in part to its use of out-of state meat). See generally Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 247-263 (3d ed. 2006).

make subjective choices about how to interpret facts contributes to uncertainty about the correct legal resolution to specific cases.⁹⁵

Additionally, widespread disagreement about what the law is and requires creates substantial uncertainty about what the law is and requires. As Samantha Besson has noted, “disagreement often mirrors indeterminacy.”⁹⁶ Disagreement, of course, is a basic fact of American jurisprudence. Citizens, lawyers, and judges regularly disagree about what the law is and requires in specific cases, and such disagreement both causes and reflects epistemic legal indeterminacy.

The idea that legal disagreement causes cognitive uncertainty about the right legal resolution to cases is fairly straightforward. In practice, the only way citizens, lawyers, and legal officials are able to cognize what the law is and requires in specific cases is by relying on authoritative official pronouncements that explain how abstract legal standards apply in practice in specific cases. Legal officials rarely speak with one voice however. Legislators and administrative officials often disagree about the purposes and effects of the laws and regulations they enact. More importantly, judges regularly disagree with each other about the correct way to decide the cases that come before them. While these disagreements are sometimes resolved by the rulings of the highest court in a given jurisdiction, such decisions do not in principle clarify which – if any – of the opposing legal viewpoints is correct.⁹⁷ Supreme Court rulings are often issued by deeply divided panels of justices; judicial, scholarly, and popular disagreement about the correct resolution of cases often persists long after cases are ultimately resolved; and the dissenting opinion in one case often becomes the basis for very different rulings in subsequent decisions.⁹⁸ The rather

⁹⁵ See generally Roger J. Traynor, *Fact Skepticism and the Judicial Process*, 106 U. Penn. L. Rev. 635 (1958).

⁹⁶ Samantha Besson, *The Morality of Conflict: Reasonable Disagreement and the Law* 65 (2005).

⁹⁷ This idea is well expressed by Justice Brandeis’s famous refrain that “[i]t is sometimes more important that the applicable rule of law be settled [by the court] than that it be settled right.” *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting). Likewise, Justice Robert Jackson’s view on the function of the Supreme Court, that “we are not final because we are infallible, but we are infallible because we are final,” *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring), suggests the idea that the Court serves the practical purpose of final arbiter of disputed legal questions but that this is quite different from thinking that the Court actually clarifies legal truth.

⁹⁸ For a discussion of this phenomenon in the context of First Amendment jurisprudence, see John Wiren, *First Amendment First Principles* 54-71 (2004).

common-sense point here is simply this: The existence of legal disagreement among officials charged with issuing authoritative pronouncements of what the law is and requires makes the actual content of the law epistemologically indeterminate. Other judges, lawyers, and even more so ordinary citizens are left with a diverse array of official legal opinions, but without any clear, unambiguous indication of what the law is and requires.⁹⁹

Additionally, the incidence of normative disagreement among legal officials can be taken as an indication that the law itself is indeterminate.¹⁰⁰ H.L.A. Hart, for instance, has argued that instances of genuine, conscientious legal disagreement in which judges dispute the correct resolution of a case despite each one's own best efforts to determine the right result suggest that the law is epistemologically indeterminate. On this view, that even if there is a right answer "laid up in a jurist's heaven . . . no one can demonstrate what it is."¹⁰¹

Andrew Altman has elaborated on Hart's view of the connection between legal disagreement and legal indeterminacy as follows:

Suppose there is extensive disagreement between legal officials about the correct legal decision in a certain case. The disagreement might arise because some officials count a certain norm as part of the law, but others identify a contrary norm [that indicates a different result] as valid. Or it might occur because, though they all agree on the relevant norms, they disagree over how the norms are to be applied to the case at hand.¹⁰²

The fact that disagreement exists and persists, however, indicates that there is no objective, value-neutral method of determining which competing viewpoint, if any, in fact reflects the right legal answer. Disagreement occurs because the law provides "no conventionally accepted criteria sufficiently robust to decide a case," and having "no conventionally accepted criteria sufficiently robust to decide a case entails indeterminacy in the law with respect to that case."¹⁰³

⁹⁹ See Connie S. Rosati, *Some Puzzles About the Objectivity of Law*, 23 *Law & Phil.* 273, 278 (2004).

¹⁰⁰ See Jeffrey A. Lefstin, *The Measure of the Doubt: Dissent, Indeterminacy, and Interpretation at the Federal Circuit* 58 *Hastings L.J.* 1025, 1038 (2007).

¹⁰¹ H.L.A. Hart, *Essays in Jurisprudence and Philosophy* 140 (1983); see *id.* at 139-140.

¹⁰² Andrew Altman, *Critical legal Studies: A Liberal Critique* 33 (1993).

¹⁰³ Andrew Altman, *Critical legal Studies: A Liberal Critique* 33 (1993).

Thus, judicial disagreement reveals the underlying epistemic indeterminacy of the law itself.¹⁰⁴ If the law is epistemologically determinate – if legal materials and methods were sufficient to allow judges to cognize the law with a substantial degree of objectivity and certainty – then the correct legal resolutions for actual cases would be rationally demonstrable. Disagreement between reasonable judges conscientiously seeking to decide cases correctly would be rare, and when they did occur would be swiftly resolved by an objective demonstration of the correct ruling. The existence and perseverance of differing legal viewpoints, and the inability to dispositively demonstrate legal right answers, strongly suggests that the totality of legal reasons is insufficient to provide certain, objective knowledge of what the law is and requires. As Linda Ross Meyers puts it, “[f] experts relying only on legal materials can reasonably disagree about their meaning or application . . . then law [itself] is not binding; it does not command; it is not Law.”¹⁰⁵

One of the chief counterarguments to the epistemological indeterminacy challenge to the rule of law is rooted in the sociological jurisprudence of 20th century legal realism. At the core of many arguments for the epistemological legal indeterminacy is the assumption that “law is satisfactory only if legal reasoning is deductive or demonstrable.”¹⁰⁶ But law need not be epistemologically objective to provide a stable and predictable basis upon which citizens can reliably plan their affairs. The ability to predict legal outcomes should be sufficient, even if objective knowledge of the *correct* legal outcome remains elusive.¹⁰⁷

Indeed, many realists argued that judicial decisions are largely predictable, though they readily admitted that such predictions could not be made solely on the basis of legal materials and methods.¹⁰⁸ Brian Leiter has argued that there are broadly speaking two different realist schools of thought about what factors determine the outcomes of judicial deliberations. Scholars of the “Sociological Wing” of American legal realism held that judicial rulings are products of sociological determinants, such as prevailing commercial

¹⁰⁴ Samantha Besson, *The Morality of Conflict: Reasonable Disagreement and the Law* 67 (2005) (“legal disagreement actually reveals legal indeterminacy in many cases”).

¹⁰⁵ Linda Ross Meyer, *When Reasonable Minds Differ*, 71 N.Y.U. L. Rev. 1467, 1477-1478 (1996).

¹⁰⁶ Ken Kress, *Legal indeterminacy*, 77 Cal. L. Rev. 283, 329 (1989).

¹⁰⁷ See Joseph W. Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 Yale L.J. 1, 21 (1984).

¹⁰⁸ See Mark Tushnet, *Defending the Indeterminacy Thesis*, 16 Quinnipiac L. Rev. 339, 349-350 (1996).

practices,¹⁰⁹ economic efficiencies, or other social policy considerations. The “Idiosyncrasy Wing,” by contrast maintained that legal outcomes are largely determined by personal psychological characteristics of presiding judges. According to both approaches, however, the law – at least in the Holmesian sense of a prediction about what a judge will do – is largely predictable. Simply put, if one knows the legal rules, the background social, economic, and political conditions, and the personalities, general outlooks, and judicial records of presiding judges, legal outcomes become largely predictable, a fact confirmed by actual legal practice. As Brian Leiter observes, “While the outcome of some cases is hard to fathom, most of the time lawyers are able to advise clients as to the likely outcome of disputes brought before courts: if they weren’t, they’d be out of business!”¹¹⁰

The upshot of this indeterminacy counter-argument from the predictability of actual legal practice is that epistemic legal indeterminacy need not pose an overly problematic challenge to the rule of law.¹¹¹ “[I]ndeterminacy will not pose the threat to liberalism one would otherwise expect, provided that indeterminate judicial decisions are nevertheless reliably predictable.”¹¹² From the standpoint of actual legal practice, lawyers merely need to know how courts will rule; “what leads judges to decide the way they do, not what legal reasons, if any, would justify their decisions.”¹¹³ Likewise, in order for the legal system to preserve personal liberty and permit individuals to plan their affairs with the

¹⁰⁹ See, e.g., Underhill Moore & Theodore S. Hope, Jr., *An Institutional Approach to the Law of Commercial Banking*, 38 Yale L.J. 703 (1929) (arguing that judges’ decisions in commercial cases can be reliably predicted by examining the degree to which parties’ practices that give rise to such cases depart from common commercial culture and standard business practices).

¹¹⁰ Brian Leiter, *American Legal Realism* 10, University of Texas School of Law Public Law and legal Theory Research Paper, no. 042 (October 2002), available at file:///C:/Users/end%20user/Downloads/SSRN-id339562%20(1).pdf.

¹¹¹ See Mark V. Tushnet, *Defending the Indeterminacy Thesis*, 16 Quinnipiac L. Rev. 339, 350 (1996) (“[T]he indeterminacy thesis is compatible with a high degree of predictability about legal propositions, and therefore does not claim to establish a conflict with a rule of law analysis making predictability important.”).

¹¹² Jules L. Coleman & Brian Leiter, *Determinacy, Objectivity, and Authority*, 142 U. Penn. L. Rev. 549, 583 (1993).

¹¹³ Jules L. Coleman & Brian Leiter, *Determinacy, Objectivity, and Authority*, 142 U. Penn. L. Rev. 549, 581 (1993). See also *id.* at 582-83 (discussing predictability means of providing citizens with reliable legal frameworks within which they can order their lives and plan their affairs).

foreknowledge of how their actions interface with the justice system, all that is needed is the ability to predict what legal officials will do. As Coleman and Leiter explain:

If the need for agents to have the opportunity to conform their behavior to the law's demands is the concern that motivates the worry about indeterminacy, then all that is really needed is predictability. If individuals can predict what the law will require of them, then, in principle, they are on notice and have the opportunity to conform their behavior to the law's demands. Notice requires predictability, not indeterminacy.¹¹⁴

Thus, in arguing against radical legal indeterminacy, Ken Kress has argued that “those who claim that the law is radically indeterminate must account for the fact that most legal results are not open to serious doubt and are highly predictable.”¹¹⁵

C. Indeterminacy and the Rule of Law

The predictability of judicial rulings, while mitigating the challenge posed by epistemological legal indeterminacy, also raises another, perhaps more serious concern. Specifically, if legal outcomes are in practice largely predictable despite the epistemological indeterminacy of legal materials and methods, then that means that the reliable predictability of judicial rulings must be based on something other than strictly legal reasons.¹¹⁶ This claim, called the “Epiphenomenalist Argument,” grants that legal outcomes are very often predictable, “but suggests that . . . predictability arise[s] from extra legal factors.”¹¹⁷

According to the Epiphenomenalist Argument, “legal doctrines, constitutions, statutes, case law, and the like are mere epiphenomena – things without any real causal role in the results” of adjudicative processes.¹¹⁸ The real determinative cause of a legal ruling is not the normative implications of the class of legal reasons, but the personal preferences of

¹¹⁴ Jules L. Coleman & Brian Leiter, *Determinacy, Objectivity, and Authority*, 142 U. Penn. L. Rev. 549, 582 (1993).

¹¹⁵ Ken Kress, *Legal Indeterminacy*, 77 Cal. L. Rev. 283, 324 (1989).

¹¹⁶ See Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 Yale L.J. 997, 1009-1010 (1985).

¹¹⁷ Sercan Gurler, *The Problem of Legal indeterminacy in Contemporary Legal Philosophy and Lawrence Solum's Approach to the Problem*, 57 *Annales* XL 37, 47-48 (2008).

¹¹⁸ Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. Chi. L. Rev. 462, 484 (1987).

presiding judge, which ultimately account for the judge's choice to enforce one particular result rather than any of the other potential, reasonably justifiable legal conclusions.¹¹⁹ The law, then, is highly subjective. Judicial rulings – the most determinate expressions of legal norms and the means by which the law most directly and tangibly controls behavior – are essentially constituted by the personal preferences of judges. Thus, rather than legal officials applying objective norms that exist independent of their own preferences, law is a function of the subjective will of individual judges. Rather than a rule of law, normative systems thus comprise a rule of men.

Rational and Causal Indeterminacy

The argument that legal indeterminacy entails judicial rulings based on subjective, extra-legal factors is what Brian Leiter has referred to as the “causal indeterminacy” thesis. According to Brian Leiter, when realist scholars referred to legal indeterminacy they meant at least two distinct but closely related ideas.¹²⁰ First, realist jurists argued that law is “rationally indeterminate.” Rational indeterminacy refers to the idea that the class of legal reasons – the totality of legitimate legal materials, sources, and analytic and interpretive methodologies within a legal system – is often insufficient to justify only one uniquely correct answer to a legal question.¹²¹ In other words, rational indeterminacy exists when numerous alternative legal solutions are roughly equally rationally legitimate accounts of what the law requires; when legal materials and methods provide sufficient reason for reaching a variety of different answers to the same legal question.

Realist jurists also thought of the law as “causally indeterminate.” Causal indeterminacy refers to the idea that the class of legal reasons is not sufficient to account for why judges reach the rulings they do in specific cases.¹²² Causal indeterminacy follows necessarily from

¹¹⁹ See Joseph W. Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 Yale L.J. 1, 21 (1984) (noting that such extra-legal factors include the ideology of the decision maker); David Kairys, *Law and Politics*, 52 Geo. L. Rev. 243, 247 (1984) (“It is *only* the social context in a particular situation that makes one outcome more likely than any other. A legal-sounding rationale can be made for almost every result.”).

¹²⁰ See Brian Leiter, *American Legal Realism* 50, 51, in *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Martin P. Golding & William A. Edmundson eds., 2005).

¹²¹ See Brian Leiter, *Legal Indeterminacy*, 1 Legal Theory 481, 481 (1995).

¹²² See Brian Leiter, *American Legal Realism* 50, 51, in *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Martin P. Golding & William A. Edmundson eds., 2005); Brian Leiter, *Legal Indeterminacy*, 1 Legal Theory 481, 482 (1995).

the existence of rational indeterminacy.¹²³ If the class of legal reasons provides a sufficient rational justification for a variety of different legal conclusions, it follows that that same class of legal reasons is by itself also insufficient to account for a decision maker's decision settling upon any one of those possibilities as the right legal result.

Importantly, for many realists the law's causal indeterminacy suggested that something other than legal factors is necessary to explain how and why judges reach the rulings that they do.¹²⁴ Rational and causal legal indeterminacy suggest that because the legal materials and methods can justify numerous alternative results, judges faced with answering legal questions or deciding cases are themselves faced with an array of different potential rulings, all of which can be reasonably justified by reference to the law. It follows, therefore, that the determination of any particular legal result is necessarily the product of a choice made from among the available reasonably justifiable legal options. Such choices, moreover, if they are not uniquely justified by the class of legal reasons, must be grounded in preferences other than those prescribed by the law itself. More fundamentally, according to realist and Critical Legal Studies scholars, causal indeterminacy suggests that other extra-legal factors, such as judges' personalities, political preferences, or religious, racial, or class identities, must figure in the legal decision making process in order to account for what causally determines judicial rulings.¹²⁵

Determinacy and Objectivity

The causal indeterminacy thesis highlights an important distinction between legal *indeterminacy* and legal *objectivity*.¹²⁶ The epiphenomenalist argument does not claim that law is necessarily metaphysically or epistemologically indeterminate. It merely notes that the legal materials and methods that precede judicial dispositions of actual cases are indeterminate and do not themselves determine legal results. Specific judicial rulings in actual cases *do* determine the law; by deciding what the law is and requires of the parties to a dispute, the judge makes the law immanent, real, and relatively clear. This all suggest

¹²³ See Brian Leiter, *Legal Indeterminacy*, 1 *Legal Theory* 481, 482 (1995).

¹²⁴ See Brian Leiter, *American Legal Realism* 50, 52, in *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Martin P. Golding & William A. Edmundson eds., 2005) ("All the Realists agreed that law ad legal reasons are rationally indeterminate . . . so that the best explanation for why judges decide as they do must look beyond the law itself.").

¹²⁵ See Brian Leiter, *Legal Indeterminacy*, 1 *Legal Theory* 481, 482 (1995).

¹²⁶ See Brian Leiter, *Law and Objectivity* 969, 970, in *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Jules L. Coleman & Scott Shapiro eds., 2002).

however, that legal epiphenomenalism entails the subjective judicial construction of legal truth. Put differently, if doctrinal materials and methods are indeterminate and determinate law comes into being only through specific judicial decisions, then such law that exists is a product of the subjective minds of judges rather than an objective reality that exists independent of the preferences of legal officials and which therefore binds their discretionary conduct.

Judicial Subjectivity and the Rule of Law

Causal indeterminacy and subjectivism represent perhaps the most serious and oft-referenced challenges to classic rule of law justifications for the legitimacy of liberal legal and political systems. Rational and causal indeterminacy means that the class of legal reasons – the totality of legitimate legal materials and methods – is often insufficient to determine uniquely correct answers to legal questions. Such indeterminacy, moreover, entails subjectivism. If the class of legal reasons is insufficient to cause and account for legal results, then determinate answers to legal questions must be constituted and defined by the subjective legal conclusions of individual judges based on various factors extraneous to the law itself. Indeterminacy thus suggests that laws “are not self-interpreting or self applying.”¹²⁷ Law only rules through human agency and through subjective human opinions about the correct normative results in particular cases.

In the Western liberal tradition of law and politics, however, “[w]e want law to be more than opinion, collective or otherwise.”¹²⁸ Western commitments to the rule of law rest on the notion that the moral legitimacy of legal decision making hinges on judges’ applying existing law to resolve cases rather than actively making their own. As Michael Dorf has written, “[i]f the application of a rule requires deliberation about its meaning, then the rule cannot be a guide to action in the way that a commitment to the rule of law appears to require.”¹²⁹ This idea, of course, is captured in the oft-repeated mantra, “a government of laws and not of men.” This principle suggests that law – genuine, just, and legitimate law

¹²⁷ Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* 123 (2004).

¹²⁸ Dennis Patterson, *Normativity and Objectivity in Law*, 43 *William & Mary L. Rev.* 325, 340 (2001).

¹²⁹ Michael Dorf, *Legal Indeterminacy and Institutional Design*, 78 *N.Y.U. L. Rev.* 875, 877 (2003).

– is something more than an act of official will.¹³⁰ Even as essentially democratic societies respect the legitimacy of laws passed as policy measures that reflect the political preferences of individual legislators and interest groups within society, they also sense that law is qualitatively different from arbitrary will. Brian Tamanaha explains the underlying idea of this central refrain as follows: “law is reason, man is passion; law is non-discretionary, man is arbitrary will; law is objective, man is subjective.”¹³¹

The critical relationship between judicial objectivity and the rule of law was nicely framed by David Dudley Field in an article expressing the importance of legal formalism. According to Field:

The science of the law is our great security against the maladministration of justice. If the decision of litigated questions were to depend upon the will of the Judge or upon his notions of what is just, our property and our lives would be at the mercy of a fluctuating judgment, or of caprice. The existence of a system of rules and conformity to them are the essential conditions of all free government. . . . The law is our only sovereign.”¹³²

While the connection between judicial objectivity, legal determinacy, and legitimacy is not seriously disputed by American legal theorists, Field’s description of adjudication as science, of course, has been. Wilbur Larrimore, and early American legal realist, argued that “[w]e are not living under a system of scientific exposition and development of abstract [legal] principles, but, to a large degree, under one judicial arbitration, in which courts do what they think is just in the case at bar and cite the nearest favorable previous decisions as pretexts.”¹³³ These realist critiques were echoed and expanded by scholars of the Critical Legal Studies movement. While Crit theorists differed widely about what

¹³⁰ Dennis Patterson, *Normativity and Objectivity in Law*, 43 William & Mary L. Rev. 325, 340 (2001) (“The question whether a legal standard has or has not been violated should turn on more than the caprice of who is asked to decide the matter.”).

¹³¹ Brian Tamanaha, *On the Rule of Law: History, Politics, Theory* 122 (2004).

¹³² David Dudley Field, *Magnitude and Importance of Legal Science* (1859), reprinted in Stephen B. Presser & Jamil S. Zainaldin, *Law and Jurisprudence in American History* 816 (6th ed. 2006).

¹³³ Wilbur Larrimore, *Judicial Legislation in New York*, 14 Yale L.J. 312, 318 (1904). See also Edward B. Whitney, *The Doctrine of Stare Decisis*, 3 Mich. L. Rev. 89, 94 (1904) (“the courts in general tend more and more to decide each case according to their own ideas of fairness as between the parties to that case.”). See generally Brian Z. Tamanaha, *Beyond the Formalist-Realist Divide: The Role of Politics in Judging* 32-40 (2009).

factors are responsible for legal indeterminacy, the main thrust of their arguments was that “law is politics”; that judicial decisions are caused by extra-legal factors personal to individual judges; and that law is thus an expression of subjective judicial will. As John Hasnas notes:

If the personal motivations and values of judges rather than the rules of law determined the outcome of cases, then, as the realists had pointed out, ‘the ideal of a government of laws and not of men [was] a dream,’ and there was no substantive difference between legal reasoning and political discourse. This seems to deprive the law of its moral imprimatur and suggests that law was nothing more than the naked exercise of political power.”¹³⁴

The Indeterminacy Problem

American legal theorists have struggled to reconcile the tension between legal indeterminacy, the rule of law, and legal and political legitimacy for well over a century. The issue, however, seems to remain largely unresolved either conceptually or practically. This led Professor Michael Dorf to observe over a decade ago that indeterminacy jurisprudence has reached a “dead end.”¹³⁵

Some theorists have argued that law is not nearly as indeterminate as many Crit scholars have claimed; that law is at most modestly indeterminate. However, while these arguments may succeed at reducing the scope and degree of legal indeterminacy, they do not fully dispel the essential theory that legal materials and methods are often rationally and causally indeterminate. Likewise, while some scholars have sought to downplay the relationship between determinacy and legitimacy, these arguments do not deny the basic liberal commitment to substantial legal objectivity as an important theoretical benchmark for democratic legitimacy. Ultimately, it is difficult to escape the fundamental incompatibility between indeterminacy, uncertainty, and judicial subjectivity on the one hand, and the qualities of legality associated with a legitimizing rule of law on the other.

¹³⁴ John Hasnas, *Back to the Future: From Critical Legal Studies Forward to Legal Realism, or How not to Miss the Point of the Indeterminacy Argument*, 45 Duke L.J. 84, 91-92 (1995), quoting Hessel E. Yntema, *The Hornbook Method and the Conflict of Laws*, 37 Yale L.J. 468, 479 (1928).

¹³⁵ Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. Rev. 875, 876 (2003).

It is possible, of course, that indeterminacy is only a problem for ivory tower legal philosophers. Some scholars have noted that regardless of any theoretical connection between legal determinacy and legitimacy, it seems that in practice participants in the legal system do not view law's indeterminacy as a serious concern.¹³⁶ As Mark Tushnet has suggested, "[t]he very fact that there appears to be no widespread sense of the present system's illegitimacy demonstrates that whatever our practices are, they are enough to satisfy" our need for legal predictability and objectivity.¹³⁷

Tushnet's sense of American's belief in the adequate legitimacy of their legal system may be overstated, however. Numerous polls and other studies suggest that high percentages of the American public lack confidence in legislatures, courts, law enforcement agencies, judges, and the law itself.¹³⁸ In many cases, this lack of confidence is tied to the perception that these institutions and individuals do not act in the principled, objective manner that people typically associate with the rule of law.¹³⁹ When it comes to the relationship between indeterminacy and legitimacy, then, it seems that "ordinary citizens have not gotten over it; determinacy is an important element of the rule of law."¹⁴⁰ To the extent that people perceive the law to as being indeterminate and therefore subject to individual judicial

¹³⁶ See, e.g., Paul E. Campos, Pierre Schlag & Steven D. Smith, *Against the Law* 1 (1996) (noting that in response to the seeming intractability of the indeterminacy problem, "a great many leading American legal thinkers have now mostly abandoned 'doing law.'").

¹³⁷ Mark V. Tushnet, *Defending the Indeterminacy Thesis*, 16 *Quinnipiac L. Rev.* 339, 355 (1996).

¹³⁸ See, e.g., *Survey of Young Americans' Attitudes Toward Politics and Public Service*, p. 7 Harvard Public Opinion Project (April 29, 2015), available at http://iop.harvard.edu/sites/default/files_new/150424_Harvard%20IOP%20Spring%202015%20Report_FINAL_WEB.pdf (finding that 15% of 18-29 year olds have no confidence in the fairness of the justice system; that 35% have "not much" confidence; and that another 40% have only "some" confidence); Justin McCarthy, *Americans Losing Confidence in all Branches of the U.S. Government*, Gallup (June 30, 2014), available at http://www.gallup.com/poll/171992/americans-losing-confidence-branches-gov.aspx?utm_source=alert&utm_medium=email&utm_campaign=syndication&utm_content=morelink&utm_term=Politics (noting that only 30% of Americans have confidence in the Supreme Court).

¹³⁹ See Sara C. Benesh, *Understanding Public Confidence in American Courts*, 68 *The Journal of Politics* 697 (2006).

¹⁴⁰ James R. Maxeiner, *Legal Indeterminacy Made in America: U.S. Legal Methods and the Rule of Law*, 41 *Valparaiso University Law Review* 517, 519 (2007).

preferences, they are also likely to view the legal system as unjust and insufficiently legitimate.

It seems that indeterminacy, uncertainty, and subjectivity are unavoidable features of any legal system. Attempts to buttress the law's claim to legitimacy and citizens' moral allegiance by portraying law as determinate and legal processes as essentially objective are likely doomed to fail. But if the argument for legal determinacy and objectivity fails, perhaps the other side of the indeterminacy problem equation – the relationship between determinacy and legitimacy – can be rethought. The following chapters present one such way of rethinking what it means to have a rule of law. This approach embraces rather than conflicts with indeterminacy and judicial subjectivity; and is grounded in the largely successful legal experiences of the Jewish and Islamic jurisprudential traditions.

III. HALAKHA AS ENGAGEMENT

Indeterminacy is a prominent feature of traditional rabbinic jurisprudence. Numerous scholars throughout Jewish legal history have maintained that *halakha*, or Jewish law, is epistemologically indeterminate or uncertain, metaphysically indeterminate, or both. As discussed in section III.A, according to many – thought certainly not all – rabbinic sources, Jewish law is metaphysically indeterminate. On this view, there are unique and objectively correct answers to few if any *halakhic* questions. Instead, Jewish legal truth is constituted by jurisprudential processes through which human decisors analyze and apply *halakhic* materials and sources using accepted interpretive methods and their own reasoning in order to reach determinative legal judgments. Section III.B notes that while many other scholars have argued that *halakha* is in fact metaphysically objective, even many of these rabbinic theorists have admitted that Jewish law remains epistemologically uncertain. While there may be uniquely correct right answers to most *halakhic* questions, for a variety of reasons human decision makers are unable to access this knowledge, or cannot know for certain if and when they have. These jurists maintain that human scholars cannot bridge the gap between subjective cognition and objective legal truth. In practice, then *halakha* is constituted by the legal process, and, as that process is characterized by individual analysis and disagreement, there exists a broad range of right answers to most any legal question. Section III.C considers one approach taken by some Jewish law scholars to address the indeterminacy thesis. This way of thinking about Jewish law maintains that *halakha* inheres in Jews' commitment to engage with the indeterminate

materials and methods of the rabbinic tradition rather than in any particular set of right answers to legal questions correctly cognized and applied by *halakhic* decision makers.

A. Metaphysical Indeterminacy in Jewish Jurisprudence

Many theories of Jewish law's metaphysical indeterminacy center on a Talmudic passage that appears to deny the existence of uniquely correct answers to legal questions, and instead embraces the possibility of multiple contradictory legal truths. The Talmud relates that "for three years there was an ongoing dispute between the House of Shammai and the House of Hillel," two major schools of *halakhic* jurisprudence.¹⁴¹ "The former asserted, 'the *halakha* is in accordance with our view,' while the latter argued, 'the *halakha* is in accordance with our view.'¹⁴² According to the Talmud's account, the dispute continued until a heavenly voice went forth and announced "these and those are the words of the living God, but the *halakha* is in accordance with the rulings of the House of Hillel."¹⁴³

Commentators have noted that while the passage does conclude that in practice the law follows the opinion of the House of Hillel, it nevertheless suggests that this is not because Hillel's view corresponds to some objective legal truth. Indeed, several scholars have suggested, based on another Talmudic passage that suggests that the scholars of Shammai's School were of keener intellect, that it may even be likely that Shammai's legal position was more correct from an analytic perspective.¹⁴⁴ Instead, some commentators maintain that while both positions are fundamentally correct, the practical law follows the School of Hillel because they were more numerous, and it is a cardinal principle of *halakhic* procedure that the law follows the view of the majority.¹⁴⁵ Others explain that Hillel's ruling was adopted because other scholars, as well as the students of Shammai themselves, recognized that the students of the School of Hillel were more morally virtuous.¹⁴⁶ In both cases, the determination of the law does not rest in Hillel being objectively right or Shammai being wrong; indeed, both explanations deem the heavenly voice declaring that the *halakha* follows the view of Hillel to be irrelevant to the issue. Instead, the law follows

¹⁴¹ Babylonian Talmud, Eruvin 13b.

¹⁴² Babylonian Talmud, Eruvin 13b.

¹⁴³ Babylonian Talmud, Eruvin 13b.

¹⁴⁴ See Babylonian Talmud, Yevamos 14a. See generally Avi Sagi, The Open Canon: On the Meaning of Halakhic Discourse 100-102 (2007).

¹⁴⁵ See Avi Sagi, The Open Canon: On the Meaning of Halakhic Discourse 101-105 (2007).

¹⁴⁶ See R. Yisrael Salanter, Ohr Yisrael, no. 28, p. 78 (1900). See generally Avi Sagi, The Open Canon: On the Meaning of Halakhic Discourse 105-106 (2007).

the view of the School of Hillel because of a second-order rule of decision favoring majoritarian decision making, or a peer-judgment that the students of Hillel were exceptionally pious. In any case, underlying the Talmudic discussion seems to be the implicit assumption that any objectively correct legal fact of the matter with respect to the correct resolution of the dispute between Hillel and Shammai is at least irrelevant and perhaps even nonexistent.

This denial of the existence of metaphysically objective *halakbic* facts is also expressed by the 11th century French scholar, R. Sholomo Yitzchaki, better known as Rashi, who observed that legal propositions are quite different from factual claims. He wrote:

When two [scholars] argue about what a third one said, this master says “this is what so-and-so said” and this master says “this is what so-and-so said,” one of them is surely stating a falsehood. But when two Amoraim [Talmudic rabbis] argue about a matter of [commercial] law or about what is [ritually] permitted or prohibited, each one contending, “This [ruling] seems most reasonably correct,” there is no falsehood. Rather, each one is offering his own analysis; this master giving reasons to permit and this master giving reasons to prohibit; this master analogizing matters one way, and this master analogizing in a different way. In this context one can say, “these and those are the words of the living God.”¹⁴⁷

Rashi thus characterizes *halakbic* claims as a form of non-cognitive discourse. “Cognitivism is the doctrine that some branch of discourse is semantically objective,” meaning that its propositions are “apt for evaluation in terms of their truth or falsity.”¹⁴⁸ Factual claims, such as the assertion that a particular person made a particular statement, are either true or false; there are metaphysically objective facts in the world that either correspond to or contradict such claims. However, legal claims, according to Rashi, are non-cognitive. There is no objective truth of the matter. Instead, *halakbic* propositions represent the conclusions of individualist, subjective analytic processes, and can only be evaluated on their own terms.

According to some rabbinic sources, this indeterminacy of Jewish law is fundamental. It is not merely a product of poor analytics or mistaken understandings of objective legal

¹⁴⁷ R. Shlomo Yitzchaki, Rashi: Kesubos 57a (s.v. *ha kamashma lan*).

¹⁴⁸ Brian Leiter, *Law and Objectivity* 969, 975, in *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Jules L. Coleman & Scott Shapiro eds. 2002).

truth, but is part and parcel of God's original revelation of the Torah to Moses.¹⁴⁹ On this view, revelation included not only a body of legal rules and standards, but also the entire future oral tradition explaining, interpreting, and applying the law as well.¹⁵⁰ Thus, the Talmudic scholar R. Levi b. Chama explained the verse, "And I will give you the tablets of stone, and the law, and the commandments that I have written so that you will teach them," as follows:

"Tablets of stone": this refers to the Ten Commandments; "the law": this is the Torah; "the commandment": this is the Mishnah; "that I have written": this is the Prophets and Writings; "so that you may teach them": this is the Talmud. Thus, this teaches that all these things were given to Moses at Sinai.¹⁵¹

Another passage similarly relates that "God revealed to Moses all the details of the Torah and all the details of the scribes, and what the scribes would innovate in the future."¹⁵² R. Nissim Gerondi, a 14th century Spanish *halakhist*, explained that the "details of the scribes" in this second passage refers to "all the disagreements and arguments of the rabbis," again suggesting that revelation somehow anachronistically comprised of both abstract legal standards and future interpretations and applications of those standards to specific cases.¹⁵³

Some scholars have understood this maximalist conception of revelation to indicate *halakbic* determinacy; that the laws and "their correct application in every respect were given as part of the revelation at Sinai."¹⁵⁴ Proponents of the indeterminacy of Jewish law, however, understand this expansive conception of revelation to have the opposite effect. Instead of determining the uniquely correct *halakbic* answers to every question, the revelation of the Torah offered up myriad alternative legal possibilities, all of them

¹⁴⁹ See *infra* pages 193-198.

¹⁵⁰ See, e.g., Jerusalem Talmud, Megillah 28a ("The Torah, the Mishnah, the Talmud, and the Aggadah, and even whatever conscientious scholars will in the future originate, all was revealed to Moses as Sinai.").

¹⁵¹ Babylonian Talmud, Brachos 5a.

¹⁵² Babylonian Talmud, Megillah 19b.

¹⁵³ R. Nissim Gerondi, *Drashos HaRan*, no. 7.

¹⁵⁴ Michael S. Berger, *Rabbinic Authority* 23 (1998). See also Moshe Halbertal, *People of the Book: Canon, Meaning, and Authority* 54 (1997) ("Moses received the entire Law, both written and oral, and at its source it was complete and perfect.").

normative.¹⁵⁵ Even apparently clear-cut passages of the Torah are believed to lend themselves to multiple contradictory interpretations.¹⁵⁶ This idea is expressed in a Talmudic passage that addresses the apparent futility of attempting to reach definitive halakhic conclusion given the wide range of inconsistent but justifiable legal opinions available:

“The masters of the assemblies”: These are the students of the wise scholars who sit in many different assemblies and are engaged with the Torah. Some pronounce [the subject of legal inquiry] unclean, while others pronounce it clean; some prohibit, while others permit; some disqualify it, while others rule it fit. Lest a person say, “how can I study the Torah under these circumstances?” Therefore, the Torah says, “All of them are given from one Shepherd” [?]. One God gave them; one leader uttered them from the mouth of the Master of all creation, as it says, “And God spoke all these words”.¹⁵⁷

According to this teaching, numerous divergent opinions about the correct resolution of legal questions were included in God’s revelation of the Torah. Rather than determinate norms, this view maintains that Jewish law consists of a mass of conflicting claims and supporting evidences.

Consistent with its belief that Jewish law is metaphysically indeterminate, this pluralist school of *halakhic* jurisprudence conceptualizes legal decision making as a creative and constitutive process. According to this approach, the principle objective of the *halakhic* process is to create Jewish law. On this view, an answer to any given legal resolution does not exist until the question is addressed and resolved by a competent *halakhic* authority, and then the answer determines the correct law only for that case; the *halakha* remains

¹⁵⁵ See, e.g., R. Yomtov Asseveli, Chidushei HaRitva: Eruvin 13b (s.v. *eilu v’eilu*) (“[W]hen Moses ascended on high to receive the Torah, God revealed to him with respect to each and every issue forty-nine bases for prohibiting and forty-nine bases for permitting.”); R. Shimon of Sans, Tosfos Shantz: Ediyos 1:5 (“The whole Torah was given to Moses with aspects of purity and aspects of impurity. When they asked him how long they should continue to debate, Moses told them, ‘follow the majority, but both are the words of the living God.’”).

¹⁵⁶ See Babylonian Talmud, Sanhedrin 34a (quoting the verse that compares the Torah to “a hammer that shatters rock” [Jer. 23:29], and interpreting this reference to mean that “just as the hammer can split [the rock] into many splinters, so too a single verse can convey multiple meanings.”).

¹⁵⁷ Babylonian Talmud, Chagiga 3b.

indeterminate and nonexistent as to other, even closely analogous questions until those, too, are asked, addressed, and answered.¹⁵⁸ On this view, before a legal question is answered by a competent authority, Jewish law consists merely of a body of rules, principles, and methods that justify a range of possible solutions. The legal decision making process wades through this class of legal reasons to reach a definitive practical judgment, and in doing so literally constitutes the right *halakhic* answer to the question addressed.

This conception of *halakhic* decision making is embraced and explicated by a number of prominent rabbinic scholars. R. Yom Tov Asevilli, for example, conceptualized revelation as a body of indeterminate legal reasons justifying alternative solutions to particular *halakhic* questions, and explained that applicable halakhic norm is whichever legal position is endorsed by the second-order rule of decision of “follow the majority.”¹⁵⁹ Nachmanides takes a similar approach. In extrapolating the Biblical verse, “You should practice in accordance with the law that they direct you and the law that they say to you; do not stray from the words they tell you to the right or the left,”¹⁶⁰ the Talmud teaches that the people must follow the rulings of the authoritative scholars “even if they tell you right is left and left is right.”¹⁶¹ Nachmanides explains that the legal conclusions of relevantly authoritative decisors must be followed “even if it appears to you to exchange right for left” because “it was subject to their judgment that God gave the Torah.”¹⁶² The right answer to *halakhic* questions is thus constituted through the decision making process; one must adhere to

¹⁵⁸ See R. Asher b. Yecheiel, Rosh: Eruvin 6:2 (defining a “*halakhic* ruling” as an answer to a practically relevant legal question). See also R. Yosef Karo, Shulkhan Arukh: Yoreh Deah 242:7.

¹⁵⁹ See R. Yomtov Assevili, Chidushei HaRitva: Eruvin 13b (s.v. *eilu v’eilu*) (“The French rabbis have asked: ‘How can they both be the words of the living God when this one permits and the other prohibits?’ And they answer: Because when Moses ascended on high to receive the Torah, God revealed to him with respect to each and every issue forty-nine bases for prohibiting and forty-nine bases for permitting. And Moses asked God about this, and God explained that the matter is given over to the scholars of Israel of each generation, and the determination [from among these various alternatives] shall be in accordance with their judgment.”).

¹⁶⁰ Deuteronomy 17:11.

¹⁶¹ Sifei, *Shoftim* § 154. But see Jerusalem Talmud, Horiyos 1:1 (“One might think that you should listen to them even if they tell you that right is left and left is right; therefore, the Torah says, “to go right and left” – only if they tell you that right is right and left is left.”).

¹⁶² Nachmanides, Commentary on the Torah: Deuteronomy 17:11 (s.v. *yamin u’smol*).

such authoritative rulings because by definition they actually constitute what is left and right.

This account of the *halakhic* decision making process maintains that legal truth is not strongly objective; legal facts do not exist independent of human legal understandings. Rather, *halakhic* reality is subjectively constituted (and also altered) by the legal decisions of authoritative scholars.

This idea is expressed in perhaps the most oft-quoted Talmudic passage in academic legal literature, the “Oven of Akhnai.”¹⁶³ The passage begins with a dispute between Rabbi Eliezer and his rabbinic colleagues, led by Rabbi Yehoshua, over a point of Jewish ritual law:

Rabbi Eliezer used all the arguments in the world [to support his legal opinion], but they [the majority of the rabbis] did not accept his view. He said to them, “if the law is like me, let this carob tree prove it.” The carob tree then uprooted itself and moved one hundred cubits, and some say, four hundred cubits. The rabbis replied to him, “one does not bring legal proofs from a carob tree.” Rabbi Eliezer then said, “if the law is like me, let this stream of water prove it.” The stream then changed course and began running upriver. The rabbis replied, “we do not bring legal proofs from streams of water.” Rabbi Eliezer then said, “if the law is like me, let the walls of the study hall prove it.” The walls of the study hall then leaned inward as if to fall down. Rabbi Yehoshua said to them [the walls], “if Torah scholars debate over the law, what business is it of yours?” The walls did not fall, but out of respect for Rabbi Eliezer and his legal position they did not right themselves either. Rabbi Eliezer then said to the rabbis, “if the law is like me, let Heaven itself prove it!” A voice then emanated from the heavens and said, “why do you disagree with Rabbi Eliezer, for the law is always in accordance with his view.” Rabbi Yehoshua rose to his feet and responded, “the Torah is ‘not in Heaven.’” What does it mean that the Torah is “not in Heaven?” Rabbi Yirmiyah explained, “it means that the Torah was already given to Man at Mount Sinai, and

¹⁶³ See, e.g., Daniel J.H. Greenwood, *Akhnai*, 1997 Utah L. Rev. 309 (1997); David Luban, *The Coiled Serpent of Argument: Reason, Authority, and Law in a Talmudic Tale*, 79 Chi. Kent L. Rev. 1253 (2004); Samuel J. Levine, *Halacha and Aggada: Translating Robert Cover’s Nomos and Narrative*, 1998 Utah L. Rev. 465 (1998).

we therefore do not pay any mind to legal interpretations offered by a heavenly voice, for God already wrote in the Torah itself, ‘follow the majority view.’¹⁶⁴

Following this incident Rabbi Natan met the Prophet Elijah and asked him how God responded to the exchange between Rabbi Yehoshua and his disputants.¹⁶⁵ Elijah responded, “[when the rabbis rejected the heavenly voice] God was laughing and saying, ‘My children have bested me, my children have bested me.’”¹⁶⁶ In this, as well as in other passages,¹⁶⁷ the Talmud suggests that the practical legal import of Jewish law is controlled by human interpreters and decisional processes rather than by God.

According to some scholars the constitutive element of *halakhic* decision making is so powerful that rabbinic authorities are instructed to disregard even certain knowledge of God’s objective legal truth when found to be inconsistent with their own *halakhic* judgment. R. Nissim Gerondi explains as follows:

“Once the rabbis were inclined [to their ruling], even though they knew that they were inclined to rule contrary to the truth [as expressed by the heavenly voice], they did not want [to rescind their ruling]. For they would have violated the words of the Torah had they reversed themselves, because they had already reached a decision based on their own judgment. For the authority to make legal rulings was given to the scholars of the generations, and what they adjudge to be the law is what God has commanded.”¹⁶⁸

¹⁶⁴ Babylonian Talmud, Bava Mezi’a 59b.

¹⁶⁵ See Babylonian Talmud, Bava Mezi’a 59b.

¹⁶⁶ Babylonian Talmud, Bava Mezi’a 59b.

¹⁶⁷ See Babylonian Talmud, Bava Mezi’a 86a, where the Talmud records an incident involving Rabba bar Nahmeini who fled to the swamps to avoid persecution by Roman authorities. While he was hiding, the Talmud says, a dispute regarding a point of ritual purity law was taking place in heaven. God maintained that in the case under discussion the subject was ritually pure, while the rest of the heavenly assembly contended that it was impure. All agreed to consult Rabba bar Nahmeini who was considered the preeminent expert in this field. Ultimately, immediately prior to his death Rabba bar Nahmeini ruled, like God had argued, that the subject of the debate was indeed ritually pure. Only then, following Rabbah’s decision, did the celestial disputants accede to God’s view that the matter was indeed ritually pure.

¹⁶⁸ See, e.g., R. Nissim Gerondi, *Drashos haRan*, no. 7. For an excellent overview of rabbinic interpretations of the “Oven of *Akhnai*” passage, see See Izhak Englard, *Majority Decision v. Individual Truth: The Interpretations of the “Oven of Akhnai” Aggadah*, 15 Tradition 137 (1975).

Thus, rather than providing an objective standard with which to evaluate the correctness of rabbinic accounts of the law, the Jewish law itself endorses the idea that the law is what the authoritative interpreters say it is. This idea is poignantly captured in the following Midrashic teaching in which the revealed Torah is analogized to a bundle of flax or a sack of wheat:

Both the Written and Oral Torah are from the mouth of God. What is the difference between them? It is analogous to a king of flesh and blood who has two beloved servants. He gives each one of them a measure of wheat and a measure of flax. The wise one of the two servants takes the flax and uses it to weave a beautiful piece of cloth, and takes the wheat and makes flour, then mixes it, kneads it, and bakes it, and places it on the table, and puts the beautiful cloth over it, leaving it until the king will come. The foolish of the two servants does nothing. After a time, the king returns and asks the two servants, ‘my children, bring me what I have given you.’ The one brings the fine flour bread set on the table with the beautiful cloth spread over it; the other brings the wheat in its container and the bundle of raw flax . . . Which one is more beloved to the king? I would say, it is the one who has [taken the raw materials granted to him] produced the bread and the fine cloth.¹⁶⁹

This passage expresses both the indeterminacy and open-endedness of God’s revelation of the Torah, as well as a creative law-constituting conception of the *halakhic* decision making process. More remarkably, however, this analogy does not merely describe a legal process that creates *halakha* from an indeterminate class of legal reasons; it endorses it. In this teaching, it is the creatively-minded servant who is praised. He recognizes that the law itself is unprocessed and unactualized, its potential unrealized, until transformed into applicable norms.¹⁷⁰ R. Aryeh Leib Hakohen, a prominent Polish *halakhist*, presents a similar vision in the Introduction to his influential treatise on Jewish commercial law, *Ketzos Hachoshen*. According to Hakohen, “God gave us the Torah to administer as human understanding determines it to be, even if that determination falls short of objective truth.”¹⁷¹ Hakohen goes further, however, denying the very possibility of objective legal

¹⁶⁹ Tana D’bei Eliyahu Zuta, ch. 2.

¹⁷⁰ See generally Moshe Halbertal, *People of the Book: Canon Meaning, and Authority* 63-72 (1997).

¹⁷¹ R. Aryeh Leib Hakohen, *Introduction* to *Ketzos Hachoshen*.

truth: “Truth,” he wrote, “should sprout from the earth, and the [legal] truth is what the *halakbic* authorities, exercising their human intelligence, agree is true.”¹⁷²

Some rabbinic scholars have pushed this argument even further, holding that human interpretation of Jewish law does not merely create legal realities but metaphysical ones. For example, R. Chayim Palaggi, a prominent 19th century legist based in Turkey, maintained that “it appears that God alters the nature of things in accordance with the rulings of the Sanhedrin.”¹⁷³ This radical view suggests that authoritative judgments establish not only legal realities but metaphysical ones as well. An authoritative judgment holding A liable to B changes the objective nature of A’s relationship to B; similarly, a determination that a specific food is not kosher or that a particular action is legally prohibited actually alters the metaphysics of the food or act to bring them into conformity with the *halakbic* ruling. A more rationalistic variation on this theme is offered by R. Shlomo ben Aderes (1235-1310) in his explanation of the Talmud’s procedural rule forbidding an individual from asking a *halakbic* question to one decisor after having already received a prohibitory ruling from another decisor.¹⁷⁴ Aderes writes:

“This does not simply mean that *ex ante* a person cannot out of respect for the first scholar [who has already answered the question in the negative]. Rather, even after the fact, if he has already asked a second scholar, the permissive ruling of the second decisor is of no effect. Since the first scholar was qualified to judge the matter, when he ruled to prohibit he rendered the subject of the query an actually prohibited item.”¹⁷⁵

This explanation suggests that legal authority derives from the use of proper decision making procedures and a decisor’s jurisdictional competence over a question rather than the substantive correctness of a ruling.

¹⁷² R. Aryeh Leib Hakohen, *Introduction* to *Ketzos Hachoshen*. For a further explication of this view, see generally 1 Menachem Elon, *Jewish Law: History, Sources, Principles* 243-47 (Bernard Auerbach & Melvin J. Sykes trans., 1994).

¹⁷³ R. Chayim Palaggi, *Hachafetz Chayim*, no. 76.

¹⁷⁴ In general, Jewish law prohibits a practitioner from asking a second opinion after having already received a ruling from a competent decisor. *See* Babylonian Talmud, Niddah 20b (“If a scholar ruled something impure, his fellow scholar is not allowed to rule it pure; if he forbade something, his fellow scholar is not allowed to permit it.”). *See generally* Moshe Walter, *The Making of a Halachic Decision* 125-133 (2013).

¹⁷⁵ R. Shlomo ben Aderes, *Chidushei Harashba: Avodah Zarah 7a* (s.v. *tanu rabbanan*).

Even *halakhhic* pluralists thus maintain that Jewish law becomes determinate – whether metaphysically or just in a conceptual-legal sense – through the reaching of a *halakhhic* decision on a specific question. While the legal process constitutes new halakhhic facts, however, this does not also entail metaphysical legal objectivity. *Halakhhic* facts constituted through the decision making process remain contingent upon the subjective interpretive understandings of those scholars positioned to create and define the contours of the law through their legal rulings. The *halakha* can become determinate through the disposition of specific cases by legal authorities, but such determinacy is merely post-hoc, and apparently dependent on the subjective judgment of the presiding judge rather than on an objective legal reality that serves as a yardstick by which the correctness of a particular ruling may be evaluated.

In sum, the metaphysical indeterminacy school of *halakhhic* jurisprudence maintains that Jewish law norms are not objective facts, neither presently as a legal decisor prepares to answer a contemporary *halakhhic* question, nor even at the original point of divine revelation.

Like any complex legal culture, however, rabbinic jurisprudence does not speak with one voice. While many *halakhhic* scholars have embraced the idea that Jewish law is metaphysically indeterminate, others have argued the opposite. On this view, the *halakha* consists of uniquely correct answers to normative questions that exist as objective facts independent of what human scholars and decision makers may think about them. According to some rabbinic scholars, such *halakhhic* rights answers are tied to the ontological nature of the created universe. As Professor Avi Sagi describes it, this account of *halakhhic* determinacy “relates to various halakhhic values – ‘forbidden’, ‘allowed’, ‘pure’, ‘impure’ – as real properties of objects, equivalent to colour or shape.”¹⁷⁶ Likewise, R. Nissim Gerondi, a 14th century Spanish *halakhhic* and physician, suggested that from this vantage *halakhhic* truths are no different than medical truths. Just as a trained doctor’s prescribing a poison will kill the patient despite the physician’s honest but erroneous insistence that the potion will relieve his symptoms, so too, a legal decisor’s ruling, no matter how well-reasoned and sincerely held, will do spiritual harm to a questioner if it mistakenly contravenes objective *halakhhic* reality.¹⁷⁷

¹⁷⁶ Avi Sagi, *The Open Canon: On the Meaning of Halakhhic Discourse* 31 (2007).

¹⁷⁷ See R. Nissim Gerondi, *Drashos HaRan*, no. 7.

An alternative theory of Jewish law's metaphysical objectivity views determinate legal norms as products of God's positing the law through revelation.¹⁷⁸ This model, which Avi Sagi designates the "a priori position," maintains that contrary to the ontological approach, "Halakha neither derives from nor reflects a particular reality."¹⁷⁹ Instead, *halakhic* norms and "their correct application in every respect were given as part of the revelation at Sinai."¹⁸⁰ This approach is exemplified by a comment by Rashi in his explanation of the verse, "And these are the laws that you shall place before them."¹⁸¹ Following a Midrashic teaching, Rashi writes:

God said to Moses: "Do not think that you can just teach them the subject matter and the rules two or three times until it is ordered in their mouths, but that you do not have to toil in order to make them understand the reasoning of the matter and its full explanation." Therefore it says, "that you shall place before them"; like a set table prepared and ready to be eaten that is placed before a person.¹⁸²

Revelation, in other words, was determinate. Instead of comprising a mass of opinions and possibilities, the Torah revealed by God and given over to the people by Moses consisted of clearly delineated, readily applicable norms "like a set table prepared and ready to be eaten."

This approach also expressed by R. Joseph B. Soloveitchik, a prominent 20th century legist and philosopher. According to Soloveitchik, divine revelation constituted a universe of Platonic Forms consisting of metaphysically objective legal norms.¹⁸³ This system comprises "fixed statues and firm principles";¹⁸⁴ it is an a priori system of foundational,

¹⁷⁸ See, e.g., Jose Faur, *The Fundamental Principles of Jewish Jurisprudence*, 12 N.Y.U. J. Int'l L. Pol. 225, 226 (1979) ("[Jewish] law . . . is not to be identified with "natural law," which is universal and requires no promulgation. In Judaism, the *Tora* (Law) . . . became authoritative only after the theophany at Sinai.").

¹⁷⁹ Avi Sagi, *The Open Canon: On the Meaning of Halakhic Discourse* 35 (2007).

¹⁸⁰ Michael S. Berger, *Rabbinic Authority* 23 (1998). See also Moshe Halbertal, *People of the Book: Canon, Meaning, and Authority* 54 (1997) ("Moses received the entire Law, both written and oral, and at its source it was complete and perfect.").

¹⁸¹ Exodus 21:1.

¹⁸² R. Shlomo Yitzchaki, *Rashi: Shemos 21:1* (s.v. *asher tasim lifneihem*).

¹⁸³ See, e.g. trans., R. Joseph B. Soloveitchik, *Halakhic Man* 19 (Lawrence Kaplan 1983) ("The essence of the Halakha, which was received from God, consists in creating an ideal world.").

¹⁸⁴ R. Joseph B. Soloveitchik, *Halakhic Man* 19 (Lawrence Kaplan 1983).

eternal, and universal legal facts whose existence and content is both above and distinct from subjective human understandings or preferences. In this view, the essence of Jewish law is as a wholly external standard of conduct through which its adherents are charged with viewing and experiencing the world. More importantly, this approach maintains that Jewish law is a comprehensive and internally coherent body of substantive and methodological data points, and that like a mathematical formula these data points causally determine a single right answer to any *halakbic* question.¹⁸⁵

A wholly different approach to *halakba's* metaphysical determinacy rejects the idea that Jewish law is made determinate either ontologically or positively through revelation. On this view, the originally revealed body of *halakbic* teaching was substantially indeterminate, but became increasingly determinate over time as authoritative judicial and legislative officials enacted new *halakbic* rules and applied the law to new cases. According to scholars like Maimonides and his predecessor R. Yitzchak Alfasi, by the end of the Talmudic period, which marked the conclusion of independent legal interpretation and development, the *halakba* was rendered fully determinate. The *halakba*, contained in and enacted into law by the Talmud, contained a right answer to every legal question. This understanding was implicit in the work of R. Yitzchak Alfasi, an 11th century Moroccan scholar best known for having made the first widely circulated attempt to edit the Talmud into what he considered a practical *halakbic* text. Alfasi excised what he considered extraneous dialectic and homiletic materials from the Talmudic text, leaving a substantially abridged version of the Talmud containing only what he regarded as determinate legal conclusions.¹⁸⁶ Notably, in confining this compilation of the whole of Jewish law meant for practical application to the language of the Talmud itself, Alfasi implicitly suggested that the Talmud had rendered Jewish law determinate, making the addition of additional comments or rulings unnecessary.

Maimonides himself took a similar approach. In the *Introduction* to his major legal code, *Mishnah Torah*, Maimonides argued that, properly understood, the Talmud provides determinate norms for all *halakbic* queries.¹⁸⁷ On this view, post-Talmudic scholars merely

¹⁸⁵ See generally Yair Lorberbaum, *Halakbic Realism*, available at <http://law.huji.ac.il/upload/HalakbicRealism.pdf>. See also Tamar Ross, *Expanding the Palace of Torah: Orthodoxy and Feminism* 60-100 (2004).

¹⁸⁶ See Joel L. Kramer, *Maimonides: The Life and World of one of Civilization's Greatest Minds* 60-63 (2008).

¹⁸⁷ Maimonides, *Introduction*, *Mishnah Torah* ("From the two Talmuds, and from the Tosefta, and from the Sifra and from the Sifre, and from the Toseftot--from them all--are

reformulate already settled legal norms in a way that speaks more directly to contemporaneous questions; the *halakha* itself, however, was made fully determinate by the completion of the Talmud.¹⁸⁸ Unlike other theories of *halakhic* determinacy, which holds that uniquely correct, metaphysically objective answers to legal questions were brought into being through nature or revelation, this model contemplates a *halakhic* “rule of recognition” that identifies the law with the conclusive judgments of the Talmud. On both views, however, *halakha* is conceptualized as a body of metaphysically objective legal facts that causally determines the right answers to legal questions.

B. Epistemological Indeterminacy in Jewish Jurisprudence

While some *halakhic* scholars have held that Jewish law is metaphysically objective, even many of these theorists have acknowledged that the law remains largely epistemologically indeterminate. Even if objective *halakhic* truths do exist, rabbinic scholars and decision makers have widely noted the substantial difficulty, uncertainty, and human judgment involved in determining what Jewish law entails in practice. *Halakhic* jurists have attributed this epistemic legal indeterminacy to a number of different factors.

Rabbinic commentators have long appreciated that textual statements lend themselves to numerous alternative interpretations. The Talmud itself noted this reality with respect to the text of the Torah. Positing an important canon of scriptural construction, the Talmud maintained that a single scriptural proof-text can be used to derive many different *halakhic* rules.¹⁸⁹ Additionally, numerous Midrashic and rabbinic sources opine that the Torah can

to be found what is forbidden and what is permitted, what is unclean and what is clean, what is liable and what is exempt, and what is fit for use and what is unfit for use, according to the unbroken oral tradition from Moshe as received from Sinai.”). *See also* Moshe Halbertal, *People of the Book: Canon, Meaning, and Authority* 59-63, 77 (1997).

¹⁸⁸ Maimonides, *Introduction*, *Mishnah Torah* (“The Geonim [post-Talmudic scholars] in every generation also wrote works to explain the Talmud: Some of them commented on a few particular laws, some of them commented on particular chapters that presented difficulties in their time, and some of them commented on Tractates or Orders. They also wrote collections of settled laws as to what is forbidden and permitted, liable and exempt, according to the needs of the time, so that they could be easily learned by one who is not able to fathom the depths of the Talmud.”).

¹⁸⁹ *See* Babylonian Talmud, Sanhedrin 34a (“One verse goes to many [legal] reasons, but a single reason cannot be attributed to multiple verses.”).

be “deconstructed into seventy languages,”¹⁹⁰ and that “there are seventy faces to the Torah.”¹⁹¹ R. Moshe Chaim Luzatto associated this idea with an esoteric Midrashic teaching that the soul of every Jew was present for God’s revelation of the Torah on Mount Sinai. According to Luzatto, the Torah contains countless meanings because every individual received a unique “portion” of the Torah at Sinai. Thus, the Torah’s text, which encompasses the totality of these meanings, necessarily lends itself to myriad interpretive understandings.¹⁹²

Nachmanides expressly considered the epistemic uncertainty about what the law requires that results from this indeterminacy of the Torah’s text, and understood this to be the main reason for the Torah’s primary rule of decision, “follow the view of the majority.” As Nachmanides wrote:

The need for this command [to follow the rulings of the rabbis whether you think they are right or wrong] is very great. For the Torah was given to us as a text, and it is well known that minds will differ about derivative matters, and disagreement will proliferate and the Torah will become like many Torahs. Therefore the Torah gives us a clear-cut rule to obey the directives of the High Court . . . regarding what they say about the explanation of the Torah.”¹⁹³

In this passage, Nachmanides identifies the textual nature of the Torah as a primary source of epistemic indeterminacy, and thus disagreement. Texts, he implicitly notes, must be interpreted in order to ascertain what they say about “derivative matters” not expressly and clearly addressed by the text itself. But interpretation leads to disagreement because texts can be read in a variety of different ways that makes the “real” normative import of the text uncertain and perhaps unknowable.¹⁹⁴

¹⁹⁰ See Babylonian Talmud, Shabbos 88b (“Each and every statement uttered by the Almighty can be deconstructed into seventy languages. . . . Just as a hammer divides into many sparks [when it hits metal], so too, each and every statement that went forth from God’s mouth divides into seventy languages.”).

¹⁹¹ See, e.g., Midrash Rabah: Numbers, 13:15; Zohar: Genesis 47:2.

¹⁹² See R. Moshe Chaim Luzatto, *Derech Eitz Chaim*, quoted in 1 Hanina ben-Menahem *et. al.*, *Controversy and Dialogue in Halakhic Sources* 100 (1991). See also R. Avraham Azulai, *Introduction*, Balei Bris Avraham, quoted in 1 Hanina ben-Menahem *et. al.*, *Controversy and Dialogue in Halakhic Sources* 96-99 (1991).

¹⁹³ Nachmanides, *Commentary on the Torah: Deuteronomy 17:11*.

¹⁹⁴ See also R. Shlomo Luria, *Introduction to Bava Kama*, Yam shel Shlomo.

Precisely because of the epistemic indeterminacy arising from the nature of texts, Jewish jurisprudence posits a theory of dual revelation.¹⁹⁵ According to traditional Jewish thought, in addition to the text of the Written Torah, which contains broad outlines and pointed allusions to the norms of Jewish living, God also revealed to Moses the Oral Torah, teachings that elaborate, explain, and at times qualify the details of Jewish law.¹⁹⁶ The non-textualism of this oral tradition of *halakhic* teachings helped ameliorate the epistemic indeterminacy of Jewish law. Maimonides, for example, explained that the initial orality of the law avoided many of the epistemic pitfalls that later resulted from its being committed to writing, such as “great diversity of opinion, doubts as to the meaning of written words . . . dissent among the people, the formation of new sects, and confused notions about practical matters.”¹⁹⁷ R. Yosef Albo similarly explained that in order to avoid the occurrence of uncertainties in the correct understanding of the Torah’s text, God revealed to Moses a body of oral teachings. Albo goes on to explain that “it would have been impossible to communicate these clarifying teachings in a text because a textual account [of God’s explanations of the Written Torah] would be susceptible to interpretive doubts and uncertainties just as was the case with the first text [the Written Torah].”¹⁹⁸ Indeed, Maimonides and others have noted that the *halakhic* rule, “Things that I have communicated to you orally, you must not communicate them to others as text,”¹⁹⁹ specifically prohibited recording the Oral Torah in texts for precisely this reason, “for while it remained in force it prevented the evils [of indeterminacy] that subsequently arose [after the law was committed to writing].”²⁰⁰

¹⁹⁵ See 1 Menachem Elon, *Jewish Law: History, Sources, Principles* 200 (Bernard Auerbach & Melvin J. Sykes trans., 1994) (“One may conclude from even a cursory examination [of the Written Torah] that Biblical commandments and laws were accompanied by many explanations and detailed rules – given orally or preexisting in practice – which supplement and give meaning to what is written in the Torah.”). For examples see *id.* at 200-203.

¹⁹⁶ See 1 Menachem Elon, *Jewish Law: History, Sources, Principles* 192-94 (Bernard Auerbach & Melvin J. Sykes trans., 1994); David Hollander, *Jewish Law for the Law Librarian*, 98 L. Libr. J. 219, 222 (2006); Samuel J. Levine, *An Introduction to Legislation in Jewish Law, with References to the American Legal System*, 29 Seton Hall L. Rev. 916, 919 (1999).

¹⁹⁷ Maimonides, *Guide to the Perplexed*, Book 1, no. 71.

¹⁹⁸ R. Yosef Albo, *Sefer Ha’ikarim* 3:23

¹⁹⁹ See *Babylonian Talmud*, *Gittin* 60b.

²⁰⁰ See Maimonides, *Guide to the Perplexed*, Book 1, no. 71; R. Yosef Albo, *Sefer Ha’ikarim* 3:23.

Eventually, the Oral Torah tradition was committed to writing. Due to external pressures and internal discord, the rabbis of the Mishnaic and Talmudic eras decided to create a textual account of the previously orally transmitted *halakha* as a means of preserving its contents as best as possible for posterity. While the writing of the Oral Law helped preserve its content, it only exacerbated Jewish law's epistemic indeterminacy. As R. Yosef Albo explained:

Much as the text of the Mishnah, which is a commentary on the Written Torah, resulted in numerous doubts and uncertainties until it too required a further commentary – that is, the Talmud So too, the Talmud, written as an explanatory and clarifying commentary on the Mishnah, requires additional elaboration and clarification. And thus multiplied the commentaries and divergent understandings [of the meaning of the Talmud], and likewise with respect to these Talmudic commentaries themselves.²⁰¹

The textualization of the Oral Torah, in other words, only exacerbated the epistemological indeterminacy problem. Every attempt to clarify the mass of *halakhic* teachings and materials in fixed texts only created additional doubts about the correct interpretation of the new materials as scholars debated what *halakhic* rules and standards were actually being communicated.

The difficulty in determinately communicating objective truths through texts also became a common theme in arguments against medieval and early modern attempts to organize Jewish law into code-like texts. Maimonides wrote the first systematic, conceptually organized code of Jewish law in the late twelfth century, and explained that the goal of this work was to present determinate and readily applicable *halakhic* rules so as to obviate the need to derive legal rulings from the dispersed, multi-vocal dialectics of the Talmud.²⁰² Some early critiques of Maimonides' work argued that a code-like work could not fully communicate the law, which inhered in the reasoning and activating principles underlying specific legal rules. Thus, scholars like R. Abraham ibn Daud and R. Asher b. Yechiel rejected Maimonides claims that his own work offered an exhaustive and determinate

²⁰¹ R. Yosef Albo, *Sefer Ha'ikarim* 3:23

²⁰² See Maimonides, *Introduction*, Mishnah Torah (“I decided to combine all the things that emerge from all the works [of the rabbinic tradition] . . . until the entire Torah will be arranged in the mouths of all without difficulty or need for further elaboration and clarification And so that a person will not have any need of other legal works . . .”).

account of the *halakha*.²⁰³ R. Shlomo Luria, in his criticism of the prominent sixteenth century code, *Shulchan Arukh*, took this argument even further. Explicitly highlighting the indeterminacy of textual accounts of the law, Luria wrote: “[E]ven if the entire heavens were parchment, and all the oceans ink, they would not suffice to fully communicate one legal issue.”²⁰⁴ For Luria, the impossibility of committing the law to writing is not merely a function of the vastness of *halakha*. Instead, Luria observed that every time one attempts to author an account of the *halakha*, “there is an even greater need for clarifications, and clarifications upon clarifications. For it is impossible that the initial clarification of the law would be free of all doubts and nuances such that there would be no need for further elaboration.”²⁰⁵ In other words, texts are inherently incapable of fully and determinately communicating the ideas they contain. Texts always require further interpretation, and the need for interpretive clarification both highlights and produces substantial uncertainty about what the law communicated through the text actually is and requires.

The indeterminacy of *halakhic* texts is closely related to another source of rabbinic decisor’s epistemic uncertainty about what the law is and requires in specific cases. Some commentators have noted that one of the reasons for the Torah’s textual uncertainty is its prospectivity. Jewish law is a system of norms meant to be applied to countless future contingencies, but it would be functionally impossible to include determinate answers to every possible *halakhic* question in the text of the Torah itself. According to some sources, therefore, the Torah was given as a set of broader, more general rules and principles, as well as interpretive rules and analytic devices that would permit the scholars of every generation to decide what the law requires in each case as it arose.²⁰⁶ As R. Yosef Albo explained:

[The Oral Torah was given alongside the written Torah] because it is impossible that the [Written] Torah could be complete in such a way as to suffice for all future times. The details of human existence are constantly changing, and are too numerous to be encompassed in a book. Therefore, at Sinai, God orally explained

²⁰³ See 3 Menachem Elon, *Jewish Law: History, Sources, Principles* 1222-1229 (Bernard Aurbach & Melvin J. Sykes trans., 1994).

²⁰⁴ Quoted in Moshe Halbertal, *People of the Book: Canon, Meaning, and Authority* 79 (1997).

²⁰⁵ R. Shlomo Luria, Introduction to *Bava Kama*, Yam shel Shlomo.

²⁰⁶ See, e.g., Midrash Rabah: Shemos 41:6 (“Could Moses really have learned the entire Torah; but it says, ‘it is vaster than the earth and wider than the sea’ [Job 11:9]? Rather, God taught Moses the general principles.”).

to Moses those things that were merely generally and briefly alluded to in the text of the Torah, so that through them the scholars of each generation could tease out the new details.²⁰⁷

In other words, the Torah's text is not clear not only because indeterminacy is an innate quality of written communication, but also because it would be impracticable to conclusively answer every possible future question in a text revealed in a specific place and at a specific time.

The prospective and general character of Jewish law – like that of other systems – produces gaps in the law. When law is made in advance, it simply cannot clearly determine the result in every future contingency. In such situations, the law literally runs out, and decision makers must resort to a variety of analytic devices to decide the case at hand. In addition, and related to gaps in the law, legal systems comprised of generally applicable prospective rules tend to produce internal tensions and contradictions between legal norms. Because *halakhic* standards are both prospective and formulated as general rules, it is often unclear which norms apply to a given case. Indeed, oftentimes credible arguments can be made for the applicability of a number of different, even contradictory existing standards that, when applied to a given question, may urge divergent results. When faced with such tensions, *halakhic* decision makers must determine which rules apply (often an effort in analogical reasoning), or else balance equally applicable but inconsistent standards to reach a single result. These characteristic gaps and contradictions are unavoidable. As the legal system tries to avoid internal contradictions by positing fewer rules, it produces more gaps; and when the law reduces the incidence of lacuna by expanding the number and scope of legal standards it increases the number and complexity of its own internal contradictions.

These gaps and contradictions prevent rabbinic decisors from objectively determining what the law requires in new cases. Instead, as many commentators have noted, the process of reasoning from existing rules to practical judgments in specific cases is highly individualistic and subjective. For example, several rabbinic sources note the fundamentally subjective quality of analogical reasoning. When new cases arise, legal decisors often resort to analogy in order to determine whether existing norms and their underlying *ratio legis* might also apply to different but perhaps similar factual scenarios. The facts of every case, however, include both elements that are similar to and different from the operative facts of an existing legal norm. As R. Yomtov Asevilli pointed out, every

²⁰⁷ R. Yosef Albo, Sefer Ha'ikarim 3:23.

case includes “forty nine reasons to prohibit and forty nine reasons to permit.”²⁰⁸ R. Yehuda Lowe further elaborated this idea:

When God gave the Torah to the Jewish people . . . He said, “this rule has aspects of liability and aspects of exoneration.” . . . For in the Torah there is no matter fully pure without any impure qualities. . . . For the world is not straightforward that there would not be a multiplicity of conflicting aspects to things. . . . God created all things, and created them with multiple inconsistent qualities.²⁰⁹

According to some rabbinic scholars, this complexity precludes objective analogical analyses. When extending existing laws to new cases, individual decisors unavoidably engage subjective perceptions that influence their respective understandings of analogical relationships. Thus, Lowe continued to explain that

[e]ven if a certain thing is impure, it is impossible that it does not have some pure aspects and qualities to it; and likewise if a thing is pure, it necessarily has impure aspects to it as well. And human beings diverge in their cognitive processes, and it is impossible that all people should think the same way. Therefore, each person [that issues a ruling] internalizes one of the aspects of the issue in accordance with his own cognition. . . . Just as one person will conclude that the subject of a *halakhic* question is pure and give reasons and analyses for its purity, and certainly one aspect of its nature will be as he says, so too, another who rules the same thing to be impure will also reason that way based on another of its aspects.²¹⁰

R. Shlomo Yitzchaki similarly noted that when making *halakhic* judgments “this scholar compares one thing to the next in this way, while another scholar will compare those same things in another way.”²¹¹

Rabbinic scholars have also expressed broader skepticism at the possibility of epistemic objectivity due to what they see as the inherently different nature of every individual. Some commentators argue that this is a result of the Aristotelian notion that people tend to cleave to and think like those around them. R. Menachem Meiri, for instance, wrote that

²⁰⁸ R. Yomtov Asevilli, *Chidushei Haritva: Eiruvim 13b (s.v. eilu v'eilu)*.

²⁰⁹ R. Yehuda Lowe, *Be'er Hagolah, Be'er 1, quoted in 1 Hanina ben-Menahem et. al., Controversy and Dialogue in Halakhic Sources 69 (1991)*.

²¹⁰ R. Yehuda Lowe, *Be'er Hagolah, Be'er 1, quoted in 1 Hanina ben-Menahem et. al., Controversy and Dialogue in Halakhic Sources 69 (1991)*.

²¹¹ R. Shlomo Yitzchaki, *Rashi to Babylonian Talmud, Kesubos 57a (s.v. ha kamashma lan)*.

“man’s nature is to love those with whom he associates or grew up, and to equate their conduct and words to something written in a book.”²¹² It becomes difficult, Meiri argues, for people to “depart from this way [of viewing things],” and this in turn produces disagreement about normative questions.²¹³ In a similar vein, R. Yisrael Salanter argued that different understandings of Jewish law are the results of “subjective emotional forces that human beings cannot fully eradicate from their cognitive processes,” which prevent *halakhic* scholars from understanding anything more than “what their own eyes see.”²¹⁴ According to Salanter, “the rabbis reach their *halakhic* positions not only according to the [objective] evidence before them but also, and mainly, according to their personal evaluations of this evidence.”²¹⁵

Other rabbinic theorists have argued that epistemic indeterminacy results from the fact that people just see the world differently and therefore reach different subjective conclusions about the import and meaning of even objective data and mutually agreed upon standards. Thus, in another passage, R. Yisrael Salanter wrote: “Human beings differ from each other in the weight they ascribe to objective evidence, and thus they exercise discretionary judgment, as we see that their views vary widely.”²¹⁶ A similar idea is illustrated by an allegorical explanation of *halakhic* controversy. In this parable, disputing rabbis are likened to two petitioners who appear before a king. One supplicant covers his head while the other removes his hat. While each of the two takes a different course of action, each is attempting to apply the same rule, “act deferentially and respectfully before the king”; the difference in each petitioner’s practical conduct results simply from different subjective notions about what respect entails.²¹⁷ Similarly, R. Shlomo Luria argued that “each person sees [the Torah] through his own subjective channel and according to his own capacity . . . this one distant from that one.”²¹⁸

²¹² R. Menachem Meiri, *Introduction*, Responsa Meiri Magen Avos.

²¹³ R. Menachem Meiri, *Introduction*, Responsa Meiri Magen Avos.

²¹⁴ R. Yisrael Salanter, *Ohr Yisrael*, no. 30 (comment).

²¹⁵ Avi Sagi, *The Open Canon: On the Meaning of Halakhic Discourse* 31 (2007).

²¹⁶ R. Yisrael Salanter, *Ohr Yisrael*, no. 30 (comment), p. 83-84 (1900).

²¹⁷ See Akeidas Yitzchak, Part 12, *quoted in* 1 Hanina ben-Menahem *et. al.*, *Controversy and Dialogue in Halakhic Sources* 67 (1991).

²¹⁸ R. Shlomo Luria, *Introduction to Bava Kama*, Yam shel Shlomo (“[T]he Torah was received by the Jewish people through forty-nine channels . . . so that each person sees [the Torah] through his own channel according to his own capacity . . . this one distant from that one

Nachmanides nicely summarized the implications of the foregoing observations in the introduction to his *halakhic* work, *Milchemes Hashem*.²¹⁹ He cautioned his readers against expecting to find determinate, conclusive proofs to his *halakhic* conclusions, and against dismissing his views if they found his arguments less than logically airtight. He noted that “everyone who has studied our Talmud knows that in arguments among the commentators there are no complete proofs nor typically are there any absolute questions; for this wisdom is not susceptible to dispositive proofs as in the mathematical or physical sciences.”²²⁰ Here, Nachmanides emphasizes that *halakhic* knowledge and the reasoning that produces it is never truly independent of the scholar engaged in its study. On the contrary, *halakhic* conclusions depend on individual’s subjective impressions of the weightiness of various interpretations, arguments, proofs, and questions.²²¹

While Jewish jurisprudence thus maintains a strong tradition of *halakha’s* epistemological indeterminacy, several prominent rabbinic scholars have rejected this claim. These rabbis have argued that Jewish law is epistemologically determinate; that it is indeed possible for human interpreters to attain knowledge of metaphysically objective *halakhic* truths by utilizing deductive reasoning and the interpretive devices and analytic methods endorsed by Jewish law. In explaining the genesis of *halakhic* disagreement Maimonides argued that legal disagreement stemming from cognitive uncertainty about what the law requires is a product of deficient rabbinic training and weak analytic abilities. He writes:

It is well known that when two people are equal in understanding, analytic abilities, and knowledge of interpretive principles, there will not be any disagreement between them with respect to rulings derived from these interpretive principles . . . for the nature of derivations made using these interpretive principles is that the [derivative rulings] are close to each other, and the interpretive principles that this one has are also used by the other. And it was only once students became less diligent . . . that disputes arose during the process of legal reasoning because each

so that [as to the same halakhic question] this one rules impure and that one rules pure and a third is in the middle.”).

²¹⁹ Nachmanides, *Introduction*, Milchemes Hashem.

²²⁰ Nachmanides, *Introduction*, Milchemes Hashem.

²²¹ See Avi Fertig, *Bridging the Gap: Clarifying the Eternal Foundations of Mussar and Emunah for Today* 140 (2007).

scholar judges according to his own mind and using his own interpretive principles.²²²

In another passage, Maimonides similar suggests that disagreement is not a result of human scholars being unable to attain objective knowledge of objective facts. Instead, Maimonides argued that deductive reasoning and proper interpretive tools permit access to objective knowledge. Disagreement is the by-product of scholars' failing to fully banish subjective preferences and interests from their minds. Objectivity is possible, according to Maimonides, even if in practice it is a rare quality in human cognitive activities.

Likewise, the 20th century scholar, R. Elchanan Wasserman suggested that objective knowledge of God and God's true will is accessible to human beings. He argues, however, that subjective interests and biases distort a person's ability to discern truth: "A person cannot evaluate whether something is true unless his mind is free from any distorting influence with respect to the thing he wishes to judge. For when the recognition of a particular objective truth contradicts a subjective bias, no amount of intellect . . . can overcome that personal preference."²²³

Even rabbinic advocates of Jewish law's epistemic objectivity, however, cannot help but acknowledge that while *halakha* may not be epistemologically *indeterminate* it is nevertheless quite apparently epistemologically *uncertain*. In other words, while it may well be theoretically possible for human scholars to attain correct knowledge of *halakhic* norms, in practice rabbinic decisors can never be sure whether or not their legal conclusions actually reflect objective *halakhic* truth. The primary source of such epistemic uncertainty is *halakhic* disagreement that pervades Jewish jurisprudence. Disagreement about what the law is and requires in specific cases is endemic to the *halakhic* system.²²⁴ Such entrenched disagreement – as opposed to mere transitory argumentation – makes it difficult for rabbinic decisors to know whether they have in fact correctly surmised the objectively right answer to a given *halakhic* problem. Because there is typically a wide range of well-reasoned and legally justifiable opinions on any given question, the theoretical possibility of objective legal knowledge does little to soften the epistemic uncertainty produced by

²²² Maimonides, *Introduction to Seder Zera'im*, Commentary on the Mishnah.

²²³ R. Elchanan Wasserman, *An Essay on Faith*, paragraph 5, Kovetz Maamarim.

²²⁴ See Jeffrey I. Roth, *The Justification for Controversy under Jewish Law*, 76 Cal. L. Rev. 337, 338-39 (1988). See generally sources cited in 1 Hanina ben-Menahem *et. al.*, *Controversy and Dialogue in Halakhic Sources* 29-35 (1991) (illustrating the principle of "Disagreement: Such is the way of the Torah").

halakhic disagreements. In practice, rabbinic decisors must make “judgment calls in evaluating citations, precedents, [and] arguments”; and there are no uncontested, objective standards for doing so.

The necessity of making subjective judgments in light of the epistemic uncertainty produced by ubiquitous *halakhic* disputation is well expressed by R. J. David Bleich. Bleich is a contemporary proponent of a metaphysically and epistemologically objective theory of Jewish law, but has nonetheless conceded that practical *halakhic* decision making entails subjectivity (or as he puts it, “art”).²²⁵ Bleich implicitly recognizes the inverse relationship between epistemic objectivity and disagreement when he notes that while “there is no room for subjectivity” in *halakhic* decision making, “[t]hat is not to say that there is no room for disagreement.”²²⁶ In this vein, Bleich compares Jewish jurisprudence to the natural sciences. Just as scientists must often choose between conflicting scientific theses by utilizing accepted scientific methods, rabbinic decisors are also frequently obliged to choose among competing conceptions of the *halakha*.²²⁷ The very existence of these alternative legal positions, however, results in substantial uncertainty as to whether any particular *halakhic* answer is *the* right one.²²⁸ Indeed, the Talmud itself suggests as much when it wonders at the apparent futility of the *halakhic* project given the ubiquity of conflicting but reasonably justifiable legal positions on the same questions.²²⁹

C. Halakha as Engagement: A Rabbinic Conception of the Rule of Law

The indeterminacy of *halakhic* jurisprudence raises at least two problems. First, indeterminacy produces disagreement, disagreement results in uncertainty, and uncertainty makes it difficult for Jewish legal actors and decisors to know what the law is and requires. Second, even after specific legal questions are resolved by competent rabbinic decision makers, *halakha*'s causal indeterminacy suggests that such legal determinations are expressions of subjective rabbinic will rather than objective standards of the kind typically

²²⁵ J. David Bleich, *Theoretical Analysis and Halakhic Decision-Making* 87, 88, in Lomdus: The Conceptual Approach to Jewish Learning (Yosef Blau ed., 2006).

²²⁶ J. David Bleich, *Theoretical Analysis and Halakhic Decision-Making* 87, 87, in Lomdus: The Conceptual Approach to Jewish Learning (Yosef Blau ed., 2006).

²²⁷ See J. David Bleich, *Theoretical Analysis and Halakhic Decision-Making* 87, 87-88, in Lomdus: The Conceptual Approach to Jewish Learning (Yosef Blau ed., 2006).

²²⁸ See J. David Bleich, *Theoretical Analysis and Halakhic Decision-Making* 87, 88, in Lomdus: The Conceptual Approach to Jewish Learning (Yosef Blau ed., 2006).

²²⁹ See Babylonian Talmud, Chagiga 3b.

thought of as law. While these two problems are common to other jurisprudential systems, in the *halakbic* context they also implicate serious religious concerns.

The nomos-centric religious tradition of rabbinic Judaism holds that God's will is expressed through law, which sets normative standards for human conduct. Upholding and adhering to the law therefore matters. Following the law is a religious good; contravening the *halakba* is a religious ill; and either course is believed to have personal, communal, global, and even cosmic implications.²³⁰ From this vantage, prospective uncertainty about what the law requires due to *halakbic* indeterminacy and disagreement makes it difficult for Jewish legal actors to obey the law absent the impracticability of constant rabbinic hand-holding. This risks regular, albeit well-intentioned, violations of correct *halakbic* standards. Furthermore, Jewish law's indeterminacy complicates the ability of rabbinic decisors to know how to guide and direct their constituents in proper modes of *halakbic* praxis. To lead and instruct their followers, Jewish law scholars must be able to ascertain what the *halakba* is and requires. However, Jewish legal decision makers are typically faced with an array of divergent *halakbic* opinions on most issues, and the methods of *halakbic* jurisprudence often fail to provide the analytic tools needed to clarify and determine the right legal standard.

Indeterminacy and disagreement in *halakba* also raises the specter of judicial subjectivity, which is a cause and also a consequence of epistemic uncertainty about what the law is and requires. The foregoing discussion suggests that Jewish legal materials and methods often present decisors with a solution set of reasonably justifiable *halakbic* responses to any given question, and that rabbinic decision makers must ultimately choose a single

²³⁰ See, e.g., Maimonides, *Mishnah Torah: The Laws of Repentance* 3:1-2. Maimonides wrote: (1) Each and every person has merits and sins. A person whose merits exceed his sins is righteous; a person whose sins exceed his merits is wicked. . . . The same applies to an entire country. If the merits of all its inhabitants exceed their sins, it is righteous; if their sins are greater, it is wicked. The same applies to the entire world. (2) If a person's sins exceed his merits, he will immediately die Similarly, a country whose sins are great will immediately be obliterated In regard to the entire world as well, if peoples' sins are greater than their merits, they would immediately be destroyed This reckoning is not calculated on the basis of the *number* of merits and sins, but also on their significance. For there are some merits that outweigh many sins The weighing [of sins and merits] is carried out according to the wisdom of the Knowing God. He knows how to measure merits against sins.

Id.

answer from among these disparate options. Because the sources and methods of Jewish law do not on their own fully determine the right answer to *halakbic* questions, this choice must be made based on something external to the law itself.²³¹ The importance of these extra-legal factors in the decision making process – and different decisors rely on different determinants – suggests that *halakbic* determinations are ultimately an exercise in individual, subjective discretion.²³²

The determinative role judicial subjectivity plays in legal decision making raises the universal jurisprudential concern about whether *halakba* can be characterized as a system of objective law rather than rabbinic will.²³³ Additionally, the subjective quality of *halakbic* determinations calls into question the religious value of following rabbinic legal judgments entirely. First, the indeterminacy problem suggests that instead of accurately communicating the terms of God’s law, *halakbic* determinations by rabbinic decisors replace the Divine will with that of the deciding scholar, possibly leading Jewish legal actors to follow man-made rather than Divinely-posed legal standards. Moreover, one of the values served by *halakbic* praxis is humble submission of one’s own will to the external standard of God’s command.²³⁴ If practical *halakbic* judgments are expressions of rabbinic rather than divine will, however, it would seem that Jewish jurisprudence actually represents the very opposite of humility and submission.

The Talmud itself anticipates Jewish law’s indeterminacy problem. While explaining a verse in Ecclesiastes that states, “The words of the scholars are like goads; like well-

²³¹ See Aaron Kirshenbaum, *Subjectivity in Rabbinic Decision Making*, 93, in *Rabbinic Authority and Personal Autonomy* (Moshe Z. Sokol ed. 1992).

²³² See *supra* Section 5.C.

²³³ Indeed, many critics of traditional rabbinic jurisprudence and *halakbic* standards have used this argument to raise question the failure of *halakbic* scholars to change various legal standards that are seen as morally or ethically problematic. The prominent traditionally observant Jewish feminist Blu Greenberg, for example, has famously claimed that “where there is a rabbinic will there is a *halakbic* way,” suggesting that Jewish legal standards are ultimately a product of what rabbinic decisors are subjectively interested in implementing. See Blu Greenberg, *See, e.g.*, Blu Greenberg, *On Women and Judaism: A View from Tradition* 44 (1981); Sussana Heschel *On Being a Jewish Feminist: A Reader*, p. xiv (2d ed. 1995) (implicitly assuming that *halakbic* conclusions are ultimately determined by subjective preferences rather than objective norms, arguing that “[w]hat has become clear is that non-*halachic* factors often exert ultimate control over *halacha*.”).

²³⁴ See Shlomo Pill, Note, *Recovering Judicial Integrity: A Duty-Focused Disqualification Jurisprudence Based on Jewish Law*, 39 *Ford. Urban L.J.* 511, 533-34 (2011).

fastened nails are the masters of the assemblies; they are given from one shepherd,²³⁵ the Talmud notes the radical disagreement and uncertainty that inheres in Jewish jurisprudence:

“The masters of the assemblies”: These are the students of the wise scholars who sit in many different assemblies and are engaged with the Torah. Some pronounce [the subject of legal inquiry] unclean, while others pronounce it clean; some prohibit, while others permit; some disqualify it, while others rule it fit. Lest a person say, “How can I study the Torah under these circumstances?” Therefore, it says, “all of them are given from one Shepherd.” One God gave them; one leader uttered them from the mouth of the Master of all creation, as it says, “And God spoke *all* these words.”²³⁶

How can one properly know and practice the law if correct *halakhic* standards are obscured by indeterminacy, disagreement, and uncertainty about what the law is and requires? What value is there in the *halakhic* project when this pervasive disagreement suggests that “there is no objective reasoning in the Torah’s commandments at all”; that Jewish law is the flawed, contingent product of individual decisors’ subjective will?²³⁷

On its face, the Talmud’s response to these questions is unsatisfying. Students of Jewish law, the Talmud says, can take comfort on the fact that the numerous inconsistent *halakhic* viewpoints encompassed by the rabbinic tradition have all been “given from one shepherd.” Putting aside the conceptual difficulty of attributing inconsistent legal truths to a single lawgiver, it is unclear how this knowledge helps resolve Jewish law’s indeterminacy problem. Regardless of its theoretically unitary origin, practical *halakhic* jurisprudence is still a quagmire indeterminate substantive standards and analytic methods, conflicting legal opinions, and uncertain legal conclusions. While Jewish law may originate in God’s command, *halakhic* decision making is still a human process, and the applicable results of this process are still the individualistic, subjective opinions of human interpreters rather than accurate communications of objective legal truth. As Steven Resnicoff has candidly observed, “Jewish law is more the rule of men than the rule of law.”²³⁸

²³⁵ Ecclesiastes 12:11.

²³⁶ Babylonian Talmud, Chagigah 3b.

²³⁷ R. Nissim Gerondi, Derashos Haran, no. 11.

²³⁸ Steven H. Resnicoff, *Autonomy in Jewish Law – In Theory and in Practice*, 24 J. L. & Rel. 507, 534 (2008).

The 19th century *halakhist* R. Yitzchak Reines thus rightly wondered: “How does it help to say, ‘All were given by one shepherd’? For as long as the Talmud has not explained how it is possible for two contradictory viewpoints to coexist with each other, the original question remains in place.”²³⁹

Halakha-as-Engagement

Some rabbinic scholars have addressed Jewish law’s indeterminacy problems by developing a conceptualization of the nature of *halakha* and goals of *halakhic* decision making that embraces rather than strains against legal indeterminacy, disagreement, and uncertainty. This theory, termed here “law-as-engagement,” is a way of thinking about Jewish jurisprudence that locates *halakha* in a process of creative yet humble individual and communal engagement with the accepted sources and methods of Jewish law. On this view, *halakha* obtains through individuals’ and communities’ constant and perpetually renewed involvement with the process of determining *halakhic* truth. On this view, while adhering to *halakhic* standards is an essential component of Jewish religious praxis, Jewish law is not a particular set of objective norms, but engagement with the law itself. While it is often necessary to definitively answer *halakhic* questions, Jewish law inheres not in the answers themselves but in the act of turning to and engaging the rabbinic legal tradition in order to find them. The *halakhic* decision making process is not a means of reaching practical legal judgments, but is an end in itself. The goal of the *halakhic* process is the process.²⁴⁰

Halakha-as-engagement emphasizes *halakhic* process over legal results. From this perspective, Torah study, interpretation, *halakhic* analysis, and discourse are viewed as fundamental legal and religious values. This perspective was much popularized by R. Chaim Volozhiner, an early 19th century scholar who revolutionized institutional Torah study. Volozhiner emphasized what he called “*Torah lishmah*,” or “Torah study for its own sake,” as a central pillar of Jewish religious life.²⁴¹ This approach emphasized the process of study and engagement with Jewish legal materials over the attainment of correct *halakhic*

²³⁹ See R. Yitzchak Yaakov Reines, *Ohr V’simcha* 117 (1898).

²⁴⁰ See R. Joseph B. Soloveitchik, *Halakhic Man* 24 (Lawrence Kaplan transl., 1983) (“Halakhic man engages in theoretical discussion and debate . . . and plumbs the depths of those concepts, laws, and distinctions with the same seriousness that he investigates and searches out [practical legal rulings].”).

²⁴¹ See generally Norman Lamm, *Torah Lishmah in the Works of Rabbi Hayyim of Volozhin and his Contemporaries* (1989).

conclusions as the ultimate aim of studious activity. “The act of Torah study,” Volozhiner wrote, “is the wheat, while knowledge and conclusions are the chaff.”²⁴²

Volozhiner makes a similar observation about the centrality of the Torah-study process in his comments on a Mishnaic passage that reads: “Let your house be a meeting place for scholars; sit in the dust of their feet and drink in their words with thirst.”²⁴³ According to Volozhiner, the Mishnah’s choice of phrase, “sit in the dust (“*mis’avek*”) of their feet,” is an allusion to the biblical story of Jacob wrestling (“*vaye’avek*”) with an angel.²⁴⁴ Counterintuitively, then, the Mishnah does not urge submission to the scholars, but invites students to become fully engaged with their teachers in the give and take of *halakhic* disputation and discourse. As Volozhiner wrote:

The study of Torah is called wrestling . . . and the students of Torah are wrestlers. . . . It is forbidden for a student to passively accept the words of his teachers when he has questions and difficulties with their views. . . . Thus . . . we are commanded and given permission to wrestle and engage in war with the words [of the scholars who we invite into our homes], to resolve the difficulties and questions, and to not show any favoritism or deference to any man, but rather to love only the truth.²⁴⁵

Halakhic engagement and discourse is thus paramount, more so even than the possibility of substantive truth itself. Each scholar must seek and vigorously support his own considered understanding of the truth, even against contrary views of superior scholars whose view may well be more “true” than his own, for the hallmark of *halakha* is not correct conclusions, but engagement in study and discourse as an end in itself.

R. Yitzchak Yaakov Reines similarly identified the purpose of Jewish jurisprudence as the search for – rather than the discovery of – *halakhic* truth. According to Reines, truth is limitless, identical with the divine, and therefore beyond the ability of human beings to fully obtain or comprehend. God, therefore, does not expect human legal actors to attain knowledge of *halakhic* truth. Instead, the object of *halakhic* jurisprudence is the search for

²⁴² R. Chaim Volozhiner, Ru’ach Chaim, Avos 3:16.

²⁴³ Mishnah, Avos 1:4.

²⁴⁴ See Genesis 32:25-30.

²⁴⁵ R. Chaim Volozhiner, Ru’ach Chaim, Avos 1:4.

truth itself rather than definitive knowledge of true legal norms.²⁴⁶ Reines further argued that

A person that seeks to attain knowledge of the truth by relying on his *halakhic* analyses to understand the true *halakha* and by pursuing this end without distractions or selfish concern for his own honor; a person who is searching for the truth with all his abilities, and believes in the truth of the evidence as he sees it – such a person fulfills the will of God, and properly observes the obligation to study the Torah. Indeed, even when such a person fails to achieve the truth because his opponent [in *halakhic* disputation] has the correct understanding of the law, nothing is thereby lost. The [truth of] various alternative viewpoints is only relevant with respect to conclusions about *halakhic* praxis; with respect to the study of Torah itself, however, both are fully equal.²⁴⁷

The emphasis on *halakhic* engagement as an end to itself in this law-as-engagement conceptualization of is reflected in rabbinic debates over the propriety of codifying determinate Jewish legal norms. Proponents on either side of this question have alternatively endorsed process-focused or result-oriented understandings of *halakhic* jurisprudence, and arguments against codification thus offer helpful illustrations of law-as-engagement theories of Jewish law.²⁴⁸ Rabbinic advocates of codification, usually the authors of code-like works, argued that the systemization and distillation of the broad complexity of *halakhic* jurisprudence into generally applicable rules facilitates lay adherence to the law as well as rabbinic competence in finding and applying correct *halakhic* norms. In the *Introduction* to his *halakhic* code, *Mishnah Torah*, for example, Maimonides noted that

²⁴⁶ See R. Yitzchak Yaakov Reines, *Ohr V'simcha* 119-20 (1898):

In leaving room for doubts and disagreements, the Torah demonstrates that God's will is for everyone to work to towards knowing the truth without any certainty of actually attaining it. For the search for truth is beloved to God, and is as dear to Him as the truth itself. The nature of truth is that it has no innate limits; no man could ever attain complete knowledge of the truth, and therefore, man's mission in this world is merely to seek the truth.

Id.

²⁴⁷ R. Yitzchak Yaakov Reines, *Ohr V'simcha* 120 (1898):

²⁴⁸ For discussions on this debate, see Leon Wiener Dow, *Opposition to the "Shulhan Aruch": Articulating a Common Law Conception of Halacha* 3 *Heb. Pol. Studies* 352 (2008); Michael J. Broyde & Ira Bedzow, *The Codification of Jewish Law and an Introduction to the Jurisprudence of the Mishna Berura*, 35 *Hamline L. Rev.* 623, 627-35 (2012).

In our time . . . the wisdom of our sages has disappeared, and the understanding of our discerning men is hidden. Thus, the commentaries, the responses to questions, and the settled laws that the Geonim wrote, which had once seemed clear, have in our times become hard to understand, so that only a few properly understand them. . . . Therefore . . . I saw fit to write what can be determined from all of these works in regard to what is forbidden and permitted, and unclean and clean, and the other rules of the Torah: Everything in clear language and terse style, so that the whole Oral Law would become thoroughly known to all, without bringing problems and solutions or differences of view, but rather clear, convincing, and correct statements in accordance with the law drawn from all of these works and commentaries that have appeared from the time of Our Holy Teacher to the present.²⁴⁹

Maimonides, as well as other prominent rabbinic codifiers, thus viewed correct legal conclusions and practical adherence to the right *halakhic* standards as the hallmark of the Jewish legal project. It was important, therefore, to cut through the layers of rabbinic discourse and disputation, and to clearly communicate the right answers to *halakhic* questions without regard for dissenting points of view.²⁵⁰ For these scholars, the legal process is only a means of finding correct legal conclusions; once the right *halakhic* standards are uncovered, the instrumental discourse and disputation loses its value, and should be suppressed lest it confuse proper *halakhic* praxis.²⁵¹

Some opponents of codification argued, however, that codes wrongly attempt to distill *halakha* into a set of determinate behavioral norms, and thereby obfuscates the true nature of Jewish law and jurisprudence and the objectives of the *halakhic* process. According to these scholars, *halakha* is about engagement and process. When responding to an *halakhic*

²⁴⁹ Maimonides, *Introduction*, Mishnah Torah (translation by Mechon Mamre, 2008), *available at* <http://www.mechon-mamre.org/e/e0000.htm>.

²⁵⁰ See, e.g., R. Yosef Karo, *Introduction*, Beis Yosef (explaining the need for a concise restatement of past *halakhic* scholarship because the the vast number of books and legal opinions is overwhelming, and will prevent decisors from correctly determining the law); R. Yosef Karo, *Introduction*, Shulkhan Arukh (“I saw in my heart that it would be good to put the numerous statements [of the law] into a concise format using precise language, so that God’s Torah will be fluent in the mouth of every Jew . . . so that any practical rulings that he may wonder about will become clear once this wonderful work, which deals with all areas of the law, is fluent in his mouth.”).

²⁵¹ See Avi Sagi, *The Open Canon: On the Meaning of Halakhic Discourse* 18-29 (2007).

query, each individual decisor has a personal duty to plumb the breadth and depth of the rabbinic tradition before forming his own understanding of what the law requires. This approach was advocated by R. Eliyahu b. Shlomo Zalman, also known as the Vilna Gaon, who wrote extensive notations on R. Yosef Karo's code, *Shulkhan Arukh*, in an attempt to tie Karo's rule-like statements to their sources in Talmudic and rabbinic dialectics.²⁵² Volozhiner, a student of the Vilna Gaon, explained this process-oriented approach to *halakbic* jurisprudence in his preface to this work:

Many have erred by giving up on the daunting task of Talmud study as a means of reaching *halakbic* conclusions; they say, "knowledge of practical legal standards can be attained simply by studying the *Shulkhan Arukh*, and they study the Talmud only as a means of sharpening their intellects. And there are those who have put aside the Talmud entirely, and suffice with studying the *Shulkhan Arukh* alone. But this is not the correct way, for God has granted us intellects so that we may dive into the depths of the Talmud, within which all future novel *halakbic* thoughts are contained."²⁵³

Reliance on codified *halakbic* rules is wrong, in other words, because it bypasses the essential process of study and engagement within which the *halakba* itself inheres. Indeed, some scholars have gone further and chastised decisors who merely repeat the legal rulings of earlier authorities, no matter how great. Such scholars are likened to "donkey carrying books";²⁵⁴ their failure to become personally invested in the process of determining *halakbic* meaning devalues the *halakbic* project, even if it does achieve correct legal results in practice.

Indeterminacy, Disagreement, and Subjectivity

From the perspective of law-as-engagement, the causal indeterminacy and uncertainty of Jewish law, and the disagreement that it facilitates and encourages, are deliberate and essential qualities of *halakbic* jurisprudence that serve important values. Jurisprudentially, indeterminacy in Jewish law insures that the divine law itself remains eternally relevant. A determinate law is an inflexible law, one more likely to break than bend under the strain of having to be applied to ever changing human circumstances. Indeterminacy allows

²⁵² See R. Eliyahu b. Shlomo Zalman, *Biur Hagrah al Shulkhan Arukh*.

²⁵³ R. Chaim Volozhiner, *Introduction*, *Biur Hagrah al Shulkhan Arukh*.

²⁵⁴ See R. Ovadyah Yosef, *Preface*, *Responsa Yabiah Omer*, vol. 1, *Orach Chaim*. See also, Babylonian Talmud, Megillah 28b ("like a sack full of books").

successive generations of rabbinic scholars to adjust their understandings of what *halakha* requires under contemporaneous conditions without stepping outside or changing the law itself. As R. Moshe Shmuel Glasner observed, “the changing generations – their views, their circumstances, their material and moral conditions – requires changes in the law.” Indeed, rabbinic sources recognize that the law cannot be applied mechanistically, but must be understood “in accordance with the time and place” in which it is applied. While it is perhaps theoretically possible, Glasner suggests, for God to have determined in advance the correct legal norm for every future contingency, this would have been impracticable, and even still the law would not have been entirely clear and determinate.²⁵⁵ On this view, Jewish law was revealed as, and remains an indeterminate body of teachings rather than clear-cut eternal norms “to prevent specific norms from becoming permanent,”²⁵⁶ which would result in “inconsistency between life and Torah.”²⁵⁷

Similarly, R. Yitzchak Yaakov Reines observed that “everything that is written is by nature confined” and limited by its textual medium.²⁵⁸ If Jewish law had been communicated exclusively as textual standards, there would be no way to resolve gaps and doubts that arise about the law. Such matters, left indeterminate by the innately limited text, could not be resolved by the text itself, and, as the indeterminacy thesis correctly suggests, other determinations would by definition be extra-legal and thus legally illegitimate. However, “once [the Written Torah] was given as a set of foundational principles, there is neither end nor limit to the details that can be derived” through the Oral Torah interpretive tradition.²⁵⁹ The necessity of creative interpretation imbedded within Jewish law’s indeterminate Oral Torah tradition thus insures that scholars will always “be able to derive solutions to all the *halakhic* questions that arise over time. Thus, the law is rendered eternal and limitless.”²⁶⁰ Indeterminacy thus allows each generation of *halakhic* scholars to interpret and apply the law as they understand it, in their respective social, moral, political,

²⁵⁵ See R. Moshe Shmuel Glasner, *Dor Revi'i* 3 (1978) (“When addressing why the Oral Law was not recorded in writing, the Talmud observes that doing so “would have meant writing an endless number of books.” New and different interpretations of the law would be required for each era in accordance with the needs of the time and place.”).

²⁵⁶ R. Moshe Shmuel Glasner, *Dor Revi'i* 3 (1978).

²⁵⁷ R. Moshe Shmuel Glasner, *Dor Revi'i* 3 (1978).

²⁵⁸ R. Yitzchak Yaakov Reines, *Ohr V'simcha* 115 (1898).

²⁵⁹ R. Yitzchak Yaakov Reines, *Ohr V'simcha* 115 (1898).

²⁶⁰ R. Yitzchak Yaakov Reines, *Ohr V'simcha* 115 (1898).

geographic, and economic contexts, thereby assuring “that the Torah can live with the Jewish people and develop alongside it.”²⁶¹

Disagreement and the variety of available rabbinic opinions on any given *halakhic* issue likewise serves an important jurisprudential function related to the eternal relevance and workability of Jewish law. The existence of variant *halakhic* opinions on any given topic allows rabbinic decisors to draw on a wide range of different interpretations and precedents when resolving specific questions. More particularly, in different contexts legal scholars can utilize variant opinions to reach the decisions best suited to their respective factual contexts.²⁶² This view jurisprudential instrumentality of *halakhic* disagreement is suggested by Rashi, who observed that in cases of dispute “these and those are the words of the living God because sometimes one reason is most relevant, and other times another, for compelling legal reasons may change with any slight change in circumstances.”²⁶³ This kind of flexibility and adaptability would be impossible if variant legal opinions did not exist and *halakhic* norms were fully determinate, definitive, and eternal. In that case, *halakhic* decisors would be compelled to uphold the same uniform standard in every case, despite the fact that prospective rules tend to produce unworkable results when mechanistically applied to new, unforeseen circumstances.²⁶⁴ Disagreement and variant *halakhic* opinions allows decisors craft workable rulings in specific cases whose unusual facts may warrant a departure from the ordinary legal standard while still remaining within the bounds of the broad rabbinic legal tradition.²⁶⁵

²⁶¹ R. Moshe Shmuel Glasner, *Dor Revi'i* 3 (1978). See also Avi Sagi, *The Open Canon: On the Meaning of Halakhic Discourse* 153-55 (2007).

²⁶² See Jeffrey I. Roth, *The Justification for Controversy Under Jewish Law*, 76 Cal. L. Rev. 337, 384-85 (1988).

²⁶³ R. Shlomo Yitzchaki, *Rashi: Kesubos 57a* (s.v. *ha kamashma lan*).

²⁶⁴ Maimonides notes this fact in his *Guide to the Perplexed*. According to Maimonides Jewish law is fundamentally determinate and objective. Consequently, therefore, *halakha* can only be expected to work mostly well for most people most of the time. The definitiveness of single correct answers to legal questions that brook no disagreement means that a decisor cannot in fact find alternative opinions to reach more workable results in unusual circumstances without stepping outside the law. From the perspective of jurisprudential theories that accept *halakhic* indeterminacy, however, alternative legal conclusions are often available to achieve practicable rulings in hard cases where the ordinary *halakhic* standard might work extreme hardship or undermine its own objectives.

²⁶⁵ See above, the text accompanying notes _ for a discussion of how *halakha's* secondary rules of decision often permit a departure from ordinary rules in hard or unusual cases by

Indeterminacy and the possibility of disagreement are also fundamentally valuable because they transform human legal actors from passive objectives of determinate legal directives to active subjects that can and must engage with *halakha* in order to give it practical import. This notion is expressed by R. Chaim Hirschensohn, who suggests that the deliberate indeterminacy of the Torah was designed to facilitate continuous human involvement in *halakhic* discourse, interpretation, and decision making. Hirschenson frames this idea as a response to a question posed by the Talmud: “Why does the Torah repeatedly say, ‘And God spoke to Moses, saying . . .?’”²⁶⁶ According to Hirschensohn, the word, “saying” suggests that instead of giving the Torah as a set of clear-cut rules, God revealed the law in a way that left space for scholars to offer variant understandings. “God did not want to declare final rulings because He wanted every Jew to have the opportunity and discretion to explain the Torah in opposite ways.”²⁶⁷ Indeterminacy thus creates the opportunity for *halakhic* discourse and disagreement; instead of determinate norms that must simply be obeyed, the law is a body of materials and methods that must be studied, interpreted, and analyzed before they can be observed.

Judicial subjectivity is thus an important element of *halakhic* jurisprudence that adds to rather than detracts from the internal integrity of the system.²⁶⁸ By endorsing rabbinic subjectivity in *halakhic* decision making, Jewish law insures that the Jewish legal universe will remain diverse, flexible, and with the built in human tool box for addressing the myriad real-world problems to which it must be applied. Furthermore, individual subjectivity – the essence of each *halakhic* actor’s self – is the medium through which human subjects become actively engaged with the law.²⁶⁹ By injecting part of their own selves into their *halakhic* opinions, by creating legal standards that reflect their own unique perspectives and

authorizing a decisor to rely on alternative precedents and opinions that may not be ordinarily relied upon in practice. *See also* Jeffrey I. Roth, *The Justification for Controversy Under Jewish Law*, 76 Cal. L. Rev. 337, 381-83 (1988).

²⁶⁶ Jerusalem Talmud, Sanhedrin 4:2.

²⁶⁷ R. Chaim Hirschensohn, Responsa Malki Bakodesh 6:16.

²⁶⁸ *See* Eliezer Berkowitz, Not in Heaven 76-78 (2d ed. 2010).

²⁶⁹ R. Joseph B. Soloveitchik, Halakhic Man 78 (Lawrence Kaplan transl., 1983) (“Obviously all these features contribute to the development of halakhic man’s individuality. His character takes on its own particular hue, his autonomy asserts itself more and more, and his entire inner nature is determined by unique individual traits indicative of an ideal, noble personality. . . . Halakhic man . . . protects his own selfhood, his particularity, his soul’s private domain. “).

inclinations, Jewish legal actors become fully engaged and intimately bound up in the legal tradition.

In the rabbinic tradition, the uniqueness of each individual human perspective is axiomatic. In describing the creation of humanity, the Torah relates: “And God created mankind in his own image; in the image of God He created him; male and female He created them.”²⁷⁰ Some commentators note that this verse suggests that this account suggests that human beings not only possess godly qualities – “in the image of God He created him” – but that each and every individual human being is unique – each one created “in his *own* image.”²⁷¹

Several Talmudic sources confirm this view of the uniqueness of every individual, while going further and reflecting that this diversity of unique human perspectives is a testament to God’s greatness. One Mishnaic passage, for example, wonders why the human species originated from a single being, Adam. The Mishnah explains that “at first, only a single Man was created . . . in order to declare God’s greatness; for a person might mint many coins from a single mold and all will be the same, but God minted all human beings with the mold of the first Man, and not one person is exactly like the others.”²⁷² Another passage questions why a person who sees a great multitude of people should recite the blessing, “Blessed are you, God, King of the Universe, who knows their deepest secrets.”²⁷³ The Midrash suggests that witnessing a diverse multitude of human beings should cause one to reflect on the greatness of God who unifies this diversity. “Just as the faces of individuals differ, so to do their perspectives and dispositions; all individuals have their own nature.”²⁷⁴

In some sources, the uniqueness of each individual finds expression in the idea that everyone possesses a unique “portion” of the Torah. One famous though somewhat mystical teaching suggests that all present and future Jewish souls witnessed the revelation of the Torah at Sinai.²⁷⁵ On this view, “[e]ach individual experienced the revelation from a unique position,” and each received a singular “portion” of the total truth of God’s law

²⁷⁰ Genesis 1:27.

²⁷¹ See, e.g., R. Samson Raphael Hirsch, *The Collected Writings of Rabbi Samson Raphael Hirsch*, Vol 7, 411-421 (2d ed. 1997).

²⁷² Babylonian Talmud, Sanhedrin 37a.

²⁷³ See Babylonian Talmud, Brachos 58a.

²⁷⁴ Midrash Rabbah: Numbers 21:2.

²⁷⁵ See, e.g., R. Meir ibn Gabbai, *Avodas Hakodesh* 3:23.

in accordance with his or her subjective vantage and understanding.²⁷⁶ R. Yechiel Yaakov Weinberg even uses the mystical teaching about each soul having a unique portion in the revealed Torah to justify innovative *halakhic* reasoning. He writes: “with respect to analytic reasoning, we each have permission to offer novel ideas and say things that lack precedent, for every Jewish person whose soul was present at Mount Sinai received a unique portion of the Torah and its novel interpretations.”²⁷⁷ Likewise, R. Moshe b. Noach Yitzchak Lipschuetz observed that different *halakhic* decisors have different subjective inclinations; the souls of some scholars, he wrote, are naturally inclined towards stringency and have a tendency to prohibit, while others prefer leniency and instinctively look for ways to permit.²⁷⁸

This positive valuation of judicial subjectivity is encapsulated in the rabbinic aphorism, “a judge only has that which his own eyes see,” which recognizes the inevitability of subjective perspectives on the decision making process.²⁷⁹

This principle is not merely a descriptive truism, however. It is often used to justify and even endorse the subjective element in *halakhic* decision making. One Midrashic source, for example, uses this principle to justify human decision making in light of the grave eschatological consequences of wrongly determining the divine will.²⁸⁰ The Talmud invokes this same principle when it endorses a measure of judicial independence on the part of rabbinic scholars: A qualified decisor must not slavishly follow past precedents and thereby abdicate his own duty to decide each question in accordance with his own

²⁷⁶ Jeffrey I. Roth, *The Justification for Controversy Under Jewish Law*, 76 Cal. L. Rev. 337, 373 (1988). See also Gershon Scholem, *The Messianic Idea in Judaism* 298-303 (2011).

²⁷⁷ R. Yechiel Yaakov Weinberg, *Responsa Seridei Eish* 3:9.

²⁷⁸ R. Moshe b. Noach Yitzchak Lipschuetz, *Lechem Mishnah: Avos* 33b-34a.

²⁷⁹ See, e.g., *Babylonian Talmud*, Niddah 20a (holding that decisors should rule on the ritual purity of menstrual stains based on the color of the stain as it subjectively appears to them). See generally 1 *Encyclopedia Talmudit* 632-33 (s.v. *ein l'dayan elah ma she'ainav ro'os*) (R. Shlomo Yosef Zevin ed. 2009).

²⁸⁰ See, e.g., *Midrash Tanchuma: Mishpatim*, no. 6 (“Judges must know whom they judge, before Whom they judge, and Who will eventually extract payment from them [for incorrect rulings], as it says . . . ‘And he [King Jehoshaphat] said to the judges, “take note of what you do, for you do not judge [just] for man, but for God” [2 Chronicles 2:19]. And a judge might say, ‘why should I shoulder this great burden?’ Therefore, the verse states, ‘And He is with you in judgement’ [2 Chronicles 2:19]: a judge only has what his own eyes see.”).

understanding, for “a judge has only what his own eyes see.”²⁸¹ In both cases, the rabbinic tradition legitimates *halakhists*’ reliance on personal judgement, even at the expense of arriving at what may be a less objectively correct ruling.²⁸² As R. Moshe Isserles wrote, “each decisor should follow after his own heart, and rule as he thinks the times warrant.”²⁸³

Viewed through the lens of *halakha*-as-engagement, the prominent subjective element of Jewish legal decision making represents important jurisprudential and religious virtues. The subjectivity of *halakhic* judgment is both a consequence and a cause of Jewish law’s indeterminacy, and likewise closely correlates to the incidence of *halakhic* disagreement. As Maimonides noted, legal disputes demonstrate that legal decision making is influenced by decisor’s unique subjective perspectives and preferences. While Maimonides took a negative view of subjectivity and *halakhic* dispute, rabbinic proponents of *halakha*-as-process theories of Jewish law perceive these as positive characteristics of the *halakhic* system. As was mentioned earlier, disagreement helps keep Jewish law eternally relevant by creating a rich and diverse storehouse of *halakhic* opinions that can be relied on to make Jewish jurisprudence responsive to changing or unusual circumstances. Subjectivity in *halakhic* decision making insures a diversity of legal opinions and robust *halakhic* discourse, as different scholars with different subjective ways of understanding the law will reach alternative *halakhic* conclusions.

Additionally, the Jewish law’s jurisprudential endorsement of decisional subjectivity helps preserve a measure of correlation between the law and the lived experiences to which it is

²⁸¹ See Babylonian Talmud, Bava Basra 130b-131a (“Rava said to R. Papa and Ravina b. R. Yehoshua: ‘If one of my rulings comes before you and you have a question about it, do not tear it up until you bring it to me to discuss. If I have a response to the objection, I will tell it to you; if not, I will retract my previous opinion. [If this occurs] after I die, do not discard my ruling, and do not follow it. Do not discard it, for perhaps if I had been alive I would have resolved the objection; do not follow it, for [you disagree with its conclusion, and] a judge can only rely upon what his own eyes see.’”).

²⁸² See also Avi Sagi, *The Open Canon: On the Meaning of Halakhic Discourse* 146-49 (2007) (describing the jurisprudence of R. Yomtov Lippman Muelhausen); *id.* at 146 (“[T]he process of halakhic inference does not resemble to rules of logical inference. The halakhic sage is not expected to uncover a necessary truth, but to reach a halakhic decision using his best discretion. . . . According to Muelhausen, halakhic inference is subjective in the sense that individual discretion is an essential component of the ruling.”).

²⁸³ R. Moshe Isserles, *Responsa Rema*, no. 25.

applied.²⁸⁴ Traditionally, *halakbic* questions are answered by local scholars, official city or synagogue rabbis or rabbinic court judges who typically lived and worked among, and were selected by their constituents.²⁸⁵ To the extent that their own subjective perspectives are formed by the social, political, economic, philosophical, moral, and cultural climates in which they live, their judicial “sixth sense” is formed by the same milieu as that of their constituents whose lives their rulings govern.²⁸⁶ The subjective quality of *halakbic* decision making thus encourages rabbinic decisors to interpret and apply the law through subjective lenses that are not too far removed from the lived human experiences in which their *halakbic* rulings will be implemented. Instead of a mechanistic, objective law detached from reality, subjective decision making promotes lively, relevant, and practical *halakbic* jurisprudence.

Subjectivity in *halakbic* decision making also enables Jewish legal actors and officials to become deeply engaged with the sources and methods of Jewish law. Many scholars have explained that it is precisely the injection of individual scholars’ own subjective perspectives into the construction of *halakbic* standards that allows legal actors become, in the Talmud’s words, “partners with God in the work of creation.”²⁸⁷ As R. Moshe Shmuel Glasner observed, the nature of the Oral Torah means that every individual introduces something unique into the law, “something of his own grasp and understanding.”²⁸⁸ “Each scholar,” Glasner wrote, “introduces some of his own personal understanding . . . each will understand the Torah in his own way, according to his own reason and abilities

²⁸⁴ See R. Moshe Shmuel Glasner, *Dor Revi'i* 3 (1978) (noting that God left the Torah indeterminate and subject to the judgment of human interpreters so that no particular construction would ever become permanent, and to “prevent there being a contradiction between life and Torah”). See also Avi Sagi, *The Open Canon: On the Meaning of Halakhic Discourse* 155 (2007) (noting that according to Glasner, the subjective element of *halakbic* decision making preserves the notion of multiple truths, and that “the purpose of pluralism is to create harmony between ‘life and Torah’”).

²⁸⁵ See Shaul Stampher, *Rav, Rosh Yeshivah, and Kabal* 65, in *Rabbinic and Lay Communal Authority* (Suzanne Last Stone ed., 2006).

²⁸⁶ See Chaim I. Waxman, *Toward a Sociology of Pesak* 217, in *Rabbinic Authority and Personal Autonomy* (Moshe Z. Sokol ed., 1992).

²⁸⁷ See Babylonian Talmud, Shabbos 10a (“Anyone who judges one legal matter honestly and correctly is transformed into God’s partner in the work of creation.”); R. Yehoshua Falk, *Drishah: Choshen Mishpat* 1:2.

²⁸⁸ R. Moshe Shmuel Glasner, *Dor Revi'i* 2 (1978).

because people's minds differ."²⁸⁹ This subjective, highly personal contribution to Torah scholarship transforms "what is potential in the Torah into something that is actual," thereby making *halakhic* scholars partners in the creative construction of Jewish legal meaning.

Jewish law requires engagement; Scripture disparages legal actors who merely mechanistically adhere to *halakhic* norms without becoming active participants in studying, and interpreting, and constructing the *halakhic* tradition.²⁹⁰ Engagement, however, requires an opportunity to be more than a passive practitioner of determinate *halakhic* norms. It requires an opportunity for each individual *qua* individual to participate in the construction of *halakhic* meaning.²⁹¹ This is why Jewish law is indeterminate, and this is why Jewish jurisprudence embraces the role played by individuals' unique personal perspectives in negotiating Jewish legal meaning. There is no space for individual engagement with tradition in a system of determinate norms. In such a system, a legal actor can but obey; there is no need for interpretation and analysis, and to engage in such is to step outside the law itself. Only in an open legal system, where law is conceptualized as a process of engagement rather than a series of correct adjudicative results, can individual decisors become partners in an ongoing process of constructing legal meaning.²⁹²

Cabining Judicial Discretion

While *halakhic* jurisprudence recognizes and even endorses subjectivity in legal decision making, this does not mean that *halakha* is merely a reflection of naked rabbinic will. An emphasis on *halakhic* process rather than results is not a license of rabbinic scholars to actively impose their own subjective preferences on the law. *Halakhic* conclusions that

²⁸⁹ R. Moshe Shmuel Glasner, *Dor Revi'i* 3 (1978).

²⁹⁰ See Isaiah 29:13 ("And God said: 'although this nation comes close [to me] – with their lips and mouths they honor me – but their hearts are distant from me; their awareness of me is a commandment performed by rote.'").

²⁹¹ See Avi Sagi, *The Open Canon: On the Meaning of Halakhic Discourse* 177 (2007) ("Existentially, human beings become God's partners in the shaping of the Torah. They are not passive creatures, recipients absorbing what is delivered through the tradition, but creative entities.").

²⁹² See R. Moshe Shmuel Glasner, *Dor Revi'i* 3 (1978) ("The interpreted meaning of the Torah was given over orally, and it was prohibited to write it down so as to prevent any particular interpretation from becoming permanent, thereby preventing the *halakhic* scholars of later generations from interpreting the texts as they understood them . . . for it was God's will that the interpretation of the Torah not become eternal.").

derive from proper engagement with tradition represent a competent rabbinic decisor's best individual sense of what the sources and methods of *halakha* genuinely require in a specific case, not what he self-consciously prefers the conclusions to be. Rabbinic scholars have thus instructed: "A person must not say, I will decide as I wish on questions that are subject to dispute; and if he does so, this is a false judgment."²⁹³ Instead, scholars must "be deliberate in judgement";²⁹⁴ they must carefully assess each question, study relevant sources broadly and deeply, and interpret, analyze, and apply these materials in a way that is consciously averse to personal interest and bias. Thus, R. Chaim Loew described *halakhic* judgment as follows:

This had always been the custom among the Jewish people. When a sage qualified to rule . . . faced a decision, he would open all the books of law and read the opinions of those who forbid and those who allow. He would study them in apprehension and awe, dread, and trepidation. . . . If possible, he would assemble all the scholars of his town and they would discuss the issue until reaching agreement.²⁹⁵

Likewise, R. Chaim Volozhiner emphasized the importance of modestly and humility as a prerequisite for authentic engagement in Torah and *halakha* study:

But with all this, a person must be cautious [when offering his own *halakhic* conclusions] lest he speak arrogantly and stridently simply because he has found a reasonable basis for disagreement, or lest he come to think he is as great as his teachers or as the author of the book that he wishes to dispute. Rather, a person must know in his heart that sometimes he has not fully understood the author's words and intent. Therefore he should take an attitude of great humility; and [when offering his own view] he should say, "Although I am not worthy [to disagree], nonetheless it is Torah [and I cannot but offer my own considered understanding]."²⁹⁶

²⁹³ R. Moshe Isserles, Rema: Choshen Mishpat 25:2. See also R. Asher b. Yechiel, Rosh: Sanhedrin 4:6.

²⁹⁴ See Babylonian Talmud, Sanhedrin 7b; Sifri, Deuteronomy 1:16.

²⁹⁵ Quoted in Avi Sagi, *The Open Canon: On the Meaning of Halakhic Discourse* 149 (2007).

²⁹⁶ R. Chaim Volozhiner, Ruach Chaim: Avos 1:4.

As Avi Sagi characterizes this line of thought, “these qualities lead to the epistemic skepticism that is required for Torah study, whose first object are the individual’s own insights and knowledge.”²⁹⁷ Jewish legal actors are thus urged to constantly evaluate their own processes of *halakhic* engagement so as to evaluate whether they are genuinely seeking legal truth, or are hubristically imposing their own preferences upon the rabbinic tradition.

This caution against taking a light view of *halakhic* decision making is encapsulated in the Talmudic concept of “*yiraas horaah*,” or “fear of rendering legal decisions.”²⁹⁸ Accordingly, the Talmud instructs that “a judge should view himself as if a sword is resting between his shoulders and the gates of hell are open under him” lest he fail to fully consider all legal possibilities and pervert the *halakhic* process.²⁹⁹ Proper engagement with the sources and methods of Jewish law thus entails great humility, respect for the opinions of other scholars, attempts to reach consensus, and caution. A decisor must be careful not to be too quick to reach the decision he subjectively wants rather than the conclusion he subjectively thinks the *halakha* genuinely requires.

This procedural posture of decisional caution and humility especially pronounced with respect to the settled historical consensus of *halakhic* opinion. While *halakhic* jurisprudence does not generally recognize binding precedent aside from the explicit rulings of the Talmud, rabbinic scholars are as a matter of standard judicial practice highly deferential to the authority of settled historical consensus on particular *halakhic* issues.³⁰⁰ This practice is based on a Talmudic dictum that supports the notion of a “decline of the generations” – the idea that later generations are in some sense less competent at *halakhic* decision making than their predecessors.³⁰¹ In practice, this principle urges *halakhic* decisors to approach settled legal standards, long-standing historical scholarly consensus or popular modes of

²⁹⁷ Avi Sagi, *The Open Canon: On the Meaning of Halakhic Discourse* 139 (2007).

²⁹⁸ On the concept of *yiraas horaah* in Talmudic jurisprudence, see generally Yuval Sinai, *The Religious Perspective of the Judge’s Role Talmudic Law*, 25 J. L. & Rel. 357 (2009).

²⁹⁹ Babylonian Talmud, Sanhedrin 7a-7b.

³⁰⁰ See *supra* Section 5.B.

³⁰¹ See Babylonian Talmud, Shabbos 112b (“Rav Zerah aid in the name of Raba bar Zimuna: ‘If the earlier scholars were the sons of angels, we are sons of men; and if the earlier scholars were sons of men, then we are like donkeys – and not even like the donkeys of Rabbi Haninah ben Dosa and Rabbi Pinchas ben Yair [which would not eat non-kosher feed], but like ordinary donkeys.”). On the notion of the “decline of the generations” in Jewish thought, see Menachem Kellner, *Maimonides and the “Decline of the Generations” and the Nature of Rabbinic Authority* 7-26 (2012).

practice, and the corpus of legal rulings of past *halakhic* eras with substantial respect and deference.³⁰² Although post-Talmudic precedents are not formally binding, many rabbinic scholars have concluded that they ought to only be overruled with caution and contemporary support from rabbinic colleagues.³⁰³ Thus, R. Asher b. Yechiel held that “if [the words of earlier authorities] do not appear correct to him, and he relies on proofs and arguments that are deemed acceptable to his own generation” he can rule against the persuasive weight of past precedent.”³⁰⁴ Likewise, R. Moshe Isserles requires that a decisor possess “compelling proofs and arguments” before he departs from settled *halakhic* norms.³⁰⁵ In any case, deference to precedent, and the need to gather rabbinic support for departures from settled law illustrate the degree to which even a subjective *halakhic* decision making process must be undertaken with humility and a eye towards finding *halakhic* truth rather than enforcing one’s own personal predilections and will as law. As Avi Sagi explains, deference to past scholarship helps balance the potential for divisive *halakhic* anarchy through the Jewish legal community’s agreement to accept certain settled rules and influential texts as a normative *halakhic* corpus.³⁰⁶

Humble deference to the persuasive weight of consensus and past scholarship must be balanced against each decisor’s duty to rule “as his eyes see.” Competent rabbinic scholars are cautioned against becoming like “mules carrying books” by slavishly relying on the *halakhic* conclusions of others. Indeed, doing so may even be regarded as a religious and jurisprudential failing. As R. Chaim Hirschensohn wrote:

If a monitory believes its legal conclusions are correct, even against the views of a majority of scholars that it believes to be wrong, the minority must do as it thinks correct. If the minority follows the easy path and merely follows the rulings of the

³⁰² See A. Yehuda Warburg, *Rabbinic Authority: The Vision and the Reality* 63 (2014).

³⁰³ See generally Mark Washofsky, *Taking Precedent Seriously: On Halakhab as a Rhetorical Practice* 1, 28-33, in *Re-Examining Reform Halakhah* (Walter Jacobs & Moshe Zemer eds., 2002).

³⁰⁴ R. Asher b. Yechiel, *Rosh: Sanhedrin* 4:6.

³⁰⁵ R. Moshe Isserles, *Rema: Choshen Mishpat* 25:2.

³⁰⁶ See Avi Sagi, *The Open Canon: On the Meaning of Halakhic Discourse* 137 (2007). See also R. Yosef Dov Halevi Soloveitchik, *Two Kinds of Tradition*, *Shiurim L’zecher Abba Mori* 228 (1983) (describing two senses of rabbinic legal tradition, one – a tradition of *halakhic* discourse and disputation – and another – a tradition of presently settled *halakhic* praxis, the latter forming a check on how the former might express itself in the practical realm).

majority against its own better judgment . . . it will be seen as having failed to observe the obligation to obey the words of the scholars.³⁰⁷

Ultimately, the decision-making process is a challenge and a potential minefield. To traverse this path requires deference to one's predecessors, discretion based upon a rigorous application of logic and other factors, along with 'the fear of judgment.'³⁰⁸ However, the need to navigate and balance these conflicting imperatives – judicial confidence on the one hand, and humility and deference on the other – is part and parcel of the process of *halakbic* engagement. The need for constant mindful self-awareness of how one is going about the *halakbic* decision making process induces deep engagement with the law. Indeed, in some sense, this tension within Jewish adjudication suggests the possibility of meta-engagement, a way of being engaged about how best to be engaged with the *halakbic* tradition.

Halakba and Law's Rule

The foregoing discussion strongly suggests that the Western definitions of the rule of law cannot be easily mapped onto *halakbic* jurisprudence. Jewish law does not exhibit many of the qualities of legality identified by American jurists, such as prospectively, clarity, generality, and internal consistency. Instead, *halakba* is substantially indeterminate and uncertain; and practical legal standards are thus often clarified through seemingly inconsistent case-by-case determinations by various independent rabbinic authorities.

What, then, can be said for the rule of law in *halakbic* jurisprudence? Law-as-engagement conceptualizes law as the process of *halakbic* interpretation, analysis and decision making, rather than as in particular norms of *halakbic* praxis. From this perspective, the materials and methods of Jewish law and jurisprudence form the foundational canon and ultimate source and reference point for Jewish legal actors to determine – and constantly reevaluate – the character of Jewish living. By committing to the idea that private and public judgments about how to live must in the final analysis be justifiable by reference to the *halakbic* tradition, Jewish legal communities constitute themselves through this process of study, interpretation, and application. In this model, indeterminacy, disagreement, subjectivity, and uncertainty do not undermine the rule of law; they facilitate it. The law rules in the individual and national Jewish commitment to be constantly and earnestly

³⁰⁷ R. Chaim Hirschensohn, Responsa Malki Bakodesh 6:16.

³⁰⁸ A. Yehuda Warburg, Rabbinic Authority: The Vision and the Reality 63 (2013).

engaged with the *halakha*, and through the use of this common commitment to constitute Jewish religio-legal life and identity.

In the context of *halakbic* jurisprudence, the idea of law ruling through its ability to constitute individual and communal identities and ways of being in the world as a result of those individuals and communities' commitments to engage the rabbinic tradition as a foundational canon is poignantly expressed by R. Joseph B. Soloveitchik in his seminal work, *Halakbic Man*.³⁰⁹ One of the chief aims of this programmatic essay was to articulate the phenomenology of what Soloveitchik called "halakhic man," a human being who approaches existence through the lens of Jewish law. According to Soloveitchik, *halakbic* man experiences the world, constructs his own identity, and determines his conduct by means of the materials and methods of the rabbinic legal tradition.³¹⁰ "An entire corpus of precepts and laws guides him along the path leading to existence."³¹¹ Soloveitchik's view of the relationship between the rabbinic legal tradition and individual and communal Jewish legal actors suggests that the former is, to use Moshe Halbertal's phraseology, a kind of "formative canon" that constitutes the latter.³¹² By creating and defining Jewish legal communities in terms of a shared interpretive commitment to the centrality of the texts and methods of *halakbic* jurisprudence; by defining this community as a fellowship of common commitment to engage the rabbinic tradition as the source of individual and communal identity and behavioral normativity, Jewish legal actors actualize *halakha's* rule of law.³¹³

The extent to which *halakha* rules though Judaism's fundamental imperative for individuals and communities to constitute their selves by being deeply engaged with *halakbic* study and

³⁰⁹ See R. Joseph B. Soloveitchik, *Halakhic Man* (Lawrence Kaplan transl., 1983).

³¹⁰ See R. Joseph B. Soloveitchik, *Halakhic Man* 19-23 (Lawrence Kaplan transl., 1983).

³¹¹ R. Joseph B. Soloveitchik, *Halakhic Man* 19 (Lawrence Kaplan transl., 1983).

³¹² See Moshe Halbertal, *People of the Book: Canon, Meaning, and Authority* 3 (1997).

³¹³ The sense in which this common commitment to a formative canon causes law to rule is briefly but poignantly articulated by Guy Burak in connection with the formation of *madhabib*, or schools of Islamic jurisprudence. According to Burak, "by adhering to this normative canon, a society or profession defines itself . . . membership in this community is predicated on familiarity with these normative texts" and upon agreement with other members on the central role such sources play in the construction of individual and communal identity and in the determination of communal norms. Guy Burak, *The Second Formation of Islamic Law: The Hanafi School in the Early Modern Ottoman Empire* (2015).

discourse constitutes is illustrated by an anecdote with which Chaim Saiman sets the tone for his forthcoming book, *Halakha: The Rabbinic Idea of Law*. While the passage is lengthy, it is poignant and worth quoting at length. Saiman describes visiting a New York synagogue one weekend in which a flyer was posted announcing a Sabbath afternoon guest lecture by a rabbi whose talk was entitled, “*Bidding Competitively on Goods or Properties when Others are Previously Involved*.” In Saiman’s words:

As a law professor who teaches contract law, I personally find this topic is of great interest. In fact, I read articles and attend conferences where questions of this type are discussed with great precision and passion. But I am also self-aware enough to know that this topic is hardly one of general interest. . . . and certainly not marketed as uplifting material for religious seekers.

Yet . . . nearly 150 laymen came out to hear the rabbi guide them through the byways of this Talmudic discussion. No one in the room was a legal academic, and few if any had ever drafted or negotiated an agreement under Jewish law. . . . [I]hough audience surely saw themselves as bound by *halakha*, neither the topic nor manner of presentation was designed to define the rules directly relevant to commonplace observances of Jewish law. So what exactly drew all these people out on a Shabbat afternoon?

The answer is that both the rabbi and his audience understood themselves as participating in the quintessentially spiritual act of Torah study. True, the content of the talk dealt with Talmudic rules of contract and property law—many of which are not very different from what is taught in American law schools. But to those present, the discussion could not have been further from the concerns of the market and commercial life. Rather, they were engaged in a pristine act of religious worship, the study of God’s Torah.³¹⁴

Saiman’s retelling highlights how the idea of and commitment to *halakha* as a process of engagement rather than as a set of specific observed norms characterized by qualities of legality, objectivity, and due process functions to positively constitute a community defined by and thus ruled by Jewish law. The ideal and process of Torah study and discourse permeates and colors every aspect of individual and communal life; as the foundational source through which Jewish legal actors experience the world, *halakha*,

³¹⁴ Chaim Saiman, *Introduction*, *Halakha: The Rabbinic Idea of Law* [draft] (on file with the author).

conceptualized as process and engagement, makes the religio-legal community what it is. As Saiman goes on to note:

The unique status accorded to the study of Jewish law becomes even more pronounced as we shift from the life of the community to the individual. Suppose a parent is critically ill and the child desires to beseech God for a cure. As in other religious cultures, both prayer and charitable offering are appropriate Jewish responses, but the rabbinic tradition adds another, Torah study. Now suppose the parent did not survive, and the child is searching for a religiously suitable way to commemorate their life. Here too, studying a page of Talmud, or even better, an entire tractate of its legal intricacies is laudable and accepted way to mark the occasion. At weddings, bar mitzvahs, newborn celebrations, graduations, and birthdays it is common, at times expected, to punctuate the event by sharing some words of Torah. All in all, it is hard to imagine a single social, emotional religious or institutional where it is not appropriate to pull out a book and expounding on some point of Jewish law.³¹⁵

Halakha rules, but not through a framework of determinate norms predictably applied by objective rabbinic decision makers. Instead, this complex tradition of jurisprudential discourse rules because it the legal community remains committed to treating the sources and methods of the Jewish law as the principle source of individual and communal norms and values. The *halakhi* tradition is in a very real sense the lifeblood that drives traditional Jewish life and thought.

IV. CONCLUSION

Western thinking about the rule of law has for a very long time rested on the idea that law is best conceived as a system of substantive and procedural prescriptions, and that the rule of law and legal and political legitimacy depend largely on the degree to which institutions and officials successfully actualize these normative standards. This conceptualization of law's rule forms the basis for the seemingly intractable indeterminacy problem. If the materials and methods of American law fail to determine uniquely correct answers to a large number of important legal questions, and if judges are consequently forced to ground their rulings in their own subjective, extra-legal preferences, in what sense can we claim to have a legitimate legal system characterized by the rule of law?

³¹⁵ Chaim Saiman, *Introduction*, *Halakhah: The Rabbinic Idea of Law* [draft] (on file with the author).

The law-as-engagement approach grounded in the rabbinic jurisprudential tradition offers an innovative conception of the rule of law and legal legitimacy that neutralizes the indeterminacy challenge at its roots. Conventionally, indeterminacy and the judicial discretion it entails are seen as a challenge to legal legitimacy because law is typically thought of as a system of particular primary obligations that impose meaningful prior constraints on how officials regulate behavior through their adjudicatory determinations. Law-as-engagement rejects the notion that the purpose of law is regulation, and that legitimacy thus demands that law determinately govern both regulators and regulated alike. Instead, law-as-engagement suggests that the purpose of the law is to induce its human subjects to unite in a shared common experience of trying to discover what the law entails while knowing full well that they will never find the determinate, objectively correct legal truth they seek. On this view, legal disagreement is actually positive because it signals that the law truly is ruling; that diverse, individual members of society are engaged in this ongoing process of discovery and are not abrogating the opportunity to create their own unique experience with the shared law to other, authoritative decision makers.

By embracing and assimilating this model into Western legal thought, we might encourage people to think differently about what disagreement over the meaning and application of shared political, legal, or religious values signals. Law-as-engagement views law as a process of individual interpretive engagement situated within a broader societal commitment to abide by the discursive boundaries of its own legal tradition. From this vantage, it may be possible to think of societal cohesion in political society as a function of citizens' commitments to shared normative traditions rather than as requiring the actualization of any particular understanding of that tradition. Diverse individuals and interest groups can be united through their shared experience of engaging with and relating to a common political-legal heritage. Moreover, these different constituencies might be encouraged to view disagreement about what society's law and values entail not as a betrayal of those values by those whose understandings differ from their own, but as a signal that law is indeed succeeding – that individuals and groups with very different perspectives can all come together in a common commitment to constitute a society through the experiential process of engaging with shared, mutually agreed upon normative foundations.