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THE PRIMITIVE LAWYER SPEAKS!: THOUGHTS ON THE  
CONCEPTS OF INTERNATIONAL AND RABBINIC LAWS

HARLAN GRANT COHEN\*

I. FINDING AND LOSING A MENTOR

H.L.A. Hart betrayed me, and I've never fully recovered. When I first studied H.L.A. Hart's *The Concept of Law*<sup>1</sup> in law school, it seemed a revelation. With his move away from older accounts of law based on the commands of the sovereign backed by force, his embrace of a sociological account of law, and his emphasis on internalized senses of obligation, Hart seemed to capture *my* experience, *my* understanding of the law. With a budding interest in legal theory, Hart seemed a kindred spirit, a potential virtual mentor across time, space, and the pages of books.

Growing up in an observant Jewish home and attending a Jewish day school, I was surrounded by legal questions: Had enough hours passed since eating a meat lunch to allow for a dairy snack?<sup>2</sup> What time did the Sabbath start this week?<sup>3</sup> Was it late enough on Saturday night to go buy the Sunday New York Times—could we see three stars in the sky?<sup>4</sup> What exactly is “wahoo” or “sunfish”? Did they have fins and scales?<sup>5</sup> These questions and their answers structured daily life. But I never thought hard (though others might) about the sovereign will behind them or the force that might enforce them. Such concerns were not really relevant. Those were the rules that we followed, period. As we got older, we learnt to interrogate those rules, to interpret and construct them, to argue about what they meant and how they should be applied. We were taught to mirror the rabbis of the Talmud by studying with partners, arguing out the law's meaning, rather than simply memorizing and reciting the rules.

In college and graduate school, I studied international history and international relations. I took particular interest in the cultures of foreign

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\* Gabriel M. Wilner/UGA Foundation Professor in International Law, University of Georgia School of Law. Thank you to Chaim Saiman for the opportunity to engage with his brilliant book and the *Villanova Law Review* for including me in their annual symposium. Thank you to Monica Hakimi for empathizing.

1. H.L.A. HART, *THE CONCEPT OF LAW* (3d ed. 2012).

2. Somehow; the answer was always no.

3. Too soon!

4. Unclear, the third one seems to be moving; might be an airplane.

5. Answer: They do. See *Wahoo*, WIKIPEDIA, <https://en.wikipedia.org/wiki/Wahoo> [<https://perma.cc/NUZ6-H8KG>] (last visited Nov. 24, 2019); see also *Kosher Fish List*, CHABAD, [https://www.chabad.org/library/article\\_cdo/aid/82675/jewish/Kosher-Fish-List.htm](https://www.chabad.org/library/article_cdo/aid/82675/jewish/Kosher-Fish-List.htm) [<https://perma.cc/ADU8-GGQX>] (last visited Nov. 24, 2019); *Redbreast Sunfish*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Redbreast\\_sunfish](https://en.wikipedia.org/wiki/Redbreast_sunfish) [<https://perma.cc/JW5Y-LSL6>] (last visited Nov. 24, 2019).

policymaking and diplomacy, the ways ideas about foreign policy and international relations were shaped and reshaped over time through interactions and conversations. In law school, these interests, not surprisingly, drove me to international law, where the law became a key medium and language through which those interactions took place. Friends would tease that “international law’s not really law, right?” There’s no international sovereign; states just do what they want. “If the United States breaks the law,” they’d ask, “who’s going to stop it?” But the definitional question again seemed beside the point. What mattered was that policymakers, diplomats, international lawyers acted, spoke, pleaded, argued as if international law is law. Whatever they thought of it, it clearly structured their actions.

Hart’s sociological account of the law seemed to capture all of this. Imagine my shock then (a few hours into my new virtual mentorship with the dead scholar) to see Hart’s description of the two types of law I knew best—religious law and international law: “Primitive law,” was the category he seemed to put both in.<sup>6</sup> A slap in the face! He (the giant of legal philosophy) must be wrong, I (the arrogant law student) thought. What Hart’s betrayal confirmed though is something I already suspected, and which reading Chaim Saiman’s brilliant book on halakhah<sup>7</sup> confirmed: there was, somehow, a deep connection between my experiences of these two very different types of law.

I am hardly the first to see some link between international law and the Jewish experience. Others have noted that many of the most prominent international lawyers of the past century were Jewish. For some, like Hersch Lauterpact,<sup>8</sup> Louis Henkin,<sup>9</sup> and Prosper

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6. It is admittedly a bit more complicated than that, though that is the impression that stuck with me. Hart equates international law with primitive law rather than describing one as the other. See HART, *supra* note 1, at 3–4, 214. Hart doesn’t discuss religious law directly, but distinguishes law from religion and moral commands, and as will be explained *infra* text accompanying note 36, his critique of international law and primitive law applies equally to religious law.

7. CHAIM N. SAIMAN, HALAKHAH: THE RABBINIC IDEA OF LAW (2018).

8. Perhaps the most prominent public international lawyer of the mid-twentieth century, Lauterpact advised the United States, United Kingdom, and Israeli governments, served on the International Court of Justice, and was a parent of the human rights revolution. See, e.g., OONA A. HATHAWAY & SCOTT J. SHAPIRO, THE INTERNATIONALISTS: HOW A RADICAL PLAN TO OUTLAW WAR REMADE THE WORLD 238–39, 246–47, 267–68, 298–305 (2017). See generally JAMES LOEFFLER, ROOTED COSMOPOLITANS: JEWS AND HUMAN RIGHTS IN THE TWENTIETH CENTURY (2018).

9. Among other things, Henkin was the driving force behind the *Restatement (Third) of Foreign Relations Law of the United States*. See, e.g., Lori Fisler Damrosch, *In Memoriam: Louis Henkin (1917–2010)*, 105 AM. J. INT’L L. 287, 296–98 (2011). Henkin recounted that as a Supreme Court clerk, he secretly slept on Justice Frankfurter’s chambers sofa to avoid breaking the Sabbath by traveling to Saturday Justices’ Conferences. See J. Correspondent, *Justices in Agreement—No Arguments on Yom Kippur*, JEWISH TELEGRAPHIC AGENCY (Sept. 18, 2003), <https://www.jweekly.com/2003/09/18/justices-in-agreement-no-arguments-on-yom-kippur/> [<https://perma.cc/A8LB-F67C>]. Henkin’s son Daniel, as my music counselor at a Jewish camp, wrote the unforgettable paean to lunch trays, “Oh my gosh, eyn li magash.”

Weil,<sup>10</sup> Judaism was an important part of their identity. For others it was not. Nonetheless, the sheer number has led some scholars in quest to find some link between their background and an affinity for international law. Some scholars have sought to find the link in psychology, noting the attraction of international law's border-jumping cosmopolitanism for a people connected across borders and sometimes denied an identity within them. Others, like Weil<sup>11</sup> and Shabtai Rosenne,<sup>12</sup> saw more concrete legal links, plumbing the Jewish law sources used by early modern founders of international law. This essay seeks a different kind of connection, not a causal one, one that might explain one as the result of the other, but instead a conceptual or philosophical one.

One of the signature strengths of Saiman's book is that it does not try to normalize rabbinic law. Rather than treating the modern municipal legal systems we're used to today as a benchmark against which to compare rabbinic law, or attempting to explain rabbinic law's divergences from that model, Saiman seeks to understand halakhah's internal logic in its own right—halakhah's concept of the law, halakhah's methods and media of interpretation and application. In a similar vein, this essay does not seek to compare or equate rabbinic law and international law. Instead, this essay surveys some unique aspects of international law that find echoes in Saiman's account or that Saiman's account helps surface. The goal in the end is neither to draw a special link between the two, nor to defend those unique features, but instead to help deepen our understanding of how law can and does work in the world's varied legal systems.

## II. INTERNATIONAL LAW'S SOCIOLOGY AND SOCIOLOGY OF INTERNATIONAL LAW

The early modern writers credited as “the fathers” of international law (then, the law of nations), didn't create the system; they found it. For the Jesuits, Francisco de Vitoria and Francisco Suárez, for Alberico Gentili, Hugo Grotius, John Selden, Thomas Hobbes, and Samuel von Pufendorf, the laws states obeyed in their relations with one another were a practical reality. Much as the rabbis of the Talmud sought to make sense of and codify the laws that had been followed to that point, the goal of these early international law writers was to understand, explain, and explicate the

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10. See Michael Reisman's Tribute to Prosper Weil at the 2019 Annual Meeting of the American Society of International Law, *American Society of International Law, ASIL Assembly and Keynote: International Law as an Instrument: Dialogues, Tensions, Accomplishments*, YOUTUBE, at 10:15 (Mar. 28, 2019), [https://www.youtube.com/watch?v=vp\\_cKqUKZTc](https://www.youtube.com/watch?v=vp_cKqUKZTc) [<https://perma.cc/L5QL-USCZ>] (“I draw attention Prosper's origins because being a Jew and observant was an important pillar of his life, and though private, I believe he would have wished to have it noted, especially now.”).

11. Prosper Weil, *Le Judaïsme et le Développement du Droit International*, 151 HAGUE ACAD. COLLECTED COURSES 253 (1976).

12. Shabtai Rosenne, *The Influence of Judaism on the Development of International Law: A Preliminary Assessment*, 5 NETH. J. INT'L L. 119 (1958).

rules that nations or states seem to follow (and to have followed) in their relations with one another. Their goal was to find principle in the practice. Their project was, in essence, a type of sociology. And this, in turn, has affected where international lawyers look for international law—their notions of authority and what counts as law—leading international law in a few quirky directions.

First, this sociological orientation leads to an emphasis on “practice” as a source of authority; international lawyers look at what states had done and were doing as the source of the legal rule. The early writers looked at Greek, Roman, Biblical, Medieval, and early modern practice.<sup>13</sup> But this trend continues to this day.<sup>14</sup> Contemporary international lawyers weigh and debate the meaning of the 1837 Caroline incident between the United States and United Kingdom for the law of self-defense against non-state actors.<sup>15</sup> They cite the United States’ assassination of Japanese General Yamamoto during World War II for evidence of the rules on targeted killing and the geographic scope of the battlefield.<sup>16</sup> And they debate the precedential meaning of the UN resolutions leading to the first and second Iraq wars.<sup>17</sup> Much as Talmudic rabbis parsed stories about their forebears’ actions in an attempt to discern the right rules, so too do international lawyers debate the underlying meaning of these historical events.

This centrality of practice is codified in international law doctrine. Customary international law is defined as “general practice accepted as law.”<sup>18</sup> For the international lawyer, a widely observed practice is at the very least evidence of a normative commitment, and it is widely understood that practices can be jurisgenerative. A practice initially followed for other reasons can, over time, generate expectations and become a binding

13. See, e.g., David J. Bederman, *Reception of the Classical Tradition in International Law: Grotius’ De Jure Belli Ac Pacis*, 10 EMORY INT’L L. REV. 1, 4, 9–10 (1996).

14. Cf. Michael Reisman, *International Incidents: Introduction to a New Genre in the Study of International Law*, 10 YALE J. INT’L L. 1 (1984).

15. See, e.g., CRAIG FORCESE, *DESTROYING THE CAROLINE: THE FRONTIER RAID THAT RESHAPED THE RIGHT TO WAR* (2018).

16. See, e.g., Naz K. Modirzadeh, *Folk International Law: 9/11 Lawyering and the Transformation of the Law of Armed Conflict to Human Rights Policy and Human Rights Law to War Governance*, 5 HARV. NAT’L SEC. J. 225, 286 n.144 (2014); Jennifer C. Daskal, *The Geography of the Battlefield: A Framework for Detention and Targeting Outside The “Hot” Conflict Zone*, 161 PENN. L. REV. 1165, 1213 (2013); Mary Ellen O’Connell, *The Choice of Law Against Terrorism*, 4 J. NAT’L SEC. L. & POL’Y 343, 361 (2010).

17. See, e.g., DAVID WIPPMAN, JEFFREY L. DUNOFF, AND STEVEN RATNER, *INTERNATIONAL LAW: NORMS, ACTORS, PROCESS: A PROBLEM-ORIENTED APPROACH* 715–43 (4th ed. 2015).

18. See Statute of the International Court of Justice art. 38(1)(b), June 26, 1945, 59 Stat. 1055, T.S. No. 993 [hereinafter ICJ Statute] (directing the International Court of Justice (ICJ) to consider “international custom, as evidence of a general practice accepted as law”).

rule. But practice is key to treaty law as well; the subsequent practice of treaty parties is a recognized interpretive source of treaty meaning.<sup>19</sup>

Finding that practice though was and remains difficult. Cataloguing the practice of a wide range of international actors over long periods of time is a daunting task. This leads to another quirk of international law, a turn to the great writers or “publicists” as sources. The early modern writers—Grotius, Gentili, and Selden—look to Cicero, Tacitus, Plutarch, Livy, the Bible,<sup>20</sup> perhaps even the rabbis of the Talmud and Maimonides;<sup>21</sup> Hobbes famously translated Thucydides.<sup>22</sup> Later generations of international lawyers, in turn, looked to Grotius, Gentili, and Selden, along with heirs like Emmerich de Vattel<sup>23</sup> and Cornelius van Bynkershoek.<sup>24</sup> Today, more recent scholars like Lauterpacht and Henkin have come to carry totemic weight. And perhaps peculiarly, their role too has been ratified as an ancillary source of international law, most notably in the statute of the International Court of Justice.<sup>25</sup>

Most of all though, this sociological inclination demands unique approaches to the ultimate sources of authority and law. If practice is a source of law, what are its sources of normativity? What justifies looking to these practices as the sources of legal obligations? For the rabbis of the Talmud, the practice of learned rabbis and priests who came before them suggested insights into what divine rules, passed down over generations, actually required. Early modern writers of international law too similar

19. Vienna Convention on the Law of Treaties art. 31(3)(b), May 23, 1969, 1155 U.N.T.S. 331.

20. See, e.g., Bederman, *supra* note 13, at 5. Bederman usefully provides a list of all citations to ancient sources (including dozens of different writers) in Grotius’ classic tome.

21. See, e.g., Charles Leben, *Hebrew Sources in the Doctrine of the Law of Nature and Nations in Early Modern Europe*, 27 EUR. J. INT’L L. 79, *passim* (2016); Betina Kuzmarov, “Recapturing” the “Other”: *Jewish Laws of War and International Law*, 28 J.L. & RELIGION 47, 57–62 (2012).

22. See *Eight Bookes of the Peloponnesian Warre Written by Thucydides the Sonne of Olorus. Interpreted with Faith and Diligence Immediately Out of the Greeke by Thomas Hobbes Secretary to ye Late Earle of Devonshire*, ABEBOOKS.COM, [https://www.abebooks.com/servlet/BookDetailsPL?bi=19875510532&searchurl=an%3Dthucydides%26n%3D100121503%26sortby%3D1%26tn%3Dpeloponnesian&cm\\_sp=snippet\\_-srp1\\_-title1](https://www.abebooks.com/servlet/BookDetailsPL?bi=19875510532&searchurl=an%3Dthucydides%26n%3D100121503%26sortby%3D1%26tn%3Dpeloponnesian&cm_sp=snippet_-srp1_-title1) [<https://perma.cc/AJ8T-ZL6E>] (last visited Dec. 30, 2019).

23. See, e.g., William S. Dodge, *Customary International Law, Change, and the Constitution*, 106 GEO. L. J. 1559, 1569 (2018) (describing Vattel as a “favorite source with respect to the law of nations” for the framers of United States Constitution).

24. See, e.g., Judgment in the Jordan Referral re Al-Bashir Appeal, ICC-02/05-01/09-397-Corr, Appeals Chamber Decision, Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa, 18–22 (May 6, 2019), [https://www.icc-cpi.int/RelatedRecords/CR2019\\_02595.PDF](https://www.icc-cpi.int/RelatedRecords/CR2019_02595.PDF) [[perma.cc/X8JS-GS7U](https://perma.cc/X8JS-GS7U)] (considering at length van Bynkershoek’s views on jurisdiction).

25. See ICJ Statute art. 38(1)(d), June 26, 1945, 59 Stat. 1055, T.S. No. 993 (directing the International Court of Justice (ICJ) to apply “judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law”).

views, mixing customary practice and natural law in complex recipes. The Jesuits leaned heavily on natural law.<sup>26</sup> Grotius, more ambivalently, relied on “right reason”: the discovery of a widespread practice proved a rule’s consistency with the law of nature.<sup>27</sup> And Vattel, in turn, developed a more complicated schema, in which the law of nature inspired the voluntary law of nations, and the voluntary law of nations supported the conventional and customary laws of nations.<sup>28</sup>

The marriage of practice and natural law took different forms over time and was described differently by different writers, but it nonetheless remained a fixture. The bond between the two was so strong that it even survives the mid-nineteenth century rise of international law positivism and the shift from customary law to treaties. Even in our more contractarian era, in which law is what states agree to and legislate through treaties, elements of natural law remain, sometimes in central locations. *Jus cogens* or peremptory norms, general principles of law, notions of good faith, appeals to humanitarian concerns as treaty gap-fillers all pose doctrinal difficulties for the dedicated positivist; all operate as natural justice backstops. Even notions of *pacta sunt servanda*, the principle undergirding treaty law, rely on notions of natural justice.

But more importantly, international law’s sociology makes it an accordion-like concept that can be narrowed to more formalist notions of black letter law or widened to include political philosophy, economics, and international justice.<sup>29</sup> International law might be found in cases, treaties, and treatises, or in Hobbes, Immanuel Kant, Max Weber, and Jurgen Habermas. Historically, international law has been as much about exploring the nature of the ideal international community, the ideal international law, outside of what any states ever done, as about discerning the rules of the system.

And in a sense, it is the tension between these two visions that allows international law to find some equilibrium between apology, mere ratification of state actions, and utopia, the idealized set of rules no state has agreed to. The law exists in a constant state of flux, torn between two

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26. See, e.g., Cornelius F. Murphy, Jr., *The Grotian Vision of World Order*, 76 AM. J. INT’L L. 477, 482 (1982); Geoffrey R. Watson, *The Death of Treaty*, 55 OHIO ST. L. J. 781, 786 (1994).

27. 2 HUGO GROTIUS, *DE JURE BELLI AC PACIS LIBRI TRES* 42 (James Brown Scott ed., Francis W. Kelsey et al. trans., Clarendon Press 1925) (1625); see also Benedict Kingsbury, *A Grotian Tradition of Theory and Practice?: Grotius, Law, and Moral Skepticism in the Thought of Hedley Bull*, 17 QUINNIPIAC L. REV. 3, 22–23 (1997) (quoting GROTIUS, *supra*, at I.i.12).

28. Emerich de Vattel described the law of nations as a system “based on the principles of the law of nature and written with a view to practical application.” ARTHUR NUSSBAUM, *A CONCISE HISTORY OF THE LAW OF NATIONS* 156 (rev. ed. 1954); see also Jianmeng Shen, *The Relativity and Historical Perspective of the Golden Age of International Law*, 6 INT’L LEGAL THEORY 15, 20 (2000).

29. Cf. SAIMAN, *supra* note 7, at 8 (explaining that “the rabbis use concepts forged in the regulatory framework to do work other societies assign to philosophy, political theory, theology, and ethics, and even to art, drama, and literature”).

opposing logics of justification—sovereign will and natural justice. International lawyers often debate whether a particular rule is *lex lata*, “the law as it exists,” or *lex ferenda*, “the law as it should be,” but the two concepts don’t really exist in international law as binary choices. *Lex lata* and *lex ferenda* instead exist as opposing forces tugging at the rules; it is the tension between the two that holds the rules aloft and imbues them with their authority and normativity.<sup>30</sup>

### III. THE INVISIBLE COLLEGE OF INTERNATIONAL RABBIS

The normativity of practice in international law hints at a broader theme linking international law with rabbinic law and the beginning of a response to Hart’s challenge. For Hart, “law” represents the union of primary and secondary rules.<sup>31</sup> Primary rules are rules governing conduct.<sup>32</sup> They lay out those actions individuals are required or prohibited to take. Secondary rules are rules for identifying, changing, or enforcing primary rules.<sup>33</sup> Key among those secondary rules is the “rule of recognition,” a legal system’s ultimate test of a rule’s legal status.<sup>34</sup> Hart would readily grant that both international law and religious law have many primary rules<sup>35</sup>: laws of armed conflict or rules of Sabbath, for example. What makes each potentially “primitive” is the absence of clear, uncontroverted secondary rules. Both lack authoritative legal officials, clear, agreed-upon mechanisms of legal change (they have no legislature, for example), and methods for adjudicating rules with finality (courts).<sup>36</sup> In the absence of such legal technologies, how could anyone ever know what international

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30. Cf. *id.* at 9 (describing halakhah as existing along a spectrum, with “halakhah-as-regulation” at one pole and halakhah as a broader concept encompassing a whole world of religious values at the other).

31. HART, *supra* note 1, at 94–99.

32. *Id.* at 94.

33. *Id.* at 94–99.

34. *Id.* at 100–10.

35. *Id.* at 214.

36. One could easily quibble with both of these, arguing that within particular areas or sub-communities of international law or religious law such secondary rules and the institutions to enforce them do exist. The Vienna Convention on the Law of Treaties provides a long list of secondary rules of treaty interpretation and courts—the ICJ, the WTO Dispute Settlement Body, the International Tribunal for the Law of the Sea, the European Court of Human Rights, etc.—have proliferated in international law. Specific Jewish communities may recognize the authority of Beit Din (religious tribunals) to resolve disputes and the Conservative Movement has a Committee of Jewish Law and Standards that can decide halakhic questions for members of that movement. It is certainly fair though to observe that such institutions do seem narrower or weaker in international law and Jewish law than in modern Western states, and that international law and Jewish law, as a whole, must accept a significant level of interpretative cacophony and stasis.



law or Jewish law<sup>37</sup> really requires? And in the absence of such certainty, how could either fully function as law?

The answer, I would suggest, requires a return to notions of practice and authority embedded in both systems. Both international law and rabbinic law have technologies of legal identification, modification, adjudication, and enforcement, but they operate very differently than the hierarchical models of the modern state. The modern legal state, idealized, is built like an organizational chart, with bold arrows of authority running between institutions and between institutions and the governed. Crisp lines and angles are the dominant image. International law and rabbinic law look different. In both international law and rabbinic law, circles, both overlapping and concentric, are the dominant form; arrows point in both directions around and between circles, and arguments, rather than commands, flow along those arrows.

As Saiman explains, the idealized notion of rabbinic law is not the legal code, but the rabbinic dialogue or argument.<sup>38</sup> Even when codes have been prepared, they quickly become the fodder of further arguments.<sup>39</sup> Printed versions of those codes are festooned all around with these later interpretations and arguments. The pages themselves look almost like a group of rabbis sitting around and poring through a text.<sup>40</sup>

International law has often been idealized in a similar way: international law is maintained not by a code or an institution, but by “the invisible college of international lawyers.”<sup>41</sup> In my own work, I have used the model of communities of practice to describe international law’s operation.<sup>42</sup> “Communities of practice,” Emanuel Adler explains,<sup>43</sup> “consist of people who are informally as well as contextually bound by a shared interest in learning and applying a common practice.”<sup>44</sup> Such a common practice, “in turn, [is] sustained by a *repertoire of communal resources*, such as

37. I use here “rabbinic law” to describe the system of halakhah that Saiman describes in his book. I use “Jewish law” to cast a wider net, encompassing the shared legal concepts across varied Jewish communities.

38. See SAIMAN, *supra* note 7, at 164.

39. See *id.* at 184–85.

40. For examples from the Talmud, see SAIMAN, *supra* note 7, at 148–49.

41. Oscar Schacter, *The Invisible College of International Lawyers*, 72 Nw. U. L. REV. 217, 217 (1977).

42. See, e.g., Harlan Grant Cohen, *Theorizing International Precedent*, in INTERPRETATION IN INTERNATIONAL LAW (Andrea Bianchi et al. eds., 2015); Harlan Grant Cohen, *International Precedent and the Practice of International Law*, in NEGOTIATING STATE AND NON-STATE LAW: THE CHALLENGE OF GLOBAL AND LOCAL LEGAL PLURALISM (Michael A. Helfand, ed. 2015); Harlan Grant Cohen, *Finding International Law, Part II: Our Fragmenting Legal Community*, 44 NYU J. INT’L L. & POL. 1049 (2012).

43. EMANUEL ADLER, *COMMUNITARIAN INTERNATIONAL RELATIONS: THE EPISTEMIC FOUNDATIONS OF INTERNATIONAL RELATIONS* (2005).

44. *Id.* at 15 (internal quotation marks omitted) (quoting William M. Snyder, *Communities of Practice: Combining Organizational Learning and Strategy Insights to Create a Bridge to the 21st Century*, COMMUNITY INTELLIGENCE LABS (Aug. 1997), <http://www.co-i-l.com/coil/knowledge-garden/cop/cols.shtml> [permalink not availa-

routines, words, tools, ways of doing things, stories, symbols, and discourse.”<sup>45</sup> International law provides a medium for debate and agreement, requiring actors to engage with each other in very specific fora, using very specific language and procedures. The international legal community, in turn, is constituted by those debates, agreement on some ground rules, and shared expectations about good and bad arguments.<sup>46</sup> The community itself might be imagined as a series of concentric circles, with expert practitioners regularly engaged in legal debates, at the center, surrounded by groups of community members less and less engaged in these arguments, but who nonetheless accept the legitimacy of arguments that follow shared norms.

Hart writes that to find the secondary rules of a legal system, one should look to the practice of officials. International law and rabbinic law have officials, but their status is more fluid and informal, constructed not through state power but notions of craft—one’s knowledge and ability to use the interpretative rules and moves.<sup>47</sup> Authority is earned through debates—constantly tested by both fellow combatants and the broader legal community against shared notions of expertise. Secondary rules emerge and are upheld through this constant, iterative process.

This model of law, far from primitive, relies on a complex machinery to guarantee constant engagement. Norm-bound debates legitimate the authority of rules and interpretations. What that means is that paths of communication must remain open and robust and that participants must commit to engaging and requiring engagement with each other.<sup>48</sup>

This puts a different spin on the famous Talmudic story in which one rabbi, opposed to all the others on a question of law, repeatedly appeals to and receives miraculous signs in support of his view. Even after a heavenly voice confirms the rabbi’s view, the others persist in their unified disagreement, announcing, “lo ba-shamayim hi,” or, the answer is not in the heavens.<sup>49</sup> The moral usually drawn from the story is that the law now belongs

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ble]). Adler himself borrows the idea of communities of practice from the work of Jean Lave and Etienne Wenger on education and learning theory. *Id.* at 15 n.116.

45. *Id.* at 15.

46. As Adler observes, “[i]t is as members of communities of practice that people exercise one of the highest forms of power: determining the meanings and discourses that produce social practices.” ADLER, *supra* note 43, at 25; cf. Kenneth Anderson, *The Rise of International Criminal Law: Intended and Unintended Consequences*, 20 EUR. J. INT’L L. 331, 349 (2009) (discussing “communities of interpretation and authority”).

47. This account bears some resemblance to Brian Tamanaha’s sociolegal jurisprudence, which likewise, seeks to broaden Hart’s definitions and account. See generally Brian Z. Tamanaha, *Socio-Legal Positivism and a General Jurisprudence*, 21 OXFORD J. LEGAL STUD. 1 (2001).

48. Monica Hakimi has developed the deepest, most robust version of this account of international law. See Monica Hakimi, *Constructing an International Community*, 111 AM. J. INT’L L. 317 (2017); Monica Hakimi, *The Work of International Law*, 58 HARV. INT’L L. J. 1 (2017).

49. BABYLONIAN TALMUD, *Baba Mezia* 59b.

to us and must be interpreted by us. But one could easily see the problem as the lone rabbi's unwillingness to engage; by appealing directly to the divine, the rabbi refuses the dialogue and debate that legitimate all other interpretations. As Monica Hakimi suggests, the most problematic states for international law are not the ones who bend the rules, but those who refuse to answer to them, who refuse to justify their actions in international legal terms.<sup>50</sup>

#### IV. PLURALISM AND CHANGE

A legal system built around, and legitimated through, communities of practice does face unique challenges. Maintaining such a system requires sufficient centers to learn legal craft and sufficient fora in which to debate.<sup>51</sup> As the law expands its ambit and as on-the-ground legal questions proliferate, more and more of these centers—new schools, new conferences, new institutions, new courts—are needed. The risk is that as these fora proliferate, debates may diverge—courts may reach different conclusions, “schools” of law may emerge. Fragmentation has always loomed as a threat for a unified community of Jewish law.

And as international law expanded around the world and into new areas of regulation, fragmentation became the emblematic, existential threat to it as well. Could the invisible college survive the advent of the World Trade Organization, the International Tribunal for the Law of the Sea, the International Criminal Court, Investor-State Dispute Settlement, and the specialization that would accompany them?<sup>52</sup> Fragmentation fears peaked around the millennium, but have since subsided.<sup>53</sup> While divisions remain, new cross-field consensuses have begun to emerge.<sup>54</sup>

This highlights the ambivalent role of pluralism in these horizontally constructed systems. Pluralism is both a threat and the source of reform and renewal. While the inability to fully control interpretations, to wield the axe of jurispathy,<sup>55</sup> makes international law difficult to enforce, it also provides a protection against calcification, a hedge against codification, a

50. Monica Hakimi, *Why Should We Care About International Law?*, MICH. L. REV. (forthcoming). This has always been my experience of Jewish law. Commitment to the law is less a matter of obedience than engagement. The key is caring what the law might require. Engaging with the materials and looking for interpretations or loopholes that might help you achieve your goals is an act of fidelity, not unfaithfulness.

51. It may also require a robust commitment to learning for learning's sake, a feature of rabbinic law as well. See SAIMAN, *supra* note 7, at 65.

52. For more discussion of the debates over the fragmentation of international law, see Harlan Grant Cohen, *Fragmentation*, in CONCEPTS FOR INTERNATIONAL LAW: CONTRIBUTIONS TO DISCIPLINARY THOUGHT 315 (Jean d'Aspremont & Sahib Singh, eds., 2019).

53. *Id.* at 325.

54. *Id.* at 325–26.

55. See generally Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

way to introduce new interpretations in the absence of a legislature, and a repository of counter-narratives of the law smoothed away through dispute settlement. How we manage pluralism/fragmentation in both Jewish law and international law is how we manage legal change.

V. FROM NEGOTIATED LAW TO ADJUDICATED LAW;  
FROM ARGUING TO ADMINISTERING

Recognizing the distinctiveness of this community-based model of law reveals that the absence of some of the familiar institutions of modern states isn't a glitch, a deficiency, but a feature. In fact, grafting those institutions—courts, codes, and centralized enforcement—onto these types of law can be quite complicated, revealing disconnects between notions of legitimacy and authority and threatening the unique mix of both that allow international law and rabbinic law to function. Making each more state-like may weaken, rather than strengthen, their force.

This complicated, conflicted relationship has been on display as international law has adapted to the modern, globalized world. As transnational connections have spread and deepened over the past century, the demand for specific, administrable rules around which everyone can plan has increased. One response has been a drive to codify international law, reflected most clearly in the creation of the International Law Commission and the series of mass multilateral treaties designed to clarify questions previously left to custom. So many areas of international law once governed by custom are now matters of treaty that some have wondered whether customary international law may now be a relic.<sup>56</sup> But codification alone can only do so much. Getting every state to agree on a treaty<sup>57</sup> severely limits what those treaties can say and what they can cover. The drive towards clearer rules and guidance has thus led in two additional opposing directions: judicialization and soft law. Each brings benefits but also raises serious conceptual and legitimacy challenges.

Prior to the twentieth century, adjudication in international law was relatively rare, and where it existed it was either ad hoc, built on compromise, or a product of national courts, interpreting international law as much for the purposes of their own legal systems as for international law itself. Instead, the law was hashed out over time through diplomatic jostling, compromise solutions, and agreements to disagree.<sup>58</sup>

The picture today is quite different, with dozens of international courts and tribunals in operation, resolving disputes over boundaries,

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56. See, e.g., Joel P. Trachtman, *The Growing Obsolescence of Customary International Law*, in *CUSTOM'S FUTURE: INTERNATIONAL LAW IN A CHANGING WORLD* 172 (Curtis A. Bradley ed., 2016).

57. The four Geneva Conventions of 1949 remain the only treaties with universal membership.

58. See generally, Harlan Grant Cohen, *International Law's Erie Moment*, 34 *MICH. J. INT'L L.* 249 (2013) [hereinafter Cohen, *Erie Moment*].

human rights, trade, investments, and beyond.<sup>59</sup> This modern judicial revolution has allowed disputes to be resolved more peacefully, to shift the balance from power to justice, and for more systematic and organized rule development. It has simultaneously though also raised serious questions of legitimacy. As the work of these tribunals has exploded, many have started to ask why these investment arbitrators,<sup>60</sup> those WTO Appellate Body members,<sup>61</sup> these ICC judges should have authority to interpret the law for everyone and all time.<sup>62</sup> The difficulty of “legislating” as a community through treaties or custom, in this case, to respond to judicial decisions, only deepens these concerns.<sup>63</sup> But the concerns are not just about the legitimacy of the rule-makers. Judicialization also raises concerns that the adjudicatory process will eliminate the give-and-take ambiguity that had formed the lived life of international law.<sup>64</sup> The gains in certainty, predictability, and finality may or may not be worth the costs to diplomacy and flexibility. It is no surprise then that many of these courts are currently facing legitimacy crises.

The demand for more guidance in transnational affairs has simultaneously led in another, almost opposite direction. Facing the same difficulties of agreeing on hard legal rules, international lawyers have developed alternative normative forms: non-binding United Nations General Assembly declarations, reports on international or comparative best

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59. See Cesare P.R. Romano, *A Taxonomy of International Rule of Law Institutions*, 2 J. INT'L DISP. SETTLEMENT 241, 241–42 (2011).

60. See, e.g., Andrea K. Bjorklund, *The Legitimacy of the International Centre for Settlement of Investment Disputes*, in LEGITIMACY AND INTERNATIONAL COURTS 234 (Nienke Grossman et al. eds., 2018); Sergio Puig & Gregory Shaffer, *Imperfect Alternatives: Institutional Choice and the Reform of Investment Law*, 112 AM. J. INT'L L. 361 (2018); Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107 AM. J. INT'L L. 45 (2013).

61. See, e.g., Geraldo Vidigal, *Addressing the Appellate Body Crisis: A Plurilateral Solution?*, J. WORLD INVESTMENT & TRADE (forthcoming 2019), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3359555](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3359555) [<https://perma.cc/2ABK-2YSJ>]; Markus Wagner, *The Impending Demise of the WTO Appellate Body: From Centrepiece to Historical Relic?* in THE APPELLATE BODY OF THE WTO AND ITS REFORM (Chang-fa Lo ed., forthcoming 2019), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3399300](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3399300) [<https://perma.cc/S8VS-APUE>].

62. See, e.g., Douglas Guilfoyle, *Reforming the International Criminal Court: Is It Time for the Assembly of State Parties to Be the Adults in the Room?*, EJIL: TALK! (May 8, 2019), <https://www.ejiltalk.org/reforming-the-international-criminal-court-is-it-time-for-the-assembly-of-state-parties-to-be-the-adults-in-the-room/> [<https://perma.cc/XP5E-8W5G>].

63. See, e.g., Wagner, *supra* note 61, at 11–12; Cosette D. Creamer, *Can International Trade Law Recover?: From the WTO's Crown Jewel to its Crown of Thorns*, 113 AJIL UNBOUND 51 (2019).

64. See generally, Cohen, *Erie Moment*, *supra* note 58. Cf. SAIMAN, *supra* note 7, at 169–70 (describing debates whether the law of the Torah was “far too holy” to be applied in judicial practice, that “even the Codes—understand the ideal of halakhah as a holy corpus to be studied rather than necessarily applied”).

practices, voluntary codes of conduct, and interpretive guidance.<sup>65</sup> This “soft law” bears a striking resemblance to Saiman’s rabbinic concept of sub-halakhah<sup>66</sup> or to traditional notions of custom or minhag. As with those, soft law fills the governance needs of a community unable to legislate new rules. Like sub-halakhah or minhag, soft law can thus be extraordinarily useful. The problem is that like sub-halakhah, soft law tends to harden into binding rules over time, and with that hardening, comes questions of legitimacy. (No kitniyot, really?<sup>67</sup>) While rabbis and international lawyers may have limited authority to resolve specific disputes or devise default rules for coordination, they do not necessarily have the authority to bind the community as a whole and for all time. Moreover, the tendency of soft law to harden is no secret. Soft law’s production can thus become competitive, a means through which to harden one’s desired rules and normative vision of the system.<sup>68</sup>

These modern international law tensions mirror some of the challenges for rabbinic law that Saiman describes resulting from its relationship to the modern Israeli state.<sup>69</sup> Both demonstrate the difficulty of adapting community-legitimized law to the machinery of the state. Many international lawyers jealously aspire to build the institutions resembling those of state. But the question is whether international’s law machinery of legitimization can support them. International law’s horizontal, argument-based structure is perfectly attuned to a plural legal community in which agreement in cooperation is high, but on values much lower. International law has been said to lack a true demos,<sup>70</sup> and it has developed a model of lawmaking that doesn’t require one. It is arguably the horizontal, dialogic nature of both international and Jewish law that have allowed them to remain relevant for a wide, disparate array of legal subjects with very different views of the law, its sources, and its applications. The institutions of state though—courts, legislatures, and centralized enforcement—all derive their legitimacy from solidarity within a particular political community. That sense of demos is what allows minorities to submit to the judgments of the majority expressed through such institutions.<sup>71</sup> Until a

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65. See, e.g., Janet Koven Levitt, *A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments*, 30 YALE J. INT’L L. 125, 127 and *passim* (2005) (describing soft law and cataloguing examples).

66. See SAIMAN, *supra* note 7, at 230–31.

67. Kitniyot is a category of food items including legumes, rice, corn, and various seeds that many Jews of European origin consider forbidden on Passover. The prohibition appears to have taken hold in thirteenth century France. See, e.g., *What is Kitniyot?*, OU KOSHER, <https://oukosher.org/passover/articles/what-is-kitniyot/> [<https://perma.cc/ZE4L-72DB>] (last visited Nov. 26, 2019).

68. See, e.g., Andrew T. Guzman & Timothy L. Meyer, *International Soft Law*, 2 J. LEGAL ANALYSIS 171, 176–79 (2010).

69. See SAIMAN, *supra* note 7, at 213–41.

70. See, e.g., Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?*, 94 AM. J. INT’L L. 596, 600 (1999).

71. *Id.* at 615–17.

true international demos develops, such international institutions may remain only a dream, and international law a law without state, a law in "galut,"<sup>72</sup> or diaspora.

#### VI. LIVING WITH THE PRIMITIVES

So, if international law and rabbinic law are not primitive, they are nonetheless different from modern state law. But those differences can also help reveal hidden similarities, ways in which even state law works outside formal and official channels. They also provide lessons in managing law in the plural legal communities in which we all live, in which state law is just one of the normative systems demanding our adherence. The community-based model of legitimacy and authority exemplified in international and rabbinic law provides a model of the norm-filled communities in which we live, communities in which competing normative demands are liquidated through community practices and expectations, rather than formal doctrines. It is in our own communities of practice that we learn, on a daily basis, how to be subjects of U.S., Jewish, and international law, all at the same time.

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72. Cf. SAIMAN, *supra* note 7, at 31.