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13. Qualified Sovereignty, Law, and the Moral Floor

Jewish Thought about War and Political Authority

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Abstract

This paper argues for an international system in which political sovereignty is minimally shared among nation-states and international authorities in order to establish a global "moral floor" whereby international institutions have real power to enforce prohibitions against extreme violations of human well-being. The notion that the sovereignty of nation-states would be even minimally qualified sparks volatile debate. Fear of the loss of communal identity in nation-states causes some to desire a retreat from international law and norms. On the contrary, I argue that a system of minimally shared sovereignty does allow for preservation of communal identity. As a case study, I examine certain developments in religious-legal thought in Jewish communities during the classical rabbinic period. Multiple Jewish communities retained distinct identities in often-oppressive diasporic conditions, without political sovereignty, by developing systems of legal norms and integrating those laws creatively with laws of governing authorities. Contemporary Jewish thought, drawing on these experiences, provides helpful ways of conceptualizing shared sovereignty.

Introduction: A Crisis of Sovereignty

Our world is in a crisis of sovereignty. Much ink has been spilled over what seems to be a looming breakdown in the post-World War II international order, which was characterized, however imperfectly, by international commitments both to the self-determination of nation-states and to fundamental human rights. The story of that post-World War II order is complicated, of course, by the Cold War and its legacy and by the neo-imperialist ambitions of the Soviet Union as well as the United States and other Western nations. Especially with the breakup of the Soviet Union, however, it appeared for a time as though human rights and liberal democratic ideals were quickly becoming the currency of global moral debate and the means through which nation-states understood and justified their actions (Fukuyama 1992: xi, xviii; Williams, Sullivan, and Matthews: 14-15).[1]

Debate has been fierce over what "human rights" truly means and whether recent moves to better protect human rights, such as the Responsibility to Protect agreement at the United Nations World Summit in 2005 or the establishment of the International Criminal Court under the Rome Statute in 1998, are proper and effective (Bellamy: 161-67; Rossi: 374-79). Responsibility to Protect, in particular, committed states (however vaguely) to the idea that their sovereignty entails protecting the human rights of their populations against the worst abuses, and it seemed to be a step in the direction of finding a balance between claims to the absolute sovereignty of nation-states and a global commitment to upholding human rights norms. But like other human rights-related agreements, it has proven only minimally effective at pushing nation-states to stop human rights abuses, and its invocation remains vulnerable to accusations of hypocrisy, imperialism, and abuse (Reinold: 60-77).

Even the idea of shared global norms around human rights has come under increasing attack in the past few years. Latent (or not so latent) far-right and nationalist movements have arisen in many parts of the world, including in Europe and the United States where human rights norms were traditionally, though often hypocritically, championed. Furthermore, democracy has not exactly spread and flourished worldwide in the past few years. If anything, it has arguably been in retreat.[2] There are still many at the United Nations, in non-

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[1] Fukuyama's work is complex and takes into account many of the issues of identity, nationalism, and unequal treatment that we are confronted with today. He does *not* simply proclaim that liberal democracy is the end of history. His work is so well-known, however, that it is a useful touching-off point for questions about liberal democracy and human well-being in our contemporary world.

[2] *The Economist*'s Democracy Index 2017 report shows that, according to the metrics used by its researchers, 89 countries saw declines in measurements of democratic life in 2017 and only 27 made improvements, lowering the *Economist*'s Intelligence Unit Democracy Index to 5.48 from 5.52 on a scale of 0 to 10 (The Economist Intelligence Unit). The *Washington Post* did report slightly more hopeful data in November 2017 from the Lexical Index of Electoral Democracy and the International Institute for Democracy and Electoral Assistance, indicating that while some countries have seen backsliding in democratic processes, others have made improvements. The *Post* argued that on the whole, democracy has still advanced worldwide in the last few years (Jiménez). Whether or not democracy is in decline certainly depends on what indices are measured. But I believe that there is enough evidence to say that liberal democracy is at the very least under pressure, and that the rhetoric employed by

governmental organizations, and in governments and civil society who defend and seek to promote human rights and democratic norms, but they are facing an uphill battle at the moment.

Nevertheless, there is still relatively widespread global agreement on very basic moral norms that ought to govern how human beings treat each other, whether or not these norms are described in the language of human rights. Such norms include protecting the lives of innocent people, meeting people's most basic needs (food, water, rudimentary shelter), and refraining from acts of torture, rape, slavery, and other forms of extreme abuse. Therefore, dealing with the question of how sovereign powers and institutions can better promote human well-being does not have to, and should not, wait for greater global agreement on the specifics of human rights norms. Our leaders do not always live up to our ideals, but the great majority of people in the world would say that those who hold power in governments and global institutions should certainly act in ways that protect people's lives and provide for their fundamental needs, whatever religious, moral, or philosophical reasons they might base that claim on. I will refer to these most-fundamental moral norms as "basic norms of human well-being," and will structure this paper around the question: How can we best understand and practice political sovereignty in our contemporary world in order to uphold basic norms of human well-being as broadly and soundly as we possibly can?

And the answer I will propose is this: given contemporary trends of globalization, increased communication, inequality, the influence of both cosmopolitanism and (often ethnically influenced) nationalism, and more, we should advocate for shared sovereignty at multiple levels of power, where various kinds of authorities (international, regional, national, local) hold sovereignty over distinct aspects of our lives together, all governed by laws that intersect and enhance rather than contradict each other. International institutions and authorities should have the authority to uphold and enforce a very minimal moral floor, which has already been established by a global consensus on the tenets of international law, and more recently on the principle of Responsibility to Protect. That is, international institutions should, *in practice*, have enforcement mechanisms to stop and punish genocide, ethnic cleansing, war crimes, and crimes against humanity. Nation-states should have authority over most of the things they do now – their own systems of government, elections, granting of citizenship, most aspects of immigration and national borders,[3] and social welfare programs. Smaller localities should then have authority over local issues, including the prosecution of certain

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nationalist parties in the U.S. and Europe that attacks ideas of human rights and basic democratic norms is damaging to global commitments to human rights and international law.

[3] Much could be said about immigration/emigration policy and the issue of sovereignty at the national and international level. The Universal Declaration of Human Rights sets forth a right of *emigration* out of a country, but not of *immigration* to another country. The question of what happens to refugees, asylum-seekers, and other migrants in a world of sovereign nation-states is clearly important, and one that I have dealt with elsewhere (Alexander; Hwang and Alexander). In relation to the argument in this paper, I do in fact think that from a moral standpoint, nation-states should yield a certain minimal amount of control over their borders in order to enhance protection of refugees and other migrants who may or may not fit the United Nations definition of "refugees" but who are nevertheless fleeing violence or other extreme circumstances. While that discussion certainly relates to the discussion at hand, I will leave it for another time.

types of crimes[4]; local issues of social welfare; city- or county-level concerns such as speed limits, zoning laws, and parks. And all of these authorities should be in the business of crafting and enforcing laws: laws that may at times be used to critique each other, but which by and large support each other, always with the goal of harmonizing international, national, and local laws as far as possible. The main change this way of understanding sovereignty would make to our current way of operating is that it would support, in practice, the ability of international institutions to actually *enforce* very minimal norms of human well-being, without regard to the whims of nation-states. But though I do want to emphasize that point, I also want to frame it as part of a larger conception of sovereignty in which sovereignty is properly shared among institutions and authorities at various levels of power, and where the actions of both leaders and citizens are law-governed.

Contemporary Problems and Where We Go from Here

One of the most pressing problems of global sovereignty is that we have put more pressure on the nation-state than it can handle. The basic unit of sovereignty in the contemporary world is the nation-state. Sovereignty, as political authority, certainly does not inhere *only* in the nation-state, but the state is the political unit that is afforded respect for self-determination and holds sovereign powers like control over citizenship, protection of borders, and the ability to go to war. Debates over precisely how "Westphalian" our global order is are as old as the treaty of Westphalia itself (Glanville: 81-85), but we clearly do rely on the nation-state to provide for many or all of the goods of its people. Recent events including "Brexit" and the increasing influence of nationalist parties and politicians in the U.S., France, Hungary, Poland, and elsewhere have shown, furthermore, that many of us now also rely on the nation-state as the bearer and protector of our fundamental sense of identity and community, perhaps especially (though not exclusively) in the United States and in Europe, where European-developed ideals of the nation-state as *the* sovereign entity have been strongly influential in political thought and institutions.

Consider, for example, the "evils" that people on the political right and left in the United States accuse each other of. "Conservatives" accuse "liberals" of asking the nation-state, as represented by the federal government, to do everything to take care of everyone, from providing food or cash assistance to mandating business practices like family leave. Liberals accuse conservatives of upholding the nation-state as *the* recipient of loyalty from its citizens, where a "patriotism" that brooks no criticism becomes mandatory, and where one's communal identification as "an American" becomes the strongest, or only, type of communal identity one has.

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[4] It seems wiser not to call this sort of local authority "sovereignty," since many theorists understand a "sovereign" power as one that can go to war. Since I focus on the international/national nexus, I will generally use the word "sovereignty," and one of the aspects of sovereignty I will analyze is the power to go to war. But in this particular sentence, I use the word "authority" in part in order to avoid seeming to allow local powers to go to war (though local jurisdictions do have authority, in most nation-states, to use violence in the sense of deploying police power within a particular geographic area).

The point is that in our world the nation-state is by far the strongest locus of sovereignty.[5] Furthermore, the capitalist economic structures that prevail in our world force many of us to break communal bonds that are based in shared geography, language, religion, culture, and interest; the nation-state then steps in to provide a community we can identify with that is compatible with the pressures of our economic life (Fukuyama 2018: 62-65; Goodman: 10-12). We therefore end up putting extreme pressure on the nation-state to be all things to all people – because often we feel that it is all we have. The problems this causes become especially clear when people's lives begin to feel more insecure precisely because the nation-state does *not* seem able to handle the problems we face, while at the same time we come into ever-increasing contact with people outside our national communities, some of whom request either entry into or help from the national community. When all these circumstances come together, it can – and has – led to a rise in nationalist thought and practice that blames outsiders, seeks to keep everyone else out, and wishes to promote only *my* national interests. In this way we try to hold onto the nation-state as the provider of identity, community, and security, even as it seems to be slipping out of our grasp.

I do not think that our global circumstances allow us to continue this way, at least if we intend to promote the well-being of all. Hanging onto the nation-state as the sole (or nearly sole) provider of basic goods, identity, and community is a losing proposition. Certainly this is true for those who wish to protect human rights worldwide, since nation-states do frequently fail to protect the rights of some members of their populations or are themselves perpetrators of rights violations. The most stark examples of this currently include the genocide of Rohingya Muslims in Myanmar; the ethnic cleansing of Uyghur Muslims in northwest China; and the inability of the government of Yemen to assert its sovereignty[6] and stop what has become a proxy war on its territory, to the point that children are literally starving to death each day. Even for those who tend to support nationalist ideas and policies, though, attempts to close off the nation-state and have it provide all basic goods and sense of identity are not going very well. The failure, so far, of British and E.U. negotiators to come to an agreement on what their relationship will look like after Brexit has shown how difficult, even painful, it is to break ties with other communities. Many basic goods – like healthcare and even peace in Northern Ireland – have been sustained by membership in the E.U., including by the local ties E.U. membership has enabled between U.K. citizens and new arrivals (Bennhold; Campbell). Americans who hoped that Donald Trump's "America first" policy would make their lives or

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[5] There are other factors at play here: decreasing participation in civil institutions in the U.S. and other places, as noted by sociologists, most famously Putnam; economic pressures that break apart communal and family life; increased communication between people who are geographically distant that can lead to stronger ties far away but can weaken ties locally; and so on. But this is precisely the point: as we lose some of our communal ties, the nation-state remains because it is the strongest locus of sovereignty. Thus, we are in some sense forced to remain engaged in the community the nation-state creates for us – and we end up asking that community to provide for us, in addition to its traditional provisions such as protection and security, all the things other communities once provided.

[6] Some thinkers or politicians might argue that the problem in Yemen is in fact that its sovereignty is *not* absolute, or properly respected. My point here, though, is that the international order as we currently have it is clearly not preventing other states from imposing on Yemen and its people. It does not seem likely that shoring up sovereignty will prevent every instance of aggression or every proxy war. The question is what to do about the human suffering that such aggression causes, and that is what I seek to address in the essay as a whole.

communities more stable have also seen, at best, a mixed bag of results. The U.S. economy has continued the upward growth trajectory it began during the Obama presidency,[7] but workers in portions of the agriculture and manufacturing sectors have been harmed precisely by the trade wars that the administration has engaged in under the "America first" ideology (Collins). Finally, in the U.S., there is at least anecdotal evidence for the proposition that even people who ascribe to white nationalist ideology may find a more fulfilling sense of community and identity in local and personal ties, when those ties are available, than they do in an ideology of the (ethnically homogenous) nation-state. The widely reported case of Daryl Davis, an African American man who befriends members of the Ku Klux Klan, offers an intriguing look into how bonds of friendship can provide a stronger sense of community than even very strong commitments to an ideology of the nation-state (Chason). All this is to say that, though many people may find themselves pushed toward identifying primarily with their state of citizenship or residence and looking to the nation-state to provide the basic goods of life, the nation-state does not seem to be able to provide for our individual and communal goods in all the ways we need. Both global and local efforts are needed as well.

So what I want to ask is: how can we conceive of sovereignty across the international arena in order to better ensure that basic goods are provided and human well-being upheld, and how can we strengthen local, national, regional, and global institutions accordingly? Many of us in wealthy Western countries are invested in a false choice between either retaining *our* distinct national character and system of laws, or giving in to a global order that flattens out all distinctions and forces us all to act in exactly the same ways under the watchful eyes of technocrats and bureaucrats. A few, on the other hand, long for the day when the world *does* achieve a cosmopolitan order that brings us together under the same set of laws and norms, without recognizing the potential abuses and oppressions that can come with such a global regime. I submit that in lieu of either of these concepts, we need to envision and work toward some palatable notion of minimally shared sovereignty across local/national/global lines: a system of qualified sovereignty[8] in which local and national communities retain their identity and character, and to a large extent their own legal norms, while also delegating real authority to international laws and institutions to uphold and, importantly, enforce the most basic norms of human well-being.

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[7] The truth of this statement waxes and wanes depending on the day; as I revise this article, a government shutdown is imminent and the stock markets have been tumbling. So even this upward trajectory of growth is marked by painful vacillations that are spurred in part by Trump's own personality and in part by his sometimes-incomprehensible theory of what "America first" should entail.

[8] The idea of qualified sovereignty has been explored, whether using that or other terms, by many thinkers. Interestingly, this phrase was used by Colonel George Mason at the United States Federal Convention of 1787, to remind his fellow delegates that the federal government of the U.S. would not have absolute control over the laws and doings of the population; its sovereignty would be "qualified" by the sovereignty of the individual states that made up the union. I do not here claim to use the term exactly as Mason understood it or for the same purposes, but his concern that the nation-state is not the be-all and end-all of sovereignty is heuristically intriguing. Of course, conceptions of the sovereignty of the individual states that make up the United States have their own set of historical problems, most prominently the use of "states' rights" arguments to justify first slavery and then Jim Crow and segregation practices. This is where the idea of qualified sovereignty as honoring a "moral floor" whereby *no* political entity has the right to kill unjustly, torture, or enslave becomes important. The record of the 1787 Convention may be found in Max Farrand. Mason's comment on "qualified sovereignty" is at 2:347.

Qualified Sovereignty: Retaining Identity under External Legal Authority

Jewish Diasporic Communities as Historical Analogy

To make the case that it is possible for national or local communities to retain communal connections and identity with less-than-absolute sovereignty, I wish to turn to a historical analogy – not an exact precedent by any means, but an analogy with intriguing implications. As stated, when the possibility comes up that states could ever agree on less-than-absolute sovereignty, many seem to worry that states and smaller communities will lose their communal norms and identity and be assimilated into some nebulous global culture. It is not at all clear that this has to be the case, however. In fact, if we consider historical analogies in which national, religious, or cultural groups have lived under the power of others, we see that communal identity can in fact be remarkably robust, especially in cases in which a group retains *some* control over the legal and moral norms that shape its communal life – and as I have said, I am proposing that states retain quite a lot of control over these things.

To expand on these ideas, this paper will turn to the case of Jewish communities in diaspora. I will examine how certain Jewish diasporic communities, particularly in the classical rabbinic period of roughly the first to the seventh century CE, dealt with the complexities of retaining and expressing communal identity while living under the rule of external governments and political authorities. In their diasporic contexts, many Jewish religious leaders had to navigate the intersection of Jewish religious law with the laws of the wider political community. I focus especially on Jewish religious and legal thought about war, which is often taken the be the prerogative of the sovereign power in a given polity and therefore provides us an intriguing look into how some diasporic communities grappled with moral questions regarding the limits of their sovereignty and self-determination. Without claiming that we can simply transfer the ideas of these religious leaders and communities into our time, I will draw on their examples to spur creative thought about what it might look like for the states that make up our contemporary international system to come to terms with more fully honoring and abiding by international law. Specifically, I will ask what it might mean for states to be willing not to claim absolute sovereignty over every action they take, but instead to treat the norms of international law as a "moral floor" that determines the bare minimum obligations states have to uphold the rights of individuals and groups, and, in this spirit, to integrate their own laws with international law even as they critique international law and seek to modify it to be more reflective of their own moral concerns.

Interestingly, contemporary Jewish thinkers are working on these questions in their own creative ways, drawing on Jewish thought about law and ethics to deal with present concerns about the moral obligations of the state of Israel. At the end of the essay, therefore, I will consider current Jewish thought about war and sovereignty to show how some Jewish thinkers are advocating for something like the "moral floor" I propose. Again, I will not seek to draw a direct line from the thought of Jewish religious leaders in the early diaspora to concepts in contemporary Jewish thought about sovereignty, but the contemporary thinkers I cite do themselves look back to Jewish legal and moral thought over the centuries to inform their work. Current scholarly conversations on Jewish thought about sovereignty and the global

order provide a foundation for more robust engagement of nation-states with international law and a possible global "moral floor."

I begin my discussion of Jewish diasporic thought with a caveat. I do not intend to romanticize the tenuous and often-oppressive circumstances Jews in the first to seventh centuries CE found themselves in, or to say that the conditions under which those communities were forced to exist were morally sound or particularly conducive to well-being. One significant difference between the case of Jewish diasporic communities and the type of minimally shared sovereignty between nation-states and international institutions that I am proposing, is that Jewish communities were subject not to clearly promulgated and morally-justified legal and moral norms, but to the whims of the powers that ruled and often oppressed them. These communities showed remarkable resilience under pressure, and that can give us hope that communal laws and norms can, today, be maintained under conditions that are less oppressive; but that does not in any way make it right that, say, the Roman Empire, or a particular European king, would "allow" Jewish communities governance over certain aspects of communal life, while retaining the prerogative of simply forcing Jews either to obey a new set of laws, or to leave or be killed, when it suited the powers that be. The kind of qualified sovereignty I am proposing is a qualified sovereignty with very specific limits, in a system which recognizes and cares for certain basic human needs, such as the need to have food and shelter and not to be threatened with murder, torture, and the like. In many cases Jews *were* unjustly killed and subject to other acts of violence during the diaspora, up to and including the genocide of the Shoah. So I do not take the experience of Jewish communities, during this or other periods of exile, to be an ideal or even a good one. What I instead intend to propose is a system which draws insight from diasporic Jewish religious leaders and communities precisely to enhance the development of a global order in which the oppression and violence that Jewish and other marginalized communities have faced are *less* likely to happen.

Jewish Thought about War, Halakha, and Communal Identity Under Conditions of Limited Sovereignty

Many Jewish diasporic communities and the rabbis who sought to guide them retained a robust set of communal norms, laws, and ways of thinking during the classical rabbinic period. I examine the development of Jewish diasporic thought about *war*, specifically, for two reasons: 1) to describe one area of moral thought in which diasporic Jewish communities maintained communal identity while reckoning with laws imposed by political authorities outside the community; and 2) to engage ideas about sovereignty that are developed by contemporary Jewish thinkers in their discussions of states and international law. The authority to go to war is often considered to be *the* paradigmatic power and function of the sovereign, and only a sovereign power has the authority to go to war (Johnson: 2, 5-6). Therefore, to ask "who can go to war?" is to ask "who holds sovereign power?" Diasporic Jewish religious leaders' discussions of war, which pertain directly to questions of sovereignty, provide a particularly rich source of moral and legal thought for the contemporary Jewish thinkers we will examine later, and thus for my own considerations of international law and the possibility of qualified sovereignty. In this section, I will discuss the development of thought about war and sovereignty in various diasporic Jewish communities. I will further argue that Jewish communities' understanding of their moral life as fundamentally law-governed strengthened

and sharpened religious leaders' arguments about sovereignty and made it more possible for the communities to retain at least some communal religious norms while surviving under the authority and laws of outsiders.

In 132 CE, the failure of the Bar Kochba rebellion against Roman imperial authority led to Roman oppression of Jewish communities and the scattering of Jews who had been living in the region of Israel to other parts of the Middle East and to Europe. In the immediate aftermath of the rebellion, some of the rabbis who survived the fighting (and the Roman oppression that followed) turned to an interpretation of Torah that would, for all practical purposes, forbid the Jews from rising up in rebellion again. Based on the laws and narratives related in the Tanakh, they argued that for Jews there were two kinds of war: obligatory (some thinkers say "commanded") and discretionary (some thinkers say "optional") (Firestone 2006: 959; 2012: 3-5; Zohar 1996: 229).[9] And they defined these categories of war in such a way as to render either kind of war impossible for Jews at the time to engage in. Obligatory wars, those commanded by God, were by definition limited either to Joshua's wars of conquest as described in the Tanakh or to defensive wars against an attacker – but even the idea of defensive war as "commanded" was only laid out explicitly in the Jerusalem Talmud, and not in the Babylonian Talmud which is considered as more authoritative (Firestone 2006: 960). In addition, given that Jewish communities lacked political sovereignty, it would be difficult to argue that an enemy was actually going to *war* against them and that defensive war would therefore be necessary.

Discretionary wars, meanwhile, were defined as wars initiated by Israel against an enemy, the paradigmatic example being King David's wars of expansion. As Reuven Firestone puts it, in these rabbis' explications of Talmud, "discretionary war could still be sanctioned if the proper procedures for initiation were followed" (2006: 960), but these procedures required a king of Israel to initiate the war, the consent of the Sanhedrin, *and* a positive response after an oracular consultation using the high priest's breastplate. Given that there was no king of Israel and the Sanhedrin and office of the High Priest were in disarray, the chances of successfully carrying out any one of these procedures, let alone all three, were so low as to be nil.

Rabbis also argued against Jews trying to bring about conditions under which discretionary war would be a real possibility or in which a defensive war would be both thinkable and possible to win. The prospect of engaging in discretionary or defensive (commanded) war would almost certainly rely on Jews either returning to Israel or rising up in revolt against the gentiles under whose power they lived, and many rabbis interpreted Biblical texts to forbid Jews from doing either of these things. Through interpretation of the "Three Vows" found in a passage of the Song of Songs, they argued that Jews must uphold two vows:

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[9] Noah Feldman engages in an important discussion of Maimonides's use of these categories (which Feldman recognizes that Maimonides took from Talmudic sources) in the *Mishneh Torah* (93-100). In Feldman's view, Maimonides assumed that the "Noahide" commandments were universally applicable philosophical moral demands. This assumption then led Maimonides to argue that Jewish kings should follow specific ethical mandates, both in going to war and in their treatment of idolaters who were conquered in war. Feldman also compares Maimonides' thought to that of Averroes in intriguing ways. Since I am focusing primarily on the classical rabbinic period, I will not here examine Maimonides's work in depth, but I commend both Maimonides's thought on war, and Feldman's interpretation of his work, to the reader.

not to seek to conquer the land of Israel, either by force or by return in massive numbers, and not to rebel against gentile rulers. At the same time, the gentiles were to uphold a vow not to oppress the Jews in their midst too harshly. Jews who did try to conquer or organize mass movements into the land of Israel, or who rebelled against the gentiles, would be understood to be wrongly "forcing God's hand" by trying to bring about the messianic period before the time God had ordained (Firestone 2006: 960-62; Cooper: 84-85).

By limiting the Jewish community's ability to make war, or even to develop a political framework in which going to war might be possible, these rabbis limited the community's claim to political sovereignty. The claim to sovereignty was limited both in the sense that the Jewish community would not fight to be recognized as a sovereign nation among the world's various nations and empires, and in the sense that Jews acknowledged, however willingly or unwillingly, that their diasporic communities would have only limited control of their own laws and communal practices – because they would not be able to go to war to defend those laws and practices if they were challenged. For the rabbis we are discussing, this was a matter of communal self-preservation: especially after the failure of Bar Kochba, they worried that another rebellion would end with the global Jewish community being wiped out (Firestone 2006: 960).

But Jewish communities in diaspora, though lacking sovereignty in the sense of complete self-governance, did retain some control over their own communal life and norms. One important facet of their self-governance, which has intriguing implications for contemporary Jewish thought and for our own time, was that these communities and their rabbis deeply understood their life together to be law-governed. Rabbis of the first several centuries CE devoted much of their attention to developing more fully their various contributions to the religious-legal system of halakha. Of course, interpretation and practice of halakha varied from one community to the next. But halakha, as a shared system of legal interpretation, did serve as what Suzanne Last Stone calls a "transnational legal culture," meant to guide Jewish life in the areas of religious practice, the civic life of the community, and family life (342). As Stone puts it, through even the first full millennium of diaspora, "Judaism developed as a decentralized, semisovereign entity in exile" (342). Jewish communities had limited but real sovereignty over their own affairs, sovereignty which was structured and wielded through the interpretation and application of religious law. Jews acted as "a collective dedicated to the observance of law," and even "maintained their own court system throughout this time and possessed sufficient legal autonomy to enforce traditional Jewish law fully" (Stone: 346-47).[10] Interestingly, one way that Jewish communities and religious leaders seemed able to square the circle of living under others' governance while enforcing Jewish religious law was through an interpretation of the idea that "the law of the kingdom is the law." This notion developed among Babylonian Torah scholars in the fourth century and became widespread (Stone: 347). It was a way of saying that, in general, Jews should follow the laws of the lands in which they lived – and yet Jewish communities nevertheless were allowed by external powers, and claimed

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[10] This is not to say that religious laws would never have clashed with the laws of the various empires and kingdoms under which diasporic Jewish communities lived – prohibitions on idolatry, for instance. But at least some communities did manage to live in relative peace and to maintain control over their religious practices, even as they were marginalized by the wider political authorities and communities.

for themselves, meaningful self-governance through interpretation and enforcement of halakha. Jews' focus on the moral importance of law and legal interpretation aided them in finding creative ways to maintain recognizable communal identities and to have some say over their communal lives, while also, for the most part, following the laws of external political authorities.

In short, many diasporic rabbis sought to discourage Jews from seeking political sovereignty and the authority to go to war, and to encourage Jewish communities to live peacefully, as far as possible, under the authority of non-Jews. Yet they also sought to retain the community's understanding of itself as governed by Jewish law and by the religious-legal authority of Jewish teachers, in certain specific areas of communal life. In conditions of very incomplete sovereignty and even oppression, many Jews lived recognizably as Jews, in Jewish communities, with a set of laws that governed certain separate spheres of life from the laws of the wider communities in which they lived.

Zionism in the Modern Period and Jewish Arguments over the Nation-State and Diaspora

In the modern period things changed, with the advent of the Enlightenment in Europe and the rise of the nation-state as the basic unit of political organization. Jews sought, and in some cases were granted, emancipation in European societies. In these cases they became more fully integrated as citizens with civil rights and responsibilities in the wider social and political community. This new status came with its own set of problems and concerns. Even under conditions of Jewish emancipation, European leaders and citizens retained anti-Judaic ideas that were gradually developing into modern-era anti-Semitism. Jewish leaders and thinkers also worried that Jews would lose their Jewish identity as they assimilated. Zionism – most basically, the push for a Jewish state – was one way in which thinkers and activists tried to address these worries, informed by the modern notion that ethnic and/or religious communities needed to hold sovereign power in a nation-state in order to guarantee self-determination and avoid oppression. Jews certainly *were* oppressed and mistreated, especially in eastern Europe (Laqueur: xxv; Avineri: 7-9), and Zionism seemed a possible solution to that state of affairs. And after the horrors of the Shoah it was clear that Jews needed some sort of protection, whether that meant holding power in a Jewish state or something else. When the contemporary state of Israel was in fact established in the area of Israel/Palestine in 1948, largely by the power of British and United Nations leaders, a whole new set of questions arose. Jews now *did* hold sovereignty in a Jewish nation-state, and they faced not only the political debates and questions that any nation-state must deal with, but also a further set of problems, and critiques, that came with holding power in a state created by colonial powers through the act of displacing other ethnic and religious communities.

And this is what contemporary Jewish thinkers, and those who study Jewish political thought including but not limited to Zionism, now must wrestle with. *Must* an ethnic or religious community have power in a nation-state in order for its rights and well-being truly to be honored and upheld? Should nation-states have absolute sovereignty over their own affairs, no matter what they do? How do the particular laws, norms, and circumstances of any given nation-state intersect with international law and global norms regarding basic human well-being, and should international norms ever be understood to outweigh the norms or interests of individual nation-states and the communities in them?

These questions take on a particular urgency due to the specific circumstances of the Jewish community both in and outside of the State of Israel. These include the memory of the Shoah and of anti-Semitism in general, including what seems to be a rise in vocal and virulent anti-Semitism as white nationalism rears its ugly head in the United States and parts of Europe; the wars that Israel has been involved in, by choice or not, ever since its founding; the ongoing occupation of Palestinian-majority territories; concerns about security issues and terrorism; and the continued dilemma of a one- or two-state solution in Israel/Palestine, a debate which has been exacerbated and made more volatile by recent United States initiatives to declare Jerusalem the capital of Israel and the relocation of the American embassy there.

Even so, the questions faced by Jewish thinkers, and by those who study Israel as a Jewish nation-state, are questions about political sovereignty that are being asked all over the world. Jewish ethical and political thought gives us a useful lens through which to view these globally relevant questions, precisely because of the history of Jewish communities and their trajectory of thought about sovereignty: because Jewish thought is, for most of its history, the thought of a community in diaspora. Jewish communities and religious teachers for many centuries found ways to maintain communal norms, and to develop and interpret their own laws, without the protection of full sovereignty and self-determination. Jewish thought has a long history of integrating halakha with the laws of outsiders.

Contemporary Jewish thinkers, therefore, have resources for understanding sovereignty and the intersection of various sorts of law that are not so clearly available to others. These resources have given Jewish thinkers a more creative set of possible ways to understand how the laws of nation-states as self-determining political communities might intersect with international law, in order to best promote human well-being worldwide. In particular, Jewish thinkers at the more cosmopolitan end of the ideological spectrum have drawn on the precedent of integrating systems of laws at different levels of sovereignty as they seek to understand how Israeli law and practice ought to intersect with international law. Again, most of these discussions arise out of thought about war, because the violence of war and its standing as *the* paradigmatic action of the sovereign renders questions of sovereignty and human well-being particularly pressing. While the thinkers whose work I examine speak about Israel specifically, their proposals are applicable to other nation-states as well.

Shaul Yisraeli is one of the primary twentieth-century thinkers who sought to understand, from a Jewish perspective, how halakha could properly intersect with universal legal norms – here, understood as the norms of international law – in guiding the war-making practices of sovereign nation-states. Like the famous medieval scholars Maimonides and Nissim Gerondi, Yisraeli argued that halakha could and even ought to be supplemented by integrating universal legal norms into Jewish law and practice (Eisen: 146; Stone: 351-55). When there is a gap in the halakhic discussion of a particular issue, Yisraeli asserts, Torah itself provides a means for accepting universal legal norms as binding on the Jewish community, including and especially a sovereign Jewish *political* community. Deuteronomy 17 describes the Jewish king as a king "like all the other nations," but it assigns him no positive duties other than to read a scroll of the law every day of his life and to obey *its* commands. Now this does mean that the Jewish king will read, and presumably follow, positive commands found in the scroll of the law; he will therefore obey Jewish religious law. But even so, this understanding of the king's duties leaves much unsaid when it comes to specific questions of governance. Yisraeli and others

argue that since the Jewish king is to be a king like those of all other nations, it stands to reason that when specific halakhic norms are not available as guidance, *universal* moral norms may apply to the king's actions as they do to those of other kings. In the contemporary context, this would mean that the political rulers of a sovereign Jewish community – for Yisraeli, the nation-state of Israel – can and even should draw on norms of international law to direct governmental actions in the realm of war-making and the use of force. Yisraeli even goes so far as to argue that if international law places stricter limits on the use of force than halakha would seem to, Israel, as a member of the global community of nations, ought to abide by the norms of international law (Stone: 351-56).

It is important to note that there is a gap here between Yisraeli's acceptance of the norms of international law and the use to which he puts his thought. He sets out the ideas discussed above in his long essay entitled "*Takrit kibiyah le-or ha-halakhah*," which serves as his attempt to justify the Israeli raid of revenge on the West Bank village of Qibya in 1953, in which many civilians were killed. As Robert Eisen (148) points out, Yisraeli seems not to have known all that much about international law and seems to have assumed that international law permitted the intentional killing of civilians in such cases, which, to be clear, it does not. So Yisraeli argues that international law should govern acts of war even to the point of overriding more-permissive halakhic norms; yet in the actual case in front of him, he bases his justification of the Qibya raid on halakhic norms which, he fails to realize, are (in his version of these norms) more permissive than international norms. This makes him a troubling thinker to follow in some ways, and yet more recent Jewish cosmopolitan thinkers have found his reasoning helpful both as a source and as a subject of critique, as they develop their own arguments in favor of Jewish and Israeli acceptance of international norms (rendering Israel's sovereignty somewhat less than absolute) to govern acts of war.

Several of these contemporary critics have focused not on Yisraeli's misunderstanding of international law, but instead on his seeming belief that halakha could only ever provide a more-permissive take than international law on the norms of war. Insofar as Yisraeli (in theory) accepts the norms of international law as proper norms to govern the action of the state of Israel, he seems not to allow that halakha, since he thinks it is more permissive, could play any role at all in shaping norms of war, for Israel or anyone else. Some contemporary scholars argue, on the other hand, that halakha does have the potential to shape a distinctive Jewish ethical contribution to a broad discussion of the laws of war, even as they agree that Israel as a nation-state should recognize and obey the demands of international law (Stone: 358-59). These thinkers see halakha as a foundation for ethical critique that takes international law not as a maximal set of norms to govern war but as, instead, a minimal baseline for moral behavior in the global arena. In their view, Jews, and the nation-state of Israel specifically, should abide by international law, but Jewish ethical thought, rooted in halakha, should also strive to articulate ideal moral norms that will influence the development of international law in the direction of promoting human well-being. To take an early case, Yeshayahu Leibowitz strongly critiqued what he saw as the state of Israel co-opting religious ideas for political ends. Leibowitz (16-17) argued in favor of a rabbinate that would weigh in – from a *religious* perspective – on ethical issues, based on the rabbis' interpretation of Torah and other religious-legal sources, even if that meant critiquing Israel or any other political entity. More recently, Jeremy Wieder (259-60) has argued for the participation of a Jewish state in a system

of international law on both halakhic and practical grounds, but he reserves the right to disobey or critique international law in cases where it contravenes halakhic norms or is understood to be immoral by the Jewish tradition. Elie Holzer (385-404, esp. 402-4) describes a school of thought that sees a political-nationalist ideology as idolatrous and asserts that halakhic ethics holds Jews and the State of Israel to a higher standard than that of "all the nations," in the words of Rabbi Moshe Avigdor Amiel.

The notion that Jewish ethics has both critique and substance to add to international discussions of war has come to some fruition in the work of the well-known American Jewish thinkers Elliot N. Dorff and Michael Walzer. Dorff examines Jewish thought on war in order to begin to suggest a "Jewish approach to war and peace." His approach incorporates many standard international norms of war, for example, self-defense as one of the very few reasons to go to war. But it also includes specifically Jewish norms, for instance, avoidance of idolatry as the one justifiable reason for war other than self-defense, as well as the clear imperative to *actively* seek peace based on "all the prayers and hopes in the Jewish tradition for a world without war" (Dorff: 660). Walzer's philosophical work on war is well-known among just war scholars, but what is fascinating about his work on specifically *Jewish* thinking about war is his recognition that Jewish scholars such as Maimonides were developing their ideas about war from the "standpoint of the victims of war" (637). This allows Walzer to suggest a new direction for thought about war at the international level: "there ought to be a doctrine of warfare, a set of laws of war, written, so to speak, on behalf of the victims." Walzer hopes that Jews will not be victims again, but he argues that the Jewish experience of diaspora and oppression gives the tradition resources to develop a Jewish theory of war: a *universal* theory, but one that intentionally draws on "sustained reflection . . . on what it means to be a noncombatant, a bystander, an innocent person caught up in the terrible coerciveness of war" (641). In his work as in the work of all of these theorists, we see the possibility of an intersection of international law, the laws of a nation-state, and religious law as it developed over centuries of diaspora: Jewish thought on war and the actions of the State of Israel are envisioned as accepting international norms, but also as shaping those norms specifically based on the experience of Jews over two millennia.

Conclusion

The work of these contemporary Jewish thinkers fleshes out two points: one, that acceptance of qualified sovereignty of nation-states does not mean losing communal identity; and, two, that a system of qualified sovereignty that is law-governed both helps to fairly enforce a moral floor for treatment of human beings and allows authorities and systems of law at *all* levels to critique each other from a moral perspective. That is to say, in the type of system I am proposing, actions are law-governed, but laws are not simply imposed on communities by bureaucrats from above: critique flows from the bottom up as well as from the top down.

To the first point, the fact that contemporary Jewish thinkers about war and sovereignty do in fact draw on Jewish religious-legal and ethical thought – the fact that they *have* this thought to draw on – demonstrates that the Jewish tradition has survived its centuries of diaspora while retaining community ties and communal traditions of thought and practice. Again, the experience of Jews in diaspora was often quite horrific, so my point is not to

romanticize. But the robustness of Jewish thought, both during and after diaspora, demonstrates that it is possible, even under oppressive conditions, for communities to retain their bonds and distinct identities under conditions of less-than-absolute sovereignty.

If we take this example as meaningful, it would seem that the various national, religious, and other communities of the world are not, in fact, at risk of blending together in some indiscernible globalist blob if the sovereignty of nation-states becomes (in both principle and practice) internationally recognized as less than entirely absolute. I hope this may help eliminate one source of fear – the fear of losing one's communal identity – that, consciously or not, keeps the citizens and leaders of nation-states from acceding to some minimal qualification of the sovereignty of those nation-states. With that in mind, the importance of promoting and actually *enforcing* international laws against unjust killing, torture, rape, slavery, and the like gives us strong reason to argue that international institutions – in practice, the United Nations – ought to have clear authority to enforce a moral floor whereby acts of genocide, torture, and so on are stopped and punished immediately, without having to wait for permission from the nation-states of the world. (We may note that this permission normally takes the form of a Security Council resolution, which means it can always be vetoed by just one permanent member of the Security Council – and therefore, too often, nothing is done about horrific cases like that of the civil war in Syria.)

And as I have said, this enforcement must be law-governed. In the situation I am envisioning, the relevant laws and enforcement mechanisms used by the U.N. to protect against genocide, torture, and the like would be clearly laid out and fairly enforced – meaning, especially, that powerful nations would be equally subject to censure or punishment for the same crimes as less-powerful nations. While fair enforcement of laws is an ongoing concern, fair treatment becomes more likely when all nations, including those most powerful, agree to honor and submit to the enforcement of a clear set of laws promoting minimal norms of behavior. Acceptance of qualified sovereignty by *all* nations of the world, powerful and less-powerful alike, would therefore be a step in the direction of fair enforcement. In short, establishing and actually enforcing a minimal moral floor is not harmful to communal norms and self-determination – and it is the very least the world can do to protect people against the most egregious of harms.

To the second point, the example of the Jewish cosmopolitan thinkers above shows that even if nation-states do give up just enough self-determination to establish this moral floor, it is not only international law that gets to critique the practices of national or local communities. Allowing the practices of nation-states to be governed, at a minimal level, by enforceable international law also means allowing for modification and critique of international law by the religious and philosophical moral systems we are committed to as individuals and communities. Laws of nation-states themselves may serve as models for improved laws at the international level, and religious or philosophical moral thinkers can argue for better protection of people in any number of ways, just as they do now.

In the world we now have, human well-being is best promoted, I argue, by a system of shared sovereignty in which the sovereignty of any given entity is at least minimally qualified. To be sure, the world has never been fully "Westphalian" in practice: there has never truly been a time when all nation-states enjoyed absolute sovereignty and self-determination. But

our failures of Westphalianism often go in the opposite direction of the ideal set out here: instead of enforcing minimal moral norms applicable to all, powerful nation-states have breached others' sovereignty for their own self-interest, and then, when their self-interest was not at stake, have looked the other way as people are tortured or killed. We need a system in which international laws that forbid crimes against humanity are actually enforceable by an international power (which, at least for now, would be the United Nations). Nation-states would retain control over nearly all other aspects of their communal life, and local authorities would retain various levels of control, depending on context, over their local communities. The nation-states of the world ought to work through the United Nations to agree to an enforceable moral floor of behavior globally. They should also establish meaningful enforcement mechanisms to stop and punish the very worst human rights violations, mechanisms that do not depend on permission from powerful nation-states. These mechanisms and the U.N. authorities who deploy them should also, of course, be subject to critique and censure if enforcement mechanisms are not ideal or if authorities act badly.

The political will to do this is not especially robust at the moment, particularly in powerful nations like the United States which do not like the idea of being constrained by anyone but themselves. But I have tried to show that the U.S. and other states should not worry about, and cannot use as an excuse, the idea that their communal bonds or identities or laws will be rendered meaningfully weaker if the sovereignty of the nation-state is qualified in this minimal way. The case of Jewish communities in diaspora, though under very different circumstances, demonstrates that identity does not have to be lost even if sovereignty is limited. Even more than that, the creativity of Jewish thinkers in bringing to bear ideas developed under conditions of loss of sovereignty shows that, in circumstances of less-than-absolute sovereignty, a community's ability to critique international law from its own distinct perspective can even be enhanced.

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