WILDERNESS AS A FUNDAMENTAL CONCEPT OF LAW

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Even today, standard works on the history of political thought trace it back, through Marx, Rousseau and Hobbes to Plato's Republic, Aristotle's Politics, and the Greek city-states (Athens in particular) of the fourth century BCE. This is a serious error. To be sure, words like "democracy" (rule by the people) are Greek in origin. The Greeks were gifted at abstract nouns and systematic thought. However, if we look at the "birth of the modern"–at figures like Milton, Hobbes and Locke in England, and the founding fathers of America–the book with which they were in dialogue was not Plato or Aristotle, but the Hebrew Bible. Hobbes quotes it 657 times in The Leviathan alone. Long before the Greek philosophers, and far more profoundly, at Mount Sinai the concept of a free society was born.

–Jonathan Sacks[1]

A Theory of Law

Sovereign is he whose legal order over a territory binds a people in covenant.

Two elements of this covenant allow for the possibility of legal order. The people freely accept the obligation to uphold the law, *and* the sovereign demands the compliance of the people with the threat of force. The covenant is binding only with both the consent of the people and the coercion of the sovereign. The paradoxical combination of coercion and consent is thus the source of the sovereign's legitimate authority.[2]

For decades the great debate of jurisprudence has been over this question: *What is law?* Or perhaps more precisely: *What makes law binding?* The question is general, in that the answer will describe most legal systems. The question is also descriptive, in that the answer will amorally describe law as it exists in the world.[3]

John Austin, following Jeremy Bentham, advanced a theory of law as sovereign command. John Austin is well known for his exposition on the role of force for law. The difference between law and custom, he argued, is in the existence of force. In Austin's framing, laws are a type of command that is enforced by the possibility of sanction. Rules of conduct that are generally observed but are

[1] The Politics of Revelation Shevat 18, 5773 · January 29, 2013, available at http://www.chabad.org/parshah/article_cdo/aid/2113038/jewish/The-Politics-of-Revelation.htm

[2] See also DENNIS WRONG, POWER: ITS FORMS, BASES, AND USES (1980) on Weber's *Herrschaft*

[3] Hart's Postscript (HLA Hart, The Concept of Law, 239ish, 2d ed. 1994)

not imposed by any force beyond social disapprobation are custom. Individual customs can become law if and when enforced by the state.[4]

Austin also recognized the importance of the people's habitual obedience. To be a sovereign state, the generality of the society "must be in the habit of obedience to a determinate and common superior: whilst that determinate person, or determinate body of persons must not be habitually obedient to a determinate person or body."[5] Habitual obedience stops short of acceptance, however.

On this point is where H. L. A. Hart differed. Hart saw law as arising solely from the true consent of the people.[6] [HART SECTION PLACEHOLDER]

Both sides, as Joseph Raz rightly noted, wrongly assume that the concept of a *legal system* would follow from the concept of *a law*. On the contrary, said Raz, the definition of a law follows from the concept of *a legal system*. Legal systems are not merely sets of independent individual laws but "intricate webs of interconnected laws."[7] But Raz's further philosophy of law suffers from an almost mathematical approach that is too abstract to capture any sort of consensus.

Where better to look for answers on the concept of a legal system than in the oldest living legal system: Jewish law. Austin and Hart, focused narrowly on the question of a particular law, missed the broader picture in which a legal system flows not only from coercion and not only from acceptance. As we will see, Jewish law recognizes a fundamental truth of law: legal systems rest simultaneously on both sovereign coercion and popular acceptance of the sovereign's legitimate authority.

A Jewish Political Theology:

Carl Schmitt's *Political Theology*, which sets out his theory of the sovereign state, is indeed a theology. In Schmitt's view, as explained by Tracey Strong, sovereign states "hold back human instincts toward anarchy and chaos until the Second Coming."[8] A corollary of Schmitt's view, Strong added, is that

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[4] John Austin, The Province of Jurisprudence Determined, Lecture 1 (reprint from Vol I, John Austin, Lectures on Jurisprudence, 5th ed. 1885)

[5] John Austin, The Province of Jurisprudence Determined, Lecture V1 (reprint from Vol I, John Austin, Lectures on Jurisprudence, 5th ed. 1885) (emphasis omitted)

[6] H. L. A. HART, THE CONCEPT OF LAW (1961)

[7] JOSEPH RAZ, THE CONCEPT OF A LEGAL SYSTEM 183 (1980).

[8] strong foreward, in schmitt leviathan, xxv

> Jews, who deny that Jesus is the Messiah, constitute a threat to the entire political doctrine of Schmitt. This is the oldest form of anti-Semitism given a new twist: the denial of Christ as the Messiah constitutes a threat to the possibility of political order and furthers the depoliticization and neutralization of humanity.[9]

Judaism, of course, is not the threat to political order that Schmitt envisioned. While Jewish law is generally binding only on Jews[10], Judaism recognizes seven Noahide Laws that are understood as binding on all of humanity. The seventh law obligates all peoples to establish courts in every town.[11] Far from a threat to order, Jews insist on it.

Moreover, if we substitute a Jewish political theology for Schmitt's antisemitic Catholic political theology, we will discover familiar notions of sovereignty, authority, and legal order that will enable a deeper and fuller understanding of the exception.

Many theorists have discovered the source of law in a theological conception of sovereignty. In Jewish thought, we find a quasi-rejection of the divinity of Jewish Law. The Law, we learn in Deut. 30:12, "is not in heaven." In the Talmudic story of the Oven of Akhnai (Bava Metzia 59a–b) we find that rabbinical authority can indeed supersede heavenly authority.

In the dispute over the oven, Rabbi Eliezer brings "every answer in the world" to support his position, but his arguments from reason were not accepted. He then brings proof by miracle that the law is in accordance with his position.

> Rabbi Eliezer said to the Rabbis: If the law is in accordance with my opinion, this carob tree will prove it.
>
> The carob tree was uprooted from its place one hundred cubits, and some say four hundred cubits.
>
> The Rabbis said to him: One does not cite proof from the carob tree.

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[9] strong foreward, in schmitt leviathan, xxvi

[10] Rashi's commentary on first pasuq of mishpatim (also: Look at midrash, incl 6:4):
לפניהם. וְלֹא לִפְנֵי גוֹיִם...
לפניהם BEFORE THEM — but not before the heathens. Even if you know that in the case of a particular matter of law they will decide it in the same way as Jewish law would, do not bring it before their courts; for he who brings Israel's law-cases before the heathens defames the Name of the Lord and pays honour to the name of the idol (in the name of which the heathen court administers justice), thereby giving it undue importance, as it is said, (Deuteronomy 32:31) "For their rock is not as our Rock that our enemies should be judges over us", which implies: when our enemies are judges over us (i. e. if we make them judges over us) it is a testimony to the superiority of that which they reverence (their idol) (Midrash Tanchuma 2:6:3).

[11] Rambam mishneh torah kings & wars, 9:14

> Rabbi Eliezer then said to them: If the law is in accordance with my opinion, the stream will prove it.
>
> The water in the stream turned backward and began flowing in the opposite direction.
>
> They said to him: One does not cite proof from a stream.
>
> Rabbi Eliezer then said to them: If the law is in accordance with my opinion, the walls of the study hall will prove it.
>
> The walls of the study hall leaned inward and began to fall.
>
> Rabbi Yehoshua scolded the walls and said to them: If Torah scholars are contending with each other in matters of law, what is the nature of your involvement in this dispute?
>
> The walls did not fall because of the deference due Rabbi Yehoshua, but they did not straighten because of the deference due Rabbi Eliezer, and they still remain leaning.

Surprisingly, heavenly miracles are unable to reveal the law. Rabbi Yehoshua even chastises the objects of these miracles for intervening in the law. And were it not for the deference due to Rabbi Eliezer as a righteous human being—not for any heavenly reason—the walls of the study hall would have returned to their original upright positions.

The story continues with a more direct intervention from heaven:

> Rabbi Eliezer then said to them: If the law is in accordance with my opinion, Heaven will prove it.
>
> A Divine Voice emerged from Heaven and said: Why are you differing with Rabbi Eliezer, as the law is in accordance with his opinion in every place that he expresses an opinion?
>
> Rabbi Yehoshua stood on his feet and said: It is written: "It is not in heaven" (Deut. 30:12).
>
> What is the relevance of the phrase "It is not in heaven" in this context? Rabbi Yirmeya says: Since the Torah was already given at Mount Sinai, we do not regard a Divine Voice, as You already wrote at Mount Sinai, in the Torah: "After a majority to incline" (Exodus 23:2). Since the majority of Rabbis disagreed with Rabbi Eliezer's opinion, the law is not ruled in accordance with his opinion.
>
> Years after, Rabbi Natan encountered Elijah the prophet and said to him: What did the Holy One, Blessed be He, do at that time, when Rabbi Yehoshua issued his declaration?
>
> Elijah said to him: The Holy One, Blessed be He, smiled and said, "My children have triumphed over Me."

The heavenly voice, which insisted that Rabbi Eliezer was correct, was rejected. Instead, as God surprisingly concedes, the law triumphed over God. God, therefore, is not the ultimate source of the law. If God is to be the ultimate source of law, then God must be the source of law forever. If the ostensible source of law institutes law on one day, then the same source of law must be able to institute overriding law on the next day. The exception to this rule is if the source of law is

inherently impermanent. But God is eternal, preceding all and succeeding all.[12] God is not the source of the law.

We ought not dispose of God's role so quickly. God is, of course, the progenitor of the law. God gave the Torah at Mount Sinai. Even so, we should not over-emphasize the subject—God—in the action of giving the Torah at Mount Sinai.

José Faur similarly insisted, "the basis of Judaism is not conformity to the revealed will of God, but conformity to Sinaitic law." Revelation which preceded Sinai, he noted, "has no legal authority." Divine revelation after the Jewish people leave the wilderness and enter the Promised Land merely admonishes the people to observe the law given at Sinai. It does not — indeed it cannot — add to or subtract from Sinaitic law.[13]

In referencing the revelation at Sinai, Rabbi Yirmeya used the passive voice ("the Torah was already given at Mount Sinai"), thereby obscuring God-as-giver. The legitimacy of the law lies in the *giving* of the Torah. The source of law is an action, not a being, divine or otherwise.

The source of law is a covenant.

The giving of the Torah occurred, as already noted, at Mount Sinai. The Israelites journeyed from Refidim to the Sinai wilderness, and there they encamped east of Mount Sinai (Ex. 19:2). After days of preparation, the appointed day arrived. Moses led the people from their camp, and "they took their places at the foot of the mountain" in order to receive the Torah (Ex. 19:18). Rashi explained that the literal meaning of the phrase is "at the foot of the mountain" but that the midrashic explanation is that the people were standing *underneath* the mountain. The Talmud relates:

> Rabbi Avdimi bar Ḥama bar Ḥasa said: the Jewish people actually stood beneath the mountain, and the verse teaches that the Holy One, Blessed be He, overturned the mountain above the Jews like a tub, and said to them: If you accept the Torah, excellent, and if not, there will be your burial."[14]

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[12] Jews "believe with perfect faith that the Creator, Blessed be His Name, is first and last." Maimonides, Thirteen Principles of Jewish Faith

[13] Faur, Understanding the Covenant, Tradition p. 41. Faur's precise phrasing about admonitory revelation refers to "post-Sinaitic revelation contained in the Prophets and Hagiographa." My rendering of his meaning is, I think, true to his intended meaning and better captures his intent for a general audience.

[14] Shabbat 88a. The Talmud later relates that the coercive threat was not only to the Jewish people but to all of Creation: "if they do not accept it, I will return you to the primordial state of chaos and disorder." Id.

These two understandings of the verse seem diametrically opposed. In the literal meaning, the people freely accept, or consent to, the law. In the more metaphorical meaning, the people are coerced into accepting the law on penalty of death. Yet within the rabbinical interpretation both meanings can be understood as "true."

The conflict in the meanings bothered the rabbis:

> Rav Aḥa bar Ya'akov said: From here there is a substantial caveat to the obligation to fulfill the Torah. The Jewish people can claim that they were coerced into accepting the Torah, and it is therefore not binding.[15]

Perhaps law is not obligatory if it was coerced, after all?

> Rava said: Even so, they again accepted it willingly in the time of Ahasuerus, as it is written: "The Jews ordained, and took upon them, and upon their seed, and upon all such as joined themselves unto them" (Esther 9:27), and he taught: The Jews ordained what they had already taken upon themselves through coercion at Sinai.[16]

Rava's response can be read as making the legitimacy of law conditional on free consent alone — that only once the coercion had faded did the laws take on the status of law. The better understanding of Rava's response, however, is this: law rests on *both* free consent and coercion. If it occurs to you, as it occurred to Rav Aḥa, that there can be no free consent contemporaneous to coercion, Rava points to the people's consent a long time time thereafter, when the threat is not readily apparent. He is not suggesting that consent only came at that later point in time. Rather, consent at the later point in time merely reveals, in the absence of any apparent threat, that consent was present all along.

Faur pointed to parallel occurrences of free consent, far earlier than the time of Ahasuerus, when the people were still in the wilderness. In the events of Exodus 24:4–8, described by Faur as the ratification of the pact between God and the whole nation:

> God is conspicuously absent. There is nothing that may coerce, frighten, or suggest to the people. Freely and at once, the people burst the quietness of the morning with these words: "All that the Lord hath spoken we will do and we will hearken."[17]

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[15] Shabbat 88a

[16] Shabbat 88a

[17] Faur 43

The people's consent is essential to the legitimacy of the law as law. On this point, Rav Aḥa and Rava seem to have agreed "that, absent an act of genuine consent, God's law does not bind."[18] It is for this reason that there is such an emphasis on showing that the people did, in fact, consent.

But coercion by the sovereign is equally essential to the legitimacy of the law as law. Judah Loew, the Maharal of Prague, offered the first of two explanations:

> ...God held the mountain over them so that Israel would not say: "We accepted the Torah on our own, and had we not willed it we would not have received the Torah." This would not have suited the elevated status of the Torah.[19]

The concept of law demands that law have an elevated status, a status above everyday life. We might promise to exercise regularly as easily as we promise to honor our parents. Why is the promise to exercise not law, while the promise to honor our parents is law? Sovereign coercion rendered the prosaic pledges of the people into Mosaic Law. Said Hobbes, "covenants, without the sword, are but words, and of no strength to secure a man at all."[20] Law demands the people's awe, and the sovereign secures their awe with the threat of force.[21]

The Maharal's second explanation is that consent without coercion risks law being contingent:

> It may also be said that God held the mountain over them . . . so that Israel would not say that there might be — Heaven forbid — an annulment of the acceptance of the Torah. [For one might argue that] since Israel voluntarily accepted the Torah, they can be released from it, for it was not done of necessity but was contingent: they may or may not have accepted.[22]

The covenant that underlies the entire legal system, however, is no mere frivolity. It is *necessary* for the people to accept the covenant for the sovereign to be sovereign. In the case of God's sovereignty, the consequences of rejection would have been catastrophic. The universe of God's creation cannot possibly deny God's sovereignty. Thus the particular threat demanding the Jewish people to accept the Torah extended to the entire universe: "if they do not accept it, I will return you to the primordial state of chaos and disorder."[23] In less cosmic terms, the nature of sovereignty requires he who claims sovereignty to coerce the people's acceptance of his sovereignty in order for him to attain sovereignty.

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[18] Michael J. Sandel, in Walzer JPT 31

[19] Judah Loew, *Tiferet Israel*, Chapter 32, in walzer Jewish political tradition 41

[20] Leviathan ch. 17, at 131

[21] see Leviathan ch. 17, at 131–132

[22] Judah Loew, *Tiferet Israel*, Chapter 32, in walzer Jewish political tradition 42

[23] Shabbat 88a

The people are thus obligated, not to obey God's commands per se, but to follow God's legal order, which they freely accepted and that God coercively imposed upon them. This is the central theoretical basis for Jewish law as law.

There is a further matter here which demands consideration: the spatial, or territorial, aspect of legal order. While the covenant between God and the Jewish people is universal — its validity extends everywhere and for all time — the legal order the covenant creates applies primarily to the Land of Israel.

Nachmanides, the 13th century Jewish scholar from Spain known as the Ramban, explained in his commentary on the Torah that God separated the nations and established borders between them. God gave the Land of Israel to the Jewish nation and sanctified them with his laws. "[T]he essence of all the laws," the Ramban wrote, "are for those dwelling in the Land of Israel." That is, God's legal order is for the Land of Israel, *and not for other lands*. According to this view, Jews in exile should still adhere to the law, but only so that upon their return to the Land of Israel the laws will not be new to them.[24]

For this reason the Talmudic sages taught that a Jew "should always reside in the Land of Israel…." Living outside of the Land of Israel is compared to turning away from God and engaging in idolatry.[25]

Thus, Abraham Isaac Kook, the first Chief Rabbi of Mandatory Palestine and a leading figure of Religious Zionism declared, "The Land of Israel is not an external thing," but rather "bound to the nation in the bond of life…."[26]

Or perhaps more precisely, the Land of Israel is bound to the nation of Israel in the bond of the *covenant* of life. If we return to Deuteronomy 30, where we learned the law "is not in the heavens," we find a few verses later a presentation of Moses to the people:

> 15 See, I set before you this day: life and good, death and evil.
>
> 16 For I command you this day, to love the LORD your God, to walk in His ways, and to keep His commandments, His laws, and His rules, that you may live and multiply, and that the LORD your God may bless you in the land that you are about to enter and possess.

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[24] Ramban on Lev. 18:25; see also Rashi commentary on Deut. 11:18 ("Even after you have been banished [from the Land of Israel] make yourselves distinctive by means of My commands: lay *tefillin*, attach *mezuzot* to your doorposts, so that these shall not be novelties to you when you return.")

[25] Ketubot 110b

[26] Kook, Orot, ch. 1

> 17 But if your heart turns away and you give no heed, and are lured into the worship and service of other gods,
>
> 18 I declare to you this day that you shall certainly perish; you shall not long endure on the soil that you are crossing the Jordan to enter and possess.
>
> 19 I call heaven and earth to witness against you this day: I have put before you life and death, blessing and curse. Choose life—if you and your offspring would live—
>
> 20 by loving the LORD your God, heeding His commands, and holding fast to Him. For thereby you shall have life and shall long endure upon the soil that the LORD swore to your ancestors, Abraham, Isaac, and Jacob, to give to them.

Here it is plainly apparent: Torah binds together God and the people of Israel in the Land of Israel, with its legal order. *Sovereign and People, in a Territory, bound with Law.* Hegemon and Demos, in a Polis, bound together with Nomos. This law, this *nomos*, provides in itself the form and method of governance, including the hierarchy of authority.

The generalized definition of the relationships between these concepts presented here is universally applicable and encompasses all forms of political and legal order. Even in the most autocratic sovereign space, sovereign authority necessarily, though perhaps only implicitly, derives from law, namely that (1) there is a dictator; (2) X is the dictator; and (3) the commands of the dictator are law. In democracies and republics in which the people are sovereign, the people serve in both the roles of *hegemon* and *demos*. The people-as-sovereign implicitly covenant with the people-as-demos. In all sovereign spaces, the political structure of a sovereign system, including the relationship of people and sovereign, is determined internally to the legal order. Recall that in Jewish political theology, the law supersedes even divine command to the contrary.

Having discovered the essence of a legal system in the paradoxical combination of sovereign coercion and free acceptance by the people, and conceptualized the relationship between law, sovereignty, peoplehood, and territory, significant questions still remain. Before delving further into questions of legal order, the opposite extreme demands brief consideration. This is the state of nature.

The Concept of the State of Nature

The state of nature is a space and time that admits of no legal order — a space-time of chaos and anarchy. Here man is as a wolf to his fellow man (*homo homini lupus*).[27] Hobbes characterized this space somewhat simplistically as one in which "every man is enemy to every man."[28] The state of

[27] Schmitt Leviathan 31.

[28] Hobbes, Leviathan, ch. 13.5.

nature is therefore a zone of palpable, continuous danger to human life.[29] If sovereign space is a space of nomos, the state of nature is a space of *antinomy*. Antinomy here bears little resemblance to the Kantian use of the term. Rather, antinomy is to be understood more literally as *anti-nomos*, or "in opposition to legal order." Antinomy and nomos are self-annihilating, and indeed antinomy exists as a space-time of annihilation. Annihilation is loud, destructive, and lethal.

The total absence of legal order does not mean that every form of order is completely absent here. Hobbes' "every man is enemy to every man" is perhaps better phrased as "every man for himself." This is the law of the jungle. The law of the jungle does not of course remotely resemble law in the juridical sense but rather in a natural, pseudo-biological sense.

J. L. Mackie explored the content of the law of the jungle in a 1978 essay devoted to the subject. The colloquial meaning of the term, he reported, refers to "unrestrained and ruthless competition, with everyone out solely for his own advantage."[30] But Rudyard Kipling, who coined the term "law of the jungle,"[31] understood it in a completely different way. Kipling's law of the jungle is a law of social cooperation in a wolf pack. Mackie elaborated, "Its provisions are a judicious mixture of individualism and collectivism, prescribing graduated and qualified rights for fathers of families, mothers with cubs, and young wolves, which constitute an elementary system of welfare services."[32]

In Mackie's own version of the law of the jungle, each individual primarily acts selfishly but also acts with reciprocal altruism and self-referential altruism. Reciprocal altruism is "helping those (and only those) who help you." Self-referential altruism is a term borrowed from C. D. Broad.[33] Broad wrote, "Each of us is born as a member of a certain family, a citizen of a certain country, and so on." After discussing the family, mostly not relevant for our purposes, Broad continued,

> [E]ach of us has direct obligations to certain groups of persons, considered as collective wholes, of which he is a member. The most obvious case is one's nation, considered as a collective whole.... [E]ach of us is frequently under an obligation to sacrifice his own happiness, and

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[29] Schmitt, Leviathan 49

[30] J.L. Mackie, The Law of the Jungle: Moral Alternatives and Principles of Evolution, Philosophy, Vol. 53, No. 206 (Oct., 1978), pp. 455-464. p. 455

[31] *The Second Jungle Book*

[32] J.L. Mackie, The Law of the Jungle: Moral Alternatives and Principles of Evolution, Philosophy, Vol. 53, No. 206 (Oct., 1978), pp. 455-464. p. 455

[33] J.L. Mackie, The Law of the Jungle: Moral Alternatives and Principles of Evolution, Philosophy, Vol. 53, No. 206 (Oct., 1978), pp. 455-464. p. 460

> sometimes to sacrifice the development of his personality and even to give up his life for the benefit of other persons or institutions.[34]

Put simply, self-referential altruism is helping those who are like us.

As far as the law of the jungle goes to discover or explain order in the state of nature, this order remains an order of self-interest and self-preservation. Such an order bears no resemblance to law. It serves the individual alone. Law, conversely, moderates the selfishness of the individual to serve others. These moderating norms of law by definition cannot exist in the state of nature.

For centuries in Western thought, the state of nature has been the antithesis of sovereign space. But a binary approach to sovereign space and the state of nature is woefully insufficient to account for reality.

The Concept of Wilderness

Wilderness lies between sovereign space and the state of nature, with attributes of each but belonging to neither sphere. It is the liminal space-time in which legal orders are created and destroyed — the space-time of ordering, disordering, and reordering. The result, neither nomos nor antinomy, is *anomie* in the literal sense of "without legal order." This is a space of contestation of sovereignties and their legal orders.

The Hebrew word for wilderness, מדבר (translit. *midbar*; pron. mid-bawr'), is perhaps better translated in full as desert-wilderness. The Torah primarily presents wilderness as the physical space between Egypt and the Land of Israel, the liminal place in which the Jewish people wandered forty years in their journey from slavery to nationhood.

The journey into the wilderness begins in the middle of the night, in the crisis of the killing of the first-born at God's hand in Exodus 12:

> 29 In the middle of the night the LORD struck down all the first-born in the land of Egypt, from the first-born of Pharaoh who sat on the throne to the first-born of the captive who was in the dungeon, and all the first-born of the cattle.
>
> 30 And Pharaoh arose in the night, with all his courtiers and all the Egyptians—because there was a loud cry in Egypt; for there was no house where there was not someone dead.
>
> 31 He summoned Moses and Aaron in the night and said, "Up, depart from among my people, you and the Israelites with you! Go, worship the LORD as you said!
>
> 32 Take also your flocks and your herds, as you said, and begone! And may you bring a blessing upon me also!"

[34] C. D. Broad, Ethics (ed. C. Lewy) (1985) pp. 220–22

> 33 The Egyptians urged the people on, impatient to have them leave the country, for they said, "We shall all be dead."

Each of the previous nine plagues that God brought upon Egypt shook the foundation of Egyptian Pharaoh's sovereignty. With the tenth plague, in sound and fury, with fear and exigency, Pharaoh's sovereignty over the Israelites shattered. Never again would Pharaoh have the power to assert his sovereignty over them. Pharaoh's words conclusively divided the Egyptian demos, politically and spatially, between "my people" and "you and the Israelites." Pharaoh expelled the Israelites out from under his own divine sovereignty and toward the divine sovereignty of their God. Joining the Israelites were a mixed multitude of proselytes. Together they fled Egypt, armed and in haste. With no time to prepare provisions for the journey, they carried bowls of raw unleavened dough on their shoulders. In a pillar of cloud by day and in a pillar of fire by night, God led the people on a circuitous path into the wilderness. (Exodus 12–13)

Pharaoh decided to reassert his sovereignty over them and gave chase with his army. The Egyptians overtook the Israelites at the Sea of Reeds (Exodus 14):

> 10 As Pharaoh drew near, the Israelites caught sight of the Egyptians advancing upon them. Greatly frightened, the Israelites cried out to the LORD.
>
> 11 And they said to Moses, "Was it for want of graves in Egypt that you brought us to die in the wilderness? What have you done to us, taking us out of Egypt?
>
> 12 Is this not the very thing we told you in Egypt, saying, 'Let us be, and we will serve the Egyptians, for it is better for us to serve the Egyptians than to die in the wilderness'?"[35]

This time it is not the Egyptian people but the Israelites who responded in sound and fury, with fear and exigency.

But Moses instructed them not to fear. God would fight on their behalf. Moses raised his staff and split the sea. "And the Israelites went into the sea on dry ground, the waters forming a wall for them on their right and on their left." The Egyptians pursued. There, between the walls of water, God turned to destroy the Egyptian army with the pillar of fire and cloud and confused them in a great thundering sound. The Egyptian troops, seeing that God fought for the Israelites, wanted to flee. Moses raised his staff again, and the sea receded toward its original state. Then God hurled Pharaoh's entire army into the sea, drowning them all. The Israelites' fear of Pharaoh evaporated upon seeing the Egyptians dead on the shore. Instead, the people feared God and believed in God and his servant Moses.[36]

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[35] According to tradition, the Egyptians were struck with more plagues here in the wilderness of the Sea of Reeds than they had faced in Egypt. Rambam on Pirkei Avot 5:4

[36] Exodus 14, relying on Rashi

The scene was not a war. Rather, it was a sovereign contestation over the Israelites between God and Pharaoh. The Israelites were bystanders to the action. Indeed, as the text relates, Moses told them to stand by and watch. As events transpired, the Israelites' fear turned from God, to Pharaoh, and then back to God. This is phenomenal in itself. The Israelites at this very moment were witness to divine miracle in the form of the pillar of cloud. God had just brought the Ten Plagues upon the Egyptians and delivered the Israelites from bondage. Still, the Israelites did not trust in God to protect them from death at the hands of the Egyptians. Only when they saw the bodies on the shore did they turn their fear away from Egypt and to God. God had, in effect, proved himself before the Israelites.

This contestation was intensely emotional, full of confusion, regret, and mortal fear. It was elemental, inscribed in earth, water, fire, and cloud. It was also inscribed in sound, with the cries of the Israelites, the great thundering sound, and in the next chapter the Israelites' Song of the Sea in praise of the victorious God. Perhaps most importantly, the contestation was precarious, and it was violent.

God's victory was not complete insofar as it concerned the imposition of sovereignty over the Israelites. To the contrary, this would be only the **first** of ten trials in the wilderness. These were not ten trials with which God tested the Israelites. Rather, the Israelites *tested God*.[37] That is, they tested God's sovereignty over them. God, in turn, worked miracles to secure their loyalty. Again and again, the Israelites and God cycled through commitment and rejection. These trials did not culminate at Sinai with a final conclusive covenant. Instead, three of the ten trials occurred *after* Sinai. These ten trials occur regularly throughout the Israelites' journey in the wilderness. To a certain extent, these trials even come to define the Israelites' wilderness journey.

No sooner had the Israelites finished the Song of the Sea than the **second** trial occurred. The Israelites "traveled three days in the wilderness and found no water." They then arrived in Marah, where the water was too bitter to drink. Rather than respectfully ask Moses to entreat God for water, "the people murmured against Moses, saying, 'What shall we drink?'" On God's instruction, Moses threw a piece of wood into the water, and the water turned sweet. God then turned the tables and put the Israelites to a trial. The trial here, Rashi explained, was that God gave the people "a few sections of the Torah in order that they might engage in the study thereof; viz., the sections containing the command regarding the sabbath, the red heifer and the administration of justice." This was not a trial for individuals in a group but a trial of the group itself, as the Hebrew text makes plain. God tried "it," singular (the people), not "them," plural (the individual members of the people). God presented the law to "it," singular (the people), not "them," plural (the individual members of the people). Should the people as a unit accept the laws and perform them, God

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[37] Pirkei Avot 5:4 ("[With] ten trials did our ancestors test the Omnipresent, blessed be He, in the Wilderness"). See also Bartenura and Rambam commentaries on Avot 5:4.

would save them from the diseases he brought upon the Egyptians. If the people refused, God would blight them with disease. In a sense, the moment is a mini-Sinai. God offered up a mini-legal order, to be freely accepted by the people and coerced upon them.[38]

The Israelites followed God further into the wilderness, and before long they exhausted the food supply they had brought with them from Egypt. For a **third** time they tried God.

> 2 In the wilderness, the whole Israelite community murmured against Moses and Aaron.
>
> 3 The Israelites said to them, "If only we had died by the hand of the LORD in the land of Egypt, when we sat by the fleshpots, when we ate our fill of bread! For you have brought us out into this wilderness to starve this whole congregation to death."[39]

The Israelites were, the text emphasizes, in the wilderness. They were surrounded by a barren, empty landscape. With no remaining food stores, their situation seemed grim. They expected to die of starvation. Nostalgia for Egypt made them regretful at having ever left Pharaoh's kingdom. At least in Egypt they had as much to eat as they wanted. As before, the Israelites insolently murmured against Moses, as well as against Aaron. They forgot that they learned in Marah to respectfully ask Moses to entreat God to fulfill their needs. They nearly forgot God altogether. Instead they blamed Moses and Aaron for leading them into the wilderness. Still, as before, God provided what they demanded. Meat and manna would henceforth appear miraculously in the Israelites' camp daily.

Also as before, God reversed the situation and tried the Israelites (literally, "to try them whether they will walk in my Torah or not"). Moses and Aaron conveyed the terms of the trial with a preambulatory rebuke:

> 6 So Moses and Aaron said to all the Israelites, "By evening you shall know it was the LORD who brought you out from the land of Egypt;
>
> 7 and in the morning you shall behold the Presence of the LORD, because He has heard your grumblings against the LORD. For who are we that you should grumble against us?
>
> 8 Since it is the LORD," Moses continued, "who will give you flesh to eat in the evening and bread in the morning to the full, because the LORD has heard the grumblings you utter against Him, what is our part? Your grumbling is not against us, but against the LORD!"[40]

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[38] Exodus 15:22–26, with Rashi commentary. See also Sanhedrin 101a for the blighting part, which isn't clear from the text.

[39] Exodus 16

[40] Exodus 16:4–8

We are only matchmakers, Moses and Aaron explained to the Israelites. The Israelites' dispute was with God — the same God who, with the power of miracle, unshackled the Israelites from Pharaoh's bondage to be their sovereign. God heard your murmuring against him and would again employ his miraculous power to provide food in the barren wilderness to convince you of his worthiness to be your sovereign.

> 9 Then Moses said to Aaron, "Say to the whole Israelite community: Advance toward the LORD, for He has heard your grumbling."
>
> 10 And as Aaron spoke to the whole Israelite community, they turned toward the wilderness, and there, in a cloud, appeared the Presence of the LORD.[41]

God is omnipresent, and yet the Israelites must turn toward the wilderness to behold God and advance toward him. Why must the Israelites turn in a particular direction to encounter the omnipresent God? The Israelites did not turn toward the wilderness because God was there in that specific place as opposed to elsewhere. Rather, they turned themselves, to situate themselves in a space where they could encounter God. Were the Israelites not already in the wilderness? Rabbi Naftali Zvi Yehuda Berlin ("the Netziv") said that in turning toward the wilderness "they all left their tents to see what was in the wilderness."[42] Their encampment was too much of a civilization-within-the-wilderness, or otherwise sheltered from the wilderness. The Israelites had to leave their tents to be fully present in the wilderness in order to encounter God. In an alternative midrashic explanation, the Israelites did not turn toward the wilderness until God's might was revealed to them.[43] The revelation of God in the miracle of the cloud thus caused the Israelites to turn toward the wilderness. Either way, the Israelites had to turn toward the wilderness to encounter God.

This wilderness encounter between the Israelites and God was full of miracles meant to court the people's devotion. Through these miracles, God said to the Israelites through Moses, "you shall know that I the LORD am your God."

> 13 In the evening quail appeared and covered the camp; in the morning there was a fall of dew about the camp.
>
> 14 When the fall of dew lifted, there, over the surface of the wilderness, lay a fine and flaky substance, as fine as frost on the ground.
>
> 15 When the Israelites saw it, they said to one another, "What is it?"—for they did not know what it was. And Moses said to them, "That is the bread which the LORD has given you to eat.

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[41] Exodus 16

[42] Ha'amek Davar on Exodus 16:10

[43] Meir Simcha HaKohen of Dvinsk, Meshech Hochma (Riga 1927), Beshalakh 31, quoting the Mekhilta of Rabbi Ishmael

> 16 This is what the LORD has commanded: Gather as much of it as each of you requires to eat, an omer to a person for as many of you as there are; each of you shall fetch for those in his tent."
>
> 17 The Israelites did so, some gathering much, some little.
>
> 18 But when they measured it by the omer, he who had gathered much had no excess, and he who had gathered little had no deficiency: they had gathered as much as they needed to eat.
>
> 19 And Moses said to them, "Let no one leave any of it over until morning."[44]

The meat and the manna that God provided were supernatural. After all, by definition wilderness cannot sustain human life. The manna was so foreign a substance the Israelites did not recognize it as food. It had the round shape of coriander seed but was white and tasted like honey cake.[45] Moses had to instruct them that it was food and how much of it each person required. When the Israelites gathered the manna, another miracle occurred. No matter how much each person gathered, each person ultimately had exactly the same volume of manna, equivalent to the necessary daily ration. Finally, there was the condition that God set to try the Israelites readiness to follow God's law: that no manna should be left over until morning. Any remaining manna had to be discarded.

But, for a **fourth** time, the people tried God. "[S]ome of them left of it until morning, and it became infested with maggots and stank. And Moses was angry with them."[46]

The sixth day of the week arrived. The Israelites went out to gather manna as usual, except that they gathered twice the usual quantity. Moses instructed them that the following day would be the Sabbath and that the Israelites should cook everything they needed not only for the sixth day but for the Sabbath as well. Unlike on the regular days of the week when it was prohibited to leave leftover manna until the morning, on the Sabbath they were instructed to keep over to the morning that which remained from the previous day. The Israelites obeyed, and on the Sabbath morning the leftover manna was neither infested nor stank. At the time of day when the Israelites customarily gathered manna for the day, they returned to ask Moses what to do. Moses told them not to gather manna as usual on the Sabbath—there would be no manna on the ground to gather anyway—but to eat that which they had kept overnight. For the **fifth** time, the Israelites tried God, as some of them went out on the Sabbath in vain to gather manna. God asked Moses, "How long will you [the Israelites] refuse to obey my commandments and my teachings?" Moses reiterated to the Israelites that God would provide the rations for both the sixth day and the Sabbath on the

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[44] Exodus 16:12–19

[45] Exodus 16:31

[46] Exodus 16:20

sixth day. On the Sabbath, no one was to leave his place. From that day onward, the people rested on the Sabbath. As for the manna, it sustained the Israelites for the forty years they journeyed in the wilderness.[47]

When the Israelites encamped at Refidim, again there was no water for them to drink. And again, a **sixth** time, the Israelites tried God.

> 2 The people quarreled with Moses. "Give us water to drink," they said; and Moses replied to them, "Why do you quarrel with me? Why do you try the LORD?"
>
> 3 But the people thirsted there for water; and the people murmured against Moses and said, "Why did you bring us up from Egypt, to kill us and our children and livestock with thirst?"
>
> 4 Moses cried out to the LORD, saying, "What shall I do with this people? Before long they will be stoning me!"

Some of the Israelites had water left. But even they joined in to challenge Moses to supply water in the arid wilderness. For this reason the text says that the people "quarreled," meaning without justification, rather than "complained."[48] And yet again the Israelites' challenged Moses rather than beseech God, and yet again Moses chastised them for their error. These people had seen God's power demonstrated before them numerous times and yet they still did not place their trust in God.[49] Fearing death and nostalgic for Egypt, the Israelites turned against Moses. They were poised to kill Moses, and with him God's claim of sovereignty over them, even at the risk of all of their deaths.

> 5 Then the LORD said to Moses, "Pass before the people; take with you some of the elders of Israel, and take along the rod with which you struck the Nile, and set out.
>
> 6 I will be standing there before you on the rock at Horeb. Strike the rock and water will issue from it, and the people will drink." And Moses did so in the sight of the elders of Israel.
>
> 7 The place was named Massah and Meribah [Trial and Quarrel], because the Israelites quarreled and because they tried the LORD, saying, "Is the LORD present among us or not?"

From the perspective of the Israelites', according to Nachmanides, previous miracles such as water turning sweet and manna appearing on the ground occurred without any clear intervention from God.[50] Those miracles might have occurred by coincidence, or even been caused by a competing

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[47] Exodus 16:22–30, 35; Rashbam on Exodus 16:31

[48] Ibn Ezra on Exodus 17:2, Tur HaAroch on Exodus 17:2

[49] Sforno on Exodus 17:2

[50] Tur HaAroch, Exodus 17:5; Tur HaAroch, Numbers 33:14

sovereign, as far as the Israelites knew. This time God instructed Moses to perform the miracle publicly, with the elders as witnesses, so that there could be no question that it was God who miraculously caused water to flow from a rock.

These six trials took place during two months of wilderness journeying since the Israelites left Egypt. In the third month, the Israelites arrive at the foot of Mount Sinai. The narrative reaches its climax in the epic and public scene of divine revelation. The Torah is given to the people ("we will do and we will hear!"[51]). The Israelites conclusively accepted God's legal order, both freely and coerced. Moses ascended the mountain for forty days to receive the Torah directly from God. The Israelites waited for him at the foot of the mountain.

At this point we expect the Israelites to be overwhelmed with ecstasy for God's sovereignty. Yet shockingly it is here, of all times and places, that the people tried God for the **seventh** time by crafting the Golden Calf. The Golden Calf narrative is a repressed narrative, delayed outside of linear time by twelve chapters in the text. Yet, Avivah Gottlieb Zornberg writes, "it is inseparable from the encounter with God at Sinai."[52] Immediately following the zenith of revelation comes this fundamental challenge to God's sovereignty. Sinai, according to rabbinical tradition, was the wedding of the Jewish people and God as bride and groom. The Golden Calf incident, consequently, was no less than a brazen act of infidelity under the wedding canopy.[53]

As much as revelation on Sinai declared *here is God's Law*, the Golden Calf scene returned ambivalence to the wilderness. The bride, euphoric at the start of the wedding, suddenly had cold feet and turned to an old lover. The marriage is made; the covenant is done. But the marriage remains unconsummated. The covenant is not sealed.

Instead, the order that had coalesced ruptured. Moses, up on the mountain and separated from the Israelites, had not returned to the encampment when the Israelites had expected him. So great was this rupture between leader and people that, according to the commentators, the people were convinced Moses was dead. Then there was the rupture among the people. Judah Halevi elucidates, "An evil spirit overpowered a portion of the people, and they began to divide into parties and factions."[54] The result was a rupture between the people and God, as at least a significant number of the people separated themselves from God and turned back to polytheism. They demanded Aaron create for them a god to lead them through the wilderness in place of

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[51] Exodus 24:7

[52] Zornberg exodus 398

[53] Shabbat 88b

[54] Judah Halevi, The Kuzari 1:97

Moses.[55] Aaron was also alienated from the people. He tried to delay the people's embrace of idolatry until Moses returned. Aaron requested the gold jewelry of the women and children, presuming the women and children would hesitate to hand it over. But the men, rupturing their relationships with their families, took the jewelry without permission and brought it to Aaron.

Aaron cast the gold into the fire. The magicians who had left Egypt with the Israelites as part of the mixed multitude of proselytes immediately conjured the golden calf from the molten gold. These proselytes who had rebelled against Aaron sought to lead the Israelites astray. The proselytes declared, "This is your god, O Israel, who brought you out of the land of Egypt!" Aaron's nephew Hur reprimanded them, and they killed him for it. Aaron recognized his life was at stake if he openly resisted them. Under this coercion, he built an altar to the golden calf and announced a festival to celebrate the following day. By building it himself, he hoped to delay the construction. In Aaron's heart the festival was for God, not the golden calf; he was sure Moses would return by then.

Up on the mountain, God instructed Moses, "Hurry down, for your people, whom you brought out of the land of Egypt, have acted basely."[56] The phrasing seems distinctly sardonic. In the previous trials, the Israelites held Moses, rather than God, responsible for the journey into the wilderness. Moses had corrected them by reminding them that it was God who brought them out from Egypt. The Israelites repeated the error again here when they tasked Aaron with making the Golden Calf to replace "that man Moses, who brought us from the land of Egypt…."[57] Here God played the same game with Moses to reverse effect. "*Your* people, whom *you* brought out" — *yours*, and not *mine* and *you*, and not *me*. In one reading, God's words are like those of a frustrated parent unloading a disobedient child on the other parent. But read differently, God disowned the Israelites.[58] The latter reading gains credence as God set himself to destroy the Israelites, telling Moses, "Now, let Me be, that My anger may blaze forth against them and that I may destroy them…."[59] There is a critical ambiguity here: Did the people fail to obey one of God's laws, or did they reject God entirely to seek the path of a different sovereign?

Judah Halevi renders the rebellion as one against a particular law and not against the whole of God's sovereignty.

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[55] Exodus 32:1; Rashi on Exodus 32:1; Chizkuni on Exodus 32:1

[56] Exodus 32:7

[57] Exodus 32:1

[58] See Tur HaAroch on Exodus 32:7

[59] Exodus 32:10

> This sin was not on a par with an entire lapse from all obedience to Him who had led them out of Egypt, as only one of His commands was violated by them. God had forbidden images, and in spite of this they made one.... At the same time the people did not intend to give up their allegiance to God.[60]

God's sovereign order was not wholly overturned, or even wholly rejected. The Golden Calf was not a replacement for God but a wayward addition to God — the result of a lingering fidelity to the polytheistic ideas of Egypt.[61] Regardless, God renounced his plan of annihilation on the plea of Moses.

With the tablets of God's law in his hand, Moses descended Sinai to restore order to the growing disorder in the Israelite encampment. He was greeted on the way with boisterous noise from the encampment. The text makes plain that this was not the sound of war but rather the sound of the Israelites celebrating their new god. Moses, seeing the Israelites rejoicing over their infidelity to God, "became enraged; and he hurled the tablets from his hands and shattered them at the foot of the mountain."[62] The image is striking. The Israelites were in some sense reenacting the Song of the Sea with a new god. Moses, messenger of God, stood apart from them, in a rage. He destroyed the tablets of God's law at the same foot of the mountain where the people had stood to accept God's law. The law was ruptured both literally and metaphorically. It was as if the covenant at Sinai were completely undone.

Moses then turned to undoing (the sovereign claim of) the Golden Calf. To hand the tablets of God's law to the people while they lusted after other gods was unthinkable.[63] Moses first had to restore a tabula rasa of sovereignty and order. "He took the calf that they had made and burned it; he ground it to powder and strewed it upon the water and so made the Israelites drink it."[64] The procedure was an embodied rebuke of a competing sovereignty. All of the Israelites were forced to

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[60] Judah Halevi, The Kuzari 1:97

[61] See Zornberg 408–409

[62] Exodus 32:19; Seforno

[63] See Shabbat 87a: "And he broke the tablets following the sin of the Golden Calf. What source did he interpret that led him to do so? Moses said: With regard to the Paschal lamb, which is only one of six hundred and thirteen mitzvot, the Torah stated: 'And the Lord said unto Moses and Aaron: This is the ordinance of the Paschal offering; no alien shall eat of it' (Exodus 12:43), referring not only to gentiles, but to apostate Jews as well. Regarding the tablets, which represented the entire Torah, and Israel at that moment were apostates, as they were worshipping the calf, all the more so are they not worthy of receiving the Torah. And from where do we derive that the Holy One, Blessed be He, agreed with his reasoning? As it is stated: 'The first tablets which you broke [asher shibarta]' (Exodus 34:1), and Reish Lakish said: The word asher is an allusion to the phrase: May your strength be true [yishar koḥakha] due to the fact that you broke the tablets."

[64] Exodus 32:20

literally digest, and ultimately to excrete, the false god. And they did so through the medium of life-sustaining water that God had miraculously provided them previously.[65] At the same time, the procedure mimicked the test for a *sotah*, a wife accused of adultery.[66] Rav and Levi, rabbis of the amoraic period, disagreed on which "adulterous" — idolatrous — acts incurred which punishment. They agreed, however, that what happened next was a series of punishments. Two types of those punishments (death by plague and an intestinal illness) were carried out through divine intervention. The third and most severe type of punishment, and the only one directly referenced in the text of the Torah, was death by sword.[67] Moses, along with the Levites, who had remained faithful to God and had not worshiped the Golden Calf, performed the executions by the sword. All told, three thousand were slain.[68] These killings were not part of a war nor a free-for-all. The commentators further clarified that this was not a series of summary executions. On the contrary, these executions were carried out according to judicial verdicts. In the opinion of Ramban, these trials were held under the emergency procedures of *hora'at sha'ah*.[69] Thus, in a moment of exigency, the order under the Golden Calf was undone. The small faction of half a percent of the people that had wrought the chaos of contestation of God's sovereignty was quashed — within God's legal order.

After receiving a second set of tablets, the Israelites journeyed for three straight days from Sinai toward the Land of Israel. There, in Taberah, the Israelites tried God for the **eighth** time. The people murmured against God, ostensibly over their weariness from the journey. But, Rashi says, weariness was merely pre-textual. Their true motivation was to separate themselves from God's sovereignty. They wanted God to hear their perversity, to become annoyed with them. God heard them and was infuriated. Their contestation of God's sovereignty was met with force. "[A] fire of the LORD broke out against them, ravaging the outskirts of the camp." (Targum Pseudo-Jonathan suggests that the fire destroyed a faction on the outskirts of the camp that was practicing idolatry.) Afraid, the Israelites asked Moses to intervene on their behalf. Moses in turn prayed to God. The rebellion quashed, the fire died down.[70]

The eighth trial demonstrates some maturation and an entrenchment of God's sovereignty over the Israelites. Unlike in previous trials, the Israelites seem to have learned to direct their

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[65] See Bemidbar Rabbah 9:46

[66] Rashi on Exodus 32:20

[67] Yoma 66b

[68] Exodus 32:25–28

[69] Ramban on Ex. 32:27

[70] Numbers 11:1–3; with Rashi, Sifrei Bamidbar 85:1; Targum Jonathan on Numbers 11:1

complaints and requests to God rather than Moses. And the idolatry, rather than being at the center of the camp with Aaron, has been relegated to the margins.

The **ninth** trial followed immediately thereafter. Proselytes that had united with the Israelites in the exodus from Egypt gluttonously craved meat. Israelites joined them and together they wept, "Who will give us meat to eat?" But, as Rashi proves from the text, they already *had* meat to eat! This was only a pretext, he explains. The core of the issue, Sforno adds, was that the Israelites regretted having left Egypt. (Ramban, in a view more favorable to the Israelites, says that some of them did not have daily access to meat.) In Egypt, they could have fish for free — meaning free from the burden of God's law, says Rashi. The Israelites further expressed their frustration with the monotony of the manna. The manna could take on nearly every flavor, but its appearance and texture remained constant.[71] They had no fruits or vegetables. Aside from the meat to which they had access, the manna was what they ate, twice daily.

Moses was overwhelmed with frustration. He resented God for commanding him to lead the people. He tells God he would rather die than carry on in this manner. The burden of his role was too heavy for him. So God directed Moses to appoint seventy elders to share in his burden.[72]

As for the people, God instructed them that a divine miracle would provide them with meat for an entire month, "until it comes out of your nostrils and becomes loathsome to you." That which the Israelites asked for would be punishment for their regret over having abandoned the sovereignty of Pharaoh in Egypt. The Israelites spent two days collecting the tremendous numbers of quail God sent to them. God had fulfilled the gluttonous demands of all. They took their first bites. Before they could even chew, God's anger blazed forth against them with a plague. The average of the murmurers died before they could swallow the meat. The truly wicked ones were made to suffer in pain for a month, after which they died.[73]

The **tenth** and final trial took place in the wake of the scouts' report on the promised land. The Israelites asked Moses to send men into Canaan to scout out the land that God had promised them. The request itself was extraordinary. God had already told them the land was good, flowing with milk and honey. The request thus reveals their lack of trust and faith in God. Moses sent the

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[71] [[Manna as mother's milk. Child suffers when weaning. Sifrei Bamidbar 89:1. Also: baby easily fed when mother is there. Rashi on Num. 11:8.]]

[72] Numbers 11:4–15; with Rashi, Sforno on 11:4, 11:6; Tur HaAroch on 11:4; Sifrei Bamidbar 87:1

[73] Numbers 11:18– ; with Rashi; Daat Zkenim on Numbers 11:33:1; Chizkuni, Numbers 11:33:1; Yoma 75b

scouts, all of whom except Joshua set out on their mission having predetermined to shame the Land of Israel.[74]

The scouts returned after forty days and reported to Moses. Yes, they told him, the land flows with milk and honey as God promised. But, they continued, the inhabitants are powerful. The cities are heavily fortified. The scouts had seen giants. The Israelites, hearing this report, began to express doubts about the possibility of conquering the land.[75] These doubts represent a fundamental challenge to God's sovereignty. Not only did they have a lack of faith in God to trust his promises about the land without scouting it out for themselves, they doubted God's power to successfully defeat the existing sovereign powers to conquer the land. If they did not conquer and inhabit the land, God's law would be for naught and God's sovereignty foiled.

It was no wonder then that Moses tried to interrupt the scouts. The Israelites ignored him.[76] Caleb, one of the scouts, decided to intervene. "And is this the only thing that the son of Amram, Moses, has done to us?" he shouted out. The Israelites assumed Caleb was about to tarnish Moses and fell silent. But instead, Caleb reminded them of the miraculous journey in the wilderness on which Moses had taken them. "He took us out of Egypt, and split the sea for us, and fed us manna," Caleb said. "If he says to us, 'Build ladders and climb to the heavens,' should we not listen to him? We should go up at once, even to the heavens, and possess it." And if they should follow him into the heavens, so much more so they should follow him into the Land of Israel. "Let us by all means go up and take possession of it, for we shall overcome it," said Caleb.[77] Caleb's intervention was not ideal from the perspective of the rabbis. He contradicted the other scouts' conclusions about the land, but he did not object to the facts they laid out, notes Tur HaAroch.[78] Caleb also overemphasized the role of Moses and ignored the role of God. Still, Caleb's blasphemy was far outweighed by the other scouts' response.

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[74] Numbers 13:1– 21; with Rashi, Ramban; Sotah 34b

[75] Numbers 13:25–29 ; Chizkuni, Numbers 13:28; Tur HaAroch, Numbers 13:29

[76] Chizkuni, Numbers 13:30

[77] Sotah 35a; Numbers 13:30, with Rashi, Tur HaAroch, Numbers 13:30:1

[78] Tur HaAroch, Numbers 13:30:2

"We cannot attack that people, for it is stronger than us," the other scouts said. At least that is one reading of the text. The Talmud relates the interpretation of Rabbi Ḥanina bar Pappa:

> **The spies said a serious statement at that moment.** When they said: **"They are stronger," do not read** the phrase as: Stronger **than us**, but rather read it as: Stronger **than Him**, meaning that **even the Homeowner**, God, **is unable to remove His belongings from there, as it were**.[79]

The same word for "than us" can equally be read as "than him," such that the meaning of the line becomes not "stronger than us" but rather "stronger than God." In this second reading, the scouts were guilty of heresy. They believed the Canaanite inhabitants were stronger than God.

The scouts continued to sow discord. "It is a land that consumes its inhabitants," they reported. In every place they went, the leader had died, and the Canaanites were busy with mourning rituals. From the heretical scouts' perspective, the prevalence of death meant that the land was no good. They failed to recognize God's causal hand in these deaths. God had brought about the deaths so that the scouts would go unnoticed and unmolested. God had made the land consume the enemies of the Israelites in order to protect the scouts' security.[80]

The Israelites nearly abandoned God's sovereignty completely.

> 2 All the Israelites railed against Moses and Aaron. "If only we had died in the land of Egypt,"
> the whole community shouted at them, "or if only we might die in this wilderness!
> 3 Why is the LORD taking us to that land to fall by the sword? Our wives and children will be
> carried off! It would be better for us to go back to Egypt!"[81]

As they saw it, God had not delivered on his promise. Abandoning Pharaoh's sovereignty in Egypt to follow this inept God had been a catastrophic error. They decided to set a new path, to turn away from the sovereignty of God in the promised land.

"And they said to one another, 'Let us head back for Egypt.'" Rashi reads this instead as "Let us set a head over us," meaning they would replace God and appoint a new king. Rashi notes that earlier rabbis read this as the Israelites deciding to turn to idolatry.[82] He means it as yet another understanding of the verse. But all three of these readings — to head back for Egypt, to replace God with a new king, and to turn to idolatry — are fully consistent. They all speak to the rejection of God as sovereign and the search for a replacement.

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[79] Sotah 35a

[80] Numbers 14:32, with Rashi; Sotah 35a

[81] Numbers 14:2–3

[82] Numbers 14:4, with Rashi

The four leaders who had remained loyal implored the Israelites not to abandon God. Moses and Aaron fell on their faces. Joshua and Caleb tore their clothes and said:

> 7 ..."The land that we traversed and scouted is an exceedingly good land.
>
> 8 If the LORD is pleased with us, He will bring us into that land, a land that flows with milk and honey, and give it to us;
>
> 9 only you must not rebel against the LORD. Have no fear then of the people of the country, for they are our prey: their protection has departed from them, but the LORD is with us. Have no fear of them!"[83]

It was a rousing speech. Their words sought to overturn the overturning of God's sovereignty. Not only was the land good, as God had promised, it was exceedingly good. The land did not consume its inhabitants, Sforno explains; but rather, *the Israelites* would consume its inhabitants.[84] Put another way, it was not the land that would conquer the Israelites but the Israelites who would conquer the land. The Israelites need only obey God's law, and God would make the land theirs. The Israelites should not fear the people of the land; they should fear God. Indeed the inhabitants of the land, Rashbam adds, were afraid of God and the Israelites! The inhabitants of the land remembered the miracles God had wrought for the Israelites in the wilderness.[85] The Israelites all the more so should have remembered the miracles.

The Israelites did not heed their words. Instead, the whole of the community threatened to stone them.[86] It was almost as if the situation had reversed. A new sovereign order was forming over the Israelites. *Pursuit of God* had become the idolatry. In the Golden Calf incident, the commentators questioned why the Israelites were punished by the sword. According to Rashi, the answer was that individual idolators are punished by stoning by the entire community but the inhabitants of a whole city upturned by idolatry were put to death by the sword. The encampment at Sinai during the Golden Calf incident was akin to an idolatrous city.[87] But here, the idolators against the new sovereign order were four alone: Joshua and Caleb, Moses and Aaron. They who had been leaders in the sovereign order of God were now the lonely idolators of a new order. Thus, the whole community would stone them to death in punishment.

But God's order was not so easily defeated. The perceptible presence of God descended in a cloud on the Tent of Meeting. "How long will this people provoke me to anger?" God asked Moses.

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[83] Numbers 14:5–9

[84] Sforno on Numbers 14:7

[85] Rashbam on Numbers 14:9:1

[86] Numbers 14:10

[87] Rashi on Exodus 32:20; http://www.biu.ac.il/JH/Parasha/eng/kitisa/aru.html; see Deut. 17

"How long will this people not believe in me despite all the signs [miracles] that I performed in their midst?" God prepared to annihilate the people, but Moses begged his forbearance. Destroying the people, Moses reasoned, would only be a sign of God's weakness. The other nations of the world would not view the annihilation of the people as a punishment. Rather, they would say, "It must be because the LORD was powerless to bring that people into the land He had promised them on oath that He slaughtered them in the wilderness."[88] Noteworthy here is Moses's recognition of sovereignty as having both an internal dimension (viz. the Israelites) and an external dimension (viz. the other nations of the world).

More compelling, though, is the paradox that Moses raised. On the one hand, force is an integral component of sovereignty. The very real possibility that God would drop the mountain on the Israelites if they did not accept the Torah was essential to their acceptance of Torah-as-law and God-as-sovereign. But here Moses insists that the realization of the annihilation of the people would render impossible the existence of Torah-as-law and God-as-sovereign. In more generalized terms, sovereign legal order requires the potential for overwhelming force to be deployed it is rejected, but the use of such force forecloses the viability of this sovereign legal order.

God "solved" the paradox, so to speak, by forgiving the people as a corporate whole[89] while at the same time punishing the people as individuals. Every individual Israelite who had witnessed God's miracles in the wilderness but nonetheless refused to submit to God's sovereignty would not see the Promised Land. Save for Caleb, the Levites, the young, and the elderly, all of the Israelites would die in the wilderness. "In this very wilderness shall your carcasses drop… [Of] you who have murmured against Me, not one shall enter the land in which I swore to settle you…," God declared.[90] But the people, and thus God's sovereignty, did not die there in the wilderness with them.

Their children, the next generation, "would wander the wilderness for forty years, suffering for your faithlessness, until the last of your carcasses is down in the wilderness."[91] The phrase "suffering for your faithlessness" returns to the adultery motif from the Golden Calf incident. The literal meaning of the Hebrew for "faithlessness" is "whoredoms" or "fornications."[92] As before, pursuit of other sovereignties is framed as sexual infidelity. The punishment for this infidelity

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[88] Numbers 14:10–19, with Rashi

[89] Tur HaAroch, Numbers 14:20:1

[90] (Num. 20–35; Bava Batra 121b)

[91] (Num. 14:33)

[92] Klein, A Comprehensive Etymological Dictionary of Hebrew Language, p. 200

would be borne not only by the philanderers but also by their children.[93] Forced to wander the wilderness until the elder generation died off, the children would thereby suffer for their parents' faithlessness.

The scouts who had caused the people to murmur against God merited special punishment, however. They died instantly by a plague.

God's sovereignty was thus restored to life. Twice in the text God uses the phrase חי-אני, meaning "[as] I live."[94] But the restoration was not complete. Early the following morning, the Israelites readily admitted their error in having turned back toward Egypt and, with childlike contrition, prepared to enter the Land of Israel.[95] Perhaps they believed they could escape their punishment by fulfilling what God ultimately desired for them. Moses warned them of the folly of ignoring God and attempting to enter the land prematurely. He too was ignored. The Israelites defiantly marched toward the Land of Israel. Moses and the Ark of the Covenant remained in the camp.[96] The image is striking. The Israelites literally left God's law behind.

There is one further motif in this chapter which demands attention: the repeated references to *eretz* (ארץ) — meaning earth, land, country[97] — and wilderness. Wilderness is mentioned nine times and *eretz* fourteen times. Wilderness appears as a place secondary in value to *eretz*. Wilderness is characterized as if it is a waiting room in which one endlessly paces until called to enter the inner chamber. Wilderness is a space of miracles. Wilderness is a space of death, specifically an animal-like death stripped of its human qualities. (Human death in the wilderness is portrayed as a dropping carcass.) *Eretz* is desirable. *Eretz* is a space that naturally provides food. *Eretz* is a space of human habitation. *Eretz* is a space of sovereign legal order.

What these ten trials demonstrate is that the space and time in the wilderness between Egypt and the Land of Israel is a space and time of sovereign contestation. The trials resist a simplistic reduction of law-giving to the moment of divine revelation at Sinai. As much as Sinai is paradigmatic of legal order at the intersection of sovereign coercion and popular acceptance, the moment was fleeting. The Israelites' acceptance of God's sovereignty was fickle. The shadows of the text reveal narratives of alternative sovereignties. But neither was the wilderness a state of nature. The Israelites were bound together by more than altruism. The law in contention was not a biological law of the jungle but truly juridicial law. It would be inaccurate to say conclusively that

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[93] (Rashi on Num. 14:33)

[94] Numbers 14:21, 28

[95] Numbers 14:40

[96] Numbers 14:41–44, with Rashi

[97] Klein, Comprehensive Etymological Dictionary of Hebrew Language p. 57

there was legal order in the wilderness. It would be equally inaccurate to deny that there was legal order. This wilderness is the archetype of anomie.

The etymology of the Hebrew word for wilderness is instructive in itself. The root of *midbar*, *d-b-r*, typically means "to speak." The same Hebrew letters that mean wilderness (*MiDBaR*) also, pronounced differently, mean "speaks" (*MeDaBeR*). This will prove revealing, but first we must dig deeper. Rabbi Yehudah Aryeh Leib Alter ("Sefat Emet") said, "The word for wilderness, *midbar*, comes from a root meaning 'to lead' or 'rule.'" In the wilderness, he added, one submits to that rule, negating one's own self and realizing one's powerlessness in the absence of the life-flow of God.[98] Rabbi Dr. Ernest Klein opined that *midbar* originated as an infinitive meaning "to drive (cattle)." He connected the etymological dots back to a *d-b-r* root meaning "to lead." The literal meaning of *midbar*, then, is "the place whither cattle are driven."[99] To lead, to rule — these defy a classification of the wilderness as the state of nature. Self-negation especially is the opposite of the selfishness that is typical of the state of nature. But neither do we find what we would expect in sovereign space. In sovereign space, the sovereign leads, and the people follow. Here, however, the individual is driven like an animal — forced in one direction or another without regard for his desires, forced together with the herd. Any freely given consent of the individual is incidental at best. Neither the state of nature nor sovereign space, wilderness is a space in which a sovereign contestants drive a people in one direction or another.

In this desert-wilderness, Jonathan Sacks explained, "there is no nature. Instead there is emptiness and silence...."[100] In spaces of intense silence, every sound emerges is all the more profound. Speech is transformed into speech of a different character. This transformed — and transformative — speech is not limited to Sinaitic revelation. Elijah fled to the wilderness in order to hear God in a still, small voice.[101] In the book of Isaiah we hear the redemptive divine voice that calls out in the wilderness to clear a path for God.[102] More than specifically "divine" speech, though, the wilderness is the space of speech that is *political* and *constitutional*.

The essence of the *d-b-r* root is to collect or gather into a coherent whole.[103] The root forms the verb "to speak" in the sense that to speak is to collect words into coherent sentences. Speech in the

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[98] Judah Aryeh Leib Alter, Sefat Emet / The Language of Truth transl. Arthur Green, JPS 1998, p. 220

[99] Klein dictionary at p. 317

[100] Jonathan Sacks, Covenant & Conversation, Bemidbar 2015 / 5775

[101] Kings I ch. 19

[102] Isaiah 40:3 with Rashi

[103] MATITYAHU CLARK, ETYMOLOGICAL DICTIONARY OF BIBLICAL HEBREW: BASED ON THE COMMENTARIES OF RABBI SAMSON RAPHAEL HIRSCH __ (1999).

wilderness (*DiBuR Ba-MiDBaR,* **דיבור במדבר**) compounds this meaning. The wilderness is the space in which, through speech, individuals are collected together into a people and a people are gathered together with a sovereign in covenant. The wilderness is therefore a space of *constitution*. The wilderness is not a space of politics but rather the space of the *political*, in which is determined "the utmost degree of intensity of a union or separation, of an association or dissociation."[104] In the wilderness, individuals are collected together into a whole people, to the exclusion of others.

The contrasting meanings of wilderness in the second chapter of Hosea further elucidate the political and constitutional space of wilderness in a love metaphor. (The references to wilderness in this chapter of Hosea are fairly significant within the Jewish tradition.[105]) In those days the people of Israel had abandoned God and his law. The prophet Hosea positions the people as an adulterous wife and God as the betrayed husband. The adultery/idolatry has destroyed the very foundation of the marriage/covenant. The husband angrily exclaims, "For she is not my wife, and I am not her husband!" His point is not that he has divorced her but that her actions make it appear as if she has divorced *him*. He demands she cease her harlotry, or "else I will strip her naked and leave her as on the day she was born; and I will make her like a wilderness and render her like arid land and let her die of thirst." Here wilderness is associated with disunion and hopelessness. In the following verses we find her in unrequited pursuit of other lovers/nations and her husband/God exacting punishment and retribution on her. Then, abruptly, the tone changes. "Therefore, behold, I will allure her and lead her into the wilderness, and I will speak to her tenderly." Suddenly wilderness symbolizes union and possibility. But rather than being inconsistent, these opposing meanings of wilderness are as we have understood the wilderness all along. The wilderness is a space of *re*-ordering. The wilderness is where a covenantal love between people and God falls apart and where such covenantal love comes into being.

This same concept of the wilderness is also reflected in Song of Songs, which recounts the people's wilderness journey from Egypt to Israel as a tempestuous love story. God, as the male lover, called out to the people, as the female lover: ""Arise, my darling; My fair one, come away!" (2:10). Come away, explained Rashi, *from Egypt*.[106] He enticed her toward the Land of Israel with promises of bounty, and she followed him into the wilderness. But then she lost him. She turned to the watchmen — Moses and Aaron. Had they seen her lover? Just as she passed them — just as Moses and Aaron died in the wilderness and the people continued on into the Land — she found him again and held him tight until he brought her into his home — until the Tabernacle arrived in Shiloh.

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[104] Carl Schmitt, CotP 26

[105] This text of Hosea is from the *haftarah* associated with *parshat Bamidbar*. My interpretation is inspired in a significant way by Rabbi Jon Kelsen.

[106] Rashi on Song of Songs 2:10

Song of Songs, at least in Rashi's interpretation, reflects a complex understanding of a world of multiple sovereign nomoi. In 3:5 Israel adjured the other nations not to arouse God's love away from her by enticing her to forsake God's law while she is exiled from the Land. She should remain attached to his sovereignty even in nomos. At the same time, there is a frank recognition of the increased possibility of conversion to a new nomos while away from the Land. In 3:6 the other nations take note as Israel emerges from the wilderness into sovereignty. "Who is this coming up from the wilderness?" they ask. They acknowledged her tents and her army and her people. They recognized her greatness. This was the recognition of her sovereignty, the bedrock of external sovereignty.[107] But in chapter 6, paralleling the time when the First Temple was destroyed and God's sovereignty nearly destroyed with it, the nations taunt Israel. "Where has your beloved gone?" they ask. Did he die and leave Israel as a widow? But even in exile, Israel assures the other nations that she remains under God's sovereignty (8:4). God acknowledges that her continued devotion is apparent to all, recalling their first union in the wilderness: "Who is this coming up from the wilderness, embracing her beloved?" (8:5). And he calls for her to flee from exile, as she fled from Egypt, and to return to the Land in redemption (8:14).

There is some suggestion that *midbar* means "pasturage",[108] but it would be erroneous to understand the wilderness of the Torah in terms of an English word reminiscent of green pastures. Wilderness is defined in opposition to cultivated land. The wilderness of the Israelites' journey between Egypt and Israel is, as Jeremiah 2:2 recounts, "a land not sown." It is, rather, "a land of deserts and pits, a land of drought and darkness, a land no man had traversed, where no human had dwelt" (2:6). Wilderness is a space of desolation, empty and lifeless.[109] In Isaiah 27:10, wilderness is a symbol of forsakenness. Maimonides described the wilderness of the Torah as consisting of "places very remote from cultivated land, and naturally not adapted for the habitation of man."[110] Anyone who has been to the area in question was no doubt struck by the barrenness of the landscape.

We must take care to distinguish between the wilderness and verdant pastureland. The distinction is, as it happens, of significant consequence. In Greek, the word for the verdant type of pastureland is *nomé* (νομή). This verdant pastureland is fertile; when sown, it provides sufficient food.

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[107] See also Yalkut Shimoni Bamidbar Ramaz Tarpag

[108] Klein at 317

[109] see also Jeremiah 9:9–10, with commentators

[110] Guide to the Perplexed, Part 3, 50:7

Translated back into Hebrew, *nomé* is not at all etymologically related to the word *midbar*.[111] As previously noted, *midbar* is arid, and food does not grow there naturally in any significant quantity. What the word *nomé* is closely related to, however, is the word *nomos* (νόμος) which, as previously mentioned, means law. The etymological connection between *nomos* and verdant pasture is not incidental. *Nomos* derives from the verb meaning "to parcel out." Specifically, *nomos* refers to parceling out land for productive human use. *Nomos* is the radical title through which sovereignty is asserted over territory.[112] Schmitt observed:

> ...the earth is bound to law in three ways. She contains law within herself, as a reward of labor; she manifests law upon herself, as fixed boundaries; and she sustains law above herself, as a public sign of order. Law is bound to the earth and related to the earth.[113]

The connection between land and law is in contrast to the sea, which "knows of no such apparent unity of space and law, of order and orientation."[114]

I will not fully debunk Schmitt's simplistic land-sea dichotomy at this point. What demands attention here is how the earth is supposedly bound to law. These are important revelations about the relationship between land and law. But while these three characteristics clearly apply to the verdant pasture to which *nomos* is etymologically related, they do not apply to all types of land. In particular, the desert-wilderness does not offer reward for labor. And while it may seem a bold claim, I believe history will show that the wilderness between Egypt and Israel has never truly been susceptible to *nomos*.

Extraordinarily, the rabbinical tradition recognized the importance of a wilderness that was not parceled out. The opening line of the Book of Numbers — in Hebrew the Book of Numbers is titled "In the Wilderness" — is "And God spoke to Moses in the Sinai wilderness." The midrash asks, "Why in the Sinai wilderness?" Because, according to one answer, the wilderness is *hefker*, ownerless. The midrash further explains that, to acquire the Torah, one must make himself ownerless like the wilderness.[115] A people cannot adopt a new nomos without first ridding themselves of the existing nomos and throwing off the existing sovereign. The wilderness is the requisite liminal anomic space between nomoi. The wilderness is the space of disordering from an old nomos and reordering to a new nomos.

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[111] Thayer's Greek Lexicon, STRONGS NT 3542: νομή (http://biblehub.com/greek/3542.htm) "1. pasturage, fodder, food: in figurative discourse εὑρήσει νομήν, i. e. he shall not want the needful supplies for the true life, John 10:9; (the Sept. for מִרְעֶה, מַרְעִית, נָוֶה)."

[112] Schmitt, Nomos of the Earth, 70

[113] Schmitt, Nomos of the earth, 42

[114] Schmitt, Nomos of the Earth 42

[115] Bamidbar Rabbah 1:7

The radical nature of the change from the nomos of Egypt to the nomos of Israel demanded more than a quick journey through the wilderness. In Exodus 13:17–18, we learn that God led the Israelites on a circuitous path in the wilderness rather than the direct route through the land of the Philistines. The direct route presented a greater likelihood that the people would turn back to Egypt. According to one midrash, the time spent wandering the wilderness was necessary for the nomos of Israel to absorb into the Israelites' bodies.[116] Likewise in Deuteronomy 8:2, the long path in the wilderness is characterized as God's way of ensuring that the Israelites would not doubt his sovereignty and his law.

This literal conception of wilderness is also taken up as metaphor to refer to polities that have fallen into ruin. The midrash draws the link in an exposition on what it means for God to come to the wilderness to give the Torah:

> A parable of a prince who entered a city-state: The people of the city-state saw him and fled. He entered a different city that was in ruin. The people saw him and exalted him. He said, "This is best city of all the city-states. Here I shall build my palace.[117]

The lesson of the parable follows the same theme we have already encountered. To impose a new sovereignty over an existing sovereign nomos is not nearly as easily completed as imposing a new sovereignty over a place that is without sovereignty ("ownerless"). The novel point here is that the word "ruin" (חרבה) is linked to the wilderness. This Hebrew word for ruin can also mean "dry ground" or "waste" and is closely related to words meaning "dryness," "drought," and "desolation."[118] The connection between these meanings and the understanding of *midbar* wilderness developed here thus far is evident. The wilderness is no longer confined strictly to its literal location but can also assume a metaphorical meaning referring to a city left in ruin.

The later biblical texts reference wilderness as metaphor, as well. When cultivated land with nomos falls into anomic desolation, it becomes wilderness. In Isaiah 27:10 there are "fortified cities made desolate, dwellings deserted and forsaken like a wilderness." In Jeremiah 4:26, "I saw and behold, the fruitful field became wilderness, and all of its cities were destroyed…" Conversely in the messianic era, even wilderness will become a verdant garden. As it is written in Isaiah 51:3, God "will comfort Zion and all her ruins, and he will make her wilderness like Eden…."

These correspond to a talmudic approach (Nedarim 55a–b; Eruvin 54a) that views wilderness and "nomic land" (*midbar* and *eretz*) as vertical "levels" of existence. *Midbar* is the lower level, and *eretz* is the higher level. One without sovereignty, one who is *hefker*, is at the lower level. When he receives

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[116] Mekhilta d'Rabbi Yishmael 13:17

[117] Yalkut Shimoni on Bamidbar רמז תרפג (my transl.). See similarly, Machiavelli, The Prince p.13

[118] Klein dictionary at 230

nomos, it is as a gift, and "he rises to greatness." But if he tries to elevate himself over the nomos, he is instead degraded to a lower level. When he humbles himself and accepts nomos over himself, he is elevated again. Wilderness is essential insofar as wilderness is necessary to reach *eretz*. But wilderness remains a less desirable, non-ideal space. Wilderness is "the evil place," a place where grains, figs, grape vines, and pomegranates cannot be grown (Num. 20:5). But *eretz* is "the good land," which has not only grains, grape vines, figs, and pomegranates but, in the case of the Land of Israel, also olive and date trees (Deut. 8:7–10).

There is one final aspect of wilderness to consider: the juridical. One of the most surprising aspects of wilderness is that there is a juridical component in the wilderness. In Exodus 18 there is an extended account of how Moses sat and judged the people:

> 13 Next day, Moses sat as magistrate among the people, while the people stood about Moses from morning until evening.
>
> 14 But when Moses' father-in-law saw how much he had to do for the people, he said, "What is this thing that you are doing to the people? Why do you act alone, while all the people stand about you from morning until evening?"
>
> 15 Moses replied to his father-in-law, "It is because the people come to me to inquire of God.
>
> 16 When they have a dispute, it comes before me, and I decide between one person and another, and I make known the laws and teachings of God."
>
> 17 But Moses' father-in-law said to him, "The thing you are doing is not right;
>
> 18 you will surely wear yourself out, and these people as well. For the task is too heavy for you; you cannot do it alone.
>
> 19 Now listen to me. I will give you counsel, and God be with you! You represent the people before God: you bring the disputes before God,
>
> 20 and enjoin upon them the laws and the teachings, and make known to them the way they are to go and the practices they are to follow.
>
> 21 You shall also seek out from among all the people capable men who fear God, trustworthy men who spurn ill-gotten gain. Set these over them as chiefs of thousands, hundreds, fifties, and tens,
>
> 22 and let them judge the people at all times. Have them bring every major dispute to you, but let them decide every minor dispute themselves. Make it easier for yourself by letting them share the burden with you.
>
> 23 If you do this—and God so commands you—you will be able to bear up; and all these people too will go home unwearied."
>
> 24 Moses heeded his father-in-law and did just as he had said.

> 25 Moses chose capable men out of all Israel, and appointed them heads over the people—chiefs of thousands, hundreds, fifties, and tens;
>
> 26 and they judged the people at all times: the difficult matters they would bring to Moses, and all the minor matters they would decide themselves.

With that, Moses established a judicial system in the wilderness. By our conception of wilderness thus far, this judicial system therefore establishes the existence of the juridical prior to nomos. The only remaining question is on when this first recorded judging in Exodos 18 occurred.[119] The predominant view is that this episode is related out of the chronological order of the story and that it happened after Sinai. But a minority view is that this episode occurred even before Sinai. In this view, the "law" on which the people were judged was a combination of the seven Noahide Laws, the trial laws given at Marah, and perhaps equities. I am inclined to the latter interpretation, though either way the discovery of the juridical in the wilderness is a key insight, as will soon become apparent.

This wilderness is a prominent space in the rabbinical tradition. The account here is far from complete in this regard. At the very least, however, this exposition has revealed a hint of that which has been missing in political-legal theory, even that which rests heavily on (Christian) biblical exegesis. This liminal space ought to be restored to its rightful place as an essential concept of political-legal theory. This is the subject of the next section, which juxtaposes the wilderness against sovereign space with nomos and against the state of nature.

A Reconsideration of the State of Nature

The three categories — nomos, anomie, and antinomy — are essential components of a single framework. Each is understood in comparison to the others. The characteristics of each of the three spaces help to reveal the characteristics of the others and of the system as a whole. This comparison is the task at hand.

This task begins with a reconsideration of the state of nature in the Jewish context, followed by its distinction from wilderness. Conceptions of antinomy are emphasized in the Torah far less than wilderness is. That said, there are instances which may qualify. Amalek, especially in the interpretation of the Rambam, is arguably one such example.

The conceptual possibility of the state of nature does not necessarily entail that it appears with any frequency in the real world. This is of no consequence to the soundness of the model. Even Hobbes did not claim the state of nature to be a significant phenomenon in the world. To differentiate these as three concepts still remains an important step.

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[119] Zevachim 116a

Menachem Mendel Schneerson, the seventh and last Lubavitcher Rebbe, spoke not infrequently about the state of nature through the metaphor of a jungle. He recognized the importance of the state of nature as a concept but at the same time insisted on its non-existence as a significant phenomenon. "This world is not a jungle," the Rebbe famously taught.[120]

Understanding the three concepts as constructing a unified model evinces new importance in a single verse from the Book of Joel that prophesies the arrival of the messianic age: "Fire consumes before it and a flame blazes after it; before it, the land was like the Garden of Eden, and in its wake is a desert wilderness; neither does it have a remnant" (2:3). The image is spatial and temporal, as a phenomenon moves across territory over time, and it references three ideal types. The first (the *before-it*), which is compared to the Garden of Eden, is the ideal type of law-governed, cultivated land. The third type (the *after-it*) is wilderness.

Between them is the second type (the *it*). The phenomenon is an overwhelming swarm of animal life, namely locusts. The animal life is loud with a consuming fire. There is fear and trembling. The textual metaphors are ones of war. There is chaos most especially, with the most basic norm (of parceled land) prominently upended; "they go up into the houses; through the windows they come like a thief" (2:9).

The text compares the locust swarm to "an enormous horde arrayed for battle" (2:5). This is no orderly contest, however. Quite the contrary, life in this cataclysm is fully disordered. Each "goes in his own way, and their paths are not entangled. No one jostles another; each keeps to his own course." (2:7–8).[121] In short, every man is for himself. This is the law of the jungle. This is the state of nature.

We can begin to see now how the wilderness is a categorically different space than the anarchic chaos of the state of nature. Wilderness has contested sovereignties, while the state of nature is inimical to sovereignty. Wilderness has juridicial order, while the state of nature has only the biological law of the jungle. The people in the wilderness are neither friends nor foes, per se; their interrelationships are contested. Wilderness is *tabula rasa*. The state of nature, in contrast, is full of life in which man is reduced to animal. In nature, one must kill or be killed.

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[120] This World is Not a Jungle, Farbrengen, 12 Tammuz, 5743 • July 23, 1983, http://www.chabad.org/therebbe/livingtorah/player_cdo/aid/217047/jewish/This-World-is-Not-a-Jungle.htm

[121] The word I translate here as "entangled" is יִעָבְטוּן, a hapax legomenon (i.e., it appears only once in the Bible). The JPS translation is "Their paths never cross," with a footnote indicates the meaning of the Hebrew is uncertain. The JPS version seems to reflect Rashi's contextual interpretation of the word in question as "bend/twist/curve." Klein, in his etymological approach, defines the word as "was entangled, was confused." Klein 462. This is the translation I use, and I hope the reader finds it justifiable, especially given the rabbis' uncertainty.

Conclusion

There are, therefore, three spaces, which can equally be understood as periods of time, planes, or human conditions. The lowest is the jungle, the primeval state of nature.[122] Here the human being exists in its animal state, in constant mortal danger. Life here is precisely what Hobbes described as nasty, brutish, and short. This is a space of chaos, and the only law here is the biological law of nature.

The introduction of political consciousness into the human condition elevates to the wilderness. This is the space of gathering together, where jural communities are formed, dissolved, and re-formed into coherent wholes. Here is where sovereignty is fundamentally contested. Sovereign contestants and their legal orders vie for supremacy. Each seeks to impose itself through performative violence, otherwise understood as law-making violence[123]. Subsequently this violence will be understood as miracle, which renders the ugliness of violence into beauty. But this space is precarious. The sovereign contestant with a seemingly solid grip may be overthrown at any moment. In wilderness all is contingent and nothing is conclusive. The juridicial is introduced by the sovereign contestant in the wilderness. While it may seem like "law" in many respects, it is not law. Law in the wilderness is a quasi-law, or law-like. As with the sovereign contestant, in the wilderness law is not yet legitimate, nor is it illegitimate.[124] And, lacking legitimacy, it cannot be law. Rather than operate from a position of legitimacy, law (and courts) function to establish legitimacy, or to search for legitimacy. The human being in the wilderness is no longer in mere animal condition but neither is this animalistic side nullified. Rather, the animal side is joined by an angel side. Lower functions are joined by higher functions. Here the human is most essentially human. The wilderness is not a space of chaos and neither is it a space of legal order. Life is not nasty, brutish, and short — but neither is it pleasant, gentle, and long. There is death, but the vast majority survive to old age.

The elevation to *eretz* is through the popular acceptance of law and sovereignty. The romanticized account of the wilderness happenings, as popularly accepted, justifies and establishes the law. The law is thereby "founded on violence"[125] and retroactively legitimizes the violence of its establishment and delegitimizes the violence of those that contested it. This is what Derrida termed "the mystical" — wherein "a silence is walled up in the violence structure of the founding

[122] see also the concept of t'hom, the deep sea. Klein 693.

[123] Walter Benjamin, Critique of Violence; Robert M. Cover, *Nomos & Narrative*; Joseph Caro, *Beit Yosef*

[124] See Jacques Elie Derrida, Force of Law: The Mystical Foundation of Authority

[125] Derrida 1015

act."[126] The aporia of the wilderness, seen in hindsight now, is recognized as a road with a destination.[127]

[126] Derrida 943

[127] Derrida 947