

bers of the community. The covenant creates the neighbor just as it creates the self. Adherence to the covenant brings into being a community of moral agents. The moral agent is also a historical agent: the future of the nation hangs upon how I treat my neighbor.

The radical argument of this text is that there exists neither fate nor chance: history is contingent upon moral action; there is no theology without history, no duties to God without duties to the neighbor, no self except one that is construed in and through relationships to God and neighbor, no community or polity without covenant and revelation. The dialectical relationship between deity and people fundamental to the notion of covenant carries with it a clear risk of becoming broken, absolutized either into unconditional heteronomy (passive dependence upon the will of God, understood as entirely other, whereby agency and history are lost) or into unconditional agency, which is to say, tyranny (the absolute self independent of all commitment to the other). The repeated reformulations and renewals of the covenant throughout the Bible emphasize how central it was to ancient Israel's political and religious discourse. That it provides the structure of mutuality—for placing self and other in a relationship and for conceiving the polity as a community—warrants the attention of modern readers.

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Covenant and Consent

Grounds of Obligation

7. *Mekhilta Derabbi Yishmael, Bahodesh 5, 6*

This midrash describes the negotiations between God and Israel leading up to the Sinai covenant. It employs the parable—common in Rabbinic literature—of God as a king and provides typical grounds for establishing obligation to a sovereign.

(5) "I the Lord am your God" (Exod. 20:2). Why were the Ten Commandments not proclaimed at the beginning of the Torah? A parable: what is this

like? Like a human king who entered a province [*medinah*] and said to the people: Shall I reign over you? They replied: Have You conferred upon us any benefit that you should reign over us? What did he do [then]? He built the city wall for them, he brought in the water supply for them, and he fought their battles. [Then] he said to them: Shall I reign over you? They replied: Yes, yes. Similarly, God brought the Israelites out of Egypt, parted the sea for them, sent down the manna for them, brought up the well for them, brought the quails for them [and] fought for them the battle with Amalek. [Then] He said to them: Shall I reign over you? They replied: Yes, yes. . . .

(6) “You shall have no other Gods besides Me” (Exod. 20:3). . . .

A parable: A human king entered a province [*medinah*]. His servants said to him: Issue decrees upon the people. He answered: No! Once they have accepted my reign I shall issue decrees upon them. If they do not accept my reign, why should they accept my decrees?

Similarly, God said to Israel: “I the Lord am your God who brought you out of the land of Egypt. You shall have no other gods.” He [thus] said to them: “Am I He whose reign you have accepted in Egypt?” They replied: “Yes”; [so He went on]—“Now, just as you have accepted My reign, accept My decrees.”

“A Forceful Disclaimer Regarding the Torah”

8. BT Shabbat 88a

The discussion here introduces the bold proposition that Israel’s initial acceptance of the Torah was coerced—and therefore not binding. This latter implication is expressed by the term moda’a (disclaimer), drawing an analogy to a document asserting that coercive pressure has been applied, which serves to annul a deed of sale signed under duress (cf. BT Bava Batra 48b).

“. . . And they took their places at the foot of the mountain”⁶ (Exod. 19:17): Rabbi Avdimi b. Hama b. Hasa said, this teaches that the Holy One held the

6. Literally, “under the mountain.”

mountain over them like an [overturned] tub and told them: "If you accept the Torah—well and fine; otherwise, you will be buried right there."

Rav Aha b. Jacob said: This furnishes a powerful disclaimer [*moda'a*] regarding the [acceptance of the] Torah. [*Rashi*: So if He arraigns them, demanding "Why have you failed to observe that which you accepted?" they can respond that the acceptance was coerced.]

Rava said: Nevertheless, they reaffirmed its acceptance in the days of Ahasuerus, as written, "The Jews confirmed and accepted" (Esther 9:27)—they confirmed that which they had already accepted.

God's Bound Subjects

9. *Sifre Numbers* 115

This midrash again takes the form of a royal parable and, drawing upon Ezekiel (§5), characterizes the covenant as a relationship of subjection. Its point of departure is the last verse of the biblical text commanding the wearing of ritual fringes, which—like many other commandments—ends by referring to the Exodus.

"Thus you shall be reminded to observe all My commandments and to be holy to your God. I am the Lord your God, who brought you out of the land of Egypt to be your God: I, the Lord your God" (Num. 15:40-41).

Why is the Exodus mentioned in connection with each and every *mitzvah* [commandment]?

A parable: what is this like? Like a king whose friend's son was taken captive. When he redeemed him, he did not redeem him as a freeman but as a slave, so that if the king issues [decrees] and the son resists, he can say to him: "You are my slave!" When they came into the city, [the king] instructed him: "Put my sandals on my feet; carry my garments before me to the bathhouse!" The [friend's] son started pulling away; he then produced the deed and said to him: "You are my slave!"

Similarly, when the Holy One redeemed the seed of Abraham, his friend, He did not redeem them as freemen but as slaves, so that if He issues [decrees] and they resist, He can say to them: "You are my slaves!" When they

emerged into the desert, he issued to them some minor *mitzvot* and some major *mitzvot*, such as the Sabbath, incest, fringed garments, and phylacteries. Israel started pulling away; He then said to them: "You are my slaves! It is on this condition that I redeemed you—that I shall issue [decrees] and you obey."

"I, the Lord your God"—Why is this repeated? Is it not written already, "I am the Lord your God, who brought you out of the land of Egypt"? Why write again, "I, the Lord your God"? So that Israel should not say, "What was the point of God commanding us—wasn't it so that we observe [His commandments] and receive a reward? Let us neither observe [His commandments] nor receive a reward!" Just as Israel asked Ezekiel ["Certain elders of Israel came to inquire of the Lord" (Ezek. 20:1)]: "If a slave is sold by his master, is he not then outside his power?" He answered: "Yes." They said to him: "Since God has sold us over to the nations of the world, we are outside His power." He answered them: "If a slave is sold by his master on condition that he be returned [after a time], is he outside his power?"

"And what you have in mind shall never come to pass—when you say, 'We will be like the nations, like the families of the lands, worshipping wood and stone.' As I live—declares the Lord God—I will reign over you with a strong hand, and with an outstretched arm, and with overflowing fury" (Ezek. 20:32–33). "With a strong hand"—that is the plague, as written, "The hand of the Lord will strike" (Exod. 9:3). "And with an outstretched arm"—that is the sword, as written, "A drawn sword in his hand outstretched against Jerusalem" (1 Chron. 21:16). "And with overflowing fury"—that is starvation. Once I have brought upon you these three calamities one after another, I will reign over you against your will—that is why it is repeated, "I, the Lord your God."

Commentary. Covenant and Consent

At Sinai the people of Israel made a covenant with God to obey his law. But why was their consent necessary? Why didn't God simply hand down the law? Social contract theory suggests a possible answer. Obligation arises from consent; people are bound to obey only those authorities and laws

they choose for themselves. Since every man is “master of himself,” Rousseau argues, “no one can, under any pretext whatever, place another under subjection without his consent” (*Social Contract* IV:ii). As Hobbes writes, there is “no obligation on any man, which ariseth not from some act of his own” (*Leviathan*, chap. 21).

It might be objected that the covenant was no ordinary social contract. Were the people of Israel really free to accept or reject God’s law? And even if their consent was freely given, did the act of consent *create* the obligation to obey, or did it recognize and affirm a preexisting obligation? The Rabbis struggle with these questions, but not in a way that reveals a fundamental difference between God’s covenant with Israel and other social contracts. To the contrary, their commentaries highlight a tension endemic to consent theory—between consent as a source of obligation and consent as a way of acknowledging an obligation that exists independently of the contract. Their attempts to account for the moral force of the covenant illustrate a paradox that besets all contract arguments: The more compelling the grounds for consenting to a law or political arrangement, the less true it is that the act of consent creates the obligation to obey.

The notion that obligation depends on consent underlies the dispute, in BT Shabbat 88a, about whether Israel’s acceptance of the Torah was invalid due to coercion. The Talmud tells us that God secured the agreement of the people by holding the mountain over their heads and threatening to destroy them. Rav Aha b. Jacob argues that this act of coercion undermines the obligation to keep the commandments. Just as a commercial contract signed under duress does not bind, neither does a coerced covenant with God. Rava accepts the premise but finds a way out. The Jews reaffirmed their acceptance in the days of Ahasuerus, he suggests, when they were not in the shadow of the mountain. In voluntarily adopting the *mitzvah* of reading the *megillah* (a *mitzvah* God did not command), they implicitly accepted the entire Torah. Whether or not Rava’s solution is convincing, both Rabbis seem to assume that, absent an act of genuine consent, God’s law does not bind.

Other commentators reject the consent-based theory of obligation. In *Sifre Numbers* 115, the obligation to keep the *mitzvot* has nothing to do with the covenant, but arises instead from the conditions under which God redeemed the Jews from slavery in Egypt. On this account, the Exodus is not

a journey from slavery to freedom but a journey from one master (pharaoh) to another (God). Since God redeemed the Jews as slaves, not as freemen, the issue of consent never arises. He retains the right to issue decrees and they have the obligation to obey.

In *Mekhilta*, Bahodesh 5, 6, the covenant plays a role but not as the source of obligation. Rather than creating the obligation, it expresses or recognizes an obligation to God that preexists (and motivates) the act of consent. The obedience that Israelites owe God arises from all that he has done for them—delivered them from Egypt, divided the sea, sent manna and quails, fought the battle with Amalek, and so on. When he asks to be their king, the people reply, “Yes, yes.” But their obligation to him derives less from the fact of their consent than from the considerations that inform their consent. God is not a worthy sovereign because the people consent to his rule; rather, the people consent to his rule because he is a worthy sovereign.

Gratitude for great deeds is not the only reason for accepting God’s law. Another is the intrinsic justice or importance of the law itself. Maharal, a sixteenth-century scholar from Prague, invokes the ultimate version of this argument (§14). More than a just scheme of law, the Torah is necessary to the perfection of the universe; in its absence, he maintains, the universe would revert to chaos. However implausible this metaphysical claim may be, it nicely illustrates the paradox of consent theory by offering a limiting case. If no less than the survival of the cosmos is at stake in Israel’s acceptance of the Torah, then two consequences follow for the covenant. One is that the people have the most weighty reason imaginable to give their consent. The other is that, given the stakes, their consent is more or less beside the point. The moral importance of free choice pales in the face of the considerations that point to a particular choice. Unlike Rav Aha, Maharal is not troubled in the least by the coercion that God employed when he held the mountain over the people. Far from undermining the moral force of the Torah, this act of coercion expressed God’s view that the acceptance of the Torah was necessary, not contingent on a voluntary act.

Maharal’s insight into the limits of consent theory can be detached from his metaphysical assumptions. Consider a law of undisputed moral importance, such as a prohibition against a grave violation of human rights. The moral importance of such a law gives people a strong reason to consent to it

(as part of their constitution, say, or bill of rights). But it also gives grounds to obey such a law (and perhaps also to force others to obey it) independent of any act of consent. The weightier the reasons for consenting to a law, the less the obligation to uphold it derives from consent. Nations that fail to accept human rights conventions can nevertheless be held responsible for violating them. And if they protest that they have not given their consent, there may be a case for holding a mountain over their heads until they do.

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Offering the Torah to the Nations

10. *Sifre Deuteronomy* 343

Sifre: A Tannaitic Commentary on the Book of Deuteronomy, translated by Reuven Hammer, Yale Judaica Series (New Haven: Yale University Press, 1986), pp. 352–53.

If the main point of Selection 7 is that God's covenant cannot be refused, the argument here suggests that it can be—and actually was.

“And he said: The Lord came from Sinai [and rose from Seir unto them]” (Deut. 33:2). When God revealed Himself to give the Torah to Israel, He revealed Himself not only to Israel but to all the nations. He went first to the children of Esau⁷ and asked them, “Will you accept the Torah?” They replied, “What is written in it?” He said to them, “Thou shalt not murder” (Exod. 20:13). They replied that this is the very essence of these people and that their forefather was a murderer, as it is said, “But the hands are the hands of Esau” (Gen. 27:22), and, “By thy sword shall thou live” (Gen. 27:40). He then went to the Ammonites and the Moabites and asked them, “Will you accept the Torah?” They replied, “What is written in it?” He said, “Thou shalt not commit adultery” (Exod. 20:13). They replied that adultery is their very essence, as it is said, “Thus were both the daughters of Lot with child by their father. [And the first-born bore a son, and called his name Moab . . . and the

7. Otherwise named Seir, hence the midrashic rendering of the opening verse.