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JUSTICE RETOLD: THE SEMINAL NARRATIONS OF THE TRIAL OF THE JUDEAN KING

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ABSTRACT

Many legal systems have foundational stories about their provenance, serving to heighten the stature and authority of the normative order. Yet, these primary myths are often complicated by secondary ones that describe later climactic moments. A prevalent plot of this latter kind involves a defiant political actor who contests the jurisdiction of the courts and relates the legal order's response to this daunting challenge. The crucible of struggle forges a formidable legal institution that can withstand assault or a weaker one that limply survives.

Such stories captivate the collective legal imagination of a paideic community, a process first analyzed by the late Robert Cover. Hence they are preserved, told, and retold. However, the morals of secondary stories are more variable. Precisely because they examine moments of disturbance and conflict their implications are frequently in dispute. Thus, the very act of narration aims to amplify core truths implicit in these tales and announce their essential lessons.

The narrative history of the epic "trial of the Judean king" among Jews in antiquity and late antiquity affords a striking instance of this phenomenon. Making a lasting impression on the Jewish legal imagination of this period, the trial's impact and perpetual legacy are nevertheless highly contested. While the enduring lesson of the trial revolves around the relationship between law and power, what that legacy is depends entirely on the way the tale of the trial is told and, perhaps more importantly, retold.

KEYWORDS: power, trial, king, narrative, Jewish law

INTRODUCTION

Almost three decades ago the legal community lost Robert Cover, one of its most creative minds, at the far too young age of forty-two. A champion of civil rights and a brilliant constitutional theorist, Cover's final years yielded a flourishing of seminal articles on legal narratives.[1] His "*Nomos* and Narrative," "Obligation: A Jewish Jurisprudence of the Social Order," and, especially, "The Folktales of Justice: Tales of Jurisdiction" focused renewed attention on the profound nature and formative role of law's stories.[2]

1 For more on Cover's life, see Guido Calabresi, Michael J. Graetz, Barbara A. Black, Stephen Wizner, David Brion Davis, Tanina Rostain, Owen M. Fiss & James Ponet, *Tributes to Robert M. Cover*, 96 YALE LAW JOURNAL 1717 (1987). *See also* Martha Minow, *Introduction: Robert Cover and Law, Judging, and Violence*, *in* NARRATIVE, VIOLENCE AND THE LAW: THE ESSAYS OF ROBERT COVER 1–12 (Martha Minow, Michael Ryan & Austin Sarat eds., 1992).

2 Robert M. Cover, *Obligation: A Jewish Jurisprudence of the Social Order*, 5 JOURNAL OF LAW & RELIGION 65 (1987); Robert M. Cover, *The Folktales of Justice: Tales of Jurisdiction*, 14 CAPITAL UNIVERSITY LAW REVIEW 179 (1985),

Heeding Cover's appeal to expand the legal canon by examining rich literary texts from the past, this article explores a critical dimension of such texts that is often neglected. After introducing a crucial distinction between primary and secondary legal myths, this article demonstrates how the latter are especially prone to being adapted and transformed in the very process of their narration. It is the manifold expressions of legal meaning embedded in these multiple versions that capture the diverse normative claims of a "paideic community." The body of the article exemplifies this seminal dimension of legal stories by analyzing several different renditions of a profound early myth involving a fundamental clash between the rule of law and sovereign power (which Cover briefly studied in "The Folktales of Justice").[3] Inspired by Cover's life and works, this article charts new directions for the study of foundational legal narratives by way of example.

Cover's landmark studies should be situated within a larger scholarly context. The 1980s marked the heyday of the law and literature renaissance that sought to mine literary expressions of juristic themes, and conversely to heighten sensitivities to the rhetorical dimensions of normative writings.[4] In addition, Cover's study of legal narratives intersects with the critical legal studies movement that thrived at the same time. As Cover demonstrated, legal stories often revolve around themes of power and violence.[5] They also serve as a means of expression for the disempowered. Deconstructing the formal legal edifice, the "Crits" sought to expose formidable underlying interests and influences, and Cover provided complementary lines of inquiry relevant to their project.[6] Finally, because legal narratives also offer means of expression for smaller paideic communities, studying such stories draws attention to minority groups. In this sense, Cover was contributing to the civil rights movement, whose formative phases matched the main decades of Cover's life.[7]

Yet Cover's writings on law's stories also transcend these three legal movements and have a sui generis quality to them. Through his studies, Cover introduced, and elaborated upon, an ambitious new legal theory that borders on the anarchic. In place of rulers and other political forces dominating the socio-legal order, Cover proclaimed the supremacy of a polyvalent normative universe. In this cosmos, legal stories play an essential role.[8]

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reprinted in NARRATIVE, VIOLENCE AND THE LAW: THE ESSAYS OF ROBERT COVER, *supra* note 1; Robert M. Cover, *The Supreme Court, 1982 Term – Forward:* Nomos *and Narrative*, 97 HARVARD LAW REVIEW 4 (1983).

3 *See* Cover, *The Folktales of Justice*, *supra* note 2, at 183–90.

4 *See* James Boyd White, *Thinking about Our Language*, 96 YALE LAW JOURNAL 1960 (1987). For more on the law and literature movement, see MELANIE WILLIAMS, EMPTY JUSTICE: ONE HUNDRED YEARS OF LAW, LITERATURE, AND PHILOSOPHY (2002); Richard H. Weisberg, *Literature's Twenty-Year Crossing into the Domain of Law: Continuing Trespass or Right by Adverse Possession?*, *in* LAW AND LITERATURE: CURRENT LEGAL ISSUES (Michael Freeman & Andrew Lewis eds., 1999); Sanford Levinson, *Some (Brief) Reflections about Law and Literature*, 10 CARDOZO STUDIES IN LAW & LITERATURE 121 (1998); Robin L. West, *Communities, Texts, and Law: Reflections on the Law and Literature Movement*, 1 YALE JOURNAL OF LAW & THE HUMANITIES 129 (1988).

5 *See* Robert M. Cover, *Violence and the Word*, 95 YALE LAW JOURNAL 1601 (1985).

6 *See*, *e.g.*, Cover, *The Folktales of Justice*, *supra* note 2, at 181 n.10 (citing Roberto Unger, *The Critical Legal Studies Movement*, 96 HARVARD LAW REVIEW 561 (1983)). For more on the critical legal studies movement, see THE CANON OF AMERICAN LEGAL THOUGHT 647–732 (David Kennedy & William W. Fisher III eds., 2006); DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION: FIN DE SIÈCLE (1997); ANDREW ALTMAN, CRITICAL LEGAL STUDIES: A LIBERAL CRITIQUE (1990); MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987).

7 *See* Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE LAW JOURNAL 1287 (1982). For more on Cover's personal engagement in social justice causes, see Joseph Lukinsky & Robert Abramson, *Robert Cover: A Jewish Life*, 45 CONSERVATIVE JUDAISM 4, 5 (1993); Stephen Wizner, *Tribute to Robert M. Cover*, 96 YALE LAW JOURNAL 1707 (1987).

8 The term "anarchic" was used by Cover in describing his own theory. *See* Cover, *The Folktales of Justice*, *supra* note 2, at 181 ("My position is very close to a classical anarchist one—with anarchy understood to mean the absence of rulers, not the absence of law."). Cover's studies of legal narratives have been the subject of several

Under Cover's expansive definition of law, which encompasses principles, ambitions, and rights, legal stories serve as a rich repository of normative values and aspirations. Further, according to Cover, law operates among an amalgam of individuals and groups, and legal myths are a mode of expression for their collective voice. Likewise, law functions within a complex matrix of historical, societal, ethical, and political forces, and legal narratives reflect the multiple dimensions of this dynamic enterprise.[9]

Moreover, Cover contended, folktales also constitute a vehicle for legal transformation. Conceiving of law as a bridge built out of committed social behavior, Cover located formative building blocks in the materials of the legal narratives of each community. They represent current normative commitments, as well as an imagined alternative state, and the way of connecting the present to a possible projected future. From this perspective, law develops not only through legislation or judicial decisions but also by way of the legal stories that are told.[10]

The dual characterization of law's stories as filtering the communal imagination and enabling the construction of a path towards an ideal "alternity" explains the special role of legal narratives for marginal groups. Lacking state authority and unable to deploy the violence of law, these myths afford a singular tool for the disempowered. Moreover, whereas the exercise of law by state officials is an act of power, a "jurispathic" act, smaller paideic communities develop law as an act of meaning, an act of "jurisgenesis." For the latter, normative stories become a primary vehicle for law's genesis.[11]

Much of Cover's fascination with Jewish law, and especially Jewish lore, stems from this feature.[12] Lacking sovereignty for almost two millennia, Jews nevertheless developed an elaborate

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scholarly studies. *See* Thorn Brooks, *Let a Thousand Nomoi Bloom? Four Problems with Robert Cover's Nomos and Narrative*, Issues in Legal Scholarship (2006); John Alder, *Robert Cover's 'Nomos and Narrative': The Court as Philosopher King or Pontius Pilate*, Issues in Legal Scholarship (2006); Richard Mullendar, *Two Nomoi and a Clash of Narratives: The Story of the United Kingdom and the European Union*, Issues in Legal Scholarship (2006); Robert Post, *Who's Afraid of Jurispathic Courts: Violence and Public Reason in Nomos and Narrative*, 17 Yale Journal of Law & the Humanities 9 (2005); Aviam Soifer, *Covered Bridges*, 17 Yale Journal of Law & the Humanities 55 (2005); Beth A. Berkowitz, *Negotiating Violence and the Word in Rabbinic Law*, 17 Yale Journal of Law & the Humanities 125 (2005); Stephen Wizner, *Repairing the World through Law: A Reflection on Robert Cover's Social Activism*, 8 Cardozo Studies in Law & Literature 1 (1996); Susan P. Koniak, *When Law Risks Madness*, 8 Cardozo Studies in Law & Literature 65 (1996); and Suzanne Last Stone, *In the Pursuit of the Counter-Text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory*, 106 Harvard Law Review 813 (1993).

9 *See* Cover, *The Supreme Court, 1982 Term – Forward:* Nomos *and Narrative*, *supra* note 2, at 4–25; Cover, *The Folktales of Justice*, *supra* note 2, at 182–83.

10 *See* Cover, *The Supreme Court, 1982 Term – Forward:* Nomos *and Narrative*, *supra* note 2, at 9–10; *see also* Michael Ryan, *Meaning and Alternity*, in Narrative, Violence and the Law: The Essays of Robert Cover, *supra* note 1, 267–76.

11 *See* Cover, *The Supreme Court, 1982 Term – Forward:* Nomos *and Narrative*, *supra* note 2, at 40–44; Cover, *The Folktales of Justice*, *supra* note 2, at 181–82. Likewise, the stories that are told from within a state are heroic when they represent ways of resisting the state's power. *See id*.

12 For a discussion of this dimension in Cover's writings, see Berkowitz, *supra* note 8. Beth Berkowitz, *Negotiating Violence and the Word in Rabbinic Law*, 17 Yale Journal of Law & the Humanities 125 (2005); Steven D. Fraade, *Nomos and Narrative before Nomos and Narrative*, 17 Yale Journal of Law & the Humanities 81 (2005); Samuel L. Levine, *Halacha and Aggada: Translating Robert Cover's Nomos and Narrative*, 1998 Utah Law Review 465 (1998); Perry Dane, *The Public, the Private, and the Sacred: Variations on a Theme of "Nomos and Narrative,"* 8 Cardozo Studies in Law & Literature 15 (1996); Tikva Frymer-Kensky, *Towards a Liberal Theory of Halakhah*, Tikkun, July 1995; Rachel Adler, *Feminist Folktales of Justice: Robert Cover as a Resource for the Renewal of Halakhah*, 45 Conservative Judaism 40, 40–55 (1993); Stone, *In the Pursuit of*

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legal tradition over the course of this volatile period.[13] In fact, their robust normative system served as a vital force for a largely disempowered Jewish people. Throughout its various phases, the Jewish legal tradition was perpetually sustained by its formative legal myths which enabled it to either resist power or envision an ideal alternity without power.

Cover's pioneering interpretation of the role and nature of legal stories, and especially Jewish legal stories, has had a transformative effect on scholarship ever since.[14] Nevertheless, Cover's account has certain limitations. Most notably, Cover ironically imposes a normative and teleological frame on legal narratives that obscures their diverse nature. A crucial part of Cover's project is to challenge the monolithic nature of state-generated law that overshadows the legal variety that emerges from paideic communities. Yet, despite recognizing the multiplicity of normative perspectives within a *polity*, Cover offers too narrow a description of the voices within a *minority community*.[15] In the process of transmission, such communities tell and retell their foundational myths, and along the way adapt or even transform their essential meanings. In addition, they at times relay secondary stories that can be subversive to primary ones and that further complicate legal discourse over time. By characterizing certain sacred legal myths as normative narrations that form discrete bridges to superior destinations, Cover veils the plurality of ideas—sometimes even competing ones—that are generated by a community through the very act of narration. Indeed, the proliferation of disparate versions of a given myth is an essential feature of legal narratives.[16]

A parallel point was underscored by Judith Resnik in her probing reappraisal of "*Nomos* and Narrative."[17] Seeking to extend Cover's normative critique of *Bob Jones University v. United States*, 461 U.S. 574 (1983), to issues such as Muslim headscarves in France, Resnik also highlights

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the Counter-Text, *supra* note 8; Gordon Tucker, *The Sayings of the Wise Are Like Goads: An Appreciation of the Works of Robert Cover*, 45 Conservative Judaism 21 (1993).

13 *See* Cover, *Obligation: A Jewish Jurisprudence of the Social Order*, *supra* note 2, at 68.

14 For Cover's wider (direct or indirect) influence, see, e.g., Linda H. Edwards, *Once Upon a Time in Law: Myth, Metaphor, and Authority*, 77 Tennessee Law Review 883 (2010); Law and the Humanities: An Introduction (Austin Sarat, Matthew Anderson & Cathrine O. Frank, eds., 2010); Robert R. Garet, *Natural Law and Creation Stories*, *in* Religion, Morality, and the Law: Nomos XXX 218–62 (J. Roland Pennock & John W. Chapman eds., 1998); L. H. LaRue, Constitutional Law as Fiction: Narrative in the Rhetoric of Authority (1995); Paul W. Kahn, *Community in Contemporary Constitutional Theory*, 99 Yale Law Journal 1 (1989); Mark V. Tushnet, *Anti-Formalism in Recent Constitutional Theory*, 83 Michigan Law Review 1502 (1985).

For Cover's (direct or indirect) influence on the study of Jewish law, see, e.g., Jeffrey L. Rubenstein, Stories of the Babylonian Talmud (2010); Steven D. Fraade, *Ancient Jewish Law and Narrative in Comparative Perspective: The Damascus Document and the Mishnah*, 24 Dine Israel 65 (2007); Moshe Simon-Shoshan, *Halakhic Mimesis: Rhetorical and Redactional Strategies*, 24 Dine Israel 101 (2007); Suzanne Last Stone, *On the Interplay of Rules, 'Cases,' and Concepts in Rabbinic Legal Literature: Another Look at the Aggadot on Honi the Circle-Drawer*, 24 Dine Israel 125 (2007); Barry Scott Wimpfheimer, *Talmudic Legal Narrative: Broadening the Discourse of Jewish Law*, 24 Dine Israel 157 (2007); Steven Winter, *The Cognitive Dimension of the Agon between Legal Power and Narrative Meaning*, 87 Michigan Law Review 2225 (1989).

15 *See* Cover, *The Supreme Court, 1982 Term – Forward:* Nomos *and Narrative*, *supra* note 2, at 46–68.

16 Thus, while Cover focuses on a normative universe held together "by the force of interpretive commitments"—a characterization that loosely attaches to Jewish thinkers from antiquity and late antiquity—he tends to obfuscate the rich diversity of their legal output, *including their multiple renditions of the same legal myth*. For more on this phenomenon within Jewish writings of late antiquity, see Symposium, *What is (the) Mishnah*, 32 AJS Review Symposium 221 (2008); Shamma Friedman, *A Good Story Deserves Retelling*, *in* Creation and Composition: The Contribution of the Bavli Redactors (Stammaim) to the Aggada 71–100 (Jeffrey L. Rubenstein ed., 2005); Jeffrey L. Rubenstein, Talmudic Stories: Narrative Art, Composition and Culture (2003).

17 See Judith Resnik, *Living Their Legal Commitments: Paideic Communities, Courts, and Robert Cover*, 17 Yale Journal of Law & the Humanities 17 (2005).

a lacuna in Cover's analysis. According to Resnik, Cover never addresses situations where there is conflict within paideic communities about their own practices and authoritative interpretations. Confronting an undifferentiated other, Cover fails to interrogate the power within such paideic communities. With a deliberate emphasis on the question of gender equality, Resnik grapples with the formidable question about which members of such communities have the authority to make community law.

Even as Resnik is right to raise this criticism, certain elements of her analysis need to be modified. While Resnik frames her commentary as describing an omission in Cover's thought, I would argue that Cover's analysis falters in his conceptualization of the distinct narrative bridges of paideic communities. Further, Resnik's particular emphasis on authority within paideic communities is misplaced. A primary interest of Cover concerns how paideic communities generate law in the absence of power, and, by extension, an absence of authority. Narration supplies them with a normative medium, in lieu of traditional instruments of law. The rhetorical channel, however, is more open-ended and more resilient to hierarchies. Indeed, one of the essential characteristics of legal narratives is that their transmission often leads to a multiplicity of tellings and retellings. It is precisely here where dissident voices within the paideic community find robust expression.[18] The locus of differentiation is not in praxis or authoritative interpretation but rather in the very act of narration.

An important illustration of the plural narrations of a myth that can be generated by a paideic community is the diverse ways it portrays the inevitable confrontation between the rule of law and sovereign power. Cover is too quick to assume that minority voices that describe such encounters champion law over power.[19] In fact, often the disempowered submit to power, or they attempt to reclaim, or even exalt power. In a similar vein, a thorough examination of Jewish reflections on law and power reveals a more complex record than Cover recognized.[20] Rather than viewing these reflections as building normative bridges that rise above the threats of power, a better description would be that Jews puzzled over the core tension between law and power, struggling to come to terms with this phenomenon and offering different possible resolutions. Their legal stories, especially the secondary myths I refer to below, mediate this process.

A dramatic range of Jewish responses to law's clash with sovereign power is reflected in the diverse narrations of the myth of one epic trial in Jewish antiquity and late antiquity, which we can label "the trial of the Judean king." In a section in his "Folktales," Cover offers a penetrating analysis of this trial. Yet, characteristically, Cover homes in on one account of this trial, which he privileges as normative, rather than on the assorted portrayals that have been refracted by a paideic community.

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18 This is partially a function of the oral nature of these retellings, which contributes to their fluidity. *See* MARTIN JAFFEE, TORAH IN THE MOUTH (2001); Shamma Y. Friedman, *On the Origins of Variant Traditions in the Talmud Bavli*, 7 SIDRA: A JOURNAL FOR THE STUDY OF RABBINIC LITERATURE, 66, 66–102 (Hebrew); Yaakov Zussman, *The Oral Law—Simply Understood as it Sounds*, in MEHQERE TALMUD 3, MUQDASH LI-ZIKHRO SHEL PROFESOR EPHRAIM ELIMELECH URBACH 289–385 (Yaakov Zussman & David Rosenthal eds.) (Hebrew).

19 *See* Cover, *The Supreme Court, 1982 Term – Forward:* Nomos *and Narrative*, *supra* note 2, at 46–68; Cover, *The Folktales of Justice*, *supra* note 2, at 182–204.

20 Moreover, Jewish writings need to be more properly contextualized. Rather than attributing the Jewish perspective to the way disempowered Jews respond to an absence of power, a more accurate description would recognize the historic centrality of law within Judaism (from certain sections in the Bible onward), acknowledge a degree of Jewish empowerment (especially during various phases of the biblical and late Second Temple period), and register the plural Jewish ideas which emerge about power. For a further discussion of some of these themes, see David C. Flatto, *The King and I: The Separation of Powers in Early Hebraic Political Theory*, 20 YALE JOURNAL OF LAW & THE HUMANITIES 61 (2008); *The Historical Origins of Judicial Independence and Their Modern Resonances*, 117 YALE LAW JOURNAL POCKET PART 8 (2007); and my forthcoming book, *Justice Unbound: Separation of Powers in the Early Jewish Imagination* (Harvard University Press).

This article honors Cover's legacy by continuing his analysis of this foundational legal story. Throughout this article, the indelible imprints of Cover's insights are apparent: Cover's essential enlargement of what constitutes law; his insistence on situating norms within their narrative context; his deep awareness of the enduring struggle between law and power; his striking amplification of the violence enabled by law; and his profound sensibilities that Jewish normative and narrative writings are a rich source for interrogating questions of authority and justice.

Inspired by Cover, and amplifying certain motifs that were central to his project, this article also seeks to overcome the limitations of his work that I described above. It offers an original study of the manifold mythical expressions of the epic trial of the Judean king. Rather than identifying one bridge, this article discerns multiple and competing paths that are constructed out of alternative retellings of one legend.

The body of this article is organized into four parts. Part I provides methodological background. It describes a sub-genre of legal narratives that we can label "foundational legal stories," and it further introduces an important distinction between primary foundational legal stories—depicting the establishment of a legal system—and secondary ones—capturing crucial moments when the legal system confronts and (in some form) overcomes existential challenges. A prominent example of a secondary foundational story in Jewish jurisprudence of antiquity and late antiquity is the legend of the trial of the Judean king, which is told and retold in Jewish writings from this period.

Parts II—IV, which make up the heart of the article, offer an extensive analysis of the various retellings of this secondary story. In contrast with previous scholarship, which addressed the historicity of this trial, this analysis focuses on its literary record and presents a novel interpretation of the jurisprudential implications of these varied accounts. Specifically, Part II analyzes the best-known version of this epic trial, the Babylonian Talmudic account, which Cover analyzed in his "Folktales." After discussing the advantages and drawbacks of Cover's analysis, I advance a revised interpretation of the trial's essential message according to the Talmud that emphasizes the irreconcilable clash between law and power.

Part III explores a parallel midrashic version of the epic trial that apparently was unknown to Cover. Analyzing this parallel alongside the Babylonian Talmudic account sheds additional light on both versions. The midrashic version presents a remarkable proclamation of legal supremacy, where the rule of law fully applies to absolutist rulers. Part IV returns to the earliest accounts of this epic trial, found in the writings of Josephus. While Cover was aware of the Josephan parallels, he marginalized their normative significance because of their historiographic nature. However, as I argue below, Josephus's accounts are carefully constructed and have much juristic value. They portray a world where sovereign power and violence dominate the administration of justice.

The legend of this epic trial revolves around a fundamental confrontation between justice and power, a tension that runs through much of jurisprudence. The several versions of this myth all grapple with this dynamic and the ways it shapes the nature of political and legal authority. Surveying them sequentially, as I do in in Parts II–IV, displays an array of early Jewish responses to the systemic clash between these spheres. The Conclusion returns to the theme of legal myths in Cover's thought and in legal traditions more generally.

A historic episode in antiquity, then, spawns a myth with three separate, and even contradictory, narrations about the ultimate relationship between the rule of law and sovereign power. One account depicts the irreconcilable conflict between law and power and calls for a stark division between these realms; a second concludes that law binds the powerful; and, finally, a third declares that the powerful control the law. The parts below explore the different retellings and legacies of this seminal folktale.

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I: METHODOLOGICAL BACKGROUND

Many legal systems have foundational stories about their provenance, often describing a leading figure or group playing a monumental role or associated with a primary act or text. Hammurabi erected a stele enumerating the legal rights of the Babylonians. Solon established the legal principles of the Athenians. The first and second Decemvirate promulgated the Twelve Tables for the Roman plebeians. Justinian collated the classical writings of the jurists in Byzantium. Henry II consolidated the jurisdiction of the Westminster Court of Common Pleas. Napoleon codified the law in post-revolutionary France.[21] Rooted in historical events, the legacy of these stories transcends their historical record. Filling the collective legal imagination of a paideic community, these foundational stories reverberate as they are told and retold.

In a similar vein, Jewish law has its foundational story that traces its origins back to God's revelation of the law at Mount Sinai. At the culmination of Israel's exodus from Egypt, Moses ascends the sacral mountain and mediates an eternal covenant between God and the priestly Israelite nation. In return for God's election of Israel, the people pledge to obey God's commandments. Upon descent from the mountain, Moses delivers the Covenantal Tablets recording the Decalogue and transmits a plethora of additional laws that inaugurates the Israelite legal tradition.[22]

These storied accounts offer portraits of decisive moments with definitive and far-reaching normative consequences. Each event that is described announces the advent of a novel legal tradition, launching a new era in jurisprudence. Yet these primary myths are often accompanied or subverted by secondary ones that describe climactic moments from later phases, which are frequently less triumphant and more fraught with danger, but are no less transformative. Whether depicting a battle for control over legal jurisdiction or an existential threat to the courts posed by a defiant political actor, these accounts also portray how the legal order responds to such daunting challenges. The crucible of struggle forges a formidable legal institution that can withstand assault or a weaker one that limply survives.

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21 The literature is voluminous. For several helpful treatments:

On Hammurabi, see Raymond Westbrook, A History of Ancient Near Eastern Law (2d ed. 1997); Martha T. Roth, Law Collections From Mesopotamia and Asia Minor (2d ed. 1997); Martha T. Roth, *Ancient Rights and Wrongs: Mesopotamian Legal Traditions and the Laws of Hammurabi*, 71 Chicago-Kent Law Review 13 (1995); Hans J. Boecker, Law and the Administration of Justice in the Old Testament and Ancient East (Jeremy Moiser trans., 1980); The Babylonian Laws (G. R. Driver & John Miles eds., 1960).

On Solon, see The Cambridge Companion to Ancient Greek Law (Michael Gagarin & David Cohen, eds., 2005); Solon of Athens: New Historical and Philological Approaches (Josine H. Blok & Andre P. M. H. Lardinois eds., 2006).

On the Twelve Tables and Justinian, see Barry Nicholas, An Introduction to Roman Law (1962); David Johnston, Roman Law in Context (1999); Peter Stein, Roman Law in European History (1999); Jill Harries, Law and Empire in Late Antiquity (1999).

On Henry II, see John H. Langbein, Renee Lettow Lerner & Bruce P. Smith, History of the Common Law: The Development of Anglo-American Legal Institutions (2009); J. H. Baker, An Introduction to English Legal History (4th ed. 2002).

On Napoleon, see John Henry Merryman and Rogelio Pérez-Perdomo, The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America (3rd ed. 2007); Manlio Bellomo, The Common Legal Past of Europe, 1000–1800 (1995).

22 The literature is voluminous. For several helpful treatments, see James Kugel, How to Read the Bible 233–79 (2007); John Collins, Introduction to the Hebrew Bible 125–42 (2d ed. 2014); Moshe Greenberg, *Some Postulates of Biblical Criminal Law*, *in* Essential Papers on Israel and the Ancient Near East 333–52 (Frederick E. Greenspahn ed., 1991); Jon D. Levenson, Sinai and Zion: An Entry into the Jewish Bible (1985); Shalom M. Paul, Studies in the Book of the Covenant in the Light of Cuneiform and Biblical Law 1–10, 27–42 (1970); Yehezkel Kaufman, The Religion of Israel, From Its Beginnings to the Babylonian Exile 231–40 (trans. Moshe Greenberg 1960).

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Legal systems are also shaped by accounts of such moments. A recalcitrant Henry IV had to yield to the papal (legal) authority of Gregory VII during the Investiture Controversy. Lord Coke refused to succumb to the absolutist demands of James I. Justice Marshall adroitly outmaneuvered Madison and Jefferson and emphatically upheld the supremacy of the federal judiciary.[23] Likewise, Jewish jurisprudence during antiquity and late antiquity preserves a similar tale describing an existential challenge to the legal system that was encountered when leading judges confronted a powerful ruler: the story of the trial of the Judean king.[24]

While the historical kernels of these secondary myths are at times hard to reconstruct or corroborate, their importance transcends their facticity and relates to their enduring legacies. Such stories captivate the collective legal imagination of a paideic community. Hence they are preserved, told, and retold. When it comes to primary foundational myths, their overall purpose is plain: to heighten the stature and authority of the normative order. For example, recounting how the Decemvirates authored the Twelve Tables promotes the venerable and ancient roots of Roman jurisprudence.[25] However, the morals of secondary stories are more variable. Precisely because they examine moments of disturbance and conflict their implications are frequently contested. Thus, the very act of narration aims to amplify core truths implicit in these tales and announce their essential lessons.

The narrative history of the tale of the trial of the Judean king among Jews in antiquity and late antiquity affords a striking instance of this phenomenon. Making a lasting impression on the Jewish legal imagination of this period (in contrast with later periods, when the influence of this tale evidently wanes), the trial's impact is nevertheless highly contested. Several retellings not only differ on a host of details, but also radically diverge on the principal moral of the story. Each narration steers the tale in a different direction, and boldly underscores a distinct lesson about the relationship between law and power. Below I briefly summarize the historical background to this trial before turning to an analysis of each narrative version.

Five literary sources, which can be grouped into three sets of texts, describe the trial of the Judean king in antiquity and late antiquity: two are recorded by Josephus (these have much in

23 The literature is voluminous. For several helpful works:

On the Investiture Controversy, see HAROLD BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 94–119 (1983); UTA-RENATE BLUMENTHAL, THE INVESTITURE CONTROVERSY: CHURCH AND MONARCHY FROM THE NINTH TO THE TWELFTH CENTURY (1988).

On Cook and James I, see CATHERINE DRINKER BOWEN, THE LION AND THE THRONE: THE LIFE AND TIMES OF SIR EDWARD COKE (1552–1634) (1957); ALAN CROMARTIE, THE CONSTITUTIONALIST REVOLUTION: AN ESSAY ON THE HISTORY OF ENGLAND, 1450–1642 (2006).

On *Marbury v. Madison*, see PAUL KAHN, THE REIGN OF LAW: MARBURY V. MADISON AND THE CONSTRUCTION OF AMERICA (1997); WILLIAM E. NELSON, MARBURY V. MADISON: THE ORIGINS AND LEGACY OF JUDICIAL REVIEW (2000).

24 I thank Barry Wimpfheimer for sharing an Association of Jewish Studies 2005 Conference paper with me that explored certain dimensions of the trial's multiple narrations in rabbinic literature and Josephus, especially addressing its midrashic underpinnings, which introduced me to several references and helped spark my interest in this topic.

On the trial of the Judean king (i.e., the trial of Herod or Jannaeus or a Hasmonean King), see MENAHEM KAHANA, SIFRE ZUTA DEUTERONOMY: CITATIONS FROM A NEW TANNAITIC MIDRASH 282–86 (2002) (Hebrew); Zvia Kefir, *King Jannaeus and Simeon b. Shetach: An Amoraic Legend in Historical Garb*, *in* 3 TURA 85–97 (1994) (Hebrew); DAVID M. GOODBLATT, THE MONARCHIC PRINCIPLE: STUDIES IN JEWISH SELF-GOVERNMENT IN ANTIQUITY 112 (1994); J. MCLAREN, POWER AND POLITICS IN PALESTINE: THE JEWS GOVERNING THEIR OWN LAND 67–79 (1991); JOSHUA EFRON, STUDIES ON THE HASMONEAN PERIOD 190–96 (1987); Cover, *The Folktales of Justice*, *supra* note 2; E. P. SANDERS, JESUS AND JUDAISM 313 (1985).

For references to earlier scholarship see EFRON, *supra*, 190–96 (1987) and LOUIS FINKELSTEIN, 2 THE PHARISEES: THE SOCIOLOGICAL BACKGROUND OF THEIR FAITH 684 n.6 (1938).

25 *See* NICHOLS, *supra* note 21; JOHNSTON, *supra* note 21.

common), and three are collected in rabbinic literature (one is very elliptic).[26] Given that Josephus was both more chronologically and geographically proximate to the original event and was focused upon preserving Judean history, it is likely that his accounts are more historically accurate than the rabbinic ones.[27] Nevertheless, here as elsewhere, Josephus's accounts have a narrative quality, too, which suggests that it would be a mistake to overly rely on their accuracy.[28] Moreover, internal inconsistencies in Josephus's renditions call into question the reliability of his accounts.[29] What seems most prudent from a historical perspective, then, is to adopt a more conservative methodology. A high degree of credibility can be assigned to "facts" that are common to all of these respective versions and likely form the historical kernel that was then embellished or adapted in the multiple retellings of Josephus and the rabbis.[30]

All of the accounts agree on the following: During the Hasmonean period (approximately 152–37 BCE)—either in the intermediate phase (the reign of Alexander Jannaeus) or at its tail end (the end of the reign of Hyrcanus II and the beginning of the political career of Herod)—a Hasmonean king is involved in a prominent trial (in some capacity).[31] The defendant in the trial is a powerful political actor (either the king or a rising figure who is pursuing the throne) who is summoned before the leading sages. Reluctant to submit to their jurisdiction, the powerful defendant defiantly resists the trial proceedings. Opposing the recalcitrant defendant is a leading (Pharisaic) sage by the name of Sameas or Simeon, who daringly insists upon the rightful jurisdiction of the sages. However, other sages do not share his temerity, and they cower before the intimidating tactics of the powerful defendant. With the parties locked in a dramatic stalemate, the episode takes a

26 See Parts II–IV for the exact references.

27 For a summary of the life and times of Josephus, see Steve Mason, *Introduction* to Josephus Flavius: Translation and Commentary (Steve Mason ed., Louis H. Feldman, trans., 2000); Louis H. Feldman, *Flavius Josephus Revisited: The Man, His Writings, and His Significance*, *in* Aufstieg und Niedergang der Römischen Welt 21.2 (1984); Tessa Rajak, Josephus: The Historian and His Society (1983).

28 For more on the challenges of interpreting Josephus's historiography, see Chaim Milikowsky, *Josephus between Rabbinic Culture and Hellenistic Historiography*, *in* Shem in the Tents of Japhet: Essays on the Encounter of Judaism and Hellenism 159–200 (James Kugel ed., 2002). For a comparison of the historicity of Josephus's accounts with rabbinic literature, see Shaye J. D. Cohen, *Parallel Historical Tradition in Josephus and Rabbinic Literature*, 91 World Congress of Jewish Studies 1, 7–14 (1986); Vered Noam, *Did the Rabbis Know Josephus's Work?* 81 Tarbiz 367–95 (2013) (Hebrew); Noam, *The Story of King Jannaeus (b. Qiddushin 66a): A Pharisaic Reply to Sectarian Polemic*, 107 Harvard Theological Review 1, 31–58 (2014). Vered Noam and Tal Ilan are continuing to explore this theme in their forthcoming work, Josephus and the Rabbis: A Literary-Historical Investigation of the Parallel Traditions in Josephus and Rabbinic Literature (Hebrew). One should also note the skeptical position (rejecting the link between Josephus's accounts of the trial of Herod and the rabbinic trial narratives) of James VanderKam, From Joshua to Caiaphas: High Priests after the Exile 359–62 (2004).

29 *See* Part IV below. Thus, in Part IV I analyze Josephus's accounts of the trial as a myth or aggadah that he relays (where Josephus may act as more of a transmitter of the myth, than its author). However, I believe that my analysis should be equally compelling to those who treat these sections in Josephus's writings as historical accounts.

30 For more on the challenges of early Jewish historiography, and the need for employing this careful methodology, see Rubenstein, Talmudic Stories, *supra* note 16, at 1–33; Barry Scott Wimpfheimer, *Richard Kalmin's Jewish Babylonia between Persia and Roman Palestine*, 78 Journal of the American Academy of Religion 312, 312–15 (2010) (book review); Isaiah Gafni, *Rabbinic Historiography and Representations of the Past*, *in* The Cambridge Companion to the Talmud and Rabbinic Literature 295–312 (Charlotte Elisheva Fonrobert and Martin S. Jaffee eds., 2007); and Friedman, *A Good Story Deserves Retelling*, *supra* note 16.

31 For more historical background, see Martin Goodman, Rome and Jerusalem: The Clash of Ancient Civilizations (2007); Peter Schaefer, The History of the Jews in the Greco-Roman World (rev. ed. 2003); Isaiah Gafni, *The Historical Background of Rabbinic Literature*, *in* The Literature of the Sages 1–34 (Shmuel Safrai ed., 1987).

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tragic turn. The cowardly sages (excluding Sameas/Simeon) all perish, evidently due to their failure to assert their authority before the powerful defendant.

Situated in the context of the Hasmonean period, whether earlier or later, the above account is also historically plausible. If the trial transpired during the lifetime of Alexander Jannaeus, as claimed by certain rabbinic sources, there were significant tensions between him and the Pharisaic sages. These were largely due to the intense sectarianism that fractured the Judean people during this period.[32] More specifically, various sources depict Jannaeus as being squarely caught within the sectarian conflict, switching his allegiances between Pharisees and Sadducees and trying to manipulate the loyalties of these various groups.[33] Breaking with the Pharisees later in his career, Jannaeus evidently had direct clashes with them and even killed many of them. Moreover, Jannaeus's reign marks a particularly expansionist phase of Hasmonean rule, when the monarchy assumes the trappings of Hellenistic kingship. These developments could easily have elicited a traditionalist response, where leading sages remind the king of his limits and the need for his obeisance to traditional law.

If the trial occurred at the end of the Hasmonean period, during the reign of Hyrcanus II and at the dawn of Herod's ascent, the underlying tensions are likewise understandable. As elaborated upon below, Herod, a non-Hasmonean, aims to usurp the crown from the Hasmonean line (and he eventually succeeds, by an amalgam of a strategic marriage, shrewd diplomacy, and, especially, brute force). The sages, in turn, challenge his right to the crown in light of his questionable Idumean (i.e., non-Jewish) lineage. Herod's ruthless tactics and pagan manner further aggravate his relationship with the leading sages.[34]

More generally, throughout the Hasmonean period Jewish governance was in flux, and the parameters of Jewish leadership were perpetually being renegotiated.[35] The rise of the Hasmonean dynasty marked a shift in the monarchic (to a non-Davidic family) and priestly (to a non-Zadokite) lines, and its decline signaled yet another transition, and these changes were all highly controversial. With royal and priestly authority up for grabs, the control and durability of legal authority was also likely being contested. To the extent that this trial transpired at a later phase, Judean sovereignty was by then very weak and operated at the mercy of the Romans (Pompey raids Judea in 63 BCE). In such a precarious atmosphere the need to assert internal authority in a political trial makes much sense. Finally, the larger seismic shifts that transpired in the classical world—the changeover from Hellenistic to Roman supremacy, and then the dramatic transformation that took place inside the Roman world with the collapse of the Republic and the rise of the Principate—may have emboldened challengers of the Judean king and made the need for the king to affirm his own authority even more of a necessity.[36]

The kernel of the story of the trial, therefore, not only is corroborated by multiple attestations but also has the ring of truth. Beyond these core "facts," however, it is hard to know what, if

32 For more on Jewish sectarianism in antiquity, see SHAYE J. D. COHEN, FROM THE MACCABEES TO THE MISHNAH, 119–66 (1987); ALBERT BAUMGARTEN, THE FLOURISHING OF JEWISH SECTS IN THE MACCABEAN ERA: AN INTERPRETATION (1997); EYAL REGEV, SECTARIANISM IN QUMRAN: A CROSS-CULTURAL PERSPECTIVE (2007).

33 *See* EFRON, STUDIES ON THE HASMONEAN PERIOD, *supra* note 24, at 147–89.

34 For more on the life of Herod, see PETER RICHARDSON, HEROD: KING OF THE JEWS AND FRIEND OF THE ROMANS (1996); ARYEH KASHER, KING HEROD: A PERSECUTED PERSECUTOR: A CASE STUDY IN PSYCHOHISTORY AND PSYCHOBIOGRAPHY (2007). For more on Herod's lineage, see SHAYE J. D. COHEN, THE BEGINNINGS OF JEWISHNESS: BOUNDARIES, VARIETIES, UNCERTAINTIES 13–24 (1999).

35 *See* GOODBLATT, THE MONARCHIC PRINCIPLE, *supra* note 24; LAWRENCE H. SCHIFFMAN, FROM TEXT TO TRADITION: A HISTORY OF SECOND TEMPLE AND RABBINIC JUDAISM (1991).

36 For more on this tumultuous period, see WILLIAM W. BATSTONE & CYNTHIA DAMON, CAESAR'S CIVIL WAR (2006). For larger changes in the Roman world and their influence on the Judean world, see GOODMAN, *supra* note 31.

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anything, is historically reliable in these several accounts. Nevertheless, what cannot be gainsaid is the importance of the memory of the trial in the collective imagination of Jewish antiquity and late antiquity. Josephus repeats the tale of the trial in two different works spanning some twenty years. The rabbis, who live centuries later and are generally far less interested in history, recount this episode multiple times as well. While the enduring lesson of the trial revolves around the relationship between law and power, what that legacy is depends entirely on the way the tale of the trial is told, and perhaps more importantly, retold. I will now examine each retelling in succession.

II: THE TRIAL IN THE BABYLONIAN TALMUD

The last of the narrations of the trial of the Judean king, the account recorded in the Babylonian Talmud, offers the best starting point for an analysis of this literary myth, as the moral of this tale is clearly articulated in this source. In general, rabbinic literature is less interested in historiography, and if an historical episode is the focus of rabbinic writings it is often for a programmatic purpose.[37] In the present context, the Talmud's immediate aim is to explain a problematic normative teaching of the Mishnah.

The opening chapters of the Mishnah in tractate Sanhedrin map out the design and jurisdiction of the judiciary.[38] In this context, the second chapter addresses the legal role and status of the leading executive figure, the monarch. Here, the Mishnah delineates a seemingly straightforward rule: "The king may neither judge nor be judged . . . ."[39] Yet stating that the king cannot judge is also highly problematic, as it contravenes much biblical and historical precedent and is therefore difficult to accept at face value. Accordingly, the Babylonian Talmud responds to the Mishnah's declaration by significantly qualifying its scope.[40] Citing the teaching of Rabbi Pappa,[41] the Talmud elaborates:[42]

37 See Gafni, *supra* note 30, 295–312.

38 See Mishnah Sanhedrin chapters 1–5 for a discussion of the design, jurisdiction and procedure of the judiciary. The Mishnah was redacted in the early third century of the common era in Palestine. The Babylonian Talmud, which is an expanded commentary on the Mishnah, was redacted in the sixth and seventh centuries in Babylonia. The Babylonian Talmud was often considered by later rabbinic authorities to be the authoritative statement of all rabbinic traditions up until its time, notwithstanding its many bold and innovative teachings. For the dates and characterizations of these and other rabbinic works cited herein, see HERMAN L. STRACK & GUNTER STEMBERGER, INTRODUCTION TO THE TALMUD AND MIDRASH (Markus Bockmuehl trans., 1992); Stone, *supra* note 8, at 816 n.13 (1993).

39 Mishnah Sanhedrin 2:2 (translation mine).

40 Encountering the Babylonian Talmud after noting the manifestly different plain sense of the Mishnah raises the question of what accounts for the Talmudic revision (indeed, the Mishnah's plain sense is no doubt its original intention). Yet, employing a panoramic lens, one recognizes that the Babylonian Talmud's jurisprudence corresponds to the wider conception of Jewish and classical law. The Mishnah espouses a minority view, relying upon a relatively anomalous Deuteronomic tradition, see *Deuteronomy* 17, which separates kingship from the judicial role. The Babylonian Talmud resists the Mishnah's anomalous position. Jettisoning the Mishnah's juridical and administrative structure, the Babylonian Talmud harmonizes the core mishnaic teaching with popular biblical and contemporary conceptions regarding the king's judicial role and his participation in the normative system. For a fuller discussion of the Mishnah's plain sense, and the Babylonian Talmud's revision, see Flatto, *The King and I*, *supra* note 20. Yet even the Babylonian Talmud's position is ultimately more complex, as reflected in its narration of this trial. *See infra*.

41 The printed text refers to Rabbi Joseph, but certain reliable manuscripts attribute this teaching to R. Pappa. For an additional analysis of this passage, see YAIR LORBERBAUM, DISEMPOWERED KING: MONARCHY IN CLASSICAL JEWISH LITERATURE 96–102 (2011).

42 Babylonian Talmud Sanhedrin 19a.

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> This refers only to the kings of Israel; kings of the house of David, however, both judge and are subject to judgment. For it is written, "O House of David, thus said the Lord: Render just verdicts, morning by morning"[43]—and if they are not subject to judgment, how can they judge others (i.e., a rhetorical question)? For . . . Resh Laqish expounded [thus]: "Examine yourself and only then examine others!"

According to the Babylonian Talmud, the Mishnah's teaching records only a secondary rule. The primary rule, applicable to the Davidic line, maintains that kings participate in, and are subject to the jurisdiction of, the judiciary. The Mishnah merely presents an alternate rule that treats non-Davidic kings of Israel differently. Here the Babylonian Talmud invokes a distinction that originated in the biblical period with the post-Solomonic monarchic schism between the Northern kingdom of Israel (non-Davidic kings) and the Judean kingdom (the Davidic dynasty).[44] In later biblical legacy, non-Davidic rule is often associated with political and spiritual corruption and even national catastrophe.[45] Accordingly, in various rabbinic traditions, Davidic kings are portrayed as ideal rulers, while non-Davidic kings are depicted as having an inferior status that is only reluctantly tolerated.[46]

In the present context, Rabbi Pappa associates the Mishnah's alternate scheme with non-Davidic kings, an arrangement that the anonymous Talmud in the continuation traces to the disturbing legacy of the trial of (the non-Davidic) King Jannaeus. The Talmud, thus, invokes the story of the trial to provide an etiology for the Misnhah's perplexing secondary rule. On a deeper level, as I argue below, the Talmud's rich, if telescopic, account of the trial subtly conveys a seminal message about the relationship between law and power.

The Talmudic account of the trial begins with a capital offense associated with King Jannaeus, a crime that evidently falls under the jurisdiction of the sages, led by Simeon b. Shetah:[47]

> B1. (a) But why this prohibition of non-Davidic kings [judging or being judged]? (b) Because of an incident which happened when a slave of King Jannaeus killed a man. Simeon b. Shetah said to the sages: Be bold and let us judge him.

The sages send the king a summons, which he grudgingly answers, but also partially defies:

> B2. They sent for the king saying your slave killed a man. The king sent the slave to them. They sent to the king saying you must appear with him for the Torah says (in the case of a goring ox), "If warning has been given to its owners,"[48] [teaching], that the owner of the ox must come and stand by his ox (i.e., so too the

43 *Jeremiah* 21:12.

44 *See* 1 *Kings* 11:29–39.

45 *See* Jon Douglas Levenson, Sinai and Zion: An Entry into the Jewish Bible 188–206 (1985).

46 *See* Midrash Tannaim Devarim 17:14 (introducing a binary even among Davidic kings between righteous ones who behave properly (such as David), and those who fail to behave properly (such as Solomon)). For more on the distinction between Davidic and non-Davidic kings in post-biblical literature, see, e.g., Tosefta Sanhedrin 4:4, 11; Tosafot Sanhedrin 20b; Hameiri, Bet Habehira LeHorayot, 279; Hameiri, introduction to Psalms; Nahmanides, Genesis 49:10; and Maimonides, Hilkhot Melakhim, 1:7–11.

47 Babylonian Talmud Sanhedrin 19a–b.

48 *Exodus* 21:29 (referring to the owner of a goring ox). The citation of the verse, according to the Talmud, teaches a notion of vicarious responsibility, which applies to masters. *See* Sifre 190; Babylonian Talmud Baba Kamma 112b. The extension of the principle of vicarious liability to a master of a slave is problematic, and has led some to speculate that Simeon's assertion of jurisdiction in the narrative ironically, and perhaps deliberately, reaches beyond conventional norms. See Mishnah Yadayim 4:7. I thank Jeffrey Rubenstein for this insight.

In terms of the identity of the slave, some have seen here an allusion to Herod (who is identified as the murderer by Josephus). *See* Maharsha ad loc.; *see also* Babylonian Talmud Baba Batra 3b. I thank Amram Tropper for this reference.

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owner of a slave who has killed must appear in court). He appeared but sat down before the court. Then Simeon b. Shetah said, Stand on your feet, King Jannaeus, so witnesses may testify against thee. For you do not stand before us but before He who spoke and the world was created.

Even when the king finally arrives before the sages, he spurns their judicial authority. Yet Simeon persists in his demand that the king submit to the jurisdiction of the sages, as they represent divine justice. Having met his match in the courageous Simeon, King Jannaeus shrewdly turns to the feeble associate judges, aiming to drive a wedge between them and Simeon:

B3. The king replied, I will not act by your [Simeon's] word but upon the words of your colleagues. He then turned to the left and to the right, but all looked at the ground.

As Simeon is let down by his cowardly colleagues, the narrative shifts its focus to their profound failure as jurists:

B4. Then Simeon b. Shetah said to them, Are you wrapped in thought? Let the Master of thoughts [God] come and call you to account. Instantly, Gabriel [the angel] came and smote them all to the earth [and they died].

In an extraordinary *deus ex machina* that reflects the heavenly source of justice, Gabriel metes out the harshest of punishments against the spineless judges. In the aftermath of this bloody climax, a new rule of jurisdiction[49] is announced:

B5. Then it was stated: The king may neither judge nor be judged, testify nor be testified against.

According to the Babylonian Talmud, the Mishnah's secondary rule, then, originated as a response to an ugly encounter between King Jannaeus and the sages.[50] To avoid future confrontations it was decided that insolent kings, such as Jannaeus, and evidently by extension all other non-Davidic kings (or perhaps even a wider range of kings), may not be judged and, therefore, should be separated from the judiciary altogether.[51] Presumably Davidic kings, who are considered pious, do not

49 It is unclear from the Talmud whether this is a formal legislative enactment, or a prudential decision that was announced, which, according to the Talmud, apparently gained normative stature by being recorded in the Mishnah.

Paragraph (B5) includes the four different clauses of the Mishnah's rule (a king not judging, nor being judged, not testifying, nor being testified against), although in context one would only expect the second and fourth. This likely reflects that (B5), at least as presented in the Talmud, is a later addition. *See infra*.

50 On historical and legendary references to a court of sages or Sanhedrin (*see infra* note 75), and for additional information about its relationship to Hasmonean (non-Davidic) kings, see GOODBLATT, THE MONARCHIC PRINCIPLE, *supra* note 24, at 77–130.

51 An additional Talmudic gloss explains that one who is not subject to the jurisdiction of the court cannot enjoy the privileges of judging: "[A]nd if they are not subject to judgment, how can they judge others? For . . . Resh Laqish expounded [thus]: Examine yourself and only then examine others!" *See* Babylonian Sanhedrin 18b, 19a. While Resh Laqish's teaching was likely originally intended in a more general sense, the anonymous Talmudic editors apply it here as a juridical principle. *See, e.g.*, Midrash Eichah Rab. Parsha 3, 50 (containing what may be the original context of Resh Laqish's teaching, even though it is attributed there to R. Oshaya),

It should also be noted that in the body I have assumed, like most traditional interpreters, that the story of the trial is a gloss on the Mishnah, as understood in light of Rabbi Pappa's teaching. Nevertheless, as Gerald Blidstein has pointed out to me, the entire story, including the coda (B5), never specifies that it is referring only to non-Davidic kings, and it could be that its original intent was to refer more broadly to all kings. This would be consistent with the plain sense of the Mishnah, but not the way the Mishnah came to be understood in

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pose such a threat and continue to follow the original design wherein a king can judge and be judged.

Michael Walzer further unpacks the two different rules described by the Babylonian Talmud, which he conceptualizes as two distinct models.[52] (1) *An ideal model for Davidic kings*: the king rules alongside, and as a part of, the judiciary. While the king must act within institutional constraints and is subject to the jurisdiction of the court (i.e., without the privilege of sovereign immunity), he reciprocally gains the capacity to participate in the judiciary.[53] (2) *An alternative model for non-Davidic kings* (i.e., the secondary rule of the Mishnah): the ideal model functions only if the king subjects himself to the jurisdiction of the court and willingly cooperates with the judges. If, however, the king refuses to respect the authority of the court, then the ideal structure collapses (Walzer describes this as a constitutional breakdown). The alternative model is instituted because of the prevalence of recalcitrant kings in the non-Davidic monarchy.

What is the attitude of the Babylonian Talmud toward these two models? From Walzer's lexicon it seems clear that the ideal model constitutes the ultimate political vision of the Talmud. This is plainly the implication of R. Pappa's teaching, which projects the jurisprudence of Davidic kings in an optimal light. Similarly, the inferiority of the alternative model seems to emerge from its association in the Talmud with the infamous King Jannaeus (who is strongly censured in the Babylonian tradition).[54] Nevertheless, the extension of the alternative model to all non-Davidic kings (or perhaps even a wider range of kings) raises the possibility that this template represents a legitimate theory of governance (and is not just an outcome of a constitutional breakdown). Moreover, the fact that the Mishnah exclusively records the alternative model—and the ideal model is only inferred and reconstructed—heightens the significance of the alternative model or minimally lends it a more basic and less exceptional quality.

A fuller distillation of the Babylonian Talmud's ideology emerges from a careful parsing of its narrative of the Jannaeus trial. While in the most immediate sense, the Talmudic tale of the trial explains the origins of the alternative model of the Mishnah, in a deeper sense it offers a penetrating comment about these two different models or juridical perspectives. A critical examination of several insights of Cover and Walzer concerning the Talmudic account of the trial helps illuminate the way it calibrates between these two perspectives.

On one level, the Babylonian Talmud's narrative of the Jannaeus trial reinforces the ideal model. Even as the Talmud relays the Jannaeus episode that led to the implementation of the alternative model, it reminds us that it offers a reluctant solution.[55] In "The Folktales of Justice," Cover underscores this point by demonstrating the essential role the unfolding narrative plays in the above

light of Rabbi Pappa's teaching. This alternative understanding would actually further punctuate the point I make below about the significance of the coda (B5).

52 *See* THE JEWISH POLITICAL TRADITION 139–41 (Michael Walzer, Menachem Lorberbaum & Noam J. Zohar eds., 2000).

53 Although even the Babylonian Talmud (Babylonian Sanhedrin 18b), relying on an earlier teaching of the Tosefta (Tosefta Sanhedrin 2:15), implies that a king (presumably even a Davidic one) may not join the high court of the Sanhedrin.

54 *See, e.g.*, Babylonian Qiddushin 66a. For more on the relationship of Simeon and King Jannaeus, see JOSHUA EFRON, STUDIES ON THE HASMONEAN PERIOD, *supra* note 24, 143–205.

55 Yet, the extension from King Jannaeus to all non-Davidic kings according to the Talmudic account may suggest that the alternative model is the more common and realistic one, and that therefore is the default model (which is therefore represented in the Mishnah, according to the Babylonian Talmud). Seen in this light, the ideal model remains more utopian and aspirational. I thank Yoni Friedman for contributing to this insight.

Talmudic passage.[56] While the Mishnah records perhaps the only pragmatically viable setup (the alternative model announced, according to the Talmud, in the aftermath of the trial), the Talmud makes clear that Simeon, as depicted throughout the narrative, courageously pushed for a different kind of solution (the ideal model). In Cover's words: "The gesture of courage is conjoined with pragmatic concession" in the Babylonian Talmud, and "still the gesture of courage is the aspiration."[57] The Talmudic myth thus inspires us to transcend power and specifically here, emboldens judges to "speak truth to power" by trying the recalcitrant king and not electing for "prudential deference . . . the great temptation, and the final sin of judging."[58] Extending Cover's analysis may also imply that the Babylonian Talmud endorses both aspects of the ideal model, wherein the king judges and is subject to judgment,[59] which would further link the king and the court.[60]

Yet, as much as Cover amplifies Simeon's role in the Talmudic narrative, he mutes its crucial *normative* reasoning. Recall that the Babylonian Talmud adduces the Jannaeus trial as an etiological tale that justifies a difficult normative ruling of the Mishnah. *Pace* Cover, who contrasts the tale with its normative punch line (labeling it a pragmatic concession), an integrated reading suggests that the entire account leads up to its legal apogee.[61] The ultimate legacy of the Jannaeus trial for the Babylonian Talmud is reflected in the manner in which it anchors the holding of the Mishnah.

Walzer's characterization of the Mishnah's rule, as framed by the Talmudic narrative, is in this sense preferable to the one articulated by Cover. Instead of merely labeling the Mishnah's rule as a

56 *See* Cover, *The Folktales of Justice*, *supra* note 2, at 183–90.

57 *Id.*, at 190.

58 *Id.* In the same vein as Cover, one can add that the Talmudic narrative fittingly shifts the focus of the trial from the king to the weak judges, since they are the ones who most need to internalize the court's mandate.

While Walzer and Cover focus on the Babylonian Talmud, they each make helpful observations relating to the plain sense of the Mishnah. At the same time, their even richer analysis of the Babylonian Talmud is incomplete. They do not fully address the Babylonian Talmud's treatment because they (Cover, more than Walzer) primarily focus on whether the king can be judged, but they do not sufficiently grapple with the issue of whether the king can join the judiciary and the interrelationship between this issue and the question of sovereign immunity. Moreover, they do not sufficiently consider how the steps of the narrative lead to its coda (B5).

59 Cover concludes that for the Babylonian Talmud ideally "there must be a jurisdiction of the judges which the King cannot share," *id.*, although a more accurate description of the Talmudic ideal is that the king and the judiciary should not be separated (i.e., the king must submit to the court's justice, but he also jointly participates in the administration of justice).

60 Like Walzer and Cover, later interpreters of the Mishnah tend to read the mishnaic text through the lens of the Babylonian Talmud. Therefore, medieval, early modern, and modern commentators, including critical scholars, interpret the Mishnah as presenting a secondary rule that applies only to non-Davidic kings. According to this understanding, the ideal model—that is, the integrated scheme of the Babylonian Talmud—remains the preferred juridical scheme, which is of course contrary to the plain sense of Mishnah Sanhedrin. See, for example, the summary of traditional commentators in Pinhas Kehati, Mishnah Masekhet Sanhedrin 363 (1966). For modern critical commentaries, see Ephraim E. Urbach, The Sages: Their Concepts and Beliefs 441 (Israel Abrahams trans., 1975); Jacob N. Epstein, Mevo'ot Le-Sifrut Ha-Tanna'im (Introduction to Tannaitic Literature) 55, 417–19 (1957); and Hanoch Albeck, Shishah Sidre Mishnah Masekhet Sanhedrin 174 (1953).

61 There is a larger methodological point here about how to interpret Talmudic narratives: Are they elaborating upon inherent normative ideas that are advanced by the halakhic materials cited in the same context, or are they providing alternative perspectives? There is also a narrower point that applies in this specific context: The entire narrative is about the legal system, and it is therefore especially likely that the normative punch line (which announces an innovation in the legal system) is its ultimate legacy. This would suggest, then, that the final line presents a deliberate legal arrangement, and not just a pragmatic solution that is conceptually at odds with the ideology of the narrative.

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pragmatic concession, Walzer suggests that it constitutes an alternative model that arises from the failure to incorporate kingship within a constitutional structure.[62] Elaborating on the implications of this model (where the rabbinic court withdraws from the political sphere due to a constitutional collapse), Walzer interestingly discerns the seeds of a later pattern in Jewish history whereby religious actors reclaim authority only in the absence of a strong, defiant political figure. By exploring the conceptual significance of the alternative model (announced in the aftermath of the trial, according to the Talmud), Walzer avoids a facile interpretation that would cast it as an immediate response to an egregious occurrence or even as signaling a broader pragmatic concession. Instead, he distinguishes an alternative model that becomes embodied in a legal rule.[63]

Even Walzer, however, understates the implication of the Babylonian Talmud's rendition of the trial by describing the alternative model as arising from a contingency, a constitutional breakdown. Rather, according to the Talmud the alternative model constitutes a deliberate administrative law that responds to the inherently unstable relationship between law and power. Given the prodigious and problematic challenge of constructively integrating powerful kings into the legal system, as suggested by the Babylonian Talmud's narrative of the trial, the Mishnah judiciously codifies a norm of separation.[64]

The full force of this normative conclusion can be better appreciated by considering the dramatic reversal recorded in the final section of the Talmudic narrative, which ultimately countermands the trope, lauded by Cover, of law triumphing over power.[65] While Cover is correct that the Babylonian Talmud underscores the heroism of Simeon and the validity of the divine mandate behind his position,[66] the final phase of the Talmudic account (B5)—which proclaims the Mishnah's alternative model—crucially overrides his view. Rather than vindicating Simeon and heeding his emphatic demand to submit to the divine call of justice, the narrative remarkably champions the king's stance.[67] Despite God's proximate presence among the sages (B2, B4)—which is especially manifest in the divine punishment of the cowardly ones (B4)—the Babylonian Talmud concludes that power and law are irreconcilable and these spheres must be kept apart. In other words, while one would have expected the Talmudic narrative to fully support Simeon's ideology and

62 The Talmudic response, as described by Walzer, is an alternate model that is nevertheless inspired by realpolitik considerations, and one senses that it would hardly have satisfied idealistic sages such as Simeon. I offer a different interpretation of the Talmudic response below. *See also* Maurice Finkelstein, *Judicial Self-Limitation*, 37 HARVARD LAW REVIEW 338–64 (1924) (regarding the withdrawal described in the Talmudic account).

63 *See* LON L. FULLER, THE MORALITY OF LAW 33–94 (1964).

64 In the Babylonian Talmud's rendition of the trial the culmination is an enactment about kings—which is certainly broader than Jannaeus and even sounds like it extends to all kings (Davidic and non-Davidic alike). Within the larger frame of the Babylonian Talmudic passage (in particular, R. Pappa's teaching), however, the sweep of the enactment must be limited to non-Davidic kings. *See supra* note 51.

65 The etiological nature of the tale not only encompasses its ultimate legislation, but the process by which this enactment was reached—that is, the key is not only the punch line, but the explanation of how we got there. Methodologically, I am assuming that the Talmud is advancing a coherent ideological argument, which seems far preferable to assuming it is clumsily relating the Mishnah to an incident which it knows.

66 Notice the shift of the litigants from the king to the other sages. *See supra* note 58. Perhaps the sin of the judges is worse, because they especially should abide by their mandate, while the king is just being a king. See also the explicit verse in Deuteronomy 1:17 charging judges not to fear any person.

67 The conclusion is that a king is not judged, which apparently also necessitates, by a law of parity, that the king does not judge, or better yet, necessitates a more sweeping separation between the king and the judiciary. A less likely alternate reading is that given the divine nature of judging, which has just been reinforced, the king is now deemed especially unsuitable to act as a proxy for God and serve as a judge.

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hail the supremacy of sacral law at all costs,[68] here the position of the king is vindicated or at least affirmed, and the lesser sages who fail Simeon's mandate are protected from failing again.

The fact that this alternative model becomes normative—that it is recorded as the default position of the Mishnah and is extended (at least) to all non-Davidic kings—notwithstanding the force of Simeon's position, needs to be understood. Here the narrative leaves a gap, which must be supplied by the interpreter. Perhaps a rare hero such as Simeon can overcome the resistance of a powerful ruler, but his stance can hardly be adopted as a widespread norm. Alternatively, even Simeon required the support of divine intervention, and such a heavenly act is too intrusive, possibly too dangerous, for the ordinary modus operandi of the normative system. Essentially, the narrative acknowledges that standard judicial procedures are inadequate to restrain a powerful ruler, which may signal that the court system cannot sustain such an expansive jurisdiction. A third aspect of the trial narrative that may have steered the Talmud away from Simeon's stance is its violence. Confronting the craven sages leads to a bloodbath, while compelling the defiant litigant requires maximum force. Here the problematic violence of the law—so underscored by Cover in another context[69]—is fully on display. In order to contain the violent ruler (who is guilty of bloodshed by association), the legal institution must commit an act of violence (both to its own judicial actors and the litigant). Speaking truth to power now demands overpowering the powerful. Allowing such violence of the law ultimately commits too much violence to the law.[70] Lastly, humbling powerful rulers,[71] in the manner of the narrative, may have too many negative collateral consequences—ranging from the threat of their retribution to the possibility of their marginalization—to be a viable option. One or more of the above explanations likely underpins the sharp turn in the Talmudic narrative away from the approach of Simeon.

The overall lesson of the trial for the Babylonian Talmud, then, is about the limits of law and its irreconcilability with sovereign power.[72] Although, as Simeon demonstrates, on an axiological level

68 Usually when the Talmud retreats from this position it is in order to make room for another spiritual value, like the primacy of human agency in the halakhic process. *See, e.g.*, Babylonian Talmud Bava Metzia 59a. This raises the crucial interpretive question of what is the underlying value that is animating the retreat in this passage. See below.

69 *See* Cover, *supra* note 5. In the context of his analysis of the Jannaeus Trial, Cover emphasizes the violence that is perpetrated by a powerful king, but downplays the violence of the law that must be unleashed in response to the king. *See* Cover, *The Folktales of Justice*, *supra* note 2, at 189–90.

70 This may be especially true in rabbinic jurisprudence where a general aim of judicial procedures is to achieve order and stability by settling disputes through the compliance of the litigants. *See, e.g.*, Mishnah Avot 1:8; Babylonian Talmud Sanhedrin 6b, 7b.

71 A fallout may occur as a result of humbling both political leaders and judicial authorities.

72 Indeed, the tale seems to revolve around the role of the courts and the scope of its jurisdiction, more than the position of the king. The thrust of the Talmudic story seems to turn on a crucial theme relating to judicial autonomy and supremacy. Administering law against a recalcitrant political leader dangerously bends the rules of legal adjudication and the terms of legal discourse toward the arc of absolutism. Law can only succeed in this context as a triumphant act of power, emphatically enforced against a litigant by crushing him. Even the inner makeup of the rabbinic court already begins to precariously crumble before rabbinic eyes in this tale, as a distinct verticality emerges that hierarchically separates Simeon and the other rabbinic judges. When Gabriel descends from on high and smashes the sages "to the earth" the irreparable fissure is all but too tragically apparent. Further, this scene can be seen as a failed revelation, where heaven crushes humanity, and divine law leaves no space for mortal judges. Moreover, the futility of enforcing rabbinic norms and the steep price of a collapse of rabbinic jurisprudence looms all the larger in late Babylonian rabbinic society, which has such limited political power and which depends on voluntary halakhic solidarity for its most basic socio-religious vitality.

Retreating in order to save the rule of sacral law, and the independent legal authority of rabbinic sages, is therefore profoundly consonant with the deeper spirit of rabbinic jurisprudence. Here is a story worth telling.

As far as Davidic kings are concerned, evidently, according to the Talmud, they submit to the law and do not

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law transcends power, the court's jurisdiction must recede before sovereign power in order to protect the integrity of the legal system and allow it to function properly. A theological notion may underlie this conclusion as well. Recall how the Talmudic narrative trumpets God's looming presence in the court. Perhaps a divine legal system can only maintain its sanctity or operate effectively among those who recognize law as a manifestation of God's justice. Coercing a political actor who denies this creed is a futile exercise, or worse, even undermines the special fabric of sacral law. Be that as it may, the trial according to the Babylonian Talmud's account poignantly captures the irreconcilable clash between power and justice and emphasizes the need to keep these domains apart.

III: THE TRIAL IN THE MIDRASH TANHUMA

The analysis in Part II focused on the legacy of the account of the trial *as redacted* in the Babylonian Talmud, meaning, as understood in light of the introductory and concluding editorial glosses (B1a, B5) that frame the narrative. As argued above, these clauses,[73] which invoke the trial episode as background for the mishnaic ruling that a king may neither judge nor be judged, transform the entire meaning of the trial legend as transmitted in the Babylonian Talmud. Yet, the kernel of the story (B1b–B4) read independently of its larger Talmudic (and mishnaic) setting has an essentially opposite connotation. Read as a stand-alone account, the narrative actually trumpets the broad jurisdiction of the court of sages that reaches all litigants, even a defiant king (in contrast with the Mishnah's rule).[74] When King Jannaeus, who is summoned by the sages, attempts to undercut their authority, the brave Simeon demands his submission.[75] In justifying his bold stance, Simeon proclaims that the sanction of the sages emanates from on high: "For you do not stand before us but before He who spoke and the world was created."[76] This motif is dramatically

assert their power in the legal arena. *But see supra* note 51.

In another forum, I hope to explore several seminal themes that surfaced in the various narrations of the trial of the Judean king that are related to legal and political authority; the clash between law and power; and the nature of sovereignty, and to bring these ideas from early Jewish jurisprudence into conversation with Western legal and political thought, and modern constitutional jurisprudence. For brief reflections on some of these themes, *see infra* notes 136, 150, and 151.

73 I refer to the opening gloss, as well as the final gloss, whose content is alluded to in the opening gloss.

74 This reading of the Talmudic kernel is somewhat similar to the ideal scheme in the redacted Babylonian Talmud—although the ideal scheme requires a reciprocal relationship between the king and the court, and also recognizes the consequences of a breakdown in its scheme as reflected in the Jannaeus trial, while this reading focuses on the court's broad jurisdiction (due to its divine mandate) reaching all litigants, even the king, which is substantiated by the Jannaeus Trial.

How to square this reading with the Mishnah's rule, Mishnah Sanhedrin 2:2, that a king is not judged is a more difficult question. Perhaps the original kernel did not follow the tannaitic tradition of this Mishnah, and instead follows the tannaitic tradition recorded in the Sifre Zuta passage cited below (which also may coincide with the tradition reflected in Mishnah Sanhedrin 2:4 about a king judging). Alternatively, and this is purely conjecture (and runs opposite to Rabbi Pappa's teaching in the Babylonian Talmud), perhaps this kernel was originally understood to apply to non-Davidic kings, while Davidic kings were understood to be covered by the Mishnah. *See infra* note 88; *see also* KAHANA, *supra* note 24. As I have argued elsewhere, Davidic kings are plainly within the orbit of the Mishnah. *See* Flatto, *The King and I*, *supra* note 20.

75 The legal authority is not necessarily the Sanhedrin in this account, and may just be the sages who administer justice and serve as a proxy for divine authority.

76 This theme is emphasized in various other rabbinic sources, see, for example, Babylonian Sanhedrin 7a, and has been discussed by Barry Wimpfheimer in an unpublished AJS paper. *See supra* note 24. *See also* Haim Shapira, *For the Judgment is God's—On the Divinity of Judging*, 26 BAR-ILAN LAW REVIEW 320 (2010).

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confirmed when the other sages, who shrink before Jannaeus, are instantly judged from the heavens. Shifting its focus to the judges who now assume the position of the guilty party, the narrative suggests that a judge abdicating judicial responsibility is a grave offense, perhaps worse than murder. Stripped of its editorial case, the story of the trial conforms precisely to Cover's thesis, as it champions Simeon's position that the rule of law must prevail over all litigants.

It is quite plausible that the kernel that emerges from this form criticism resembles an earlier iteration of the trial legend.[77] Likewise, source criticism helps peel away different accretions from the Talmudic tale and reveals a more rudimentary account of the trial, which was filled out with several discrete rabbinic teachings.[78] Support for the hypothesis of an earlier kernel is also found in a couple of parallel accounts of the trial recorded elsewhere in rabbinic literature, especially the Midrash Tanhuma, which maintain that rabbinic judges should judge the king, as described below. Moreover, the Tanhuma's rendition lacks the interpolated rabbinic teachings, and in this respect as well may resemble a preliminary version of the Talmudic account.[79] Indeed, scholars have argued more generally that a synoptic study of parallels between the Tanhuma and the Babylonian Talmud reveals that the version of the Tanhuma often corresponds to an earlier redaction of the Babylonian Talmud (which was then reworked by the later Tanhuma).[80] In any event, these parallel rabbinic accounts clearly diverge from the tale as recorded in the (later) redacted Babylonian Talmud, and underscore the sweeping jurisdiction of rabbinic judges.

The earliest of these parallel rabbinic texts is a brief passage in the Sifre Zuta. Commenting on Deuteronomy 19:17, this early tannaitic source alludes to the trial in a few spare words:[81]

> "Then both parties to the dispute shall appear (before God)"[82] . . . even the king and a layman. And they taught about the episode involving King Jannaeus . . . before Simeon b. Shetah.

According to the Sifre Zuta, the verse from Deuteronomy mandating the appearance of both litigants before God translates into a summons to appear before the (rabbinic) court, echoing the rabbinic theme encountered above that the (rabbinic) tribunal serves as a proxy for divine justice. Further, the Sifre Zuta adds, the court's reach even extends to cases involving the king as a litigant. Evidence for broadening the court's jurisdiction to include a royal subject is adduced from the trial of King Jannaeus before Simeon. The Sifre Zuta thus rules, in contrast to the Mishnah, that kings are judged.

An elaborate rendition of this position is found in the Tanhuma.[83] Although this is a relatively late midrash, and this particular passage contains certain signs of a late redaction,[84] its substantive

77 For more on this kind of form criticism, see Rubenstein, Talmudic Stories, *supra* note 16; Rubenstein, *supra* note 14.

78 One can identify the sources of certain of these interpolations. *See, e.g.*, Sifre Deut 19:17; Yerushalmi Sanhedrin 1:5; Babylonian Talmud Shevuot 30a; Babylonian Talmud Bava Batra 4a; *see also* Efron, Studies on the Hasmonean Period, *supra* note 24, at 190–96; Kahana, Sifre Zuta Deuteronomy, *supra* note 24.

79 The Midrash Halakha inserts in the Tanhuma are less elaborate, which may suggest that the rabbinic interpolations were inserted at a later phase in the Babylonian Talmud's development.

80 *See infra* notes 84–85.

81 *See* Kahana, *supra* note 24, at 282–86. The Sifre Zuta must be examined with critical care since it is a reconstructed midrash, reconstructed in part from a medieval Karaitic commentary. For more on this and other halakhic midrashim, see Menahem Kahana, *The Halakhic Midrashim*, in The Literature of the Sages, Second Part, 4–106 (Shmuel Safrai, Zeev Safrai, Joshua Schwartz & Peter T. Tomson eds., 2007).

82 *Deuteronomy* 19:17.

83 For more background on the Tanhuma, see Marc Hirshman, *Aggadic Midrash*, *in* The Literature of the Sages, Second Part, *supra* note 81, at 107–32.

84 The Tanhuma sometimes reworks traditions from the Babylonian Talmud, which is reflected in certain later redactional features, such as repetitions. For instance, in this passage there is the clumsy doubling of Simeon's demand

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similarity to the Sifre Zuta and the kernel of the Babylonian Talmud, and its lack of interpolations, suggests that these three rabbinic sources reflect a distinct recension of the legend of the trial, whose core is quite early.[85] Certain minor differences differentiate these three passages as well. For example, whereas Sifre Zuta does not hint at the debatable nature of its teaching, and presumes that the king is subject to the court's jurisdiction, the Tanhuma openly probes whether a king may be summoned before the court, even as it emphatically concludes, like the Sifre Zuta, that a king is indeed subject to the court's authority.[86] In addition, the Tanhuma's account is the most expansive of the versions, especially in one prominent respect. It extends the narrative of the trial by adding a crucial and resounding denouement that strongly reinforces the sweeping jurisdiction of the court.

The Tanhuma's rendition of the trial involves Simeon and several unidentified actors: an unnamed Hasmonean king (who is directly accused),[87] an unknown opposing litigant, and a generic angel. The underlying legal complaint is also not specified, although the terminology suggests a civil offense rather than a capital one.[88] While the anonymity may bear on the dating of the passage,[89] its literary effect is to focus the account on Simeon, and the vindication of his position. Moreover, the reference to an unnamed king may extend the implications of this story to all kings.

The Tanhuma's account reads as follows:[90]

> (a) There was an episode involving a person who had a legal claim against a king from the Hasmonean dynasty, and he came and appeared before Simeon b. Shetah. He [the person] said, I have a legal complaint against the king. Simeon b. Shetah inquired of the judges presiding with him, if I summon the king, will you reprove him? They answered affirmatively. He [Simeon] summoned him [the king], and he [the king] arrived,

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that the Hasmonean king stand up. But the Tanhuma sometimes reworks traditions that trace to an earlier version of the Babylonian Talmud.

85 For more on the dating of the Tanhuma, its different literary phases, and its relationship to the Babylonian Talmud, see Marc Bregman, The Literature of Tanhuma-Yelamdenu (1st ed. 2003) (Hebrew); Solomon Buber, Midrash Tanhuma (1964) (Hebrew); Abraham Epstein, *Kidmot Hatanhuma*, 5 Beit Talmud 7, 7–23, 53–55 (1886) (Hebrew). I thank Dov Weiss for these references.

86 The version of the trial in Midrash Tanhuma is very similar to the kernel of the Babylonian Talmud, but evidently involves a civil dispute; records an initial request of the litigant, as well as Simeon's preliminary consultation with his colleagues; portrays the Hasmonean king as the direct subject of the trial, not as the master of the culprit; never records Simeon's rebuke of the other judges, nor his appeal for a divine punishment to be meted out against them; only registers later on in the passage Simeon's stern warning about God's presence in the court; and concludes with the king's submission. Although there are certain traces in this retelling that appear to be later embellishments (e.g., Simeon twice demands that the king stand up and ultimately prevails fantastically over the humbled king), the core account may be quite early and is consistent with the Sifre Zuta and the Babylonian Talmud's kernel.

87 This likely reflects the uncertain historical identity of the king in the actual trial, which may be further suggested by the alternate identities recorded in the parallel sources (Jannaeus in the Babylonian Talmud, and Hyrcanus and Herod in the writings of Josephus).

88 Perhaps this can be helpful for harmonizing the Tanhuma's teaching with the ruling in Mishnah Sanhedrin 2:2, an issue that is particularly acute given the line in the Tanhuma, "is one allowed to judge the king?," which seems to be answered affirmatively. *See infra* notes 92 and 93. Perhaps one can only judge a king in a civil matter (although this seems counterintuitive). Alternatively, perhaps the Tanhuma is consistent with the tradition of the Sifre Zuta (and Mishnah Sanhedrin 2:4). In addition, perhaps one should distinguish between Davidic and non-Davidic kings (or some other division between Hasmonean and other kings). Finally, perhaps the Tanhuma should be understood in more of a homiletic sense, that kings are subject to God's judgment, and not in a literal normative sense. These possibilities require further investigation. *See supra* note 74.

89 Anonymity is sometimes seen as a sign of an earlier tradition, but this is not foolproof. *See* Jacob Neusner, Judaism: The Evidence of the Mishnah 14–21 (2003). In this case perhaps, despite a later date, the details are forgotten or deliberately glossed over.

90 Midrash Tanhuma Shoftim, Siman 6.

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> and they offered him a seat next to Simeon b. Shetah. Simeon b. Shetah said to him [the king] arise upon your feet and provide a legal account. He [the king] said to him [Simeon], is one allowed to judge the king? He [Simeon] faced rightward and the judges hid their faces in the dirt, he faced leftward and the judges hid their faces in the dirt. The angel then came and smote them into the earth until they expired. (b) Immediately the king was shaken. Simeon b. Shetah said to him [the king] arise upon your feet and provide a legal account, for you are not standing before us, but rather before He who spoke and the world was created [God]. Immediately he [the king] arose to his feet and gave a legal account . . . .[91]

In the Tanhuma's narration, after the king is summoned into court Simeon insists that he stand up, without providing a justification. Although the Hasmonean king parries with an assertion of a privilege of sovereign immunity,[92] which the other judges meekly accept (or are scared to defy), he is forcefully taught otherwise. An intervening angel fatally punishes the other judges—a crushing display of divine justice—and then Simeon reiterates his demand. Now, for the first time, he loudly proclaims that the judges serve as a proxy for divine judgment. By only inserting this rationale at this later point in the narrative, the Tanhuma especially spotlights the latter stages of the trial. In a crucial coda (beginning at (b) in the citation above) that is absent from the Babylonian Talmud (and inconsistent with (B5), the conclusion of the redacted Talmudic account), the Tanhuma depicts Simeon judging the once audacious king who has now been thoroughly humbled. The Tanhuma thereby maintains the juridical focus on the guilty king throughout the narrative,[93]

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91 The Tanhuma passage continues as follows:

> From here we learn that litigants must act with reverence for it as if they are causing God to be judged, for this is how Jehoshaphat said to the judges "Be aware (what you are doing) you are not judging about a man, but about God (2 *Chronicles* 19:6)." Said Rabbi Hama b. Hanina come and see, for if the verse did not say it, one could not formulate it in such a manner, that flesh and blood is judging its Creator. God said to the judges you must act with reverence for it is as if you are judging Me. How so? If a man fulfills a positive commandment, I decree that he should be given one hundred fields. If you pass judgment concerning one (such field) which I decreed that he deserves, I will give him another from my own (possession), and I will consider it as if you took it (the field) from Me (by your verdict).

The end of the passage shifts gears and focuses on God's "presence" in the courtroom, not as a judge but as a litigant. Notably, according to this passage, then, God judges and is judged (which perhaps makes a striking statement about the all-encompassing nature of law, and its widespread applicability). On these themes, and other parallels in rabbinic literature, see Shapira, *For the Judgment is God's*, *supra* note 76.

92 The challenge of sovereign immunity is raised explicitly in this passage, while in the Babylonian Talmud's kernel the king may recognize that he is formally subject to the court's jurisdiction, even as he resists, defies, and flaunts its authority.

In the Tanhuma, it is unclear whether the Hasmonean king's presumption of sovereign immunity is based on widespread legal practice in the ancient world (which seems likely), or on some normative principle within Jewish law (which evidently does not pertain in such circumstances according to Simeon and the conclusion of this rabbinic passage). The placement of the throne or seat in the court alongside the leading sage, after the king is summoned as a litigant, which is where a royal judge presumably would sit (if he presided together with the sages), accentuates the ambivalence about this issue in the Tanhuma. In any event, the opposing litigant demands that the king appear as a litigant, and the sages initially concur with Simeon that the king should be summoned. Even the king seems to accept this to a certain extent, as he appears in court.

93 Unlike the Babylonian Talmud passage, the Tanhuma maintains its focus throughout the narrative on judging the king (note that it never records Simeon's rebuke of the other judges, nor his appeal for a divine punishment). This highlights the fact that according to the Tanhuma the legacy of the trial is that Simeon is correct and that the king should be judged, and therefore the king literally is judged. In other words, the original tentative question about whether a king should be judged is emphatically answered in the affirmative. While the judging of the king could be a later extension or development in the Tanhuma (the doubling over which seems clumsy may be indicative of a

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in contrast with the Babylonian Talmud. The entire sequence of the Tanhuma underscores that nobody is above sacral law or exempt from its precincts, including powerful sovereigns.

In all, the legend of the trial of the Judean king as narrated in this second set of rabbinic texts imparts a very different message about the confrontation between law and power than the redacted Talmudic account. Whereas the tale as presented in the redacted Talmud calls for the separation of these realms, the narrative recorded in the second set of texts proclaims the supremacy of law to sovereign power. In the Sifre Zuta, jurisdiction over the king is simply asserted, and the trial is adduced as supporting evidence. In the Talmudic kernel, Simeon declares judicial authority over the king, and the sages who refuse to try the king are fatally punished. In the Tanhuma, judicial authority over the king is proclaimed, and then fully executed. In these various ways the second set of texts projects the sweeping rule of law, and its capacity to check and bind sovereign power.[94] In contrast, the redacted Talmud retreats from this conclusion. Notwithstanding the ascendancy of law, the redacted Talmudic narrative restricts the jurisdiction of the sages in the face of absolutist power, and arguably thereby better secures law's sacral nature.

IV: THE TRIAL IN JOSEPHUS'S WRITINGS

All of the narratives of the trial of the Judean king in rabbinic literature must be contrasted with Josephus's historiography (even as they share certain resemblances, described in Part I). Unlike the rabbinic versions that depict the king as the defendant (in the Babylonian Talmud, King Jannaeus is a kind of co-defendant), in Josephus's accounts King Hyrcanus serves as the judge (along with the Sanhedrin—see note 124) and a youthful Herod—a royal aspirant—is charged with murder and summoned to trial but evades conviction. Beyond these and various other factual discrepancies (several of which I refer to below), the most profound difference relates to the overall legacy of the trial.

Whereas rabbinic literature primarily refers to the trial in order to justify or expound upon rabbinic teachings, Josephus chronicles this event as a part of the history of the late Hasmonean and early Herodian periods.[95] While on the surface Josephus merely records a political episode, the thrust of his accounts makes a forceful statement about the nexus between law and power. Indeed, in a sense the entire trial revolves around this very point.[96]

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later accretion) the continuous focus on judging the king in the Tanhuma is actually smoother than the Talmudic account. In the Tanhuma, only the king is judged by Simeon; the other judges are dealt with directly by divine justice. Note that the Tanhuma's account of the trial, where Simeon actually judges the king, goes further than the Talmud's account (even Simeon's aspiration of courage in the Talmud, described by Cover, is ultimately held at bay by pragmatism).

94 The Tanhuma thus diverges from the redacted Babylonian Talmud, in which the sages' jurisdiction over the king is only envisioned in a cooperative dynamic (its broader support by Simeon is overridden by the lasting rabbinic decree of separation). The traditions of the Tanhuma, Sifre Zuta, and Babylonian Talmud (the kernel and the redacted version) differ from the rule of Mishnah Sanhedrin 2:2, in which the king is not judged (but see the parallel Tosefta passages). In fact, the plain sense of the Mishnah's juridical scheme, which starkly segregates the king from the court, sharply diverges from all of these other rabbinic sources.

95 The period referred to is the first century BCE. A more precise date for the trial is 47 BCE, when Herod was about twenty-five years old (even though Josephus says he was fifteen in *Antiquities* 14.158, this seems inaccurate in light of *Antiquities* 17.148). *See* KASHER, *supra* note 34.

96 It should be emphasized at the outset that the notions of legal and political authority found in Josephus's descriptive writings on the trial of Herod differ from the theocratic-juristic vision that Josephus advances in various programmatic writings, especially in *Antiquities* 4 and *Apion* 2. In *Antiquities* 4, Josephus restates sections of

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Josephus describes the events leading up to the trial of Herod both in the *Jewish War* and *Jewish Antiquities* (the actual trial is only portrayed in *Antiquities*),[97] and scholars have analyzed numerous parallels and distinctions between these two versions, as well as various internal inconsistencies within the (longer) *Antiquities* account.[98] Overall, the similarities in these accounts outweigh their differences, and together they relay a significant teaching about law as an expression of power politics. Still, focusing on several discrepancies between these respective accounts, as well as problems that arise within each, offers an important point of entry into Josephus's distinctive rendition of this episode.[99]

Most basically, Josephus's two narrations convey conflicting signals about whether a trial, or at least its initial stages, ever took place. The *War* never mentions the trial. The later *Antiquities*

Deuteronomy 17 in a manner that is informed by his vision of legal administration: the high priest, prophet and council of elders (the *gerousia*) serve as higher judicial authorities. Josephus's reference to this latter council as a judicial body is an important addition to the underlying biblical verse, *Deuteronomy* 17:9, that mentions only "the levitical priests and the judge." At the same time, Josephus expresses opposition to the very institution of the monarchy that goes well beyond any equivocation that may be detected in *Deuteronomy* 17:14–20. In an ideal system, according to Josephus, the rule of law will be supreme, and God will act as sovereign. If a king is selected, he must be concerned with justice and be subservient to the laws. Moreover, the king must solicit the counsel of the high priest and the advice of the elders (*gerousia*) before he acts. This suggests a dramatic form of subservience by the king to these latter two institutions. Josephus here never states that the king participates in the judiciary.

In *Apion*, Josephus's final work that offers a rich apology for, and theoretical account of, Judaism, Josephus advances an analysis of the Torah's unique political constitution (he labels this a "theocracy"), which is built upon a durable legal foundation. Given that the political strength of the Jewish tradition derives largely from its legal supremacy, the allocation of judicial responsibility within this system is crucial. Here, too, Josephus's model is clear: the high priest (not the king), along with the priestly class, is responsible for overseeing the judiciary and God's sacral law. For more on these sections in Josephus, see my articles, *The King and I*, *supra* note 20, and *Theocracy and the Rule of Law: A Novel Josephan Doctrine and its Modern Misconceptions*, 28 Dine Israel 5 (2011).

The considerable differences between Josephus's expositions in *Antiquities* 4 and *Apion* 2 and his representations of the trial of Herod can be largely attributed to the fact that the trial occurs within a monarchic framework, which necessarily diverges from the anti-monarchic undercurrent of his programmatic writings. Moreover, I would add that the lasting legacy of the trial (that Josephus must have also internalized to a certain extent, notwithstanding my remarks below about his own confusion)—which underscores the abundant power that a sovereign wields over legal affairs—may be one of the indirect influences that inspired Josephus to formulate an alternate theocratic-juristic vision which he presents in his programmatic writings. That is, precisely because royalty tends to dominate legal affairs, Josephus envisions an ideal system of law that operates independently of royal intervention. This vision is only possible if the king is eliminated or subordinated, and an independent theocratic legal system governs society.

In the present context, I am focusing on Josephus's descriptive writings, in particular his writings about the Herod trial. Nevertheless, as I argue below, Josephus's accounts touch on political and structural issues, and do not merely offer descriptive chronicles of these events. With that background, I turn to Josephus's renditions of the trial, considering its function and message in his historical writings. See also *infra* note 150.

97 *See* Flavius Josephus, The Jewish War 1.201–15 (H. St. J. Thackeray trans., Loeb Classical Library 2004) (1926); Flavius Josephus, Jewish Antiquities 14.158–84 (Ralph Marcus trans., Loeb Classical Library 2004) (1933).

98 For several scholarly treatments, see Kasher, *supra* note 34; Tamar Landau, Out-Heroding Herod: Josephus, Rhetoric, and the Herod Narratives 226–27 (2006); Richardson, *supra* note 34, 108–12; Goodblatt, *supra* note 24, at 112–13; James S. McLaren, Power and Politics in Palestine: The Jews and the Governing of Their Land 67–79 (1991); Seth Schwartz, Josephus and Judean Politics 183–84 (1990); Richard Laquer, Der Jüdische Historiker Flavius Josephus 171–204 (1970) (German); and Efron, *supra* note 24, at 190–97 (including numerous secondary references cited by Efron in notes 209 and 210). *See also* Richard Kalmin, Jewish Babylonia between Persia and Roman Palestine 249 (2006).

99 In contrast with rabbinic literature, Josephus's accounts are riddled with more complexities, which have to be confronted in order to better understand the significance of this epic trial in Josephus's writings.

account, which likely builds on two distinct earlier sources, has opposite connotations.[100] Whereas *Antiquities* 14.171–175 describes the trial procedure, *Antiquities* 14.176 sounds like Herod evaded the trial. Perhaps in the aggregate this suggests that (at least in the mythical memory) only an initial stage of the trial transpired, which raises a descriptive question of whether this even constitutes a trial or is best characterized as a dismissal before a trial.

Beyond this apparent tension, a review of Josephus's treatments of this trial reveals multiple explanations for why Herod's trial ended or was avoided, or more specifically why Herod was not convicted. The following reasons are stated, or at least hinted at, in Josephus's two accounts: (1) Sextus Caesar, the Roman governor of Syria, instructed Hyrcanus to discharge Herod (*War*, *Antiquities*),[101] and even threatened Hyrcanus to make sure he complied with the discharge order (*Antiquities*);[102] (2) Hyrcanus released Herod because he loved him (*War*, *Antiquities*);[103] (3) Herod escaped from the trial and ran northward to Roman Syria (*War*);[104] (4) Hyrcanus delayed the trial for a day and helped Herod to escape northward to Roman Syria (*Antiquities*);[105] and (5) Herod intimidated Hyrcanus and the Sanhedrin during the trial, and they freed him because they were too scared to try him (*Antiquities*).[106] While some of these explanations can overlap, others are independent from one another or even mutually exclusive.[107] In the aggregate, they inconsistently suggest that Herod escaped or was acquitted, or that his trial was adjourned.[108] Minimally, Josephus is guilty of "overkill" by supplying (much) more than one explanation.[109]

Not only is Josephus confusing or confused, but so apparently are the trial's protagonists. Josephus describes Hyrcanus and Herod as misunderstanding each other's intentions following the trial. Upon arriving in Roman Syria after the trial, Herod expects a second summons that never arrives.[110] Similarly, Hyrcanus expects Herod to launch an avenging attack, which also never (fully) happens.[111] Moreover, Josephus's overall portrait of these two figures is difficult to

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100 Regarding the claim that Josephus here relied on two distinct sources (specifically, that *Antiquities* 14.171–76 is assumed to come from a distinct pro-Pharisaic source, in contrast with the rest of the *Antiquities* section which likely comes from Nicholas), see JOSEPHUS, JEWISH ANTIQUITIES, *supra* note 97, at 14.171 note a; *see also* SCHWARTZ, *supra* note 98, at 174 n.16.

101 JOSEPHUS, JEWISH WAR, *supra* note 97, at 1.211; JOSEPHUS, JEWISH ANTIQUITIES, *supra* note 97, at 14.170.

102 JOSEPHUS, JEWISH ANTIQUITIES, *supra* note 97, at 14.170.

103 JOSEPHUS, JEWISH WAR, *supra* note 97, at 1.211; JOSEPHUS, JEWISH ANTIQUITIES, *supra* note 97, at 14.170.

104 JOSEPHUS, JEWISH WAR, *supra* note 97, at 1.212.

105 JOSEPHUS, JEWISH ANTIQUITIES, *supra* note 97, at 14.177.

106 JOSEPHUS, JEWISH ANTIQUITIES, *supra* note 97, at 14.171–76. This reason can be inferred from Josephus's account, which states, "But when Herod stood in the Synhedrion with his troops, he overawed them all, and no one of those who had denounced him before his arrival dared to accuse him thereafter." *Id.* Sameas proceeds to blame Hyrcanus and the Synhedrion for giving Herod such great license. All of this suggests that Hyrcanus and the Synhedrion refused to try Herod. The very next lines (14.177), which state that Hyrcanus saw that the members of the Synhedrion were bent on putting Herod to death, likely derive from a different source, *see supra* note 100, and offer a different reason why Herod was not convicted.

107 Josephus tries to harmonize some of them, saying that Herod escaped northward, thinking his escape was contrary to Hyrcanus's wishes. *See* JOSEPHUS, JEWISH WAR, *supra* note 97, at 1.212.

108 *Compare supra* note 107 (stating that Herod escaped), *with Id.*, at 1.211 and note a (stating that Herod was acquitted), *and* JOSEPHUS, JEWISH ANTIQUITIES, *supra* note 97, at 14.177 (stating that the trial was adjourned).

109 The biblical scholar James Kugel uses the term "overkill" to describe a common phenomenon that occurs in early postbiblical literature, where a single interpretive text records two or more exegetical motifs to explain one specific textual problem. *See* JAMES L. KUGEL, THE LADDER OF JACOB: BIBLICAL INTERPRETATIONS OF THE BIBLICAL STORY OF JACOB AND HIS CHILDREN 7 (2006).

110 JOSEPHUS, JEWISH WAR, *supra* note 97, at 1.212; JOSEPHUS, JEWISH ANTIQUITIES, *supra* note 97, at 14.178.

111 JOSEPHUS, JEWISH WAR, *supra* note 97, at 1.212–15 (stating that Herod "collected an army and advanced upon Jerusalem to depose Hyrcanus" but eventually yielded to his father and brother, who advised him to stop);

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follow. In a somewhat dizzying sequence, Josephus paints Hyrcanus not only as a weak person but also as a manically inconsistent figure. Over the course of a few passages (in both *War* and *Antiquities*), Hyrcanus's attitude toward Herod is described as animated by jealousy, anger, love, and fear.[112] Further, Hyrcanus is both intent on trying Herod and the opposite.[113] Josephus's portrait of Herod is also perplexing. While Josephus's initial account of Herod offers a glimpse of a shrewd and calculating political actor, Herod's lingering anger about the trial (or the threat of the trial) seems irrational, even reckless.[114] An explanation offered by Josephus for Herod's behavior (stating that Herod was planning to respond with force if summoned a second time, but then suggesting that he was intent on marching against Hyrcanus in any event) only compounds the problem.[115] Indeed, Antipater and Phasael do not seem to understand Herod's obstinacy, as they point out his good fortune in escaping the trial (and even emphasize that he should feel gratitude toward Hyrcanus).[116] To summarize, there is much confusion in Josephus's accounts about whether Herod ever stood trial; and why Herod was discharged (or how he evaded his trial). Also, Josephus offers a contradictory portrait of Hyrcanus, and depicts a calculating Herod caught up in what seems to be irrational anger about a matter that was settled in his favor, perhaps with the assistance of Hyrcanus.

While some of these inconsistencies can be attributed to Josephus's two accounts and the likely disparate sources from which he culled in composing them,[117] I would conjecture that Josephus provides multiple explanations for the trial's conclusion and projects uncertainty onto the trial's protagonists because he is confused by these events. Nevertheless, if one returns to the basic outline of the narrative that Josephus records, one can reconstruct a fairly coherent account of this momentous trial (i.e., perhaps Josephus is transmitting a narrative of the trial that he does not fully comprehend). The various stages of the trial, as narrated, are coordinated around its heightened stakes —which are abundantly clear to the protagonists (even if they are less plain to Antipater, Phasael, and others). Hyrcanus and Herod, as represented in this narrative account, realize throughout that the trial is not really about murder, notwithstanding the official charge. Rather, the entire trial— from its cause of action to its adjudicators to its outcome and aftermath—revolves around controlling the monarchy and is propelled by the substantial bond between royal and legal authority. In order to bring this point into sharper relief, in the discussion that follows I first contextualize the

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Josephus, Jewish Antiquities, *supra* note 97, at 14.180–84 (stating that "Herod did come against him with an army" but adding that "Herod, however, was prevented from attacking Jerusalem by his father Antipater and his brother").

112 Josephus, Jewish War, *supra* note 97, at 1.208, 210, 211, 213 (describing Hyrcanus's jealousy at Herod's rising acclaim; his anger at Herod's repeated successes, which was further fueled by malicious advisors who especially underscored the significance of Herod's execution of Ezekias and the bandits; his love for Herod that leads to the acquittal; and his concern about Herod's counter attack); Josephus, Jewish Antiquities, *supra* note 97, at 14.168, 170, 180 (describing Hyrcanus's anger, which was further kindled by the mothers of the bandits who had been killed by Herod; his love for Herod that leads to his acquittal; and his fear of Herod's counter attack).

113 Josephus, Jewish War, *supra* note 97, at 1.210–12; Josephus, Jewish Antiquities, *supra* note 97, at 14.168, 170.

114 Josephus, Jewish War, *supra* note 97, at 1.214–15; Josephus, Jewish Antiquities, *supra* note 97, at 14.180–84.

115 Josephus, Jewish War, *supra* note 97, at 1.212–15; Josephus, Jewish Antiquities, *supra* note 97, at 14.178–84. According to *Antiquities*, Herod relents from his aggressive plan only because he determines that he has already made an adequate showing of strength to the people when he first arrived at the trial. *See* Josephus, Jewish Antiquities, *supra* note 97, at 14.184. This explanation seems at odds with Josephus's description of Herod fleeing from Hyrcanus. *See* Josephus, Jewish Antiquities, *supra* note 97, at 14.177.

116 Josephus, Jewish War, *supra* note 97, at 1.214–15; Josephus, Jewish Antiquities, *supra* note 97, at 14.181–84.

117 Thus, conjecturing that *Antiquities* 14.171–76 derives from a different source, *see supra* note 100, may help to explain some inconsistencies, but certainly does not resolve all of them.

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trial within the historical period in which Josephus situates it and then analyze the essence of the trial narrative.

In the course of describing the lives of King Hyrcanus, Antipater, and his son Herod, Josephus recognizes this trial as an important episode that captures Herod's rising acclaim and the early resistance that he encountered. Transpiring during the waning years of the Hasmonean dynasty, the trial also exposes its increasing vulnerability. Riven by inner turmoil (civil wars and sectarian feuds) and dominated by the Roman conquest (Pompey invasion), the Hasmonean dynasty is in an enfeebled state by the middle of the first century BCE.[118] In the years preceding the trial, first Aristobulus and then his son Antigonus compete for the Hasmonean throne with Hyrcanus.[119] In order to resolve this dynastic controversy, Hyrcanus appeals to Caesar, a further reflection of the fragile state of Jewish affairs.[120] Although Hyrcanus manages to prevail, Antipater and his two sons—Phasael, a governor in Judea, and, especially, the younger Herod, a governor in the Galilee—continue to vie with him for royal power.[121]

Animated by an insatiable ambition for power, Herod is no doubt emboldened in his pursuit of Hyrcanus's crown by these past events, and likely by the historic political changes in the Roman world.[122] Evidently eager to lay the groundwork for his royal quest, Herod kills Ezekias and a troop of bandits in the Galilee. He thereby brings stability to a region under his control, flexes his military prowess, and gains a notable reputation even among the Roman Syrians, all steps towards accumulating sovereign power.[123] In the aftermath of the killing, Herod is summoned to trial before King Hyrcanus and the Sanhedrin (the latter is mentioned only in *Antiquities*).[124] As stated above, Herod is never convicted.

The essence of the trial can now be discerned by focusing more carefully on the underlying offense, Herod's alleged crime of murdering bandits in the Galilee. The charge is made in *Antiquities* in the following terms:[125]

> Thus Herod . . . has killed Ezekias and many of his men in violation of our law which forbids us to slay a man, even an evildoer, unless he has first been condemned by the Sanhedrin to suffer this fate. He however has dared to do this without authority from you [Hyrcanus].

In other words, Herod is indicted for homicide, having acted without a prior condemnation of the Sanhedrin and/or authorization from the king. Similarly, according to the *War*, Herod acted "without either oral or written instructions from Hyrcanus, killing people in violation of Jewish law."[126]

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118 For more historical background, *see supra* notes 31, 98.

119 JOSEPHUS, JEWISH WAR, *supra* note 97, at 1.187–201; JOSEPHUS, JEWISH ANTIQUITIES, *supra* note 97, at 14.140–55.

120 JOSEPHUS, JEWISH WAR, *supra* note 97, at 1.199; JOSEPHUS, JEWISH ANTIQUITIES, *supra* note 97, at 14.143.

121 JOSEPHUS, JEWISH WAR, *supra* note 97, at 1.201–03; JOSEPHUS, JEWISH ANTIQUITIES, *supra* note 97, at 14.156–62. The following paragraph presents my reconstruction of Herod's behavior and likely motivations, as represented in the trial narrative.

122 This was the period of the Great Roman Civil War of 49 BCE–45 BCE, when Julius Caesar defeats Pompey, ending the First Triumvirate and initiating the final phase of the Roman Republic. For more background on these events, see 9 THE CAMBRIDGE ANCIENT HISTORY: THE LAST AGE OF THE ROMAN REPUBLIC, 146–43 B.C., 424–67 (J. A. Crook, Andrew Lintott & Elizabeth Rawson eds., 2008).

123 JOSEPHUS, JEWISH WAR, *supra* note 97, at 1.204–05; JOSEPHUS, JEWISH ANTIQUITIES, *supra* note 97, at 14.158–60.

124 The Sanhedrin (or Synhedrion) that is described in these passages is probably not a permanent institution but rather an ad hoc council, or even the king's council. For Josephus's use of this term, see GOODBLATT, *supra* note 24, at 109–19.

125 JOSEPHUS, JEWISH ANTIQUITIES, *supra* note 97, at 14.167.

126 JOSEPHUS, JEWISH WAR, *supra* note 97, at 1.209.

To reformulate this, what defines Herod's act as 'murder' is that it was illicit; but had it been decreed or authorized by the king and/or the Sanhedrin then it would be considered a lawful punishment of, or an authorized strike on, dangerous bandits.[127]

Notably, this indictment operates with assumptions about criminality and lawfulness that to the modern reader are profoundly Weberian in nature. To wit, the very same violent act is either a criminal violation (murder!) or a legal or political duty, depending upon the perpetrator and the conditions under which the act is perpetrated. Had the sovereign executed capital punishment against a notorious criminal, his act would be a faithful administration of justice; and had he subdued an at-large terrorist, his act would be an exemplary exercise of political authority. This highlights that an essential function of the sovereign is that he (licitly) perpetrates violence—for, as Weber teaches us, the sovereign monopolizes violence.[128]

In the context of the trial narrative, the crucial point is that the sovereign, or king, is the quintessential figure who can authorize a licit killing of bandits. From the continuation of the account, it appears that the king manages this power both as the supreme legal authority (alongside the Sanhedrin) and as the principal political authority. Hyrcanus therefore reifies his exclusive royal standing by defining Herod's act as criminal. Law thus serves as Hyrcanus's instrument to subordinate Herod and suppress his royal aspirations.

From Herod's perspective, however, his act has the opposite connotation. Having assumed leadership in the Galilee, Herod deliberately asserts his control over the region by eliminating the menacing outlaws as a way of demonstrating his sovereignty.[129] The advisors who exert pressure on Hyrcanus to try Herod (according to *Antiquities*) sense the broader royal aspirations of Herod (and Antipater) and recognize how Herod's killing of Ezekias and the bandits serves his objectives:[130]

> But the chief Jews[131] were in great fear when they saw how powerful and reckless Herod was and *how much he desired to be dictator*. These Jews came to Hyrcanus and asked in disbelief, "Do you not see that Antipater and his sons *have girded themselves with royal power*, while you have only the name of king given you?[132] But do not let these things go unnoticed, nor consider yourself free of danger because

127 There is an important nuance in Josephus's accounts here. He states that the killing was unauthorized, but also emphasizes that it was illicit because somebody was put to death without a trial. Evidently, what is being implied here is that such an act can be authorized either by way of royal sanction (i.e., a king may kill whomever is a threat) or by the verdict of a trial (led by the king and/or the Synhedrion). Thus, the killing or violence would be legitimate if they are an authorized attack or a punishment. Interestingly, these synoptic excerpts reflect an ambiguity about whose permission is necessary, the king or the Synhedrion. It is plausible that they each have the requisite authority, in the manner just described.

128 Max Weber, *Politics as a Vocation*, *in* FROM MAX WEBER: ESSAYS IN SOCIOLOGY 78 (H. H. Gerth and C. Wright Mills eds. and trans., 1958).

129 *See* Josephus's characterization in the JEWISH WAR, *supra* note 97, at 1.204–05, where Herod is described as acting as sovereign of the Galilee, in accord with his own monarchic pretenses. Herod's heroic act is both a sign of royalty and constitutive of royalty.

For a contemporary application of the notion that the sovereign can authorize the violence of others, see Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation*, 45 HARVARD INTERNATIONAL LAW JOURNAL 183 (2004) (describing how privateering constitutes a licit form of piracy that is authorized by the sovereign under the law of nations).

130 JOSEPHUS, JEWISH ANTIQUITIES, *supra* note 97, at 14.165–67.

131 In *War*, the characterization is different, as those giving the advice are described as "malicious persons at court." JOSEPHUS, JEWISH WAR, *supra* note 97, at 1.208–09; *see* SCHWARTZ, *supra* note 98, at 183–84.

132 Officially, Hyrcanus was an Ethnarch, but the Jews considered him to be their king. *See* JOSEPHUS, JEWISH ANTIQUITIES, *supra* note 97, at 14.157, 172, 190ff.

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> you are careless of yourself and the kingdom. For no longer are Antipater and his sons merely your stewards in the government, and do not deceive yourself with the belief that they are; they are openly acknowledged to be masters. *Thus, Herod, his son, has killed Ezekias . . . .*"

Aiming to secure royal status, Herod pursues Ezekias and the bandits.[133] Following Herod's calculus, he does not need authorization from Hyrcanus. As rightful ruler over the Galilee, Herod's act constitutes a sovereign act of enforcement, and is the opposite of criminal.

By trying Herod, Hyrcanus therefore aims to subvert the royal symbolism of Herod's act. Charging Herod with murder serves as a way of defining Herod's actions as the unauthorized criminal act of a subject of the king and the legal authorities. Moreover, the very act of summoning Herod to court further reinforces this same hierarchy. This point is spelled out in a passage in the *War* that records the argument made by Hyrcanus's advisors that swayed him to subpoena Herod, "If he [Herod] is not king but still a commoner, he ought to appear in court and answer for his conduct to his king and to his country's laws, which do not permit anyone to be put to death without trial."[134] What differentiates the king from his subject is that a king can never be summoned to court, while a subject of the king must answer before "his king and to his country's laws." Formulated in mishnaic terminology, Josephus here describes a scheme, common throughout the world of antiquity, where the king judges (apparently, he serves as the leading judge),[135] but cannot be judged. Thus, while Herod's underlying act aims to assert his royal status, both Hyrcanus's indictment and subpoena undermine Herod's rank and signify that only Hyrcanus commands royal authority. The underlying act, indictment, and subpoena all cut to the heart of the question of who has monarchic standing.[136]

For Herod, the very notion of being accused of murder and standing trial is therefore an unforgivable (double) affront to his royal aspirations. To offset the damaging implications of his

133 Recall that Antipater competed with Hyrcanus, and Caesar granted Antipater the right to choose his office after bestowing the high priesthood upon Hyrcanus. *See* JOSEPHUS, JEWISH WAR, *supra* note 97, at 1.196–201; *see also id.*, at 1.203 ("[H]e took the organization of the country into his own hands, finding Hyrcanus indolent and with the energy necessary of a king."); *id.*, at 207 ("Antipater, in consequence, was courted by the nation as if he was king and universally honoured as lord of the realm."); *id.*, at 209 ("Hyrcanus, they said, had abandoned to Antipater and his sons the direction of affairs, and rested content with the mere title, without the authority, of a king. How long would he be so mistaken as to rear kings to his own undoing? No longer masquerading as viceroys, they had now openly declared themselves masters of the state, thrusting him aside."). In a similar vein, Josephus describes the rise of Antipater and his sons, achieved in part by way of Herod's exercise of power in the Galilee, as leading to Antipater's receiving the nationwide "respect shown a king and such honor as might be enjoyed by one who is an absolute master." JOSEPHUS, JEWISH ANTIQUITIES, *supra* note 97, at 14.161–62. By extension, this kind of esteem accrued to Herod as well.

134 JOSEPHUS, JEWISH WAR, *supra* note 97, at 1.209.

135 Throughout the accounts of Herod's trial, Josephus describes King Hyrcanus as the supreme legal official who subpoenas and discharges Herod, and who, alongside the Synhedrion (in the *Antiquities* account), judges the indicted defendant.

136 By charging Herod, Hyrcanus is using law as a political tool against Herod, which is consistent with the account's overall conception of the relationship between law and politics. Moreover, it seems clear that law is being used as a political instrument in the additional sense that Herod is charged, even though Hyrcanus and the Sanhedrin did not (or could not) pursue Ezekias and the bandits or punish them in court. Nevertheless, they refuse to delegate such responsibilities to another person, or at least not to a royal aspirant. Finally, it is worth noticing how the bandits' mothers try to use law against Herod, also suggesting its instrumentality. *See* JOSEPHUS, JEWISH ANTIQUITIES, *supra* note 97, at 14.168.

appearance in court, Herod carefully calculates his response to the summons. He arrives in court with the accompaniment of an impressive, quasi-royal, entourage.[137] Moreover, during the course of the trial proceedings, Herod assumes an indomitable posture:[138]

> But when Herod stood in the Sanhedrin with his troops, he overawed them all, and no one of those who had denounced him before his arrival dared to accuse him thereafter; instead there was silence and doubt about what was to be done.

A more detailed description of Herod's manner before the court is offered by Sameas, in his rebuke of Hyrcanus and the other judges:[139]

> Fellow councilors and king, I do not myself know of, nor do I suppose that you can name, anyone who when summoned before you for trial has ever presented such an appearance. For no matter who it was that came before this Sanhedrin for trial, he has shown himself humble and has assumed the manner of one who is fearful and seeks mercy from you by letting his hair grow long and wearing a black garment. But this fine fellow Herod, who is accused of murder and has been summoned on no less grave a charge than this, stands here clothed in purple, with the hair of his head carefully arranged and with his soldiers round him, in order to kill us if we condemn him as the law prescribes, and to save himself by outraging justice . . . .

Herod's audacious appearance before Hyrcanus and the judges should be seen not only as irreverent or intimidating but as deliberately monarchic in nature. Donning the emperor's purple, with a perfectly groomed hairdo, Herod wears royal attire in order to display that he, as a king, is above the law.[140] Likewise, he does not act humbly before the legal authorities because he refuses to submit to their jurisdiction.

Yet, from Hyrcanus's perspective, although he balks at Herod's behavior and fails to subdue Herod,[141] the aborted trial has already bolstered his position. While at first blush Hyrcanus acts throughout this episode in a manner that seems confused and perhaps even spineless,[142] he achieves more through his uneven behavior than is immediately apparent. Monitoring Hyrcanus's apparently erratic conduct actually exposes the deliberate and resolute manner in which he aims to cut Herod down to size through the trial procedure. For the very act of summoning Herod, and

137 Even though Josephus records Antipater's advice to Herod to walk a fine line between securing his own safety and not provoking a revolt, *id.*, at 14.169, it seems clear that a primary motive for Herod is to appear monarchic. In a sense, this is Herod's best option at this point: he must make a royal showing, but if he makes it too boldly he will be in open revolt against Hyrcanus, which Herod apparently is not yet ready to be. However, shortly thereafter, when Herod escapes northward, he is willing to edge closer to an open revolt against Hyrcanus. *Id.*, at 14.169.

138 *See id.*, at 14.169, 171–74 (anticipating and then explicitly describing Herod's appearance).

139 *Id.*, at 14.172–73 (originating, possibly, from a different source).

140 This may be the meaning of the following passage: "Thereupon the members of the Synhedrion became indignant and attempted to persuade Hyrcanus that all these things were directed against him." *Id.*, at 14.179. By "all these things" the members of the Synhedrion likely refer to Herod's purple dress and regal posture, as well his escape from the trial, which all can be interpreted as ways of undermining his subjugation to the law, and thereby defying King Hyrcanus.

141 When Sameas continues, "[b]ut it is not Herod whom I should blame for this or for putting his own interests above the law, but you (the members of the Sanhedrin) and the king, for giving him such great license," the latter phrase includes allowing Herod to assume royal airs. JOSEPHUS, JEWISH ANTIQUITIES, *supra* note 97, at 14.174.

142 First, Hyrcanus becomes infuriated and compels Herod to appear before the tribunal, and then he readily, and lovingly, acquits him from all charges. *See supra* notes 110–17 and the accompanying text.

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then acquitting him, doubly achieves Hyrcanus's purpose: Herod must appear in court and respond to a homicide charge, which signifies his non-royal status; Hyrcanus's discharge of Herod, in turn, displays his (not Herod's) royal-judicial authority.[143]

In a sense, Hyrcanus is availing himself of his only real option. Not summoning Herod would have meant capitulating to his act of royal usurpation. Trying Herod would have been far too confrontational and perilous.[144] Therefore, Hyrcanus adopts the optimal course of action for his purposes.

Although onlookers deem Hyrcanus cowardly (e.g., Sameas) or compassionate (e.g., Antipater), Herod has a keener perception of his opponent and what has transpired. Herod understands that his very appearance at the trial, along with the subsequent official discharge, cedes much to Hyrcanus in the struggle for sovereignty.[145] This is likely the reason why Herod remains so disturbed by his subpoena even after he escapes the trial. Herod therefore resolves not to reappear in court,[146] and even considers avenging his earlier appearance.[147] Rather than behaving rashly, the calculating Herod realizes that he has been bested by Hyrcanus's latest move of acquittal. Ultimately, Herod refrains from mobilizing troops, not out of gratitude to Hyrcanus or because of the pious lessons that Antipater and Phasael stress, but because he likely concludes that his competing show of strength at the trial was adequate for now.[148] Herod postpones further flaunting his "royal" powers until a later date. Sure enough, in time Herod is completely vindicated when the roles are reversed, and Herod serves as the royal judge in a subsequent trial against Hyrcanus.[149]

The trial narrative recorded in Josephus's works, then, exposes a juridical universe that functions at the crux of power politics, and is animated by a fascinating and novel conception of sovereignty that is legalistic in nature.[150] Whoever exercises legal authority or controls the violence of law assumes the role of the sovereign.[151] Convening tribunals, subpoenaing commoners, and exercising

143 Since Hyrcanus is officially discharging or acquitting Herod, and (at least officially) not just bowing to Herod's intimidating stature, Hyrcanus remains legally in charge. Hyrcanus thereby reinforces his royal legal authority and Herod's inferior status as a commoner who is subject to the law.

144 Especially because it is not clear whose side the Romans or the Judean people would support, given Herod's rising popularity, alongside his father and brother.

145 In other words, when Antipater states that Herod should not avenge his having been subpoenaed by Hyrcanus since ultimately Hyrcanus acquitted Herod, he seems to have missed what Herod (at least eventually) understood. Namely, even though Hyrcanus had discharged Herod, Hyrcanus had nevertheless succeeded in reinforcing his own royal legal authority and Herod's status as a commoner, thereby subtly but categorically damaging Herod's reputation and aspirations.

146 Josephus, Jewish War, *supra* note 97, at 1.212; Josephus, Jewish Antiquities, *supra* note 97, at 14.178.

147 Josephus, Jewish War, *supra* note 97, at 1.214–15; Josephus, Jewish Antiquities, *supra* note 97, at 14.180–84.

148 What seems to ultimately sway Herod to not avenge being subpoenaed is that he has already done enough to project his own royal image during the preliminary trial proceedings. *See* Josephus, Jewish War, *supra* note 97, at 1.215; Josephus, Jewish Antiquities, *supra* note 97, at 14.184.

149 *See* Josephus, Jewish War, *supra* note 97, at 1.229ff; Josephus, Jewish Antiquities, *supra* note 97, at 14.285ff; *see especially* Josephus, Jewish Antiquities, *supra* note 97, at 15.173.

150 Josephus's programmatic writings offer a very different portrait of legal and political authority, which may well be a response and alternative to his descriptive accounts of the trial scheme that underscore the deep nexus between law and power. *See supra* note 96.

151 According to Josephus's depictions of the trial of the Judean king, sovereignty, then, is identified through a distinct capacity: a monopoly over legal control. In other words, commanding legal supremacy or controlling the violence of the law is a critical dimension of sovereignty. Therefore, a competition over royal power is also, or even primarily, manifest in the legal sphere. That is, even in Josephus's accounts of the trial that emphasize power politics, one still senses the importance of law for political and social authority. Throughout these passages, a primary indicia of political power is controlling the law, and concomitantly being immune from its enforcement.

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the power to indict or acquit, the king can also confer a licit status on political actions. Presiding at the helm of the judiciary and delimiting the scope of legality, the king, almost by definition, stands immune from lawsuits.

This legalistic conception of sovereignty fuels the entire trial narrative in Josephus's accounts. When Herod senses a void in monarchic leadership, he attempts to assert his own royalty by assuming a regal posture, especially within the legal sphere. Responding to Herod's power grab, Hyrcanus attempts to contain Herod by entrenching his subordinate position under the rule of the king and the king's legal authority. Herod resists this demotion at the trial, but nevertheless is partially trapped under the king's legal procedures. Far from the rabbinic legacies of the trial story, Josephus's trial narrative reflects the legal supremacy of the king and the allure of legal authority for those who aspire to gain sovereign power.

CONCLUSION

In sum, the legacy of the narrative of the trial of the Judean king in Jewish antiquity and late antiquity runs the full gamut. According to the redacted Babylonian Talmud, it captures the irreconcilability of law's confrontation with political power; in the Midrash Tanhuma, the legendary trial demonstrates that law is all-encompassing and binds the politically powerful; and in Josephus, it exhibits how the politically powerful control the sphere of law. The very act of narration of this myth generates a plurality of perspectives.[152]

At first blush, this idea seems similar to standard conceptions of sovereignty. For an absolutist conception of sovereignty includes all powers, including legal powers. Thus, the sovereign exercises both political sovereignty, as well as legal sovereignty. But in the absolutist definition of sovereignty, legal authority is just one manifestation of a general command of powers. In contrast, Josephus's accounts operate with a more focused conception of sovereignty. What is fascinating about Josephus's renditions of this episode is that *the theater where sovereignty is being established is entirely within the legal domain*. It is the capacity to licitly authorize actions, define crimes, subpoena, judge, and acquit—all dimensions of legal authority—that define or constitute sovereignty. Josephus's accounts operate with what can be described as a "legalistic conception of sovereignty," wherein the sovereign monopolizes the legal enterprise.

152 Multiple narrations of these tales—to invoke Peter Brooks's description of the function of narration—"give them shape, give them a point, argue their import, and proclaim their results." Brooks, *Narrativity of the Law*, 14 Cardozo Studies in Law and Literature 1 (2002).

Cumulatively, these multiply narrated tales help construct Jewish law. Jewish law offers a profound exemplar of the prominence of narratives within legal discourse, as Cover already realized, and supports the growing claim of the importance of narrativity for fully comprehending the nature of law. In addition to the amalgam of halakhah and aggadah (rabbinic narrative), one also finds within early Jewish jurisprudence what can be described as the aggadah of the halakhah (or the halakhic process), meaning the meta-narratives that establish, frame, reinforce, shape, and perpetuate the halakhic system—or, what I have labeled as the foundational or secondary stories of Jewish law throughout this article (especially in Part I). These narratives help shape Jewish law, which belies any attempt to analyze them discretely from the field of law.

As emphasized in Part I, the importance of foundational and secondary legal tales as a genre extends beyond Jewish law. While such myths play a distinct role within the Jewish legal tradition, they also have much relevance for legal traditions at large. Stories are crucial vehicles of the culture of law and help construct our conceptions of law. Indeed, as argued in Part I, entire legal systems and traditions are anchored in foundational myths and shaped by secondary narratives. These stories (alongside other tools of the culture of law) can inform the nature and scope of law; the values of a legal tradition; the rights and liberties it protects; the roles of courts and leading officials within society; the way law operates in times of emergency; and many other matters. A study of law and its stories must encompass the tales that establish and sustain a legal tradition. The Law Stories Series, published

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Underlying these multiple narrations is a momentous historical event dating to the Hasmonean period, whose impact reverberated throughout antiquity and late antiquity. In a tense encounter between the judicial sages and a leading political actor the very viability of the legal system was put to an existential test. Threatening to topple the monumental legal edifice that had been constructed upon the foundations of Sinaitic revelation, a defiant, powerful figure challenged the validity and reach of sacral law. While the historical incident is shrouded in an impenetrable cloud of obscurity, the paideic community of antiquity and late antiquity mediated the significance of this critical encounter through their laden retellings of the tale of the trial.

In a thoughtful summary of his treatment of the trial in "The Folktales of Justice," Robert Cover also distinguishes between the historical foundation and the mythical tale that rehearses this event. Cover's remarks are highly indicative of his overall theory of legal narratives:[153]

> In the historical . . . case of King Yannai [Jannaeus]/Herod, the gesture of courage is conjoined with pragmatic concession. It may be that had the craven colleagues of Simeon been more courageous, they would all have survived. It may also be that they all would have died and Simeon with them as their leader . . . . We can never be sanguine about the capacity of courage to rescue itself. Still, the gesture of courage is the aspiration . . . certainly rescued in the Talmudic account by a *deus ex machina*—the Angel Gabriel, himself. Nonetheless, were the gesture and aspiration of resistance not the principal motif of these stories, *we* would have no reason to remember them or to make them our own. We would need no myth to prepare us to cave in before violence and defer to the powerful. We must get the relative roles of myth and history straight. Myth is the part of reality we create and choose to remember in order to *reenact*. It is intensely personal and committed. History is a counter-move bringing us back to reality, requiring that we test the aspiration objectively and prudentially. History corrects for the scale of heroics that we would otherwise project upon the past. Only myth tells us who we would become; only history can tell us how hard it will really be to become that.

Even as Cover's sharp distinction between history and mythology has much appeal,[154] his characterization of each is drawn too narrowly. History records events as they transpire—whether they unfold neatly or chaotically, triumphantly or tragically. Facing the historical record can therefore leave us inspired, in despair, or can evoke a full range of other responses. To the extent we aim to retrieve history, however, there are formidable challenges. The shattering impact of critical events often generates confusion and controversy, which makes the prospects for accurate reconstruction improbable. Moreover, the problem of recovery is compounded by the passage of time, which creates an ever expanding chasm between the past and the present. In contrast, myths fill in the void of a fading antiquity. Moreover, they allow narrators and listeners to once again inhabit prior spaces and, as Cover says, to reenact encounters of bygone eras.

Yet Cover's definition of myths constricts their course to one possible outcome. According to Cover, myths coax us forward; they spawn, or at least aim to inspire, heroic behavior. Thus, the myth of the trial of the Judean king inspires the morally upright to speak truth to powerful figures. Cover is right in envisioning such a mythology. Indeed, the myth of the trial can be narrated as a tale in which the intrepid guardian of law prevails over an absolutist ruler (Tanhuma). But the myth can also be narrated in different ways. Perhaps the myth rehearses the deep, irreparable

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recently by Foundation Press, reflects an increasing awareness of the significance of legal stories (broadly defined) in the academic community.

153 Cover, *The Folktales of Justice*, *supra* note 2, at 190.

154 For further meditations on a related theme, especially in the context of Judaism, see Yosef Hayim Yerushalmi, Zakhor: Jewish History and Jewish Memory (1982).

trauma of the destructive confrontation between law and power. Retelling the tale of the legendary trial refracts the acute existential threat that was barely survived. Therefore, the myth is oriented toward a more secure climax where a steadfast barrier is erected to ensure that this alarming encounter never recurs (the redacted Babylonian Talmud). Or perhaps the myth imagines the extensive machinations of powerful rulers who deftly exploit legal instruments while jockeying for control of the normative field (Josephus).

All of these narrations of the trial of the Judean king offer alternative resolutions to an epic clash between law and power. Their narrative arcs cannot be predetermined. Such narratives gesture at disparate ideas about the best ways to navigate a complex legal and political terrain. Only when one heeds the multiple retellings of the foundational myth of the trial of the Judean king can one discern the profoundly different narrative trajectories—and underlying conceptions of law, justice, and sovereignty—that emanate from a single tale.

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