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Tikvah Working Paper 08/12

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**Justice Retold:
The Trial of the Judean King, and the Narration of Legal Myths**

NYU School of Law • New York, NY 10011
The Tikvah Center Working Paper Series can be found at
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ISSN 2160-8229 (print)
ISSN 2160-8253 (online)
Copy Editor: Danielle Leeds Kim
© David C. Flatto 2012
New York University School of Law
New York, NY 10011
USA

Publications in the Series should be cited as:
AUTHOR, TITLE, TIKVAH CENTER WORKING PAPER NO./YEAR [URL]

**JUSTICE RETOLD:
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LEGAL MYTHS**

By David C. Flatto

INTRODUCTION

Over two 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 (who became widely known with his first book “Justice Accused: Antislavery and the Judicial Process”), 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 his “Folktales of Justice: Tales of Jurisdiction” focused renewed attention on the profound nature and formative role of law’s stories.²

Heeding Cover’s appeal to expand the legal canon by examining rich literary texts from the past, this article analyzes several different renditions of a profound early legal myth involving a fundamental clash between law and power (which Cover briefly studied in his “Folktales of Justice”).³ 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, which captures the diverse normative claims of a “paideic community.” Inspired by

¹ Robert M. Cover, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* (1975). 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 and James Ponet, *Tributes to Robert M. Cover*, 96 *YALE L.J.* 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 (M. Minow, M. Ryan & A. Sarat eds., 1992).

² Robert M. Cover, *Obligation: A Jewish Jurisprudence of the Social Order*, 5 *J.L. & RELIGION* 65 (1987); Robert M. Cover, *The Folktales of Justice: Tales of Jurisdiction*, 14 *CAP. U.L. REV.* 179 (1985) (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 *HARV. L. REV.* 4 (1983).

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

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 which 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 additional avenues for this project.⁶ Finally, since legal narratives also offer means of expression for smaller paideic communities, their study 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

⁴ See James Boyd White, *Thinking about Our Language*, 96 YALE L.J. 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 STUD. LAW & LIT. 121 (1998); Robin L. West, *Communities, Texts, and Law: Reflections on the Law and Literature Movement*, 1 YALE J.L. & HUMAN. 129 (1988).

⁵ See Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1848 (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 HARV. L. REV. 561 (1983)). For more on the critical legal studies movement, see THE CANON OF AMERICAN LEGAL THOUGHT (David W. Kennedy and William Fisher eds., 2006); DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION: FIN DE SIECLE*, (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 L.J. 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 L.J. 1707 (1987).

of rulers and other political forces, Cover proclaimed the supremacy of a robust and polyvalent normative universe. In this cosmos, legal stories play an essential role.⁸

Under Cover's expansive definition of law which encompasses principles, ambitions, rights and entitlements, legal stories serve as a rich repository of legal values and aspirations. Further, in contrast with analytical accounts which reduce the definition of law to the sovereign's will, law operates among an amalgam of individuals and groups. Meditating upon a paideic community's profound legal myths offers a way of exploring the collective legal imagination. Likewise, law functions within the complex matrix of historical, societal, ethical and political forces. Embedded within the language and myths of law are various resonances. Only by encountering law within the context of its narratives can we gain access to the essence of this dynamic enterprise.⁹

Moreover, Cover contended that folktales not only reflect legal values, but also constitute a vehicle for legal transformation. Conceiving of law as a bridge built out of committed social behavior, Cover locates the formative building blocks in the material of sacred legal narratives of each community. They represent the normative significance of reality, but also the imagined alternative state, and the way of connecting the present to

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 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 L.J. & HUMAN. 9 (2005); Aviam Soifer, *Covered Bridges*, 17 YALE L.J. & HUMAN. 55 (2005); Beth A. Berkowitz, *Negotiating Violence and the Word in Rabbinic Law*, 17 YALE L.J. & HUMAN. 125 (2005); Stephen Wizner, *Repairing the World through Law: A Reflection on Robert Cover's Social Activism*, 8 CARDOZO STUDIES IN LAW AND LIT. 1 (1996); Susan P. Koniak, *When Law Risks Madness*, 8 CARDOZO STUDIES IN LAW AND LIT. 65 (1996); and Suzanne Last Stone, *Justice, Mercy, and Gender in Rabbinic Thought*, 8 CARDOZO STUDIES IN LAW AND LIT. 139 (1996).

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.

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 reflecting 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, the normative imagination affords a singular tool for the disempowered. Moreover, the exercise of law by state officials is an act of power, a "jurispathic" act. In contrast, smaller paideic communities develop law as an act of meaning, an act of "jurisgenesis." For the latter, it is precisely their normative stories which becomes the 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 legal tradition over the course of this volatile period.¹³ In fact, this 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.

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 40-4; 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 Cover, *The Folktales of Justice*, *supra* note 2, at 181-82.

¹² For a discussion of this dimension in Cover's writings, see Beth Berkowitz, *Negotiating Violence and the Word in Rabbinic Law*, 17 YALE J.L. & HUMAN. 125 (2005); Steven D. Fraade, *Nomos and Narrative before Nomos and Narrative*, 17 YALE J.L. & HUMAN. 81 (2005); Samuel L. Levine, *Halacha and Aggada: Translating Robert Cover's Nomos and Narrative*, 1998 UTAH L. REV. 465 (1998); Perry Dane, *The Public, the Private, and the Sacred: Variations on a Theme of "Nomos and Narrative,"* 8 CARDOZO STUDIES IN LAW AND LIT. 15 (1996); Tikva Frymer-Kensky, *Towards a Liberal Theory of Halakhah*, TIKKUN (1995); Rachel Adler, *Feminist Folktales of Justice: Robert Cover as a Resource for the Renewal of Halakhah*, 45 CONSERVATIVE JUDAISM 40, 40-55 (1993); Suzanne Last Stone, *In the Pursuit of the Counter-Text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory*, 106 HARV. L. REV. 813 (1993); and Gordon Tucker, *The Sayings of the Wise Are Like Goats: 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.

Cover's pioneering account of the role and nature of legal stories, and especially Jewish legal stories, have had a transformative effect on scholarship ever since.¹⁴ Nevertheless, Cover's account also has certain limitations as well. Most notably, Cover 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 shadows over the variety of law that emerges from paideic communities. Yet, despite recognizing the multiplicity of normative perspectives within a *polity*, Cover offers too narrow a description of the counter-voices within a *minority community*.¹⁵ In the process of transmission, legal communities tell and retell their foundational myths, and along the way adapt or even transform their essential meanings. In addition, legal communities at times relay secondary stories which can be subversive to primary ones, and which further complicate the legal discourse over time. By characterizing certain sacred legal myths as normative narrations which form discrete bridges to idealized destinations Cover veils the plurality of ideas—sometimes even competing ones—which are generated by a legal community through the very act of narration. Indeed, the proliferation of disparate versions of stories is essential to the nature of the literary-legal enterprise.¹⁶

¹⁴ For the wider influence, see Linda H. Edwards, *Once Upon a Time in Law: Myth, Metaphor, and Authority*, 77 TENN. L. REV. 883 (2010); LAW AND HUMANITIES: AN INTRODUCTION (Austin Sarat ed., 2010); Robert R. Garet, *Natural Law and Creation Stories*, in NOMOS XXX: RELIGION, MORALITY, AND THE LAW 218 (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 L.J. 1 (1989); Mark V. Tushnet, *Anti-Formalism in Recent Constitutional Theory*, 83 MICH. L. REV. 1502 (1985). For the influence on the study of Jewish law, see 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 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 MICH. L. REV. 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 which loosely attaches to Jewish thinkers from 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*

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* to issues such as Muslim headscarves in France, Resnik also highlights 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 conceptualization of the distinct narrative bridges of paideic communities is where his analysis falters. 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. In this context, narration supplies a normative medium instead of traditional instruments of law enforcement. Yet the rhetorical channel is more open-ended, and more resilient to hierarchies. Indeed, one of the striking characteristics about such stories is how 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.

(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* (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 J.L. HUMAN.* 17 (2005).

¹⁸ This is partially a function of the oral nature of these retellings, which keeps matters even more fluid. 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,

One of the more striking manifestations of the plurality of narrations that is generated by a paideic community is the diverse portrayals of the confrontation between law and 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 power reveals a more complex record than Cover recognized.²⁰ Rather than viewing them as building normative bridges to surmount the limits 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, are an essential vehicle for this process.

A dramatic illustration of the range of Jewish responses to law's clash with power is reflected in the diverse narrations of one epic trial in Jewish 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 hones in on one account of this trial, which he privileges as normative, rather than appreciating the assorted portrayals that represent the diversity within this paideic community.

This article, then, 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

MUQDASH LI-ZIKHRO SHEL PROFESOR EPHRAIM ELIMELECH URBACH [Hebrew] 289-385 (Yaakov Zussman and David Rosenthal eds.).

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 acknowledge a degree of Jewish empowerment (especially during various phases of the biblical and late Second Temple period), the distinct role of legalism as separate from power (beginning with the Bible and extending forward throughout Jewish history), and the plural Jewish ideas which emerge about power. For a further discussion of some of these themes, see my pieces *The King and I: The Separation of Powers in Early Hebraic Political Theory*, 20 YALE J.L. HUMAN. 61 (2008), *The Historical Origins of Judicial Independence and Their Modern Resonances*, 117 YALE L.J. POCKET PART 8 (2007), and my forthcoming book *Justice Unbound*.

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 trove that mediates questions of authority and justice.

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

The body of this article is divided into four parts. Part I of this article offers a methodological background for the in-depth analysis undertaken in the latter parts. This part describes a sub-genre of legal narratives which I 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 where it faces existential challenges. A prominent example of a secondary foundational story in Jewish jurisprudence is the legend of the trial of the Judean king, which is told and retold in early Jewish legal writings.

Parts II-IV, which comprises the heart of the article, offer an elaborate analysis of the various retellings of this secondary, foundational story. In contrast with numerous earlier historical studies of these versions, these parts present a novel interpretation of the rich legal dimensions of these varied accounts. 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, this part advances a revised interpretation of this account’s essential message 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 dramatic statement of legal supremacy, as the narration insists on power’s subordination to law.

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 due to their historiographic nature. However, as I demonstrate below, Josephus's accounts are deliberate and programmatic, and have much juristic value. They carefully adumbrate a world where power and violence dominate law.

As seen throughout Parts II-IV, the legend of this epic trial serves as a crucial vehicle for framing the encounter between justice and power, a dynamic that runs through much of jurisprudence. The several versions of this myth all reflect a deep grappling with this dynamic, and the way it shapes the nature of political and legal authority. Surveying them sequentially in Parts II-IV displays a striking 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.ⁱ

A historic episode in late antiquity, then, spawns three separate, and even contradictory, foundational statements in early Jewish jurisprudence about the ultimate relationship between law and power. One account concludes that law overrides power; a second declares that the powerful control the law; and, finally, a third depicts the irreconcilable conflict between law and power, and calls for an absolute division between these realms. The parts below will explore the different retellings and legacies of this seminal folktale.

I.

Many legal systems have foundational stories, often describing a heroic figure performing a monumental act. 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 tracing 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

²¹ The literature is voluminous. For several helpful works: On Hammurabi, see RAYMOND WESTBROOK, *A HISTORY OF ANCIENT NEAR EASTERN LAW* (2003); 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 *CHI.-KENT L. REV.* 13 (1995); Hans J. Boecker, *LAW AND THE ADMINISTRATION OF JUSTICE IN THE OLD TESTAMENT AND ANCIENT EAST* (Jeremy Moiser trans., 1980); *THE ASSYRIAN LAWS* (G.R. Driver & John Miles eds., 1975); *THE BABYLONIAN LAWS* (G.R. Driver & John Miles eds., 1960); On Solon, see M. GAGARIN AND D. COHEN, EDs., *THE CAMBRIDGE COMPANION TO ANCIENT GREEK LAW* (2005); *SOLON OF ATHENS: NEW HISTORICAL AND PHILOLOGICAL APPROACHES* (J. Blok and A. Lardinois eds., 2006); on the Twelve Tables and Justinian, see PETER STEIN, *ROMAN LAW IN EUROPEAN HISTORY* (1999); JILL HARRIES, *LAW AND EMPIRE IN LATE ANTIQUITY* (1999); on Henry II, see JOHN LANGBEIN, RENEE LETTOW LERNER AND BRUCE P. SMITH, *HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS* (2009); *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); MANILLO BELLOMO, *THE COMMON LEGAL PAST OF EUROPE, 1000-1800* (1995).

²² The literature is voluminous. For several helpful treatments, see: BERNARD M. LEVINSON, *LEGAL REVISION AND RELIGIOUS RENEWAL IN ANCIENT ISRAEL* (2008); JAMES KUGEL, *HOW TO READ THE BIBLE* (2007); JOHN COLLINS, *INTRODUCTION TO THE HEBREW BIBLE* (2004); Moshe Greenberg, *Some Postulates*

These storied accounts offer portraits of decisive moments with definitive and far-reaching normative consequences. Launching a new era in jurisprudence, each event that is described announces the advent of a novel legal tradition. Yet, these primary myths are often accompanied or subverted by secondary ones that are less triumphant and more fraught with danger. Nevertheless, these scenes are no less transformative. Wrestling to control legal jurisdiction, or exposing the legal order to an existential threat of a defiant alternative authority, these accounts depict how the legal order overcomes such daunting challenges. Out of the crucible of struggle, a formidable legal institution is formed which can withstand the assault of others, or a weaker one emerges that becomes reconfigured or reduced as a result.

Legal systems are also shaped by such accounts. A recalcitrant Emperor Henry IV had to yield to the Papal (legal) authority of Gregory VII during the Investiture Controversy. Chief Justice Coke refused to succumb to the entrenched demands of an absolutist King James I. Justice Marshall adroitly outmaneuvered Madison and Jefferson, and emphatically upheld the supremacy of the federal judiciary.²³ Likewise, Jewish jurisprudence during 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

of Biblical Criminal Law, in ESSENTIAL PAPERS ON ISRAEL AND ANCIENT NEAR EAST 333-52 (Frederick E. Greenspahn eds., 1991); JON LEVENSON, SINAI AND ZION (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 (trans. Moshe Greenberg 1960).

²³ The literature is voluminous. For several helpful works: On the Investiture Controversy, see HAROLD BERMAN, LAW AND REVOLUTION (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 a 2005 AJS paper with me on this trial 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.

While the historical kernels of these secondary myths are hard to reconstruct or corroborate, their importance transcends their facticity and relates to their enduring messages. These stories captivate the collective legal imagination of a paideic community for a reason or reasons, and hence they are preserved, told and retold. When it comes to primary foundational myths, their overall purpose is plain—to anchor or establish the respective legal tradition. For example, the Decemvirates authored the Twelve Tables which demonstrates the authenticity, antiquity, and rectitude of Roman jurisprudence.²⁵ What is less preset and more unstable, however, are the meanings of secondary stories. Precisely because they examine moments of disturbances and conflicts their implications are often contested. Thus, the very act of narration aims to amplify a core truth implicit in these tales, and thereby announce their essential lessons.

The narrative history of the trial of the Judean king among Jews in 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. Several retellings not only differ on a host of details, but also radically diverge on the emphatic messages which they convey. Each narration steers the story in a different direction, and boldly underscores a distinct fundamental lesson about the relationship between law and power. Below I will briefly summarize the historical backdrop to this trial, and in the subsequent parts I will successively analyze each version.

Five literary sources, which can be clustered into three sets of texts, describe the trial of the Judean king in late antiquity: two come from Josephus (which have much in

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 [Hebrew]* (2002); Zvia Kefir, *King Jannaeus and Simeon b. Shetach: An Amoraic Legend in a Historical Trappings*, in *TURA* VOL. 3, 85-97 (1994); DAVID 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* (1987); Cover, *The Folktales of Justice*, *supra* note 2; E.P. SANDERS, *JESUS AND JUDAISM* 313 (1985). For references to earlier scholarship see JOSHUA EFRON, *STUDIES ON THE HASMONEAN PERIOD* 190-96 (1987) and LOUIS FINKELSTEIN, *THE PHARISEES* VOL. 2, 684 n.6 (1938).

²⁵ See BARRY NICHOLAS, *AN INTRODUCTION TO ROMAN LAW* (1962); DAVID JOHNSTON, *ROMAN LAW IN CONTEXT* (1999).

common) and three from rabbinic literature (one being very elliptic).²⁶ Given that Josephus was much more proximate to the original event, both chronologically and geographically, and was far more interested in history, it is likely that his accounts are more historically accurate than the other ones.²⁷ Nevertheless, here as elsewhere, Josephus's accounts have a narrative quality that 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 embrace a more conservative methodology. A high degree of credibility can be assigned to the "facts" which are common to all of these respective accounts, 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 tale 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 (either as

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., 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 and Tal Ilan, *Josephus and the Pharisaic Narrative* (paper presented at the 2005 Society of Biblical Literature conference). To the best of my understanding, Vered Noam is continuing to explore this theme. One should also note the skeptical position of JAMES VANDERKAM, *FROM JOSHUA TO CAIAPHAS: HIGH PRIESTS AFTER THE EXILE*.

²⁹ See Part IV below.

³⁰ For more on the challenges of early historiography, and the need for employing this careful methodology, see RUBENSTEIN, *TALMUDIC STORIES*, *supra* note 16; 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* (Charlotte Elisheva Fonrobert, Martin S. Jaffee eds., 2007); and Friedman, *A Good Story Deserves Retelling*, *supra* note 16.

the defendant or judge).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 and tries to convince the other sages to join him. However, they do not share his temerity and cower before the intimidating tactics of the powerful defendant. Locked in this dramatic stalemate, the episode concludes in a tragic manner. The cowardly sages (all except for Sameas/Simeon) lose their lives, evidently a consequence of their own failure to assert their legal authority against 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 life 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 which fragmented 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 in Hasmonean rule, when the monarchy assumes the trappings of Classical or Hellenistic kingship. This shift could easily have elicited a traditionalist response, where sages remind the king of his limits and the need for his obeisance to traditional law.

³¹ For more on the 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).

³² For more on Jewish sectarianism in late 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).

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

If this account happened at the end of the Hasmonean period, during the reign of Hyrcanus II and at the dawn of Herod's ascent, the tension at the trial is 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). Likewise, the sages challenge his right to the crown due to his questionable Idumean (i.e., non-Jewish) lineage. In addition, Herod's ruthless tactics and pagan manner further aggravate his relationship with the leading sages.³⁴

In all, then, throughout the Hasmonean period Jewish governance was in flux, and the parameters of Jewish leadership were being negotiated.³⁵ The rise of the Hasmonean family 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 durability and control of legal authority was also likely being contested. Moreover, to the extent that this happened at a later phase, the Jewish dynasty was already very weak and operated at the mercy of the Romans (Pompey already raids Judea in 63BCE). In such a precarious political atmosphere the need to assert internal authority is even more pressing. Finally, the larger seismic shifts in the classical world—the changeover from Hellenistic to Roman supremacy, and then the dramatic transformation inside the Roman world with the collapse of the Republic and the rise of the Principate—may have emboldened the challengers of the Judean king, and made the need for the king to assert his own authority even more of a necessity.³⁶

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 AND CYNTHIA DAMON, *CAESAR'S CIVIL WAR* (2006). For larger changes in the Roman world and their influence on the Judean world, see GOODMAN, *ROME AND JERUSALEM: THE CLASH OF THE ANCIENT CIVILIZATIONS* (2007).

The kernel of the story of the trial, therefore, is not only corroborated by multiple attestations, but also has the ring of veracity. Beyond these core “facts,” however, it is hard to know what, if 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 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 far less interested in history in general, recount this episode multiple times as well. While the legacy of the trial revolves around the relationship between law and power, what that is depends entirely on the way it is retold. In the subsequent parts I will examine each one of these retellings.

II.

The last of the narrations of the trial of the Judean king, the account recorded in the Babylonian Talmud, perhaps offers the best starting point for an analysis of this literary myth since the moral of this tale is here clearly articulated. 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. In particular, the Mishnah lays out a seemingly straightforward principle: "The king may neither judge nor be judged"³⁹ Yet, this statement 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 and impact.⁴⁰ Citing the teaching of Rabbi Pappa,⁴¹ the Talmud elaborates:⁴²

³⁷ See Isaiah Gafni, *Rabbinic Historiography and Representations of the Past*, in THE CAMBRIDGE COMPANION TO THE TALMUD AND RABBINIC LITERATURE (Charlotte Elisheva Fonrobert & Martin S. Jaffee eds., 2007).

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 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); Suzanne Stone, *The Pursuit of the Countertext: The Turn to the Jewish Legal Model in Contemporary American Legal Theory*, 106 HARV. L. REV. 813, 816 n.13 (1993).

³⁹ Mishnah Sanhedrin 2:2.

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

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 the exception rather than the rule. For the primary principle maintains that kings participate in, and are subject to the jurisdiction of, the judiciary. The Mishnah merely presents a secondary rule that treats non-Davidic kings differently. Here the Babylonian Talmud invokes a distinction that originated in the post-Solomonic monarchic schism in biblical Israel between the Northern kingdom (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, the anonymous Talmud traces the administrative

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 David C. Flatto, *The King and I: The Separation of Powers in Early Hebraic Political Theory*, 20 YALE J.L. HUMAN. 61 (2008). Yet, even the Babylonian Talmud’s position is ultimately more complex, as reflected in its narration of this trial. See below.

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* (2011).

⁴² Babylonian Talmud Sanhedrin 19a.

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* (1987).

⁴⁶ See Midrash Tannaim Devarim 17:14 which introduces 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.

scheme of non-Davidic kings recorded in the Mishnah to the disturbing legacy of the trial of (the non-Davidic) King Jannaeus.

The Talmud, therefore, invokes the story of the trial to provide an etiology for the Mishnah's perplexing secondary rule. On a deeper level, as I argue below, the Talmud's rich, if telescopic, account of the trial conveys a more subtle and seminal message about the relationship between (sacral) law and power. The account 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 with a slave of King Jannaeus who killed a man. Simeon b. Shetah said to the [court of] sages: Be bold and let us judge him.

In response, the king reluctantly answers the summons, but also defies the jurisdiction of the sages in various ways:

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, 'If warning has been given to its owners,'⁴⁸ [teaching], that the owner of the ox must come and stand by his ox. He appeared but sat down before the court. Then Simeon b. Shetah said, Stand on your feet, King

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, and Babylonian Talmud Baba Qamma 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.

Jannaeus, so witnesses may testify against thee. For you do not stand before us but before He who spoke and the world was created.

At first the king only sends the direct culprit before the sages, and when afterwards the king arrives in person, he disrespects the sages' judicial authority. Countering Jannaeus' effrontery, Simeon demands that he submit to the jurisdiction of the sages who represent divine justice.

Having met his match in the courageous Simeon, 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 word but upon the words of the court as a whole. 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 now 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 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 divine source of justice, Gabriel metes out the harshest of punishments against the futile judges. In the aftermath of this bloody climax, a ruling was then announced. Returning to the etiology of the secondary norm of the Mishnah, the Babylonian Talmud concludes its account of the trial by reproducing its rule of jurisdiction:⁴⁹

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.

B5. Then it was stated: The king may not judge nor be judged, testify nor be testified against.

According to the Babylonian Talmud, the Mishnah's rule, then, originates as a response to an ugly encounter between Jannaeus, a Hasmonean king, and the sages led by Simeon b. Shetah.⁵⁰ To avoid future confrontations it was decided that insolent kings, such as Jannaeus, and evidently by extension all other non-Davidic kings (but see note 53 below), may not be judged, and, therefore, should be distanced from the judiciary altogether.⁵¹ Nevertheless, Davidic kings, whose presumed pious orientation and harmonious nature do not pose such a threat, continue to follow the original design wherein a king can judge and be judged.

Michael Walzer further unpacks this Babylonian Talmudic passage by distinguishing between its two different schemes:⁵² (1) *An ideal model for Davidic kings*: here 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

(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 below.

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

⁵¹ An additional Talmudic gloss (see Babylonian Sanhedrin 18b and 19a) 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!" While Resh Laqish's teaching was likely originally intended in a more general sense (see, e.g., Midrash Eichah Rab. Parsha 3, 50, which may be its original context, even though it is attributed there to R. Oshaya), the anonymous Talmudic editors apply it here as a juridical principle. 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, 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 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 Loberbaum, and Noam J. Zohar eds., 2000).

participate in the judiciary.⁵³ (2) *An alternative model for non-Davidic kings* (i.e., the secondary rule of the Mishnah): the ideal model only functions 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 due to 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 that paints the jurisprudence of Davidic kings in an optimal light. Similarly, the inferiority of the alternative rule seems to emerge from the Talmud's association of the alternative model with the infamous King Jannaeus (who is strongly censured in the Babylonian tradition).⁵⁴ Yet, the extension of the alternative scheme to all non-Davidic kings (or perhaps even all kings) raises the possibility that this template is not meant to be understood so negatively, but rather as reflecting a certain theory of governance. Moreover, the fact that the Mishnah only presents the alternative model—and the ideal model is only inferred and reconstructed—suggests the significance of the alternative model, and minimally lends it a more basic and less exceptional quality.

A fuller expression of the Babylonian Talmud's ideology emerges from a careful parsing of the Babylonian Talmud's rendition of the Jannaeus trial. While in the most immediate sense, the tale of the trial explains the origins of the alternative model of the Mishnah, in a deeper sense it offers a more penetrating comment about these two different templates or juridical perspectives. A critical examination of several insights of Cover and Walzer concerning the trial helps illuminate these two perspectives.

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 (1987).

On one level, the Babylonian Talmud's presentation of the Jannaeus trial reinforces the ideal model. Even as the Talmud relays the Jannaeus episode that generated the implementation of the alternative model, it reminds us that the alternative model is a reluctant solution.⁵⁵ In his "Folktales of Justice," Cover underscores this point by demonstrating the essential role the narrative plays in the above Talmudic passage.⁵⁶ While the Mishnah records perhaps the only pragmatically viable setup (the alternative model), the Babylonian Talmud makes clear that Simeon b. Shetah 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 inspires us to transcend power, and specifically here, emboldens judges to "speak truth to power" and not elect for "prudential deference . . . , the great temptation, and the final sin of judging."⁵⁸ In a fuller sense, then, the Babylonian Talmud conveys the aspirational value of the ideal model wherein the king judges and is judged.⁵⁹ The

⁵⁵ 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 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.

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

⁵⁷ Cover, *The Folktales of Justice*, supra note 2, 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 primarily focus on whether the king can be judged, but do not sufficiently grapple with the steps leading up to the coda (B5), nor the issue of whether the king can join the judiciary, and the interrelationship between this issue and the question of sovereign immunity.

⁵⁹ Cover concludes that for the Babylonian Talmud ideally "there must be a jurisdiction of the judges which the King cannot share," 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 justice, but he also jointly participates in the administration of justice). Cover, *The Folktales of Justice*, supra note 2, at 190.

administrative vision of the Babylonian Talmud is one which integrates the powers of the various branches of leadership.⁶⁰

As much as Cover amplifies Simeon's role in the Jannaeus trial, he mutes the crucial normative reasoning of the Babylonian Talmud's narration. Recall that the Babylonian Talmud adduces the Jannaeus trial as an etiological tale that justifies a difficult normative position of the Mishnah. While Cover contrasts the tale with its normative punch line (labeling it a pragmatic concession), a more integrated reading must interpret the entire account as leading up to its legal apogee.⁶¹ For 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.

Returning to Walzer's characterization of the alternative model helps focus on this climactic dimension of the Jannaeus trial (even though Walzer, like Cover, privileges the ideal model). For Walzer, the alternative model of the Babylonian Talmud arises as a consequence of failing to incorporate kingship within a constitutional structure.⁶² Elaborating on the implications of the alternative 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 where

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, e.g., 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., 1979); 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 the normative framework, or providing alternative ideas? There is also a narrower point that applies in this specific context: The entire narrative is about the juridical system, and in this context especially it is likely that the normative punch line (which announces a legal innovation) is the ultimate legacy. This would suggest, then, that a durable legal solution is being upheld, and not just a pragmatic solution that is being eclipsed by the narration.

⁶² This response is a surprising concession of the anonymous Talmud to realpolitik, and one senses that this is certainly not a response that would have satisfied certain idealistic sages such as Simeon b. Shetah. I would formulate matters somewhat differently. See more below. See also Maurice Finkelstein, *Judicial Self-Limitation*, 37 *HARV. L. REV.* 338-64 (1924), on the withdrawal described in the Talmudic account.

religious actors reclaim political power only in the absence of a strong, defiant political figure. By exploring the conceptual significance of the alternative model, Walzer avoids the facile interpretation of the rabbinic ruling after the trial as reflecting an immediate response to an egregious occurrence, or as signaling a broader pragmatic concession. Instead, he articulates an alternative model that becomes embodied in a legal rule.⁶³

Even Walzer, however, understates the message of the Babylonian Talmud's rendition of the trial by describing the alternative model as arising from a contingency. In fact, the norm separating the king from the judiciary is not the outcome of a constitutional breakdown. Rather, it 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 account of the trial, the Mishnah rightfully codifies the 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 account, which ultimately countermands the trope of law triumphing over power that Cover describes.⁶⁵ While Cover is correct that the Babylonian Talmud underscores the heroism of Simeon, and the validity of his divine mandate⁶⁶—and in this sense perhaps aspires to overcome the inferior rule of the Mishnah—the final phase of the Talmudic account (B5)—which introduces the Mishnah's alternative tradition—crucially overrides this message. Rather than vindicating the position of Simeon, and heeding his emphatic demand to submit to the divine call of justice, the source, quite shockingly, champions

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 has to be limited to non-Davidic kings.

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 clumsily is relating the Mishnah to an incident which it knows.

⁶⁶ Notice the shift of the litigants from the king to the other sages. See fn. 58 above. Perhaps the sin of the judges is worse, because they especially should abide by their mandate, while the king is just being a king.

the position of the king.⁶⁷ Despite God's proximate presence in the court of sages (B2, B4)—which is especially manifest in the divine punishment of the other sages (B4)—the Babylonian Talmud concludes that power and sacral law are irreconcilable and must be kept apart. In other words, while one would have expected the Talmud to advocate on behalf of the voice of the spiritual mandate at all costs,⁶⁸ here in a sense the king is vindicated or at least reluctantly accepted, and even the sages who are punished for failing the mandate are protected from being subjected to future tests.

The fact that this alternative model becomes normative—that it is adopted as the default position of the Mishnah, and is extended to all non-Davidic kings—withstanding 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 withstand the resistance of a powerful ruler, but his stance can hardly be adopted as a widespread norm. Alternatively, even Simeon requires the support of divine intervention, and such a heavenly act is too intrusive, possibly too dangerous, for the ordinary function of the normative system. Essentially, the account acknowledges that standard judicial procedures are inadequate to control such 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 limits of the violence of the law—so underscored by Cover in another context⁶⁹—are fully on display. In order to contain the violent ruler (who is guilty of bloodshed), the legal institution

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 distancing 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 legitimate legal authority.

⁶⁸ Usually when the Talmud retreats from this position it is in order to make room for another spiritual demand, like the input of human reason. See, e.g., Babylonian Talmud Bava Metzia 59a.

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

must commit an even greater 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 Finally, humbling powerful rulers⁷¹ 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 ultimate legacy of the trial of the Judean king for the Babylonian Talmud.

The overall lesson of the trial for the Talmud, then, is about the limits of law, and its irreconcilability with power.⁷² Although, as Simeon demonstrates, on an axiological level sacral law transcends power, the law's jurisdiction must recede before power in order to properly function and preserve its integrity. Stated this way, one can add a final explanation to the various reasons charted above. Evidently, according to the Talmud the only way the sacral legal system can succeed and fulfill its mandate is if it addresses those who recognize the law as a manifestation of divine justice. A powerful king who resists this creed undermines the essence of the law. The trial, according to the Talmud,

⁷⁰ This may be especially true in rabbinic jurisprudence where the 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 This may include the fallout that occurs 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 that 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 between 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. 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 assert their power in the legal arena. But see note 51 *supra*.

captures the dangers of the confrontation between power and sacral justice and emphasizes the necessity of keeping them apart.

III.

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) which frame the narrative. As argued above, these clauses,⁷³ which invoke the trial episode as the background for the mishnaic ruling that a king may not judge nor be judged, transform the entire message of the trial 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 challenge its authority, the brave Simeon demands his submission before the legal experts.⁷⁵ In justifying his bold stance, Simeon proclaims that the sanction of the rabbinic court emanates from on high: "For you do not stand before us but before He who spoke and the world was created."⁷⁶ This message is then dramatically confirmed when members of the court who cower before Jannaeus are immediately judged by the Heavenly tribunal. Notice how the story shifts its focus to the judges who now assume the position of the guilty party, instead of the king. Evidently, even worse than murder, the

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

⁷⁴ The above suggestion is somewhat similar to the ideal scheme in the redacted Babylonian Talmud—although that ideal scheme requires a reciprocal relationship between the king and the court, and also recognizes the consequences of a breakdown in its scheme, while the above suggestion focuses on the court's broad jurisdiction, as divine jurisdiction, reaching all litigants, even the king—but now it is being substantiated by the legacy of the Jannaeus Trial.

How to square this reading with the Mishnah's (Mishnah Sanhedrin 2:2) rule 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, perhaps this kernel was originally understood to apply to non-Davidic kings, while Davidic kings were understood to be covered by the Mishnah (as I have argued elsewhere, Davidic kings are plainly within the orbit of the Mishnah. See the articles cited in note 40 *supra*). See note 88 *infra*. See also KAHANA, SIFRE ZUTA DEUTERONOMY, *supra* note 24.

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, e.g., Babylonian Sanhedrin 7a, and has been discussed by Barry Wimpfheimer in an unpublished AJS paper. See also Haim Shapira, *For the Judgment is God's—On the Divinity of Judging*, BAR-ILAN LAW REVIEW 26 (2010).

graver offense in this rendition is when a judge abdicates from his judicial responsibility. Stripped of its editorial case, the story now conforms precisely to Cover's thesis, as it champions Simeon's position that sacral law should prevail over all litigants.

It is quite plausible that the kernel that emerges from this form criticism resembles an earlier iteration of the Babylonian Talmud's version of the trial legend.⁷⁷ Likewise, source criticism helps peel away different accretions to 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 champion the notion that the (rabbinic) court should judge the king, as described below. Moreover, the Tanhuma's rendition lacks the interpolations of the discrete rabbinic teachings referred to above, and in this respect too may resemble the more preliminary 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 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 of the trial of the Judean king clearly represent a distinct legacy relative to the redacted Babylonian Talmud, and underscore the sweeping jurisdiction of the rabbinic court.

⁷⁷ For more on this kind of form criticism, see JEFFREY L. RUBENSTEIN, *TALMUDIC STORIES: NARRATIVE ART, COMPOSITION AND CULTURE* (1999); and JEFFREY L. RUBENSTEIN, *STORIES OF THE BABYLONIAN TALMUD* (2010).

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 they are inserted at a later phase in the Babylonian Talmud's development.

⁸⁰ See fns. 84 and 85 below.

The earliest of these accounts is a brief passage in the Sifre Zuta. Registering a rabbinic comment on Deut 19:17, this early tannaitic Midrash 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 lay man. 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 court, echoing the rabbinic theme encountered above that the tribunal serves as a proxy for divine justice. Further, the Sifre Zuta adds, the court's reach 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 then rules, in contrast to the Mishnah (Mishnah Sanhedrin 2:2), that kings are judged.

A more elaborate version of this motif is found in the Tanhuma.⁸³ Although this is a late midrash, and this particular passage contains certain signs of a late redaction,⁸⁴ its substantive similarity to the Sifre Zuta and the kernel of the Babylonian Talmud, and its lack of the interpolations referred to above, suggests that all three rabbinic sources reflect a distinct recension of the legend of the trial whose core is quite early.⁸⁵

⁸¹ See KAHANA, SIFRE ZUTA DEUTERONOMY, *supra* note 24, on Deuteronomy 19:17. The Sifre Zuta must be examined with critical care since it is a reconstructed midrash, relying for reconstruction in part on 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 on the Tanhuma, see Marc Hirshman, *Aggadic Midrash*, in THE LITERATURE OF THE SAGES, SECOND PART, 107-32 (Shmuel Safrai, Zeev Safrai, Joshua Schwartz, Peter T. Tomson eds., 2007).

⁸⁴ The Tanhuma sometimes reworks the traditions from the Babylonian Talmud, and this is at times reflected in certain later redactional features, such as repetitions. For instance, in this passage there is the clumsy doubling of Simeon's demand 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 [Hebrew] (1st ed.

Nevertheless, certain minor differences differentiate these three accounts as well. For example, whereas Sifre Zuta does not hint to the debatable nature of its teaching, and assumes that the king is subject to the court's jurisdiction, the Tanhuma initially openly probes whether the king can be summoned, even as it emphatically reaches the same conclusion that he is subject to the court's authority.⁸⁶ Moreover, the Tanhuma's account is the most elaborate of the versions, especially in one prominent sense. It extends the narrative of the trial by adding a crucial and resounding denouement that strongly reinforces the same legacy of an expansive 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. Likewise, the underlying 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 transmission,⁸⁹ its literary effect is to focus the account on Simeon, and the vindication of his position. Moreover, the reference to an

2003); SOLOMON BUBER, MIDRASH TANHUMA [Hebrew] (1964); Abraham Epstein, *Kidmot Hatanhuma*, [Hebrew], 5 BEIT TALMUD 7, 7-23, 53-55 (1886). I thank Dov Weiss for these references.

⁸⁶ The version of the trial in Midrash Tanhuma is actually 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; relocates Simeon's stern warning about the divine 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 reflects the uncertain identity of the king in the underlying historical trial, which may be further corroborated by the variance in the other sources that mention Jannaeus (Babylonian Talmud), and Hyrcanus and Herod (Josephus).

⁸⁸ Perhaps this can be helpful for harmonizing the Tanhuma's teaching with the Mishnah ruling (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 notes 92 and 93 *infra*). 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 note 74 *supra*.

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 (2003). In this case perhaps the details are forgotten or deliberately glossed over.

unnamed king helps extend the implications of this story to all kings (perhaps even Davidic ones).

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, 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 the one who spoke and the world was created (=God). Immediately he (the king) arose to his feet and gave a legal account...⁹¹

Presenting a relatively similar account to the Babylonian Talmud in a subtly different order, the Tanhuma states that after the king is summoned into court Simeon insists that he stand up, without providing a justification. Although the Hasmonean king

⁹⁰ Midrash Tanhuma Shoftim, Siman 6.

⁹¹ The Tanhuma passage continues as follows:

From here we learn that litigants must act with reverence for it as if they are judging God, 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 rather as a litigant. Parenthetically, according to this passage, then, God judges and is judged. On these themes, and other parallels in rabbinic literature, see Shapira, *For the Judgment is God's*, *supra* note 76.

parries with an assertion of a privilege of sovereign immunity,⁹² which the majority of judges meekly respect (or are scared to defy), he is forcefully taught otherwise. An intervening angel punishes the other judges—a manifest display of divine justice—and then Simeon reiterates his demand, and now, for the first time, loudly proclaims that the court is a proxy for divine judgment. By only inserting this rationale at this later point in the narrative, the Tanhuma especially highlights the latter stages of the trial. In a crucial coda (beginning at (b) in the passage above) that is absent from the Babylonian Talmud (and inconsistent with (B5), the end 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 in contrast with the Babylonian Talmud. This entire sequence of the Tanhuma underscores that nobody is above the law or exempt from its precincts, including powerful kings.

The legacy of the trial of the Judean king in this second set of rabbinic texts offers a very different perspective on the encounter between (sacral) law and power. Whereas

⁹² This challenge is stated explicitly in this passage, while it is only communicated indirectly in the Babylonian Talmud's kernel. In the latter, the king may recognize that he is formally subject to the court's jurisdiction, even as he resists, defies and flaunts its authority.

According to the Tanhuma, it is unclear whether the Hasmonean king's presumption of sovereign immunity according to the midrash is based on the 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 after the king is summoned as a litigant, which is where a royal judge presumably would sit alongside the leading sage, accentuates the ambivalence about this issue in this source.

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. Finally, even the king seems to accept this to a degree, as he appears in court.

⁹³ Unlike the Babylonian Talmud passage, the Tanhuma maintains its focus throughout the narrative on judging the king. This highlights the fact that for the Tanhuma the legacy 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 of the Tanhuma, and here the doubling over which seems clumsy may be indicative of a later accretion, the continuous focus on the judging the king in this account is actually smoother than the Talmud's account. In the Tanhuma, only the king is judged by Simeon, and the other judges are dealt with directly by divine justice.

Note that the Tanhuma's account, where Simeon actually judges the king, goes even further than the Talmud's account—even according to Cover's description of Simeon's aspiration of courage in the Talmud, for the latter is held at bay by pragmatism.

the tale as presented in the redacted Babylonian Talmud analyzed in Part II aims to separate between these realms, the Talmudic kernel alongside two other rabbinic passages relays a narrative that proclaims the supremacy of law to power. In the Sifre Zuta, jurisdiction over the king is simply asserted, and the historical episode is adduced as supporting evidence. In the Talmudic kernel, judicial authority over the king is announced, as the king is summoned into the divinely ordained courthouse led by Simeon, and the judges, who refuse to try the king, are harshly punished. In the Tanhuma's version, judicial authority over the king is dramatically proclaimed, and then fully executed. This second set of rabbinic renditions of the trial, in its various forms, projects the sovereignty of (sacral) law, and its capacity to contain power.⁹⁴ This set also serves as a foil to the redacted Babylonian Talmud and thereby sheds light on its distinct teaching, for the Talmud retreats from the above position, evidently concluding that notwithstanding the general supremacy of (sacral) law, restricting its jurisdiction in the face of power is the best way to preserve its inviolable nature.

⁹⁴ The Tanhuma thus contrasts with the redacted Babylonian Talmud where jurisdiction of the king is only envisioned in a compliant, idyllic scheme, or is hinted at in the voice of Simeon that 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 Mishnah's rule (Mishnah Sanhedrin 2:2) that the king is not judged. Especially the plain sense of the Mishnaic juridical scheme, which starkly segregates the king from the court, diverges from all of these other rabbinic sources.

IV.

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

Whereas rabbinic literature refers to the trial in order to justify or expound 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 account makes a forceful statement about the relationship between law and power. Indeed, the entire trial in a sense revolves around this very point.⁹⁶

⁹⁵ The period referred to is the first century B.C.E. A more precise date for the trial is 47 B.C.E., when Herod was about twenty-five years old (even though Josephus says he was fifteen in *Ant.* 14.158, this seems inaccurate in light of *Ant.* 17.148). See ARYEH KASHER, KING HEROD: A PERSECUTED PERSECUTOR 39-40 (2007).

⁹⁶ It should be emphasized at the outset that Josephus's descriptive writings on the trial of Herod differ from the theocratic-juristic vision which Josephus endorses in his various programmatic writings, especially in *Antiquities* 4 and *Apion* 2. In the former work, Josephus restates sections of *Deuteronomy* 17 in a manner that reveals his administrative vision: 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 only mentions "the levitical priests and the judge." At the same time, Josephus expresses opposition to, or in the least a general ambivalence about, the very institution of the monarchy that goes well beyond any equivocation that may be detected in *Deuteronomy* 17. 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 never states that the king participates in the judiciary. In *Apion*, Josephus's final work—a rich apology for, and theoretical account of, Judaism—he frames a general defense of the *Torah* as an analysis of its unique 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 along with the priestly class is responsible for

Josephus describes the events leading up to the trial of Herod both in *War* and *Antiquities* (the actual trial is only portrayed in *Antiquities*),⁹⁷ and scholars have analyzed the numerous parallels and distinctions between these two versions (including the absence of an actual trial in the *War*), as well as the various internal inconsistencies within the (longer) *Antiquities* account.⁹⁸ Overall, the similarities in these accounts outweigh their differences, and they converge to convey a common motif regarding law as an expression of power politics. Still, focusing on several discrepancies between these accounts, as well as problems that arise within each, offers an important point of entry into a fuller analysis of Josephus's treatment of this episode.⁹⁹

overseeing the judiciary and God's sacral law; not the king. For more on these sections in Josephus, see my articles, *The King and I: The Separation of Powers in Early Hebraic Political Theory*, 20 YALE J.L. HUMAN. 61 (2008); and *Theocracy and the Rule of Law: A Novel Josephan Doctrine and its Modern Misconceptions*, 28 DINE ISRAEL 5 (2011).

The different tones of these sections relative to Josephus's representations of the trial of Herod is not surprising, however, since the accounts of the trial of Herod function within a monarchic framework, which differs substantially from the anti-monarchic undercurrent of his programmatic writings. Moreover, I would add that the lasting legacy of the trial (which Josephus must have also internalized to a certain extent, notwithstanding my remarks below about his own confusion)—which underscores the dominant role of royal power in legal authority, when the king is in power—may be one of the indirect influences on the alternate theocratic-juristic vision espoused in his programmatic writings. That is, precisely because royalty tends to dominate legal affairs, Josephus envisions an ideal system of law which 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 presently argue, in his retelling Josephus focuses on political and structural issues, and is not merely offering a descriptive chronicle of these events. With that background, I will turn to Josephus's renditions of the trial, considering its function and message in his historical writings. See also note 149 *infra*.

⁹⁷ See FLAVIUS JOSEPHUS, *THE JEWISH WAR* 1.201-215 (H. St.J. Thackeray trans., 1926); FLAVIUS JOSEPHUS, *JEWISH ANTIQUITIES* 14.158-84 (Ralph Marcus trans., 1933).

⁹⁸ For several scholarly treatments, see ARYEH KASHER, *KING HEROD: A PERSECUTED PERSECUTOR* (2007); TAMAR LANDAU, *OUT-HERODING HEROD: JOSEPHUS, RHETORIC, AND THE HEROD NARRATIVES* (2006); PETER RICHARDSON, *HEROD: KING OF THE JEWS AND FRIEND OF THE ROMANS* (1996); GOODBLATT, *THE MONARCHIC PRINCIPLE*, *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); SHAYE J. D. COHEN, *JOSEPHUS IN GALILEE AND ROME: HIS VITA AND DEVELOPMENT AS AN HISTORIAN* (1979); RICHARD LAQUER, *DER JÜDISCHE HISTORIKER FLAVIUS JOSEPHUS* [German] (1970); and EFRON, *STUDIES ON THE HASMONEAN PERIOD*, *supra* note 24, at 190-97, and the numerous secondary references cited by Efron in notes 209 and 210. See also RICHARD KALMIN, *JEWISH BABYLONIA BETWEEN PERSIA AND ROMAN PALESTINE* (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 event for Josephus.

On a very basic level, Josephus's 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* 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 only an initial stage of the trial transpired, which raises a descriptive question of whether this should even qualify as a trial or is best characterized as a dismissal before a trial.

Beyond this apparent tension, a review of Josephus's treatment of this trial reveals multiple explanations for how 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

¹⁰⁰ Regarding the claim that Josephus here relied on two distinct sources (specifically, that *Antiquities* 14.171-176 is assumed to come from a distinct pro-Pharisaic source, in contrast with the rest which likely comes from Nicholas), see, e.g., FLAVIUS JOSEPHUS, *JEWISH ANTIQUITIES VOL X*, 94-5 n.a (H. St.J. Thackeray and Ralph Marcus eds., 1998); see also SETH SCHWARTZ, *JOSEPHUS AND JUDEAN POLITICS* 174 n.16 (1990).

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 14.171-176. 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." 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

of these explanations can overlap, others are independent from one another or even mutually exclusive.¹⁰⁷ In the aggregate, they inconsistently suggest that Herod was acquitted, his trial adjourned, or he escaped.¹⁰⁸ Minimally, Josephus is guilty of “overkill” by supplying (much) more than one explanation for a specific issue or problem.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 after 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 follow. In a somewhat dizzying sequence in the trial narrative, Josephus not only paints Hyrcanus 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

that Hyrcanus saw that the members of the Synhedrion were bent on putting Herod to death likely derive from a different source (see fn. 100 above) 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 See JOSEPHUS, *JEWISH WAR*, *supra* note 97, at 99 n.A, which contrasts JOSEPHUS, *JEWISH WAR*, *supra* note 97, at 1.211 (which states that Herod was acquitted) with *JEWISH ANTIQUITIES*, *supra* note 97, at 14.177 (which states that the trial was adjourned).

¹⁰⁹ The biblical scholar James Kugel uses the term “overkill” to describe a common phenomenon in the literature of late antiquity, where a single text contains two or more exegetical motifs that explain or interpret 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 1.212-215 (which states 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); JOSEPHUS, *JEWISH ANTIQUITIES*, *supra* note 97, at 14.180-184 (which states that “Herod did come against him with an army,” but adds 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 the killing 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

the opposite.¹¹³ Turning to Herod, Josephus's portrait is also perplexing. While Josephus's initial account of Herod offers a glimpse of a shrewd and calculating political actor, Herod's persistent anger about the trial (or the threat of the trial) seems rash and impetuous.¹¹⁴ The added explanation offered by Josephus actually compounds the problem, for he states that Herod was planning to respond with force if he was summoned a second time, but then suggests that Herod was intent on marching against Hyrcanus in any event.¹¹⁵ Indeed, Antipater and Phasaël do not seem to understand Herod's obstinacy, and point out his good fortune in escaping (and even emphasize that he should have gratitude to Hyrcanus).¹¹⁶ To summarize, there is much confusion in Josephus's accounts about whether Herod ever stood on 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 which settled in his favor, perhaps with the assistance of Hyrcanus.

While some of these inconsistencies can be attributed to Josephus's two renditions, 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 "facts" which Josephus records, one can

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 1.210-212; JOSEPHUS, *JEWISH ANTIQUITIES*, *supra* note 97, at 14.168, 170.

¹¹⁴ JOSEPHUS, *JEWISH WAR*, *supra* note 97, at 1.214-215; JOSEPHUS, *JEWISH ANTIQUITIES*, *supra* note 97, at 14.180-184.

¹¹⁵ JOSEPHUS, *JEWISH WAR*, *supra* note 97, at 1.212-215; JOSEPHUS, *JEWISH ANTIQUITIES*, *supra* note 97, at 14.178-184.

According to *Antiquities*, Herod only withdraws from his aggressive plan 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 1.214-215; 14.181-184.

¹¹⁷ Thus, conjecturing that JOSEPHUS, *JEWISH ANTIQUITIES*, *supra* note 97, at 14.171-176 derives from a different source (see fn. 100 above) helps for some inconsistencies, but certainly does not resolve all of them.

reconstruct a fairly coherent narrative of this momentous trial. Carefully calibrated by its protagonists (at least as they are constructed in this narration), the various stages of the trial are coordinated around its heightened stakes—which are abundantly clear to the protagonists (even if they are less plain to Antipater, Phasaël and others). As Hyrcanus and Herod realize throughout, 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 kingship, who controls the monarchy and the deep nexus between royal and legal authority. Below I will first contextualize Josephus’s trial narrative, in order to better understand its role, and then focus on its essence.

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 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 mid first century BCE.¹¹⁸ In the years preceding the trial, Aristobulus, and then his son Antigonus, are Hasmonean competitors for the throne with Hyrcanus.¹¹⁹ In order to resolve this controversy, Hyrcanus turns to Caesar, a further reflection of the fragile state of Jewish affairs.¹²⁰ Although Hyrcanus manages to retain the monarchy, Antipater continues to vie for royal power, along with his two sons—Phasaël, a governor in Judea, and especially the younger son Herod, a governor in the Galilee.¹²¹

Animated by an insatiable ambition for power, Herod is also no doubt emboldened by these past events, and likely by the historic political changes in the

¹¹⁸ For more historical background, see fns. 31 and 98 above.

¹¹⁹ JOSEPHUS, *JEWISH WAR*, *supra* note 97, at 1.187-201; JOSEPHUS, *JEWISH ANTIQUITIES*, *supra* note 97, at 14.140-155.

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 1.201-203; JOSEPHUS, *JEWISH ANTIQUITIES*, *supra* note 97, at 14.156-162. The following paragraph is my reconstruction of Herod’s behavior and likely motivations, based on the narrative.

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 After the killing, Herod is summoned to trial before King Hyrcanus and the Sanhedrin (the latter is only mentioned in *Antiquities*).¹²⁴ As stated above, Herod is never convicted.

While the basic narrative summary is fairly straightforward, the essence of the trial can be discerned by focusing more carefully on the underlying offense, Herod's alleged crime. Having murdered 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 *Synhedrion* 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 *Synhedrion* 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 To reformulate this, what makes Herod's act a murder is that it is illicit, but had it been decreed or authorized by the king

¹²² This was the time 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 on these events in Rome, see *THE CAMBRIDGE ANCIENT HISTORY VOLUME 9: 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 1.204-205; JOSEPHUS, *JEWISH ANTIQUITIES*, *supra* note 97, at 14.158-160.

¹²⁴ The Sanhedrin (or Synhedrion) which 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, *THE MONARCHIC PRINCIPLE*, *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.

and/or the *Synhedrion* then it would be considered a lawful punishment of, or authorized strike on, dangerous bandits.¹²⁷

It should be noted that the concepts of criminality and lawfulness that inhere in this indictment are profoundly Weberian in nature. Essentially, 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, highlighting that an essential function of political officials is that they (licitly) perpetrate violence—or as Weber taught us, the sovereign monopolizes violence. More specifically, the act of executing capital punishment to a dangerous criminal is often lauded in antiquity as the epitome of justice, and the act of subduing an at-large terrorist is held up as an exemplary exercise of political authority. The above highlights that an essential function of judicial and political officials is that they (licitly) perpetrate violence (there also echoes of Cover here).

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 he manages this power both as the supreme legal authority (alongside the Sanhedrin), and as the lead political authority. Commanding such authority, Hyrcanus reifies his exclusive standing by defining Herod's act as criminal. Law serves as Hyrcanus's instrument to subordinate Herod.

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.¹²⁸ The

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 can be legitimated either as an authorized attack or a punishment. Interestingly, these synoptic excerpts reflect an ambiguity about whose permission is necessary, the king and/or the Synhedrion, and it is likely that they both have a role in the manner just described.

¹²⁸ 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 therefore both a sign of royalty and constitutive of royalty.

advisors who exert pressure on Hyrcanus to try Herod (according to *Antiquities*) sense the broader royal aspirations of Herod (and Antipater), and recognize Herod's killing of Ezekias and the bandits as manifesting this ambition:¹²⁹

But the chief Jews¹³⁰ 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?¹³¹ But do not let these things go unnoticed, nor consider yourself free of danger because 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...*' (emphasis added).

Aiming to secure royal status, Herod designs his pursuit of Ezekias and the bandits.¹³² Following Herod's calculus, he does not need authorization from Hyrcanus. As rightful

On the above distinction between the sovereign's violence and others, see below. See also Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation*, 45 HARVARD INTL L. JOURNAL 183 (2004) (describing how privateering constitutes a licit form of piracy that is authorized by the sovereign under the law of nations).

¹²⁹ JOSEPHUS, *JEWISH ANTIQUITIES*, *supra* note 97, at 14.165-167.

¹³⁰ In *War* 1.208-209 the characterization is different, as those giving the advice are described as "malicious persons at court." See SCHWARTZ, *JOSEPHUS AND JUDEAN POLITICS*, *supra* note 98, at 183-84.

¹³¹ 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.

¹³² 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 JOSEPHUS, *JEWISH WAR*, *supra* note 97, 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."), 207 ("Antipater, in consequence, was courted by the nation as if he was king and universally honoured as lord of the realm."), 209 ("Hyrcanus, the 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 14.161-162. By extension, this kind of esteem accrued to Herod as well.

ruler over the Galilee, Herod's act is the opposite of criminal, and instead constitutes a sovereign act of enforcement.

By trying Herod, Hyrcanus aims to subvert this message, and thereby affirm that he is the king and Herod is not. Charging Herod with murder serves as a way of characterizing Herod's actions as the unauthorized and unofficial 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* which records the argument that swayed Hyrcanus to subpoena Herod. Herod's detractors argue,¹³³ "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." What differentiates the king from his subject is that a king can never be summoned to court, while the subject must answer before the law. Formulated in mishnaic terminology, Josephus here describes a scheme common throughout the world of antiquity where the king judges (in fact, he appears to be the leading judge),¹³⁴ but cannot be judged. Thus, while Herod's underlying act aims to assert his royal status, Hyrcanus' indictment and subpoena undermine his rank (in two devastating senses) and signify that only Hyrcanus commands royal authority. The underlying act, indictment and subpoena all cut to the heart of who has monarchic standing.¹³⁵

For Herod, the very notion of being accused of murder and standing on trial is therefore an unforgivable (double) affront to his royal aspirations. To offset the implications of his presence in court, Herod carefully calculates his response to the

¹³³ JOSEPHUS, *JEWISH WAR*, *supra* note 97, at 1.209.

¹³⁴ 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.

¹³⁵ By charging Herod, Hyrcanus is using law as a political tool against Herod, which is consistent with the entire account's 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, or at least not to a royal aspirant. Finally, it is worth noticing how the bandits' mothers try to use the law against Herod, also suggesting its instrumentality. See JOSEPHUS, *JEWISH ANTIQUITIES*, *supra* note 97, at 14.168.

summons. Accordingly, he only appears in court with the accompaniment of an impressive, quasi-royal, entourage.¹³⁶ Moreover, during the course of the proceedings, Herod assumes an indomitable posture:¹³⁷

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; 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 Samaias, in his rebuke of Hyrcanus and the other judges:¹³⁸

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 Synhedrion 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 the judges should not only be seen 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

¹³⁶ Even though Josephus records Antipater's advice to Herod to walk a fine line between safety and not provoking a revolt (JOSEPHUS, *JEWISH ANTIQUITIES*, *supra* note 97, at 14.169), it seems clear that a primary motive for Herod is to appear monarchic. In a sense, this is Herod's only 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 he is apparently not yet prepared to be. However, shortly thereafter, when Herod escapes northward, he is willing to edge closer to an open revolt against Hyrcanus.

¹³⁷ See JOSEPHUS, *JEWISH ANTIQUITIES*, *supra* note 97, at 14.171. Herod's appearance is anticipated in JOSEPHUS, *JEWISH ANTIQUITIES*, *supra* note 97, at 14.169, and then described more explicitly in JOSEPHUS, *JEWISH ANTIQUITIES*, *supra* note 97, at 14.171-174.

¹³⁸ JOSEPHUS, *JEWISH ANTIQUITIES*, *supra* note 97, at 14.172-173, which may come from a different source.

a king, is above the law.¹³⁹ Likewise, he does not cower before the law, or the legal authorities, because he refuses to submit to their jurisdiction. Instead, Herod threatens to kill the judges, which demonstrates that he has a monopoly over violence. From Hyrcanus's perspective, although he balks at Herod's behavior and fails to surmount Herod's challenge,¹⁴⁰ in a sense he has already made his point. For the very capacity to summon Herod to court already affirms the latter's non-monarchic status.

Monitoring Hyrcanus's apparently erratic conduct throughout this episode actually exposes the deliberate and resolute manner in which he aims to cut Herod down to size through the trial procedure. While at first blush, Hyrcanus acts in a manner which seems confused and perhaps even spineless, as stated above,¹⁴¹ through his uneven behavior Hyrcanus achieves more than is immediately apparent. For the very act of summoning Herod, and then acquitting him, doubly achieves Hyrcanus's purpose: Herod must appear in court, and respond to a homicide charge signifying his non-royal status. Moreover, Hyrcanus's discharge of Herod is a further display of his (and not Herod's) royal-judicial authority.¹⁴² 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.¹⁴³ Therefore, Hyrcanus adopts the optimal course of action for his purposes.

¹³⁹ This may be the meaning of JOSEPHUS, *JEWISH ANTIQUITIES*, *supra* note 97, at 14.179, "Thereupon the members of the Synhedrion became indignant and attempted to persuade Hyrcanus that all these things were directed against him." 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 defying his subjection to the law, and thereby defying King Hyrcanus.

¹⁴⁰ When Sameas continues to state in JOSEPHUS, *JEWISH ANTIQUITIES*, *supra* note 97, at 14.174, "But 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 Synhedrion) and the king, for giving him such great license," the latter phrase includes allowing Herod to assume royal airs.

¹⁴¹ First, Hyrcanus becomes infuriated and compels Herod to appear before the tribunal, and then he readily, and lovingly, acquits him from all charges. *See above*.

¹⁴² 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.

¹⁴³ 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.

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 before the court, along with the subsequent official discharge, cedes much to Hyrcanus in the struggle for sovereignty.¹⁴⁴ This is likely the reason why Herod is so disturbed by his subpoena even after he escapes the trial, and therefore he resolves not to re-appear in court,¹⁴⁵ and even considers avenging his earlier appearance.¹⁴⁶ Rather than behaving rashly, the calculating Herod realizes that he has been bested by Hyrcanus's latest move of acquittal. Accordingly, Herod considers exercising military power as a fresh demonstration of his royal clout and his supremacy to the legal order. Ultimately, Herod refrains from mobilizing troops, not out of gratitude to Hyrcanus or due to the pious lessons of which Antipater and Phasael remind him, but since he likely feels that his show of strength at the trial was an adequate counter-display at this stage.¹⁴⁷ Therefore, Herod delays his next 'royal' display until later. Sure enough, in time Herod fully reverses the scales and assumes the role of royal judge over Hyrcanus.¹⁴⁸

In Josephus's accounts, then, we encounter a legal universe that functions at the crux of power politics, which touches on a fascinating and novel legalistic conception of sovereignty.¹⁴⁹ Whoever exercises legal supremacy or controls the violence of the law

¹⁴⁴ 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 demoting Herod to a commoner, thereby subtly but unequivocally damaging Herod's reputation and aspirations.

¹⁴⁵ JOSEPHUS, *JEWISH WAR*, *supra* note 97, at 1.212; JOSEPHUS, *JEWISH ANTIQUITIES*, *supra* note 97, at 14.178.

¹⁴⁶ JOSEPHUS, *JEWISH WAR*, *supra* note 97, at 1.214-215; JOSEPHUS, *JEWISH ANTIQUITIES*, *supra* note 97, at 14.180-184.

¹⁴⁷ Even when Herod decides not to avenge Hyrcanus's act, what seems to ultimately sway him is that he has already done enough to display his royal image. See JOSEPHUS, *JEWISH WAR*, *supra* note 97, at 1.215; JOSEPHUS, *JEWISH ANTIQUITIES*, *supra* note 97, at 14.184.

¹⁴⁸ See JOSEPHUS, *JEWISH WAR*, *supra* note 97, at 1.229ff; JOSEPHUS, *JEWISH ANTIQUITIES*, *supra* note 97, at 14.285ff, and especially at 15.173.

¹⁴⁹ Josephus's programmatic writings offer a very different portrait of legal and political authority, which may well be a response and alternative to this descriptive scheme that underscores the deep nexus between law and power. See fn. 96 above.

assumes the role of the sovereign who dominates political life.¹⁵⁰ Convening the judicial tribunal and exercising the power to indict or acquit, the king additionally commands the authority to confer licit status on political actions. In this scheme, it almost follows by definition that the king stands immune from lawsuits, presiding above the law and at the helm of the legal structure. As Herod (and Antipater) senses a void in monarchic leadership, he attempts to assert his own standing by assuming a royal posture, especially within the legal domain. Responding to Herod's power grab, opponents (including Hyrcanus, up to a certain point) attempt to contain Herod by entrenching his subordinate position (under the rule of the king and the king's legal authority). Herod resists this act, and this leads to persisting tensions about his rank at the time, and the degree to which he is under legal jurisdiction. Far from the rabbinic legacy of the trial story, which underscores the king's subordination to the law (Tanhuma), or the limitations of the law given the irreconcilable conflict between royal power and the legal order (redacted Babylonian Talmud), for Josephus it reflects the supreme legal position of the king, and the allure of this placement for those who aspire to gain sovereign power.

¹⁵⁰ 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, and therefore a competition over royal power is also, or even primarily, manifest in the legal sphere. That is, even Josephus, who emphasizes power politics in both accounts of the Herod Trial, still senses the importance of law for political, societal and cultural identity. As Josephus emphasizes throughout these passages, the indicia of political power is controlling the law, and concomitantly being immune from its enforcement. 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 an overall command of powers. However, 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. In other words, the sovereign monopolizes the legal enterprise, which can be referred to as “the legalistic conception of sovereignty.”

CONCLUSION

In sum, the legacy of the trial of the Judean king in Jewish late antiquity runs the full gamut. For the Midrash Tanhuma, the legendary trial demonstrates that (sacral) law encompasses (and binds) the politically powerful; for Josephus it confirms that the politically powerful control the law; and for the redacted Babylonian Talmud it shows the irreconcilability of law's confrontation with political power. The very act of narration generates a plurality of perspectives.¹⁵¹

Underlying these multiple versions is a momentous historical event dating to the Hasmonean period that clearly made a deep impression on the collective Jewish legal imagination of late antiquity. In a tense encounter between the judicial leaders and the chief executive 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 sovereign challenged the validity and reach of sacral law. While the precise aftermath of that event is shrouded in an impenetrable cloud of historical ambiguity, the paideic community offers vivid explorations of this encounter through their laden retellings of the tale of the trial.

¹⁵¹ 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." *Narrativity of the Law*, 14 CARDOZO STUD. IN LAW AND LIT. 1 (2002). Cumulatively, these multiply narrated tales help construct Jewish law.

Jewish law offers a profound exemplar of the prominence of narrative 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, 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 keep them apart from law as a distinct discipline.

As emphasized in Part I, the import 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. The stories are crucial vehicles of the culture of law that 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 culture) can inform the nature and scope of law; the values a legal tradition; the rights and liberties it protects; the role of courts and lead officials within society; the way law operates in times of emergency; and sundry other themes. The narrativity of law encompasses the tales that establish and sustain the legal tradition.

In a thoughtful summary of his treatment of the trial in his “Folktales of Justice,” Robert Cover also distinguishes between its historical basis (which Cover thought was documented by Josephus’s two versions) and the mythic tale that rehearses this event (which was recorded in the Babylonian Talmud). Cover’s remarks are highly indicative of his overall theory of legal narratives:¹⁵²

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 hard it will really be to become that.

Depicting legal narratives as normative aspirations which point toward distinct destinations—in this case, where truthful verdicts can even overcome the violence of powerful political actors—Cover relies upon myths to help rise above the jagged edges of historical realities.

Even as Cover’s sharp distinction between history and mythology has much appeal,¹⁵³ his characterization of each is drawn too narrowly. History records events as they transpire—whether they unfold neatly or chaotically, triumphantly or tragically.

¹⁵² Cover, *The Folktales of Justice*, *supra* note 2, at 190.

¹⁵³ For further meditations on this theme, especially in the context of Judaism, See YOSEF HAYIM YERUSHALMI, *ZAKHOR: JEWISH HISTORY AND JEWISH MEMORY* (1982).

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 is compounded by the passage of time which places increasingly insurmountable obstacles between the past and the present. In contrast, myths fill in the void of hazy antiquity. They offer a definitive version or account of an early event that can be seized upon. They allow the narrators and the listeners to once again inhabit that prior space, and, as Cover says, to reenact the very encounter of a bygone era.

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, in the context of law's confrontation with power, the myth enables the morally upright to overcome the corrupting influence of powerful actors. Cover is right in envisioning such a mythology. Indeed the myth can narrate the tale of the intrepid guardian of sacral law prevailing over the absolutist ruler, and even augment this account with a vivid depiction of the latter's ultimate judgment (Tanhuma). But the myth can also navigate in other directions as well. Perhaps the myth rehearses the deep, irreparable trauma of the very confrontation. In retelling the tale of the legendary trial, the mythmaker recognizes the acute existential threat that was barely survived. Therefore, the myth is reoriented 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 in ways that dramatically capture the colossal forces that undergird the normative field (Josephus).

All of these myths offer resolutions to the epic clash between law and power, but their narrative arcs cannot be predetermined. Such myths therefore gesture at very different ideas about the best ways to navigate a complex legal and political terrain. Only when one heeds the multiple retellings of this foundational tale can one discern the

profoundly different mythical trajectories, and visions of justice, that emerge from the same point of origin.

ⁱ In an earlier draft, this article also contained a Part V, which explored several seminal themes related to legal and political authority; the clash between law and power; and the nature of sovereignty that surfaced in the various narrations. This part also brought ideas from early Jewish jurisprudence into conversation with Western legal and political thought, and modern constitutional jurisprudence. For a brief meditation on some of these themes, *see* notes 72, 135 and 150 *supra*. In addition, the Conclusion elaborated further on the significance of narrativity in legal traditions more generally. *See* note 151 *supra*. These relatively discrete sections deserve separate elaboration, and I hope to return to them in a future publication.