

# THE NARRATIVE QUANDARY: CASES OF LAW IN LITERATURE

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## I

While ancient literary texts, such as the narrative parts of the Hebrew Bible or the Iliad or the Oresteia, are regularly used to reconstruct ancient law and legal procedure,<sup>1</sup> we would have serious qualms about using modern literature as a historical source on law. As literature, not a law code or a legal record, its texture differs from that of a historical source. Indeed, using a literary text as a mine from which legal nuggets can be extracted may betray the very nature of literature.<sup>2</sup> The natural ambition of literature is to address the concerns of the human condition. Whatever law is to be found in literature, according to this objection, is purely ancillary. Focusing on the legal aspects of a literary turn of events is simply inappropriate: it is an eccentric

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<sup>1</sup> On the Bible, see J. Wellhausen, *Prolegomena to the History of Israel* (preface by W. Robertson Smith; foreword by D.A. Knight; Atlanta, GA, 1994 [1885]), p. 33; R. de Vaux, *Ancient Israel* (New York, 1961), pp. 1.10-12, 21-22, 33-40, 51-55, 80-90, 150-158; H. McKeating, "The development of the law of homicide in Ancient Israel," *VT* 25 (1975), pp. 46-68; W.F. Albright, "The Judicial Reform of Jehoshaphat," in *Alexander Marx Jubilee Volume* (New York, 1950), pp. 61-82; D. Friedman, *To Kill and Inherit* (Hebrew) (Tel Aviv, 2000). On the Iliad, see M. Gagarin, *Drakon and Early Athenian Homicide Law* (New Haven, 1981), pp. 5-16; M. Gagarin, *Early Greek Law* (Berkeley, 1986), pp. 26-34; D.M. MacDowell, *The Law in Classical Athens* (Ithaca, 1978), pp. 17-21; R. Westbrook, "The Trial Scene in the Iliad," *Harvard Studies in Classical Philology* 94 (1992), pp. 53-76. On the Oresteia, see Gagarin, *Early Greek Law*, pp. 41-42; MacDowell, *The Law in Classical Athens*, p. 27; Th. Ziolkowski, *The Mirror of Justice: Literary Reflections of Legal Crises* (Princeton, 1997), pp. 30-41. Analyzing narrative as a source of legal history has also been utilized for ancient Egyptian literature. Cf. Nili Shupak, "A New Source for the Study of the Judiciary and Law of Ancient Egypt: 'The Tale of the Eloquent Peasant,'" *JNES* 51 (1992), pp. 1-18; R. VerSteg, "Law in Ancient Egyptian Fiction," *Georgia Journal of International Law* 24 (1994), pp. 37-97.

<sup>2</sup> R. Posner, *Law and Literature* (Cambridge, 1988), pp. 75-131. Despite his strictures, Posner himself was comfortable subjecting ancient Greek literature to the cause of legal history: cf. *The Economics of Law* (Cambridge, 1981), pp. 119-145.

way of reading. Literature is only incidentally about law. And even if it is deemed valid to focus on the legal elements in a literary text, it must be asked to what extent are the law and legal practice accurately portrayed when legal elements might be exaggerated or attenuated for the sake of plot or character development or theological exposition.

However, the written artifacts from ancient Israel are too scarce for one type to be categorically rejected. In the case of ancient Israel, the historian has no other recourse except to make use of literature that treats legal matters. As I hope to show in the following pages, I would make the stronger claim that narrative texts are indispensable for the study of biblical law. The analysis of literary texts is necessary for reconstructing legal practice and the perception of how law operated. Statutes only tell us so much.

## II

There are a number of approaches to the legal aspects of the narrative literature in the Bible. One way is to use narrative as raw material for the reconstruction of legal history: the analytical trajectory runs from narrative to law. The legal practices reflected in narrative can be taken as representative of the actual procedures followed in the periods in which the particular narratives either were set or were written. However, narrative is not a mirror of reality. Biblical narrative utilizes conventions and motifs that may be purely literary in nature. For example, biblical narrative and historiography are both based on concepts of vicarious reward and punishment that do not operate in the legal material—pious ancestors make their descendents prosper, a sinful king causes the entire nation to suffer. These concepts are roughly analogous to collective responsibility, which operates in much of biblical prophecy and historiography but which is greatly limited in biblical law.<sup>3</sup> Furthermore, writers have a free hand in portraying occurrences

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<sup>3</sup> B. Halpern observed that “human justice is specific, like a sort of spot-remover; divine wrath is general, like fire among the flax” (“Jerusalem and the Lineages in the Seventh Century BCE: Kinship and the Rise of Individual Moral Responsibility,” in *Law and Ideology in Monarchic Israel* [Journal for the Study of the Old Testament Supplement Series 124; Sheffield, 1991], p. 12). Put another way, we may say that human law in the Bible is specific to individuals, while divine justice, which is the principle informing much of biblical narrative, historiography, and prophecy, is collective. Collective responsibility in human law is restricted to treasonous acts against God, such as apostasy (Exod. xx 5; xxii 19; Deut. xii 13-19).

to emphasize character development and plot. They reveal personal thoughts, private conversations, and secret occurrences. The accuracy of a literary account is, therefore, questionable. Narrative is not a mirror of reality but a shaping of reality.

Another way of approaching law in literature is to reverse the analytical trajectory, to use law to illuminate narrative, and this is a more tenable method. D. Daube utilized this approach to identify legal aspects in narrative which biblical scholarship had either ignored or failed to recognize in emphasizing other aspects of narrative.<sup>4</sup> Daube's trenchant analysis of the scene in which Joseph's brothers bring Joseph's torn clothing to Jacob enables the reader to grasp the legal aspects of the specific language Jacob used, legal terminology that formally acknowledges that Joseph is dead in spite of Jacob's doubts, the connotations of which the reader might otherwise miss. And in so doing, Daube actually helps our appreciation of the narrative as literature. This, in fact, is a good criterion for judging whether we have correctly understood the legality of the narrative.

Joseph's brothers report that Jacob said: "This one (Joseph) went out from me and I said, 'He is surely torn to pieces,' and I have not seen him since" (Gen. xlv 28). This last clause is surprising—of course, Jacob has not seen Joseph since: Joseph is supposed to be dead. The force of this clause, "and I have not seen him since," is to show that Jacob was not convinced of Joseph's death. Why then did Jacob say, "(Joseph) is surely torn to pieces," which implies that Joseph was dead? Jacob said these words because he was forced to recognize legally Joseph's death. Joseph's brothers had forced this statement out of Jacob by employing a loophole in the law: it allowed them to avoid responsibility for Joseph's fate. Just as a shepherd is not held liable for an animal who is a victim of predators when he can show the last few scraps of that animal to its master,<sup>5</sup> Joseph's brothers produce evidence that the boy was a victim of a wild beast. Joseph's brothers dye his coat and show it to their father as the final remains of the youth. What Jacob must do in response is a legal act: he must formally recognize the evidence and concomitantly its legal implications. A technical legal term is used, דָּבַר, to express Jacob's verdict.<sup>6</sup> "... they said, 'This

<sup>4</sup> D. Daube, "Law in the Narratives," in *Studies in Biblical Law* (Cambridge, 1947), pp. 1-73.

<sup>5</sup> Cf. Exod. xxii 12; Amos iii 12.

<sup>6</sup> This term is akin to the juridical term, "find," used by a jury to announce its verdict.

(the coat) we have found; recognize whether this is your son's coat or not.' He recognized it and said, 'Yes, it is my son's coat; a wild beast must have eaten him; he is surely torn to pieces'" (Gen. xxxvii 32-33). Presented with the evidence, Jacob is forced to formally recognize that Joseph's death was due to *force majeure* and that the brothers are not subject to legal action for his death. Despite this, Jacob still has his doubts about Joseph's death and expresses it by noting "and I have not seen him since." By identifying the legal elements embedded in this narrative, we as readers deepen our sensitivity to the nuances of the text.

But one-way trajectories distort the nature of the material: law and literature are profoundly interrelated. The literary conventions and motifs on which narrative is built bear a relationship to actual law, or else they would be neither recognizable nor acceptable to the readers of their time. The study of the Bible is not alone in having to face the possibly intractable problem of determining the quantity and the quality of correlation between literary motifs and law. Admittedly, not all literary stylization indicates literary invention. Literary topoi reflect lived experience. A social historian analyzing the Icelandic sagas has stated that "good art in the saga mode is not the art of inventiveness, it is the art of incisive description, which, with sure and brief strokes, gives so much context and standard by which to reveal the social significance of the activity being described."<sup>7</sup> Analysis of the internal world-view of biblical narratives can recover how law was perceived. In this process, legal texts<sup>8</sup> and narrative texts are compared, and cognizance is taken of the light each genre sheds on law. This is a third way of approaching the legal aspects of narrative, and it is invaluable in the reconstruction of legal practices because it expresses how legal

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<sup>7</sup> W.I. Miller, *Bloodtaking and Peacemaking: Feud, Law, and Society in Saga Iceland* (Chicago, 1990), p. 76. Miller is correct in asserting that narrative may not be able to give us more than anecdotal evidence about mortality rates but can reveal the mechanics of conflict resolution. His test of the limits of what may be extracted from narrational data, which is simply the competing controls of saga and formal law, works well for biblical narrative and law, because, like the results from the early Icelandic evidence, it highlights the continuities and discontinuities in the biblical evidence.

<sup>8</sup> This is not to say that the texts in the Bible generally identified as "legal" necessarily mean that they were actually used in the legal arena. These texts appear to be legal in contrast to narratives because they exhibit certain linguistic and literary characteristics, such as imperatives or casuistic form, not plot or character development. They are not artifacts recovered from an ancient court. Only in the afterlife of the Hebrew Bible as Scripture can we be sure that these texts are precedent-setting.

institutions and principles were thought to operate, whether well or poorly.

I champion this comparative methodology. Narratives, particularly but not exclusively those that present themselves as telling a legal story, can tell us about legal matters. They can provide evidence for elements essential to legal practice omitted in legal texts. More importantly, they can provide the social setting in which law was used, from which its origins, inadequacies, and psychology can be highlighted.<sup>9</sup> Narrative can be used as a means of accessing key concepts in law, such as the behavior defined as criminal or the offenses not subject to legal action. It can identify what are felt to be the inadequacies of a legal system. It can provide insight into how the law appears to those not strictly involved in the legal process. Narrative texts are, therefore, critical to the study of biblical law.

### III

Let me illustrate this with specific examples. In biblical law, legal action is limited to those cases of homicide in which direct physical contact results in death. There is anxiety in biblical law to define which acts of homicide constitute intentional homicide and which constitute accidental homicide, but all the possible slayings considered are those in which a direct physical blow occurred. This is reflected most clearly in statutes from the Covenant Code and the Priestly law.

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<sup>9</sup> This is analogous to the program of the Law and Literature movement in contemporary legal studies. R. Weisberg, in *Poethics* (New York, 1992), pp. 4, 35, argues that the analysis of law in literature provides deep structural insights into the underpinnings of law that are generally ignored, unstressed, or misperceived and cannot be accessed by strictly legal texts. In particular, Weisberg contends, it teaches about four elements of law not treated in statutes: how a lawyer communicates, how a lawyer treats those outside the power structure, how a lawyer reasons, and how a lawyer feels. By promoting the study of law in literature, Weisberg hopes to fill the ethical vacuum that legal thought and practice now occupy by challenging students of the law to consider the moral implications of the law. Other Law and Literature critics concur with Weisberg on focussing on issue of justice and fairness. B.L. Rockwood, in "On Doing Law and Literature," in B.L. Rockwood, ed., *Law and Literature* (Critic of Institutions 9; New York, 1996), argues that the study of literature can illuminate how legal power can be abused. A. Julius, "Introduction," in M. Freeman and A.D.E. Lewis, eds., *Law and Literature* (Current Legal Issues 1999; Oxford, 1998), pp. xvi-xvii, reflects that the Law and Literature movement has served to rebuke the law and to scale down its pretentiousness. Cf. I. Ward, *Law and Literature: Possibilities and Perspectives* (Cambridge), p. ix.

Accidental homicide is defined in Exod. xxi 13 as “if (the slayer) did not do it by design, but God caused it to meet his hand . . .” Even though there is no intent, the link is made between what a person does with his hands and what occurred. Similarly, Hittite Laws 3-4<sup>10</sup> depict one category of murder, that is, accidental homicide, as “only his hand is at fault,”<sup>11</sup> making a distinction between the action of the offender with his hand and the intention of the offender in the seat of his intellect. There is thus a qualitative difference between an act and a physical event. Legal responsibility is attributed to the most direct cause of death,<sup>12</sup> a physical act that causes death. Although a distinction is drawn between a physical act intended to kill and a physical act that happens to kill, in both cases the offender must flee (Exod. xxi 13-14). Ultimately, legal culpability is imputed solely to the killer who lies in wait—“But if a man willfully attacks a man to kill him treacherously, you shall take him from my altar to be put to death” (Exod. xxi 14). Nonetheless, the direct physical act subjects the killer to legal action. The offender can see the connection between his hand and the corpse and knows to flee.<sup>13</sup>

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<sup>10</sup> The most recent edition and translation of the Hittite Laws, used here, is that by H.A. Hoffner, Jr., *The Laws of the Hittites: A Critical Edition* (Documenta et Monumenta Orientis Antiqui 23; Leiden, 1997). These particular statutes are on p. 18.

<sup>11</sup> Although the Hittite verb *waštai* is often rendered “to sin,” it does not have the element of moral depravity associated with the English verb. Hence, the translation adopted here is “to be at fault.” Cf. H. Hoffner, “On Homicide in Hittite Law,” in *Crossing Boundaries and Linking Horizons: Studies in Honor of Michael C. Astour on His 80th Birthday* (ed. G.D. Young, M.W. Chavalas, and R.E. Averbeck; Bethesda, MD, 1997), p. 297.

<sup>12</sup> D. Daube, “Direct and indirect causation in biblical law,” *VT* 11 (1961), pp. 246-47.

<sup>13</sup> A physical act, however, must have a cause, and accidental homicide signaled in Exod. xxi 13 is ascribed to God. By attributing to God the responsibility for accidental homicide, the Book of the Covenant holds the view that visible agents of the killing—implements of wood, stone or metal—are equally directed by the ultimate mover. Accidental slaying is equated with an accident without a human cause. Exod. xxi 13 may have other parallels in ancient Near Eastern statutes. LH 266 attributes the death of sheep to *lipit ilim*, “a plague (lit. a touching) of the god,” while LH 249 attributes the death of a rented ox to a god. These phrases signify an event which has no human cause. K. van der Toorn notes that this phraseology emphasizes the fortuitousness of an accidental and fatal action (*Sin and Sanction in Israel and Mesopotamia: A Comparative Study* [Studia Semitica Neerlandica 22; Assen/Maastricht, The Netherlands, 1985], p. 71). Cf. S.M. Paul, *Studies in the Book of the Covenant in the Light of Cuneiform and Biblical Law* [SupVT 18; Leiden, 1970], pp. 63-64, and Daube, “Direct and Indirect Causation,” p. 255. However, the biblical usage is a radical extension of the phrase since it refers not to an otherwise inexplicable illness but to a fatal assault directly done by human

Numbers xxxv contains two distinct definitions of the categories of homicide, but each assumes direct physical assault. The first, in Num. xxv 16-18, bases capital murder on the instrument involved, an iron tool,<sup>14</sup> a stone hand-tool that can kill, or a wooden hand-tool that can kill. Against this, Num. xxxv 20-23 introduces the idea of intent in the three examples of capital murder it offers: shoving<sup>15</sup> someone in enmity, hurling something on purpose, or striking with his hand and killing. Three examples of unintentional homicide according to this typology are given in contrast. The murderer shoved the victim suddenly without enmity, or hurled something unintentionally, or caused a deadly stone implement to fall upon the victim without seeing him. Num. xxxv 20-23 explains these examples by connecting them to the relationship between the killer and the victim—"the killer) was not his enemy and did not seek his harm." The criterion at work in vv. 16-18 is fundamentally distinct from that in vv. 20-23. That in vv. 16-18 defines the categories of murder formally: the extent of culpability depends on the type of object that caused death. The criterion in vv. 20-23, on the other hand, depends on explicitly determining the state of mind of the murderer.<sup>16</sup> Determining intentionality lies behind both

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hands. The Hittite conception, referred to above, has also been radically extended in the Bible by linking the activity of human hands to the direction of the Deity.

<sup>14</sup> It appears that iron tools in any form are assumed to be capable of causing death. Cf. Rashi.

<sup>15</sup> The verb **ד-ר-ח** signifies direct pushing in 2 Kings iv 27 and Ezek. xxxiv 21.

<sup>16</sup> This divergence is a sign that vv. 9-34 underwent a complicated history of redaction. There is other evidence for redactional activity. Vv. 16-18 use the term **רצח** to denote someone guilty of capital murder in contrast to the use of the term to denote any killer in the rest of the chapter, vv. 11, 12, 25, 26, 27. In addition, the definition of culpable murder in vv. 20-21 is most likely interpolated material because it is encased in a *Wiederaufname* that may indicate interpolation and because it contradicts the definition in vv. 16-18. Lastly, vv. 33-34 appear to be doublets: v. 33 has a parallel in the P material in Gen. ix 6 while v. 34 contains H wording (cf. I. Knohl, *The Sanctuary of Silence* [Minneapolis, 1995], p. 99). I would propose the following redaction history of vv. 9-34 that takes into account the divergent denotations of the term **רצח**, the differing definitions of capital murder, and the doublet of vv. 33-34. First, the priority of vv. 9-14, 24-29 seems clear. Then, a number of additions were made. A definition of culpable murder was added, vv. 16-19, which included a technical term, **רצח**, for capital murder. Verses 30-33 use **רצח** to denote culpable murder and may belong to the same layer, but it is difficult to provide any definitive timetable for the addition of vv. 30-33. Another definition of capital murder was added, vv. 20-21, to the definition in vv. 16-19. Later, a corresponding definition to vv. 20-21 of non-capital murder and legislation regarding the stay of the accidental homicide in the city of refuge was added, making up vv. 22-23. Vv. 15 and 34 are additions originating from a H editor (on

criteria. However, vv. 16-18 derive it from the instrument of killing. The use of particular instruments of deadly force presumes intention by the sheer fact of their use. This definition seeks to determine intention by objective means, checking whether the instrument of murder is on its list. In contrast, vv. 20-23 derive it from the manner of killing. Both typologies assume that only direct physical assault constitutes homicide, albeit sometimes intentional, sometimes accidental.

Limiting legal action to direct physical assault is not a sign of an inability to grasp a less direct connection but stems from an eminently practical concern.<sup>17</sup> Unlike the omniscient narrator of the Bible's most famous case of murder, the story of Cain and Abel, an actual court lacks direct access to the offender's thoughts, making it difficult to discern what he intended, and in ancient times, the absence of forensic experts makes for greater uncertainty. It is easy to prove that the cause of a death was unnatural when the marks of physical violence are present on the victim's body. The legal process can take such evidence with certainty. Less direct causation, i.e. poisoning, means greater doubt and less certainty about the identity of the offender.

Limiting legal action to cases in which there is direct physical action is a principle followed in narrative as well. In Gen. xxxvii 21-22, Reuben objects to his brothers' plan to kill Joseph and dump him in a pit. He suggests that instead of killing Joseph first, he simply be left alive in the pit to perish on his own accord, without anyone dealing the fatal blow: "Reuben said to them, "Don't shed blood. Throw him into this pit here in the wilderness, but don't lay your hand against him . . ." (Gen. xxxvii 22). Reuben makes a contrast between killing Joseph directly and indirectly.<sup>18</sup> If they were to kill him directly, the brothers would be fully culpable. If they kill him indirectly by casting him into a pit out in the wilderness and leaving him to starve, they would evidently be immune.

This same principle is followed in the narrative of David and Bathsheba, 2 Sam. 11-12. David is deemed guilty for taking Uriah's wife, not for causing his death. For the latter offense, he is not cul-

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v. 15, cf. Knohl, *The Sanctuary of Silence*, p. 99), but the timing of this is difficult to determine. This redaction history points to a number of redactional layers, reflecting different historical periods and their views of evidence.

<sup>17</sup> Daube, "Direct and indirect causation," *VT* 11 (1961), pp. 247-48.

<sup>18</sup> Daube, "Lex Talionis," in *Studies in Biblical Law*, p. 111.

pable because he did not directly shed Uriah's blood.<sup>19</sup> This is seen clearly in Nathan's parable. Its point is not the death of the poor man, which is not mentioned, but the theft of the poor man's ewe by the wealthy man (2 Sam. xii 1-4). The purpose of Nathan's parable was not to condemn David for Uriah's death, but rather for commandeering Uriah's wife.<sup>20</sup> Indeed, David's reaction to the parable is to order the wealthy man to pay the appropriate fine for a stolen ewe (2 Sam. xii 5-6).<sup>21</sup> In Nathan's explication of his parable, he holds David responsible for Uriah's death—"Why did you treat the word of the LORD with contempt, doing what is evil in his sight, by smiting Uriah the Hittite with the sword, taking his wife as your own, and killing him with the sword of the Ammonites?" (2 Sam. xii 9)—but Nathan bases David's punishment solely on the sin of taking Uriah's wife—"And now, the sword shall never depart from your house because you have despised me and taken the wife of Uriah the Hittite to be your wife (2 Sam. xii 10)." Nathan does not make David subject to legal action for Uriah's death because he did not actually deal the

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<sup>19</sup> This stratagem was used by Saul, who promises David his daughter's hand if David would battle the Philistines (1 Sam. xviii 17-27). Saul hopes that in the process of killing the Philistines, David himself would be killed—"... now Saul thought: Let my hand not be upon him but the hand of the Philistines" (1 Sam. xviii 17).

<sup>20</sup> U. Simon argued that the reason why an act parallel to Uriah's murder does not appear in Nathan's parable is that in order to emphasize the severity of the murder, the offense in the parable must be less heinous (קריאה ספרותית במקרא: סיפורי נביאים) [The Biblical Encyclopedia Library; Jerusalem, 1997], p. 140). If the offender who is the target of the parable demands a certain punishment for a lesser offense, the offender's own misdeed would certainly require that punishment. The problem with this is Nathan's own explication of his parable in which he links David's punishment only to the affair with Bathsheba.

<sup>21</sup> Although David's first words are "(I swear) as the LORD lives, that man deserves to die," he then orders the man to pay. The first reaction, "(I swear) as the LORD lives, that man deserves to die," is an expression of moral approbation, not law. The judgment to pay is law. Further, the penalty for adultery is death (Lev. xx 10). After David's confession, the penalty is transferred to the son who is to be born. Some have suggested that the term, בן מוֹה, is not a juridical term, but an emphatic expression, based on analogy with the term אֵלֶּשׁ מוֹה and the use of מוֹה in emphatic expressions, but this argument is faulty: the correct analogy is to the technical legal term בן הַבֹּהֶה, "one who deserves a lashing," in Deut. xxv 2. The phrase בן מוֹה is in fact a juridical term. Cf. A. Phillips, "The interpretation of 2 Samuel xii 5-6," *VT* 16 (1966), pp. 243-45; P. Kyle McCarter, *II Samuel* (The Anchor Bible; Garden City, New York, 1984), p. 299; H. Seebass, "Nathan und David in II Sam 12," *ZAW* 86 (1974), pp. 203-204; D. Winton Thomas, "A consideration of some unusual ways of expressing the superlative in Hebrew," *VT* 3 (1953), pp. 219-20; S. Rin, "The מוֹה of grandeur," *VT* 9 (1959), pp. 324-25.

fatal blow. Measure for measure retribution reflects David's transgression—"Thus says the LORD: I am going to make trouble for you out of your own house. I am going to take your wives before your very eyes and give them to someone else, and he will lie with them in the light of the sun itself, because although you acted in secret, I am going to do this in front of all Israel, in front of the sun" (2 Sam. xii 11-12). David's punishment is a transfiguration of his crime, the affair with Bathsheba.

At the same time, therefore, a distinction is drawn in narrative texts between responsibility and culpability. To return to the case of Joseph's brothers: when they descend to Egypt and are treated harshly, the connection is made to what they did to Joseph. Reuben reproaches his brothers for the responsibility they bear for Joseph's fate (Gen. xlii 22), although they did not directly cause his death. "Reuben answered them, 'Did I not say to you, 'Do not wrong the boy,' but you did not listen, and now his blood is being required.'"

The same concept lies behind a series of killings and counter-killings among David's retainers. The killing of Asahel (2 Sam. ii 18-23) is depicted as the first link in a chain of events. Abner slays Asahel in battle despite his best efforts to avoid killing him.<sup>22</sup> Asahel's brother, Joab, then ambushes Abner and kills him in revenge. David, in turn, reacts emphatically, horrified by "the blood falling on the head of Joab and his father's house." He utters a curse upon Joab and his patrimonial house to insure that the taint would fall on the murderer's descendants, not his own (2 Sam. iii 28-29). David orders Joab and the army to display outward signs of mourning, and David himself walks before Abner's bier and intones a dirge. These formal acts of grieving constitute a public declaration that David did not intend the death of Abner. The presumption, however, is that the king is responsible for the actions of one of his men. The same point lies behind David's death-bed scene, where he instructs Solomon to kill Joab for the death of Abner and the death of Amasa, commander of the army of Judah, because his deed was an offense against David himself (1 Kings ii 5). After David's death, when Joab sees Solomon settling David's unfinished business, Joab flees to the Tent-shrine and takes

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<sup>22</sup> The description of Abner's attempts to discourage Asahel from engaging in combat with him make Abner's own murder at the hands of Joab appear even more unjustifiable.

refuge there. Joab's action is of no avail. Solomon instructs Benaiah to kill Joab in order to remove blood guilt for the deaths of Abner and Amasa from David and his house (1 Kings ii 31). David and his house bear moral responsibility for their subordinate's deed, not actionable culpability.<sup>23</sup> The fact that a person could be held morally responsible, but legally exempt, for what he did not do is a phenomenon we would not be aware of if it were not for literary texts. Legal texts, by contrast, are concerned with actionable murders, that is, with offenses for which there are legal consequences. These are limited to certain acts of homicide.

#### IV

The narrative of 2 Sam. xiv provides another insight into the limitations of the legal system. The wise woman of Tekoa appeals to the king to save her son from being executed by her **נשפחה** as punishment for killing his brother.<sup>24</sup> She informs the king that she is a widow with only two sons. They fought and, with no one to separate them, one killed the other. According to the legal texts of the Hebrew Bible, the role of the monarchy or central government in legal affairs is limited. The central government is not mentioned as being involved in the statutes on homicide in Exod. xxi, Lev. xxiv, Num. xxxv or Deut. xix or xxi.<sup>25</sup> The only reference to the central government is in Deut.

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<sup>23</sup> An analogous case is that of Rahab, who is warned by the spies that she will bear the bloodguilt if her family ventures out of doors during the conquest of Jericho but that they will bear it if her family is not protected (Josh. ii 17-20), even though neither Rahab nor the spies will deal the fatal blow.

<sup>24</sup> Clearly, the institution of **נאלי הדם** operated within an extended family. *Contra* I. Schapera, who argued that capital punishment was not enforced in Cain's case because the remedy for killing a member of one's own group, based on ties of kinship and residence, is optional ("The Sin of Cain," in *Anthropological Approaches to the Old Testament* [ed. B. Lang; Issues in Religion and Theology 8; Philadelphia, 1985], pp. 35-36). This theory is contradicted by the presumption in the story of Cain and Abel that Cain's life is at the mercy of all who meet him and by the assumption in the parable of the wise woman of Tekoa.

<sup>25</sup> In general in the Pentateuch, the role of the king is ignored. While this might tell us more about the Pentateuch than legal procedures, even in Deuteronomy, the one Pentateuchal text that acknowledges the monarchy, the king's role in the legal process is submerged. The limited role of the king in adjudicating cases is reflected in texts throughout the Hebrew Bible. First, 2 Sam. xiv 1-17, where, as we saw, the king does play a role, has, in fact, been identified as part of the Succession Narrative, a product of a court historian during Solomon's reign, that was re-used by the D circle of writers. A product of the royal court would most likely exaggerate the king's role,

xvii 8-10, where local court could appeal to the levitical priests and the judge at the central sanctuary for clarification as to the law in a difficult case. If we did not have the narrative of 2 Sam. xiv 1-17, we would not know that the king could overturn the law or even intervene. However, the king is portrayed as hesitant as to whether he ought to become involved. The wise woman presents her case, King David equivocates, and the wise woman presses him to clarify his ruling.

<sup>4</sup>The Tekoite woman spoke to the king: she flung her face to the ground and prostrated herself, and she said, "Help, O king." <sup>5</sup>The king said to her, "What is the matter with you?" and she said, "Alas, I am a widow, my husband is dead. <sup>6</sup>Your maidservant had two sons. The two of them fought in the field where there was no one to intervene, and one of them struck down the other and killed him. <sup>7</sup>The entire family has now come to your maidservant and said, "Give up the one who killed his brother that we may put him to death for his brother, whom he killed, even though we kill the heir. They will extinguish my last ember, without leaving my husband a name or remnant upon the earth." <sup>8</sup>The king said to the woman, "Go home. I will issue an order for you. <sup>9</sup>The Tekoite woman said to the king, "My lord king, may the sin be upon me and my father's house: the king and his throne are innocent." <sup>10</sup>The king said, "If anyone says anything to you, bring him to me, and he will not trouble you any more." <sup>11</sup>She said, "May the king remember the LORD your God and restrain the blood avenger from destroying so that my son not be killed." The king said, "As the LORD lives, not a hair of your son shall fall to the ground."

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not reduce it. Second, the Chronicler's history, an alternate history to the Deuteronomic history, presents Jehoshaphat as reorganizing the legal system but not taking part in its day-to-day operations (2 Chron. xix 4-11). Finally, the legal texts from the Book of the Covenant and from the Priestly circles do not assign any role to the king.

A distinction must be drawn between the ideal of the king as the one who assures justice and the reality of the king's role: there is no evidence that the king acted as a court of last resort (K. Whitlam, *The Just King: Monarchical Judicial Authority in Ancient Israel* [JSOTSup 12; Sheffield, 1979], pp. 29-37, 197-206, 219-20). The rise of the monarchy, according to Whitlam, gave rise to new legal realms, such the royal estate and crown officials, which were outside the already established judicial system of the local communities.

The king had a general responsibility to oversee the justice system (2 Sam. viii 15), and this is portrayed as one of the incentives to establish a monarchy (1 Sam. viii 5). He also could respond to those who made a personal appeal to him, and a rebel against the king could use those who felt unsatisfied by the king's response (2 Sam. xv 4). A king's legitimation as the rightful heir could be expressed through the glorification of his judicial discernment and wisdom (1 Kings iii 5-28; v 9-14; x 1-13). Cf. G.N. Knoppers, *Two Nations Under God: The Deuteronomic History of Solomon and the Dual Monarchies* (Harvard Semitic Monographs 52-53; Atlanta, 1993-1994), pp. 1.83-7.

The widow herself admits that the king bears no responsibility: he is  $\text{ׁוּל־}$ —the clan has the responsibility—but the grieving mother argues that clan retaliation would be excessive because it would destroy not only the remaining son but also the paternal line.<sup>26</sup> Here, a narrative yields insight into aspects of conflict resolution and of the role of royal authority in judicial intervention that legal texts do not offer.

The intervention of the king in judicial affairs in 2 Sam. xiv has been interpreted as the attempt of the Deuteronomistic historian to reverse what Deuteronomy did to the monarchy.<sup>27</sup> According to this interpretation, Deuteronomy redefined every aspect of royal office to the requirements of cult systematization and to the authority of the deuteronomic Torah. This was a radical departure from the norms of kingship in the ancient Near East that the Deuteronomistic historian pointedly reversed and restored to the king what Deuteronomy had removed. The monarch in the ancient Near East was the supreme judicial authority, but Deuteronomy, according to this view, divests him of this authority and grants ultimate judicial authority to the Torah text (Deut. xvi 11). Other explanations of the contradictions between Deuteronomy and the Deuteronomistic history regarding the role of the king have been proposed: 1) the inconsistencies are due to the diversity within the deuteronomic school; 2) Deuteronomy is only one influence among many on the Deuteronomistic history; 3) those parts of Deuteronomy which impose restrictions on royal authority are later additions which postdate the Deuteronomistic history.<sup>28</sup> However, what needs to be considered in the analysis of the Deuteronomistic historian is the effect of genre. The Deuteronomistic history is a narrative history. To be sure, it shapes events, highlighting certain occurrences and making others obscure, emphasizing and de-emphasizing the role of individuals or nations. The writer's hand is free, but the writer is

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<sup>26</sup> B. Levine, *Numbers 21-36* (The Anchor Bible; New York, 2001), pp. 564-565, argues that the slaying was not premeditated and therefore the son should not be executed. This is contradicted by the wise woman's own argument in v. 7b and by the typology of homicide in the Bible, which identifies the culpable variety of homicide as intentional, not necessarily premeditated. (Compare Exod. xxi 14 and Deut. xix 11 to Num. xxxv 16-18).

<sup>27</sup> B.M. Levinson makes this suggestive insight in "The reconceptualization of kingship in Deuteronomy and the Deuteronomistic History's transformation of Torah," *VT* 51 (2001), pp. 511-34.

<sup>28</sup> G.N. Knoppers, "Rethinking the Relationship between Deuteronomy and the Deuteronomistic History: The Case of Kings," *CBQ* 63 (2001), pp. 414-15.

still describing a reality, albeit a reality as he sees it. By contrast, Deuteronomy is a radical vision of the future as it ought to be, not an interpretation of the past and present reality, what the Deuteronomistic history is. The fact is that a narrative history shows the king as reluctantly intervening in a difficult case that involves an individual on the margin of society and overturning the established law, not simply maintaining judicial practice.

Biblical law holds to the principle that everyone is subject to the law and that no one, whether king, priest, prophet, or judge, is above the law, but the power relations prevailing in an actual community at a particular time restrict or distort the actualization of this principle.<sup>29</sup> The reality that extra-judicial factors affect the law is reflected in narrative. In 1 Kings xxi, Ahab, king of the northern kingdom, seeks to purchase a vineyard belonging to Naboth to use it as a vegetable garden for the palace. He offers Naboth a choice of a better vineyard or money, but Naboth refuses. Ahab has no choice but to return to the palace empty-handed (and dispirited). Ahab assumes that even he, the monarch, is constrained by the laws of property tenure and cannot exercise his will as he wishes. His wife, as the well-known tale continues, manages to manipulate the legal process so as to condemn Naboth and his property: Naboth is executed and his property is transferred to the king's possession. Jezebel the queen used royal power to influence the legal system in order to evade the restraints on royal power. The crown is officially subject to the law, but the actual power relations in a society may allow it to possess the means to circumvent the law. In Naboth's case, judicial murder was the result.

## V

According to biblical law, sanctuary was available only to manslayers. No other offenses qualify. Because a member of the victim's family had the right to kill the slayer with impunity, a sanctuary was necessary to protect him until it could be determined whether he had killed intentionally and therefore was justifiably subject to death. An individual who had killed by accident was allowed to remain protected in the sanctuary. However, narrative accounts show that sanctuary was

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<sup>29</sup> M. Walzer, "The Legal Codes of Ancient Israel," *Yale Journal of Law and the Humanities* 4 (1992), p. 341.

an option for political offenders. Adonijah, one of David's sons, rebelled against his father and claimed the throne (1 Kings i 5-6). However, his claim was thwarted when Solomon was confirmed by David as the rightful heir. Adonijah fears for his life and flees to the altar, seeking sanctuary because he has made political misjudgments (1 Kings i 41-53). He has not committed a homicide.

Another member of the Davidic regime also seeks refuge. In Joab's case, he is in fact a murderer, but the timing of his flight shows that Joab is trying to evade his political predicament. Joab had allied himself with Adonijah when Adonijah attempted to claim the throne, and when Joab hears that Solomon has had Adonijah executed and Abiathar, another Adonijah supporter, dismissed from his post as priest, Joab realizes that he is in trouble and takes refuge at the Tent-shrine. It is of no avail: he is taken from the sanctuary and killed. Joab sought sanctuary because he was a political offender.

The use of the Temple as a sanctuary from political machinations is attested for both the First Temple period and the Second Temple period. Joash is kept hidden from his mother Athaliah within the Temple after she has killed every other scion of royal stock (2 Kings xi 2-3). During the Persian period, Nehemiah is counselled to protect himself from assassins by taking shelter in the Temple (Neh. vi 10-13). Although he refuses, objecting that a person in his position should not show cowardice by taking flight, he assumes that sanctuary asylum still operated in his day.

While formal legal texts assume that asylum was legitimate solely for those who have slain another human being, narrative texts reveal it operated for political offenders as well. Political transgressions occupy an odd position between legal and illegal. Technically, opposing a political force was not a formal crime *per se*, but officials with power would be sorely tempted to use it to punish political offenders. Asylum operated as an escape mechanism in an internal political crisis. It was not part of the formal legal system, and we would not know of the available of sanctuary for political offenders were it not for narrative texts.

## VI

While particular details of legal practice may be submerged in narrative texts, major issues of law and justice are brought to the surface. A distinction must therefore be drawn between concrete legal problems, which are solved through technical legal analysis and are the

subject of legal texts, and larger issues of justice and government, which are the grist for moral and literary examination and are appropriate subjects for narrative. Narrative texts in which law appears are, therefore, critical to the study of biblical law because they shed light on legal matters not touched upon in legal texts. They offer access to elements essential to the process of law and to issues of justice and fairness that are otherwise ignored in legal texts.<sup>30</sup>

*Abstract*

Narrative texts that address legal matters in the Hebrew Bible must be approached with caution. An author has freedom to create and shape characters and events, and the law that is touched upon in such narratives is subject to the needs of narrative art. Can such texts be used to reconstruct legal history? I will examine three approaches to law in literature, and I will argue that the literary texts in the Bible are critical to the study of biblical law because they reflect essentials of legal practice omitted from legal texts. They exhibit what is perceived to be the inadequacies of a legal system and what type of problems arose in putting the law in practice. They address issues of justice and governance that are omitted in legal texts.

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<sup>30</sup> I would like to thank Professors Nancy E. Berg and Elizabeth A. Oyler of Washington University and Professor Moshe Greenberg of Hebrew University for their comments on this paper. A version of this paper was presented before the Bible Departments at Hebrew University and Bar-Ilan University, and I am grateful for the observations and questions of the audience.