1985

The Folktales of Justice: Tales of Jurisdiction

Robert M. Cover

Yale Law School

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I. INTRODUCTION

The word “law” resonates richly in the language and mythology of western civilization. H.L.A. Hart began his great work, *The Concept of Law*, with an inquiry into the persistence of the question “what is law?” in our jurisprudence.1 He argued that it is strange that such an apparently elementary question has persisted in jurisprudence while no analogous question such as “What is chemistry?” has occupied other areas of human inquiry.2 Hart’s answer to his own question is, in some sense, the book, itself. He stresses and illuminates the analytic perplexities that constitute the deep structure of our concept of law. But there is an historical and political answer to Hart’s question which may be more to the point. The literature on the question “what is law?” is voluminous and continues to grow not because there are analytic difficulties in our conceptual apparatus—our categories—in this field. There are, indeed, such difficulties, but they are no greater than analogous problems in the categories of the sciences. In the sciences, however, the illumination of a deep structural ambiguity hitherto uncaptured by the “chemistry” paradigm does not lead to another round in a perpetual argument over “what is chemistry” but to the creation of new fields like “biochemistry” or “molecular biology.” The new fields take as their standard cases the problematic case for “chemistry.” The label itself is not the object of controversy.

A label may be the object of controversy, however, if the question is not “what is chemistry?” but rather, “what is science?”3 For the word “science” is a heavily loaded one, freighted with normative significance. If one is doing “science”—which may or may not be chemistry—then the legitimacy of the enterprise is not in question, only the appropriate administrative label. Such labels are matters of convenience. But if one is not doing science at all, then the charge is that the enterprise itself

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2. Id.
3. The philosophy of science in recent decades is frequently a debate about what is science. Thomas S. Kuhn’s *The Structure of Scientific Revolutions* (1962) has been enormously influential in defeating simplistic earlier models of “scientific method” as systems of observation, hypothesis, confirmation/disconfirmation. Michael Polanyi’s brilliant work *Personal Knowledge* (1958) represents a still earlier and in some ways richer critique of what was then conventional philosophy of science.
is outside the scope of legitimate inquiry for a certain sort of truth.  

The word "law", itself, is always a primary object of contention. People argue and fight over "what is law" because the very term is a valuable resource in the enterprises that lead people to think and talk about law in the first place. "Law" evokes the law given on Sinai, Solon's legislative enterprise, Kant's categorical imperative. On a political level, it connotes legitimacy in the exercise of coercion and in the organization of authority and privilege. On a philosophical plane it connotes universality and objectivity. Legal positivism may be seen, in one sense, as a massive effort that has gone on in a self-conscious way for over two centuries to strip the word "law" of these resonances. But the sacred narratives of our world doom the positivist enterprise to failure, or, at best, to only imperfect success.  

Historicist and analytic debunking of "law" have, indeed, rendered the term problematic. There is now a counter-resonance. For law has

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4. Thus, the battle over the label science is fought out not only on the front of philosophy: what is science? what is scientific method? but also through various heavily loaded questions for particular fields: e.g., is Psychoanalysis a science? is its method scientific? See, e.g., N.Y. Times, January 15, 1985, at C1. See also M. EDELSON, HYPOTHESIS AND EVIDENCE IN PSYCHOANALYSIS (1984). Similarly, great heat and everlasting smoke may be generated over the question of whether "social science" is "science". More narrowly, still, consider the debates over the "scientific" character of IQ testing. And, also, the long debate over the issue of whether ESP studies can be called "scientific."

5. It is a resource in legitimation, in aspirations to ideas of justice and in ambition for social control. See, e.g., E. P. THOMPSON, WHIGS AND HUNTERS 258-269, especially 260-64 (1975). "Most men have a strong sense of justice, at least with regard to their own interest. If law is evidently partial and unjust, then it will mask nothing, legitimize nothing, contribute nothing to any class's hegemony. The essential precondition for the effectiveness of law, in its function as ideology, is that it shall display an independence from gross manipulation and shall seem to be just. It cannot seem to be so without upholding its own logic and criteria of equity; indeed, on occasion, by actually being just." Id. at 263 (emphasis in original).


7. The fact that "law" is located in our myths and stories as a powerful attribute of legitimate authority creates a potential ironic twist in the political consequences of positivist theory. The positivist assures us that evil "law" is "law" nonetheless, that the character of something as "law" cannot depend upon its moral qualities. Yet, the mythologies that we share do give that which is law legitimating force not by virtue of a sound analytic argument but by virtue of brute facts of culture, language and history. The result of the two vectors of positivism and cultural legitimation may be the unwanted greater legitimation of evil law. Positivism breaks down psychological barriers to outright conscription of the word "law" to nefarious purposes which natural law thinking might create. There remains, however, especially among the masses—sufficient cultural force to the symbolism of law that the evil law is given a substantial degree of legitimacy it would not otherwise have. Whether such a situation is "stable" is doubtful.
also come to suggest the mask of privilege. Nonetheless, the very meaning of law as an effective mask or ideology would be lost were the word to lose its primary mythic resonances. The struggle over what is “law” is then a struggle over which social patterns can plausibly be coated with a veneer which changes the very nature of that which it covers up. There is not automatic legitimation of an institution by calling it or what it produces “law”, but the label is a move, the staking out of a position in the complex social game of legitimation. The jurisprudential inquiry into the question “what is law” is an engagement at one remove in the struggle over what is legitimate.10

I have recently staked out a position about the nature of law that has obvious and consciously chosen political significance.11 My position is very close to a classical anarchist one—with anarchy understood to mean the absence of rulers, not the absence of law. Law, I argued, is a bridge in normative space connecting [our understanding of] the “world-that-is” (including the norms that ‘govern’ and the gap between those norms and the present behavior of all actors) with our projections of alternative “worlds-that-might-be” (including alternative norms that might ‘govern’ and alternative juxtapositions of imagined actions with those imagined systems of norms).12 In this theory, law is neither to be wholly identified with the understanding of the present state of affairs nor with the imagined alternatives. It is the bridge—the committed social behavior which constitutes the way a group of people will attempt to get from here to there. Law connects “reality” to alterity13 constituting a new reality with a bridge built out of committed social behavior. Thus, visions of the future are more or less strongly determinative of the bridge which is “law” depending upon the commitment and social organization of the people who hold them.

The above is not a definition of law; it is a plea to understand the legitimating force of the term in a certain way. It is a plea to grant all collective behavior entailing systematic understandings of our commitments to future worlds equal claim to the word “law”. The upshot of such a claim, of course, is to deny to the nation state any special status for the collective behavior of its officials or for their systematic understandings of some special set of “governing” norms.14 The status

9. See E. THOMPSON, supra note 5.
12. Id. at 9-10.
of such "official" behavior and "official" norms is not denied the dignity of "law." But it must share the dignity with thousands of other social understandings. In each case the question of what is law and for whom is a question of fact about what certain communities believe and with what commitments to those beliefs. The organized behavior of other groups and the commitments of actors within them have as sound a claim to the word "law" as does the behavior of state officials. The most important consequence of this radical relativization of law is that violence—a special problem in the analysis of any community's commitments to its future—must be viewed as problematic in much the same way whether it is being carried out by order of a federal district judge, a mafioso or a corporate vice-president.15

I have argued not only that the nature of law is a bridge to the future, but also that each community builds its bridges with the materials of sacred narrative that take as their subject much more than what is commonly conceived as the "legal." The only way to segregate the legally relevant narrative from the general domain of sacred texts would be to trivialize the "legal" into a specialized subset of business or bureaucratic transactions.16

The commitments that are the material of our bridges to the future are learned and expressed through sacred stories. Paradigmatic gestures are rehearsed in them. Thus, the claim to a "law" is a claim as well to an understanding of a literature and a tradition. It doesn't matter how large the literature or how old the tradition. Sinai might have been yesterday or four thousand years ago; the text might be two tablets or the infinity of Borges' library of Babel.17

In my earlier work on this subject, I considered primarily the commitments and narratives of those communities who would make a law for themselves apart from that of the State. I believed and still believe that that emphasis is a necessary corrective to the imbalanced character of almost all contemporary legal theory. Nonetheless, I did consider briefly the commitments that are implicit in the assumption of jurisdiction by official judges of the state.18 In that section of my earlier work I criticized most jurisdictional reasoning as largely apologetic, state-

15. Please note well, here, that I am not saying that all violence is equally justified or unjustified. I am claiming that it is problematic in the same say. By that I mean that the form of analysis that we enter into to determine whether or not the violence is justified is the same. That same method will, of course, if it is any good at all, not yield the same answer with respect to dissimilar cases.

16. Cover, supra note 11, at 19-25. See also the important work of James White arguing for the significance of such narrative materials in the "culture of argument." J. WHITE, WHEN WORDS LOSE THEIR MEANING (1984); White, Law as Language: Reading Law and Reading Literature, 60 TEX. L. REV. 415 (1982).


18. Cover, supra note 11, at 53-60.
serving enterprises. I did conclude, however, with the following, undeveloped thought:

It is possible to conceive of a natural law of jurisdiction. . . . In elaborating such a law . . . a judge might appeal to narratives of judicial resistance. . . . He might thus defend his own authority to sit in judgment over those who exercise extralegal violence in the name of the state. In a truly violent, authoritarian situation, nothing is more revolutionary than the insistence of a judge that he exercises such a "jurisdiction"—but only if that jurisdiction implies the articulation of legal principle according to an independent hermeneutic. . . .

Such a hermeneutic of jurisdiction [texts], however, is risky. It entails commitment to a struggle, the outcome of which—moral and physical—is always uncertain.19

In this article, I take up the task of elaborating on the idea that there are sacred narratives of jurisdiction that might constitute the texts to ground judicial commitments. In part II, I shall consider one category of such texts—the resistance to "Kings". In Part III, I shall consider another, more problematic category—bringing the Messiah. Part II treats of the minimal aspirations of our myths for autonomous "law." Part III treats of the place of law in more comprehensive Utopian reorderings of the world.

II. OF JUDGES AND KINGS

Leonard Koppett once wrote that the most important single fact about hitting a baseball and the one least mentioned explicitly is fear.20 There is in the archetype of an upright judge—as there is in the upright batter—an important element of having conquered a fear, a fear which is always present yet almost forgotten. To understand that fear and its significance we must tell the stories that remember the fear and rehearse the gestures we make in response to it.

There is in the Talmud, tractate Sanhedrin, a fascinating account. The law in the Talmud (Mishneh) seems clear: "The king does not judge and we do not judge him."21 This rule appears to state a not unexpected norm of sovereign immunity and a perhaps unexpected norm of sovereign judicial incapacity. The rule was enunciated almost two thousand years ago and it will, as we shall explore, perhaps ring some bells concerning English law in the seventeenth century.22 In any event, the Talmud, hav-

19. Id. at 58-60.
21. MISHNEH SANHEDRIN, II, 3.
22. See notes 29-37 infra and accompanying text.
ing stated the rule in question, asks about its origin. Let me quote the answer in full:

But why this prohibition? Because of an incident which happened with a slave (servant) of King Yannai, who killed a man. Simeon b. Shetah (head of Sanhedrin) said to the court of sages: Be bold and let us judge him. 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. He appeared but sat down before the court. Then Simeon b. Shetah said, Stand on your feet, King Yannai, so witnesses may testify against thee. For you do not stand before us but before He who spoke and the World was created. 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. Then Simeon said, Are you wrapped in thought? Let the Master of thoughts come and call you to account. Instantly, Gabriel came and smote them all and they died. Then it was enacted: The King may neither judge nor be judged, testify nor be testified against.  

What, we might ask, are we to make of this fabulous tale of a not altogether unreasonable king, a courageous, perhaps foolhardly and somewhat inflexible judge, and the Angel Gabriel? It seems clear enough that the taleteller and the redactor of the text consider it both a cautionary tale and a celebration of courage. Simeon b. Shetah is the hero. He is spared, and his castigation of his cravenly colleagues leads directly to their demise at the hand of the angel. At the same time the incident is put forward to account for a rule of law which, itself, seems to owe more to the cowardice of Simeon's colleagues than to the courage of their leader. The rule which results from the incident is not, after all, that Courts judge Kings courageously and impartially, but that they do not judge them at all. Before we begin an analysis of this very common paradox of jurisdiction, we should explore, for a bit, the historic episode that may lie behind this fabulous story.

The tales of the Talmud may be founded in myth or history. They may owe their fabulous character to literary or religious imagination, to failure to appreciate and preserve scientific historicity, or to the need—in some periods—to disguise a story with revolutionary implications. In the case of the story of King Yannai and Simeon b. Shetah we have another ancient source which tells a similar though by no means identical tale. In his work, Jewish Antiquities, the hellenized Jewish historian, Josephus, related a story which, if true, took place in 47 B.C.E. almost forty years after the death of King Yannai.

23. BABYLONIAN TALMUD [hereinafter cited as B.], Sanhedrin, 19a-19b.
Antipater the Idumite had been appointed the governor or procurator of Judea by Caesar. He executed his office while Hyrcanus II, the hereditary, legitimate, ruler of the Jews, descendant of the Hasmonean family of high priests, served as high priest and titular King of the Jewish nation. Both Hyrcanus and Antipater strongly supported Caesar and the Romans in their Egyptian campaign. In return, Caesar supported Hyrcanus in his conflict with Aristobulus II over Hasmonean succession. Antipater, at least for a while, formed an alliance with Hyrcanus. Antipater's second son, Herod, still very young, was made governor of the Galilee. There, he succeeded in boldly putting down a group of bandits or rebels, killing the leader and a number of others. According to Josephus, this and other acts formed the basis of a series of complaints from leading Jews that Antipater and his sons had become the de facto rulers of Judea and that Hyrcanus and the Jews were left with but a shadow.

The complainants fastened upon the fact that Herod's execution of the leader and some men of the band of brigands without judicial trial violated Israel's law. They asked that Herod be brought to account for this act. Hyrcanus, whether for political or personal reasons, summoned Herod to be tried for the act. [The servant of the king had killed a man]. Josephus suggests that Hyrcanus may have then received some sort of instructions or requests from Sextus, Roman governor of Syria, that Herod be acquitted. In any event, Josephus tells us that Herod arrived with a bodyguard of troops and stood before the Sanhedrin or Court with those troops, an act which had the desired effect:

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.

Josephus then goes on with a remarkable parallel to the Talmud's tale.

While they were in this state, someone named Samaias, an


25. Id. at 170. See also Loeb Edition, at 539 note e. There is a somewhat more abbreviated version of this event related in Josephus, I The Jewish War, 211 (reprinted by Penguin, G. Williamson, at 48-49). In The Jewish War, Josephus attributes Hyrcanus' motive in bringing Herod to trial entirely to jealousy. He sees the event as one involving a play by Hyrcanus to regain real power which was blocked by Sextus acting as ally and patron of Herod.

26. JOSEPHUS, supra note 22, at 171. See also JOSEPHUS, supra note 23, at 201 note ff. In The Jewish War the trial scene is not related but Josephus does say that Herod "presented himself in Jerusalem, accompanied by a strong escort—not so swollen a force as to suggest the intention of dethroning Hyrcanus, nor small enough to leave him helpless in face of jealousy." Id. at 211.
upright man and for that reason superior to fear, arose and said, 'Fellow councillors 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. . . But this fine fellow Herod, who is accused of murder . . . stands here clothed in purple, with the hair of his head carefully arranged and with his soldiers around him, in order to kill us if we condemn him as the law prescribes, and to save himself by outraging justice. But it is not Herod whom I should blame for this . . . but you and the King for giving him such great licence. Be assured, however, that God is great, and this man, whom you now wish to release for Hyrcanus' sake, will one day punish you and the King as well.' And he was not mistaken in either part of his prediction. For when Herod assumed royal power, he killed Hyrcanus and all the other members of the Sanhedrin with the exception of Samaias. 27

Hyrcanus, by Josephus' account, saw that Samaias had moved the Court and postponed any decision so that Herod could escape. At that point, Herod resolved not to answer any future summons. 28

While there are difficulties and possible internal contradictions in Josephus' account, it plainly described an historical moment of great danger in the jurisdiction of the Sanhedrin—a moment the moral enormity of which is captured in the Talmud's tale. That the historical referent for both tales was the same event has long been recognized even by traditional Medieval Jewish commentators on the Talmud for whom Josephus was hardly a canonical text. 29

27. JOSEPHUS, supra note 22, at 172-76. The identity of Samaias is a matter of scholarly dispute. See Loeb Edition at 540-41 note a, for difficulties in piecing together the parallel accounts.

28. JOSEPHUS, supra note 22, at 177-79.

29. See HIDUSHEI HALAHOTH VE. AGGADOT MAHARSHA (Novellae of Laws and Legends of Samuel Eliezer ben Judah Ha-Levi Edels, 1555-1631) discussing B. SANHEDRIN 19a: "[T]he reason he (the King) did not send him (the servant) to them and emancipate him (thus removing his own legal responsibility to answer) may have been that the servant was dear to him and it was hard for him to put him to death. And when he first sent him before them he relied on the supposition that they would not judge him from fear of the King since he was the servant of the King as they say. And so it appears from Josephus that this murdering servant was Herod and the King wanted to save him." (My translation).

See L. FINKELSTEIN, II THE PHARISEES, 684 n.6 (1938) for a discussion of some nineteenth and twentieth century critical scholarship on the event in question. The discussion of the MAHARSHA on this question, which I have translated above, shows that the identification of the two stories long antedates the Wissenschaft des Judentums sources cited by Finkelstein.

The persistent question concerning the identity of "Samaias" in the account of Josephus is of interest. Shammai the Elder—who is one of the candidates for the role—is
Before we begin an analysis of this story, it is well to compare it to a striking counterpart in seventeenth century English legal history. The special, sacred history of the common law treats as one of its high moments the opinion supposedly enunciated by Chief Justice Coke in the matter reported by him and published posthumously under the style, Prohibitions Del Roy.\textsuperscript{30} King James, you will remember, had become angry at the writs of prohibition emanating from the common law courts and directed at the Court of High Commission. Some of these prohibitions had issued with respect to the power of High Commission to punish puritans for breaches of ecclesiastical discipline. The culmination of a string of acrimonious disputes over the use of the writ of prohibition by the common law courts to restrain High Commission came in Fuller's Case.\textsuperscript{31} Nicholas Fuller was a barrister who had defended puritan dissenters in trouble over breaches of discipline. In one case before High Commission, Fuller had overreached a bit in his rhetoric, complaining

said, by the Talmud, to have differed with the majority of the Sages in that he held that one who procures the murder of a third person at the hand of an agent is nonetheless completely responsible as a murderer. See B. KIDDUSHIN, 43a. While there is absolutely no basis in either the Talmud's account or the account of Josephus for believing that the trial of Herod ever got to the point of a discussion of legal principles grounding Herod's liability as commander for acts done at and under his command, it is nonetheless interesting that Shammai did advocate from a minority position the only rule of law which would have rendered Herod criminally liable. Moreover, Shammai's proof text is II Samuel c.12, v. 9: "... you killed him with the sword of the Ammonites." referring to David's sending Uriah to the front against the Ammonites. The identification of Herod and Yannai occurs elsewhere in Rabbinic literature. I'm not sure what to make of it, but in Megillath Ta'anith, ch. 11., we find:

"On the second of Shevat is a holiday and not for lamentations. And why is this different from, "that [the first day] for as to the first day, it is not written that there not be lamentations," and here it is written. On the first day (of Shevath) Herod died and on this (second) day Yannai the King died. And it is a joy before the Holy One Blessed Be He when the wicked are removed from the world. They said: 'when Yanai got sick he captured 70 Sages of the elders of Israel, put them in prison, and commanded the officers of the prison: If I die, kill the Elders. So that to the extent that Israel is joyful (at my death) may they lament their teachers.' They said: 'He (Yannai) had a good wife, Salome by name. When he died she removed the ring from his hand and sent it to the officer of the prison. She said to him, your master in (by) a dream has freed these sages. He freed them and they went home. Afterward she said, Yannai, the King is dead. And on that day that he died they make a holiday.'" Josephus tells almost exactly the same story concerning the death of Herod. JOSEPHUS, The Jewish War, Book I, 660 et seq. In JOSEPHUS, it is Herod's sister, Salome, who saves the Jewish leaders. (This is not the Salmone of The New Testament.)


31. Nicholas Fuller's Case, 12 COKE 41; See also Bowen, supra note 29, at 293-301.
of the process before the Court of High Commission as "popish, under jurisdiction not of Christ but of anti-Christ." This inspired advocacy led contemporaries to remark that Nicholas Fuller had "pleaded so boldly for the enlargement of his clients that he procured his own confinement."32

The question of whether the common law courts could issue writs of prohibition to deny to High Commission the power to punish a barrister for contempt was the context in which the greatest of the common law texts of jurisdiction was written. Fuller was finally committed to prison though not for contempt but for, inter alia, schism and heresy over which it was conceded that the ecclesiastical courts had jurisdiction. Nonetheless, the case had precipitated a showdown on the issue of who was to be the final arbiter of jurisdiction within the English legal system. Archbishop Bancroft argued that the final determination of the respective jurisdictions of courts could and should properly rest with the King, himself, since all judges derived authority from him.33 Coke, if we are to believe his own account of the affair, answered not only the Archbishop, but the King, himself, with the ringing words that:

true it was that God had endowed his Majesty with excellent science and great endowments of nature. But his Majesty was not learned in the Laws of his Realm of England; . . . With which the King was greatly offended, and said that then he should be under the Law, which was treason to affirm (as he said). To which I said, that Bracton saith, Quod Rex non debet esse sub homine, sed sub Deo et Lege—that the King should not be under man, but under God and the Law.34

It is striking that in this case, as in the case of Simeon b. Shetah, there is an alternative to the canonical version of the event. Contemporary historians have largely rejected Coke's self-serving account,35 relying instead on other seventeenth century evidence including a letter from Sir Roger Boswell to Dr. Milborne which recites that:

his Majestie fell into that hight indignation as the like was never knowne in him, looking and speaking fiercely with a bended fist, offering to strike him etc., which the Lo. Cooke perceiving fell flatt on all fower; humbly beseeching his Majestie to take compassion on him and to pardon him if he thought zeale had gone beyond his dutie and allegiance.36

In both of our stories of judges and Kings we find an unambiguous canonical text in which the courageous judge challenges the King, af-

32. BOWEN, supra note 29, at 299.
33. Prohibitions del Roy, 12 COKE at 63; BOWEN, supra note 29, at 303-04.
34. Prohibitions del Roy, 12 COKE at 65.
35. BOWEN, supra note 29, at 305-06.
36. Id. See also Usher, supra note 29, at 673.
firms the value of an impersonal law or source of law over the King and places the authority of the Court to speak the law—its jurisdiction—upon that impersonal foundation. The didactic power of these stories inheres in part in the literary form—the compression of the messages into a concentrated text which, itself, depicts a highly focused and artificially circumscribed stage upon which the action unfolds. In short, the classic "unities" are observed. History is rarely so neat. The processes by which Courts acquire the concepts of independence of jurisdiction and relate it to the autonomy of the law are long and complex. Moreover, the acts by which judges resist political subordination of themselves, their courts, and their law almost always entail prudential as well as principled behavior. Samaias, in Josephus' account, may have simply seen more clearly than did his colleagues, that Herod was a man to be unambiguously crushed or else catered to. If Josephus is to be credited, Samaias may have been principled in opposing Herod but he later became Herod's political ally. Similarly, according to Usher and Holdsworth following him, Coke cowtowed to King James but lived to continue his struggle on technical grounds in Common Pleas. Moreover, he completed his texts which became the canon after his death.

These texts and countertexts provide an interesting context for asking what the respective places of myth and history are in the building of law. It is important to note that from an "inside" perspective it is Coke's report not Boswell's letter that is the "source of law", the "privileged" text, the citation for the future. From the "inside" perspective of Jewish law it is the Talmud not Josephus that is the privileged text. History certainly should provide cold water to throw upon any overzealous inclination to read these canonical texts uncritically. But the complex and circuitous paths of history ought not be permitted to obscure the proper destination of our journey. It is the canonical myths that supply purpose for history. They are the stories we would write and would live if we could. If we could we would, as judges, be the Lord Coke of the Reports, the Simeon b. Shetah of tractate Sanhedrin. The legitimating objective of jurisdiction, these canonical texts proclaim, is prophetic not bureaucratic. As a judge, one must be other than the King not because of the need for specialists in dispute resolution, but because of the need to institutionalize the office of the Prophet who would say to the King, as Nathan said to David, "You are that Man"; As Simeon b. Shetah said to Yannai, "Stand! before He who spoke and the World

37. JOSEPHUS, supra note 22, at 176: "[Herod] held him in the greatest honour, both because of his uprightness and because when the city was later besieged by Herod and Sossius, he advised the people to admit Herod. . . ."
38. See Usher, supra note 29. See also HOLDSWORTH, 5 HISTORY OF ENGLISH LAW 430-31 (1903).
39. II SAMUEL, ch. 12, v. 7.
was created”; As, Coke said to James I, “... under no man, but under God and the Law.” For that ultimate purpose—speaking truth to power—there must be a jurisdiction of the judge which the King cannot share.

At the moment the judge so speaks—if he so speaks—he is naked. Much, perhaps in one sense, all, of the complexity of jurisdictional lore from ancient times to our own day arises from a contra-motif produced in the tales through the awefulness of that very realization when it comes to both Judge and King. If the judge does not call the King to account—if the King is not judged—then the judge will not stand there, as Nathan, as Simeon, as Edward Coke, stripped of institutional protection against the power that ordinarily stands behind the Court. Prudential deference, thus, is the great temptation, and the final sin of judging.

In both the historical context for Prohibitions del Roy and in the case of King Yannai/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. It may be that Lord Coke would have produced a greater gesture if we were left in no doubt as to his standing tall before the King. It may be that, in fact, he kissed the royal feet, that gesture rescued both the author of his great texts and the texts themselves from destruction. We can never be sanguine about the capacity of courage to rescue itself. Still, the gesture of courage is the aspiration, perhaps fabricated by Coke, certainly rescued in the talmudic account by a deus ex machina—the Angel Gabriel, himself. Nonetheless, were the gesture and aspiration of resistance not the principal motif of these stories, we would have no reason to remember them or to make them our own. We would need no myth to prepare us to cave in before violence and defer to the powerful. We must get the relative roles of myth and history straight. Myth is the part of reality we create and choose to remember in order to reenact. It is intensely personal and committed. History is a counter-move bringing us back to reality, requiring that we test the aspiration objectively and prudentially. History corrects for the scale of heroics that we would otherwise project upon the past. Only myth tells us who we would become; only history can tell us how hard it will really be to become that.

III. BRINGING THE MESSIAH

I have spoken until now of the fearful act of speaking law to power and of the necessarily difficult tightrope act that judges must perform precisely in these most challenging of cases.

Imagine yourself a tribunal. Pretend you have an audience—a community of some sort that will recognize you as a tribunal. Now, go all
the way. What grandeur of transformation of the normative universe would you perform? Will you simply issue a general writ of peace? A warrant for justice notwithstanding facts and law? Will you order everyone to be good? Perhaps, perhaps you will judge the dead? Or even bring God as a defendant? The possibilities are endless and the question arises whether or why one should or should not try something outlandish, impossible, or just plain daring. (Now, I am not speaking of jokes. If you are to try God you must believe in God.) If law, however, is a bridge from reality to a new world there must be some contraints on its engineering. Judges must dare, but what happens when they lose that reality?

I want to explore a couple of outlandish attempts to do more with a court then perhaps we would think might plausibly be done. Among the folktales of justice are a few serious comedies as well as the tragedies we always rehearse. The first of these tales is a serious enough attempt to create a Court to bring the Messiah in 1538 in the Holy Land. The second is more recent history: the Bertrand Russell/Jean Paul Sartre Vietnam war crimes tribunal in Sweden and Copenhagen in 1967. Both of these events had much about them that cannot be captured in the idea of courts and jurisdiction. But they each had something as well which approaches an idea of jurisdiction based on "pure" legal meaning divorced from power and coercion in every way. As such they are worth studying.

A. The Renewal of Semikhah at Safed, 1538

Jewish law has traditionally distinguished between the authority exercised by ordinary judges and that exercised by truly ordained judges. Ordination, or semikhah, the laying on of hands, was a transference of authority that supposedly traced back through an uninterrupted chain to Moses, himself. Only a truly ordained judge could decide certain classes of cases, especially those involving fines or criminal penalties. Sometime, probably in the fifth century, the chain of ordination was broken. Indeed, Roman authorities had tried to prohibit semikhah much earlier, though according to the Jewish sources they never totally wiped it out. The end of the chain of semikhah, shrouded in mystery, did not bring a sudden or catastrophic change in the actual practices of Jewish courts. For one thing, most elements of criminal jurisdiction had been taken from these courts by the Roman authorities centuries before the end of semikhah. Moreover, to the extent that Non-Jewish authorities permitted a measure of criminal jurisdiction to the Jewish courts, Jewish law evolved doctrinal ways of permitting that power to be exercised

40. ENCYCLOPEDIA JUDAICA, sub nom. Semikhah.
41. B. SANHEDRIN, 13b-14a.
by judges who did not have true semikhah. Categories of penalties imposed by virtue of the exigency of the hour were exempted from the semikhah requirement. In short, as one might suppose would happen, legal fictions and categories were created to accommodate the formal requirements of the system to reality.42

The formal characteristics of the system continued, however, to have some impact. Certain penalties,—those biblically mandated—were not carried out by unordained judges. Moreover, the cosmological significance of human jurisdiction was impaired. For example, according to the Talmud, many transgressions are punishable by "excision."43 This penalty is signaled by the biblical phrase, "And he shall be cut off . . ." Rabbinic law had taught that this penalty meant that the person who transgressed would either die an untimely death or, alternatively, that he would not have a place with Israel in the world to come after the Messiah.44 But the penalty or excision could be avoided by the experience of the very this-worldly punishment of flogging for the violation in question.45 But precisely in this respect the fictions surrounding the exercise of rabbinic authority cut deeply. For the floggings imposed by the bible were among the true biblical penalties that unordained judges could not impose. On the other hand, they could impose flogging for rebellion against rabbinic authority. But were floggings imposed for rebellion efficacious in preventing the penalty of excision? Of such stuff are academic legal discussions made. And you can be sure that such academic discussions there were in the thousands. But even academic discussions may become pressing matters if conditions are ripe.

In 1492 the Jews were exiled from Spain, the home of the most important and brilliant of Jewish communities in the world. The disaster of that exile existed at several levels. Homelessness and economic losses were catastrophic. Cultural loss was equally great as the dominant scholars and artists of the Jewish world lost their communities and tried to start afresh as refugees and wanderers. If communities in Turkey and the East profited greatly from the dislocation, it was at a great cost to those who were themselves dislocated. Among the refugees were many who had undergone at lest nominal conversion to Christianity during the disastrous years attending the exile. Those pseudo-Christians or Maranos frequently viewed themselves as having committed a grievous

42. For an interesting compilation of these fictions and subterfuges see E. QUINT & N. HECHT, I JEWISH JURISPRUDENCE, ITS SOURCES AND MODERN APPLICATIONS, 139-213 (1980). The terms fictions and subterfuges" is mine and would not, I think be an acceptable characterization of "exigency jurisdiction" to Quint and Hecht themselves. For a much more aggressive posture on the application of exigency jurisdiction, see J. GINZBERG, MISHPATIM LE' ISRAEL: A STUDY IN JEWISH CRIMINAL LAW (Hebrew) (1956).
43. See Mishneh K'ritoth 1, 1.
44. MAIMONIDES, Mishneh Torah, Laws of Repentance, ch. 8, ¶ 1.
45. B. Makkoth, 23a-b.
sin—one punishable by excision—in the acts attending their conversion. Their attempt to find solace, or more precisely penitence, was an important phenomenon, particularly among the most religiously active and pious of the refugees. A second phenomenon of importance was the wave of Messianic anticipation that attended the disasters in the wake of the Exile.  

Both of the phenomena mentioned above raised the problem of the true status of Jewish courts and judges. The penitents needed, or so some of them thought, a tribunal that could impose upon them the true biblical lashings that would absolve them from the penalty of excision, especially now that there were signs of the coming of the Messiah. The coming of the Messiah, itself, was related to the renewal of Semikhah. For, in Isaiah, Chapter 1, we have a Messianic proof text: “I will return your Judges as of Old, your counselors as at the beginning; And (then) you shall be called the faithful city...” All rabbinic authorities agreed that the return of the judges referred to true judges: namely those ordained in the tradition that went back to Moses. The text from Isaiah thus provided an occasion for the use of law to express powerfully needs and aspirations that are not themselves necessarily legal.

The precise legal question that was raised was whether it was possible to reconstitute semikhah—true ordination—once it had been lost, as all agreed it had been, long before the sixteenth century. For the position that such a bold act of jurisdiction creation was possible there was the word of the greatest of medieval Jewish authorities, Maimonides, himself. There were two texts in the Maimonidean corpus in which the issue was addressed as a legal question. In Maimonides’ Commentary on the Mishnah, written while Maimonides was a young man and completed in 1168, the Great Eagle wrote that if all the sages of the Land of Israel should agree to reinstitute semikhah and should all agree on one of their number to be the head of the academy, then that person would be truly ordained and would have the power to pass on the ordination to others.

46. In particular, there was a major Messianic anticipation surrounding the life and martyrdom of Solomon Molcho (1500-1532). Molcho, himself, was a reconverted Marrano. He had predicted that a Messianic event would occur in 1540, and many of his followers believed he had been miraculously saved from the stake in 1532. For the Messianic background to the Safed events, see, e.g., R. Werblowsky, Joseph Karo, Lawyer and Mystic, 97-99 (1976); Y. Maimon Hidush Ha Sanhedrin Be Medinnatenu Ha Mehuadeseth (1967). See also Encyclopedia Judacia, sub nom. Molcho, Solomon.


48. For examples of law as a medium of expression, see Cover, supra note 11, at 8.

49. Maimonides, Mishneh Commentary, Sanhedrin, I, 3: “And I reason that if there be agreement from all the students and sages to appoint a man of the Academy—that is that they make him Head—on condition that this be in Israel—then behold that would make that person ordained and he could ordain whomever he wished.”
In his great code, the Mishneh Torah, written in 1180, Maimonides takes a somewhat more equivocal position:

It seems to me that if all the sages in the land of Israel agree to appoint judges and to ordain them then they would thereby be ordained and could judge matters of fines and could ordain others. . . . And the matter requires reflection.\(^5\)

These texts suggested a blueprint for the reinstitution of ordination, even if it was not clear what the reflection on the matter would yield. Maimonides, himself, reasoned that there had to be a formal, legal process for reinstitution of semikhah, in part because he was not prepared to take an apocalyptic perspective on Messianism. Indeed, Maimonides held that the Messiah himself could do nothing against the law. He would have no power to change or transform the law, but only to oversee its more perfect implementation. Thus, it was necessary that the verse “I will renew your judges . . .” be amenable to realization without postulating any extra-legal act by the Messiah or by God.\(^5\)

Maimonides' texts and the texts surrounding the renewal of Semikhah in Safed leave little doubt that for this legal civilization “true jurisdiction” was a sacred aspiration, a part of Messianic fulfillment. The justice that was rendered as part of their daily lives—and these Rabbis were all judges in their communities—was an inadequate and pallid reflection of the justice that could be rendered by true courts. The active approach to Messianism taken by many in the generation after 1492 included the view that those acts which were necessary preconditions to the Messiah which could be done by human beings should be done by them to hurry the Messiah on his way. Among those acts was the renewal of Semikhah—the return of the Judges.\(^2\)

By the 1530's there was a geographic center to the Messianic yearnings, to the Kabbalistic approaches to manipulation of the cosmos and to the legal scholarship that in Judaism had never been divorced from the esoteric approaches to religion. That center was Safed, a small city in the Galilee. There probably had been speculation and preparation for a renewal of Semikhah in Safed for a year or two prior to 1538.\(^3\)

\(^{50}\) MAIMONIDES, MISHNEH TORAH, LAWS OF SANHEDRIN, ch. 4, ¶ 11.

\(^{51}\) MAIMONIDES, supra note 49. Maimonides' reasoning in this respect led later commentators to engage in elaborate textual exegesis to determine whether there were proof texts for a scenario in which Maimonides' requirement for a return of judges without abrogating the law could be satisfied without also postulating some concrete legal act for reinstating semikhah. See, e.g., the commentary of Yom Tov Heller on Mishneh Sanhedrin I, 3 (Tosephoth Yom Tov) suggesting that Elijah the Prophet who undoubtedly has Semikhah will precede the Messiah and will ordain the judges.

\(^{52}\) On the connection between Messianism and the renewal of Semikhah see R. WERBLOWSKI, supra note 44, at 122-25.

\(^{53}\) On Berab's role in creating the academy and its spirit, see Dimitrovsky, Rabbi

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50. MAIMONIDES, MISHNEH TORAH, LAWS OF SANHEDRIN, ch. 4, ¶ 11.

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52. On the connection between Messianism and the renewal of Semikhah see R. WERBLOWSKI, supra note 44, at 122-25.

53. On Berab's role in creating the academy and its spirit, see Dimitrovsky, Rabbi
Berab, the dominant scholar in the town, seems to have attempted to create an academy of colleagues that enacted his vision of what the Great Sanhedrin had been and would be. Berab was able to mold a community out of such great and often conflicting figures as Joseph Karo and Moses b. Isaac Trani (The MaBIT). While we do not know a lot about the communal processes that led up to the fateful renewal of Semikah, we can guess that there must have been an intense interpersonal atmosphere of moral energy and collegial pride to produce such an act. For, the act was an act of supreme juridical chutzpah (nerve). Rabbi Jacob Berab, the head of the Academy in Safed, the acknowledged leader if not the acknowledged master among them, was made the head of the academy as outlined by Maimonides and was given Semikhah. The sages of Safed were unanimous in their appointment of Berab and in their intent to renew Semikhah. They proclaimed their act through a message sent to the sages of Jerusalem through one of their number. In the message sent to Jerusalem they also purported to confer upon the leader of the sages of Jerusalem, Rabbi Levi Ibn Habib, ordination by virtue of the new authority of Berab.

The missive to Jerusalem was, of course, necessary from two perspectives. First, Maimonides had written of the necessity for the consent of all the sages in Israel. Outside of Safed, which was by the 1530's the dominant community in Israel, Jerusalem was the only town in the holy land which had a community of scholars worth noting. At the very least, the consent of Ibn Habib and of his colleagues appeared necessary to follow the outline that Maimonides had left. Quite apart from the legal validity of the acts in question without the assent of the Jerusalem sages, was the political force of the failure to secure their approval. It was hardly likely that the rest of Judaism would take the Safed experiment seriously without such assent.

In fact, Ibn Habib considered the missive from Safed and quickly concluded that it had no basis in law according to the normal canons

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Ya'akov Berab's Academy, 7 SEFUNOT, ANNUAL FOR RESEARCH ON THE JEWISH COMMUNITIES IN THE EAST, 41-102 (1983). See also R. Werblowski, supra note 44, at 125.

54. On the later conflicts between Karo and Trani see Dimitrovsky A Dispute Between Rabbi J. Caro and Rabbi Moshe Trani, 6 SEFUNOT 71-134. (1962).
55. See Dimitrovsky, supra note 50.
56. The messenger was R. Solomon Hazzan or possibly Hasson.
57. The proclamation of Semikhah and the polemical literature between R. Levi Ibn Habib and R. Jacob Berab were collected by Ibn Habib and published by him as a sort of appendix to his responsa. It has become known as Kunteres Ha Semikhah and may be most conveniently found as a separately numbered addendum to She'eloth UTeshuvoth HaRaLBaHI reprinted, Jerusalem, 1975. Two additional items in the controversy have been found and published by H. Dimitrovsky. 10 SEFUNOT, 113-192 (1966). These documents are also included in the modern reprint edition. Some of the documents are also reprinted in Y. MAIMON, supra note 46.
of standard legal reasoning. A war of pamphlets ensued between Berab and Ibn Habib with some assistance from others on both sides. Eventually, a request for a formal opinion was also sent to Rabbi David Ibn Abi Zimra (RaDBaZ), one of the great authorities of the time, then residing in Egypt. He sided with the sages of Jerusalem and, by his own account, sent them a responsum denying the power to renew semikhah.58

We can hardly ignore the fact that for the Rabbis of Safed this was not a case of standard legal reasoning. Indeed, the most eloquent testimony to this fact is a "dog that didn’t bark." Rabbi Joseph Karo was, as I have said, among the academy that conferred semikhah on Berab. Moreover, he, himself, was one of four disciples of Berab who received semikhah from him when he had to leave the country a year later. Finally, we know that Karo used the authority of Semikhah he had received to ordain still a third "generation" of sages, his disciple Moses Alshekh.59 None of this would be surprising in itself. However, in all of Karo’s large legal corpus there is very little that indicates his opinion on the validity of this audacious act. Indeed, Karo wrote a commentary to the Mishneh Torah of Maimonides in which there is a gloss to practically every legal provision in the sections covered by the commentary. The provision in which Maimonides makes his creative and by no means uncontroversial suggestion draws no substantive comment or expression of approval from Karo. It is almost as if Karo managed to keep his legalistic oeuvre mentally separated from this act, the reasons for which were not standard legal reasoning but the necessity to hasten the Messiah.60

There is in the Act of Safed, a daring commitment and a risk of madness. The daring commitment is in this: One of law’s usual functions is to hold off the Messiah. Messianism implies upheaval and fairly total transformation. Law ordinarily requires a cautious discernment among commitments: some of these we are prepared to undertake now

58. See gloss of the RaDBaZ, in MAIMONIDES, supra note 47 C.4, ¶ 11 (printed ad loc. in standard editions).
59. On Karo, see R. WERBLOWSKI, supra note 44, at 122-29. On Alshekh, see PORGES, INTRODUCTION TO SHE 'ELOTH UTESHUBOTH MAHARAM ALSHEKH (1982).
60. R. WERBLOWSKY, supra note 44, at 124. There are several references, sometimes oblique, to the Semikhah incident in the strange work, Maggid Mesharim, a sort of mystical diary attributed to Karo in which the Mishneh personified speaks to and through Karo. The authenticity of the attribution was long in doubt though Werblowski has established the work as Karo's to the satisfaction of those competent to judge (of whom I am not one). Id. ch. 2-3. One must note that the Kesef Mishneh was the last of Karo’s major works to be completed and he must have looked back at the Semikhah incident from a perspective of it having failed. On the other hand, the MaBiT in his commentary on the Mishneh Torah does explicitly relate the incident. Kiryath Sefer ad loc.
with total subordination of other values; some of these we are prepared
to undertake only after specified preconditions shall be met; and some
we are not prepared to undertake now but subject to certain prior claims;
some we are prepared to undertake only after specified preconditions
shall be met; and some we are not prepared to commit ourselves to con-
cretely though we may yet acclaim their value. The readiness to move
into a pre-Messianic mode of judicature is a readiness to dramatically
increase the range of current legal commitment. It is to evince not only
dramatic dissatisfaction with the world as it is, but a looming respon-
sibility for drastic change. Now the natural understanding for a Court
confronting a gap between what is affirmed as right and the world as
perceived, is that the world will be changed. Courts exercise power to
that end. But we know from the study of failed Messiahs that the failure
of inflated expectations may entail complex compensations in the percep-
tion and understanding of a reality that cannot be brought to coincide
with the demand made upon it. The risk, in short, is that the gulf be-
tween the redeemed world and the unredeemed will be bridged not by
our committed practical behavior, but by our “inner life”—our spiritual
and psychological realities. The Safed which was to have been the home
of the Great Court or Sanhedrin became the home of Lurianic Kabbalah,
increasingly spiritual and esoteric; psychologically demanding; and power-
fully expressive of the chasm between the unredeemed fractured world
of mortal human kind and the hope and vision that could no longer be
grasped through law. Such powerful, expressive movements of the in-
ner life may have revolutionary potential, realized in this case in the
Sabbatian Movement in the 1660’s. But such movements, though they
bring a Messiah, do not do so through law. Sabbatai Sevi was hardly
the Messiah Maimonides, Berab, or Karo had projected for the world.61

b. Nuremberg and The Creation of A Modern Myth

As the allied victors in World War II set out to punish many of
the leaders and other perpetrators of atrocities among the vanquished
axis powers, a curious debate took shape about the character that should
be given to the punishment proceedings. Almost nobody seriously main-
tained that the principal perpetrators of the axis war policies should
 go unpunished.62 But there was vigorous debate about whether the forms

WHEN PROPHECY FAILS (1956); See, more pointedly, the complex social responses to the col-
lapse of the Sabbatian Messianic Expectations. G. SCOHEM, SABBATAI SEVI: THE MYSTICAL
MESSIAH (Werblowsky, trans) (1973) especially at 689-93. See also G. SCOHEM, THE CRYPTO-
JEWISH Sect of Donmeh (Sabbatians) in Turkey, in THE MESSIANIC IDEA IN JUDAISM AND
OTHER ESSAYS ON JEWISH SPIRITUALITY (1972).

62. See M. BELGION, VICTORS' JUSTICE (1949) for one view that no punishment was
 warranted for the “political” crimes.
of law and justice should be used. Charles Wyzanski asked of the trials:

For those who were not chargeable with ordinary crimes but only with political crimes such as planning an aggressive war, would it not have better to proceed by an executive determination—that is, a prescription directed at certain named individuals? . . .

To be sure, [such an executive determination] is also an exhibition of power and not of restraint. But its very merit is its naked and unassumed character. It confesses itself to be not legal justice but political.

Wyzanski's public challenge to the War Crimes Tribunal took place in April, 1946. We now know that a similar debate about whether to proceed in a juridical or purely political mode took place at the planning stages both within the American Administration and among the allies.

The defense of the Nuremberg Trials—a defense which Wyzanski, himself, came to accept in large part—was sounded at the outset in terms of the capacity of the event to project a new legal meaning into the future. Building a precedent which would be taken seriously was one of Robert Jackson's enunciated objectives. And his retrospective judgment on the event included that objective as one of its principal achievements. The fact of having shed blood in the juridical mode made the precedent one of special character. Wyzanski, by the end of 1946 acknowledged:

But the outstanding accomplishment of the trial, which could never have been achieved by any more summary executive action, is that it has crystallized the concept that there already

65. See R. Smith, REACHING JUDGEMENT AT NUREMBERG (1977) for debate among allies and something of the debate within the American administration. The internal debate is more comprehensively canvassed in B. Smith, THE ROAD TO NUREMBERG, supra note 60, give a summary of this material.
66. For the significance of the "aggressive war precedent" to Jackson before Nuremberg, see, e.g., Minutes of Conference Session of July 25, 1945 in U.S. DEPT. OF STATE, REPORT OF ROBERT H. JACKSON, U.S. REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIALS, 376, 383-84. (1945), Doc. 1.
67. Report to the President by Mr. Justice Jackson, October 7, 1946 in Id. at 437: "We have also incorporated its principles into a judicial precedent. 'The power of the precedent,' Mr. Justice Cardozo said, 'is the power of the beaten path,' One of the Chief obstacles to this trial was the lack of a beaten path. A judgment such as has been rendered shifts the power of the precedent to the support of these rules of law. No one can hereafter deny or fail to know that the principles on which the Nazi leaders are adjudged to forfeit their lives constitute law—and law with a sanction."
is inherent in the international community a machinery both of the expression of international criminal law and for its enforcement.  

It is important to note that while the unlawful and evil character of the Nazi War seemed self-evident to most, the "aggressive war" crime was also applied across the world in the trial, conviction and execution of Japanese defendants. In retrospect, the Tokyo tribunal judgments seem to have applied criminal sanctions to a range of conduct which was not discontinuous with "normal statecraft" in the way that Nazi policy had been.  

Finally, in a series of trials by Military Commission, American tribunals undertook to punish Japanese General Officers for atrocities committed under their command on a theory of command responsibility which was breathtakingly broad and, as applied, seemed to some almost impossibly demanding.

The War Crimes tribunals of 1946 and the Military Commissions that interpreted command responsibility in 1945 employed the forms of jurisdiction in the interests of power. They were, in our typology, instances of Kings using judges. That, indeed, was the essence of the critic's case. But these were also instances of judges using Kings. It is true that the particular proceedings at Nuremberg and Tokyo were limited to trials of axis defendants. But, the precedent that Jackson believed he was creating and that Wyzanski came to accept as a justification for the Trial was one which could not be so circumscribed.

As a matter of doctrine, the judgments at Nuremberg and Tokyo and the Yamashita enunciation of command responsibility did become part of the law of war of the United States of America. However, the controversy about the trials in 1946 had not been so much a controversy over doctrine as one over jurisdiction and its exercise. The issue was not so much whether to make "law" as it was whether to make a Court. In making the Court in 1946 the interests of judges and of Kings converged. What would happen when they came to diverge?

The Vietnam War, twenty years after Nuremberg, created a protracted and complex case study of the life of legal ideas when they come to diverge from the exercise of power through state institutions. Millions of Americans took the Nuremberg principles as their guide for conduct in opposing the Vietnam conflict and in legitimating their large scale opposition to a national war. Those principles were particularly well-

68. C. WYZANSKI, JR., Nuremberg in Retrospect in The New Meaning of Justice, 137, 144 (1966).
suited for legitimating opposition without recourse to alternative loyalties (the old treason rubric) and without requiring any ideology of interna-
tionalism (such as WW I pacifist socialism). Moreover, once certain fac-
tual premises were accepted, the Nuremberg principles provided the
basis for an obligation to oppose such a war.

There were a variety of texts for this application of principle. Richard
Falk and Telford Taylor wrote major works legitimating the comparison
of Nuremberg to Vietnam.\(^2\) Taylor's small book was particularly impor-
tant because of the weight of his own person—a chief prosecutor at the
second round trials at Nuremberg itself.

With a few lonely exceptions that I shall not go into detail about
here\(^3\) the official courts of the United States, when confronted with a
variety of challenges to the Vietnam War in terms of the Nuremberg
principles, refused to challenge power with law. The courts played a
deferece game, averting their eyes from the wielders of violence like
the sage colleagues of Simeon b. Shetah.\(^4\) Can we expect more from
the protected holders of life tenure? Is one of the preconditions for be-
ing given such a job the expectation that one will not take advantage
of it to seriously discomfort the wielders of power?

The gesture of speaking truth to power was not often made within
the official court system; but, it was inevitable that someone would think
of institutionalizing the extraordinary popular feeling that Nuremburg
was in fact applicable through creating a “court” just as the victorious
powers had done in 1946.

In 1967 events took place first in Stockholm, then in Copenhagen
which purported to be an “International War Crimes Tribunal.”\(^5\) The
tribunal was under the “Honorary Presidency” of Bertrand Russell and
the “Executive Presidency” of Jean Paul Sartre.\(^6\) There were no in-
dividual defendants. The tribunal purported to adjudicate certain ques-
tions about the United States—Has the government of the United States
committed acts of aggression against Vietnam under the terms of inter-


\(^{73}\) For an account of the exceptions and of the rule see BANNAN & BANNAN, LAW,
Taylor, it should be noted, did feel the Nuremberg principles were directly relevant to
Vietnam and argued eloquently that we should learn that lesson, but he did not think
the domestic tribunals of the United States could or should stop the war. See T. TAYLOR,
supra note 68, at 120-21. The author of this article has taken the position since 1968
that whether or not they could have stopped the war, judges should have removed
themselves completely from the apparatus of complicity. See Cover, Book Review 68

\(^{74}\) See Cover, supra note 73; the final and most grotesque instance of this aver-

\(^{75}\) See AGAINST THE CRIME OF SILENCE, PROCEEDINGS OF THE INTERNATIONAL WAR
CRIMES TRIBUNAL (J. Duffett ed. 1968).

\(^{76}\) Id. at 17.
national law?—about the conduct of the war; and about the complicity of other governmennts. There can be little doubt that the tribunal passed a judgment that was in a sense a foregone conclusion. There can also be no doubt that the tribunal was understood to be a tribunal manqué by the very organizers themselves. They disclaimed any intent to bring to justice or punish the perpetrators of the acts they condemned. Yet, the event took the form of a trial and that form was not accidental. It did have force to others as well. The French government denied to some participants the visas necessary to let them convene on French territory for the trial, thus requiring it to be moved to Stockholm. DeGaulle wrote to Sartre that:

Neither is it [the right to hold the tribunal in France] a question of the right of assembly nor of free expression, but of duty, the more so for France, which has taken a widely known decision in this matter [of opposition to the war] and which must be on guard lest a state with which it is linked and which, despite all differences of opinion, remains its traditional friend, would on French territory become that subject of proceedings exceeding the limit of international law and custom. Now such would seem to be the case with regard to the activity envisaged by Lord Russell and his friends, since they intend to give a juridical form to their investigations and the semblance of a verdict to their conclusions. I have no need to tell you that justice of any sort, in principle as in execution, emanates from the State.

DeGaulle thus recognized a kind of force to the tribunal as such in denying it a French location. Needless to say, Sartre did not accept the characterization of the exclusive role of the State in justice which DeGaulle asserted. But in his answer to DeGaulle he went somewhat further than nonacceptance. He also answered the question of the mandate by which the tribunal created its own jurisdiction over the matter. In this Sartre recognized and quite correctly delineated a relation between the tribunal and the nonaction of the official world of law.

There was Nuremburg, of course, but after having enforced the laws of the conqueror on the conquered—just laws, for once—the court was quickly disbanded by its creators for fear that one day they might find themselves brought before it. . . .

77. "At no time did we maintain that the Tribunal consisted of men who were agnostic about the war in Vietnam. On the contrary, we proclaimed our conviction that terrible crimes were occuring. . . ." Id. at 7. (Forward by Ralph Schoeemann).

78. Opening statement of Jean Paul Sartre: "We are powerless: it is the guarantee of our independence. . . . What is certain, in any case, is that our powerlessness . . . makes it impossible for us to pass a sentence." quoted in id. at 43.

79. Letter from DeGaulle to Sartre, April 19, 1967 cited in id.
Why did we appoint ourselves? For the precise reason that no one else did. Governments or peoples could have done it. But governments want to retain the ability to commit war crimes without running the risk of being judged; they are therefore not about to set up an international body responsible for judging them. As for the people, save in time of revolution they do not appoint tribunals; therefore they could not appoint us.80

Sartre expressed some hope that the tribunal either continue or be a precedent for similar bodies to take cognizance of other war crimes around the world. But the important thing to note here is that the act of utopian jurisdiction-making was, in simple terms, an anarchist variant of a state institutional response. For Sartre it is perhaps second best. But any response, whether by the courts of states, revolutionairy tribunals, or the Russell tribunal would share the legal meaning created still earlier by the primal act of Nuremburg. It is an irony of the history of this age that Nuremburg—an act often characterized as a fig leaf for naked power, bore as offspring the attempt to empower the fig leaf standing alone. The “lynching party” of Robert Jackson, to use Hugo Black’s phrase becomes Lord Russell’s affront to the dignity of the United States which France would not abide—an affront that had the juridical defects not of a lynching, but of a tea party.

IV. CONCLUSION

The Russell/Sartre tribunal, like the Sanhedrin that R. Jacob Berab tried to set up, was a philosopher’s realization of an ideal type. But both “Courts” refrained from acts that might have tested definitively their capacity to transform their worlds. Had the Russell/Sartre tribunal purported to license or solicit political assassination against particular defendants it would certainly soon have confronted a test in blood concerning the legitimacy of the “trial” and conviction of the defendants. For reasons of principle as well as prudence the “Court” took only actions which could—in a liberal democracy—be characterized by others not as a “Court” but as dramatization, or instruction. Berab and the elders he ordained in Safed never acknowledged any defect in their ordination. But, they, too, so far as we know, refrained from taking specific action that would test either world Jewry’s view of the legitimacy of their status or the Turkish overlord’s authority. They used their “ordination” but probably only for purposes for which the defective, routine ordination of ordinary Rabbis would have sufficed.

The caution which the Utopian jurist exercises in this regard is parallel to the caution that the state’s judge exercises before the King.

80. Id. at 33.
Both thereby maintain the connection between law and reality. Both risk losing law to the overpowering force of what is and what is dominant. Integrity in both kinds of judges is the act of maintaining the vision that it is only that which redeems which is law.