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COMMAND AND CONSEQUENCE: REASSESSING KING DAVID'S MILITARY DECISIONS IN THE UURIAH AFFAIR - A LEGAL AND ETHICAL ANALYSIS IN THE CONTEXT OF MODERN LEGAL THEORY

Jonathan Hasson, Oded Mudrik,** & Abraham Tennenbaum****

ABSTRACT

This study critically reevaluates King David's command in 2 *Samuel* 11 and 12 to place Uriah the Hittite in the battle's frontlines, resulting in his death, through the contemporary lens of military law and ethics. By juxtaposing the ancient narrative with modern legal doctrines, it investigates the complexities of command responsibility and the intersection of personal motives in military orders.

Focusing on the interplay between David's personal entanglements with Bathsheba and his official capacity as a military leader, the analysis navigates the ethical quandaries and legal

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ramifications of his decisions. This piece methodically dissects the Biblical text and contemporaneous legal principles, revealing a multifaceted perspective on military command, liability, and the moral burdens of leadership.

The core argument posits a nuanced understanding of David's command, balancing the exigencies of military necessity against the backdrop of personal motivations. It further extends the discussion to the modern context, drawing parallels with current military leadership challenges and the imperative of ethical decision-making.

In conclusion, the article underscores the perpetual relevance of these ancient dilemmas, offering insights into the ethical and legal underpinnings of military leadership across eras. This work not only contributes to the discourse in Biblical legal studies but also enriches the broader understanding of law, religion, and ethics in the context of military command.

I. INTRODUCTION

In the annals of legal and ethical discourse, few stories resonate with the complexity and depth of the Biblical account of King David, Uriah the Hittite, and the ensuing moral and legal fallout. This narrative, while ancient in its origin, provides a fertile ground for contemporary American legal analysis, particularly in the context of military law and ethical leadership. This article seeks to explore the dimensions of this narrative through the prism of modern American and Israeli legal principles, focusing on aspects of command responsibility, the boundaries of lawful orders in a military context, and the intricate relationship between personal ethics and public duty.

As we delve into this historical episode, we aim to uncover the layers of legal implications relevant to today's American jurisprudence. The Uriah incident, set against the backdrop of ancient Israel's monarchy, presents a scenario replete with issues pertinent to modern military and political leadership in the United States. These include the ethical dilemmas faced by those in power, the legal ramifications of command decisions, and the pursuit of justice within a hierarchical structure.

This analysis is more than a mere academic exercise; it is a critical examination of how age-old moral quandaries and legal challenges continue to shape and inform contemporary American legal thought and practice. By placing King David's actions within the framework of American military law and leadership ethics, we confront questions of accountability, the limits of authority, and the enduring struggle to balance personal morality with public responsibility. Thus, this article not only revisits a pivotal moment in Biblical history but also engages with ongoing debates in American legal circles about the nature of leadership, the scope of legal duty, and the pursuit of ethical governance in complex organizational settings.

By dint of his personality, feats, and comportment, King David is one of the most significant personalities in the Bible. One may debate his importance relative to other cardinal figures, such as the three Patriarchs (Abraham, Isaac, and Jacob), Moses, and Joshua. It is indisputable, however, that in terms of the breadth and extent of writing invested, David is the most popular figure in Scripture.¹ There

¹ In a quick Hebrew search, the name David (appearing in Scripture as דָּוִד in the First Prophets and as דָּוִד in Chronicles) appears 1,075 times, far exceeding mentions of Moshe (Moses), 769 in the entire Hebrew Bible, and Abraham, 245 times (both in

is no other Biblical hero of whose life we know so much. His filial, marital, and paternal relations, as well as those with his soldiers and his enemies, are all described in minute detail and not always sympathetically. The Biblical account of David portrays a monarch who fought valiantly and tenaciously, loved madly, played music skillfully, ruled effectively, stayed only one step ahead of death all his life, and nevertheless, against all odds and predictions, died placidly in a bed of plain old age.

Despite all this copious information, however, the tableau produced by the details is neither cohesive nor harmonious. It yields the fascinating picture of a man of contradictions and contrasts that do not always settle well—a tough and cruel warrior, a superb bureaucrat and administrator, a devoted father who pampers his children disproportionately, an adventurer who takes wholly irrational risks, a romantic sweet of the lyre whom the daughters of Israel court, and so on and so forth.

The contrasts among the profuse particulars of this colorful personality stir and fascinate almost all students and scholars of the Bible. Thus, it is no wonder that each and every event in David's life has drawn keen attention and interest over the generations. Artists, rabbis, clerics, authors, intellectuals, commentators, columnists, and pundits have read and interpreted the relevant scriptures each to the best of their comprehension. David cannot wag a finger, it seems, without attracting masses of commentaries.²

Among these episodes, the incident of David and Bathsheba stands out—the famous affair in which David arranges the death of Uriah the Hittite, one of his military commanders and the husband of Bathsheba, in order to marry her.³ For the readers' convenience, here is gist of the matter in brief: Uriah is a senior officer in the unit known as *gibore David* (David's warriors). Thirty-seven military men have

his original name, אַבְרָם, Abram, and as אַבְרָהָם, Abraham). We should add, however, that the name דָּוִיד is often used as a toponym (City of David, David's Tombs) or in reference to the Davidic dynasty (the House of David).

² Any search for the phrase "King David" in any search engine will result in hundreds of thousands of sites where this phrase appears. A Google search conducted on August 13, 2002, resulted in 187,000 sites in which the expression "King David" appears. Since search engines do not cover everything, the actual number is probably larger.

³ 2 Samuel 11:2-26. Biblical quotations here and hereinafter are sourced to the *New Jewish Publication Society of America Tanakh* as found at SEFARIA, www.sefaria.org. (last visited Nov. 21, 2024).

the privilege of being commemorated by name in the Bible.⁴ Bathsheba is mentioned mainly as “very beautiful.”⁵ She is the offspring of a pedigreed, high-ranking family.⁶ Her father, Eliam, is apparently one of “David’s warriors” himself. Her grandfather, Ahithophel the Gilonite, was one of David’s senior advisers, known mainly for his role in Absalom’s insurrection.⁷ According to the Biblical account, Uriah is fighting in David’s campaign against Rabbah, capital of the Ammonites, as David’s tryst with Bathsheba takes place.⁸ Bathsheba becomes pregnant and apprises David of the complication that has arisen.⁹ David acts with alacrity. He sends an instruction to Joab, his general, that, according to conventional wisdom, includes an order to the fighters on the front to abandon Uriah and allow him to face the enemy alone so that the Ammonites will kill him.¹⁰ Ultimately, Uriah is not forsaken to the enemy but does perish in combat.¹¹ David marries his widow, Bathsheba.¹² The Prophet Nathan approaches David and reproaches him for his crime, using the famous parable of the poor man’s lamb.¹³ David admits his wrongdoing at once and is punished by God in the various dire ways that are prescribed for this sin.¹⁴

David’s transgression, starting with adultery and culminating in Uriah’s ostensible manslaughter, has reverberated in many ways and attracted multiple interpretations in midrash (Jewish homiletic/exegetic teachings), literature, and creative art. There is no

⁴ 2 *Samuel* 23:8-39.

⁵ 2 *Samuel* 11:2.

⁶ Some disagree about this, too, of course, even claiming that only due to Bathsheba’s non-Israelite status does David dare to act this way. See S. Yevin’s remarks in Gutman, Beit Mikra, *The Poor Man’s Ewe Lamb*, 18-19 J. STUDY BIBLE & ITS WORLD, 1964 4, 13 <https://www.jstor.org/stable/23499109>.

⁷ See 2 *Samuel* 23:34 (identifying Eliam as the son of Ahithophel). Indicative of Bathsheba’s fame is the passage: “and the king sent someone to make inquiries about the woman. He reported, ‘She is Bathsheba daughter of Eliam [and] wife of Uriah the Hittite.’” 2 *Samuel* 11:3, which suggests amazement that David is unacquainted with her.

⁸ 2 *Samuel* 11:1-6.

⁹ 2 *Samuel* 11:4-5.

¹⁰ 2 *Samuel* 11:14-15.

¹¹ 2 *Samuel* 11:16-17.

¹² 2 *Samuel* 11:27. Below, we adjust the factual account to allow it to underpin the conclusions that the facts seemingly warrant.

¹³ 2 *Samuel* 12:1-9.

¹⁴ 2 *Samuel* 12:10-14.

doubt that one may read the story in varied ways that deliver different if not diametrically opposed emphases.

In this article, we study the story from a narrow legal point of view to probe the question of David's *criminal* liability.¹⁵ Our contemplation is legal only; it skirts moral questions that fall short of conduct that constitutes a criminal offense. We will try to determine through the lens of criminal law—including today's military criminal law—whether David committed an offense of some kind that led to or caused Uriah's death. In other words, we will put David on "trial" and ask, in accordance with the rules of criminal law, evidentiary law in criminal cases, and today's penal law, whether sufficient evidentiary validity and grounds exist to hand down a criminal conviction against the monarch in this affair.¹⁶

Many in the past, and presumably today as well, are willing to invest much effort in cleansing David's name under the circumstances described in Scripture. This is mainly because, for religious or other reasons, they see David as emblematic of an ideal personality that does not fit a negative depiction at all. Contrarily, some held and still hold the diametrically opposite view, seeking to drench David in a negative light.¹⁷ Both ostensibly adhere to the factual Biblical account but each lends itself to a view tailored to their opinions and beliefs.

This legal analysis is unique in the analysts' willingness to shield themselves against the influence of biased opinions, outlooks, and beliefs and in their ability to examine extraneous considerations pertinently and filter them out.¹⁸

A salient example of a topic that does not affect our analysis of criminal liability is the relationship between Uriah the Hittite and his wife Bathsheba before David's interference. It may be argued, and

¹⁵ Research into Biblical law is an ancient vocation. See, e.g., Alexander Rofer, "*Me-hqar ha-mishpat ha-miqra'i le-or ha-shita ha-filologit-historit*," MISHPATIM 13, 477–96 (1984) (Isr.).

¹⁶ The examination that follows is on Israeli substantive and procedural law. Since the crimes of willful manslaughter and conspiring, attempting, and soliciting to commit them are *mala in se*, they are probably included in the penal code of every legal system in the Western world.

¹⁷ DANIEL FRIEDMAN, DID YOU KILL AND ALSO INHERIT: LEGAL, ETHICS, AND SOCIETY IN THE BIBLICAL STORIES 117 (Dvir Publishing House, Tel-Aviv, 2000).

¹⁸ It is commonplace that unrecognizable considerations in the legal commentator's hands pique the public's curiosity and even lend them a large measure of persuasiveness. A murderer's motives, for example, are of no evidentiary significance to him or her, but the existence of a motive may strongly convince the public that the motive belongs to the murderer.

some have suggested, that their relationship was broken by then in any case—that their marriage was on paper only. One may go so far as to argue that Uriah, for his own reasons, refused to give Bathsheba a *get* (Jewish writ of divorce) and preferred to embitter her life as best he could. “Get refusers,” then as now, habitually snooped on their spouses. Perhaps it was due to this shaky relationship that Uriah refrained from going down to his house the night he returned to David from the battlefield. From this point of view, Bathsheba emerges as a suffering, if not battered, wife who is badly oppressed by her husband. Her affair with the king gives her a ray of light and her only hope of release from her wretched plight.

One may, of course, argue in the exact opposite manner. Bathsheba and Uriah led happy and placid lives together. The king’s meddling, in exploitation of his authority and status, destroyed their marriage and ended Uriah’s life. Although the Biblical account reports no resistance whatsoever on Bathsheba’s part, the balance of forces is unequal. David is a male well versed in the ways of the world; his power and status may overwhelm Bathsheba, a guileless young woman whose husband is away. It is a bidimensionally abject exploitation of power of position: of innocence and trust and of Uriah’s absence at war, risking his life for the king.

Another moral question that does not project directly onto the legal analysis that follows is whether it was only by chance that Bathsheba had gone bathing as David strolled on the roof of his palace. Might it have been a setup? In the traditional literature, views on the matter are divided. In one view, the affair is seen as purely random:

Rav Yehuda says Rav says:

A person should never put himself to the test, as David, king of Israel, stirred himself to be tested and failed. . . . Bathsheba was shampooing her head behind a beehive. Satan came and appeared to [David] as a bird. [David] fired an arrow at [the bird], severed the beehive, [Bathsheba] was exposed, and David saw her.¹⁹

Another midrash (exegetic text) differs diametrically:

Every day [Bathsheba] would don pieces of lavish clothing, a thousand in the morning and a thousand in the afternoon and a thousand at twilight, and would

¹⁹ BABYLONIAN TALMUD, SANHEDRIN 107a.

adorn herself with a hundred and fifty perfumes and wrap herself in a thousand and eighty glittering shawls of gold, and would stand across from David so that he would see her and be pleasant to her. And when she saw he was not being pleasant, she climbed to the roof and sat there naked and bathed on the roof in the nude.²⁰

The nature of Uriah's relationship with Bathsheba may have moral, literary, sociological, feminist, and religious importance but should have no legal effect.

Attempts to examine the David-and-Uriah affair from a legal standpoint have been made in various ways. In the traditional sources, David's crime is usually presented as an unchallenged fact. One legal analysis, however, undertaken in the Talmud, offers a perspective on David's innocence in reference to the acts of adultery and of murder, both capital crimes.

This midrash offers a two-tiered conclusion. At the underlying level, one assumes that Bathsheba was unmarried at the time of her encounter with David. This reasoning rests on the peremptory assumption that each House of David fighter who set out for the king's wars wrote his wife a *conditional get*—a document originating in the strict approach of the halakha toward marital law. A wife whose husband has disappeared is called an *aguna* (a “chained” woman); she may not remarry until her husband's death is confirmed. As long as the husband is alive, his wife may not remarry, even if he has vanished deliberately in order to thwart divorce.

David's soldiers wrote this document to solve the aguna problem.²¹ Men who wrote conditional *gittim* (pl. of *get*) and set out for war and vanished to an unknown fate—death, capture, or deliberate and willful escape—activate and implement the *get* by their disappearance.²² The divorce becomes valid as of the day on which the *get* was signed.²³

²⁰ LOUIS GINZBERG, BOOK A GINZE SCHECHTER (EXCERPTS FROM MIDRASH AND HAGGADAH FROM THE GENIZAH IN EGYPT) 166 (New York, 1927) (Isr.).

²¹ Unfortunately, this has become a current issue in Israel today. Given the thorny problem of accounting for missing persons in all of Israel's wars, the idea may deserve serious reconsideration.

²² The origin of the custom appears in several places in the Babylonian Talmud. See, e.g., *Ketubot 9B*, SEFARIA, <https://www.sefaria.org/Ketubot.9b?lang=bi> (last visited Nov. 21, 2024).

²³ Thus, vacillation about the exact date on which the *get* is invoked may be resolved.

The widow of a soldier killed in combat is not an aguna and does not need a get, but if her husband deposits a conditional get before heading into the battlefield, his death in war causes the get to be invoked retroactively irrespective of the circumstances of his death. Hence, once Uriah fell in battle, Bathsheba became a divorcee from the time Uriah had set out—making David's relations with her permissible and not adulterous.

The second tier rests on the definition of Uriah as a rebel against the crown, a capital offense. This statement is based mainly on Uriah's use, when speaking with David, of the expression "my master Joab."²⁴ The phrase "my master," uttered by a soldier, should denote the king, the supreme commander of the army, and no one else, even a senior commander. There is no precedent in Scripture for such brazenness, tantamount to insulting the king to his face. From this, the Talmud finds Uriah guilty of sedition. Others identify Uriah's noncompliance with David's order to go down to his house and sleep there as another act of sedition.

This midrash offers a legal solution. As such, it discusses moral questions neither in the context of David's behavior toward Bathsheba nor in the context of the circumstances of Uriah's death, including the way the ostensibly legal punishment was implemented: in a secret location and in the dark.

To our minds, this legal construct is biased and strained. There is no evidence of the custom among soldiers in David's army of writing a get to their wives as they prepared to go into battle. The types of gittim practiced at that time and their content are altogether unclear. Reliance on Uriah's words to determine his status as a rebel against the crown, liable to death, is also unsatisfactory. If so, the commentator seems to be motivated by the intention of exculpating the king.

A contemporaneous quasi-legal analysis by Daniel Friedman, relating to legal and moral issues that find expression in Scripture, reflects a bias in an opposite direction.²⁵ The commentator presents David as a skirt-chaser whose Bathsheba story is but one of many—alongside with his being a power-hungry and strength-thirsty ruler who

²⁴ "Uriah answered David, 'The Ark and Israel and Judah are located at Succoth, and **my master Joab** and Your Majesty's men are camped in the open . . .'" 2 *Samuel* 11:11(emphasis added).

²⁵ DANIEL FRIEDMAN, HA-RATSAHTA VE-GAM YARASHTA: MUSAR MISHPAT VE-HEVRA BE-SIPURE HA-MIQRA 117 (2000) (Isr.).

does not flinch from murder to get self-gratification.²⁶ He finds David categorically guilty and rules without explanation that “David’s legal liability as Uriah’s murderer is clear.”²⁷ Again, this interpretation is flawed in its failure to uphold basic elements of the legal approach. The author prejudges the outcome, presents problematic and far-from-convincing evidence, and bases and expresses his conclusions on unfounded answers to totally irrelevant questions.²⁸

Our own aim is to try to adhere strictly to the requisites, an unbiased and topical legal analysis, in the sense of “honest scales and balances”²⁹ We begin with a factual analysis based on the written account, add educated conjectures adequately anchored in criminal law, and conclude with an aggregated presentation of the legal implications of the factual foundation.

II. THE FACTUAL INFRASTRUCTURE

The story of David and Bathsheba is told in Scripture only. Were it not for the Biblical account, we would know nothing about the David–Bathsheba–Uriah triangle. Before one may base a factual infrastructure on a Biblical source, one must first clarify the reliability of such a source generally and in this matter specifically.

A. The Hebrew Bible as History, or the Historical Truth of Scripture

The question of the reliability of the Bible as a historical source has been debated tumultuously and extensively. The debate is not ours to resolve, but we can give a brief summary of where it stands and

²⁶ *Id.*

²⁷ The negative reference to David in the Uriah affair is but one of several besmirchings of the monarch. It recurs in David’s relationship with the House of Saul, between David and Michal, daughter of Saul, and David’s moves to attain power. 2 *Samuel* 6:16-23. In the Uriah affair, David’s conduct is likened to Ahab’s in the vineyard of Nabot the Jezreelite. 1 *Kings* 21.

²⁸ For a general critique of the approach of this study, which claims that factually groundless interpretation is at work, see Abraham Tennenbaum’s (brief) critique, ABRAHAM TENNENBAUM, “SEFARIM, RABOTAI, SEFARIM,” *Ha-lishqa* 55, 29 (Nov. 2000) (Isr.). For a specific criticism of Friedman’s approach to the story of Uriah the Hittite, see Nisan Ararat, “*Meser mishipati ve-meser miqra’i: ‘Al sifro shel Daniel Friedman, ‘Ha-ratshta ve-gam yarashta’*,” *BET MIQRA* C 170, 209-18 (2002) (Isr.).

²⁹ *Proverbs* 6:11.

describe its scholarly history.

The historical credibility of Scripture has been questioned for ages. Traditional commentators occasionally express divergent views by allusion.³⁰ Modern Biblical Criticism began with Spinoza and evolved in the hands of others—Witter, Astruc, Eichhorn, and De Wette, *inter alia*.³¹ The most sophisticated approach, attributed to Julius Wellhausen and widely accepted in principle, assumes that the Bible as we know it is a composite of earlier and later sources and that some of the latter are but responses to the former.³² This so-called “sources method,” invoked mainly to analyze the various origins of the Torah, views the Pentateuch as a hybrid of literary sources that were blended by a relatively recent redactor.³³

According to this explanation, Scripture at large was mainly influenced by Source D, so-called after the first letter in the Greek title of the Hebrew *Sefer Devarim*, Deuteronomy. Deuteronomy is the accepted term in Biblical research for the set of ideas, values, worldviews, and language that appears chiefly in the books of Deuteronomy, Joshua, Samuel, and Kings (with a few expansions to and impacts on other books).³⁴ Deuteronomistic historiography is attested in the late First Temple period at the earliest (seventh and sixth

³⁰ Well-known among them, for example, is that of Ibn Ezra on the verse fragment “The Canaanites were then in the land.” *Genesis* 12:6 (implying that it may not have been Moses who wrote certain passages of the Torah). See also Ibn Ezra’s commentary on *Isaiah* 40:1 (“Comfort, oh comfort My people”), which implies that someone other than Isaiah may have written it. *Ibn Ezra on Isaiah 40:1*, SEFARIA, https://www.sefaria.org/Ibn_Ezra_on_Isaiah.40.1.3?lang=bi (last visited Nov. 19, 2024).

³¹ See BRAUCH SPINOZA, *THE TRACTATUS THEOLOGICO-POLITICUS* (1670); HENNING BERNHARD WITTER, *JURA ISRAELITARUM IN PALAESTINAM* (1711); JEAN ASTRUC, *CONJECTURES SUR LES MÉMOIRES ORIGINAUX DONT IL PAROIT QUE MOYSE : S’EST SERVI POUR COMPOSER LE LIVRE DE LA GENÈSE : AVEC DES REMARQUES, QUI APPUIENT OU QUI ÉCLAIRCISSENT CES CONJECTURES* (1753); JOHANN EICHORN, *EINLEITUNG IN DAS ALTE TESTAMENT* (1787); WILHELM DE WETTE, *BEITRAGE ZUR EINLEITUNG IN DAS ALTE TESTAMENT* (1807).

³² JULIUS WELLHAUSEN, *PROLEGOMENA TO THE HISTORY OF ISRAEL* (J. Sutherland Black & Allan Menzies trans., 1885).

³³ For an exhaustive review of modern book criticism, see *Biblical Criticism*, BRITANNICA, <https://www.britannica.com/topic/biblical-criticism> (last visited Nov. 19, 2024).

³⁴ On this method, see Martin Noth, who took matters to an unconventional extreme: MARTIN NOTH, 15 *The Deuteronomistic History*, in J. STUDY OLD TESTAMENT SUPP. SERIES (University of Sheffield, 1981) (U.K.).

centuries BCE) in close connection with King Josiah's reforms.³⁵ Some even postdate parts of the Bible to the Hellenistic period.³⁶

Nineteenth-century scholars of Biblical Criticism dismissed the literal veracity of Pentateuchal and prophetic stories and saw their contents as mere retrospectives from the late Israelite kingdom period. Some denied the existence of monotheism in ancient Israel and dated its invention to after the Babylonian exile. A few even deemed the Babylonian exile but a parable.³⁷

Biblical Criticism almost totally refrained from comparing textual sources with archaeological findings, turning instead mainly to various techniques of linguistic analysis. Christian Erudites and Biblical scholars who opposed Biblical Criticism sought to use archaeology to invalidate and disprove its findings. Thus Albright, Glück, and other scholars tried to identify the historical background of, among others, the Patriarchal era, the route taken in the Exodus, the City of David, Solomon, and Solomon's reign.³⁸

This use of archaeology had elements that ran in both directions. After more than a century of excavations, the debate continues furiously. The credibility and value of the so-called historiographic segments of Scripture as reliable sources for Jewish history are fiercely disputed. It bears emphasis that the period in question is mainly that preceding the splitting of the kingdom—that of the Patriarchs, the Exodus, the Judges, and the United Monarchy (Saul, David, and Shlomo). It is universally agreed that the later one goes, the more reasonable Scripture seems as a historical source. External sources mention many kings and events that appear in the Bible but most are of relatively late provenance. The earliest source that apparently relates explicitly to Israel is the Merneptah Stele (c. 1208

³⁵ 2 *Kings* ch. 22-23.

³⁶ NOTH, *supra* note 34.

³⁷ For a general survey of Biblical Criticism, see MENACHEM SOLOVEITCHIK & ZALMAN RUBASHOV, TOLEDOT BIQORET HA-MIQRA (1925) (Ger.) (A photocopy was published by the Department of Bible at the Hebrew University of Jerusalem in 1975); ISRAEL TA-SHEMA, "BIQORET HA-MIQRA," s.v., "Miqra", *The Hebrew Encyclopedia*; YAIR HOFFMAN, SUGIYOT BE-VIQORET HA-MIQRA (Tel Aviv, Ministry of Defense, 1997); Yaira Amit, *Historia ve-ideologia ba-miqra* (in Hebrew) (Tel Aviv, Ministry of Defense, 1997).

³⁸ See WILLIAM F. ALBRIGHT, THE ARCHAEOLOGY OF PALESTINE AND THE BIBLE; NELSON GLUECK, THE RIVER JORDAN: BEING AN ILLUSTRATED ACCOUNT OF EARTH'S MOST STORIED RIVER (Jewish Publication Society of America 1946).

BCE).³⁹ Then we have the Shishak's campaign of conquest, of which the Bible reports only the part that relates to the Kingdom of Judah.⁴⁰ As time passes, we find more and more attestations of Israelite and Judean kings whom we know from the Bible. Omri, Ahab, Hezekiah, and Jehoiachin are only a few of the kings who appear by name in external sources⁴¹ Even according to the strictest of minimalists, from the ninth century BCE onward one may consider the historical sections of Scripture reasonable testimony even though, they allege, these accounts were written centuries after the events they describe.⁴²

In sum, critics of the Bible's reliability as a historical source doubt only the credibility of Biblical reportage up to the ninth century BCE or thereabouts. From then on, the Bible is a rather accurate source. The details, of course, are widely contested but this happens in any historical account. Indeed, general accuracy does not thwart controversies over the minutiae of a given event; such disputes do not challenge the credibility of the historical source. As a possible example, the Bible glorifies and extols King Hezekiah⁴³ in view of his comportment and contrastingly castigates Kings Ahaz⁴⁴ and Menashe⁴⁵ at length. Contemporaneous scholars hold that these, of all kings, were the ones who saved Judah from conquest and caused it to flourish and develop.⁴⁶ To their minds, the Biblical account was written long after the events and originates in the scribe's ideological

³⁹ An Egyptian inscription that describes the campaign of Pharaoh Merneptah, son of Rameses II, to conquer the cities of Canaan, mentions Israel. Frank J. Yurco, *Merneptah's Canaanite Campaign*, 23 J. AM. RSCH. CNT. EGYPT, 189 (1986).

⁴⁰ Nadav Na'aman, *The Campaign of Shishak to the Land of Israel in Light of Egyptian Inscriptions, the Bible, and Archaeological Findings*, 63 Zion – Quarterly for the Study of the History of Israel, 247-276 (1998),

⁴¹ ISRAEL FINKELSTEIN & NEIL ASHER SILBERMAN, *THE BIBLE UNEARTHED: ARCHAEOLOGY'S NEW VISION OF ANCIENT ISRAEL AND THE ORIGIN OF ITS SACRED TEXTS* (Free Press 2001).

⁴² Some trace this to the time of Josiah and his religious reform; a few extend it to the Return to Zion period and even later. NADAV NA'AMAN *THE PAST THAT SHAPES THE PRESENT: THE CREATION OF BIBLICAL HISTORIOGRAPHY IN THE LATE FIRST TEMPLE PERIOD AND AFTER THE DOWNFALL* (Orna Hess Press, Jerusalem 2002).

⁴³ See, e.g., 2 Kings 18-20.

⁴⁴ See, e.g., 2 Kings 16.

⁴⁵ See, e.g., 2 Kings 21:1-18.

⁴⁶ Israel Finkelstein & Neil Silberman, *Archeologia ve-miqra be-ferush ha-elef ha-shelishi: Mabat min ha-merkaz*, 100 CATHEDRA 48, 50 (2001).

and theological motives.⁴⁷ Even these scholars, however, would agree that the Biblical author was familiar with the kings, their doings, their foreign policies, and so on. For our purposes, this should suffice. Problems do arise in determining which foreign policy, and of which kind, proved to be more correct. However, if the Biblical account plainly speaks of the same king and reports the same main details of his reign, it is a reliable historical source for our purposes.

B. On the Historical Persona of King David

The European school dismisses the credibility of the Biblical account of David's existence and feats, as it does most Biblical reportage of events preceding his time. The literature refers to erudites of this school as "minimalists," in contrast to "maximalists," who see the Bible as a reflection of factual truth. One minimalist, for example, likens the David and Solomon stories to the legends of King Arthur: "In fact, the Succession Document may tell us as little of the tenth century B.C. as the *Morte d'Arthur* does of the sixth century A.D."⁴⁸ Others say the same thing differently:

None of these studies leave much room for a historical David. Although Jameson-Drake thinks of him as a bandit chief in the Judaeen mountains of the tenth century, . . . In the history of Palestine that we have presented, there is no room for a historical United Monarchy, or for such kings as those presented in the Biblical stories of Saul, David or Solomon. The early period in which the traditions have set their narratives is an imaginary world of long ago that never existed as such.⁴⁹

Most scholars, however, surmise that David and Solomon were real historical figures. Their stance received meaningful support recently when fragments of an Aramaic stele were discovered at the Tel Dan excavations, in which a king from the House of David is mentioned

⁴⁷ Disagreements about the success or performance of a given regime are natural, of course, and have been known since time immemorial. Even today, there is no consensus about the success or failure of presidents and prime ministers who wound up their terms in office only a few years ago.

⁴⁸ DONALD B. REDFORD, EGYPT, CANAAN, AND ISRAEL IN ANCIENT TIMES 308 (1992).

⁴⁹ Niels Peter Lemche & Thomas L. Thompson, *Did Biran Kill David? the Bible in the Light of Archaeology*, J. STUDY OLD TESTAMENT 16, 17, 19 (1994).

explicitly.⁵⁰ The stele, evidently erected by King Hazael of Aram to mark his feats and triumphs, generally squares with the account in the Book of Kings about the reigns of Yehoram of Israel and Ahaziah of Judah.⁵¹ The main novelty is, of course, the relatively early mention by name, of a king of Judah as being of the Davidic line.⁵² This evidence has also been contested, some holding that the expression denotes a place named Bet Dod (and not David, spelled identically but voweled differently), from which other diverse explanations have flowed.⁵³

The debate today revolves around the true extent of the Davidic and Solomonic kingdoms, assuming that one accepts the existence of a United Kingdom embracing Israel and Judah. The Bible, as we know, describes an empire of sorts that intimidated all its neighbors, from Egypt to the Euphrates. The minimalists have it that even had such an empire existed, it was small—an empire-state of sorts at the most.

Late Biblical evidence of a large Israelite kingdom appears in the Book of Ezra. Mentioned there is an accusation against the inhabitants of Jerusalem sent by “the adversaries of Judah and Benjamin” to King Artaxerxes of Persia.⁵⁴ Writing in response, the

⁵⁰ See NOTH, *supra* note 34 and accompanying text.

⁵¹ On the three stele fragments that were discovered on two separate occasions, see Avraham Biran & Joseph Naveh, *The Tel Dan Inscription: A New Fragment*, 45 ISR. EXPL. J. 1 (1995) (addressing the three stele fragments that were discovered on two separate occasions).

⁵² Some also claim that the phrase “House of David” recurs on the famous stele of King Mesha of Moab. See André Lemaire, *House of David: Restored in Moabite Inscription*, BIBLICAL ARCHAEOLOGY SOC’Y (May/June 1994) <https://library.biblicalarchaeology.org/article/house-of-david-restored-in-moabite-inscription/>.

⁵³ See Philip R. Davies, *House of David Built on Sand: The sins of the Biblical Maximizers*, BIBLICAL ARCHAEOLOGY SOC’Y (July/Aug. 1994), <https://library.biblicalarchaeology.org/article/house-of-david-built-on-sand-the-sins-of-the-biblical-maximizers/>; Frederick H. Cryer, *On the Recently Discovered ‘House of David’ Inscription*, 8 SCANDINAVIAN J. OLD TESTAMENT 3 (1994). In their defense, one should note that most presented their claims during the interval between the two discoveries. The second discovery strongly reinforces the claim that the inscription references a king of the House of David. For a summary of the various views and an additional one, see Gershon Galil, *Ha-ketovet ha-Aramit ha-malkhutit mi-Tel Dan*, TESHURA LE-SHMUEL—MEHQARIM BE-’OLAM HA-MIQRA (2001).

⁵⁴ *Ezra* 4:1. The “adversaries of Judah and Benjamin” were apparently leaders of the Jewish population who had remained in Judah and had not been exiled to Babylon. *Ezra* 4:1-6. They wished to take part in rebuilding the Temple and were turned down by Zerubbabel, leader of the return to Zion. *Id.*

monarch notes that his records have been examined and revealed that “[p]owerful kings have ruled over Jerusalem and exercised authority over the whole province of Beyond the River, and tribute, poll-tax, and land-tax were paid to them.”⁵⁵ This document shows that the Persians or, at least, the historians in the kingdom knew about the Unified Kingdom and its large scale. The opponents of this view reduce the account in Ezra to a figment of the imagination, as they do with the entire Unified Kingdom era.⁵⁶

The scholarly dispute is strongly influenced by political ideologies. The claim of nonexistence, even allegorical, of the Patriarchs, the Exodus, the wandering in the desert, the conquest of Canaan, the Judges, David, and Solomon has been invoked in the service of anti-Zionist and post-Zionist polemics⁵⁷ and, at times, for personal mudslinging.⁵⁸ The controversy also resonates widely online.⁵⁹

We do not purport to pick the winner of the dispute and need

⁵⁵ *Ezra* 4:20.

⁵⁶ For a presentation of this argument, see Philip R. Davies, *In search of Ancient Israel*, J. STUDY OLD TESTAMENT SUPP. SERIES (1994).

⁵⁷ Mazar writes: “After decades of research into the matter, a situation of pluralism and radicalization in scholars’ opinions has come about. All three currents—fundamentalists, ‘middle of the road’ researchers, and revisionists—make ample use of archaeological matter for their needs and sometimes use it uncritically and distort the conclusions they yield.” Amihai Mazar, *Al ha-ziqa ben ha-mehqar ha-archaeologi li-khtivat ha-historia shel reshit Yisrael*, 100 CATHEDRA 66-88 (2001). Zeev Herzog of Tel Aviv University contributed to the public debate by publishing the following under a somewhat sensational headline, triggering few responses. Zeev Herzog, *Ha-tanakh: En mimtsa ‘im ba-shetah*, HA’ARETZ SUPPLEMENT 39-40 (October 29, 1999); see also Yair Hoffman, *Heqer ha-historiografia ha-miqra’it: Historia, mitus u-folitiqa*, in Israel L. Levin & Amihai Mazar, *Ha-pulmus ‘al ha-emet ha-historit ba-miqra* 26-33 n.27 (2001).

⁵⁸ See Rainey’s personal attack on Philip Davies, in which he claims in effect that many of the minimalists are but charlatans: Anson F. Rainey, *The “House of David” and the House of the Deconstructionists*, 20 BIBLICAL ARCHAEOLOGY REV. 6, 47 (1994).

⁵⁹ For examples, see *King David Was a Nebbish*, SALON, <https://web.archive.org/web/20050316140159/dir.salon.com/books/feature/2001/02/07/solo-mon/index.html?pn=1> (last visited Nov 21, 2024); *Minimalism: The Copenhagen School of Thought*, PASTOR, <https://web.archive.org/web/20030618001456/www.pastornet.net.au/jmm/athe/athe0312.htm>; Thomas L. Thompson, *A view from Copenhagen: Israel and the History of Palestine*, BIBLE INTERP., <https://web.archive.org/web/20080123065317/www.bibleinterp.com/articles/copenhagen.htm> (visited on Nov. 21, 2022).

not take a stance of our own.⁶⁰ We note the existence of the controversy because the Biblical narrative and language serve us as a factual infrastructure for our conclusions. On final analysis, this article is but a “mind game” and, as such, needs no peremptory factual substantiation.

Two clarifications, however, are needed. First, as stated, we will stay within the narrow bounds of the Biblical text, and because this text tells the story in past tense, so will we. We will neither resort to Biblical commentaries or rephrasings nor compare the Biblical account with other mythological narratives near or far. Further, we may fill in the missing pieces of the factual Biblical puzzle with factual hypotheses that are reasonably plausible and somewhat anchored in the Biblical account—reasoned hypotheses that may explain the text and establish coherence among its segments. To wit, we will use only hypotheses that can cross the threshold into the criminal debate at this time and on which reasonable doubt can be predicated.

III. THE FACTS AS ELUCIDATED BY THE SOURCES IN OUR POSSESSION

The David-and-Bathsheba account appears only three times in the Bible. Two occurrences are relatively brief and deficient in detail, but nevertheless worthy of attention. The first is *Psalms* 51, introduced as “For the leader. A psalm of David. When Nathan the prophet came to him after he had come to Bathsheba.”⁶¹ In the Psalm, the author

⁶⁰ Those interested in investigating the Bible-as-history question in greater depth will find an ocean of research material on the topic. *E.g.*, Levin & Mazar, *supra* note 57. See also VOLKMAR FRITZ & PHILIP R. DAVIES, *THE ORIGINS OF THE ANCIENT ISRAELITE STATES* (Sheffield Acad. Press 1996); V. Philips Long, *Israel's Past in Present Research: Essays on Ancient Israelite Historiography*, in 7 *SOURCES FOR BIBLICAL AND THEOLOGICAL STUDY* (1999). All contain articles that present diverse views and provide references to many other sources; for two conspicuous and sometimes problematic representatives of the minimalist school. See THOMAS L. THOMPSON, *THE BIBLE IN HISTORY: HOW WRITERS CREATE A PAST* (1999); KEITH W. WHITELAM, *THE INVENTION OF ANCIENT ISRAEL: THE SILENCING OF PALESTINIAN HISTORY* (1996). For criticism of the minimalist approach, see, e.g., William G. Dever, *Archaeology, Ideology, and the Quest for an “Ancient” or “Biblical” Israel*, *NEAR EASTERN ARCHAEOLOGY* 39, 39-52 (Mar. 1998). For an attempt to set up a confrontation between the positions, see Hershel Shanks, *Face to Face: Biblical Minimalists Meet Their Challengers*, *BIBLICAL ARCHAEOLOGY REV.* 23, 26 (July/Aug. 1997).

⁶¹ *Psalms* 51:1.

(David) asks God to forgive and pardon him.⁶² The subtext here is an affair of sin and crime that seems to be known and familiar and is associated with Bathsheba. The psalm concludes with a request for atonement for something not explained in detail.⁶³

The second mention is in *I Kings* 15:3–5. The key verse discusses the behavior of King Abijam of Judah—son of Rehoboam, grandson of Solomon, and great-grandson of David—and criticizes it as a departure from the straight path:

[Abijam] continued in all the sins that his father before him had committed; he was not wholehearted with the Eternal his God, like his forefather David. Yet, for the sake of David, the Eternal his God gave him a lamp in Jerusalem, by raising up his descendant after him and by preserving Jerusalem. For David had done what was pleasing to God and never turned throughout his life from all that had been commanded him, *except in the matter of Uriah the Hittite*.⁶⁴

Here, too, David's sin against Uriah seems widely known; again, the text omits the details. Uriah appears twice on the roster of David's warriors⁶⁵ with no further elaboration.⁶⁶

The main and, in effect, the only source that describes the David-and-Bathsheba affair is *2 Samuel* 12, composed of fifty-two relatively terse verses that number fewer than eight hundred words in Hebrew.⁶⁷ The passage unfurls a human narrative of love, jealousy, betrayal, suspense, war, loyalty, *inter alia*—material from which the world's finest authors created massive books, here abridged and packed into a tiny vessel that holds vast content.

Since this is a narrative, most of its analyses use the tools of literary analysis. Literary scholars deal with plot structure and various literary techniques, comparing them with those in other works of literature, attempting to fathom the author's intentions. The liberties

⁶² *Psalms* 51:3.

⁶³ *Psalms* 51:18–21.

⁶⁴ *1 Kings* 15:3–5 (emphasis added).

⁶⁵ *2 Samuel* 23:39; *1 Chronicles* 11:41.

⁶⁶ To be more precise, all of Chapter 11 (twenty-seven verses) and twenty-five of the thirty-one verses in Chapter 12 deal with the affair of Uriah the Hittite. *1 Chronicles* 11.

⁶⁷ The exact number of words, of course, depends on an arbitrary determination of which verses begin and conclude the narrative. *2 Samuel* 12.

that Biblical scholars have taken in interpreting the facts pale in comparison with those taken by literary scholars in analyzing this short narrative.

There is good reason for multiple interpretations, of course. The David-and-Bathsheba story is presented in a succinct and totally neutral manner. Unlike the moral judgmentalism that resonates from many Biblical passages, no verdict or value judgment for David's and Bathsheba's doings is offered.⁶⁸ Above all, the narrative contains many gaps and evokes troubling questions for which we have no answer. Here are only a few:

Was David being criticized for not having headed out to war along with Joab and his army, remaining in Jerusalem instead?

Why did David summon Uriah? Had he already decided to dispose of him?

Did Uriah know what was transpiring or did he remain naïve? And what did David know about what Uriah knew?

What was David's full order to Uriah, and why was it given?

Did Joab carry out the order or not?

What explains the difference between Joab's words to the messenger and those of the messenger to David?

These factual lacunae are even more puzzling when we remember that the Biblical narrator is usually what literature calls "omniscient." That is, he knows everything including people's thoughts and minutiae unknown to outsiders. Some even consider this characteristic of the Biblical narrator—omniscience and peremptory authority—the main feature of Hebrew literature.⁶⁹ Accordingly, as

⁶⁸ 2 *Samuel* 11:1-12:15. It is beyond our capacity to explain why the author chose this of all techniques but, in the manner of literary scholars, we will try. The motive, it seems to us, originates in the telling of the act itself. No matter how we tell the story, the outcome is bitter. Neither David nor Bathsheba nor Uriah emerges unscathed. In such cases, the Bible prefers to economize on words and not to elaborate where unnecessary. So also, with the deeds of Jehu son of Jehoshaphat son of Nimshi (2 *Kings* 9-10), who rebels against the House of Ahab and assaults the priests of Baal. Perhaps due to the excessive cruelty of his actions, however, the narrative hardly judges them.

⁶⁹ See Assaf Inbari's remarks on the topic: "The Biblical narrator is omniscient, He knows how the world was created and who created it, he knows how and why man,

Meir Sternberg says:

[The Biblical narrator] thus establishes himself in the strongest position conceivable, one unrivaled in the annals of literature since, again, it uniquely combines the sources of authority attaching to otherwise incompatible models of narration. For he wields the authority of supernatural knowledge and of empirical evidence, of inspiration (or convention) and tradition, of the divine performer and of the human observer, of the mentor and of the “son” meeting other sons on their common ground.⁷⁰

The obvious conclusion is that this narrator wishes, for reasons he does not disclose, to steer clear of excessive elaboration. He deliberately mutes certain points and withholds unequivocal answers. For this very reason, any attempt to fill in the missing facts would be problematic and, probably, incomplete.

This, however, does not absolve us of the need to make an initial attempt to illuminate all the facts and harvest those essential for the legal analysis that follows. For this purpose, given the brevity of the story, we will use the accepted method of quoting several verses each time and then presenting our factual conclusion.⁷¹

intelligence, sex, and shame were created, how and why cultures and languages were created, how and why the world was swept away in the Flood, and how life was spared from extinction in that bygone event. When he reports on family, social, political, or military happenings, he knows not only what their heroes did or said but also what they thought and felt. When he reports on simultaneous events in places far apart, he knows what happened in all with the same extent of detail. He reports all this to us not as ‘hypotheses,’ ‘reasoning,’ or ‘logical inferences’—as does Thucydides, as his trade requires—but as unchallengeable narrative facts.” Assaf Inbari, *Liqrat sifrut ‘Ivrit’*, 9 J. FOR JEWISH THOUGHT 35–81, 43 (2000).

⁷⁰ MEIR STERNBERG, *THE POETICS OF BIBLICAL NARRATIVE: IDEOLOGICAL LITERATURE AND THE DRAMA OF READING* 117 (Ind. Univ. Press 1987).

⁷¹ Many have dealt with this point from a literary perspective. Among them, we reference mainly Menahem Perry & Meir Sternberg, *Ha-melekh be-mabat ironi: ‘Al tahbulotav shel ha-mesaper be-sipur David ve-Bathsheva u-shete ha-pelugot ke-teoria shel ha-proza’*, *HASIFRUT A* 283-292 (1969); Uriel Simon, *Sipur miqra’i be-tefisa ironit: ‘Al ha-interpretatsia shel sipur David u-Bathsheba’*, *HASIFRUT B* 598-607 (1970); Boaz Arpeli, *Zehirut sipur miqra’i: He’arot le-sipur David u-Bathsheva u-le-she’elot ha-poetika shel ha-sipur ha-miqra’i*, *HASIFRUT B* 582-97 (1970); M. Gracieli, *Malkhut David: Mehqarim be-historia ve-‘iyunim be-historiografia*, Tel Aviv: DON BOOKS AND ISRAEL SOC’Y FOR BIBLICAL RSCH. (1975); Nisan Ararat, *Meser mishpati ve-meser miqra’i ‘Al sifro shel Daniel Friedman, Ha-ratsahta ve-*

We begin with 2 *Samuel* 11:

1. At the turn of the year, the season when kings go out [to battle], David sent Joab with his officers and all Israel with him, and they devastated Ammon and besieged Rabbah; David remained in Jerusalem.
2. Late one afternoon, David rose from his couch and strolled on the roof of the royal palace; and from the roof he saw a woman bathing. The woman was very beautiful,
3. and the king sent someone to make inquiries about the woman. He reported, “She is Bathsheba daughter of Eliam [and] wife of Uriah the Hittite.”
4. David sent messengers to fetch her; she came to him and he lay with her—she had just purified herself after her period—and she went back home.
5. The woman conceived, and she sent word to David, “I am pregnant.”⁷²

The first question is whether the narrator implicitly scolds David for not having gone out to battle against Ammon with Joab and the rest of the Israelites, instead lolling in midday and strolling indolently on the roof of his palace.

Indeed, several commentators see this as a denunciation of David. Thus, Rabbi Meir Leibush ben Yehiel Michel Wisser (1809–1879) (Malbim) remarks: “It happened to the king because he remained at home and did not go out to fight to the Lord’s war personally.”⁷³ Others claim that the verse is indicative of David being worried about the war.⁷⁴ We have no evidence either way, of course.

However, we wish to make a proposal. David was not the sort

gam yarashta, ’ 170 BEIT MIQRA C 209-18 (2002). Additional to these are the innumerable commentaries and rabbinical writings on the topic. Among them, we resorted to commentaries in *Miqra’ot gedolot*, Yehuda Kiel’s commentary in *Da’at miqra* on the Book of Samuel, and Yigael Ariel, *’Oz melekh—’Iyunim be-sefer Shmuel*, ’ HISPIN: MIDRESHET HAGOLAN (1994). Each of these cites numerous other commentaries and rabbinical exegeses. Interestingly, almost every explanation offered by contemporaneous researchers, in any direction, is preceded by several earlier commentaries. Due to this profusion of repeated views, we do not reference the source of every view on every point.

⁷² 2 *Samuel* 11.

⁷³ Kiel, *supra* note 71.

⁷⁴ Ararat, *supra* note 28, at 210.

to avoid wars, as we know. In the previous chapter of 2 *Samuel*, we read about his great battle against Hadadezer and the entire Aramean army, in which he marshaled the forces and led them into war. The war in our case study, however, is a siege against the Ammonites—a unique measure that took a long time, sometimes years, to yield victory. In the case at hand, David's first-born son from Bathsheba (who died after birth) and even his son Solomon were born before Rabbah was conquered, meaning that the siege lasted at least eighteen months, if not longer. Thus, one should not be amazed that Samaria withstood its siege for three years and that others reportedly held on even longer.⁷⁵ Therefore, it is clear why the king should not and in fact could not spend this entire period *in situ* with his army. Only when the siege seemed to verge on its end should the king show up for the decisive battle. So it happened in the case before us. When Joab captured the city's waterworks, he summoned David to come and wind up the campaign. David mobilized the rest of the Israelites and conquered Rabbah together with them. The definition of this war as one of conquest is immensely important, as we explain in detail below.

The second question relates to Bathsheba's role in the affair. As we showed above, in Section I, the introduction, there is controversy about whether the incident happened by chance or Bathsheba encouraged it with her behavior. Bathsheba's relationship with her husband, Uriah, before her acquaintance with David, is not totally clear. Had David known her before she had indulged in her rooftop bath? The verse equivocates. Even vaguer is whether this was a one-off event or an ongoing relationship; again, the narrative conceals more than it reveals. There are many reasons for people to stroll on rooftops or in gardens; not all are illegitimate. According to the plain text, however, the acquaintance in this case was random.⁷⁶

Two facts seem to be clear. First, there is no hint whatsoever of relations being forced on Bathsheba;⁷⁷ they were totally consensual.

⁷⁵ On the singularity of siege warfare as against ordinary warfare, see ISRAEL EFAL, *KE-'IR NETSURA: HA-MATSOR VE-GILUYAV BAMIZRAH HA-QADUM* 101-03 (1997). As for its length and nature, see *id.* mainly 101-03.

⁷⁶ Some disagree, of course. According to Ararat, for example, even David's servants did not know why Bathsheba approached David. Ararat, *supra* note 28, at 210; Nisan Ararat, *Hesed ve-emet ba-miqra*, WORLD ZIONIST ORG. 196-241 (1993). They attributed it to his wish to tell her about her husband being called in from the front.

⁷⁷ Here again, of course, there is a dissenting view: some even argue that Bathsheba approached David not willingly but by royal command. They base their view

Second, it is undisputed that Bathsheba became pregnant from David. Her response was to apprise David of the problem and leave it to him to solve. The verse emphasizes that Bathsheba had purified herself after her period (i.e., immersed herself after her menstruation ended), leaving no doubt about the parentage: David and not Uriah.

David responded by summoning Uriah to Jerusalem, as the narrative goes on to explain:

6. Thereupon David sent a message to Joab, “Send Uriah the Hittite to me”; and Joab sent Uriah to David.

7. When Uriah came to him, David asked him how Joab and the troops were faring and how the war was going.

8. Then David said to Uriah, “Go down to your house and bathe your feet.” When Uriah left the royal palace, a present from the king followed him.

9. But Uriah slept at the entrance of the royal palace, along with the other officers of his lord, and did not go down to his house.

10. When David was told that Uriah had not gone down to his house, he said to Uriah, “You just came from a journey; why didn’t you go down to your house?”

11. Uriah answered David, “The Ark and Israel and Judah are located at Succoth, and my master Joab and Your Majesty’s men are camped in the open; how can I go home and eat and drink and sleep with my wife? As you live, by your very life, I will not do this!”

12. David said to Uriah, “Stay here today also, and tomorrow I will send you off.” So Uriah remained in Jerusalem that day. The next day,

13. David summoned him, and he ate and drank with him until he got him drunk; but in the evening, [Uriah] went out to sleep in the same place, with his lord’s officers; he did not go down to his home.⁷⁸

The first immediate question about this passage is why David summoned Uriah to Jerusalem. Plainly, the goal was to cover up Bathsheba’s pregnancy. If Uriah went home, it could be alleged later

themselves on the word וַיִּקְחָהּ, which, they claim, means “against her will.” This, however, is not implied by the wording of the verses. Kiel, *supra* note 71.

⁷⁸ 2 Samuel 11:6-13.

that he was the father of the newborn. David's action would have solved the initial problem. Unanswered, however, is whether David considered this the end of the affair: At this stage, did he already want Bathsheba for himself or wished only to save face regarding the pregnancy? Notably, if the pregnancy problem were solved, in principle Bathsheba could later obtain a divorce from Uriah and marry David.

Two interpretations are possible here, each ambiguous. Either way, things became problematic because Uriah refused to go home. There are many theories about why, all deficient in factual support. Some claim that Uriah knew what his wife was doing and therefore refused to go along with David's scheme. This may explain why he refused David's instruction and answered him rather brazenly. Another possibility is that on his first night in the palace he did not know about the affair until various court officers tipped him off. Once he knew, however, he wanted to bring it into the open at the expense of both the king and his wife.

Others claim, conversely, that Uriah comported himself as would a soldier who wishes to demonstrate his allegiance to his king and commander-in-chief—especially if his relationship with Bathsheba was wobbly to begin with. Some adduce from the Biblical account that David knew Uriah had not gone home and was already living apart from his wife.⁷⁹

Also unclear is whether David understood or knew that Uriah knew the truth. Had David discovered that Uriah suspected the king of cuckolding him? The suspicion cannot be expressed in words because the very fact of suspecting the monarch is an act of treason. It seems to us that Uriah did not suspect David because if he did, his logical response would be to confront his wife, Bathsheba, which he did not do. If he was in conflict with her, he would see no point in going home, of course.

If so, we need to ask several double questions. We do not know what Uriah knew and whether he suspected David and Bathsheba, and we cannot tell whether David suspected Uriah of suspecting him of the act of adultery. Needless to say, the narrator could have answered both questions easily and concisely, but he evaded this duty. Both possibilities are plausible and, from the literary standpoint, reasonable.

⁷⁹ Ararat, *supra* note 28, at 211, for example, expresses this view. In his opinion, the Biblical narrator did not report Uriah and Bathsheba's separation because this would not justify David's actions in any way.

Nevertheless, we cannot determine which is correct and which is not.

When David realized that Uriah had not gone home, as he had not for three nights, he decided to send him back to Joab together with a letter that he placed in Uriah's hands. It is here that David issued a clear and unequivocal order. David told Joab to put Uriah in a dangerous location and leave him there alone so that the Ammonites would kill him:

14. In the morning, David wrote a letter to Joab, which he sent with Uriah.

15. He wrote in the letter as follows: "Place Uriah in the front line where the fighting is fiercest; then fall back so that he may be killed."⁸⁰

This seems to leave no doubt: David's general and loyalist, Joab, should engineer Uriah's death. The king expressed this in a letter that, ironically, he handed to Uriah the Hittite. Uriah personally delivered his death sentence to the man who would be responsible for implementing it.

We remark right now that the exact wording of the order—which, of course, is critical for our investigation—was known to no one but David and Joab; the messenger (Uriah) was not authorized to look at the missive. We learn of it from the mouth (or the quill) of the Biblical narrator. The wording in our possession is most likely the result of a collection of rumors and logical inferences produced from the events.

This information gap has allowed commentators and preachers to offer various hypotheses about the purpose of the order.⁸¹ We, too,

⁸⁰ 2 *Samuel* 14-15.

⁸¹ It has been argued, for example, that David did not intend to have Uriah killed at Joab's hands. He assumed that Uriah would open the letter and, after discovering the order to eradicate him, would flee and disappear. This reasoning is based on the assumption that David realized that no commander would obey an order so worded. *See id.*; *see also* Nisan Ararat, *Hesed ve-emet ba-miqra*, WORLD ZIONIST ORG. 196-241 (1993). Others surmise that David's order was hard to carry out. Perry & Sternberg, *supra* note 71, at 279. Uriah could not be abandoned on the battlefield easily because his soldiers would not have agreed, especially in a siege battle, in which the besieging forces have no interest in engaging the besieged. *Id.* As these commentators see it, therefore, Joab deliberately set up a battle and a dangerous attempt to break into Rabbah, knowing that David's soldiers would be killed for no gain in this rather hazardous undertaking. *Id.* Still others offer a gentler version: Joab used David's instruction as a pretext for a swift attempt to conquer Rabbah. According to Perry & Sternberg, the Biblical author intentionally left the multitude of interpretive

will try to fill the lacuna by proposing reasoning that, in our opinion, squares solidly with the phrasing of the order as given by the Biblical narrator and with the undisputed circumstances of the battle.

The question now is how David's general, Joab son of Zeruiah, responded to the order. The narrator answers explicitly and unequivocally:

16. So when Joab was besieging the city, he stationed Uriah at the point where he knew that there were able warriors.

17. The men of the city sallied out and attacked Joab, and some of David's officers among the troops fell; Uriah the Hittite was among those who died.⁸²

The plain meaning of the text is clear. Joab did not abandon Uriah to his fate. He gave Uriah relatively hazardous duties. Obviously, one cannot fault him for this because it is the nature of battle for all warriors to undertake, or accept by command, very hazardous missions. Someone had to do it. Furthermore, given the way he was described previously, Uriah probably had no objection to the assignment and may have volunteered for it. In the battle that developed, several of David's warriors perished. Uriah was one of them.⁸³

It should also be remembered that such an order would have entailed cooperation from the other soldiers, who would be asked to abandon Uriah. The text does not explain clearly why Joab disregarded David's explicit order. Simple logic says that he must have considered it strange and irrational. In all probability, Joab was unacquainted with the intrigues underway in the king's palace. Abandoning an outstanding officer would have seemed irrational to him. Furthermore, there is no telling how the other soldiers would have reacted upon hearing the order from David. Comrades-in-arms is no mere cliché, as unfortunately, many Israelis know. Probably each would have begun to fear for his personal safety, too, and would have refused to commit a murder such as this.

In the midrash, the Jewish Sages wondered about this and asked who would agree to forsake their officer just so. According to

possibilities so that each reader could interpret them as he wished. *Id.* Finally, some propose that Joab carried out David's order verbatim and left Uriah to his own devices, but the Ammonites pursued the men who had abandoned him and killed them, too. Kiel, *supra* note 71; FLAVIUS JOSEPHUS, THE JEWISH WARS 138-40.

⁸² 2 *Samuel* 16-17.

⁸³ 2 *Samuel* 11:22-25.

one of the proposed answers, Joab indeed obeyed the king, carried out the order verbatim, and was almost killed by his own soldiers. Then, however, he showed them David's explicit order. Thus, Joab spared himself but offended David by making the order public knowledge. You find that when David wrote to Joab: "Place Uriah in the front line where the fighting is fiercest; then fall back so that he may be killed,"⁸⁴ and "[Yoav] did so and he died. All the heads of the army gathered around Yoav to kill him, as he [Uriya] has been the head of the mighty, as it is written in his regard 'Uriah the Hittite. Thirty-seven in all.' (2 Samuel 23:39). He showed them the letter."⁸⁵

The details of the battle remain rather vague. The Biblical narrator paints the tableau of a battle that began with a siege of the Ammonite city Rabbah and continued with a violent clash between Ammonite and Israelite warriors. In this standoff, several of David's warriors, including Uriah, were killed:

16. So when Joab was besieging the city, he stationed Uriah at the point where he knew that there were able warriors.

17. The men of the city sallied out and attacked Joab, and some of David's officers among the troops fell; Uriah the Hittite was among those who died.⁸⁶

Joab, ordered to report to David about the battle, sent a messenger to undertake this task.⁸⁷ His instructions to the messenger on how to do this are important because David, learning how the battle had been managed, might become angry. Seemingly, according to the earlier order to Joab, only Uriah should have been sent to the front line; in actuality, a unit of David's warriors engaged the Ammonite townspeople in a battle.⁸⁸ Bearing this in mind, Joab instructed the messenger to present David with a full report in a way that would assuage the king's rage:

18. He instructed the messenger as follows: "When you finish reporting to the king all about the battle,

⁸⁴ 2 Samuel 11:15.

⁸⁵ *Numbers Rabba* 23 (beginning with והקרייתם לכם).

⁸⁶ 2 Samuel 11:16-17.

⁸⁷ 2 Samuel 11:19-20.

⁸⁸ 2 Samuel 11:16-17.

19. the king may get angry and say to you, ‘Why did you come so close to the city to attack it? Didn’t you know that they would shoot from the wall?’

20. Who struck down Abimelech son of Jerubbesheth? Was it not a woman who dropped an upper millstone on him from the wall at Thebez, from which he died? Why did you come so close to the wall?’

21. Then say: ‘Your servant Uriah the Hittite was among those killed.’”⁸⁹

The messenger, true to the ways of messengers, revised the account given, perhaps believing that thus he would not anger the king. Explaining why Joab had approached the wall, he explained, “because the people rose up upon us and came out to us in the field.”⁹⁰ That is, it was the besieged forces, not we, who had taken the initiative.

22. The messenger set out; he came and told David all that Joab had sent him to say.

23. The messenger said to David, “First the men prevailed against us and sallied out against us into the open; then we drove them back up to the entrance to the gate.

24. But the archers shot at your men from the wall and some of Your Majesty’s men fell; your servant Uriah the Hittite also fell.”⁹¹

David found this description of the battle satisfactory. He ordered the messenger to return to Joab and advised him that sustaining casualties was only natural in war. “Whereupon David said to the messenger, ‘Give Joab this message: “Do not be distressed about the matter. The sword always takes its toll. Press your attack on the city and destroy it!’ Encourage him!”⁹²

The continuation of the story is relatively simple. David married Uriah’s wife after the latter’s death.⁹³ For the soldiers, who were unfamiliar with the details of the story, the king’s behavior seemed respectful and appropriate. By marrying a war widow, the king assures lifelong economic security for her and her children (if any). It

⁸⁹ 2 *Samuel* 11:18-21.

⁹⁰ 2 *Samuel* 11:22-23.

⁹¹ 2 *Samuel* 11:22-24.

⁹² 2 *Samuel* 11:25.

⁹³ 2 *Samuel* 11:27.

also suggests, to the other soldiers, that the king is the father of war orphans and would be responsible for their own families should they die in battle.⁹⁴ The Biblical account describes this briefly:

26. When Uriah's wife heard that her husband Uriah was dead, she lamented over her husband.

27. After the period of mourning was over, David sent and had her brought into his palace; she became his wife and she bore him a son. But the Lord was displeased with what David had done him⁹⁵

The Prophet Nathan concluded his reprimand to David with the famous "poor man's lamb" parable, substantiating his belief that the monarch had behaved criminally by engineering Uriah's death in war:⁹⁶ "You have put Uriah the Hittite to the sword; you took his wife and made her your wife and had him killed by the sword of the Ammonites."⁹⁷

The parable deserves thorough attention, of course. For our purposes at this stage, however, we need to extract the factual part that is relevant to the legal analysis. Given everything stated and mentioned above, we believe we may draw several conclusions.

IV. SUMMING UP THE FACTUAL SECTION

A. The Circumstances of the Affair According to the Biblical Account

David entered into relations with Bathsheba while she was married to Uriah. As a result, he impregnated her. David tried to cover up the pregnancy by summoning Uriah to Jerusalem. Uriah, however, did not go down to his house despite David's pressure.

David sent his general Joab (by means of Uriah) a written order

⁹⁴ Interestingly, the reason for polygamy in Muslim law is concern for war widows. A Muslim male, of course, is allowed to take four wives. According to one version of this statute, the dispensation traces to the way things were at the time of the first caliphs: the Arab armies set out on many wars and would obviously create many widows. In this matter, see Muhammad Abduh *Prohibition of Polygamy*, MUHAMMADABDUH, https://ar.muhammadabduh.net/?page_id=23.

⁹⁵ 2 *Samuel* 11:26-27.

⁹⁶ Below we test this reasoning in the context of our viewpoint on David's criminal liability.

⁹⁷ 2 *Samuel* 12:9.

to place Uriah on the front line and pull the other soldiers back, so that Uriah would face the enemy alone and, thus, would very probably be killed.

Joab did not obey the order in full. He did send Uriah to the front line, a dangerous place per se, but did not instruct the other soldiers to retreat.

Uriah was killed in a battle that claimed the lives of other soldiers among David's forces. The outcome of the battle was reported to David. The king had no objection to the conduct of the battle and, after Bathsheba finished her official mourning period for her husband, David brought the war widow into his home and married her.

B. Filling the Information Gap on the Basis of the Circumstances

As a point of departure, let us take the Biblical version of the order verbatim: David instructed Joab to place Uriah on the front line and to pull the other soldiers back, leaving Uriah as the sole casualty (hereinafter: "the order in its Biblical version").

A question worth asking is what prompted Joab to disobey. Disobeying the king's word is sedition, a capital offense par excellence. Why would Joab risk such a penalty? Furthermore, what reason did he have to transgress his strong commitment and absolute fidelity to his ruler? Moreover, Joab proved repeatedly that he did not value human life if the king's benefit or even his own would justify its loss. Joab and his brother Abishai killed Abner son of Ner.⁹⁸ Joab also killed Absalom, David's son, in what he considered the safeguarding of David's interests.⁹⁹ And he killed Amassa, son of Ithra, whom the king had appointed as his apparent successor as general of the army.¹⁰⁰

By implication, transgressing the king's order despite the potential penalty should have been based on the king's best interests (as Joab understood them) or on those of Joab himself. There is no reason to believe that some consideration of David's well-being guided Joab in refraining from carrying out the order¹⁰¹ nor to suppose that the

⁹⁸ 2 *Samuel* 3:30.

⁹⁹ See 2 *Samuel* 18:9-15.

¹⁰⁰ 2 *Samuel* 20:8-10.

¹⁰¹ Daniel Friedman offers his own reasoning: Joab refrained from sacrificing Uriah "apparently due to fear that the murder would be too transparent." FRIEDMAN, *supra* note 25. This was surely not Joab's personal concern. After all, he had to carry out the king's order and could defend himself on those grounds. Consequently,

misdeed against Uriah inspired Joab to disobey due to pangs of conscience.

Uriah's subsequent death in battle, together with other warriors, was a foreseeable outcome of the battle. Therefore, Joab's reluctance to expose only Uriah to the enemy did not originate in knowing that he would be killed later.

Adding these matters together, one finds that the Biblical account of the facts may also accommodate the possibility that Joab did not act in the manner of one refusing an order. On the contrary, he comported himself in *accordance* with the order that he received. Our reasoning is that David did instruct Joab to place Uriah on the front line and pull back the other warriors, but only insofar as *the requisites of the war demanded such risk to an individual warrior*.

Various accounts of warfare demonstrate the plausibility of sacrificing one soldier in order to extricate a combat force from a tight situation or to make sure a mission is accomplished. A case in point is the mid-second-century BCE battle at Beth Zechariah between the powerful Seleucid army and the Maccabees, sons of Matityahu (Mattathias), standard-bearers of the anti-Seleucid uprising.¹⁰² The balance of forces in this battle gave the Hasmoneans a scant likelihood of victory. Accordingly, Eleazar, Matityahu's youngest son, decided to commit an act of self-sacrifice that would tilt the balance of forces in the rebels' favor. 1 *Maccabees* 6:44–46 reports:

Eleazar gave his life to save his people and win eternal fame. Boldly he dashed into the midst of the phalanx at the elephant, slaying men right and left as he cut the enemy down on both sides of his path. Going in underneath the elephant, he stabbed it to death, whereupon the elephant fell to the ground on top of him, killing him there.¹⁰³

Another case worthy of attention involves the battle of Mitla Pass (Operation Kadesh, 1956), which took place some three thousand

Friedman must assume that Joab wished to defend the king against the charge of committing a murder that might immediately become publicly known. This reasoning may also serve as grounds for a different reasoning (see below).

¹⁰² 1 *Maccabees* 6:28–47.

¹⁰³ DANIEL R. SCHWARTZ, 41B 1 MACCABEES A NEW TRANSLATION WITH INTRODUCTION AND COMMENTARY (The Anchor Bible Commentaries) 313 (William Foxwell et al. ed., Yale Univ. Press 2022).

years after the battle of Rabbah.¹⁰⁴ In its course, a large reconnaissance unit from the Israel Defense Forces Paratroop Brigade was sent to the pass in order to capture it. Part of the force was ambushed in the slot and came under Egyptian fire of indeterminate origin.

The commander of the reconnaissance force, Lieut.-Col. Aharon Davidi,¹⁰⁵ was positioned at the entrance to the pass. From that location he ordered his driver, Private Yehuda Kan-Dror, to drive his jeep into the pass alone in order to draw Egyptian fire and thus reveal the sources of the fire, which other Israeli forces could then destroy. With supreme heroism, Kan-Dror did as told. The Egyptian bullets found him. He was gravely wounded and died in hospital shortly thereafter. His feat of valor earned him the highest decoration that the Israel Defense Forces awards.¹⁰⁶

It did not occur to anyone that Davidi, the commander, had done something criminal. In fact, even though he had doomed his subordinate to death, everyone saw his decision as the fulfillment of a crucial necessity dictated by the conditions of combat. Some regarded it as “a supreme manifestation of leadership.”¹⁰⁷

Examples abound of voluntary self-sacrifice by individual soldiers (as in the case of Eleazar) and acts of sacrifice for which soldiers had to volunteer. Presumably, those orders that carry the highest probability of death in combat, and are imposed on a specific soldier in order to spare other soldiers from harm, are much fewer in number. Davidi’s instruction to Kan-Dror is an example of the latter.

Might the order concerning Uriah have resembled that given to Kan-Dror? It is not totally implausible. Lieut.-Col. Davidi stood at

¹⁰⁴ 2 *Samuel* 11:1.

¹⁰⁵ Subsequently, Chief Infantry and Paratroopers Officer (Brigadier General), a founder of the Paratroop Brigade, and one of the brigade’s most celebrated commanders. *Aharon Davidi*, WIKIPEDIA, https://en.wikipedia.org/wiki/Aharon_Davidi (last visited Nov. 19, 2024).

¹⁰⁶ For a detailed description of the event, see the website of the commemoration of the martyrs of Israel see *Private Yehuda Ken-Dor*, IZKOR, https://www.izkor.gov.il/%D7%99%D7%94%D7%95%D7%93%D7%94%20%D7%A7%D7%9F-%D7%93%D7%A8%D7%95%D7%A8/en_76d1ca29e754c70c3b39295e6bdba49f (last visited Nov. 19, 2024).

¹⁰⁷ This was said at a seminar on the Chinese operation held 60 years after the battle by one of its participants, Brig. Gen. (Res.) Ephraim Hiram. See *Tzevet-Israel Defense Force*, 118 VETERANS ASSOCIATION’S BULLETIN, 2016 at 1; see also *The Battle of the Chinese Farm*, THE PAST (Jan. 11, 2022), <https://the-past.com/feature/the-battle-of-chinese-farm/> (analyzing the Battle of the Chinese Farm which occurred during the Yom Kippur War of 1973).

the threshold of a battle and responded to circumstances that left him no choice but to issue the exceptional order. David, departing from his habit, remained in his palace and did not participate in the battle scene as the commander.¹⁰⁸ His rich combat experience, however, taught him that the battle might develop in a way that would entail the nearly absolute endangerment of one warrior in order to assure victory and save the rest of the army. Accordingly, he instructed Joab, *in the event of a specific and clear war necessity*, to send Uriah out alone to attract fire and thus draw out the enemy's forces (hereinafter: "the military-necessity version" of the order).¹⁰⁹ It did not actually happen because the battlefield circumstances that would necessitate it apparently did not come about. Absent the necessity, Joab saw no need to place Uriah at special risk.

By this reasoning, David, who secretly did hope that Uriah would die in combat, chose Uriah for a highly hazardous mission but did not order Joab to engineer Uriah's death by creating an artificial risk or an artificial "military necessity."

V. THE PLAUSIBILITY OF THE MILITARY-NECESSITY VERSION—ARGUMENTS PRO AND CON

A. Argumentation against the Plausibility of the Military-Necessity Version

Three reasons to reject the military-necessity version of David's order come to mind. The first is the Biblical wording of the order. Admittedly, the narrator penned this wording long after the event and presumably learned of its contents by hearsay. However, it is hard to entirely disregard hearsay when it finds its place in the Book of Books. It is also hard to imagine why derogatory "common hearsay" about the king would spread if the king acted as he did under strongly extenuating circumstances.

The second argument against the military-necessity rationale is predicated on the motivation for the order. David had an obvious interest in Uriah's death.¹¹⁰ It stands to reason that he would issue an

¹⁰⁸ 2 Samuel 11:1.

¹⁰⁹ 2 Samuel 11:14-15.

¹¹⁰ The Torah expressly prohibits adultery and includes the proscription in the Ten Commandments due to its severity. It is a capital crime for both participants. In this case, the act of adultery was supplemented by the birth of a *mamzer*—the offspring of a mother married to another, forever banished from the Congregation of Israel.

order that would induce Uriah's death and not one that subjects the death to special battlefield conditions that would come about, or that might not.

The third reason is adduced from the Prophet Nathan's reprimand: "You have put Uriah the Hittite to the sword; you took his wife and made her your wife, and had him killed by the sword of the Ammonites."¹¹¹ The prophet, visiting the king shortly after the incident, defines killing Uriah as a willful act and attributes it to the monarch. He says nothing about the stipulation relating to the circumstances of battle. We do not know where Nathan obtained his knowledge. Did he base his reproach on common hearsay, or may he have heard about it from Joab? Either way, David did not protest the grave indictment. On the contrary: "I stand guilty before the Lord!" he admitted¹¹²—a virtual confession.

B. Argumentation in Support of the Plausibility of the Military-Necessity Version

The military-necessity reasoning may be substantiated on several grounds. First, it does not contradict the Biblical order because it includes an order to send Uriah to the front line alone. The military-necessity hypothesis focuses on the circumstances under which Uriah should be sent alone but does not rule out his solitary dispatch.

Second, had the order not included the condition of military necessity for its fulfillment, it would be very hard to imagine why Joab did not carry it out. It is unreasonable to risk oneself by disobeying an order by commission or omission. In that era, the risk might have been fatal. Given Joab's nature and history as a man of blood, the probability of his self-endangerment tends to be zero.

Third, David definitely wanted Uriah to die. However, he refrained from ordering his execution and tried to dress it up as a battlefield fatality. Sending Uriah to face the enemy alone for neither reason nor necessity is tantamount to an execution carried out with all the soldiers looking on. It cannot be presented as a combat fatality. The military necessity of sending a soldier on an almost unsurvivable

The death of Uriah on the battlefield, retroactively activating the writ of divorce that he had given his wife before setting out for war, may have sanctioned David's relationship with Bathsheba and thwarted its implications.

¹¹¹ 2 *Samuel* 12:9.

¹¹² 2 *Samuel* 12:13.

mission is a common situation that David, experienced in the ways of war, knew well. Assigning such a task to Uriah was not an “execution;” Uriah’s death in carrying it out was plainly a battlefield death. David may have assumed, for good reason, that the circumstances of the battle would necessitate the sacrificing of Uriah, but then the king would have his way without being defined as a murderer.¹¹³

Fourth, the military-necessity reasoning gains limited support from the report that Joab sent to David after the battle and in its wording as actually presented by the soldier-messenger. Joab gave his messenger the following instructions:

[T]he king may get angry and say to you; “Why did you come so close to the city to attack it? Didn’t you know that they would shoot from the wall? Who struck down Abimelech son of Jerubbaal? Was it not a woman who threw an upper millstone on him from the wall at Thebez, from which he died? Why did you come so close to the wall?” Then say: “Your servant Uriah the Hittite was among those killed.”¹¹⁴

The messenger presented the matter differently:

The messenger said to David, “First the men prevailed against us and sallied out against us into the open; then we drove them back up to the entrance gate. But the archers shot at your men from the wall and some of Your Majesty’s men fell; your servant Uriah the Hittite also fell.”¹¹⁵

The instruction and the report have a common motive. Joab and the emissary feared that the king would be enraged to discover that some if not many of his men had been killed. Joab knew that the sacrifice of Uriah might mitigate the loss. The messenger, oblivious to the

¹¹³ Above we mentioned Friedman’s reasoning: Joab refrained from carrying out the order due to fear that the murder would be too transparent. FRIEDMAN, *supra* note 25. Namely, once the murder became public knowledge, it might cause the king so much harm as to justify disobeying the order to protect him. One may readily doubt this reasoning. David was surely as sagacious and knowledgeable of history as was Joab. Accordingly, it is hard to imagine that David ordered an overt murder, a crime that would immediately become known and would endanger him, to be committed.

¹¹⁴ 2 *Samuel* 11:20–21.

¹¹⁵ 2 *Samuel* 11:23–24.

contents of the order, explained away the loss of the soldiers by tracing it to the circumstances of the battle. By implication, David was keenly sensitive to the loss of fighting men and his soldiers knew it. If so, one may understand the order to sacrifice one soldier in order to save the lives of many others and why Joab and the messenger tried to assuage David on this point.

Fifth, Nathan centered his reprimand on the theft of the “poor man’s lamb.”¹¹⁶ That is, the alienation of Bathsheba from her husband by deceit and crime are tantamount to contempt for God, “you spurned Me by taking the wife of Uriah the Hittite and making her your wife.”¹¹⁷ This focus on a moral theft that accords with the gravest accusation of all, of murder, demands elucidation.¹¹⁸ Furthermore, Nathan, responding to David’s admission, “I stand guilty before the Lord,” intones: “The Lord has remitted your sin; you shall not die.”¹¹⁹ Waiving capital punishment for murder seems groundless unless David’s order was a “factual circumstantial cause” of Uriah’s death and creates no legal liability for willful homicide.¹²⁰

¹¹⁶ See *supra* note 13 for the parable.

¹¹⁷ 2 *Samuel* 12:10.

¹¹⁸ Murder is the gravest offense—a capital offense—in Jewish law. “Whoever sheds the blood of man, by man shall his blood be shed. . . .” *Genesis* 9:6. It is so severe that it affords neither atonement nor forgiveness. Maimonides writes: “Only to the murderer we must not be lenient because of the greatness of his crime; and no ransom must be accepted of him. ‘And the land cannot be cleansed of the blood that is shed therein but by the blood of him that shed it’ (Num. 31:33). . . . For there is no greater sin than this.” *Guide for the Perplexed* 3:41. Indeed, the death penalty is prescribed for a direct act of murder. An indirect murderer—one who sends an agent to commit murder—is considered a murderer but is not sentenced to death by the court; his punishment is from Heaven. Maimonides writes: one “who hires a murder to kill a colleague, one who sends his servants and they kill him, one who binds a colleague and leaves him before a lion . . . are all considered to be shedders of blood; the sin of bloodshed is upon their hands, and they are liable for death at the hands of God.” *Mishne Torah, Hilkhhot rotsea’h u-shemirat ha-nefesh* 2, 1–2.

¹¹⁹ 2 *Samuel* 12:13.

¹²⁰ Friedman is aware of the intrinsic oddity (in accordance with his way of thinking) of Nathan’s disregard of the murder of Uriah and his focusing on the alienation of Bathsheba from her husband (the theft of the poor man’s lamb), which also prompts Nathan to prophesy mild punitive measures against David. This, says Friedman, is due to Nathan’s status as a “court prophet” who advises and is paid by the monarch. Friedman, *supra* note 25, at 108–15. It strains credulity, however, that the Book of Books would treat an act of murder with total disregard. Thus, one presumes that Friedman’s hypothesis is no more reasonable than ours, i.e., that indeed, no order to commit murder was given.

C. Between Pro and Con—Low Probability Tips the Scales

The military-necessity version deviates from the Biblical text. We presented several rationales against the plausibility of this hypothesis and several rationales in support of it. The Biblical text is not based on anything that David or Joab said (i.e., there is no “testimony”). Only they saw the text of the order. Given what we elucidated above about the possible deficiency or inaccuracy of the Biblical text, one may conceive of the possibility that the wording of the order included the military-necessity reasoning. The strength of this possibility may be recognized only if it can be supported by the actual circumstances or logic.

How probable is it that the military-necessity version actually existed? The answer is definitely binary: it did or it did not. As we show below, however, the relationship between the possibility and the impossibility of its existence is unimportant. The probability that the Biblical version reflects reality may be very high and that of the military-necessity version expressing reality may be very low, but the latter would still have a definitive impact on the outcome of the criminal trial. We explain why this is so in the next section.

D. Summarizing the Facts: the Biblical Text + the Military-Necessity Hypothesis

David, via Uriah, sent his general, Joab, a written order to dispatch Uriah to the front line and withdraw the other warriors so that Uriah would face the enemy alone and, thus, in all probability, die. It is somewhat (although not very) reasonable to argue that the order limits the extreme endangerment of Uriah in a situation in which the requisites of the war would dictate the sacrifice of one soldier in order to attain victory or to spare many other soldiers’ lives. The singularity of this order traces to the dictate from David, the commander of the Israelite army who is not on the battlefield, to Joab, the commander on site, including the identity of the soldier to be sacrificed.

Uriah was stationed on the front together with other soldiers.¹²¹ Joab did not order the others, either before or during the fighting, to isolate Uriah and leave him unaccompanied in the face of the enemy. One may assume—with some reasonability, although not high—that

¹²¹ 2 *Samuel* 11:16.

the circumstances of the battle did not necessitate leaving anyone on his own. Uriah fell in combat and so did other soldiers along with him.¹²²

Thus, as it happened, David got his wish—Uriah perished—not as a deliberate sacrifice but as a war casualty, in the manner of soldiers who lead an attack.

VI. LEGAL ANALYSIS OF THE QUESTION OF DAVID'S CRIMINAL LIABILITY FOR URIAH'S DEATH

Our main topic of inquiry here is whether the factual infrastructure presented in the previous section establishes criminal liability on David's part. Namely, we will assume in the examination that the contents of the order handed down correspond to what we have called the "military-necessity version" of the order. We preface this, however, with brief remarks about the question of David's criminal liability in the event that the Biblical text correctly reflects the contents of the order.

A. Criminal Liability as Attested in the Biblical Text

The decision to kill Uriah, as it gelled in David's mind, was one of homicide in conjunction with another person (Joab), who was expected to use the enemy's armed force as the homicide weapon. Had the decision been carried out, David would have been liable for the murder of Uriah as a co-perpetrator. An order issued by a competent commander establishes the commander's de facto complicity in what happens by force of the order,¹²³ either as a main perpetrator¹²⁴ or as an enticer.¹²⁵

Given that the order was not carried out, one strongly doubts that the offense of attempted murder may be attributed to David. By all appearances, one may attribute to him the offense of *attempted* enticement to murder.

¹²² 2 *Samuel* 11:1.

¹²³ See *In re Yamashita*, 327 U.S. 1 (1946); Oded Mudrick, *Mefaked: Samkhut, ahrayut, ashma*, 2 PELILIM 262, 268 (1991); HCJ MR 3/57 Military Prosecutor v. Major Malinski et al., 17 PD 90 (Isr.).

¹²⁴ § 29, Penal Law, 5737-1977.

¹²⁵ § 30, 34d, Penal Law, 5737-1977.

1. Lack of Grounds for an Attempted Murder Indictment

“Our penal laws”—wrote Justice Edmond Levy—

make it possible to attribute liability to an attempt to commit an offense as well, before the perpetrator manages to complete the offense in full. The underlying idea of this approach is that one should not wait for the complete offense to be carried out when the perpetrator has already made his intentions clear and may be stopped from fulfilling them even before the wrongdoing takes place and the damage becomes a fact.¹²⁶

Studying the Biblical account, one gets the impression that David had made up his mind to cause Uriah to die, meaning that he had intent. May he be seen as one who had begun to put his scheme into practice but had failed to complete it?

The offense of “attempting” embodies the behavior of a person who intends to commit a crime (in our case, murder). Its manifestations may not trace to the components of the factual or circumstantial foundation (behavioral or consequential) of the typical offense but rather to the crystallization of circumstances that may encompass the overall background of the criminal event.¹²⁷

In regard to scheming to cause Uriah’s death, it is clear that no component of the factual or circumstantial foundation of the offense of murder began to become real. But did “circumstances that may encompass the overall background of the criminal event,”¹²⁸ as Shneur-Zalman Feller puts it, begin to take shape? Examining matters from the angle of Joab’s comportment, we conclude unreservedly that one cannot attribute the offense of “attempting” to Joab even if Joab had resolved to implement the order at the opportune moment. In other words, from the perspective of an observer who examines Joab’s action—or, to be more exact, his inaction—one cannot detect anything that falls within the bounds of “components of the factual or circumstantial foundation (behavioral or consequential) of the typical offense” or of “circumstances that may encompass the overall

¹²⁶ Based on CrimA 9849/05 State of Israel v. Brauer, para. 6.

¹²⁷ Shneur-Zalman Feller, YESODOT BE-DINE ‘ONSHIN B 60 (1987).

¹²⁸ See *id.*

background of the criminal event.”¹²⁹

David’s behavior is precedent to Joab’s. Just as Joab is not implicated in the offense of “attempting,” neither is David. David’s order does fall within the bounds of a circumstance derived from the overall background of the criminal event. It seems to us, however, that basing the offense of “attempting” on the order alone is far-fetched. We adduce this from an approach taken by the Israel Supreme Court:

To be willing to impose criminal liability at this preliminary stage of attempting to commit an offense, one must draw a line up to which restrictions and prohibitions on the perpetrator’s comportment shall not be imposed. Where no such line is drawn, the risk is that, ultimately, liability will also be imposed for actions that do not carry a minimum risk of infringement of protected values and even for the *intent* to commit an offense without external actions accompanying it. After all, it is a well-known rule that one does not penalize for matters within the heart.¹³⁰

Accusing David of attempting to murder Uriah on the basis of the order alone, it seems to us, is tantamount to punishing him for an *intent* that, although expressed in writing, is no different, for this purpose, from “matters within the heart.”

2. *Attempted Enticement to Murder*

The offense of attempted enticement to murder is defined as “caus[ing] another to commit an offense by means of persuasion, encouragement, demand, cajolery or by means of anything else that constitutes the application of pressure.”¹³¹

The Biblical wording shows that David did not “cause” Joab “to commit an offense.” Since David did not commit any offense by placing Uriah the Hittite in a more dangerous place, since someone should have been there.¹³² Consequently, there is no room for the offense of enticement (which is tantamount to main perpetration).¹³³

¹²⁹ *Id.*

¹³⁰ See CrimA 9849/05 State of Israel v. Brauer, para. 6.

¹³¹ § 30, Penal Law, 5737-1977.

¹³² 2 *Samuel* 11:16.

¹³³ *Id.*; see § 34D, Penal Law, 5737-1977 for an exception to enticement.

However, the Penal Law treats perpetrators of “attempted enticement” very strictly: “The penalty for attempting to entice a person to commit an offense is half the penalty set for its main commission; however, if the penalty for it is set at—(1) the death penalty or mandatory life imprisonment, then his penalty shall be twenty years imprisonment.”¹³⁴ Enticement to murder carries a compulsory life sentence and attempted enticement twenty years in prison.¹³⁵ The Biblical account implies that David attempted to prompt Joab, by order (“demanding”), to commit murder. Plainly, then, one may accuse him of attempted enticement to murder, which carries the penalty of twenty years in prison.

3. *Unbecoming Conduct*

We should remember that this article probes the question of David’s criminal liability in the Uriah affair as though through a time tunnel. That is, we examine David’s long-ago act through the lenses of settled (normative) law as practiced today. Given that David was the commander of the Israelite army, he may be likened to a chief of staff¹³⁶ and his behavior should also be tested in accordance with the system of laws that applies to members of the military.

Soldiers, from the lowest private to the highest commander, are subject to the laws of the state as are civilians, including the provisions of criminal law (which, insofar as they seem germane to the matter at hand, were examined above). However, soldiers, unlike civilians, must also answer to the Military Justice Law, which lays down dozens of “military offenses.”¹³⁷ Our review of these military offenses finds only one that deserves examination in the context of David’s

¹³⁴ § 33, Penal Law, 5737-1977. The statute absolves from punishment one who attempts, entices, attempts to entice, or aids the commission of an offense defined as such (Heb. *het*). § 34C, Penal Law, 5737-1977.

¹³⁵ § 301A, Penal Law, 5737-1977; § 33 Penal Law, 5737-1977.

¹³⁶ David’s regal status may also meet the definition of a “political echelon” (head of government and minister of defense combined) that oversees the army and is not subject to military law. That David was “commander of the army” should not be seen as an additional level of authority because today, too, “[t]he army is subject to the authority of the Government. . . . [t]he Minister in charge of the army on behalf of the Government is the Minister of Defense” Basic Law; the Military (Isr.).

¹³⁷ § 43-135, Military Justice Law, 5715-1955. For the essence of “military offenses” and the limits of military judicial authority, see Oded Mudrick, *Shefita tseva’it*, TEL AVIV: MINISTRY OF DEF. (1993).

comportment in the Uriah affair: “unbecoming conduct,”¹³⁸ defined as follows: “A soldier of or above the rank of *samal* who conducts himself in a manner unbecoming his rank or his status in the Army is liable to reduction in rank and, notwithstanding anything contained in this Law, this penalty shall not be replaced by a penalty of detention.”¹³⁹

The main characteristic of this offense is that it applies only to soldiers of a rank no lower than sergeant.¹⁴⁰ In other words, this military criminal prohibition reflects unbecoming conduct of commanders that undermines their status as a commander and subjects the command status to contempt. Usually, a commander who commits the offense of unbecoming conduct does so by transgressing accepted limits of moral conduct.

The Biblical reportage leaves no doubt that David’s behavior toward Uriah put him and the command echelon to disgrace—an act that, at that time, amounted to disgracing God as well. The Prophet Nathan’s stinging moral sermon to David implies as much: “Why then have you flouted the command of the LORD and done what displeases Him? You have put Uriah the Hittite to the sword; you took his wife and made her your wife and had him killed by the sword of the Ammonites.”¹⁴¹ Through the lenses of the Biblical text, attributing the military offense of unbecoming conduct to David as commander of the army is so justified as to be self-evident.

VII. ANALYSIS OF THE CRIMINAL LIABILITY QUESTION AS REFLECTED IN THE MILITARY-NECESSITY VERSION

A. Material Examination

We have shown that, according to the Biblical text, David’s behavior (encapsulated in his order to insert Uriah into the battle against the Ammonites) establishes grounds for two typical offenses: the felony of attempted enticement to murder and the misdemeanor manifested in the military offense of unbecoming conduct. Do these

¹³⁸ Other military offenses deal with military orders and relate to disobedience and non-obedience of an order and thus are not germane to the affair at hand. §§ 122-25, Military Justice Law, 5715-1955.

¹³⁹ § 130, Military Justice Law, 5715-1955.

¹⁴⁰ Military Justice Law, 5715-1955 (translator’s note, explaining that *Smal* is a sergeant and that is why it only applies to a soldier of a lower rank).

¹⁴¹ 2 *Samuel* 12:9.

crimes fit into the military-necessity version?

B. Attempted Enticement to Murder

An order that a commander issues due to military necessity prompted by battlefield circumstances, involving the dispatch of an appropriately qualified soldier to face an enemy alone as a target through which enemy forces will be located, is not grounds for the offense of enticement to murder. Consequently, the offense of attempted enticement to murder is similarly not committed if the order is not carried out.

It is clear the order given by Aharon Davidi, commander of the paratroop force that was ambushed in the Mitla Pass at the beginning of Operation Kadesh, to his subordinate, Yehuda Kan-Dror, to set out alone in a jeep and face the Egyptian array in order to serve as a target that would reveal the enemy's position, was not and cannot be a criminal offense of the aforesaid type. Soldiers' lives are at risk in any belligerent operation, great or small. A commander who sends his or her soldiers into battle is aware of this but sends them anyway. The law sees this as justified and cleansed of criminality.¹⁴²

The military-necessity reasoning assumes that David's order about sending Uriah to the front is similar to Davidi's command to Kan-Dror but with one difference: Kan-Dror was chosen for the task at random and in the hope, however slim, that he would emerge from the grim mission safely, whereas Uriah was chosen deliberately and due to the reasonable possibility that he would perish.

From the moment the order laid down a task that had a military purpose conditioned on compelling military circumstances, *a fortiori* when the mission was assigned to a talented and outstanding officer, there was no reason to attribute criminal liability to the motive for which the task was assigned to Uriah. Only military circumstances could have caused Uriah to be sent out on an unsurvivable mission. Therefore, David's wish to see Uriah dead was a secondary motive, free of criminal implications, in the context of the offense of attempted enticement to murder.

C. Unbecoming Conduct

This is a typical open-ended crime that exists independently of

¹⁴² § 34M, Penal Law, 5737-1977.

any underlying offense. Military tribunals have often attempted to link it to specific forms of content, usually by moral criteria (in the Israeli case): an act of commission or omission that disgraces its perpetrator; an act of the lowliest kind in human or military terms; an act of commission or omission that is conspicuously invalid, usually on moral grounds; and behavior that besmirches the individual as a commander in the Israel Defense Forces or as a citizen of the State of Israel.¹⁴³

The purpose of defining unbecoming conduct as a military offense, it seems to us, is to establish a worthy behavioral norm for a commander. Unbecoming conduct is not perpetrated when a commander commits a specific act of moral dereliction. It takes shape only when morally invalid action or inaction impairs the command mission or undermines command authority.¹⁴⁴

A whiff of moral dereliction wafts from David's order, even in its military-necessity version, because David based his choice of Uriah as the candidate for an unsurvivable combat mission on his wish to be rid of the man. This moral blemish underlies the Prophet Nathan's harsh moral message to David. But does the blemish establish an infrastructure for the offense of unbecoming conduct?

It is clear that David, as the commander, was entitled to choose any of his competent soldiers for the mission, including Uriah, and did not have to explain his considerations to anyone. Sometimes, such a choice resembles the decision to amputate one's right hand or left hand; at other times, it may include a personal consideration as well.

We do not dispute the grave breach of moral criteria that the Prophet Nathan found. Such breaches, however, remained within narrow moral confines. When it comes to establishing grounds for a criminal offense, things are different. One cannot state that the personal (immoral) consideration that figured into a decision based on military necessity, which mandated the sacrifice of one soldier for the entire fighting force, undermined command authority or impaired command tasking.

D. Material Examination—Summary

Thus far, we have taken various strides down the lanes of material criminal law in order to determine whether David's

¹⁴³ See, e.g., A 256/96 Major Bibas v. Chief Military Prosecutor et al. (Isr.).

¹⁴⁴ Appeals 227/86 & 277/90, Chief Military Prosecutor v. Major Hauser (Isr.).

comportment in the affair of Uriah's death in battle amounted to a criminal offense under general penal laws or under the special military code. We conclude that David's command to position Uriah against the enemy by himself is not an offense only if the circumstances of battle necessitated such a mission for a single soldier.

E. Procedural Examination

As we head from the academic "corridor" into the "hall"—the courtroom where David undergoes his simulated trial—let us give thought to the special difficulty that arises when such a trial is conducted three thousand years after the fact. The perspective is distant not only in time but also, and mainly, in the social reality generally and in that of the battlefield particularly. Apart from the intrinsic *problematique* of this remoteness, even more problematic is the absence of testimony by David and Joab. Plainly, had there been at least real-time documentation of these testimonies,¹⁴⁵ reaching a verdict would have been rather simple. The testimonies may have expressed factual consistency (making it much easier to determine the facts) or offered clashing versions of what happened (necessitating the use of various tools to determine the preferred version of one over another).

Under the given circumstances, the evidentiary material in the prosecution's possession is rather flimsy. It lacks *direct* evidence, of one-one value, that David had ordered Joab to position Uriah alone facing the enemy. Admittedly, such information is explicitly included in the Biblical text—which is not "source testimony," as stated. Even if the Biblical narrator could be called to the stand, it would be only hearsay. One cannot rest factual findings on a plinth such as this. Apart from the Biblical wording, several points of circumstantial evidence—pre-factum, "mid-factum," and post-factum—exist.

¹⁴⁵ Such documentation is considered not "source testimony" but hearsay. Under certain circumstances, however, such evidence may be accepted as an exception to the rule that blocks its acceptability (for example, testimony about words expressed by a person while doing his or her job and who died afterward). It is also conceivable to see the circumstances of this trial as a "special situation" that rules out the disregard of documentation of matters stated by someone who is no longer among the living (*cf.* The special situation that came about in the *Demjanjuk* case, when the Supreme Court, at the appeal stage, accepted written documentation without hearing its underlying testimonies.). CrimA 347/88 *Demjanjuk v. State of Israel*, 47(4) PD 221, 648.

Preceding the act was the evolving relationship of David and Bathsheba and the unsuccessful attempt to persuade Uriah to go home.¹⁴⁶ In the course of the act is Uriah's death in battle without his having been left on his own.¹⁴⁷ After the fact, the Biblical narrator presents Nathan's reprimand.¹⁴⁸

The defense has no evidence whatsoever. It can only examine the prosecution's evidence, point to circumstances that may cast doubt on the Biblical version, and suggest how the lacunae might be filled (e.g., by offering the military-necessity hypothesis).

Thus, the verdict may be influenced by the combination of circumstantial evidence and the projection of doubt onto the outcomes of a criminal trial.

VIII. CIRCUMSTANTIAL EVIDENCE AND RELEVANCE OF DOUBT IN A CRIMINAL TRIAL

A. The Relevance of Reasonable Doubt

It has long been accepted in our international jurisprudence that criminal conviction occurs only after proof of guilt beyond reasonable doubt is provided. In Israel, the rule is enshrined in the Penal Law¹⁴⁹ and it recurs in all jurisprudence in democracies that uphold the presumption of innocence.¹⁵⁰

It is beyond the bounds of this article to test the nature, essence, and scope of the conceptual interpretation of the expression "reasonable doubt."¹⁵¹ It suffices for our cause to call attention to three accepted insights. First, doubt that entails the exoneration of a criminal

¹⁴⁶ 2 *Samuel* 11:5-13.

¹⁴⁷ 2 *Samuel* 11:17.

¹⁴⁸ 2 *Samuel* 12:1-12.

¹⁴⁹ § 34V(a), Penal Law, 5737-1977: "A person shall not bear criminal responsibility for an offense unless it was proven beyond all reasonable doubt."

¹⁵⁰ For references to the rule in countries that practice Anglo-American law (e.g., the U.K., the U.S., Canada, New Zealand, Australia) and its incidence in Japan, see *Reasonable Doubt*, WIKIPEDIA, https://en.wikipedia.org/wiki/Reasonable_doubt (last visited Apr. 8, 2024). Ancient Jewish law also sets a very high standard of proof for criminal conviction generally and for capital cases particularly. The rabbinical Sages believed that the standard should leave no room for even the slightest doubt. Rabbi David Nissani, *Hokhahat ashma me'ever le-safek savir ba-mishpat ha-'Ivri*, 3789 WKLY. TORAH PORTION SHEETS (2010).

¹⁵¹ To delve into these questions, see Yaniv Vaki, *Sefirut shel safek: 'Iyyunim ba-din ha-pozitivi ve-hatsa'a liqrat model normativi hadash*, 2 HAPRAKLIT 463 (2007).

defendant exists when the evidence raises a real question about the defendant's guilt. The doubt must be real, rational, and somehow anchored in the evidentiary material. A mere hypothesis or a far-fetched possibility will not do. "An accepted formulation of 'reasonable doubt' is that the proof of the defendant's culpability must be so convincing and nearly certain that the exculpatory counterclaim should be seen as theoretically possible but so strained that it should not be considered altogether unrealistic."¹⁵²

Second, because the burden of proof in a criminal trial belongs to the prosecution, the defendant need not prove anything; he or she need only explain satisfactorily the presumption of guilt that arises from the prosecution's evidence. In other words, the defendant need not *present* any evidence whatsoever and need not *point out* evidence presented in order to create doubt about guilt. An *explanation* (thesis) that can establish doubt of guilt may suffice to acquit the defendant.

When the defendant explains the incriminating evidence to the satisfaction of the court, the court must acquit. However, acquittal for reasons of doubt is also mandatory when the court can neither reject the explanation nor find the defendant's explanation trustworthy. The Israel Supreme Court dwelled on this:

If the prosecution presented evidence that ostensibly creates the assumption that the defendant committed the offense attributed to him, it becomes the defendant's obligation to continue presenting proof of his own. [Neither] at this stage—nor at any other stage—must he prove his innocence of crime. All he need do is offer explanatory remarks for the assumption that surfaced from the prosecution's evidence. If he gives a satisfactory explanation, the Court need not decide whether to accept or reject said explanatory remarks—viz, it is unprepared to decide whether said remarks are correct or not—and must acquit him on grounds of doubt.¹⁵³

¹⁵² Based on CrimA 347/88 Demjanjuk v. State of Israel, 47(4) PD 221, 648 (quoted consensually in Criminal Further Hearing 3391/95 Ben Ari v. State of Israel, 51(2) PD 377, 463); inferring from the many to the individual, CrimA 51/20 Podemski v. Attorney General, 5 PDI 1187, 1196 (Isr.); CrimA 99/6359, State of Israel v. Kurman.

¹⁵³ *Podemski*, 5 PDI at 1196; *Ben Ari*, 51(2) PD 377 (emphasis added).

Third, the nature of the circumstances in doubt is important. Where these circumstances revolve around the core of the alleged criminal event, reasonable doubt that necessitates the defendant's acquittal may arise. Doubt that surfaces in regard to secondary circumstances marginal to the criminal event, however, should not necessarily conclude with acquittal.

As a rule, the expectation that, within the matrix of incriminating evidence, every detail in the comportment of the defendant and the victim of the offense, be it before, during, or after the offense, will be fully proven, clear, and consistent with the entire body of evidence, may not square with the complexity of events in life and the complexity of the human psyche and behavior, for which full evidence and explanations are not always found. Where the missing details are immaterial and marginal to the core of the offense, they may not necessarily preclude the incrimination of the defendant and the raising of reasonable doubt that would justify his exoneration.¹⁵⁴

B. Conviction by Circumstantial Evidence

Above we noted that the Biblical account of the Uriah affair is based not on direct evidence but on several points of circumstantial evidence. The strength of these points needs to be examined.

Circumstantial evidence, unlike direct evidence, gives no direct proof of a fact that must be proven in a trial. It demonstrates a *circumstance* from which, sometimes in combination with other circumstantial evidence, one may infer the existence of a fact that entails proof.¹⁵⁵ Hence, while a factual finding grounded in admissible direct evidence hinges solely on its credibility, one based on circumstantial evidence rests on a two-tier foundation: credibility and a logical inference derived from it.¹⁵⁶

It is a settled rule of law that “*the evidentiary power of circumstantial evidence is no less than that of direct evidence and a criminal conviction may be based on both equally.*”¹⁵⁷ This, however, applies only where the circumstantial evidence yields one and only one logical inference. Where more than one inference may be adduced and

¹⁵⁴ CrimA 6295/05 Eli Vaknin v. State of Israel.

¹⁵⁵ CrimA 6392/13 State of Israel v. Krief, para. 96.

¹⁵⁶ *Id.*; based on CrimA 6167/99 Ben Shalush v. State of Israel, 57(6) PD 577, 586–587 (2003).

¹⁵⁷ Krief, para. 97 (emphasis added).

the additional inference does not incriminate, the circumstantial evidence may lose its strength.

Logical inferences may differ to the extent of their plausibility. When one logical inference incriminates and another exonerates, the finding should be predicated on the rule of doubt. Namely, the first inference loses its incriminating power if the second inference is strong enough to subject it to reasonable doubt. If the additional inference is but a highly improbable and strained hypothesis, it cannot blanket the first inference in reasonable doubt.

On the basis of these principles, case law has developed a three-stage process to test the evidentiary power of circumstantial evidence.¹⁵⁸ First, each piece of circumstantial evidence is examined separately from the others in terms of its potential as grounds for a factual finding. Second, all such evidence is tested in the aggregate in order to determine whether it yields an incriminating conclusion. When an incriminating logical inference emerges from the first two stages, the third stage begins, in which the burden is handed to the defendant to offer an alternative *explanation* that may plant reasonable doubt in the incriminating inference. The Israel Supreme Court elaborates:

In the third stage, the burden is handed to the defendant, [who must] offer an explanation that may refute the incriminating postulate against him. An alternative way of explaining the circumstantial evidence, casting the reasonable doubt on the incriminating postulate, suffices to exonerate the defendant. The Court juxtaposes the prosecution's incriminating thesis to the defense's antithesis and asks whether the circumstantial evidence refutes the defendant's version and explanation beyond all reasonable doubt.¹⁵⁹

This deserves reemphasis. Even when a solid web of circumstantial evidence exists and dangles over a defendant's head like a guillotine blade, the defendant need not "prove" anything and need not present evidence of his or her own. The defendant must merely explain the prosecution's evidence in a way that establishes doubt about it.

¹⁵⁸ The framework of the three-step test appears frequently in the case law. See, e.g., CrimA 9327/03, Amos von Wiesel v. The State of Israel.

¹⁵⁹ *Krief*, para. 97; CrimA 497/92 Nahum v. State of Israel, para. 5.

IX. THE QUESTION OF CRIMINAL LIABILITY FOR URIAH'S DEATH THROUGH THE LENS OF THE PRINCIPLE OF DOUBT AND THE RULES OF CIRCUMSTANTIAL EVIDENCE

The Biblical narrator presents a scenario, without backing of direct evidence, of the veracity of the contents of the order that he has placed in David's mouth: "[p]lace Uriah in the front line where the fighting is fiercest; then fall back so that he may be killed."¹⁶⁰ This statement/command resonates with the offense of attempted enticement to murder. The evidence offered to prove it, however, is merely *circumstantial* and sits at three thresholds:

David and Bathsheba develop a love affair and David fails to persuade Uriah to go down to his house in order to cover it up.¹⁶¹

Uriah's placement on the front line where a difficult battle is expected, for which reason elite warriors are stationed there. Uriah is killed in battle without being abandoned by the others, some of whom join him among the fallen: "So when Joab was besieging the city, he stationed Uriah at the point where he knew that there were able warriors. The men of the city sallied out and attacked Joab, and some of David's officers among the troops fell; Uriah the Hittite was among those who died."¹⁶²

Afterward, the Prophet Nathan reproaches David for his dastardly conduct, including the killing of Uriah: "You have put Uriah the Hittite to the sword" ¹⁶³

A. Testing the Evidence

It is the rule that evidence is tested in the three-stage process described above. The evidence here, observed at each of the three evidentiary thresholds, does not per se conduce to a factual finding that even inches toward incrimination.

David's relationship with Bathsheba and the attempt to conceal the act of adultery are background circumstances only. Their connection with the incriminating order yields, at the most, a motive for the criminal act alleged. This motive is not fundamental to the crime. Therefore, demonstrating the existence of the motive does not,

¹⁶⁰ 2 Samuel 11:15.

¹⁶¹ 2 Samuel 11:2-14.

¹⁶² 2 Samuel 11:16-17.

¹⁶³ 2 Samuel 12:9.

in itself, imply criminality.

The circumstances of the crime do not suggest that an aberrant course of action was taken. In a pitched battle such as this, elite fighters obviously lead the way. Uriah, a member of this elite, was stationed in the spearhead company that bore the brunt of the losses. This account of routine warfare is not incriminating. The Prophet's reproach is grounded in the public's conventional wisdom. In our legal system, this "background static" has no evidentiary value of its own.¹⁶⁴

Aggregate observation of the circumstantial evidence yields a reasonable, perhaps very reasonable, logical possibility: that David ordered Uriah to be stationed alone against a superior enemy and thus to cause his demise with high probability. The reasonability of this conclusion rests on (1) David's interest in tossing Uriah "under the bus"; (2) the fact that Joab, in his post-battle report to David, made special note of Uriah's death; and (3) David did not protest when Nathan held him liable for Uriah's death.¹⁶⁵

Can the defendant counter this by offering a logical alternative explanation that is somewhat based on the evidentiary material? Above we analyzed the alternative option and found that David's instruction to "sacrifice" Uriah may have been conditioned on battlefield requirements. If such a requirement materialized, Uriah's self-sacrifice might have been induced by the force of the king's order.

No fewer than five different explanations for the likelihood and the rationality of this alternative option have been found, each in turn.¹⁶⁶ Five of them are rooted in the reality that emerges from the Biblical narrative and are planted in the circumstantial evidence itself. Thus, this alternative should not be regarded as a "mere" or "far-fetched," but rather a well-based hypothesis that affects the factual findings.

¹⁶⁴ The Bible credits Nathan with presenting God's word to David. Even if we stipulate this, Nathan's enraged cry to David, "and [you] had him killed by the sword of the Ammonites," bespeaks killing, not murder. 2 *Samuel* 12:9. The Sixth Commandment proscribes murder, not killing. The difference between the two in Jewish law is material: a killer is put to death by Heaven and not by the court. Chaim H. Cohen, *Murder and Bloodshed in Jewish Law*, 8 STATE OF ISR. & SHAAREI MISHPAT COLL. CTR. FOR JEWISH LAW & ITS RSCH. (2001/02).

¹⁶⁵ 2 *Samuel* 12:13.

¹⁶⁶ See *supra* pages 232-34 (Argumentation in Support of the Plausibility of the Military-Necessity Version).

X. CONCLUSION

We set out on a long and winding road in an attempt to contemplate the ancient historical event of the death of Uriah the Hittite in battle against the Ammonites through the lenses of customary criminal law. We took long and short walks across material and procedural fields of customary criminal law in Israel and found that one may imagine, as a reasonable possibility based on some evidentiary grounds, that David did hope for Uriah's death but did not express this in an order to cause his deliberate and premeditated death. We proposed that David assumed, as a highly plausible possibility, that in the course of the battle, *it would become necessary* to sacrifice one of the warriors in order to give the Israelite camp a local advantage. Accordingly, and with his hope of seeing Uriah dead, David ordered his general, Joab, to sacrifice Uriah if such a military necessity came about. Examining the order from the standpoint of military necessity, we conclude that David has no criminal liability whatsoever.

We do not purport to claim, let alone to determine, that the military-necessity hypothesis is the "real" truth. Our claim is that by using the toolbox of a flesh-and-blood judge at such a time, we may acquit David on the grounds of the doubts intrinsic to this hypothesis. Thus, we concur with Justice (subsequently Deputy Chief Justice) Menachem Elon:

*Once it becomes a matter of establishing the truth in the world of the judicial system, we intend solely to establish the truth, insofar as it can be determined, in accordance with the material and procedural norms of the judicial system within the framework of which the legal inquiry is undertaken.*¹⁶⁷

We did not intend to undermine the judgmental capacities of Heaven in this affair. Divine judgment has different "tools of the trade" (we look into each other's eyes; God looks into our hearts) and, in turn, its own outcomes. The existence of Divine judgment, however, does not rule out corporeal judgment. The expression "for judgment is God's"¹⁶⁸ means that judgment is entrusted to human judges (who, like God, are also called *elohim* in Scripture). Human judgment moves in its own circles; the two domains do not converge.

¹⁶⁷ HCJ 152/82 Elon v. State of Israel, Para. 36 449 49, 465 (emphasis added).

¹⁶⁸ *Deuteronomy* 1:17.

A. Epilogue

This comprehensive legal analysis presents a nuanced examination of King David's command to place Uriah at the forefront of battle, ultimately leading to Uriah's death. It explores the legality of this command through the lens of modern jurisprudence, particularly focusing on military law and ethics. The analysis juxtaposes the ancient narrative with contemporary legal doctrines, delving into the complexities of command responsibility and the interplay of personal motives in military orders.

It methodically dissects the Biblical text and contemporaneous legal principles, revealing a multifaceted perspective on military command, liability, and moral leadership burdens. The core argument posits a nuanced understanding of David's command, weighing military necessity against personal motivations. It extends the discussion to modern contexts, drawing parallels with current military leadership challenges and the imperative of ethical decision-making.

The sun has set, the curtain has descended, the trial is over. The verdict has been handed down and has no aftermath. We would like to remind our readers of the well-known saying that "war is too important a matter to be left in the hands of the generals."¹⁶⁹ Paraphrasing this statement, we can say that "the law deals with matters too important to be left to the jurists." In our matter, too, we would probably be remiss if we settled for the formal judicial outlook and went no further.

Therefore, we wish to relate our case to four somewhat interrelated topics that emanate from more than the judicial side:

- the judge in the case at hand;
- the response of the defendant, David;
- a comparative historical perspective; and
- in praise of David.

B. The Judge in David's Trial

There's a well-known Israeli joke about two judges who set out

¹⁶⁹ The saying is attributed to Georges Clemenceau, one of the Prime Ministers of France, although it is not clear if he was indeed the first to say it. *See Georges Clemenceau 1841–1929 French statesman, Prime Minister of France 1906–9, 1917–20*, OXFORD REFERENCE, <https://www.oxfordreference.com/display/10.1093/acref/9780191843730.001.0001/q-oro-ed5-00003062> (last visited Nov. 19, 2024).

on a morning run together. As they skip along, an elderly woman bursts from a courtyard and showers one of them with verbal abuse. As they try to determine the facts, her cause comes to light: she claims that this runner's dog attacked and killed her beloved cat. "I'll sue you for what your dog did to my Mitzi," she screams. After trying to calm her, he gives up and asks her what the damage will be. The woman mentions a sum; he pulls it out of his wallet and pays her off *sans* debate.

The other judge stares at him in shock. "It's one thing for you to pay her off, but we both know that you don't have a dog!" "You're right," his friend replies, "but go figure which judge I'll get if she sues me"

The gag reflects, for better or worse, the influence of the judge on the course and outcome of a trial. Like it or not, the judge's personality matters a great deal for everyone involved.

Now back to our case. David's trial was not heard by an ordinary judge. His judge was the Master of the Universe Himself, He who remembers the sins of fathers unto the third and fourth generations. One can say a great deal about God, but according to Jack Miles, "He's not what the Americans call nice."¹⁷⁰ More simply put, He was not the right judge to whom a defendant might present clever legal arguments, however correct they might be.

The judge in this case was well aware of everything we noted about Him at this time, as his language indicates. Speaking of Uriah, the Prophet Nathan tells David, "[you] had him killed by the sword of the Ammonites."¹⁷¹ Note the clear difference between "killed" and "murdered." The Sixth Commandment states "[d]o not murder" and not "[d]o not kill."¹⁷² David is not accused of murder. Elijah's resounding outcry to Ahab: "Would you murder and take possession?"¹⁷³ was not addressed to David—not because David received preferential treatment—but because he did not deserve it.

However, the judge found even this behavior on David's part vile and even outrageous. The judge's disappointment with David's behavior stands out, as the Prophet Nathan says:

¹⁷⁰ JACK MILES, *GOD: A BIOGRAPHY* 12 (1995) (in a special introduction to the Hebrew edition).

¹⁷¹ 2 *Samuel* 12:9.

¹⁷² *Exodus* 20:13; *Deuteronomy* 8:16.

¹⁷³ 1 *Kings* 21:19.

Thus said the Lord, the God of Israel: ‘It was I who anointed you king over Israel and it was I who rescued you from the hand of Saul. I gave you your master’s house and possession of your master’s wives; and I gave you the House of Israel and Judah; and if that were not enough, I would give you twice as much more. Why then have you flouted the command of the Lord and done what displeases Him? You have put Uriah the Hittite to the sword; you took his wife and made her your wife and had him killed by the sword of the Ammonites.’¹⁷⁴

David’s punishment, too, was severe and wholly disproportionate by modern standards: “Therefore [said Nathan] the sword shall never depart from your house because you [spurned] me . . . you [acted] in secret, but I will do this thing in broad daylight . . . the son born to you will die.”¹⁷⁵

David, the midrash remarks, was punished fourfold relative to his sin: via a boy, Tamar and Amnon, and Absalom. David’s misdeed was such that he was judged by the child born to him, the deed of Amnon and Tamar (in which one of his daughters was raped and his oldest son was killed), and the fatal uprising of Absalom, for whom David issued his famous lament, “O my son, my son Absalom! If only I had died instead of you”¹⁷⁶ In terms of our legal analysis above, he paid dearly by any measure.¹⁷⁷ It is hard to avoid the feeling that David was punished commensurate with the identity and expectations of the defendant not necessarily with the magnitude of the offense.

This theory is reinforced by God’s anger at David. In contrast to the stereotypical judge, God did not behave with equanimity, serenity, and patience. He fumed, seethed, and hurled the defendant’s guilt at him. You did what you did furtively, He said, but I will tell it aloud until the whole world hears. As for the analyses that let you off lightly? Save them for your lawyers.

David’s behavior: David’s behavior when Nathan accuses him is noteworthy. The king responded with six words: “I stand guilty

¹⁷⁴ 2 Samuel 12:7-9.

¹⁷⁵ 2 Samuel 12:10-15.

¹⁷⁶ 2 Samuel 19:1.

¹⁷⁷ Furthermore, some of those penalized, such as the newborn, are innocent of crime.

before the Lord!”¹⁷⁸ He did not ask to consult with a lawyer or blame childhood oppression, some mysterious illness, a mental breakdown, or just his years of hardship escaping from Saul. He did not fault Bathsheba as Adam blamed Eve; he did not announce publicly that he needed “treatment” or detoxification. He simply admitted his misdeed, his guilt, and his responsibility for what happened—unlike many other Biblical heroes such as Adam, Cain, Saul, and Job, not to speak of the Israelites themselves. We dare say that precisely this behavior of David’s alludes to the heights of what was expected of him and the depths of disappointment to which he plunged.

C. David’s Behavior in Comparative Law

We are disinclined to defend David’s behavior, which was problematic even if the offense was relatively mild. What he did to Uriah back then would be considered unfair today. One should remember, however, that moral outlooks vary with the times. Adultery, once considered a grave offense, is absent in Western countries’ law books. The main criticism of David’s actions has to do with his behavior toward Uriah and not necessarily that toward Bathsheba.

David was a king and, as the Latin saying has it, *Princeps legibus solutus est*—the sovereign is not bound by laws. If it seems to us that David’s doings were unjust and scandalous, we have to remember the reality of the time of his reign. It is altogether unclear that one can judge historical figures by the moral standards of a totally different era.¹⁷⁹ Several examples demonstrate this. Augustus took his wife, Drusilla, from her husband Tiberius Nero while escorting her in her pregnancy.¹⁸⁰ It is said of him that he led the wife of one man of the rank of consul from her husband’s banquet hall in front of his eyes to the bedchamber, and that he immediately returned her to the crowd while her ears were still hot and her hair was wild.¹⁸¹ No one bothered to speak out or tweet about the godly Augustus’s customs.

¹⁷⁸ 2 Samuel 12:13.

¹⁷⁹ In this matter of judging national forebears on the basis of current convention, see Jon D. Levenson, *Abusing Abraham: Traditions, Religious Histories and Modern Misinterpretations*, 3 JUDAISM: A Q. J. OF JEWISH LIFE & THOUGHT 47, 259-77 (1998).

¹⁸⁰ See 2 SUETONIUS, 2 THE TWELVE CAESARS ¶ 62 (Robert Graves trans., Penguin Classics 1957).

¹⁸¹ *Id.* at ¶ 69.

Nero wanted Statilia Messalina for his wife so he ordered the killing of her husband Atticus Vestinus.¹⁸² Pope Alexander VI, aka Rodrigo Borgia, took a concubine, Vannozza dei Cattane, who was, as he made sure, a married woman; she bore him two famous sons.¹⁸³

Such customs continued to manifest throughout history. In the nineteenth century, when the King of Siam desired a certain girl, it did not matter at all that she was engaged to another man.¹⁸⁴ A dictator in our times, Saddam Hussein, evidently indulged in the same kind of behavior. He married his second wife, Samira Shahbandar, after forcing Samira's husband to divorce her.¹⁸⁵

This is not the place to discuss the moral conduct of present-day rulers, even of countries that are considered democratic and advanced. One may, however, remark that David's actions, although altogether unjustified, take on other proportions in light of them.

D. In Praise of David.

We conclude with a last morsel of food for thought. Despite God's disappointment in his anointed one, David, and despite the severe punishment that He handed him, He forgave David's misdeed. It shows us that the Bible acknowledges the fact that its main hero is also a flesh-and-blood human being who is susceptible to temptations, lusts, stimuli, and pressures like anyone else. David was chosen and beloved not because he was better than everyone else but because he was like everyone else—not because he was superhuman but because he was human. Of him it is said: "For David had done what was right in the eyes of the Lord and had not failed to keep any of the Lord's commands all the days of his life—except in the case of Uriah the Hittite."¹⁸⁶

David was chosen because he tried his best, even if he sometimes failed. It is the human essence, it seems, not to succeed but to try and strive. Such is our imperative, too.

¹⁸² Suetonius, *supra* note 180, at book 6 ¶ 35.

¹⁸³ Christopher Hibbert, *The Borgias and Their Enemies: 1431-1519* ch. 8 (2008).

¹⁸⁴ See Rodgers & Hammerstein, *The King and I* act 2, sc. 4.

¹⁸⁵ Katherine Viner, *A Violent Clan*, *Guardian* (July 25, 2003, 19:56 EDT), <https://www.theguardian.com/world/2003/jul/27/iraq.iran>.

¹⁸⁶ 1 *Kings* 15:5.