

# Rabbinic Legal Magic: A New Look at Honi's Circle As the Construction of Law's Space

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## PREFACE

Robert Cover's work, on which this conference reflected, indirectly but importantly contributed to this project. Over a decade ago, I devoted a chapter of my scholarly career to his justly celebrated *Nomos and Narrative*,<sup>1</sup> showing how Cover extracted from Jewish sources an alternative, even if overly wishful, model of Jewish law and used that model to expand the horizons of American legal theory.<sup>2</sup> Cover not only recalled for us modern law's connection to the sacred; he also gave those working in the field of Jewish religious thought a new and rich vocabulary with which to describe the rabbinic legal imagination and reminded us that law and narrative are deeply intertwined. Robert Cover's work figures as well in the specific subject I have chosen to explore. Cover was fond of presenting what he called rabbinic folktales of justice, focused, as befits a scholar of Civil Procedure and Federal Courts, on questions of jurisdiction, whether that of the *Sanhedrin* (Jewish High Court) asked to exercise jurisdiction over the king or of the attempt to revive the jurisdiction of the *Sanhedrin* in sixteenth-century Safed.<sup>3</sup> What interested

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1. Robert M. Cover, *The Supreme Court, 1982 Term -- Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

2. See Suzanne Last Stone, *In Pursuit of the Counter-Text: The Turn to Jewish Law in Contemporary American Legal Theory*, 106 HARV. L. REV. 813 (1993) [hereinafter *In Pursuit of Counter-Text*].

3. Robert M. Cover, *The Folktales of Justice: Tales of Jurisdiction*, 14 CAP. U. L. REV. 179 (1985).

him most in these tales is the gesture of commitment to law involved in the act of asserting and accepting jurisdiction. Indeed, in *Nomos and Narrative Cover* condemns the Supreme Court's failure to accept jurisdiction in the *Bob Jones University* case. Like Robert Cover, I also teach Federal Courts and Civil Procedure, although my scholarly work is in the field of Jewish law and thought. This particular combination of disciplines is responsible for the interpretation I offer here of formulaic appeals to God involving the act of circle drawing. Robert Cover, through his rich interdisciplinary writings, played a seminal role in my own work, and for that I am deeply grateful.

## I. INTRODUCTION

The legal realists delighted in showing the survival of magical forms of thought within modern legal systems.<sup>4</sup> In the course of their attack on the representation of modern law as rational, they drew attention to the fact that "rational law" and "irrational magic" resemble each other in striking ways and make use of common devices. One is the performative, or, as Austin called it, *How To Do Things with Words*.<sup>5</sup> Austin had in mind verbal legal formulae, which, when uttered, alter the legal status of persons or things. The Scandinavian legal theorist Axel Hagerstrom, investigating Roman law, viewed such performatives as a continuation of a primitive belief in word magic, in which the utterance of a formula is supposed to bring about changes in the real world.<sup>6</sup> More recently, anthropologists have debated whether Austin's category of performatives provides a useful way to understand magical practices in primitive societies.<sup>7</sup> In Austin's account, however, there is a constitutive relationship between the performative and what it brings about.<sup>8</sup> A new legal relationship is constituted by the very act of uttering something. Thus, if the proper procedure is used, the act itself effects a transition from one conventionally defined state to another. The purpose of the performative is to establish a new legal relationship. By contrast, word magic implies a causal relationship between the act of uttering, which is effective or ineffective, and what it brings about in the real world. When the magician uses proper procedures and the desired result, nevertheless,

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4. See, e.g., Jerome Frank, *Modern Legal Magic*, in *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* 37 (1949); Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 *COLUM. L. REV.* 809 (1935).

5. JOHN L. AUSTIN, *HOW TO DO THINGS WITH WORDS* (1962).

6. Even John Searle, a theorist of performative language, speaks of "a quasi-magical power of . . . bringing about changes in the world through our utterances." See John R. Searle, *How Performatives Work*, 58 *TENN. L. REV.* 371, 384 (1991).

7. See, e.g., Emily M. Ahern, *The Problem of Efficacy: Strong and Weak Illocutionary Acts*, 14 *MAN* 1 (1979); S.J. Tambiah, *A Performative Approach to Ritual*, 65 *PROC. BRIT. ACAD.* 113 (1979).

8. See AUSTIN, *supra* note 5, at 6-11.

does not ensue, failure is usually attributed to causal reasons.<sup>9</sup> The distinction is important because it bears on the proper classification of the act of reciting a formula as legal or magical.

Nonverbal ritual enactments, although they do not pose language problems, may also be performatives and, therefore, are equally difficult to classify.<sup>10</sup> As with verbal recitations, some rituals are magical acts, designed directly to actualize a new reality in the physical world by, for example, coercing the deity into a desired act; others are legal or religious performatives, acts that reference or activate an underlying legal or theological concept. Ritual performatives can be found even in secular legal systems. For example, the service of a summons on the defendant or attachment of property signals the presence of a person or property within the boundaries of the court and, at the same time, activates the court's power over that person or property. These ritual enactments express, in concrete form, a mental phenomenon: the legal concept of jurisdiction. And like verbal performatives, the ritual activates what it signifies.

As Austin explained, performatives operate against the background of convention, which allows us to understand what, precisely, a statement or act is referencing or activating.<sup>11</sup> Thus, the transformations produced by certain acts or statements are the result of the background meaning they carry in a given society. If we no longer had access to that background meaning already in place within a society, it would be virtually impossible to tell, for example, whether the bare recitation of a verbal formula was word magic, a religious ritual with recognizable meaning, or a legal performative intended to generate both in the person uttering it and in state actors, a feeling of being bound by a new set of rules or normative obligations.<sup>12</sup>

With respect to ancient cultures, especially the complex culture that was late antique Judaism, in which law and religion were fused but in which magic was also practiced, this difficulty in classifying ritual and verbal acts as either magical, religious, or legal, when access to the background meaning the act carries is obscured, is a critical issue, for it bears on the essential character of early rabbinic Judaism. Although much attention has been paid to the question of how to distinguish magic from religion in late antiquity, the affinity between magical rituals or formulae and legal performatives is one that has been largely ignored by scholars who study ancient rabbinic texts. This essay is an attempt to fill that gap by asking

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9. See D.S. Gardner, *Performativity in Ritual: The Mianmin Case*, 15 *MAN* 346, 348 (1983).

10. On rituals as performatives, see ROY A. RAPPAPORT, *RITUAL AND RELIGION IN THE MAKING OF HUMANITY* 107-38 (1999).

11. See AUSTIN, *supra* note 5, at 14-15.

12. Martin P. Golding, *Rights, Performatives, and Promises in Karl Olivecrona's Legal Theory*, 18 *RATIO JURIS* 16, 24 (2005). Golding notes that, despite the large amount of literature devoted to this topic, a sense of mystery remains as to how this feeling comes about.

whether one such ritual, circle drawing, attributed to various religious figures in rabbinic texts and often viewed as a magical practice, is better understood as a legal performative, that is, a concrete enactment of a legal concept.

Such a shift in perspective has the potential to subtly alter our picture of early rabbinic culture. A key issue in the study of early rabbinic culture is the nature of certain religious virtuosos, to whom various so-called magical actions are attributed in talmudic-midrashic literature. Were the ritual acts attributed to these religious figures understood, within rabbinic culture itself, as magical acts—thus pointing to the recognition of a type of holy man within late antique Jewish culture similar to the Hellenistic divine man—or were these actions understood instead as legal performatives whose meaning was embedded in a complex of religio-legal concepts? The Judaism of late antiquity varied and Jews certainly practiced a range of magical activities in the rabbinic period. The question, however, is how far magical practices penetrated the heart of normative rabbinic texts. Given that rabbinic texts (including the midrashic literary corpus) are the products of a strong legal culture, it should not surprise us if there is an intricate interplay between legal concepts and the most puzzling rituals described in them.

The body of this Article consists of a close analysis of the legal dimensions of one literary motif found in several rabbinic narratives: the drawing of a circle in which an intercessor figure, a holy man or prophet, stands and then petitions God for relief from judgment. The most famous version of these narratives can be found in Mishnah *Ta'anit* 3:8. The Mishnah reports that, during a severe drought in the late Hasmonean period (ca. 65 BCE), the people called on the holy man, Honi ha-Me'aggel, Honi the Circle Drawer, to pray for rain. Honi, confident that he would succeed, immediately ordered the people to bring the paschal ovens inside to prevent their damage by the rain. He prayed, but to no avail. Honi then drew a circle, stood within the circle, and said: "Lord of the Universe, Your children have turned to me, for before You, I am like a member of the family. I swear by Your Great Name that I shall not move from this spot until you take pity on your children." It began to rain drop by drop. Honi prayed again, saying: "This is not as I requested; [rather, I intended] rain to fill the cisterns." Immediately, rain poured forth in buckets. Honi prayed yet again, saying: "This is not as I requested; [rather I intended] rain of blessing..." Finally, it rained in the proper amount, until the people were forced to take refuge in the Temple Mount. The people then asked Honi to pray for the rain to cease. Honi said to them: "See if the Claimant's Stone is erased." The Mishnah reports that Shimon ben Shetah sent Honi a message: "Were you not Honi, I would proclaim against you a ban. But what shall I do to you? You are like a child who misbehaves before God, yet He does your wish, like a son who

misbehaves before his father, yet [his father] does his wish.”

The Honi story is one of those narratives, like the Oven of Akhnai story,<sup>13</sup> that has captured the imagination of generations of Jewish scholars. One of the chief reasons that the story has drawn so much comment is its appearance in the Mishnah, a legal code. Indeed, the story is introduced as a legal precedent. The reporting of the strange act of circle drawing, together with adjuration and seemingly miraculous production of rain, within the Mishnah is surprising. The power to perform magic or miracles is unusual in early rabbinic Judaism and the Mishnah, in contrast to the Talmud, contains no other such stories about magic or miracles performed by tannaitic rabbis or even their Pharisaic predecessors. Although magic is not an explicit theme in any of the versions of the Honi narrative, numerous scholars, nonetheless, have equated Honi's circle with magical practices.<sup>14</sup> According to this view, the drawing of a magic circle is, either an act of theurgy, intended to coerce God, akin to methods and magical symbols in other cultures used to adduce rain, or a protective device, “by means of which the magician establishes for himself a private, forbidden precinct in which demonic spirits cannot trespass.”<sup>15</sup> This view is part and parcel of the strand of the scholarly search for traces of magical and esoteric traditions preserved in rabbinic *midrash*, particularly of early Palestinian provenance, in which I too participated at an earlier stage in my career. I argued then that numerous rabbinic narratives, particularly centered on the figure of Moses, preserve esoteric traditions of magical practices more fully described in the non-rabbinic *hekhalot* literature of the same general period.<sup>16</sup> The magical practices of holy men are used in order to bridge the gap between earth and heaven. Such esoteric practices typically involve adjuration in God's name, a magical technique enabling the practitioner to ascend safely to heaven, to overcome dangers along the path, and to learn divine secrets. Pursuant to this interpretation, the holy man uses such rituals both to protect himself from danger and to gain power over God.

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13. On the varying interpretations of this story in legal and other academic literature, see Stone, *In Pursuit of the Counter-Text*, *supra* note 2, at 855-64.

14. Citing evidence from post-talmudic medieval writers, scholars such as Lajos Blau, Samuel Daiches, Joshua Trachtenberg, William Green, and, initially, Judah Goldin viewed the drawing of a circle accompanied by the adjuration “I shall not move from here” as evidence of magical practices within rabbinic circles. See LAJOS BLAU, *DAS ALTJÜDISCHE ZAUBERWESEN* 33 (1914); ADOLF BÜCHLER, *TYPES OF JEWISH-PALESTINIAN PIETY* 254 (1968); SAMUEL DAICHES, *BABYLONIAN OIL MAGIC IN THE TALMUD AND IN THE LATER JEWISH LITERATURE* 33 (1913); JUDAH GOLDIN, *THE FATHERS ACCORDING TO RABBI NATHAN* 187 n.25 (1955); JOSHUA TRACHTENBERG, *JEWISH MAGIC AND SUPERSTITION* 121 (1939); William Scott Green, *Palestinian Holy Men: Charismatic Leadership and Rabbinic Tradition*, 2.19.2 AUFSTIEG UND NIEDERGANG DER RÖMISCHEN WELT 619, 634-35 (1979) [hereinafter *Palestinian Holy Men*].

15. GOLDIN, *supra* note 14.

16. See Suzanne J. Last, *Moses as Magician-Mystic in the Rabbinic Haggadah* (1974) (unpublished B.A. Thesis, on file with Princeton University).

This understanding of the magical practices of holy men situates holy men within the typology of the divine man, *theios aner*, a well-known type in Greek, Hellenistic Jewish, and Jewish sectarian literature.<sup>17</sup> Like the prototypical Hellenistic divine man Apollonius, as portrayed by Philostratus, this is a figure who bridges the gap between man and God through miracle-working,<sup>18</sup> or through ascent to Heaven, as in the Qumran fragments.<sup>19</sup> The divine man is also associated with the highest form of magician in the Hellenistic world.

One became a magician in Hellenistic culture through ascent and the acquisition of power and knowledge possessed by the gods through learning the names of the divinities. The Hellenistic Jewish community borrowed this pagan model and deified Moses as a divine man who ascended through heaven using his magical rod and other magical techniques, such as the drawing of a magic circle, adjuration, and use of God's names.<sup>20</sup> Traces of this image can be found in rabbinic sources about Moses that emphasize his magical uses of the rod, the circle, and the divine name.<sup>21</sup> Rabbinic stories about Honi ha-Me'aggel and other early Palestinian wonder workers, such as Hanina ben Dosa, are often seen as part of this complex.<sup>22</sup> Both Honi and Moses drew magic circles and used adjuration in performing miracles, such as producing rain or healing. With respect to the Honi story in particular, some scholars have suggested that its inclusion in rabbinic legal sources underscores the permeation of magical ideas, as well as the penetration of the typology of the Hellenistic divine man who performs wonders and magic, even within normative

17. For the Greco-Roman evidence, see Peter Brown, *The Rise and Function of the Holy Men in Late Antiquity*, 61 *J. ROMAN STUD.* 80 (1971); GRAHAM ANDERSON, *SAGE, SAINT, AND SOPHIST: HOLY MEN AND THEIR ASSOCIATES IN THE EARLY ROMAN EMPIRE* (1994).

18. See E.L. Bowie, *Apollonius of Tyana: Tradition and Reality*, 2.16.2 AUFSTIEG UND NIEDERGANG DER RÖMISCHEN WELT 1652 (1978).

19. See John J. Collins, *A Throne in the Heavens: Apotheosis in Pre-Christian Judaism*, in *DEATH, ECSTASY, AND OTHER WORLDLY JOURNEYS* 41-58 (John J. Collins & Michael Fishbane eds., 1995); James R. Davila, *Heavenly Ascents in the Dead Sea Scrolls*, in *2 THE DEAD SEA SCROLLS AFTER FIFTY YEARS* 461-85 (Peter W. Flint & James C. Vanderkam eds., 1999); Morton Smith, *Ascent to the Heavens and Deification in 4QMTT*, in *ARCHAEOLOGY AND HISTORY IN THE DEAD SEA SCROLLS: THE NEW YORK UNIVERSITY CONFERENCE IN MEMORY OF YIGAEL YADIN* 181, 187 (Lawrence H. Schiffman ed., 1990).

20. On the traditions surrounding the ascension of Moses, see Wayne A. Meeks, *Moses as God and King*, in *RELIGIONS IN ANTIQUITY* 354-71 (Jacob Neusner ed., 1970). Moses was widely recognized as a magician in pagan circles as well; see JOHN G. GAGER, *MOSES IN GRECO-ROMAN PAGANISM* 134-61 (1972); John G. Gager, *Moses the Magician: Hero of an Ancient Counter-Culture?*, 21 *HELIOS* 179, 179-88 (1994).

21. See Last, *supra* note 16, at 83-159.

22. See Baruch Bokser, *Wonder-Working and the Rabbinic Tradition: The Case of Hanina ben Dosa*, 16 *J. FOR THE STUDY OF JUDAISM* 42 (1985); Sean Freyne, *The Charismatic*, in *IDEAL FIGURES IN ANCIENT JUDAISM* 223 (George Nickelsburg & J.J. Collins eds., 1980); Jack Lightstone, *Magicians, Holy Men and Rabbis: Patterns of the Sacred in Late Antique Judaism*, in *5 APPROACHES TO ANCIENT JUDAISM* 133 (William Scott Green ed., 1985); Geza Vermes, *Hanina ben Dosa*, 23 *J. JEWISH STUD.* 28 (1972); Geza Vermes, *Hanina ben Dosa*, 24 *J. JEWISH STUD.* 51 (1973).

early rabbinic culture.<sup>23</sup> Others have argued that the story's inclusion in the Mishnah reflects a programmatic effort by the early rabbis to counter the power such wonder workers had among the masses or to assimilate it to that of the rabbis.<sup>24</sup> The Mishnah's primary aim, they contend, is either intended to cast doubt on the miracle worker's conduct and talents, thus reinforcing rabbinic power, or to suggest that the power to produce rain, formerly localized in the Temple and the priestly cult, had been taken over by the rabbis, whom Honi represents.<sup>25</sup> Eventually, it is argued, these figures were increasingly 'rabbinized,' a process evident in the Babylonian elaboration of the Honi story.<sup>26</sup>

Such analyses of the Honi story often fail to look at the larger context of the story and the motif of circle drawing as it was further developed in midrashic-talmudic literature. In each case of circle drawing in rabbinic literature the drawing of the circle is a prelude to a prayer on the part of an intercessor figure that God reverse a judgment or explain his apparent injustice. Yet, the connection between the two within rabbinic culture—prayer for justice and a supposed magical rite—has thus far eluded scholars. I suggest here that the drawing of the circle is best explained in terms of the legal imagination—or what Paul Kahn has called a crucial aspect of "law's aesthetic:" the imaginative construction of the space from which law issues.<sup>27</sup> The circle is a legal performative effecting the creation of an authoritative judicial proceeding. In short, it is an imaginative enactment of the legal idea of what we now call jurisdiction.

Jurisdiction entails locating the parties, either actually or metaphorically, within the boundaries of authoritative legal space, compelling both the defendant to answer a complaint and the judge to respond. And I shall argue, drawing on internal rabbinic and extra-rabbinic evidence, that the circle serves to locate God within the boundaries of the legal space it maps out. The mapping out of the space in which God is located is intimately connected to prayer in rabbinic texts. Thus, this interpretation places circle drawing squarely within the complex of legal forms that characterizes the petitionary prayers of holy men, who assume an intercessory role continuous with that of the ancient biblical prophet/advocate before the divine court. At the same time, this interpretation raises the larger question of whether the distinction between magical acts and legal performatives and between the typology of the lawyer and that of the shaman—both in the ancient and modern world—is

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23. See *supra* note 14.

24. See JACOB NEUSNER, *JUDAISM: THE EVIDENCE OF THE MISHNAH* 325-27 (2d ed. 1988).

25. See Green, *Palestinian Holy Men*, *supra* note 14, at 39-41.

26. See *supra* note 22.

27. See PAUL W. KAHN, *THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP* 55-56 (1999).

a meaningful one. The fine line between legal performatives and magical rituals, and between law and magic generally, is a subject that I will return to at the end of this essay.

## II. AN ALTERNATIVE INTERPRETATION OF CIRCLE DRAWING IN RABBINIC CULTURE

### A. *The Honi Narrative*

The Honi narrative is preserved and elaborated in four rabbinic legal compilations.<sup>28</sup> Each version casts Honi's actions in a subtly different light, and also reflects varying uses of the story by the redactors of the documents in which the story appears. I shall not rehearse all the details here, especially those fully explored by others.<sup>29</sup> The talmudic elaborations on the criticism of Honi's conduct, recorded in the Mishnah, constitute an important starting point, however, for understanding the meaning of Honi's circle and his accompanying acts. It is worth re-quoting this part of the Mishnah in full:

Shimon ben Shetah sent a message to him: "If you were not Honi, I should decree a ban against you. But what shall I do to you? For you misbehave towards the Omnipresent yet he does what you wish, like a son who misbehaves towards his father, yet he does what he wishes. Concerning you scripture says: 'Let your father and mother be glad, and let her that bore you rejoice.'"<sup>30</sup>

Shimon ben Shetah was a well-known opponent of magic, who is reported to have hanged eighty witches in a single day.<sup>31</sup> Yet, the ground Shetah explicitly offers in the Mishnah for his opposition to Honi rests, instead, on the bold, importuning character of Honi's prayer.<sup>32</sup> Honi has skirted the line of proper etiquette toward God.

The two talmudic versions of the story are more explicit than the Mishnah in identifying what is objectionable about Honi's conduct. As in the Mishnah, the arrogant and demanding nature of Honi's prayer is disturbing. This objection is related to larger legal questions about when

28. MISHNAH, *Ta'anit* 3:8; TOSEFTA, *Ta'anit* 2:13 (with important modifications; see *infra* note 34); BABYLONIAN TALMUD, *Ta'anit* 23a; PALESTINIAN TALMUD, *Ta'anit* 66d. The story also appears in one of the scholia of *Megillat Ta'anit* in connection with a holiday observed on the 20th of Adar; for that text and a discussion of its connection with the story as told in the Talmud, see VERED NOAM, MEGILLAT TA'ANIT: VERSIONS, INTERPRETATION, HISTORY (Hebrew) 309-11 (2003).

29. See Green, *Palestinian Holy Men*, *supra* note 14.

30. *Proverbs* 23:25.

31. See MISHNAH, *Sanhedrin* 6:4; PALESTINIAN TALMUD, *Sanhedrin* 23a.

32. See Yisrael Rosenson, *The Act of Honi the Circle Drawer in Jewish Law and Thought* (Hebrew), at <http://www.daat.ac.il/daat/kitveyet/taleley/maase-2.htm>, who notes that Shimon b. Shetah, a well-known opponent of magic, would not have hesitated to condemn Honi had he suspected Honi of magical practices.

petitionary prayer is permissible. Technically, the Honi story is invoked in the Mishnah as a precedent (a *ma'aseh*), one that must be reconciled with the larger legal discussion, and not merely as a narrative digression. The story functions as a case study testing various legal doctrines about prayer under discussion. The linkage in the Mishnah is clear: the story is recorded immediately after the Mishnah declares the legal proposition that "one cries out for every calamity that befalls the community, with the exception of excess rain." In praying for the rain to abate after it poured forth in buckets, Honi's precedent contradicts the rule.<sup>33</sup> This conflict is minimized in the *Tosefta* version, highlighted in the Palestinian Talmud, and noted by later commentators, who are at pains to point out an ambiguity in the Mishnaic text about whether Honi actually prayed for the rain to cease entirely.<sup>34</sup>

The story implicates other legal issues, as well. Is prayer effective and hence permissible after a divine decree has already been issued?<sup>35</sup> May one generally pray to revoke an excess of good? May one approach God with prayer at any time, at man's initiative, or must it be at the invitation of God, just as one may not approach a human sovereign without first securing permission?<sup>36</sup> In the Mishnah, Shimon ben Shetah's remarks serve to reconcile the law and the case. Honi's brazenness is exempt from punishment because the divine sovereign acquiesced. Such behavior is reserved for an exceptionally righteous individual like Honi, who is a familiar of God.<sup>37</sup> The legal theme of proper and improper requests is equally a focus of the Babylonian Talmud, which earlier in the tractate discusses cases in which famous biblical figures made improper requests, yet God nonetheless responded in a proper and generous manner.<sup>38</sup>

Both the Palestinian and Babylonian Talmud repeat and comment on Shetah's criticism but diverge in their emphasis. The Palestinian Talmud

33. Jacob Neusner, *The Aggadic Role in Halakhic Discourse: The Case of Mishnah-Tosefta-Yerushalmi-Bavli Taanit*, 5 REV. RABBINIC JUDAISM 51, 62 (2002).

34. In the *Tosefta* version, the pray-er is an anonymous *hasid*; there is no circle; he is answered immediately; and there is no criticism of his actions. Moreover, the actions of the pray-er in the *Tosefta* are entirely consistent with the Mishnah's mandate that one does not pray in response to excess rain, a message that he delivers to the people when they ask him to pray for the rain to stop. This message, attributed to the *hasid* in the *Tosefta*, is attributed by the Palestinian Talmud to Rabbi Eliezer, implicitly criticizing Honi for praying for the rain to stop. The *hasid* is thus portrayed in a positive light in the *Tosefta*, while Honi is criticized in the Palestinian Talmud.

35. BABYLONIAN TALMUD, *Gittin* 58a.

36. See Shlomo Naeh, "Creates the Fruit of Lips": A Phenomenological Study of Prayer According to *Mishnah Berakhot* 4:3, 5:5 (Hebrew), 63 *TARBIZ* 185, 211-13 (1994). He claims that this is the central issue linking the *aggadah* of *Mishnah Berakhot* 5:5 and the *halakhic* position of Rabbi Akiva in *Mishnah Berakhot* 4:3.

37. On Honi as *hasid* and on the relationship of the *hasidim* to *halakhah* and to special customs regarding prayer, see Shemuel Safrai, *Teaching of Pietists in Mishnaic Literature*, 16 *J. JEWISH STUD.* 15 (1965), and Berachyahu Lifshitz, "Aggadah" and Its Role in the History of the Oral Law (*Torah She'Be'al Peh*) (Hebrew), 22 *SHENATON HA-MISHPAT HA-IVRI*, 233, 297-308 (2001-03).

38. BABYLONIAN TALMUD, *Ta'anit* 4a.

elaborates why Honi's initial request for rain was not answered: "for he did not approach modestly."<sup>39</sup> (Recall that, in the Mishnah, Honi is portrayed as confident, at first, that his prayer will be answered.) Indeed, the Palestinian Talmud deepens the criticism, repeating Shimon ben Shetah's rebuke that one who acts like Honi deserves excommunication, but omitting Shimon's ultimate conclusion that God's apparent pleasure in Honi's actions exempts him from punishment.<sup>40</sup> This mitigation is transferred over to Rabban Gamliel. Although Shimon ben Shetah's rebuke is recorded in the Babylonian Talmud, the Babylonian Talmud's version softens the criticism by assigning to the people a larger part in urging Honi to intervene on their behalf.<sup>41</sup> In both the Babylonian and Palestinian Talmud, the people initially urge Honi to pray for rain. In the Palestinian Talmud, once light rain falls, the people address one another, but they do not address Honi, and we do not hear from them again until the end of the story. In the Babylonian Talmud, by contrast, the people continue to press Honi even after he seems content to stop. This reworking of the story serves to emphasize that Honi is responding to the requests of both the people and his students and is not acting on his own behalf or initiative.

The talmudic elaborations of the story, however, are concerned with the propriety of Honi's entire course of conduct, including Honi's oath and the circle, and not solely his prayer for the rain to abate. Both Talmuds question Honi's oath-taking and conclude that it was improper. Yet, again, the impropriety of the oath does not turn on the ground that it constitutes adjuration, the use of magical power over God's name to coerce the divinity. Rather, Honi, like a good lawyer, has put God to a difficult choice—either deliver rain or prove Honi's oath false, a desecration of God's name. Both Talmuds thus recall the case of Elijah here (and the parallels between the Honi story and those surrounding Elijah's prayer for rain on Mount Carmel are striking).<sup>42</sup> Elijah earlier swore that it would not rain unless Elijah wished it.<sup>43</sup> Had Honi and Elijah overlapped, God's name would be profaned by one of them.

The circle draws comment only in the Babylonian Talmud, which proceeds to supply a legal precedent for Honi's act. The Talmud elaborates that the practice of circle drawing derives from the prophet

39. PALESTINIAN TALMUD, *Ta'anit* 66d.

40. *Id.*

41. BABYLONIAN TALMUD, *Ta'anit* 23a.

42. See Gad B. Sarfatti, *Pious Men, Men of Deeds, and the Early Prophets* (Hebrew), 26 *TARBIZ* 126, 127-29 (1956-57); see also *Genesis Rabbah* 13:5 (Vilna edition) ("And there was no man to work the land': [Meaning,] there was no man who would cause humanity to work for God, like Elijah and Honi the Circle Drawer.").

43. During the course of its discussion of Honi, the Babylonian Talmud alludes to the fact that Elijah possessed the "keys of rain," a legal metaphor drawn from the use of keys to signal exclusive rights of control over property. For a fuller discussion, see BABYLONIAN TALMUD, *Sanhedrin* 113a.

Habakkuk, about whom the verse says: “I will stand at my watchpost (*mishmarti*) and station myself on the rampart (*matzor*).”<sup>44</sup> The continuation of this verse is as follows: “I will keep watch to see what he will say to me, and what he will answer concerning my complaint.”<sup>45</sup> *Midrash Tehillim* offers a play on the word “*matzor*,” taking it to imply the drawing of a shape (*tzurah*).<sup>46</sup> The verse from Habakkuk is explained there as follows: “This teaches that Habakkuk drew a shape [*tzar tzurah*], and stood within it, and said: I shall not move from here until You, God, disclose why You reward evildoers in this life.”<sup>47</sup> This invocation of authoritative precedent for Honi’s act suggests that the drawing of the circle may have been a particular locus of concern. Yet, in supplying an authoritative precedent for Honi’s strange act, the Babylonian Talmud again portrays Honi in a softer light than is portrayed in the Palestinian Talmud.

Thus, a major difficulty with the magical interpretation of the circle and the consequent identification of Honi as a representative of a particular type of holy man who uses magical techniques to coerce God to produce rain is that it bears virtually no connection to the internal viewpoint and larger legal context of the story, as presented in the Mishnah and in the later talmudic elaborations. These sources are chiefly concerned with the legality of Honi’s petitionary prayer, given its aggressive nature. The sources also emphasize the intricate interplay between Honi and the people, portraying Honi as one who takes on an intercessory role on behalf of the community to reverse a divine decree.

### *B. Circle Drawing and Demanding Prayer*

The connection between circle drawing and aggressive prayer by intercessor figures has been further obscured by the near-exclusive attention paid to the Honi story in analyzing the motif of circle drawing and the consequent failure to consider the evidence that emerges from other midrashic treatments of this theme. Although the act of circle drawing is associated primarily with the Honi stories, on account of his name—Honi ha-Me’aggel, the Circle Drawer<sup>48</sup>—the theme of drawing a circle, accompanied with the phrase “I shall not move from here” is also found in rabbinic *midrashim* about Moses and Habakkuk and should be analyzed as a coherent motif.<sup>49</sup> Circle drawing is ascribed not only to

44. NEW REVISED STANDARD VERSION, HABAKKUK 2:1.

45. *Id.*

46. *Midrash Tehillim*, ch. 77, p. 343 (Salomon Buber ed., 1966). For a translation, see WILLIAM G. BRAUDE, 2 THE MIDRASH ON PSALMS 18 (1976).

47. *Id.*

48. On *me’aggel* as also referring to rolling or leveling of roofs, see JEFFREY L. RUBENSTEIN, RABBINIC STORIES 279 n.3 (2002). For other possibilities, see Rosenson, *supra* note 32.

49. On Moses, see below; on Habakkuk, see *Midrash Tehillim*, *supra* note 46.

Honi and Habakkuk, but also to Moses. In *Avot de-Rabbi Natan*, Aaron informs Moses that God has afflicted Miriam with a skin disease for slandering Moses and asks that Moses intervene.<sup>50</sup> Immediately, Moses draws a small circle, stands within it, announces that he will not move from here, and requests that God heal Miriam. In *Deuteronomy Rabbah*, Moses addresses God's divine decree, here described as a sealed judgment, that Moses will not enter the land of Israel.<sup>51</sup> The *midrash* describes Moses as acting lightly toward that decree, waiting until the last possible moment to protest. "And when Moses saw that a binding divine decree had been sealed against him Moses immediately decreed upon himself a fast, drew a small circle, and said: 'I shall not move from here until the divine decree is obliterated.'"<sup>52</sup>

All these cases of circle drawing involve, in different fashion, the questioning of God's justice: Either they are an appeal to reverse a divine judgment or a request for an explanation of God's apparent injustice. Moreover, all involve requests from God after God initially resists. God is either unresponsive or has already issued a contrary divine decree. Finally, Honi, Moses, and Habakkuk are each identified elsewhere in rabbinic literature as individuals who petitioned God in an arrogant and demanding fashion. Indeed, Judah Goldin identifies the prayers of Honi, Moses, and Habakkuk, with their accompanying rituals of oath-taking, circle drawing, and formulaic utterance "I shall not move from here," as a discrete genre of "demanding prayers" by holy men who intercede on behalf of the people before God.<sup>53</sup> These holy men—who proffer demanding prayers—emerge as a type of religious virtuoso. They are not religious virtuosos on the model of the Hellenistic divine man but are rather the familiar religious virtuosos of the intercessor, taken from the biblical model of the prophet, who does legal battle with God through petitionary prayers. Such prayers for justice are documented across late antique culture and emerge as a particularly distinctive aspect of ancient rabbinic Judaism.

The prophetic intercessor is the closest analogue in rabbinic legal

50. AVOT DE-RABBI NATAN (Solomon Schechter ed., 1967), ch. 9, s.v. Rabbi Shimon.

51. *Deuteronomy Rabbah* (Jerusalem: Y.D. Halevi, 1985), *Parashah* 11.

52. *Id.*

53. Such demanding prayers are only acceptable, Goldin argues, when the speaker "is not making some request for himself but is demanding in behalf of someone else who is in straits." Judah Goldin, *On Honi the Circle Maker: A Demanding Prayer*, in *STUDIES IN MIDRASH AND RELATED LITERATURE* 331, 334 (Barry L. Eichler & Jeffrey H. Tigay eds., 1988) [hereinafter *On Honi*]. Accordingly, Goldin dismisses the text of *Deuteronomy Rabbah*, where Moses draws a circle and prays for himself, as corrupted, noting that in the *Midrash Petirat Moshe*, Moses opts to fast and pray but does not draw a circle. See also Zahava Neuberger, *Midrash Deuteronomy Rabbah: Its Nature and Place in the Framework of the Tanhuma-Yelamdenu Literature* (Hebrew) 15 n.8 (1999) (Ph.D. dissertation, on file with Hebrew University) (considering *parashah* 10 to be a later interpolation into the text of *Deuteronomy Rabbah* by way of *Midrash Petirat Moshe*). Note, however, that demanding prayer need not be confined to cases of intercession; it is also applicable to cases of exigency and great distress.

culture to the ideal lawyer/advocate. Prophetic intercession takes the form not simply of demanding prayer but of argument and the lodging of a legal complaint or appeal from a decree. This legal form is typical of Israelite prophecy and prayer, and also differs from prophecy and prayer to God in ancient Mesopotamian religion. In the latter, “intercession was almost always by gods . . . whose anger was soothed with prayer and music, but not with argument,” and complaints and charges were not brought before the deity himself.<sup>54</sup> In contrast, the biblical prophets invoke legal arguments and appeals to persuade God to cancel his decrees. The prophet’s function is to “stand in the breach against God,” as *Ezekiel* 22:30-31 phrases it, and do legal battle with Him.<sup>55</sup> This conception of intercession and prayer is based on the assumption of a stable order of justice sustained by God.

The emotional and psychological dimensions of prophetic prayer as legal advocacy is the subject of Yochanan Muffs’s magisterial essay on the Israelite prophets. From a form-critical perspective, Joseph Heinemann claims that petitionary prayer bears a striking resemblance to legal forms,<sup>56</sup> which philological studies of the Hebrew verb for prayer (*pll*) underscore.<sup>57</sup> The root of the verb “to pray,” the rabbinic appellation of the one who prays, as well as the structure of petitionary prayer, all allude to legal argument or advocacy. The rabbis refer to the one who prays as a *sanegor*, a Greek loan-word that means advocate and is consistently contrasted with a *kategor* (prosecutor).<sup>58</sup> The *sanegor* who leads the community in prayer tries to forestall or overcome God’s decision, which is appropriately described as a *din*, or legal decree.<sup>59</sup> God is often depicted as both the prosecutor and judge—the dual role he occupies in the circle

54. YOCHANAN MUFFS, *LOVE AND JOY: LAW, LANGUAGE, AND RELIGION IN ANCIENT ISRAEL* xix (1992) [hereinafter *LOVE AND JOY*].

55. Yochanan Muffs, *Who Will Stand in the Breach? A Study of Prophetic Intercession*, in *LOVE AND JOY* 9 (1992).

56. JOSEPH HEINEMANN, *PRAYER IN THE TALMUD: FORMS AND PATTERNS* 193-217 (1977).

57. When conjugated in the *pi’el* form, the root of the Hebrew word indicating the action of prayer, *pll*, variously means “to pronounce judgment,” “to be the arbitrator, intercessor,” “to speak up for,” and “to assume,” see LUDWIG KOEHLER & WALTER BAUMGARTNER, *2 THE HEBREW AND ARAMAIC LEXICON OF THE OLD TESTAMENT* 933 (M.E.J. Richardson trans., 2001), or, alternatively, “to attribute responsibility to someone, hold someone accountable,” see Adele Berlin, *On the Meaning of pll in the Bible*, 96 *REVUE BIBLIQUE* 345, 348 (1989). Almost all of the attested instances of the root in the *hitpa’el* form mean either “to make an intercession for,” or relatedly, “to pray.”

58. For a sampling of sources, see DANIEL SPERBER, *A DICTIONARY OF GREEK & LATIN TERMS IN RABBINIC LITERATURE* 126-30 (1984).

59. See, e.g., *PALESTINIAN TALMUD, Rosh Hashanah* 1:3 (57b) (translated in EDWARD A. GOLDMAN, *THE TALMUD OF THE LAND OF ISRAEL: ROSH HASHANAH* 44 (1988)):

Rabbi Hama the son of Rabbi Hanina and Rabbi Hoshaya: one said. . . . And the other said: is there a nation like this nation? Customarily, the ruler says the trial (*ha-din*) is today, and the robber says tomorrow is the trial. To whom do they listen? Is it not to the ruler? But the Holy One Blessed be He is not thus. The *Bet Din* said: today is *Rosh Hashanah*. The Holy One Blessed be He says to the ministering angels: set up the platform, let the defenders (*sanegorin*) rise and let the prosecutors (*kategorin*) rise; for my children have said, today is *Rosh Hashanah*.

narratives. He is both defendant/appellee and judge.

Heinemann also identifies a rabbinic tradition of “forceful” prayer, which made use of the pattern of courtroom pleas, contrasting this pattern to that commonly found in the ancient Near East, of supplication by the “servant before His master,” in which God is praised and thanked and the request for relief is phrased as request for undeserved mercy or generosity.<sup>60</sup> In the law court pattern, the petitioner opens by briefly addressing God in honorific terms (typically Master of the Universe), delineating the relevant facts, and concluding with an argument on the basis of which God must grant relief.<sup>61</sup> The argument sometimes invokes precedent, referring to previous examples in which God granted similar requests, while at other times it draws attention to the merits of the petitioner himself.<sup>62</sup> The most forcefully argued form of this genre are those prayers recited in times of distress, in which the petitioner advocates on behalf of his community. In this class of prayer, with “its strong words of pleading and defense”<sup>63</sup> there is an element of importunity, even impertinence toward God that, Heinemann notes, engendered significant rabbinic criticism but was exceedingly difficult to uproot.<sup>64</sup> Other rabbis defended the practice when used by exceedingly pious men interceding on behalf of the community in times of public distress as a mode of last resort, when previous requests were denied.<sup>65</sup> The petitioner who uses this form plays a double role—both accuser and defendant. God therefore also occupies a double role—as defendant and judge.

Honi’s prayer in particular and the other instances of circle drawing in general are prime examples of the genre of aggressive prayer in the law court pattern.<sup>66</sup> In both the cases of Honi (per the Babylonian Talmud) and Moses, when challenging the decrees rendered against themselves, objections to the forcefulness of this type of prayer are initially mounted. The Babylonian Talmud comments on the brazenness of Honi’s act, which is later mitigated on account of his success; *Deuteronomy Rabbah* takes care to draw attention to Moses’s modesty, perhaps in an effort to place his aggressive prayer in a broader perspective. Significantly, in all the circle drawing stories, the circle is drawn only after a decree has been

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60. *Supra* note 56, at 202-203.

61. *Id.* at 194.

62. *Id.* at 194-97.

63. *Id.* at 200.

64. *Id.*

65. *Id.* at 200-201.

66. *But see* Green, *Palestinian Holy Men*, *supra* note 14, at 630 n.52 (questioning the inclusion of Honi within this genre because the best manuscript evidence has Honi addressing God as *ribbono*, “its Master” rather than as the expected *ribbono shel olam*, “Master of the Universe”). This slight stylistic difference aside, however, the affinity between Honi’s prayer and other similar aggressive prayers in rabbinic literature is impressive.

rendered: God has punished the people in the form of a drought,<sup>67</sup> Miriam has been afflicted with a skin disease, and a decree has been rendered against Moses that he will not enter the land. This commonality resonates with the legal debate in the Talmud over the question whether *tza'akah*—the traditional form of prayer—is effective after a decree has already issued.<sup>68</sup> In such cases, the petitioner brings his appeal in the form of a lawsuit requesting a reversal. The requests all center on God's justice and are lodged after God initially resists or is silent.

Heinemann notes that some of these prayers are not devoid of magical elements, citing not only the circles made by Honi and Moses, but also Levi's act of grasping the Torah scroll when he utters prayers on the roof.<sup>69</sup> For Heinemann there is no intrinsic connection between these quasi-magical devices and the law court pattern of prayer. On the contrary, he contends, magical devices that compel God to perform man's will and prayer, qua legal petition, are essentially contradictory.<sup>70</sup> The common element, he speculates, is desperation. Yet, do these so-called magical acts have a background meaning within rabbinic culture consistent with a judicial prayer for relief from judgment?

### C. Circle Drawing as a Legal Performative

The simplest and most straightforward explanation of this strange act of circle drawing—consonant with the phrase “I shall not move from here” and oath-taking which accompanies the act—is that they are dramatic gestures of commitment on the part of the petitioner seeking to elicit a response from God.<sup>71</sup> The supplicant not only takes an oath, a gesture of commitment, but also binds himself within a circle and refuses to move. Like Austin's commissive category of performatives, they are evidence of a moral commitment to a course of conduct in the future that generates in the person performing it and his audience a feeling of being bound—here, to stand before God until He responds. The phrase “I shall not move from here,” standing alone, is common in midrashic literature and, in these cases, simply denotes seriousness of purpose. Moreover, within the four stories of circle drawing, only Honi accompanies the circle and statement with adjuration. Oath-taking also is evidence of commitment, and appears elsewhere in the *midrash* with the accompanying phrase “I shall not move

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67. For evidence that the drought was seen as divine punishment, see especially Mishnah *Ta'anit* chapter two, which discusses the prayers and exhortations recited during times of famine.

68. See BABYLONIAN TALMUD, *Gittin* 58a.

69. PALESTINIAN TALMUD, *Ta'anit* 66d, cited in HEINEMANN, *supra* note 56, at 206 n.11.

70. HEINEMANN, *supra* note 56, at 206 n.11.

71. See Goldin, *On Honi*, *supra* note 53, at 334. Along similar lines, Yisrael Rosenson has suggested that the practice of circle drawing was part of an ancient practice tied to concentration in prayer; see Rosenson, *supra* note 32.

from here,” signifying a commitment to elicit a response.<sup>72</sup> Usually, such oaths invoke heaven and earth. In Honi’s case alone, the oath invokes God’s name. Use of God’s name, however, does not imply that the magical practice of adjuration is at work here. The difference between an oath invoking heaven and earth and one invoking God’s name is durability.<sup>73</sup> An oath in God’s name is inviolable. The drawing of a circle may be viewed in the same vein. The circle entraps the petitioner, binding him to his spot until God responds.

This simple explanation has much to commend it. Yet, the question remains who is actually bound within the circle—the petitioner, God, or both. In other words, is there a form of displacement at work, in which the drawing of the circle entraps not only the petitioner but also God? I approach this question by noting, first, that displacement is certainly at work with respect to the oath. The party who is bound by the oath is not the oath-taker but, rather, the addressee of the oath—God. An oath generally binds, not the oath-taker, but, rather, the other party who must abide by the oath because causing “the swearer to perjure himself . . . is not compatible with piety.”<sup>74</sup> This was precisely the gist of the Talmud’s criticism of Honi’s oath—by virtue of the oath, he bound God and placed Him in an untenable situation. Significantly, an oath taken in God’s name, as was Honi’s oath, appears in seven other contexts in rabbinic literature.<sup>75</sup> In all seven instances, the reference is to an oath taken by God Himself that has the effect of imposing an irreversible and binding obligation on

72. See, e.g., *Genesis Rabbah Parashah two* (translated in JACOB NEUSNER, *GENESIS RABBAH 25* (1985)):

Simeon b. Zoma for some time had been standing, perplexed. R. Joshua came by and asked how he was, once, then again, but he did not answer him. On the third try, he answered him in a confused way. He said to him, “What’s going on, Ben Zoma? Where are you coming from and where are you walking?” He said to him, “From nowhere, my lord.” He said to him, “Lo, I call to testify against me heaven and earth, that I shall not moved from this spot until you tell me where you have come from!”

73. See BABYLONIAN TALMUD, *Berakhot* 32a (I. Epstein trans. & ed., Soncino Press 1961): Remember Abraham, Isaac and Israel Thy servants, to whom Thou didst swear by Thyself. What is the force of “by Thyself”? R. Eleazar said: Moses said before the Holy One, blessed be He: Sovereign of the Universe, hadst Thou sworn to them by the heaven and the earth, I would have said, Just as the heaven and earth can pass away, so can Thy oath pass away. Now, however, Thou has sworn to them by Thy great name: just as Thy great name endures for ever and ever, so Thy oath is established for ever and ever.

74. SAUL LIEBERMAN, *GREEK IN JEWISH PALESTINE* 108 n.85 (2d ed. 1965), cited in Green, *Palestinian Holy Men*, *supra* note 14, at 633.

75. God takes an oath to the forefathers not to destroy the Israelites, see BABYLONIAN TALMUD, *Berakhot* 32a; God takes an oath not to allow Moshe to enter the land, see *Devarim Rabbah Parashah 11* (Jerusalem: Hanahal, 1983); God takes an oath that the angels Michael and Gabriel, who claim that, after Israel, the Temple is most precious to them, will themselves torch the temple, see *Midrash Zuta: Ekkah Parashah 1* (Salomon Buber ed., 1963); God takes an oath that he will give the Torah to the Israelites, see *Seder Eliyahu Rabbah Parashah 22* (M. Friedman ed., 1969); God takes an oath that the progeny of Amram will carry the Torah and the Ark; God swears that the tears that the Israelites cry as Moses ascends the mountain a second time will one day be turned into tears of joy, see *Seder Eliyahu Zuta Parashah 4* (M. Friedman ed., 1969); God takes an oath that He will never flood the earth, see *Otzar haMidrashim* 185.

God—a form of divine reflexivity.<sup>76</sup>

Is the circle also intended to bind God, rather than Honi? (Recall as well that Elijah, in *Kings*, prior to producing rain encircles not himself but, rather, the altar on Mount Carmel, which Elijah claims is a proper site of God's location.)<sup>77</sup> Judah Goldin, in his seminal article on Honi, cites a story reported by Polybius as evidence that just such an act of displacement is at work as well in the case of Honi's circle.<sup>78</sup> According to Polybius's account, when the Seleucid King Antiochus IV Epiphanes undertook an expedition against Egypt in 168 BCE, the Romans dispatched the general Popilius Laenas to compel Antiochus to abandon his campaign. The King refused to render a decision on the letter; instead, he said he wished to consult with his advisors. Then, Polybius reports:

Popilius acted in a manner which was thought to be offensive and exceedingly arrogant. He was carrying a stick cut from a vine and with this he drew a circle around Antiochus and told him he must remain inside this circle until he gave his decision about the contents of the letter. The king was astonished at this authoritative proceeding but, after a few moment's hesitation, said that he would do all that the Romans demanded.<sup>79</sup>

Goldin is silent on the question whether this story, which he notes "made a profound impression on its audience and was frequently retold,"<sup>80</sup> served as the actual impetus for the midrashic motif. Rather, he offers this "dramatic, perhaps sensational example of peremptoriness"<sup>81</sup> toward an authority figure primarily as a means of underscoring the equally demanding nature of Honi's actions. Honi's act of circle drawing was a displacement, a substitute for encircling the divine sovereign. Honi, Goldin writes, could not draw a circle around his incorporeal God: "Instead, he draws the circle round himself and then makes his demand."<sup>82</sup>

Popilius's circle, to be sure, is the most telling extra-rabbinic source for understanding the midrashic-talmudic motif. I would like to focus more closely both on the notion that God is, indeed, located within the circle and on the notion, made explicit in the Popilius account, that encircling the sovereign constitutes an authoritative legal proceeding. The encirclement of Antiochus is specifically described as an "authoritative proceeding"

76. See KIMBERLEY C. PATTON, *THE RELIGION OF THE GODS: RITUAL, PARADOX, AND DIVINE REFLEXIVITY* (2000).

77. *1 Kings* 18:32.

78. See Goldin, *supra* note 53, at 333.

79. POLYBIUS, *THE HISTORIES*, Book XXIX 27.4-7 (Loeb edition, W.R. Paton trans., p. 91).

80. Other sources from late antiquity citing this story can be found in EMIL SCHÜRER, *THE HISTORY OF THE JEWISH PEOPLE IN THE AGE OF JESUS CHRIST 151-52* (rev. ed. 1973).

81. Goldin, *supra* note 53, at 333.

82. *Id.*

against the sovereign.<sup>83</sup> Entrapment within the circle obligates the King to render an immediate decision. The parallels between Popilius's circle and that of Honi are striking. Both Antiochus and God occupy the role of defendant and judge. Both Antiochus and God initially decline to render a decision. Antiochus explicitly states that he wishes first to communicate with his friends about the content of the letter. God first ignores Honi's prayer. An intercessor figure, Popilius on behalf of the Senate, Honi on behalf of his community, then draws a circle, which is believed to be an arrogant action. Yet, in both stories, the circle provides an authoritative method compelling an authority figure greater in rank to respond to a petition.

I do not argue that encircling the sovereign was a recognized legal procedure either in Jewish or Roman law. Whether rabbinic sources even were aware of Polybius's story is impossible to determine. Nor do we need to posit a case of actual historical borrowing to show that the circle is a legal performative, whose background meaning within rabbinic culture is consistent with a judicial prayer for relief from judgment. In the legal imagination, an authoritative legal proceeding begins with an act that both articulates the space from which law issues and constitutes it.<sup>84</sup> The legal concept of jurisdiction, as Paul Kahn astutely points out, is the imaginative articulation of this space, signifying that a court has been constituted with the power to compel the defendant to respond and the obligation, as Cover reminded us, to render a decision.<sup>85</sup>

A circle traditionally represents that space in ancient Greco-Roman culture. Johan Huizinga links the ancient Greek depiction of a court as a circle in the shield of Achilles to the concept of play intrinsic in all cultural activities, including law.<sup>86</sup> He has in mind the connection between jurisdiction, lawsuits, "agonistic" contests, and "ordinary," antithetical play.<sup>87</sup> Justice is pronounced in a "court" that is, at bottom, a "magic circle or playground." As Huizinga writes:<sup>88</sup>

83. POLYBIUS, *supra* note 79.

84. As Paul Kahn writes: "The rule of law is always rule over a defined territory. Morality may be without borders, but law's rule begins only with the imagination of jurisdiction." KAHN, *supra* note 27, at 55. The Jewish-Christian argument is, Kahn notes, a contest over law's space and borders, as much as over law's time. The question is not only whether law's time is over but whether law's space, its jurisdiction, is limited to Jews or is universal. The Christian argument has its parallels within Jewish legal thought as well. Do the Noahide laws, for example, apply universally or only to non-Jews living within the physical territory of Israel? For a discussion of this question, see DAVID NOVAK, *THE IMAGE OF THE NON-JEW IN JUDAISM* 11-19 (1983).

85. KAHN, *supra* note 27, at 55-57.

86. *THE ILIAD xviii*, 504 (Denison Bingham Hull trans., 1982). Included on Achilles' shield is a scene of two disputing parties who appear before the elders, who "sat on seats of polished stone in a sacred circle." *Id.* at 267, cited in JOHAN HUIZINGA, *Play and Law*, in *HOMO LUDENS: A STUDY OF THE PLAY-ELEMENT IN CULTURE* 76, 77 (1950).

87. HUIZINGA, *supra* note 86, at 76.

88. *Id.* at 77.

The court is still, in the full sense of the word, the hieros kuklos, the sacred circle within which the judges are shown sitting, in the shield of Achilles. Every place from which justice is pronounced is a veritable temenos, a sacred spot cut off and hedged in from the “ordinary” world. . . . But whether square or round it is still a magic circle, a play-ground where the customary differences of rank are temporarily abolished. Whoever steps inside it is sacrosanct for the time being.

Huizinga is concerned with the common imaginative processes cultures exhibit in constructing legal or authoritative space. Law separates itself from the rest of society by retreating into a designated area that is sealed off from ordinary profane life and from social hierarchies. This enclave not only allows parties to meet as equals; it also allows them to meet in safety, covering over violence and aggression under the guise of authority. In this imaginative sacred space, the court is a circle, a protected enclave bounded off from the rest of the world, and so we find courts convening in a circular shape in Greek, Jewish,<sup>89</sup> and numerous other traditions. Legal space thus resembles sacred space in its imaginative representation. Indeed, in Greek culture, the city is also sacred and, like the court, represents civic order. The perfect city is a circular, walled city, surrounded by a fortress.<sup>90</sup>

Many of the features of our story underscore Huizinga’s observations about the common imaginative processes even radically disparate cultures exhibit in constructing authoritative, legal space. Thus, in all the stories in which a circle is used, it forces the sovereign, who is both defendant and judge, to render a decision. The drawer of the circle is criticized as acting arrogantly against one of higher rank. Yet, he is acting authoritatively and is thus exempt from the consequences. These universal elements that Huizinga identifies may be intrinsic to the ritual imagination. Legal procedures and performatives, such as is circle drawing, are, like other ritual enactments, formal, recurrent modes of relating to another, similar to acts of etiquette—whether that other is a human agent or a deity. A common purpose of rituals is to help navigate boundaries, including the boundary between man and God, just as acts of etiquette help navigate the boundaries between people, especially those of different rank. The act of standing within the circle can be seen, from this perspective, both as a ritual act of role assumption, signifying the assumption of a public role—that of the intercessor/prophet who “stands in the breach” and navigates between God and man—as well as an act of proper procedure accompanying prayer. Indeed, a major concern of the Honi narrative is precisely the question of whether Honi employed proper etiquette, or

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89. According to Mishnah *Sanhedrin* 4:3, the Sanhedrin sat in a half circle.

90. Thanks to Stephen Scully for bringing this to my attention.

procedure, in addressing God the sovereign.

Such rituals also tend to have a blurring effect of easing, erasing, or reversing the usual boundaries or social hierarchies. Rituals often imagine a reversal of the ordinary state of affairs. They enact a wished-for state, the opposite of ordinary reality, such as reversing God's apparent injustice or obliterating his decrees. This aspect of rituals recalls its connection to play, as play is the area where one can safely do what cannot otherwise be done. And Honi is not only a child at play but one who safely does, like Popilius, what is otherwise dangerous and brazen. In these narratives we also have a reversal of the familiar image of divine judgment, in which God judges man from His transcendent Court on High, populated by the *famalia shel ma'alah*—the angels who act as prosecutors and witnesses. Instead, these rituals imagine an earthly court in which man appeals and God is both the defendant and the judge who will reverse his decrees.

The significance of Honi's circle, however, transcends the universal structures Huizinga identifies and should be viewed as part of a larger trend in rabbinic literature to locate God in advance of prayer. The rule of law does indeed assume rule within a defined space but, as Kahn notes, "how precisely law's space is configured is culturally contingent."<sup>91</sup> In this connection, the affinities of rabbinic prayer with the genre of legal complaint yield a serious defect: How is God, in his capacity as both defendant and judge, to be reached? Rabbinic sources, to be quoted shortly, give expression to this problem and Honi's circle, drawn immediately after God ignores his initial entreaty, may be a way of locating God in space and receiving a hearing.

The different ways law's space is configured are briefly treated by Kahn and are relevant to understanding the rabbinic conception. Kahn describes the change in how law's space was configured from pre-modern Christian thought to modern Western thought as "the map replacing the king's body."<sup>92</sup> Christian and early Western political space conceived of the state in terms of the king's body. Just as Christ's body is the corpus of the church, the king's body is the corpus of the state. Modern political thought transforms the kingly corpus into the physical geography of the map. In Anglo-American jurisprudence, the mappable border demarcates the authority or jurisdiction of the court. The person on whom the court acts, over whom it exercises authority, must be located within the mappable border. Originally, location had a concrete and tangible meaning. The court could act upon a body or thing within its borders. Persons or things outside its borders were beyond its sovereignty. Thus, the ritual act of physically tagging the person or property within the

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91. KAHN, *supra* note 27, at 55.

92. *Id.* at 60.

territory of the court was a performative that created jurisdiction. The act of locating the party within the borders of the state is still required today, although location is now rationalized as a metaphysical or metaphoric concept.

How law's space is represented in modern Western thought is also relevant to understanding the rabbinic conception.<sup>93</sup> Does the circle also connote the location of God, in either an objective, tangible sense, just as the territorial conception of jurisdiction rests on the actual presence of the defendant within the authoritative borders of the court, or in a metaphysical or metaphorical sense, as modern conceptions of jurisdiction pursue? Must God be located and, if so, where is he located? The subject of God's location, whether everywhere at once, in heaven, in the Temple, in the alternative altar on Mount Carmel encircled by Elijah prior to producing rain, with the people in exile, in the Torah scroll (such as that grasped by Levi, in Heinemann's example of a "contradictory" magical act that accompanied a judicial form of prayer<sup>94</sup>), or wherever the holy man stands—is a large topic. I will touch on only one potentially relevant theme suggested by the narratives under investigation.

After the destruction of the Temple, the place where God classically resided, alternative locations for God's presence emerged within rabbinic culture. In his recent contribution to the extensive literature on Honi, Menahem Hirschman suggests that the story reflects this shift.<sup>95</sup> The circle represents a sacred space—for Hirschman, God's house, into which Honi, God's "son of the house," enters.<sup>96</sup> The contrast in the story is between the Temple Mount, where God's presence formerly resided but which in the story serves as a profane physical structure, merely a refuge from the deluge, and the holy man's circle, in which God now resides. The story thus attests, according to Hirschman, to a shift of the location of God away from the Temple to the mobile holy man or, as Jonathan Z. Smith describes it, the "mobile magician with his equally mobile divinity."<sup>97</sup> God is now located wherever the holy man stands.

This shift in the location of God after the destruction of the Temple and the "exile of the divine presence" from there, however, is not restricted to the location of holy men, nor does this shift reflect the peculiar powers of the "mobile magician." As Uri Ehrlich has recently shown, several of the

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93. Interestingly, the modern idea of artificial, mappable borders in which law's space is contained has roots in the thought of several seventeenth-century political theorists who self-consciously borrowed from Hebraic and Talmudic sources. For details, see Fania Oz Salzberger, *The Jewish Roots of Western Freedom*, 13 *AZURE* 88 (2002).

94. See HEINEMANN, *supra* note 56, at 206 n.11.

95. See Menahem Hirschman, *Changing Foci of Holiness: Honi and his Grandsons* (Hebrew), 1 *TURA* 109 (1989).

96. See *id.* at 111.

97. JONATHAN Z. SMITH, *MAP IS NOT TERRITORY* 189 (1978), cited in Hirschman, *supra* note 95, at 112.

laws surrounding prayer, including the standing posture and physical orientation of one who prays, also attest to the shift of the location of God, away from the Temple and to the precise location of anyone who recites the *amidah* prayer.<sup>98</sup> That location is given, in several rabbinic sources, a fixed dimension: four cubits. As with theories of jurisdictional presence, the question is whether “the divine presence” is metaphorical, subjectively experienced in the worshipper’s mind and heart, or whether it is an “objective, tangible one.”<sup>99</sup> Ehrlich cites one source that unequivocally takes the latter view and, in doing so, maps out precisely the space in which God is located:<sup>100</sup> “I am the woman that stood by thee here (*I Samuel* 1:26): R. Joshua b. Levi said: From this we learn that it is forbidden to sit within four cubits of prayer.” The four-cubit zone relates “to the divine presence within the locus of prayer”<sup>101</sup> and was so understood by Hai Gaon. According to Hai Gaon, even a person who is not himself praying, and therefore not subjectively experiencing the presence of God, but who is within the four cubit zone of someone else who is praying, is required to stand.<sup>102</sup> This requirement implies the actual presence of God within this zone.

Still, the question remains: Why must God be located? The king’s body, like that of Christ, was an all-encompassing body, representing itself as a space without an identifiable location. Yet rabbinic culture, although maintaining that God is sovereign everywhere, nonetheless, assigns importance to mapping God’s specific location in space. Thus, when God resided in the Temple, prophecy was possible. In our context, locating God may serve dual purposes. Entrapping the sovereign within a circle, either physically or metaphorically, is an act of initiating judicial jurisdiction, obligating a response. More importantly, there seems to be a connection between the efficacy of prayer and locating God.

The idea of locating God in space in order for prayer to be effective emerges most poignantly in the talmudic *aggadah* about Manasseh’s prayer reaching God.<sup>103</sup> The *midrash* implies that the actual reversal of a divine decree may hinge on the appellant’s ability to reach God’s location of judgment on high. In the Babylonian Talmud’s version, God must

98. See Uri Ehrlich, “When You Pray Know Before Whom You Are Standing” (*bBer.* 28b), 49 J. JEWISH STUD. 38 (1998).

99. *Id.* at 48.

100. BABYLONIAN TALMUD, *Berakhot* 31b, cited in Ehrlich, *supra* note 98, at 48.

101. Ehrlich, *supra* note 98, at 49.

102. *Otzar ha-Geonim*, Tractate *Berakhot* § 190 (B.M. Lewin ed., 1928), cited in Ehrlich, *supra* note 98, at 49. This measure is routinely used to denominate the space an individual occupies. God is described as located within four cubits of the *halakhah* (Babylonian Talmud, *Berakhot* 8a); an individual is not permitted to sit within four cubits of a sage (Babylonian Talmud, *Kiddushin* 33b); a bill of divorce reaches the wife if it is thrown within four cubits of her location (Babylonian Talmud, *Gittin* 78a).

103. Thanks to Moshe Halbertal for bringing this source to my attention.

circumvent the attribute of strict justice in accepting Manasseh's repentance and thus reverse the divine decree for his sins.<sup>104</sup> Thus, God creates a physical channel for Manasseh, a tunnel that pierces the horizon, the *raki'a*, in order to accept him back. In contrast, the Palestinian Talmud's version tells an elaborate story in which the angels try to thwart Manasseh's attempt to gain access to God and God is compelled to burrow a tunnel for Manasseh under God's throne.<sup>105</sup> Significantly, this motif is also present in *Deuteronomy Rabbah's* depiction of Moses's prayer on his own behalf.<sup>106</sup> Note the legal imagery. A divine decree has issued stating that Moses may not enter the land. That decree is already sealed, however, as final—in contrast to the divine decrees of drought and skin disease at issue for Honi and Moses when he prays on behalf of Miriam. Moses, nonetheless, wishes to reverse the decree against him and draws a circle. Now, as in the story of Popilius, God must respond and render an immediate decision. God recognizes, as it were, the efficacy of Moses's action, compelling a response. The decision, however, is not favorable to Moses. God reasserts that this decree is *res judicata*. Moses did not initially appeal the judgment and the judgment had already been sealed. Yet, in order to prevent Moses's prayers from being effective, God orders the ministering angels to lock all the gates of heaven in the face of the sound of Moses's prayer, which is likened to a sword slicing through the horizon.<sup>107</sup> These *midrashim* imply that the efficacy of prayer hinges on reaching God's location in heaven rather than locating him within the space on earth occupied by the holy man. Thus, at least in *Deuteronomy Rabbah*, as the text is now constituted, the circle on the ground seems to be a pale and weak reflection of the horizon that lacks the efficacy of tunneling to the throne or slicing through the horizon. God may be located, in part, where the holy man stands but this does not guarantee the appellant success; it merely compels a response from the sovereign. This point about success, of guaranteed results or efficacy, is a crucial one and bears on the larger question of the fine line between law and magic, a question to which I now turn.

### III. LAW, RELIGION, AND MAGIC

Until now, I have juxtaposed two different typologies—that of the magician or divine man who forces God's hand and that of the prophetic intercessor who does legal battle. The shaman and the intercessor, however, are both ancient prophetic models and, as Yochanan Muffs has

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104. See BABYLONIAN TALMUD, *Sanhedrin* 103a.

105. See PALESTINIAN TALMUD, *Sanhedrin* 28c.

106. See *Deuteronomy Rabbah*, *supra* note 51.

107. *Id.*

pointed out, the two models are not always so easily demarcated. In the biblical texts, for example, God's hands are seen as tied until a human being makes a request.

Theoretically, this limit to God's total autonomy is self-imposed. But it is difficult to refute those who argue that at an earlier time there actually was such a limitation, that at this earlier time the prophet was a magician, an ancient shaman, or historically speaking, a reflex of the ancient Arabian kahin, whose djin was subject to him, and not the opposite.<sup>108</sup>

We see traces of this notion in the idea that God would be bound to accede to a petition if it reached his throne—although the midrashic-talmudic sources also emphasize God's ultimate control over whether the prayer will reach him. The biblical depictions of the prophets also reflect this tension. Moses has magical power and sometimes becomes a kahin (diviner); Elijah the kahin becomes a messenger and chastiser. For Muffs, it is in the creative tension between the shamanistic elements and the messenger elements that the greatness of Israelite biblical prophets resides. The shamanistic elements might be retained but within the overall context of "outrageous advocates" on behalf of the community.

This fusing of magical and legal elements in the prophetic role returns us full circle to the methodological issue I began with. In arguing that ritual forms described in midrashic-talmudic sources that resemble magical practices, such as the act of drawing a circle, are better understood along the lines of legal performatives including the imaginative constitution of legal space, I have drawn a clear division between the two endeavors. Yet, that division is not always clear because much of law itself has an aspect that may be termed magical. For example, according to those who subscribe to the magical explanation of the circle, the circle is a protective device from demons or, perhaps, even the wrath of God.<sup>109</sup> But, even as a legal construct, the circle, like a court, protects the appellant from his divine antagonist. The "magic" circle of procedure and authority dispels danger and potential violence.

The precise relationship between ritual, law, and magic is complex and deserving of more scholarly attention. The topic has obvious parallels, however, to the more commonly pursued topic of the relationship between magic and religion. In the latter context, primarily three different relationships between magic and religious ritual have been proffered. The first essentially discounts any difference between the two. The use of the term magic to describe religious rituals is simply a means of boundary setting. The ascription of magic to the rituals of other groups is a way to

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108. Muffs, *supra* note 55, at 11.

109. *See supra* note 14.

mark off the boundaries between different groups, as if to say, “Your rituals are magic, mine are religion.”<sup>110</sup> The relationship between magic and religious ritual also has been defined in terms of its esoteric versus exoteric dimension. Magic connotes illegal, esoteric rituals conducted in secret in contradistinction to legal, exoteric rituals.<sup>111</sup> The secret nature of magical ritual puts the practitioner in a private space and in isolation from his fellows while exoteric rituals serve to bind community members together and erect a boundary between fellows and others. The third harks back to the difference between word magic and legal performatives, outlined at the beginning of this essay, and I would like to concentrate on this school of thought.

Within this school, rituals are classified as magical if the instrumental, manipulative, coercive, and mechanical aspects of ritual dominate. When rituals are primarily a form or technique of coercing or manipulating God in order to bring about a certain change in reality, we call them magic. The relationship between the ritual and the result is thus causal and not, as in the case of legal performatives, constitutive. This definition has its roots in Frazer’s distinction between religious prayer, which relies on God’s power, and magic, which forces the divinity.<sup>112</sup> Others have rightly cautioned that there is a danger in adhering too strictly to preconceived classifications between coercive and manipulative rituals and supplication, especially when dealing with cases of demanding and even aggressive prayers recited before God in exigent circumstances. The Honi story is cited as a prime example of the difficulty in labeling the report on one side or another of Frazer’s divide. Thus, Michael Fishbane points to the use of a “magic circle” and the use of the divine name, “a powerful instrument,” but importantly notes that their use here is “not intrinsically capable of bringing about certain results”; that is, a certain change in reality.<sup>113</sup>

The problem of classifying aggressive prayers crosses cultural boundaries and is not confined to rabbinic texts. Versnel, in discussing various Greco-Roman curse-texts, notes that a number of texts included in the corpora of curse-texts have a different atmosphere and phrasing.<sup>114</sup>

110. See Charles R. Phillips, *The Sociology of Religious Knowledge in the Roman Empire to A.D. 284*, 2.16.3 AUFSTIEG UND NIEDERGANG DER RÖMISCHEN WELT 2677-2773 (1986); A.F. Segal, *Hellenistic Magic: Some Questions of Definition*, in *STUDIES IN GNOSTICISM AND HELLENISTIC RELIGION* 349-75 (R. Van Den Broek & M.J. Vermaseren eds., 1981).

111. See Hans G. Kippenberg, *Magic in Roman Civil Discourse: Why Rituals Could be Illegal*, in *ENVISIONING MAGIC: A PRINCETON SEMINAR AND SYMPOSIUM* 137-63, 153-56 (Peter Schäfer & Hans Kippenberg eds., 1997); see also EMILE DURKHEIM, *THE ELEMENTARY FORMS OF THE RELIGIOUS LIFE* 43-45 (1965), cited in Dorothy Hammond, *Magic: A Problem in Semantics*, 72 *AM. ANTHROPOLOGIST* 1349, 1350 (1970).

112. JAMES FRAZER, 1 *GOLDEN BOUGH* 62-78 (1922).

113. Michael Fishbane, *Aspects of Jewish Magic in the Ancient Rabbinic Period*, in 2 *PERSPECTIVES IN JEWISH LEARNING* 28, 34 (Nathaniel Stampfer ed., 1979).

114. See Henk S. Versnel, *Some Reflections on the Relationship Magic-Religion*, 38 *NUMEN* 177, 187-92 (1991).

They take the form of a classic legal complaint—and he dubs them judicial prayer or prayer for justice. Instead of compulsion, there is aggressive supplication, which he therefore classifies as religious and not magical—a distinction, he contends, of which the ancients were fully aware. The crucial difference is that success, the divine response or judicial decision, is uncertain. It is precisely this uncertainty that deprives the legal complaint of a genuine magical element because it breaks the causal connection between the act and the effect in the real world.

This crucial difference also serves to demarcate law from magic generally. For the lines between the two are sometimes fine. Certainly, law conceives of itself as an ethical, conceptual, and rational endeavor devoted to abstractions such as justice, fairness, sovereignty, and interior mental states of culpability. Magic, by contrast, consists of a body of principles or rituals of practical importance, with their own internal standard of rationality, largely governed by precedent, invoked in an archaic, secret, and cryptic language, and hostile to empirical observation. But the conceptual rigidity of the law, law's appeal to precedents, to secret language and to ritual forms, its complex relationship to standards of rationality other than its own, and its resistance to empirical observation are still subjects of criticism. Thus, legal theorists such as Axel Hagerstrom viewed law as a mental or even mystical phenomenon, a human activity that relies on words as performatives or concrete exchanges, and understood law's basic assumptions as a form of secularized magic that relied on magical thinking. Moreover, anyone familiar with litigation appreciates the persistence of "magic-like" rituals in law. In-court procedures are so rigidly followed that they can be reduced to a set of procedural steps that apply to all cases. Only the lawyers know these steps and forms, the secret language of the law. Legal procedure is thus a private language, binding together the persons—lawyers and judges—that use it and excluding all others. Thus, like magic, law is esoteric and, like magic, it is manipulative, coercive, and for a fee.

The crucial difference, as with all aggressive prayer, is the factor of uncertainty. Litigation, like aggressive prayer, is thus an intermediate category between coercion and supplication. Litigation is aggressive, imperative, and coercive, but it is also indeterminate and uncertain. The imagination of jurisdiction is an act of commitment, as Cover understood. It is a commitment to pursue justice aggressively through legal means even in the face of uncertainty. The content of the response is in the hands of the judge, and is always unpredictable. And so, here, too, it is the fusion of the ancient prophetic roles of the shaman and of the ideal intercessor pleading for justice that characterizes the secular legal role. One hopes that, as with the ancient biblical prophets, who Cover so admired, the shamanistic aspects may be retained but within the overall

context of “outrageous advocates” for justice.

