

The Many Bailments of David: A Case Study in Law and Literature

Yael Landman, Brooklyn College and Gorgias Press

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In his landmark essay “*Nomos* and Narrative,” Robert Cover argues that “[law] may be viewed as a system or a bridge linking a concept of a reality to an imagined alternative – that is, as a connective between two states of affairs, both of which can be represented in their normative significance only through the devices of narrative.”¹ References to law in literature may reflect legal practice realistically, but they may also serve to critique, to warn, and to advocate for a more just or moral option. Today, we will consider David’s exploits in the Book of Samuel with an eye toward the Covenant Code’s law of bailment in Exodus 22:6-14. This law treats scenarios in which one person – the bailor – leaves property such as goods or animals in the care of another person – the bailee – for temporary safekeeping. Through repeated allusions to the institution of bailment, the David story offers a window into the social background of this law. At the same time, the narrative exposes perceived injustices and flaws in the institution, and through this critique sets forth a more just “imagined alternative.”

1 Samuel 17 sees David engaging in two of CC’s primary bailment scenarios: When Jesse instructs his son David to visit his brothers at a military encampment, the latter leaves sheep with a bailee to watch while he is away. This bailee is called a *šōmēr* (1 Sam 17:20), echoing the language of the bailment law in Exodus 22:6 and 9: “When a man gives to another silver or goods *lišmōr* – to watch” (Exod 22:6); “When a man gives to another a donkey, or an ox, or a sheep, or any animal *lišmōr* – to watch” (Exod 22:9). Upon arriving at the camp, David proceeds to leave his belongings with a second bailee, called *šōmēr hakkēlīm* (1 Sam 17:22), before running off to find his brothers at the battlefield. The language *šōmēr hakkēlīm* not only

includes the root *š-m-r*, but also uses Exodus 22:6's term for 'goods': *kēlîm*. Within a span of three verses in 1 Samuel 17, and in nearly identical language, David thus creates two bailments.ⁱⁱ

We will consider each of these separately.

As the son of the flock-owner, and as a shepherd for that flock, David is responsible to arrange for the animals' care when he leaves home. Despite the fact that David is himself a shepherd, he is not a bailee: 1 Samuel 17:20 is not a case of one *šômēr* handing over the object of bailment, the flock animals, to a second bailee. As Jesse's son, David is a family shepherd and not a commercial shepherd. In contrast to commercial shepherding arrangements, a flock-owner does not hire or contract with a family member.ⁱⁱⁱ The sons and daughters of a flock-owner may work as shepherds for their father, but the two arrangements differ. When David hands over flock animals to a *šômēr*, he acts as a bailor representing the interests of the owner, despite not technically owning the flock himself.

1 Samuel 17:20 further offers a window into the social background of bailment: A person might entrust property with a bailee while traveling for a brief period. This diverges from a typical commercial herding arrangement, in which a shepherd would be hired on a year-long contract. David's bailment in 1 Samuel 17 suggests that a bailment of animals might arise when the flock-owner or his family member who typically watches the flock animals must travel for a temporary period – likely much shorter than a year – and so requires a short-term bailee. Moreover, the law of animal bailments in Exodus 22:9-12 is sufficiently nonspecific that it might encompass either year-long or short-term arrangements.

Let us move on now to the second reference to bailment in 1 Samuel 17. Before heading from the main encampment to the battlefield where his brothers are located, David leaves his *kēlîm* with the *šômēr hakkēlîm*. These are his belongings, referred to with the same term used by

Exodus 22:6, regarding a bailment of goods. David's *kēlîm* may include the provisions that Jesse sent with him for his brothers, and likely any other possessions that he brought along for the trip.^{iv} Whether or not David should have been at the battlefield, his personal effects certainly did not belong there.^v In a similar vein, during subsequent battles of David, for example in 1 Samuel 25 and 30, a number of people stay at the main camp with the *kēlîm* while others go out to fight.^{vi}

Bailment thus constituted one task for those in the military who were not otherwise engaged in combat.^{vii} While CC's law hardly envisions a particularly military context, these narratives point to such a context as one social background to the institution: When leaving the main camp for battle, soldiers would entrust their goods with other soldiers, who would be responsible to keep them safe. As a visitor to the camp, David also leaves his property with the designated bailee. The narrative leaves open whether David was entitled to this service or used it surreptitiously, pretending to belong at the battlefield when he should not have gone there. If David's visit was sanctioned, he may have been required to check in his belongings with the bailee.

Later in the same chapter of 1 Samuel, in an effort to convince Saul that he can defeat Goliath, David attests to his brave acts while tending to his father's sheep. 1 Samuel 17:34-37 refers to David's heroism vis-à-vis wild predators:

34. David replied to Saul, "Your servant has been tending his father's sheep, and if a lion or a bear came and carried off an animal from the flock,

35. I would go after it and fight it and rescue it from its mouth. And if it attacked me, I would seize it by the beard and strike it down and kill it.

36. Your servant has killed both lion and bear; and that uncircumcised Philistine shall end up like one of them, for he has defied the ranks of the living God.

37. The LORD,” David went on, “who saved me from lion and bear will also save me from that Philistine.” “Then go,” Saul said to David, “and may the LORD be with you!”

(NJPS)

CC excuses the shepherd from liability for casualties of predation (Exodus 22:12), assuming that such losses fall beyond the scope of what a shepherd is capable of doing. Amos 3:12 similarly paints an image of a shepherd rescuing only the scant remains of a mauled animal from the mouth of a lion, and this practice is consistent with the ANE practice of producing remains, termed *miqittu*, to a flock owner.^{viii}

David went beyond CC’s expectations of what a shepherd can reasonably do, chasing down lions and bears that snatched animals from his flock, fighting off these predators and saving his animals even from their mouths, and further killing the predators that dared attack him. Two factors, however, suggest that we ought not to evaluate David’s behavior as a reflection of a bailee-shepherd’s practices: First, David presents as an atypical hero, acting with divine assistance (v. 37) and exceeding the expected norm. Second, as a family shepherd, David may have chosen to take more risks than a commercial shepherd.^{ix}

Whereas in 1 Samuel 17, David entrusts various forms of property with different bailees, chapter 25 sees David botch an attempt at becoming a bailee himself. David and his crew provide protection to a group of shepherds, without ever arranging to do so with their employer Nabal. When David hears that Nabal is shearing his sheep, he sends men to him to request payment for the services they rendered. Nabal laughs them off, sparking David’s ire to the point where the latter nearly massacres his household. Through the intervention of Nabal’s shepherds, Nabal’s wife Abigail learns of David’s actions and placates him in time to prevent bloodshed.

A number of scholars have compared David's actions in 1 Samuel 25 to protection racketeering – providing security outside of the law, often through threats and violence, while intimidating the clients themselves into the arrangement.^x While the comparison to protection racketeering is apt, the narrative also portrays David as attempting to bully Nabal into an involuntary bailment after-the-fact. An involuntary bailment is one in which the owner does not knowingly deposit his property with another person for safekeeping, and yet a legal bailment is created. The paradigmatic involuntary bailment in the common law tradition is the case of lost property, where the owner becomes a bailor, and the finder becomes a bailee with particular duties and rights, despite the two having never come into contact previously.^{xi} The Covenant Code likewise considers lost property under the umbrella of bailment.^{xii} Unlike a finder of lost property, however, David knowingly attempts to create an involuntary bailment and to coerce Nabal into the role of bailor.

A number of details in this narrative demonstrate that David has bailment in mind when he reaches out to Nabal. First, David sends a delegation to Nabal to request compensation during the shearing of the flock animals (1 Sam 25:2). In the ancient Near Eastern herding cycle, the shearing was the time when contracts from the previous year expired, accounts were settled, and new contracts were drawn up.^{xiii} David thus inserts himself into this period of account settling as if his bailment were legitimate like that of a shepherd with a contract. Nabal refuses to give in:

“Who is David? Who is the son of Jesse? These days there are many slaves breaking away from their masters” (1 Sam 25:10).

The political implications of this response notwithstanding, Nabal's claim of not knowing David also underscores that the two have never contracted together; his reference to slaves and masters further insinuates that they have no professional relationship.^{xiv} Further, the narrative refers in

three places (once through David telling his men what to tell Nabal, once through Nabal's shepherds speaking to Abigail, and once through David "speaking" to himself) to the services David and his men provided: They did not harm the shepherds – indeed a feature of protection racketeers.^{xv} In addition, the shepherds lost nothing while David's men were with them;^{xvi} and David's crew acted like a protective wall day and night for the duration of their shepherding.^{xvii} Their protection thus prevented any losses due to theft, capture, straying, or predation: no animal or person could leave or enter the premises under their watchful eye. This is precisely the function that a bailee of animals seeks to fulfill. Moreover, David laments having watched Nabal's possessions for naught, using the language *š-m-r*.^{xviii}

Taken together, despite having forced his services upon Nabal's shepherds – as indicated by the purported virtue of having refrained from harming them – David attempts to pass off as a kind of bailee-shepherd, who comes to settle accounts at the shearing, watches over (*š-m-r*) the bailor's possession, and prevents losses from the flock. He acts as a bailee, without having ever communicated with Nabal, whom he sees as the bailor. In essence, then, David seeks to create an involuntary bailment, from which he expects to benefit. Ultimately, David receives compensation in the form of lavish gifts from Abigail. But the narrator – while hardly painting Nabal in a positive light – frowns upon David's strong-arming. Even Nabal's shepherds, when describing David's generosity toward them, do so in terror of what David and his men might do to retaliate.^{xix} The primary goal of 1 Samuel 25 does not relate to bailment, but the narrative still offers a perspective on the institution, critiquing David's unorthodox practice as flawed. Against those who might wish to force a flock-owner into a retroactive bailment by performing the work of a bailee-shepherd, 1 Samuel 25 warns that this practice is corrupt and such a "bailee" deserves no compensation. The scope of involuntary bailment that the law allows must be clarified and

limited to one which is involuntary for both parties. 1 Samuel 25's "imagined alternative" is one in which no person forces another into an unwanted bailment, especially not after the fact.

One final anecdote from David's life story may shed light on bailment. During his son Absalom's rebellion, in 2 Samuel 15, David flees Jerusalem with most of his household, leaving behind ten concubine wives to guard his house – *lišmôr habbāyit*.^{xx} On Ahitophel's advice, Absalom dares to rape these ten women who were left *lišmôr habbāyit*.^{xxi} When David finally returns to his palace, he takes the ten women left *lišmôr habbāyit* and isolates them in confinement, in a *bêt-mišmeret*, for the rest of their lives.^{xxii} The women repeatedly identified by their task involving the root *š-m-r* and a *bāyit* do not succeed in watching David's house, and ultimately remain in a place whose name includes the elements *bāyit* and *š-m-r* to live out their days.

Although CC does not treat bailment of real property – e.g., land or buildings – David's charge to his concubines to watch his *bāyit* must include not just the palace, but the possessions within. We therefore consider how this episode might inform a reconstruction of the institution of bailment. First, like 1 Samuel 17, David's flight suggests one possible social background to bailment: A person has to leave home suddenly due to an emergency – here, the threat of a usurper who might attack – and so places property in the care of others. In this case, David does not leave his property in another person's house, but has a group of people stay in his home to watch both the house and its contents. Although these women were part of David's household, under normal circumstances they would have stayed in the women's quarters deep within the palace.^{xxiii} To guard the house, they would have had to venture beyond their quarters, effectively leaving their home and entering David's.^{xxiv} This scenario diverges from those imagined by CC in placing the bailees in the bailor's house, rather than the reverse.

The concubines charged with watching David's house are, of course, female. Their gender, in addition to playing a role in the political warfare Absalom wages against his father, is also significant for a consideration of the narrative as it pertains to bailment. At all three points where the concubines feature in the narrative, the text identifies them by their assignment: *lišmôr habbāyit*. In fact, no other woman in the Bible is the agent of the root *š-m-r* in the G-stem. Even in the formulation *lišmôr habbāyit*, the women are not the subject of an active verb, but are associated indirectly with the action of watching through the infinitive construct *lišmôr*.^{xxv} The repetition of *lišmôr habbāyit* further highlights the oddity of women watching.^{xxvi} From the perspective of this narrative, guarding the house and its contents is a man's job. The fact that the female concubines fail to watch the house is therefore no surprise.

Although biblical law addresses the institution of bailment, it does so absent of social context: What motivates a person to store property with another party? Who might become a bailee? How prevalent were bailments in practice?

The recurrence of allusions to bailment throughout the David narratives demonstrates that it was a widely practiced and familiar area of law, and offers several details about its social background. In times of war in particular, situations arose where owners of property required bailees to safeguard their possessions, whether in their homes or at a military encampment. The typical bailee was male, and could be a civilian or a soldier.

The literary bailments of David also serve to critique a legal institution perceived as flawed. David's attempted involuntary bailment points to a system vulnerable to abuse. A just and effective law should expressly limit the scenarios that may fall under the umbrella of involuntary bailments. Specifically, it should prevent a person from knowingly forcing the owner of property into such an arrangement after the fact. We have also demonstrated that in the view

of the narrative, female bailees are not only unusual; they are also bound to fail at their assignment.

David's story has inspired a great body of scholarship dedicated to teasing out its many facets.^{xxvii} A law-and-literature approach uncovers a further dimension of the narrative, critical both to the reconstruction of the legal institution of bailment, and to recovering an ancient assessment of that institution. Beyond the political intrigue, family drama, and layers of conflict, the David story sheds light on what bailment might have looked like in practice, while exposing weaknesses that require correction in service of a more efficient and just law.

ⁱ Cover, "Nomos and Narrative," 9.

ⁱⁱ Bar-Efrat (*1 Samuel*, 227) notes that the similar language of vv. 20 and 22 emphasizes David's responsible behavior.

ⁱⁱⁱ For family vs. commercial herding, see Morrison, "Jacob and Laban," 160; Jackson, *Essays on Halakhah in the New Testament*, 155-56. Jackson further identifies David as a family shepherd.

^{iv} Bar-Efrat (*1 Samuel*, 227) understands David's *kēlīm* as the containers that would have held the food Jesse sent. NJPS translates "baggage."

^v While others do not seem to mind David's presence, his brother Eliab accuses him of coming down to see the war (1 Sam 17:28).

^{vi} 1 Sam 25:13; 30:10, 21-25. 1 Sam 25:13 and 30:24 use the expression *y-š-b 'al hakkēlīm* to refer to the action of remaining with the belongings; neither uses the root *š-m-r*.

^{vii} The invading force in Isaiah 10:28 also leaves (*p-q-d*) its *kēlīm* in Michmash as it goes on to overrun other towns. This may not have been its military base, as the invader raids one town after another; either they left behind a soldier or group of soldiers to watch their possessions, or they entrusted a person or persons from the town with this task.

^{viii} See e.g. A. Leo Oppenheim, *Catalogue of the Cuneiform Tablets of the Wilberforce Eames Babylonian Collection in the New York Public Library* (AOS 32; New Haven: AOS, 1948), 62; F. R. Kraus, *Ein Edikt des Königs Ammi-Šaduqa von Babylon* (Leiden: Brill, 1958), 113-14; idem., *Staatliche Viehhaltung im altbabylonischen Lande Larsa* (Amsterdam: Noord-Hollandsche U.M., 1966), 14; J. J. Finkelstein, "An Old Babylonian Herding Contract and Genesis 31:38f.," *JAOS* 88 (1968), 35; J. N. Postgate, "Some Old Babylonian Shepherds and Their Flocks," *JSS* 20 (1975), 6; M. A. Morrison, "Evidence for Herdsmen and Animal Husbandry in the Nuzi Documents," in M. A. Morrison and D. I. Owen, eds., *Studies on the Civilization and Culture of Nuzi and the Hurrians in Honor of Ernest R. Lacheman on his Seventy-Fifth Birthday* (Winona Lake: Eisenbrauns, 1981) 271, 279.

^{ix} For this observation see Jackson, *Essays on Halakhah in the New Testament*, 155.

^x See e.g. Halpern, *David's Secret Demons*, 22; Wright, *David, King of Israel*, 204. Alter (*The David Story*, 153), on the other hand, hedges: "there is a certain ambiguity as to whether David was providing protection out of sheer good will or conducting a protection racket in order to get the necessary provisions for his guerilla band."

^{xi} For "involuntary bailment" see Garner, ed., *Black's Law Dictionary*, s.v. "bailment." Involuntary bailments have figured prominently in legal discussions regarding whether bailment is a matter of property or contract. See William K. Laidlaw, "Principles of Bailment," *Cornell Law Quarterly* 16 (1930-1931), 287; Helmholz, "Bailment Theories,"

98; Thomas W. Merrill and Henry E. Smith, “The Property/Contract Interface,” *Columbia Law Rev.* 101 (2001), 811.

^{xii} This depends on an understanding of *’ābēdā* in Exodus 22:8 as referring specifically to “lost property” rather than to property that has been stolen and hence is missing.

^{xiii} For the herding cycle, see Morrison, “Jacob and Laban,” 158.

^{xiv} For a political reading of this verse see especially Levenson, “1 Samuel 25 as Literature and as History,” 11-28; Levenson and Halpern, “The Political Import of David’s Marriages,” 512-13.

^{xv} 1 Sam 25:7, 15, understanding **hiklīm* as ‘harm’ rather than ‘humiliate’.

^{xvi} 1 Sam 25:7, 15, 21.

^{xvii} 1 Sam 7:16.

^{xviii} 1 Sam 7:21.

^{xix} 1 Sam 25:17.

^{xx} 2 Sam 15:16. The women are charged not just with running the household, but specifically with watching over it. Cf. other collocations of *š-m-r* and *bāyit*; e.g. Ps 59:1; Eccl 12:3; compare also 1 Kgs 14:3 (of armed men who guard the entrance to the king’s house); 2 Kgs 11:5-12 (of armed men guarding the *mišmeret* of the king’s house and the temple).

^{xxi} 2 Sam 16:20-22, at v. 21. On the characterization of this episode as rape see e.g. Solvang, “Guarding the House,” 60.

^{xxii} 2 Sam 20:3. On the *bêt-mišmeret* as a form of confinement see Blumenfeld, “The Terminology of Imprisonment,” 156-68; Solvang, “Guarding the House,” 62.

^{xxiii} For the term *pēnīmā* as a reference to women’s quarters in the palace see Malamat, “Royal Harem,” 785-87; for discussion of these quarters, see Solvang, *A Woman’s Place Is in the House*, 51-70.

^{xxiv} Although as royal concubines, these women likely did live within David’s household, concubines did not always live in the same place as the men with whom they had relationships; cf. e.g. Gideon’s concubine in Judg 8:31.

^{xxv} Although the women are not the subjects of the root *š-m-r*, which occurs in the infinitive construct form, they are the agents of the action to which the infinitive construct refers. Elsewhere, the mother of Samson is told to be careful (*š-m-r*) and refrain from consuming certain drinks and foods (Judg 13:4), but this verb is in the N-stem and is intransitive; it cannot take an object and so differs from any form of watching in the G-stem. While feminine nouns take verbs from the root *š-m-r* (e.g. Prov 2:11; 4:6), no female human does outside of this narrative.

^{xxvi} Solvang (“Guarding the House,” 56-57) compares the concubines’ task with that of queens from Mari who looked after the palace in their husbands’ absence during war. However, these women, such as Šibtu, wife of Zimri-Lim, more accurately managed the affairs of the kingdom in the kings’ absence – reporting to the king on the goings-on in the palace and temple, personnel issues, prophecies relevant to the king, provisions for the palace kitchens and storerooms, etc. (For further details see Dalley, *Mari and Karana*, 97-99.) In contrast, David’s appointment of his concubines to watch his house specifically envisions guarding, as noted above regarding 2 Sam 15:16.

^{xxvii} See most recently Baden’s *The Historical David: The Real Life of an Invented Hero* (2013) and Wright’s *King David and His Reign Revisited* (2014).