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HEROD'S LAW AGAINST THEFT IN ITS LITERARY, LEGAL, AND HISTORICAL CONTEXTS

JAN WILLEM VAN HENTEN*

1. Introduction

Josephus begins the sixteenth book of his *Jewish Antiquities* with a brief discussion of Herod the Great's adaptation of the laws concerning burglary (*Ant.* 16.1-5).¹ It forms a transition between the report about Herod's rule in book 15, ending with the positive account of Herod rebuilding the Jerusalem Temple, and finally the events in Herod's kingdom narrated in books 16 and 17, starting with the report about Herod's visit to his sons who were in Rome for their education (16.6):

(1.1) 1 In his administration of the issues of the state the king had been eager to push back the various cases of crime that were being committed in the city as well as in the country-side. He drew up a law that in no way resembled the earlier laws, which he ensured himself by selling the burglars to be deported from the kingdom. This was not only a burdensome punishment for those who suffered it, but it also resulted in the abolition of the ancestral customs. **2** For, being a slave to foreigners who do not follow the same way of life as us and being compelled to do out of necessity whatever those people used to command, was an offence against religion and not a punishment of those caught, because the following penalty had been observed in previous times. **3** For, the laws demand that a thief pays a fourfold fine, and that he is to be sold if he is not able to, but at any rate neither to foreigners nor in a way that he would have to endure continuous slavery. For, he had to be released after a period of six years. **4** That the punishment, as it was determined then, became hard and unlawful, seemed part of his arrogance, because he had conceived to impose the punishment not in a king-like but in a tyrannical way, neglectful of the interests of his subjects. **5** Now, these deeds, which took place in in a similar way as his next actions, were part of (the reason for) their reproaches and hatred of him. **(1.2) 6** In this period he also made the boat trip to Italy, because he wanted to meet Caesar and visit his sons who were living in Rome ... (my translation with Whiston's and Niese's indications of sections)

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Josephus's interest at the beginning of this book is Herod's administration of the kingdom; he discusses the law concerning burglary as an example of Herod's style of dealing with administrative issues. The passage starts off with a positive characterization of Herod, who aims to reduce crime, but it soon becomes clear that Josephus sides with the critical perspective of Herod's Jewish subjects (16.4-5) who consider this law a violation of the ancestral laws and, moreover, a proof of Herod's tyrannical rule. In this contribution, I discuss the structure and argumentation of this short passage; its cohesion in relation to other Josephan passages, including his passage on theft in book 4 of the *Antiquities*; the content and aim of Herod's law in comparison to related laws about theft in the Bible and contemporary Judaism; and interpretations of the passage from a historical perspective.

2. *Literary aspects*

Josephus's description of Herod's law concerning burglary in *Antiquities* 16 has no parallel in the Herod narrative in the *War*, but *Antiquities* 4.271-272 provides an important parallel passage, part of Josephus' paraphrase of the Mosaic laws in *Antiquities* 4 (below).

The composition of the section in *Antiquities* 16.1-5 is fairly explicit, its starting point describing Herod's administration of the kingdom (διοίκησις τῶν ὅλων πραγμάτων, 16.1).² Josephus points out that Herod's aim is "to push back the various cases of crime that were being committed" in Jerusalem and its countryside, i.e., Judea.³ The law concerning burglary is the only example that Josephus offers to illustrate this which he immediately frames, writing that it "in no way resembled the earlier laws" (16.1), implying that the law was a significant alteration of the earlier laws. This anticipates Josephus's argument, driven home somewhat further on, that Herod, with his legislation, was a violator of the ancestral Jewish laws. The salient point here is that Herod allowed for, and in some cases even arranged for the thieves to be deported from the kingdom and sold to non-Jews. The transmitted text is difficult here and has been emended, but the main point is clear: the burglars were sold and deported from the

² The Greek phrase ἡ διοίκησις τῶν ὅλων refers to the administration or government of the kingdom, with K.H. Rengstorf, *A Complete Concordance to Flavius Josephus*, 4 vols., Leiden: Brill, 1973-1983, 1.507. Similar vocabulary in *War* 1.24 concerning Octavian taking over the administration of Egypt after the Battle of Actium (31 BCE) and 15.68; 16.21, 64 concerning Herod. See also *War* 1.669; *Ant.* 15.177; 19.362.

³ The phrase "city and country-side" (ἡ πόλις καὶ ἡ χώρα) is common in Josephus, e.g. *Ant.* 6.3 (Ashdod and its countryside); 13.358 (Gaza); 10.37, 52 (Jerusalem; cf. *Ant.* 7.389; 11.4; 13.284; *Life* 211; also *Ap.* 1.267).

kingdom.⁴ The phrase “he ensured himself”⁵ may entail an implicit criticism that Herod himself took care of the new law without consulting other legal authorities. Josephus’s explicit criticism is that the law was too harsh for Herod’s Jewish subjects and entailed the abolition of their ancestral customs, repeated in 16.4. This criticism is elaborated in the next two paragraphs. Josephus first indicates what the law entails and then points out their difference from previous laws. Being a slave of non-Jews meant that one’s Jewish practices sometimes had to be violated and could also, in some cases, lead to lifelong slavery (16.2). The previous laws required a fourfold compensation for what was stolen and, if that condition could not be met, a temporary period of slavery with a release in the seventh year (16.3). I will discuss the legal aspects of the law in section 3. Josephus spells out the implication of this characterization of Herod’s law with a brief but devastating statement about Herod’s character and rule:

That the punishment, as it was determined then, became hard and unlawful, seemed part of his arrogance, because he had conceived of imposing the punishment not in a king-like but in a tyrannical way, neglectful of the interests of his subjects. (16.4)

In *Antiquities* 16.5 Josephus offers two points immediately preceding the narrative of the events of Herod’s rule, starting in 16.6 with the report of Herod’s trip to Rome. Josephus first suggests that the law about burglary is a sample of other edicts that will follow in the report: “Now, these deeds, which took place in a similar way as his next actions ...”⁶ The latter phrase showing that the passage about Herod’s law against burglary anticipates what will follow in the subsequent narrative, thus leading to a particular characterization of Herod as ruler. This is to some extent surprising, as book 16 focuses largely on the tragic history of Herod and his two sons by Mariamme, Aristobulus and Alexander, to whom he refers in 16.6. Herod’s inability to control his family seems to be part of Josephus’ critical presentation of Herod as a ruler.⁷ The second point is the consequence of Herod’s character and way of rule, namely that his Jewish

⁴ The text transmitted in the manuscripts (ἀποδιδόμενος; “by selling”) implies that Herod is the subject of the verb. E (followed by Marcus in R. Marcus and A. Wikgren *Josephus in Nine [Ten] Volumes*, vol. 8, LCL 410, Cambridge, MA: Harvard University Press, 1963, 208) reads the participle form ἀποδιδόμενον that is connected with the law mentioned previously, leading to the approximate translation: “(which implied that) burglars should be sold and deported from the kingdom.”

⁵ The verb βεβαιῶ can have several meanings, including “establish, realize, secure (for someone)”, Rengstorf, *Concordance*, 1.319.

⁶ Cf. Josephus’ comment in *Ant.* 16.151 criticizing Herod’s brutal treatment of both his subjects and his relatives.

⁷ Further discussion: J.W. van Henten, “Herod the Great in Josephus”, in H.H. Chapman and Z. Rodgers (eds.), *A Companion to Josephus*, Blackwell Companions to the Ancient World 110, Chichester: Wiley-Blackwell, 2016, 235-246.

subjects hated him and offered reproaches against the king.⁸ The short section on Herod's law concerning burglary provides a frame for the continuation of the Herod narrative in book 16 which characterizes the king and his rule and explains already why he was hated by his subjects. Remarkably, Josephus does not refer here to the lamentable fate of Herod's sons, Alexander and Aristobulus, which takes up most of book 16 of the *Antiquities* (cf. 16.251).

Josephus' criticism concerns four main points:

(1) The harsh punishment implied by the new law reflects Herod's arrogance (ὕπερηφανία). This assertion about Herod's arrogance is unique within the Herod narratives in *War* and *Antiquities*. Ὑπερηφανία and related words occur a few times in the Herod narratives, but they always refer to others.⁹

(2) The introduction of the law demonstrates Herod's style of rule which is not king-like, but tyrannical. In the Herod narrative in the *Antiquities*, Josephus reveals the character of king gradually, providing the full picture only at the end of the narrative sections in which he figures.¹⁰ Josephus "feeds" the reader brief passages that associate Herod's character or rule with tyranny, which present either the perspective of one of the other characters in the narrative or Josephus's own view. This starts with a comment about the young Herod, who executed Ezekias and his fellow-brigands, and culminates in the golden eagle story (17.148-164), the latter which presents the full-blown picture of Herod as a tyrant at the end of his life. The Herod in this passage matches many features of the tyrannical stereotype: e.g. arrogance, autocratic rule, legal injustice, abolition of ancestral customs, violation of decency, violence against opponents, cruelty, murder of relatives, susceptibility to slander, envy of excellent subjects, fear of friends and madness. The final cut of this devastating characterization is the flashback in a passage to the Jewish delegations meeting with Augustus in Rome after Herod's death, suggesting that Herod was a tyrant by nature (17.304-314, esp. 17.304; cf. *War* 2.88).¹¹

(3) Herod neglects the interest of his subjects. The context implies that the king neglected his role as protector of his Jewish subjects by allowing non-Jewish practices to be enforced upon them.¹² The passage emphasizes the contrast between Herod's Jewish and non-Jewish citizens, and associates Herod with the conventions of the latter, implying that he acted as a foreign king (cf. the next point). Josephus points out elsewhere in *Antiquities* that Herod was

⁸ Δύσνοια ("hostile attitude, ill will, hate", Rengstorf, *Concordance*, 1.540) occurs twelve times in Josephus, ten times in the Herod narrative. See especially *Ant.* 16.155 about the hatred of Herod by his subjects.

⁹ Cf. *Ant.* 15.212; 16.193 about Glaphyra; 16.194 about Pheroras.

¹⁰ J.W. van Henten and L. Huitink, "Josephus", in K. De Temmerman and E. van Emde Boas (eds.), *Characterization in Ancient Greek Literature*, SAGN 4, Leiden: Brill, 2018, 251-270.

¹¹ Details in J.W. van Henten, "Constructing Herod as a Tyrant: Assessing Josephus' Parallel Passages", in J. Pastor, P. Stern and M. Mor (eds.), *Flavius Josephus: Interpretation and History*, JSJSup 146, Leiden: Brill, 2011, 193-216.

¹² G. Fuks, "Josephus on Herod's Attitude Towards Jewish Religion: The Darker Side", *JJS* 53 (2002): 238-245 concludes that Josephus points out that Herod neglected his role as protector of his subjects' religion (see especially p. 241).

hated by his subjects (οἱ ἀρχόμενοι, 15.304); that the king built several fortifications to protect himself from them (15.327); and that he conceived punishments and crimes against them (16.151).

(4) Herod is a transgressor of the ancestral laws because of his innovations. This is a serious accusation against Herod, which matches several other Josephan passages about the king in *Antiquities*, especially those concerning the introduction of the trophies for Augustus in Jerusalem (*Ant.* 15.267-291) and the demolition of Herod's golden eagle in the Temple in *Antiquities* (17.148-164).¹³ This could imply that Josephus criticizes Herod specifically because of a policy of Romanization, but Josephus might also have been referring to foreign innovation in a broader sense. Josephus refers in 16.1 to Herod's abolishment of the ancestral customs (κατάλυσις τῶν πατρίων αὐτοῦ ἐθῶν, 16.1). He employs similar vocabulary in *War* 1.34 concerning Antiochus IV, who forced the Jews to keep their children uncircumcised and sacrifice pigs on the altar, as well as *Ant.* 19.301 about young inhabitants of Dora who erected a statue of the emperor in the synagogue of Dora and Agrippa I's response to that.¹⁴ Herod's deviation from the ancestral customs is also criticized in *Ant.* 16.183-187, 395-404.

3. *Legal aspects*

The next step of my analysis concerns the legal aspects of Herod's law concerning burglary. Josephus points out that the king's move to sell Jewish slaves to non-Jews was unacceptable to his subjects, because it forced the slaves to deviate from their Jewish practices. This seems to be the most plausible reading of *Antiquities* 16.2. The Greek text might refer to two different groups, foreigners¹⁵ and those who did not live according to "the same way of life", i.e., the Jewish way of life (with the articles missing in both references suggesting as much).¹⁶ It is more plausible, however, to interpret the καί after ἀλλοφύλοις as

¹³ See especially *Ant.* 15.267-268, 274-277, 281, 288 and 17.149-152, 158-159; also 15.365, 368-369; Fuks, "Josephus on Herod's Attitude"; J.W. van Henten "Ruler or God? The Demolition of Herod's Eagle", in J. Fotopoulos (ed.), *New Testament and Early Christian Literature in Greco-Roman Context: Studies in Honor of David E. Aune*, Novum Testamentum Supplements, Leiden: Brill, 2006, 257-86; "The Panegyris in Jerusalem: Responses to Herod's Initiative (Josephus, *Antiquities* 15.268-291)", in A. Houtman, A. de Jong and M. Misset-van de Weg (eds.), *Empsychoi Logoi – Religious Innovations in Antiquity: Studies in Honour of Pieter Willem van der Horst*, AGJU 73, Leiden: Brill, 2008, 151-73; "The Demolition of Herod's Eagle", in N. Förster and J.C. de Vos (eds), *Juden und Christen unter römischer Herrschaft: Selbstwahrnehmung und Fremdwahrnehmung in den ersten beiden Jahrhunderten n.Chr.*, Schriften des Institutum Judaicum Delitzschianum 10, Göttingen, Vandenhoeck & Ruprecht, 2015, 175-186.

¹⁴ Cf. *Ant.* 19.301 concerning Agrippa II in connection with Jews who set up a statue of the emperor in the synagogue of Dora (κατάλυσις τῶν πατρίων αὐτοῦ νόμων "abolishment of his ancestral laws"). Also *Ant.* 16.35; 20.81. For the phrase "ancestral customs" (τὰ πάτρια ἔθη), which is common in Josephus, see J.W. van Henten, *Judean Antiquities 15: Translation and Commentary*, Flavius Josephus: Translation and Commentary 7b, Leiden: Brill, 2014, 187-188.

¹⁵ The word ἀλλοφύλος ("someone belonging to a different people, foreigner, non-Jew"; Rengstorf, *Concordance*, 1.68) refers to non-Jews here, as the continuation of the clause implies.

¹⁶ As observed by Prof. Daniel Schwartz, Jerusalem, email conversation.

an explicative, a reading supported by the term ἐκεῖνοι “those people” mentioned further on, which refers to the people mentioned previously as a single group. The phrase “who do not follow the same way of life (as us) (μη τὴν αὐτὴν δίαιταν ἔχουσι)” is obscure, but seems to point to the different ways of life of Jews and non-Jews.¹⁷ This could lead to a clash of conflicting practices “out of necessity” and may be the reason for the criticism that Herod’s law was an offence against Jewish religion (θρησκεία).¹⁸

Josephus contrasts Herod’s law with “the laws”, no doubt the Mosaic laws,¹⁹ which imply that a thief pays a fourfold fine (see below). This point needs to be commented upon, because Josephus is clearly selective here in his rendering of the biblical laws concerning theft.

First, it should be noted that there is no general law concerning theft in the Hebrew Bible.²⁰ The biblical law concerning theft of livestock in Exodus 22:1-4 (21:37-22:3 MT) mentions a specific fivefold compensation for oxen and a fourfold one for sheep,²¹ but this passage is sometimes interpreted as a law concerning theft in general.²² This may also be the case in Josephus’s paraphrase of this law in *Ant.* 4.271-272, which expands on the passage in Exodus 21-22:

Let death be the penalty for the stealing of a person, and let the one who steals gold or silver pay back double. Let the person who kills someone who is in the process of stealing in a house be free from punishment, even if he [the thief] is [merely] breaking through a wall (ἢ πρὸς διορύγματι τειχίου). Let him who steals a *farm animal* (βόσκημα) *pay four times as much as a penalty*, except for an ox, for which let him pay five times as much. Let him who lacks the means to pay the penalty be a slave to those who have condemned him. (transl. Feldman)²³

¹⁷ The same phrase occurs in *War* 2.137 and *Ant.* 15.185, but with different meanings.

¹⁸ The meaning of the key word θρησκεία (“religion, worship, veneration, cult”) is contested, because several scholars argue that there was no separate category of religion in antiquity, e.g., D. Boyarin, “The Concept of Cultural Translation in American Religious Studies”, *Critical Inquiry* 44 (2017): 17-39 (especially pp. 18-20 and 27-31). Following Daniel Schwartz, I think “religion” is an appropriate translation here; see D.R. Schwartz, *Judeans and Jews: Four Faces of Dichotomy in Ancient Jewish History*, Toronto: University of Toronto Press, 2014, 91-102.

¹⁹ “The laws” no doubt refer to the laws of the Pentateuch revealed by Moses, which is supported by the reference to a fourfold punishment mentioned in Exod. 22:1, 3b (21:37; 22:2b MT): “When someone steals an ox or a sheep and slaughters it or sells it, the thief shall pay five oxen for an ox, and *four sheep for a sheep*... The thief shall make restitution, but if unable to do so, shall be sold for the theft” (my italics).

²⁰ B. Jackson, *Theft in Early Jewish Law*, Oxford: Clarendon Press, 1972, 100-109; 130-170; Z.W. Falk, *Introduction to Jewish Law of the Second Commonwealth*, 2 vols., AGJU 11; Leiden: Brill, 1972-1978, 171-172.

²¹ The difference between the two animals is explained by the different profits one may accrue from them in Philo, *Spec. leg.* 4.11-12.

²² S. Greengus, *Laws in the Bible and in Early Rabbinic Collections: The Legal Legacy of the Ancient Near East*, Eugene: OR: Cascade Books, 2011, 215.

²³ A four-fold compensation is also mentioned in 2 Sam. 12:6; *t. B. Qam.* 7:1; Jackson, *Theft in Early Jewish Law*, 136-138; see also Falk, *Introduction*, 171. If the animal stayed alive and was

In comparison to the Exodus passage, Josephus makes several changes with his focus primarily on the owner.²⁴ Josephus does not offer the qualification that the thief pays only four or five times after having slaughtered the animal (Exod. 22:1; 21:37 MT).²⁵ He generalizes the Exodus reference to sheep, as referring instead to generic farm animals, and making them the baseline case with oxen as the exception. He also specifies to whom the thief who is sold becomes a slave, that is, to “those who have condemned him.” A four-fold compensation as penalty for manifest theft is also mentioned in Roman law, in connection with the replacement of a previous punishment by scourging and being sold as a slave.²⁶

Second, Josephus points out that selling Jews who had defaulted on debts to non-Jews was an unacceptable practice according to the ancestral laws – though, as noted already, there are biblical as well as rabbinic passages that imply that Israelites, Judeans or Jews were sold to foreigners or in fact did that themselves. Leviticus 25:47-55 deals with the procedures for redeeming such slaves through repurchase and states: “If resident aliens (LXX: ὁ προσήλυτος καὶ ὁ πάροικος) among you prosper, and if any of your kin fall into difficulty with one of them and sell themselves to an alien, or to a branch of the alien’s family, after they have sold themselves they shall have the right of redemption; one of their brothers may redeem them ... (25:47-48). The book of Nehemiah (5:1-13) also refers critically to this practice: “As far as we were able, we have bought back our Jewish kindred who had been sold to other nations (τοὺς ἀδελφοὺς ἡμῶν τοὺς Ἰουδαίους τοὺς πωλουμένους τοῖς ἔθνεσιν); but now you are selling your own kin, who must then be bought back to us! (5:8).” Exod. 21:8 states that a female slave who does not please her master cannot be sold by him to a foreign people (MT: לעם נכרי; LXX: ἔθνει ἀλλοτρίῳ), with the latter term sometimes interpreted in the literal sense as non-Israelites or non-Jews, as in the Septuagint.

Third, Josephus points out that the previous laws imply that a burglar is only to be sold if he is not capable of paying the fine, in line with Exod. 22:3 (22:2 MT), but only to fellow Israelites, Judeans or Jews, and only for a period limited to six years.²⁷ This is, once again, not the whole story. Exod. 22:3 (22:2 MT) only mentions that the thief who cannot pay the penalty is sold as a slave and must serve for six years. He is released in the seventh year, without debt. Josephus renders this accordingly in *Antiquities* 4.273: “Let someone who has been sold to a fellow countryman (ὁμόφυλος) be a slave for six years, but in the

recovered, a two-fold compensation sufficed according to 4Q22; see also Targum Onqelos and the Samaritan Pentateuch, Greengus, *Laws in the Bible*, 211-213.

²⁴ As observed by Jackson, *Theft in Early Jewish Law*, 161.

²⁵ Similarly, Philo, *Spec. leg.* 4.3.12; L.H. Feldman, *Judean Antiquities 1-4: Translation and Commentary*, Flavius Josephus: Translation and Commentary 3, Leiden: Brill, 2000, 440-441.

²⁶ Gaius, *Inst.* 3.189-190; *XII Tab.* 8.14; Greengus, *Laws in the Bible*, 217 with footnote 67.

²⁷ This is in line with the biblical law as described in Exodus. Exod. 22:3 (22:2 MT) only mentions that the thief who cannot pay the penalty is sold as a slave.

seventh year let him be set free” (transl. Feldman).²⁸ In *Antiquities* 4.272 Josephus specifies that the thief is sold to those who have condemned him, which may refer to those who were harmed, or to other Jews as well.²⁹ Josephus does not mention that Exod. 21:5-6 (MT and LXX) formulates an exception to the period of seven years, because some were to be slaves “for life”:

But if the slave declares, “I love my master, my wife, and my children; I will not go out a free person, then his master shall bring him before God. He shall be brought to the door or the doorpost; and his master shall pierce his ear with an awl; and he shall serve him for life.

Thus, not all Israelite or Jewish slaves were redeemed. In a manner that diverges from 16.1-5, Josephus deals with this exception in *Antiquities* 4.273 in connection with the case of a countryman who had married a slave woman at the house of his owner and together begot children. If that man wished to remain a slave, he would only be released in the fiftieth year (the Jubilee year).³⁰ Josephus’ brief reference in *Antiquities* 16.2-3 to the Mosaic laws about theft is, therefore, selective, even in comparison to his own paraphrase of them in book 4. He ignores the fact that there was an exception that implies that some slaves were not released after six years. Rabbinic sources imply that a Jewish slave who is sold by a Jew to a non-Jew or is sold outside the Land of Israel goes free, though obviously only in the case that he escapes.³¹ They also show that a Jew who sells himself and his children to a non-Jew will not be redeemed; only his children will be redeemed after his death (*m. Git.* 4:9).³²

Fourth, Josephus seems to forget in *Antiquities* 16 about another punishment of thieves, mentioned in the Bible as well as in his paraphrase of the Mosaic laws about theft in book 4. Josephus simplifies in 16.1-5 what the biblical laws imply in regard to the punishment of a thief, because he ignores the distinction made between night and day (cf. Job 24:14-17). This distinction assumes that a thief operating during the night takes into account the possibility that he might have to kill people in the house into which he was breaking. Given this variable, unstated by Josephus, it was allowed in these circumstances to kill such a thief. Exod. 22:2-3a (22:1-2a MT) states: “If a thief is found breaking in [literally: “tunnelling in”], and is beaten to death, no bloodguilt is incurred, but if it happens

²⁸ See also Exod. 21:3-4; Deut. 15:12; Lev. 25:47-55 for the right of redemption by repurchase by a relative; for non-Israelite chattel slaves there was no redemption, as stated in Lev. 25:44-46; see Jackson, *Theft in Early Jewish Law*, 139-140, as well as A. Schalit, *König Herodes: Der Mann und sein Werk*, 2nd edn. SJ 4, Berlin: de Gruyter, 2001, 233.

²⁹ Feldman, *Judean Antiquities 1-4*, 441.

³⁰ Cf. Lev. 25:39-41; *m. Qid.* 1:2; from the different perspective of Exod. 21:5-6 and Deut. 15:16-17, the man would remain a slave forever; see further discussion in Feldman, *Judean Antiquities 1-4*, 442 and Greengus, *Laws in the Bible*, 86-112.

³¹ See *m. Git.* 4:6; cf. *t. Avod. Zar.* 3:16, 18; Falk, *Introduction*, 265; Greengus, *Laws in the Bible*, 94.

³² The Temple had a fund for the redemption of captives according to *m. Sheqal.* 2:5; see also Falk, *Introduction*, 269.

after sunrise, bloodguilt is incurred.”³³ In his dialogue with Nathan in 2 Samuel 12, King David suggests that the thief to whom Nathan refers deserves to die (12:5).³⁴ Philo marks a similar distinction in his explanation of the biblical laws. In the case where a thief might have the intention to kill in the course of his robbery, Philo stipulates that during the day the authorities and the court adjudicate the punishment of a thief, but during the night the owner of the house is permitted to have the thief killed.³⁵ Remarkably, Josephus, in his paraphrase in *Antiquities* 4, goes even a step further than Philo in affirming a justification to kill the thief during both night *and* day: “Let the person who kills someone who is in the process of stealing in a house be free from punishment, even if he [the thief] is [merely] breaking through a wall (*Ant.* 4.271).” Several rabbinic passages express a similar view (e.g. *m. Sanh.* 8:6).³⁶ The Babylonian Talmud elaborates this view by arguing that the thief may be killed not only when breaking through a wall but also if he is found on the roof, in the court, or in an enclosure attached to the house. Others may kill the thief as well in defense of the owner, because he is considered to be a potential murderer (*b. Sanh.* 72b).³⁷

In short, if we read Josephus's discussion of Herod's law in the light of the full picture of the relevant biblical and rabbinic passages, we must conclude that his criticism is overstated and narrow-focused. The point of departure for his criticism seems to be the biblical laws about theft as described in Exod. 22:1-4 (21:37-3 MT). He does not mention in *Antiquities* 16 that there was an exception to the release of Jewish slaves in the seventh year, although he clearly was aware of such an exception. He does not take into account the several biblical passages that reckon with Israelite, Judean, or Jewish slaves sold to foreigners. And he ignores the fact that it was permitted to kill a thief during the night (and in Josephus's paraphrase in *Ant.* 4.271 even the day as well).

4. Historical context

Dating Herod's law is problematic. There is no time marker apart from the synchronizing formula in 16.6 that introduces Herod's boat trip to Italy (“In this period ...”). The law is situated within the context of the larger Herod narrative after the renovation of the Temple, at the end of book 15. The last dates given in book 15 concern the renovation of the Temple. *Antiquities* 15.380 connects this project with the eighteenth year of Herod's rule, usually identified as 20/19

³³ Similarly *Mekilta de-Rabbi Ishmael Neziqin* 13 [ed. Horovitz p. 293]; cf. also Roman law: *XII Tab.* 8.12-13; B. Cohen, “Civil Bondage in Jewish and Roman Law”, in A. Marx (ed.), *Louis Ginzberg Jubilee Volume on the Occasion of his Seventieth Birthday*, New York: New York Academy of Jewish Research, 1945, 113-132 (esp. pp. 118-121); Jackson, *Theft in Early Jewish Law*, 210; Schalit, *König Herodes*, 712-713.

³⁴ Discussion: M. Avioz, *Josephus' Interpretation of the Books of Samuel*, New York: Bloomsbury T & T Clark, 2015, 122-124.

³⁵ Philo, *Spec.* 4.7-10; cf. Targum Pseudo-Jonathan on Exod. 22:1; *b. Sanh.* 72a.

³⁶ See also *y. Sanh.* 8.8.26c; *b. Sanh.* 72b, as well as Maimonides, *Mishneh Torah, Hilkhot Genevah* 9:8.

³⁷ Feldman, *Judean Antiquities 1-4*, 440; Greengus, *Laws in the Bible*, 215-217.

BCE.³⁸ Herod's law also appears before Marcus Agrippa's visit to Jerusalem described in *Antiquities* 16.12-15, which presumably took place in the autumn of 15 BCE. For the date of the trip to Rome referred to in 16.6, it is important to note that Augustus was in Italy from the autumn of 19 BCE until the summer of 16 BCE when he travelled to Gaul.³⁹ The options for the journey to Rome are, therefore, the years 18, 17 or 16 BCE, of which the year 17 is the most probable one, because Marcus Agrippa was also present in Rome in that year,⁴⁰ departing for the East by the autumn of 17 BCE.⁴¹ This renders it plausible that Herod's visit to Rome took place in the spring and/or summer of 17 BCE, assuming that he did not sail to Rome during the dangerous period in the winter. This would give a rough date for Herod's law between 20/19 and 17 BCE.⁴² This was a successful period for Herod, in which he may have had the confidence to take a relatively harsh measure.⁴³

What should we make of the historicity of Herod's law concerning theft? Josephus does not provide information about the context of the introduction of the law or the king's motivation for it, aside from the general point of preventing crime (16.1). He does not tell us how the law was put into practice and who was responsible for selling the thieves caught to non-Jews. Bernard Jackson concludes from our passage that Herod may have made this decision in order to deter the many potential thieves in Judea and that selling Jews as slaves to Gentiles was not uncommon in Herod's time.⁴⁴

Does the lack of any specific information imply that Josephus invented the law so that he could present Herod as a brutal ruler at the beginning of book 16 of the *Antiquities*? As far as I know, no scholar has argued for this option, which should be considered, especially since every attempt to explain the law's historical context and its purpose leads to problems. All scholars who have dealt with the passage presuppose that Herod did issue a law concerning burglary, and most of them assume that the king was inspired by non-Jewish conventions.⁴⁵

³⁸ Josephus, *Ant.* 15.380, 420. The completion of the renovation of the Temple can plausibly be dated to 9-10 BCE; see van Henten, *Judean Antiquities* 15, 321.

³⁹ D. Kienast, *Römische Kaisertabelle: Grundzüge einer römischen Kaiserchronologie*, 2nd edn. Darmstadt: Wissenschaftliche Buchgesellschaft, 1996: 63-64; B. Mahieu, *Between Rome and Jerusalem: Herod the Great and His Sons in Their Struggle for Recognition: A Chronological Investigation of the Period 40 BC-39 AD, with a Time Setting of New Testament Events*, OLA 208, Louvain: Peeters, 2012, 156.

⁴⁰ With P. Richardson and A.M. Fisher, *Herod: King of the Jews and Friend of the Romans*, London: Routledge, 2018, 163.

⁴¹ Kienast, *Kaisertabelle*, 72; Mahieu, *Between Rome and Jerusalem*, 156-157.

⁴² Cf. E. Baltrusch, *Herodes König im Heiligen Land: Eine Biographie*, Munich, C.H. Beck, 2012, 194: between 18/17 and 15 BCE; A. Kasher, *King Herod: A Persecuted Persecutor: A Case Study in Psychohistory and Psychobiography*, SJ 36. Berlin: de Gruyter, 2007, 245: in proximity to the events of 18/17 BCE.

⁴³ This was suggested to me by Prof. René Bloch, Bern.

⁴⁴ Jackson, *Theft in Early Jewish Law*, 142-144; 158, referring to the 300 cases of housebreaking in a single night in Sepphoris in the time of R. Yose, *b. Sanh.* 109a.

⁴⁵ E.g. A. Gulak, "החוק של הורדוס המלך על עונש הגנבים" [King Herod's Law on the Punishment of Thieves], in N.H. Tur-Sinai a.o. (eds.), *ספר קלוזנר: מאסף למדע ולספרות יפה מוגש לפרופסור יוסף*, Tel-Aviv: Amanut, 1936/1937, 132-136; J. Gutman, "פקודת הירודוס נגד גנבים", *קלוזנר ליובל הששים*

Earlier discussions have proposed four possible purposes – singularly or in combination – for Herod instituting the law:

(1) Herod's policy of Romanization, or more specifically, a legal goal of adopting Roman law, which may have been implemented during Herod's rule as a king friendly to the Romans,

(2) The elimination of burglars in the kingdom through a definitive punishment,

(3) The elimination of gangs of robbers in the kingdom through a definitive punishment,

(4) The elimination of Herod's opponents through a definitive punishment.

One approach to explaining Herod's law is the suggestion that it reflects a broader strategy of Romanization by Herod. Such a strategy of introducing Roman conventions in his kingdom and, no less important, presenting himself as a ruler in Roman fashion, might find expression in Herod's urban planning and architecture, the organization of new festivals in honour of the emperor in Jerusalem and Caesarea Maritima (*Ant.* 15.267-291; *War* 1.415; *Ant.* 16.136-141), the organization of a ruler cult at Caesarea Maritima, Paneas-Caesarea Philippi or Horvat Omrit and Samaria-Sebaste, as well as the erection of the golden eagle in the Temple complex (*War* 1.648-655; *Ant.* 17.148-164).⁴⁶ Asher Gulak already argued in 1937 that Herod's law shows similarities with Roman laws about theft, because in both cases the thief was sentenced to be sold as a slave to foreigners.⁴⁷ He assumes that Jews could not be sold as slaves in Judea, parallel to the situation of Roman thieves who had to be sold across the Tiber, i.e. outside the city border of Rome. Avraham Schalit correctly points out in his famous monograph on Herod that there was no ban on selling of Jews as slaves in Judea,⁴⁸ but he too argues that Herod's law parallels Roman law on theft in several ways: : (1) a fourfold punishment, (2) thieves being sold into slavery as punishment, and (3) the distinction between day and night.⁴⁹ Besides Herod's

שנתפסו במהרת [The Order of Herod against the Thieves Caught Breaking in]", in E. Bin Gorion (ed.), *אדר היקר: דברי ספרות ומחקר מוקדשים לש"א הורודצקי במלאת לו שבעים וחמש שנה*, Tel-Aviv: Devir, 1947, 59–66; J. Gutman, "שעבוד גופו של אדם בחובותיו בתורת ישראל", in Y. Baer a.o. (eds.), *ספר דינבורג: קובץ דברי עיון ומחקר*, Jerusalem: Beth ha-Midrash for the Teachers of Hebrew, 1949, 68-82 (esp. 79-81); Kasher, *King Herod*, 245-246 with footnote 4; S. Rocca, *Herod's Judaea: A Mediterranean State in the Classical World* (Tübingen: Mohr Siebeck, 2008), 278-279.

⁴⁶ See the references in n. 13 and D. W. Roller, *The Building Program of Herod the Great*, Berkeley, Calif.: University of California Press, 1998; M. Bernett, *Der Kaiserkult in Judäa unter den Herodiern und Römern: Untersuchungen zur politischen und religiösen Geschichte Judäas von 30 v. bis 66 n. Chr.*, Tübingen: Mohr Siebeck, 2007; E. Baltrusch, *Herodes: König im Heiligen Land. Eine Biographie*, Munich: C.H. Beck, 2012, 72-174. Herod's architecture reflects Hellenistic as well as Roman conventions, A. Lichtenberger, *Die Baupolitik Herodes des Grossen*, Wiesbaden: Harrassowitz, 1999; E. Netzer, *The Architecture of Herod, the Great Builder*, Tübingen: Mohr Siebeck, 2006.

⁴⁷ A. Gulak, "החוק של הורדוס".

⁴⁸ Schalit, *König Herodes*, 237.

⁴⁹ Schalit, *König Herodes*, 230-256. In Roman law manifest theft [*fur manifestus*] during the night was originally punished with the death penalty (*Lex XII tabularum* 8.12-13). A thief apprehended during the day received a milder punishment. He was either sold into slavery for

deliberate adaptation of Roman law Schalit argues for another motive: the king aimed at ending all unrest in the kingdom by eliminating his opponents once and for all, following the example of Augustus's restoration of peace and order and re-introduction of the old Roman family morality.⁵⁰ In this context armed robbers were treated according to the category of manifest thieves (*fures manifesti*) and convicted to lifelong penal servitude.⁵¹ From this perspective, following Augustus's lead, Herod as a client king of the Romans implemented Roman law concerning burglary as an attempt to restore order in his territory. Gideon Fuks goes even a step further, by arguing that it was Herod's prime concern to find favour with Augustus, on whose goodwill the king's survival as a client king depended. To achieve this goal and to maintain his iron grip on his Jewish subjects Herod was ready to break the Jewish law.⁵² Schalit further argued that Herod's policy not only aimed at eliminating thieves and robbers, but also political opponents, especially those disrupting security and political stability.⁵³ Schalit, argues, therefore, for a multi-purpose law dealing with thieves, robbers as well as Herod's opponents. Finally, he also suggests that those who were convicted under the regime of the new law were brought to Cyprus and forced to work as slaves in the copper mines at Soloi.⁵⁴ In short, Herod adopted Roman law and used Augustus as a model with the introduction of his law concerning burglary.

In a recent biography of Herod, Ernst Baltrusch argues, like Schalit, for a combination of options 1–4 as explanation for the context and purpose of Herod's law, all of which he understands as a violation of Jewish law.⁵⁵ He points to the word ἀδικία in *Antiquities* 16.1 and argues that Herod as ruler aimed at pushing back various sorts of crime (ἀδικία, 16.1) in the city of Jerusalem and its countryside (above). He adds that this word is elsewhere associated with gangs of robbers, such as Ezekias and his brigands (*Ant.* 14.159), as well as the robbers in the Trachonitis.⁵⁶ Such robbers are consistently called λησταιί in Josephus (e.g. 16.347). Reading between the lines, Baltrusch argues that Herod

the rest of his life to the person who was harmed (*addictio*), became a debtor who was killed after sixty days, or was sold as a slave outside the city of Rome. This changed in praetorian law to a fourfold monetary compensation for what was stolen (Gaius, *Inst.* 3.189; Jackson, *Theft in Early Jewish Law*, 161). For details, see W.W. Buckland and P. Stein, *A Text-Book of Roman Law from Augustus to Justinian*, Cambridge: Cambridge University Press, 1963, 103; 576-585; W.M. Gordon and O.F. Robinson, *The Institutes of Gaius: Translated with an Introduction*, London: Duckworth, 1988, 373-389.

⁵⁰ Rocca, *Herod's Judea*, 278-279, argues that the law was mainly applied in Gentile areas as a deterrent against banditry.

⁵¹ Gaius, *Inst.* 3.209; *Dig.* 47.8; 47.17; Schalit, *König Herodes*, 244-247. Jackson, *Theft in Early Jewish Law*, 161, observes that Josephus does not mention that the law only applied when the thief was caught in the act, as Schalit implies.

⁵² Fuks, "Josephus on Herod's Attitude", 245.

⁵³ Schalit, *König Herodes*, 248-251, cf. p. 248: "Unseres Erachtens sind unter den 'Mauerbrechern', gegen die Herodes seine Verordnung erliess, eben solche Einzelgänger zu verstehen."

⁵⁴ Schalit, *König Herodes*, 251; cf. *Ant.* 16.128.

⁵⁵ Baltrusch, *Herodes König*, 194: "eine Verletzung des jüdischen Rechts".

⁵⁶ See *Ant.* 15.345 about Zenodorus who had made a pact with robbers in the Trachonitis.

sought to hit the radical religious opposition to his rule with a severe punishment that would force it to abide by the divine rules in the country as guaranteed by Herod.⁵⁷ Aryeh Kasher goes even a step further than Baltrusch, arguing that the law was imposed to protect Herod's rule: "In our opinion, the law testifies to the depth of the point where he [Herod] undertook this radical piece of legislation – which had no basis in Jewish law – to safeguard his rule."⁵⁸

There is some plausibility to all four options listed, but an objection to options one, three and four is that Josephus' passage does not support them. An additional objection to the interpretations discussed above arises from the specific vocabulary that Josephus employs here as well as in the parallel passage in *Antiquities* 4. He does not use the word ληστής ("robber", "brigand"), but the rare τοιχωρῦχος ("burglar, housebreaker", 16.1)⁵⁹ as well as the more common word κλέπτης ("thief", 16.3).⁶⁰ Bernard Jackson argues that there is a significant semantic difference between the two words (i.e., ληστής and τοιχωρῦχος) and therefore concludes that the law was inspired by frequent cases of burglary ("housebreaking") that indeed called for a serious deterrent (cf. option 2 above).⁶¹ Jackson also warns about overestimating similarities with Roman law, for in the latter, offenders were not sold to foreigners, as in Herod's decree. Jackson considers the punishment by slave labour in the copper mines at Cyprus implausible because such a punishment is attested to in the Roman context only in later times and not for the period of Augustus, and if so only for the *humiliores* and not the *honestiores*.⁶² A connection with the copper mines at Cyprus leased by Herod is absent in *Antiquities* 16.1-5 and the implication of the passage seems to be different, as the focus on the conflicting ways of life (above) implies: the thieves were to be sold to private non-Jewish masters. On the basis of what Josephus tells us, we may conclude that Herod introduced a new law concerning burglary as a deterrent between 20/19 and the summer of 17 BCE. Herod's law was harsher than the biblical law about theft of livestock in Exod. 22:1-4 (21:37-22:3 MT, above), but closer to some of the other biblical laws on theft, which allowed for permanent slavery in certain cases (Lev. 25; Neh. 5, above). Some rabbinic passages deal with slaves owned by non-Jews without a release (above), and documentary evidence implies that there were Jewish slaves in the

⁵⁷ Baltrusch, *Herodes König*, 195.

⁵⁸ Kasher, *King Herod*, 245.

⁵⁹ Cf. *Ant.* 4.271-272 "... even if he [the thief] is [merely] breaking through a wall" (ἢ πρὸς διορύγματι τειχίου).

⁶⁰ Cf., by way of contrast, the punishment of the rebels of Tarichaeae, who were partly Jewish, described at the end of *War* 3 (3.332-342). The Jews were trapped on Lake Gennesareth and either killed by Romans on a raft in the small skiffs which they used for piracy (σκάφη μικρὰ καὶ ληστρικά) or forced to go to the stadium of Tiberias where 1200 aged and unserviceable persons were killed. 6000 of the most robust men were sent off to forced labour at the Isthmus, and 30,400 rebels were sold by Vespasian, apart from those who were former subjects of Agrippa II's kingdom and given to Agrippa as a present. Josephus explains that this mob consisted for the most part of persons from the Trachonitis, the Gaulanitis, Hippos, and Gadara and he characterizes them as fugitive and seditious (στασιασταὶ καὶ φυγάδες).

⁶¹ Jackson, *Theft in Early Jewish Law*, 161-164.

⁶² Such a distinction is absent in Josephus, *Antiquities* 16.1-5.

Diaspora.⁶³ This supports the plausibility that Herod did issue a law about burglary with slavery to foreign masters as punishment and shows at the same time that the law was less extreme than Josephus says it was. About the specific occasion and context of the law we can only speculate because of the lack of definitive information in Josephus. The similarities with Roman laws about theft are superficial at best, which means that it is implausible that the law stemmed from a policy of Romanization.

5. Conclusion

Josephus takes the perspective of Herod's Jewish subjects when reporting Herod the Great's law concerning burglary in *Antiquities* 16.1-5. The subjects considered Herod's innovation – that thieves who were caught had to be sold as slaves to non-Jews – too harsh and even unlawful. Josephus uses this episode at the beginning of book 16 of the *Antiquities* as a frame for presenting the king as an arrogant ruler and a tyrant who ignored the interests of his subjects and transgressed the ancestral laws through his innovations. A comparison of Herod's law with the biblical laws concerning theft and Josephus's own paraphrase of these laws in *Antiquities* 4 shows that the criticism of the law in *Antiquities* 16 needed to be nuanced in several ways. There is no general law concerning theft in the Hebrew Bible and there are biblical as well as rabbinic passages that imply that Israelites, Judeans or Jews were in fact sold to foreigners or employed that practice themselves. Rabbinic sources suggest that a Jew who sells himself and his children to a non-Jew will not be redeemed. In *Antiquities* 16 Josephus ignores the rabbinic distinction between night and day and the fact that it was permitted to kill someone who broke in during the night. The law was probably issued between 20/19 and the summer of 17 BCE to deter burglars in Jerusalem and Judea, and not robbers or opponents, as Josephus' very specific vocabulary implies. The similarities between Herod's law and Roman law concerning burglary remain superficial, and there is no hard evidence that the law was part of a policy of Romanization.

⁶³ There were Jewish slaves in Ptolemaic and Roman Egypt: *P. Oxy.* IX 1205 (= *CPJ* III 473, 291 CE). On the duty for Jews to redeem Jewish slaves, see above and n. 36.