

Notre Dame Law School

NDLScholarship

Journal Articles

Publications

2003

Lawyers as Prophets

Thomas L. Shaffer

Notre Dame Law School, thomas.l.shaffer.1@nd.edu

Follow this and additional works at: https://scholarship.law.nd.edu/law_faculty_scholarship



Part of the [Legal Ethics and Professional Responsibility Commons](#), and the [Legal History Commons](#)

Recommended Citation

Thomas L. Shaffer, *Lawyers as Prophets*, 15 St. Thomas L. Rev. 469 (2002-2003).

Available at: https://scholarship.law.nd.edu/law_faculty_scholarship/273

This Article is brought to you for free and open access by the Publications at NDLScholarship. It has been accepted for inclusion in Journal Articles by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

LAWYERS AS PROPHETS

THOMAS L. SHAFFER*

Legal ethics is about injustice. My effort here is part of the broad, modern academic enterprise, and of the broad, modern professional enterprise now usually called professional responsibility. Both date from the Watergate scandal in the administration of President Richard M. Nixon, and the rejection, by legal academics and practicing lawyers, of the behavior of the President and other lawyers in that affair. Our modern enterprise, like the biblical Exodus, was born in outrage at the abuse of legal power.

In university law schools such as this one, legal ethics is now a discipline characterized by schools of thought on ways to be a lawyer and a good person, both at the same time. The school of thought I belong to answers the question theologically: the way to be a lawyer and a good person, both at the same time, in teaching or writing about or practicing law is to be, at the same time, a Jew faithful to Torah, a Christian who follows Jesus. The present project explores such an undertaking with reference to the prophets of Hebrew Scripture – Moses, Jeremiah, Isaiah, Amos, Ezekiel, and the rest.

I argue that the Hebrew Prophets, these biblical prophets, are sources of legal ethics and of jurisprudence for Jews and Christians. As I try to persuade you of that, I want also to make the suggestion that the biblical prophets were lawyers more than anything else.

My favorite Old Testament scholar, Professor Walter Brueggemann, who trains Presbyterian ministers, makes a connection like the one I am suggesting to you – between morals in a calling such as the practice of law and the morals of the biblical prophets. “[P]rophecy,” he says, is “an assault on public imagination, aimed at showing that the present presumed world is not absolute, but that a thinkable alternative can be imagined, characterized, and lived in.”¹ But, of course, as Calvinists tend to do, he finds that we have put obstacles in the way of thinking of our work from a

*A.B., J.D., LL.D., Member of the Indiana Bar; Robert and Marion Short Professor of Law Emeritus, University of Notre Dame; Supervising Attorney, Notre Dame Legal Aid Clinic. This was the annual Villanova Lecture at St. Thomas University, Miami, Florida, October 24, 2002. I am grateful for the assistance of Linda Harrington, Lenora Ledwon, Howard Lesnick, Samuel Levine, H. Jefferson Powell, Robert E. Rodes, Jr., and Nancy J. Shaffer.

1. WALTER BRUEGGEMANN, *A SOCIAL READING OF THE OLD TESTAMENT* 224 (Patrick D. Miller ed., 1994) [hereinafter *A SOCIAL READING*].

prophetic focus.

Brueggemann thinks, and I think, our neglect of a prophetic focus has to do with the facts that we are too well off, and that we manage the system we benefit from.² We lawyers. We lawyers, who have deceived ourselves. We have lost (or have never developed) our ability to be angry at the injustice around us. First, we don't see the injustice around us, as the Prophets did, because we are too comfortable – so that seeing injustice, and naming it for what it is, would disturb our comfort. And then, even if we do see the injustice around us, we take it in stride. We say it is intractable; we are doing as much as we can about it; the injustice and the pain of exploitation is part of the way things are; the tide is rising, thanks to us, and a rising tide lifts all boats.

THE ANGER OF THE PROPHETS

Lawyers are in a position to know about injustice and exploitation. But even so we are not as angry as the Hebrew prophets were; not angry, as modern American prophets have been. Dr. Martin Luther King, Jr., for example, or, on some days, Senator John McCain (neither of them a lawyer). Instead of being angry, we lawyers help one another to become more prosperous, as the poor become poorer. Judges and bar associations mostly ignore the poor, and ignore the fact that lawyers ignore the poor. Judges and bar associations tell us lawyers to be more civil to one another. The Prophets would say the trouble with us is not that we tend to be uncivil to one another. They might say we are too civil, civil to the wrong people, civil in the wrong direction.

The Prophets would say we are not angry enough. Their anger cries out from the pages of Scripture. We modern believers do not hear their anger, because we cloud their anger in ceremony. We set them to music by George Frederick Handel. We insert their words like dashes between the other pieces of Scripture we read aloud on Sundays. Because the anger of the Prophets is muted in these ways, their thinking goes unnoticed. Their thinking is ignored because their anger is ignored. And thus the prophets are not used, among us modern believers, for ethics.

I propose to explore how things would be for lawyers who are believers if the Prophets – the scriptural ones and the modern ones—became models of anger for us, and then were used by us for serving God “in the tangle of [the] mind . . .” (as Robert Bolt has Thomas More put it).³ I am

2. WALTER BRUEGGEMANN, PEACE 33-35 (2001) [hereinafter PEACE].

3. ROBERT BOLT, A MAN FOR ALL SEASONS 126 (1962).

wondering what might happen if lawyers paid as much attention to the angry words of the Prophets as we pay to the words of judges. If we paid attention not only to the outrage of the Prophets but also to the social, political, and economic conditions that moved them to outrage. First, anger – with no music – and then ethics.

The prophet Amos came to Bethel to speak out against the exploitation of the poor. He would have something angry to say about the fact that in the United States today, one out of five children skips meals because there is no food, that children in our prosperous economy are the poorest Americans. Amos would notice that most of the adults who are vocal in our politics don't seem to be worried about other people's children.⁴ James Fallows said: “[T]he richer people become, the less they . . . stay in touch with the realities of life on the bottom, and the more they . . . prefer to be excited about their own prospects . . .”⁵ Especially lawyers, as, in the poet's phrase, we “trudge on time to a tidy fortune.”⁶

Amos would apply to us what he said in Israel to matriarchs who cared for their families in luxury, who built their wealth on the backs of poor children, who ignored families that didn't have enough to eat. “[T]hey sell the innocent for silver, and the destitute for a pair of shoes,” he said:⁷

Hear this word, women of the
mountain of Samaria. . . .
You who oppress the weak
and abuse the needy;
Who say to your lords,
“Bring drink for us!”
The Lord God has sworn by his
holiness:
Truly the days are coming upon you
When they shall drag you away with
hooks,

4. See the extensive statistics assembled or cited in, Thomas Shaffer, *Jews, Christians, Lawyers, and Money*, 25 VT. L. REV. 451 (2001) [hereinafter Shaffer].

5. James Fallows, *The Invisible Poor*, N.Y. TIMES, March 19, 2000, § 6 at 68.

6. See generally Altman Weil, *The 2002 Survey of Law Firm Economics* (2002) (reporting that in 2001 “most profitable law firms. . . billed at higher rates. . . worked more hours and were more leveraged with associates and paralegals. . .”) Addendum (Indiana State Bar Association).

7. *Amos* 2:6.

the last of you with fishhooks;
You shall go out through the
breached walls,
each by the most direct way,
And you shall be cast into the mire, says the Lord.⁸

That is mean, angry stuff. It is characteristic of the Hebrew Prophets. They were angry people. They would be angry at the thousands left hungry by American "welfare reform." They would be angry at families thrown out of their homes by prosperous, commodity-driven America.

The housing situation for low-income families is worse than it has been for decades.⁹ In most cities in the United States retail clerks or janitors, working full time, cannot afford both food and rental housing for their families. The Prophet Micah observed similar conditions in biblical Jerusalem, found them enormously evil; and he said:

Woe to those who plan iniquity,
and work out evil on their couches;
In the morning light they accomplish
it when it lies within their power.
They covet fields, and seize them;
houses, and they take them;
They cheat an owner of his house,
a man of his inheritance.
Therefore thus says the Lord:
Behold, I am planning against this
race an evil
from which you shall not withdraw your necks;
Nor shall you walk with head high,
for it will be a time of evil.¹⁰

Three-fourths of the financial aid available at universities such as yours and mine goes not to needy students but to the prosperous and the wealthy. Three-fourths. About a fourth goes to students from low-income

8. *Amos* 4:1-3.

9. See Thomas Shaffer, *Jews, Christians, Lawyers, and Money*, 25 VT. L. REV. 451, 453 n.10, 454 n.11 (2001).

10. *Micah* 2:1-3.

families.¹¹ In our America today, for every dollar of wealth accumulated by the average white family, the average black family has accumulated nine cents.¹²

A modern prophet, Dr. Martin Luther King, Jr., said, “When machines and computers, profit motives and property rights are considered more important than people, the giant triplets of racism, materialism, and militarism are incapable of being conquered.”¹³ I ponder those three categories of oppression of the poor – racism, materialism, and militarism – and ask myself whether things are better in the United States now than they were the day Dr. King died. Black children were, in his day, more likely than white children to be poor. They still are – today three times more likely.¹⁴

“[T]he modern nation-state is a fundamentally unjust and corrupt set of institutions whose primary function is to preserve the interests of the ruling class, by coercive and violent means if necessary,” my colleague Father Mike Baxter, who is kind of like Amos, says. “And,” he says, “there will always come a time when it is necessary.”¹⁵

THE ETHICS OF THE PROPHETS

Thus the Bible without the music announces the anger of the Prophets. Ethics needs that anger. We could not get to prophetic ethics without the anger. Then ethics needs to turn from the anger – from the image of the idle prosperous being dragged through holes in the wall with fish hooks – to the thinking involved, to thinking about morals, to thinking about law.

Prophetic ethics, when it thinks, comes to the issue of power, as Auden did when he said we live on a moral planet tamed by terror. Our thinking about our moral planet, our ethics, is thinking about power, as much as our law and our politics are. About lethal power when we are

11. Tom Pugh, *College Aid Going to Wealthier Students*, ARIZONA REPUBLIC, Feb. 19, 2000, at A1.

12. *Net Worth of Older Households Up, Younger Down: Study*, SOUTH BEND TRIBUNE, Feb. 9, 2000, at A5 (Associated Press) (reporting a study on income dynamics done at the University of Michigan Institute for Social Research).

13. Rev. Dr. Martin Luther King, Jr., *Beyond Vietnam*, Address before a meeting of Clergy and Laity Concerned at Riverside Church in New York City (April 4, 1967), in *A CALL TO CONSCIENCE: THE LANDMARK SPEECHES OF DR. MARTIN LUTHER KING, JR.* 139, 157-58 (Clayborne Carson & Kris Shepard eds., 2001).

14. See the reports cited and quoted in Shaffer, *supra* note 4, at 453-54 n.10.

15. Michael J. Baxter, *Blowing the Dynamite of the Church: Catholic Radicalism from a Catholic Radicalist Perspective*, THE HOUSTON CATHOLIC WORKER, March-April, 1999, available at <http://www.cjd.org/paper/blow2.html>.

talking about diplomats or soldiers or lawyers. The ethical agenda to which a prophet speaks – and notably so when the prophet is a lawyer – is how lethal power dictates the moral direction we lawyers take in our lives with our clients.¹⁶

Law teachers sometimes exhibit discomfort at a power analysis of what law is. Surprise because they think the law is rational. I got over that reaction by becoming, in my old age, a legal-aid lawyer. Lethal state power evicts my clients from their homes, garnishes their wages, and deports them. It is not finally rational. It is only how the big boys win and hold on. If my colleagues don't know that, it is because they are looking in the other direction.

My friend and teacher, the late John Howard Yoder, summarized this issue, under the imposing title "Ethics and Eschatology":

Consider the providential place of the power-bearer It is assumed, at least since [the Emperor Constantine], that the frame of reference of ethical deliberation is that of the person with power: the king deciding whether to wage an unjust war, the merchant deciding whether to set a fair price, the head of household deciding whether to beat his wife or his child, the wealthy person deciding whether to lend at interest. The action is to be evaluated not by whether it keeps the rules, or by whether it resonates with the grace of God, or by whether it exemplifies virtue, or whether it coheres with the salvation story, but by whether, when carried out, when generalized through the ruler's power, it will produce the best possible outcomes¹⁷

according to the way the ruler judges outcomes.

Yoder described the way our moral planet makes up its mind. What he figured out is especially and most evidently true when the leader of the country decides to go to war. It is true, if less evidently so, when power ethics is spun by self-deception, as it is in American corporate consumerism or in attention or failure to attend to such naive religious notions as the preferential option for the poor. Legal power is cloaked behind what the Marxists call hegemony, so that the interests of the ruling class are presented as protected by rules, by grace, by virtue, patriotism, or even by the salvation story. I think my friend Yoder was saying that the coercive use of lethal legal power to protect wealth is made to be consistent with all of the categories into which professors divide ethics.

Yoder's agenda, stretched across the history of the biblical prophets, begins with the Prophet Moses, who was told by God to defy the morals of

16. See generally Shaffer, *supra* note 4.

17. See North Park Symposium (October 1990), reprinted in Thomas Shaffer, MORAL MEMORANDA FROM JOHN HOWARD YODER 27-31, 50-53 (2002).

the power bearer, which Moses did. That story establishes the self-portrayal of our God as a God of justice: Exodus says that all worldly rulers – those St. Paul called the principalities and powers – are less powerful than they think they are.

But, then the Bible story takes an ironic turn:

The children of God freed from slavery in Egypt carry their community into the desert, where God both cares for them and leads them to a legal system for ordering their common life. They come to have not only a community but also their own state – and, with the state, a system of legal ethics. The state claims to preside over a unique civil community, and those who see to legal ethics are told to see to “a community of obedience and justice.”¹⁸

But the State of Israel, ancient or modern, has never been a community of obedience and justice. At its best, it has always been less than that. Who says so? The Prophets say so. The Prophets, called first to defy lethal power in Egypt, are called later, again and again, from the Prophet Nathan¹⁹ to the modern Israeli prophet Martin Buber,²⁰ to challenge, criticize, and subvert legal power in Israel.

All of which has produced for us believers an odd political theology – a political order called into being by God, which political order is subject to repeated (even perpetual) subversion, systematic subversion set up and perpetuated by God.²¹ God’s subversives are the Prophets – disinherited from political legitimacy, protesting, pointing to a Lord who “decisively intrudes, even against seemingly impenetrable institutions and orderings.”²² Put in place by God to make power uncomfortable, not just for tyrants but also for legitimate rulers, rulers the Lord put in place to begin with. (Kings David and Solomon are two examples.) Rulers “situated among the

18. A SOCIAL READING, *supra* note 1, at 31.

19. 2 Kings 2:12.

20. MARTIN BUBER, THE LETTERS OF MARTIN BUBER 53-54 (Nahum N. Glatzer & Paul Mendes-Flohr eds., 1991); MARTIN BUBER, ON JUDAISM 109, 135 (1967); Michael Walzer, *Israel at Forty: Search for Zion*, TIKKUN, May-June, 1988, at 75; MAURICE FRIEDMAN, MARTIN BUBER’S LIFE AND WORK 241-325 (1983).

21. This is Brueggemann’s “two trajectories” theology. See generally among many sources in his work, A SOCIAL READING, *supra* note 1, ch. 1; PEACE, *supra* note 2, at 26-29; WALTER BRUEGGEMANN, OLD TESTAMENT THEOLOGY, 30-31, 147, 150 (Patrick D. Miller ed., 1992) [hereinafter OLD TESTAMENT THEOLOGY]; WALTER BRUEGGEMANN, PSALMS AND THE LIFE OF FAITH 217-234 (Patrick D. Miller ed., 1995) [hereinafter PSALMS AND THE LIFE OF FAITH]; WALTER BRUEGGEMANN, ICHABOD TOWARD HOME: THE JOURNEY OF GOD’S GLORY (2002), which, using the “Ark Narrative” of 1 Samuel ch. 4-6, extends the “trajectories” theology into what he calls “guerilla theatre.”

22. A SOCIAL READING, *supra* note 1, at 14.

established and secure,” put in place by “a God Who faithfully abides and sustains on behalf of. . . [their] ordering,”²³ sustained by a God who subverts their ordering through the Prophets.

This is the way the God of the Bible set up the law – in perpetual tension. Order on one end, subversion on the other. Brueggemann says the biblical prophets know “that the world is ordered according to systemic social distortion,” so at the heart of Israel’s “troubled life” there is a “terrible incongruity between the way of the world and the powerful will of [the Lord].”²⁴ The oath I took when I was admitted to the Bar in Indiana had me say, “I will support the Constitution of the United States.” If it had said “support and subvert” it would have been biblical.

The order side of this, which Brueggemann calls the “royal trajectory,” has its myths of unity. The Prophets have myths of liberation, which, the Prophets say to the king, is the true story of biblical Israel. The Kings’ policy is imperial, solemn, patriotic, comprehensive, and biased. The prophetic agenda is specific, individual – about shepherds, widows, children, immigrants, taken one at a time. From that worm’s-eye view, the Prophets call on the glory and holiness of God’s person and call for institutions geared to that holiness.²⁵ When Pharaoh talks about the economy, he talks about scarcity (crop yields are down; the oil is running out; not enough bricks are being made) – so that he and his prosperous friends can accumulate more. When the Prophets talk about the economy, they speak of such things as the “justice and righteousness of God’s will.”²⁶ Modern Prophets talk of abundance – plenty for everybody – and less about costs and benefits than about God as a person who cares about those who are exploited by lawyers for the prosperous.

The royal “trajectory” has its scripture, and, from scripture, a biblical theology of law and order. Its presence in the Bible, alongside the anger and subversion of the Prophets, is what preserves this odd theological politics that contemplates both a community of divinely legitimated structures, and enduring divine subversion – law and order subverted directed by a God who embraces the pain of children.

Brueggemann invites lawyers in the church to ponder the prophetic political ideal as we ponder our lives in the law. He suggests that the People of God be “the community that refuses to settle for the way things

23. *Id.*

24. *See generally* PSALMS AND THE LIFE OF FAITH, *supra* note 17.

25. *See id.* at 219-21.

26. Walter Brueggemann, *The Liturgy of Abundance, The Myth of Scarcity*, THE CHRISTIAN CENTURY, March 24-31, 1999.

are, refuses to accept the legitimated structures, refuses to accept a God who is positioned above the fray . . . does not believe that the doctor knows best, does not believe all authority is ordained by God, does not believe city hall . . . cannot be fought.”²⁷ That would be prophetic legal ethics.

The royal political ideal, the regime whose ethics my friend Yoder described as “the providential place of the power-giver,” always wants to shorten the distance between itself and what it wants to do. It doesn’t see any reason to distinguish between the throne on which it sits and the throne on which it says God sits. In America, power-givers decided a long time ago that America is God’s New Israel.²⁸ They applied to themselves what God said to Israel: “I will make of you a great nation.”²⁹ The aging white males who said that, or applauded it, applied the notion to themselves, but not to slaves or immigrants or women. They preferred not to notice or remember, I suppose, the way the Lord kept biblical government to its task: “I smote them through the prophets, I slew them by the words of my mouth.”³⁰

The biblical royals were the urban haves; they talked about continuity and about protecting Israel from “enemy combatants.” They sought to conserve stability. The biblical prophets are the peasants, the country people; the have-nots, the rebels; they talked of alternatives, of discontinuity, of civil rights and civil liberties. They sought social revolution and called for transformation. They were sometimes lawyers. When they were lawyers, they practiced law against order.

LEGAL ETHICS

How might such a description of the biblical prophets, in the political order that Israel had after the Exodus, bear on modern American legal ethics?

First, I think a lawyer-prophet in America might usefully look back on some of the lawyer-prophets in our national history – the odd, subversive ones especially: Clarence Darrow, members of the Lawyers Guild, Catholic Workers – people who knew that “the God of the Bible is endlessly restless with socio-economic power arrangements that the world takes as normal.”³¹ One who looks at American lawyer-prophets might

27. OLD TESTAMENT THEOLOGY, *supra* note 21, at 30-31.

28. See MARTIN E. MARTY, *RIGHTEOUS EMPIRE: THE PROTESTANT EXPERIENCE IN AMERICA* 24 (1970).

29. *Exodus* 32:10.

30. *Hosea* 6:5.

31. Walter Brueggemann, *Preaching a Sub-Version*, 55 *THEOLOGY TODAY* 195, 196 (1998).

even notice that a lawyer-prophet in America is often repulsive. Like Jeremiah thrown into the pit and then exiled. Like Amos chased out of town. Like the Servant of the Lord described by the Prophet Isaiah: “[W]e despised him, we held him of no account, a thing from which men turn away their eyes.”³²

The second lesson from the Prophets for legal ethics is that the lawyer-prophet is an advocate of alternatives. Brueggemann, thinking of the covenant God has with God’s people, and thinking as well of the fact that advocates of the prophetic alternative are repulsive, said, “The covenantal paradigm affirms that the world which we serve, and for which we care, is a world yet to be liberated.”³³ He spoke of it, Christian pastor that he is, as “a world [which] is to be transformed precisely by one who is deformed.”³⁴

An example from a property teacher: We could pause, we lawyers gathered to talk about prophetic alternatives, and guess together how the American law of property would look if property were seen, as it is in the Bible, as a gift rather than a commodity, a trust rather than a bulwark – if the law of property acted to guard life. Darrow, the Guild lawyers, and Catholic workers (e.g., Peter Maurin), talked about property in those prophetic terms.

The third lesson for legal ethics, from the Prophets, is that the alternatives offered by modern lawyer-prophets will be intellectually coherent. They will be unpopular, if scripture and history are guides, but they will be analytically understandable. A test for their being understandable is whether they will get through to us in “the tangle of [the] mind.” They will make us scratch our heads.

My colleague Richard Garnett presents an example. He represents death-row prisoners, a prophetic enterprise, I think. One of his clients told him, at one point in the tedious process of trying to keep the state from killing him, that he would just as soon give it up; he would, he said, like to volunteer to be killed. Rick explains that lawyer’s “ethical dilemma” with compelling clarity and then invites his readers to find a way out of it:

– The prisoner’s lawyer could “acquiesce out of respect for autonomy in the client’s submission to . . . a dehumanizing penalty”³⁵ That

32. *Isaiah* 53:3.

33. Walter Brueggemann, *Covenant as a Subversive Paradigm*, THE CHRISTIAN CENTURY, Nov. 12, 1980.

34. *Id.*

35. Richard W. Garnett, *Sectarian Reflections on Lawyers’ Ethics and Death Row Volunteers*, 77 NOTRE DAME L. REV. 795, 827 (2002) [hereinafter Garnett].

would be to endorse the dominant ethic in the American medical and legal professions: The ideal is that every client be his own tyrant. He would be his own executioner.

– This lawyer could “oppose and obstruct, admitting candidly that [his client’s] autonomy is being sacrificed to the even more pressing obligation to prevent executions”³⁶ (notice, please, the plural: executions). That would be an instance of what has come to be called “cause lawyering.”

– Or the lawyer could “resist by treating the client’s decision as conclusive evidence of his incapacity to make it and of its unworthiness of respect . . . by infantilizing the chooser.”³⁷ That would take advantage of an ethic of sanctioned paternalism, the principal way we lawyers keep our clients orderly.

Garnett has not yet needed to find his way out of this; his client changed his mind about volunteering the last time the issue came up. The case is pending. The prophetic quality I want to notice in Rick’s account is its truthfulness. It is an analytically understandable “ethical dilemma” because it is truthful about what is going on. And it makes sense: Rick is a prophet and a lawyer, confronting with a lawyer’s good mind the injustice of the king.³⁸

The fourth feature I can discern in this bizarre suggestion that you consider prophetic legal ethics is that such a position would be religiously disruptive. Organized religion almost always backs the king and opposes the prophets, as the temple priesthood opposed the biblical prophets. “It is the work of every domesticated religion to make the free grace of God a part of the system,” Brueggemann said – “a new legalism, against which Jeremiah, Ezekiel, Second Isaiah, and the poet of Job each must protest afresh.”³⁹

There are not many church or synagogue buildings in America that would appear to be welcoming to my legal-aid clients, and even fewer that would take in the homeless people who are not even shaped up enough to be my clients. The modern American church (and maybe the modern American synagogue, too), Brueggemann says, “has sorted everyone out,” so that America will make sense, “even while the parade of victims streams before us, some very close to home. [Our] necessary seductive doxology nurtures us not to notice – not to notice neighbor, not to notice self, not to

36. *Id.*

37. *Id.*

38. *See generally id.*

39. A SOCIAL READING, *supra* note 1, at 90.

notice hurt, not to notice healing or its costs – not to notice.”⁴⁰ He could have been thinking of how we use the words of the biblical prophets to fill small spaces in the liturgy, or set them to music for the holidays. He could have been thinking of how, for us, the Prophets do not teach theological ethics.

Finally, what I notice about the possibility of prophetic legal ethics – and this is probably the hardest of all for a lawyer to swallow – is that they are not effective. Amos was chased out of town. Jeremiah was thrown into a well, then hauled out, then exiled to Egypt. Jesus was tortured to death. I think of Dr. King, of Robert Kennedy. (Clarence Darrow died in his bed. Maybe, after all, he was not a prophet.)

THE ETHICAL SYSTEM OF THE PROPHETS

Those, along with prophetic anger, are the effects of prophetic ethics. Beneath the anger and the effects there is a system behind this ethic. There is a way to figure out what the Prophets are up to.

The system is not always evident, but I suggest it is always present, even when the biblical prophets seem to refer to and depend only on what is in front of them and of those they criticize. The moral arguments they make seem so evident; they do not need system or authority; it seems enough for them to be intuitive and experiential: We do not need a faith or a philosophy to be dismayed when we behold a hungry child or an abused worker. When Ezekiel got the king’s attention, he did not quote the Torah. He asked the king, “Should not shepherds pasture sheep?”

Much of the legal ethics made available by publishers for you and me to study works that way; it does not seem to need a faith or a philosophy or one of the lines of moral argument everybody else calls “ethics.” My discomfort with this state of things is that sooner or later, we do need a philosophy or a faith to help us overcome the self-deception that is causing us not to notice the hunger of other people’s children or the abuse of workers; that causes us to overlook the fact that the modern American legal profession devotes most of its energy to preserving the interests of the ruling class by coercive and violent means;⁴¹ as Father Baxter said, that causes us prosperous lawyers to covet fields and seize them, houses and

40. WALTER BRUEGGEMANN, *ISRAEL’S PRAISE* 127-28 (1988).

41. I have criticized two eminent scholars in my field for falling short on this dimension of ethics; See Thomas Shaffer, *Should a Christian Lawyer Sign Up for Simon’s the Practice of Justice?*, 51 *STAN. L. REV.* 903 (1999); Thomas Shaffer, *The Irony of Lawyers’ Justice in America*, 70 *FORDHAM L. REV.* 1857 (2002) (discussing DEBORAH RHODES, *IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION* (2000)).

take them, as the Prophet Micah says.

For that reason – not that outrage depends on it, but that clarity depends on it – the biblical prophets should be read in reference not only to observation and intuition but to the social, political, and economic system established in the Torah⁴² – an “ideal pattern of economic life embodied in the Law.”⁴³ That is:

- a social structure based on the family;
- a system of land ownership that included legal provision for strangers and visitors;
- legal provision against money lenders who would otherwise have obtained land through enforcement of debt;
- a “pattern of work” that protected workers from exploitation;
- a market system in which the market was kept small;
- provision for the impoverished that reached such detail as gleaning from harvested fields, the time of day in which wages were paid, standards for lending money to those in financial distress, special rules on secured loans, and a system of debt cancellation;
- and, finally, a disciplined, power-hampering judicial system.⁴⁴

Because of the human person’s bottomless talent for self-deception, especially when the human person is comfortable and well-off, the appeals of the Prophets in biblical Israel were made in reference to, and need to be read in reference to, this biblical “pattern of economic life.” Reading the prophets as speaking from a legal and ethical framework helps, I think, to explain their anger – why they were so vehement against corruption of the Torah’s landholding system; why they so often railed against wealth; and why they were wary of the economy and politics of cities and the human aloneness bred by cities.

THE EFFECTIVENESS OF THE PROPHETS

Finally, it is useful to notice that the prophets had presence and moral influence and even reputation. They were not hung up on being effective; they were, by and large, not effective; but they did, recurrently, make a difference. Lawyers, too, do that. Lawyers make a difference. The influence of the prophet and the lawyer reaches those who are made better by it – the Prophet Nathan and King David being perhaps the best case,⁴⁵

42. See A SOCIAL READING, *supra* note 1, at 134-46.

43. See generally Exodus 20-23, Leviticus 25, Deuteronomy 5-26.

44. See A SOCIAL READING, *supra* note 1, at 50.

45. See 2 Samuel ch. 12.

and it reaches those who are not made better by it and who retaliate when prophets embarrass them – Jeremiah’s persecutors, for example. Megan McKenna says of the prophets, “Those who listen to them either change in response . . . or . . . attempt to kill them for their words.”⁴⁶

In the modern sense, I suppose, the prophet is sometimes an evangelist focused on conversion (Nathan); sometimes is involved in non-pietistic politics – as, say, an advocate for the vulnerable (Amos); and is sometimes a moral force – influential even when not present (Elisha). Sometimes the prophet is active in a political and legal way and sometimes not, and, when she or he is active in a political or legal way, sometimes has influence and sometimes does not.

Prophetic advocacy and prophetic politics are not assured either of influence or of success. But sometimes the Prophet makes a decisive difference in bringing the situation of the vulnerable to political notice (I think of the abolitionists and the modern pro-life movement). And sometimes the prophet is chased out of town or thrown into a deep well. The scriptural point about prophets and politics seems to be less about success and failure than about the way the influence works and the fact that prophetic influence in politics seems to work out more as assertion than as trade-off. The prophet’s political influence is invoked as if the bridge between what Martin Luther called “the kingdom of faith” and “the kingdom of the law” were a one-way bridge.⁴⁷ The kingdom of faith influences the kingdom of law; prophets are in the world to keep it from working the other way around. The distaste prophetic influence seems to have for bargaining with power may explain why it is so often not successful in, as politics puts it, “the short run.”

Consider Gehazi and King Ahab and the widow whose ejection action was argued *pro se* in an irregular unscheduled hearing. The widow’s story is in Chapter Eight of the Second Book of Kings:⁴⁸ She has been a client of the Prophet Elisha, but more recently, on his advice, she has left the country and stayed away for seven years. While she has been away, an interloper has taken her land; she wants it back. Her lawsuit is pending; she apparently represents herself.

Gehazi is a ward-healer; he has sometimes helped the Prophet Elisha and sometimes has cheated him. He has influence with the King, though, because of this connection to Elisha. Because of this connection, he is able

46. MEGAN MCKENNA, *PROPHETS: WORDS OF FIRE* 16 (2001).

47. I explore the possibilities in THOMAS SHAFFER, *FAITH AND THE PROFESSIONS* 82 (1987).

48. See generally WALTER BRUEGGEMANN, *TESTIMONY TO OTHERWISE: THE WITNESS OF ELIJAH AND ELISHA* (2001) [hereinafter BRUEGGEMANN].

to have – and on the critical day is having – a pleasant academic conversation with King Ahab, who is also the judge in the widow's ejection case.

Ahab was, by and large, a disgusting public official – not likely to do justice unless he got something out of it. Gehazi was interested mostly in himself. The Prophet Elisha was not in the room. The widow was not there either. She was not expected, but she was on her way.

The pleasant academic conversation is not about ejection, but Gehazi has mentioned the widow as being ethically significant, because the Prophet Elisha, among other things, brought her dead child back to life. Word has got around on that, and on what Elisha has accomplished “great things,” the Bible says. Gehazi and Ahab are venal people who have power; they are unlikely to be discussing ethics in a serious way, but they are both being influenced by the “great things” the prophet has done. Lawyers, by the way, are often like that.

The widow is about to intrude on this academic conversation, and the spirit of the absent prophet has already intruded. “Now the king was questioning Gehazi, the servant of the man of God, about all the great things Elisha had done; and . . . he was describing to the king how he had brought the dead to life,”⁴⁹ when suddenly, in an unacademic and unprofessional fashion, “the selfsame woman” showed up, her child in tow, and “began appealing to the king for her house and her land.”⁵⁰

“‘My lord king,’ said Gehazi, ‘this is the very woman and this is her son whom Elisha brought to life.’”⁵¹ The King, who is the judge here, might have bristled at the untimely interruption, as a modern judge would, or he might have granted a continuance on his own motion, particularly since counsel for the other side was not present. In any case, he must have been annoyed at the rude interruption of his interesting conversation with Gehazi: Just when “we are ready to bear witness to the transformative power of life among us,” Walter Brueggemann comments, “our telling is interrupted by the entry of the bruised brokenness of real life.”⁵²

But if King Ahab was annoyed, he did not say so. He seems rather to have seen the connection between the interrupted conversation and the ejection case and to have been influenced by the absent prophet: “The king asked the woman about [her lawsuit], and she told him. Then he entrusted the case to a eunuch and ordered him to restore all her property to

49. 2 Kings 8:4-5.

50. 2 Kings 8:5.

51. *Id.*

52. BRUEGGEMANN, *supra* note 48, at 100.

her, with all the revenues from her land from the time she left the country till that day.”⁵³ Like any county-seat lawyer, Elisha won some and lost some. That day he was a winner. The lives of prophets and lawyers are like that.

53. 2 *Kings* 8:4-6.