

# Judges as Prophets: A Coverian Interpretation

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## I. INTRODUCTION

### A. JUDGES REMEMBERING PROPHETS

To reclaim memory, to do so honestly and well -- what modern program for the humanization of life has not given this aim an honored place among its goals? So it should not be shocking that judges are invited to engage in a program of remembering, or that this program should be urged as a path toward meaning, purpose, and identity. But when the program calls for remembering the common-law judges of the seventeenth century, and the sages of early rabbinic Judaism a millennium and a half before them, and the prophets of Israel a millennium before them -- there is room for surprise. Yet these are pages from the judicial past that the late Professor Robert Cover identified as most urgent for judges to remember.<sup>1</sup> Why these memories? Why ought judges to remember prophets?

Cover's answer expresses a certain conception of judicial independence. There exists, Cover claimed, an oral or folkloric tradition, in which exemplary judicial tales are passed down from generation to generation. This tradition comprises the "folktales of justice" or the "tales of jurisdiction."<sup>2</sup> Because this tradition is not (or not entirely) generated or mediated by the state, judges are not (or not entirely) state officials. Judges are independent in that their jurisdiction is defined by an independently

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<sup>1</sup> Robert Cover, "The Folktales of Justice: Tales of Jurisdiction," 14 Capital University Law Review 179 (1985) (hereinafter, "Folktales").

<sup>2</sup> *Id.*

transmitted canon of texts. (But judges are answerable to the tradition which they serve; their “independence” means obligation and commitment, not license.)

The didactic content of the narratives comprising the “folktales of justice” defines judicial independence in a second sense. The stories call on judges to be jealous guardians of jurisdiction, to resist the state’s claim to define the judicial role.

The legitimating objective of jurisdiction, these canonical texts [the “folktales of justice”] proclaim, is prophetic not bureaucratic. As a judge, one must be other than the King not because of the need for specialists in dispute resolution, but because of the need to institutionalize the office of the Prophet who would say to the King, as Nathan said to David, “You are that Man”;<sup>3</sup> as Shimon ben Shetaḥ<sup>4</sup> said to Yannai, “Stand! before He who spoke and the World was created”;<sup>5</sup> as Coke said to James I, “... under no man, but under God and the Law.”<sup>6</sup> For that ultimate purpose -- speaking truth to power -- there must be a jurisdiction of the judge which the King cannot share.<sup>7</sup>

What is initially so inaccessible or shocking in Cover’s program for judicial memory -- that it urges recollection of ancient prophetic traditions -- thus becomes relatively explicable, even familiar. The program is ultimately

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<sup>3</sup> 2 Samuel 12:7; *see* discussion of this text in sections III-IV, *infra*.

<sup>4</sup> Sources in English, including translations of Talmudic texts, transliterate this name (xjv !B !w[mv ) variously. I have adopted the transliteration *Shimon ben Shetaḥ* because it approximates the sound of the Hebrew name (where *ḥ* denotes a final sound like that of the *ch* in *Bach*). I have conformed all quotations from sources (including Cover’s) to this transliteration. I have adopted conventional English transliterations for commonly-encountered words (e.g., *halakhah*, *Mishnah*), but have not enforced uniformity in quotations where English sources vary.

<sup>5</sup> Babylonian Talmud Sanhedrin, 19a-b; *see* discussion of this text in sections V-VI, *infra*. The Babylonian Talmud is hereinafter cited, following convention, as B. The reference following B. is to tractate (in this case, Sanhedrin). Specific editions of the Talmud will be cited only if quotations, notes, or commentaries are drawn from them.

<sup>6</sup> “Folktales,” 187-189; *see* sections II.A and II.B, *infra*.

<sup>7</sup> “Folktales,” 189-190.

anti-statist and anti-positivist -- even, as Cover suggests, anarchist.<sup>8</sup> But once judges remember prophets, not just incidentally but as a labor in the very calling to be a judge, can this memory's implications for identity and action be confined to such a program? Remembering the prophets, can judges be sure that "speaking truth to power" is their "ultimate purpose"?<sup>9</sup> Or is it also the work of judges to speak on behalf of the most elemental terms of the divine-human relationship: of promise and straying, atonement, and the hope of turning and returning to God?

B. "ATONE FOR THE WRONG THIS DAY DONE"

Such questions raise serious issues about the place of religious faith in public political argument. These are issues which require attention, but I will say little about them here. In place of a more systematic treatment of them, let me illustrate one way in which the work of atonement might occupy judges: might occupy them precisely as they remember prophets. The words of Justice Harlan's dissent in *Plessy v. Ferguson* are well-known to all of us.

In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott* case.... The thin disguise of "equal" accommodations for passengers in railroad coaches will not mislead any one, nor atone for the wrong this day done.<sup>10</sup>

Note two striking aspects of these words. First, Harlan's concern in them is to draw attention to the Court's own deed of judgment in both its aspects, as decision and as justification (written opinion). The object of his concern is not (only) the outrage being done in far-off Louisiana but "the judgment this day rendered," "the wrong this day done". The Court is adding its own wrongdoing to that of Louisiana. Second, this immediate wrong which touches Harlan so closely, as the act not of a distant agent but of his own

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<sup>8</sup> "I have recently staked out a position about the nature of law that has obvious and consciously chosen political significance. My position is very close to a classical anarchist one -- with anarchy understood to mean the absence of rulers, not the absence of law." "Folktales," 181. Cover refers here to his prior statement of his ideas, Robert Cover, "Foreword: *Nomos* and Narrative," 97 Harvard Law Rev. 4 (1983) (hereinafter, "*Nomos* and Narrative").

<sup>9</sup> In the 1960's, Hans Morgenthau argued that "the intellectual... speaks, in the biblical phrase, truth to power." Morgenthau, Essays of a Decade: 1960-1970 (1970), 15. But the phrase is not specifically Biblical.

<sup>10</sup> Plessy v. Ferguson, 163 U.S. 537 (1896), 552 (Harlan, dissenting), at 559 and 562.

judicial fellowship, is to be measured on the scale of atonement. Louisiana is doing a wrong, but what is more so are we; we are doing a wrong, and also we are not atoning for that wrong.

The Harlan who disposes us toward atonement -- which is not to say that he makes atonement possible -- is the Harlan whom I think it worthwhile to remember specifically as prophet. This is, I claim, a possible judicial memory of Harlan. Judges do remember Harlan as a “prophet,” and describe his *Plessy* dissent as “prophetic”.<sup>11</sup> Many scholars and commentators have offered similar descriptions.<sup>12</sup> But what is meant by such descriptions? Two meanings should be distinguished.

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<sup>11</sup> Justice William J. Brennan, Jr., “In Defense of Dissents,” 37 *Hastings L. J.* 427, 431-432 (1986) (“[Harlan’s *Plessy* dissent] is at once prophetic and expressive of the Justice’s constitutional vision, and at the same time, a careful and methodical refutation of the majority’s legal analysis.... [Harlan] spoke not only to his peers, but to his society, and, more important, across time to later generations. He was, in this sense, a secular prophet, and we continue, long after *Plessy* and long even after *Brown v. Board of Education* to benefit from his wisdom and courage.”) *See also* A. Leon Higginbotham, Jr. & William C. Smith, “The Hughes Court and the Beginning of the End of the ‘Separate but Equal’ Doctrine,” 76 *Minn. L. Rev.* 1099, 1100 (1992) (describing Harlan’s *Plessy* dissent as “eloquent and prophetic.”); A. Leon Higginbotham, Jr., “The Life of the Law: Values, Commitment, and Craftsmanship,” 100 *Harv. L. Rev.* 795, 810 (1987) (noting Harvard Law Review’s failure to discuss “Harlan’s prophetic dissent” in *Plessy*.); Justice Harry A. Blackmun, “Section 1983 and Federal Protection of Individual Rights -- Will the Statute Remain Alive or Fade Away?,” 60 *N.Y.U. L. Rev.* 1, 9 (1985) (describing Harlan’s *Civil Rights Cases* dissent as “prophetic”).

<sup>12</sup> G. Edward White, *The American Judicial Tradition: Profiles of Leading American Judges* (1976), 131 (Harlan was a “visionary prophet”); Benno C. Schmidt, Jr., “Principle and Prejudice: The Supreme Court and Race in the Progressive Era. Part 1: The Heyday of Jim Crow,” 82 *Colum. L. Rev.* 444, 468 (1982) (describing Harlan’s *Plessy* dissent as “prophetic”); Michael J. Perry, “*Brown, Bolling, & Originalism: Why Ackerman and Posner (Among Others) are Wrong*,” 20 *S. Ill. U. L. J.* 53, 68 (1995) (“[A] prophetic dissent in *Plessy*”; Perry’s views are discussed further in section VI.A and notes 101-103, *infra*); Rodney A. Smolla, “The Ghosts of Homer Plessy,” 12 *Ga. St. U. L. Rev.* 1037, 1052 (1996) (“Justice Harlan was a prophet, a courageous and inspiring one”); Edward McGlynn Gaffney, Jr., “The Importance of Dissent and the Imperative of Judicial Civility,” 28 *Val. U. L. Rev.* 583, 619 (1994) (“Harlan spoke with the ringing phrases of a biblical prophet denouncing injustice”); Jules Lobel, “Losers, Fools, and Prophets: Justice as Struggle,” 80 *Cornell L. Rev.* 1331, 1382-83 (1995) (“*Plessy* . . . represents the prophetic tradition that looks not primarily at

In recalling Harlan as a prophet, judges and others sometimes mean that he accurately forecast the subsequent history of race relations. Though the *Plessy* majority thought that the challenged Jim Crow law was a reasonable enough measure for relieving racial tensions and averting violence, Harlan rightly predicted that such laws would prove inflammatory.<sup>13</sup> Prophet here means “seer”.

The recollection of Harlan as a “seer” is thin or non-Coverian. It runs only two plies deep. Looking back, we see that Harlan was right in his forecast. Harlan was right because, looking back, he appreciated how wrong Chief Justice Taney was in his estimate of the effects of the decision in *Dred Scott*.

On a Coverian interpretation, the recollection of Harlan as a prophet runs at least three plies deep. Looking back, we remember Harlan as a prophet; this recollection addresses our own conception of judicial identity and role. Harlan, looking back, remembered the decision in *Dred Scott* and invoked it as a symbol of fundamental judicial failure. But, looking further back, Harlan remembered prophets within the Biblical tradition; and this recollection taught him a certain way of recognizing and responding to wrongdoing. More precisely: to remember Harlan as prophet is to remember him remembering the prophets. It is to replace a comfortable thought (Harlan saw, looking ahead, what we see looking backward) with a more disturbing one (what if we assessed our own shortcomings by reference to a Biblical measure of atonement?)

Other claims are pressed about what is to be learned from Harlan. It is said not only that he was right about subsequent developments in race relations, but that he was right about the normative meaning of the Equal

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concrete substantive improvements in the law, but as law as a powerful, ongoing struggle that speaks to future generations about justice”).

<sup>13</sup> “The present decision, it may well be apprehended, will not only stimulate aggressions, more or less brutal and irritating, upon the admitted rights of colored citizens, but will encourage the belief that it is possible, by means of state enactments, to defeat the beneficent purposes which the people of the United States had in view when the adopted the recent amendments of the Constitution....” *Plessy v. Ferguson*, *id.*, at 560 (Harlan, dissenting). Commentators who mean, in describing the dissent as prophetic, to say that it accurately forecast the future, include Girardeau A. Spann, “Color-Coded Standing,” 80 *Cornell L. Rev.* 1422, 1490 (1995) (“[Harlan] prophetically predicted [in *Plessy*]”); The Honorable Nathaniel R. Jones, “The Harlan Dissent: The Road Not Taken -- An American Tragedy,” 12 *Ga. St. U. L. Rev.* 951, 957 (1996) (“True to Justice Harlan’s prophecy [in *Plessy*], whites were not misled.”)

Protection Clause (or of the Fourteenth Amendment, or of the Thirteenth and Fourteenth Amendments). He was a doctrinal prophet because he saw so clearly that government must not take race-conscious measures.<sup>14</sup> Or he was a doctrinal prophet because he accepted race-conscious measures as a way of attacking racism and dismantling the private and public structures of racial caste.<sup>15</sup> But Harlan's constitutional conceptions have been shown to have sent deep roots into the unexamined assumptions of his time. Owen Fiss has urged us not to project the progressive egalitarianism of *Brown* anachronistically upon Harlan.<sup>16</sup> His dissent was neither "radical" nor "visionary;" Harlan "accepted the framework of the majority, merely applying their principles differently."<sup>17</sup>

A Coverian interpretation of Harlan as prophet need make no particular claim about the substance of Harlan's understanding of the Reconstruction Amendments. In part, this is because the interpretation attends to a different "canonical text" within the canonical *Plessy* dissent. My eye is on "atone for the wrong this day done," not on "Our Constitution is color-blind" (whatever that means, and whatever its bearing on discernment of "the wrong"). Professor Fiss describes the "color-blind" statement as "the most memorable passage of Harlan's dissent,"<sup>18</sup> but what is "memorable" depends on the aims of memory. If we were to remember Harlan as a prophet in the Coverian sense (that is, recall the dissent as recalling prophets), we would find Harlan's insistence on the relevance of an atonement standard "memorable" indeed.

Attending to a different canonical text within the dissent -- and this is Cover's point -- belongs to the project of placing the dissent itself within a different canon. It is clearly enough part of the canon of highly motivating dissents. The question is whether it is also a part of the canon of the "folktales of justice"; that is, whether the dissent should be remembered as remembering those folktales, which include prophetic texts. If so, the way

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<sup>14</sup> See sources cited in Gabriel J. Chin, "The *Plessy* Myth: Justice Harlan and the Chinese Cases," 82 *Iowa L. Rev.* 151, 152-153 (1996).

<sup>15</sup> *Ibid.*; T. Alexander Aleinikoff, "Re-reading Justice Harlan's Dissent in *Plessy v. Ferguson*: Freedom, Anti-racism, and Citizenship," 1992 *U. Ill. L. Rev.* 961 (1992)

<sup>16</sup> Owen M. Fiss, *Troubled Beginnings of the Modern State, 1888-1910* (1993); The Holmes Devise History of the Supreme Court of the United States, vol. viii) 365-366, 392-395. "[F]or Harlan in *Plessy*, only the result was prophetic." *Id.* at 366.

<sup>17</sup> *Id.*, 360.

<sup>18</sup> *Id.*, 364.

we situate Harlan in relation to a canon of “folktales of justice” might inform what we mean by embracing him within the canon of great dissents.<sup>19</sup>

To open the question of what ultimate memories and meanings our present judicial memories of Harlan make possible, we may begin where Mr. Justice Kennedy, our Symposium colleague, chose to begin his opinion for the Court in *Romer v. Evans*.

One century ago, the first Justice Harlan admonished this Court that the Constitution “neither knows nor tolerates distinctions among classes.” *Plessy v. Ferguson*, 163 U.S. 537, 539 (1896) (dissenting opinion). Unheeded then, those words now are understood to state a commitment to the law’s neutrality where the rights of persons are at stake. The Equal Protection Clause enforces this principle and today requires us to hold invalid a provision of Colorado’s Constitution.<sup>20</sup>

Close analysis of the “neutrality” principle is important work, but it is not my work here.<sup>21</sup> I am concerned, instead, with the confessional significance of Kennedy’s opening words. Justice Harlan “admonished this Court”; the admonition was “unheeded” then (a century ago), but now is “understood to state a commitment”; imputed to the Equal Protection Clause, that is, to the operative constitutional provision, the commitment becomes an enforceable legal “principle”.

Justice Kennedy’s word “admonished” is well-chosen. Harlan did admonish; he denounced injustice, and so did the prophets. But many people admonish, including teachers and parents, and they are not specifically prophets.

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<sup>19</sup> One consequence of reading Harlan in relation to the prophetic texts -- and not the least important consequence -- is the drawing of a sharp distinction between remembering the dissent as prophetic and claiming that Harlan entertained enlightened racial views. A prophet’s admonitions strike close -- very close -- to home. “The wrong this day done” is done by one’s own fellowship; in insisting that atonement is necessary but absent, the prophet spares no one. On Harlan’s racial views as implied by his written opinions, *see Chin, supra* note 14.

<sup>20</sup> *Romer v. Evans*, 517 U.S. 620, 623 (1996). Kennedy’s majority opinion was joined by Justices Stevens, O’Connor, Souter, Ginsburg, and Breyer. Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, dissented.

<sup>21</sup> Cf. *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989), 518 (Kennedy, J., concurring in part and concurring in the judgment): “The moral imperative of racial neutrality is the driving force of the Equal Protection Clause.”

We need a clearer picture of the admonition. Cover brings it into focus by stressing the separate identities of the admonisher and the one admonished. The folktales of justice, with their prophetic texts, reveal that “as a judge, one must be other than the King”;<sup>22</sup> one must stand ready to rebuke and confront the King. But this is to say both too much and too little. To understand “admonition” is to recognize that the folktales situate us within a narrative in which guilt and complicity are crushing realities, in which penance is unbearable, but in which atonement remains a restorative possibility. That story is the Judge’s story -- but perhaps it is also the King’s.

In the next section, I will look more closely into the theoretical commitments within which Cover made his “judges as prophets” claim. In the sections that follow, I take that claim seriously by remembering the two prophetic texts with which Cover introduced it: the story of Nathan rebuking King David and the story of Shimon confronting King Yannai.

## II. THE ANTI-STATIST ARGUMENT OF COVER’S *FOLKTALES OF JUSTICE*

### A. THE DISTINCTION BETWEEN JUDGES AND KINGS

In “Folktales of Justice,” Cover made two tactical moves in order to gain purchase on a problem of daunting complexity. First, he compressed the institutional context of jurisdictional choice within a binary distinction between Judges and Kings. Second, he compressed the textual traditions that bear upon such choice into a binary distinction between Folktale and History. I take up these two distinctions in turn.

Cover initially defined the relevant vector of political claims in a simplified model containing only two terms: “Judges” and “Kings”. Within this model, the challenge for the judge, and the judge’s great calling, is to defend the court’s independent jurisdiction. Among the case studies which Cover analyzes under this model, the conflict between Lord Coke and James I serves best to illustrate his ideas. (Whether the conflict presents “judges as prophets” remains an open question.)

As Cover recounts this conflict, King James resented the assertion of authority by common law courts to issue writs of prohibition to the Court of High Commission. From within this conflict there came to be written what Cover terms “the greatest of the common law texts of jurisdiction.”<sup>23</sup> Lord Coke wrote that the question of a court’s jurisdiction was itself a question of law for a court to decide, and does not rest with the King.

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<sup>22</sup> Text at note 7, *supra*.

<sup>23</sup> “Folktales,” 188.

Judges remember such jurisdictional texts because they teach judges who they should hope to be -- and to avoid being -- in situations of acute difficulty such as that which confronted Lord Coke. "There is in the archetype of an upright judge... an important element of having conquered a fear, a fear which is always present yet almost forgotten. To understand that fear and its significance we must tell the stories that remember the fear and rehearse the gestures we make in response to it."<sup>24</sup> These stories are the "folktales of justice." Handed down from generation to generation, they teach judges the aim or point of jurisdiction, and motivate judges to be courageous in its assertion and defense.

#### B. THE DISTINCTION BETWEEN FOLKTALE AND HISTORY

But Cover goes on to say that other historical evidence may yield a different picture of the events and personalities featured in the folktales. While the received tradition, the "folktale of justice," serves up Lord Coke as a profile in judicial courage, available evidence suggests another view: one in which Lord Coke cowers before the King. According to one report, upon hearing Coke deliver his views,

his Majestie fell into that hight indignation as the like was never known in him, looking and speaking fiercely with a bended fist, offering to strike him etc, which the Lo. Cooke perceaving fell flatt on all fower; humbly beseeching his Majestie to take compassion on him and to pardon him if he thought zeale had gone beyond his dutie and allegiance.<sup>25</sup>

In Cover's model, the record supplied by "history" (illustrated by the report of Lord Coke's cowering before King James) serves as a valuable counterweight to the lessons supplied by the "folktales of justice" (illustrated by the jurisdictional text, and the myth surrounding it, handed down by lawyers and judges from generation to generation).

We must get the relative roles of myth and history straight. Myth is the part of reality we create and choose to remember in order to reenact. It is intensely personal and committed. History is a counter-move bringing us back to reality, requiring that we test the aspiration objectively and prudentially. History corrects for the scale of heroics that we would otherwise project upon the past. Only myth tells us who we would

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<sup>24</sup> "Folktales," 183.

<sup>25</sup> Letter from Sir Roger Boswell to Dr. Milborne, in C. Bowen, The Lion and the Throne: The Life and Times of Sir Edward Coke (1959), 305-06, quoted in "Folktales" at 188.

become; only history tells us how hard it will really be to become that.<sup>26</sup>

Cover's tactic, then, is to make an opening into the complexities of jurisdictional decision by means of two condensed binary distinctions. On the one hand, the array of political and institutional interests and loyalties is condensed into a single opposition between Judge and King.<sup>27</sup> On the other hand, the field on which current actors remember and encounter the past is polarized into a single opposition between Folktale and History, which corresponds axiologically to Courage and Prudence.

The model thus elaborated in the "Folktales" essay enables Cover to work out a critique of what he had already described, in "*Nomos* and Narrative,"<sup>28</sup> as "[t]he apologetic and statist orientation of current jurisdictional understandings."<sup>29</sup> "[T]he positivist hermeneutic of jurisdiction" is newly recognized as an act of segregation: "The only way to segregate the legally relevant narrative from the general domain of sacred texts would be to trivialize the 'legal' into a specialized subset of business or bureaucratic transactions."<sup>30</sup> To resist this state of segregation requires a judge to appropriate the sacred texts of judicial resistance, and to read and apply them "according to an independent hermeneutic."<sup>31</sup> The judge must reclaim the "folktales of justice," and treat them as "tales of jurisdiction" that supply the judge role-definitions and models of character that are not mediated by the state. Appropriating the folktales is necessarily "risky," however, in that "[i]t entails commitment to a struggle, the outcome of which -- moral and physical -- is always uncertain."<sup>32</sup> The folktales teach judges to conquer their fears, but "[w]e can never be sanguine about the

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<sup>26</sup> "Folktales," 190.

<sup>27</sup> Cover understood that the King could be almost anyone; it might well be another judge. "Consider, for example, the lower court judge supposedly constrained by superior authority to apply a rule that he believes to be wrong -- not simply morally wrong, but wrong in law as well. In such a case, the lower court affirms a hierarchical principle in place of his interpretive convictions and thereby directly affirms his commitment to the triumph of the hierarchical order over meaning." "*Nomos* and Narrative," 58.

<sup>28</sup> See note 8, *supra*.

<sup>29</sup> "*Nomos* and Narrative," 56.

<sup>30</sup> "Folktales," 182.

<sup>31</sup> "*Nomos* and Narrative," 59.

<sup>32</sup> "*Nomos* and Narrative," 60.

capacity of courage to rescue itself.”<sup>33</sup> Nonetheless, no judge inducted into the sacred texts of jurisdiction may, without betrayal, abandon the conviction that “[p]rudential deference... is the great temptation, and the final sin of judging.”<sup>34</sup>

### C. THE STATUS OF THE “JUDGES AS PROPHETS” CLAIM

Ambiguities inhere in Cover’s proposals about folkloric memory. First, is his claim descriptive (judges do remember and are motivated by the “folktales of jurisdiction”) or prescriptive (judges should do so)? I understand the claim to be descriptive in part. Judges potentially remember such stories. Cover says that he is reminding us of the jurisdictional bravado of Lord Coke.<sup>35</sup> Had he meant to make a stronger descriptive claim, Cover would have offered some evidence, perhaps gleaned from interviews with judges or from diaries, conference notes, or other sources, about jurisdictional narratives that judges recall and that inform their conception of the judicial role.

The proposal is in large part prescriptive. As judges do (potentially) remember the exemplary tales of their own predecessors (Lord Coke), they should realize that they are similarly addressed by other and more ancient texts. The more recent and the more ancient texts share the status of the “sacred”.<sup>36</sup> Any effort to “segregate” the narratives,<sup>37</sup> to define one’s predecessors narrowly, ultimately must fail. But the failure claim is itself more an evaluation than a prediction. It is, as Cover says, a “plea” against positivism.<sup>38</sup>

My own interpretation of Harlan’s *Plessy* dissent runs along these same lines. Judges (and not only judges) do in fact remember the dissent.

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<sup>33</sup> “Folktales,” 190.

<sup>34</sup> “Folktales,” 190.

<sup>35</sup> The Talmudic rule, “The king does not judge and we do not judge him” will “perhaps ring some bells concerning English law in the seventeenth century”; “King James, you will remember, had become angry at the writs of prohibition....” “Folktales” at 183, 187.

<sup>36</sup> “Folktales,” 183 (“there are sacred narratives of jurisdiction that might constitute the texts to ground judicial commitments”).

<sup>37</sup> Note 30, *supra*.

<sup>38</sup> “The above is not a definition of law; it is a plea to understand the legitimating force of the term in a certain way. it is a plea to grant all collective behavior entailing systematic understandings of our commitments to future worlds equal claim to the word ‘law’.” “Folktales,” 181.

The memory is furthermore a motivating one; we bring the memory to our current work, in the hope of being the kind of judges we should be. Justice Kennedy's opening words in *Romer* attest to this. What is more, in remembering the dissent as specifically "prophetic" we open the possibility of a confluence between the sacred texts of jurisdiction and wider, deeper currents of memory. Perhaps, in recalling the dissent as prophetic, we mean that Harlan accurately predicted the future course of race relations. But we are capable of meaning more than this. Kennedy remembers a Harlan who admonishes the Court. We can go further, and remember a Harlan whose admonition stirs us to "atone for the wrong this day done".

Harlan was a devout churchgoer and a leader in his denomination.<sup>39</sup> When he spoke of atoning for the wrong this day done, he may well have been speaking in part from his Christian memories and commitments. But I am not claiming that he did (nor do I know how one could decide whether he was or wasn't). It is possible, nothing more, to understand the canonical Harlan in a context of meanings and hopes supplied by the canons of the Biblical tradition. I can only illustrate, not demonstrate, the desegregation of sacred narratives to which Cover calls us.

I understand Cover to be expressing his faith, not making a claim on the basis of the evidence he has put forward, when he declares that "[T]he sacred narratives of our world doom the positivist enterprise to failure, or at best, to only imperfect success."<sup>40</sup> By "reminding" us of the judicial vocation as depicted in the traditions from which he draws his texts, Cover is resisting the nomic *entzauberung* that otherwise empties legality of ultimate meaning and commitment. But his affirmation, "[T]he sacred narratives of our world doom the positivist enterprise," is ambiguous. Does Cover mean that because these stories exist, positivism is doomed? Or is Cover making the more modest claim, that within the story as told by the sacred narratives, positivism is doomed? I understand Cover to mean something like the latter. Cover is saying that he chooses to live "as if" the stories were true. They do not supply the only truth; the counsels of Folktale are met by the sober counsels of History. But historical knowledge can serve as counterweight only once a judge declares for the "sacred".

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<sup>39</sup> "Harlan was a devoted Presbyterian lay leader and Bible teacher, acquiring national prominence in those roles during his years on the Supreme Court." Tinsley E. Yarbrough, *Judicial Enigma: The First Justice Harlan* (1995), 27. For details, see *id.*, 17. Justice Brewer said that Harlan "goes to bed every night with one hand on the Constitution and the other on the Bible, and so sleeps the sweet sleep of justice and righteousness." Quoted *id.*, viii.

<sup>40</sup> "Folktales," 180.

But if a judge is to “remember” the folktales of justice, and to live and choose “as if” the stories were true, does this assume that the stories have but one meaning, or many? Characterizing the tales of Lord Coke and Shimon ben Shetaḥ, Cover affirms that they have an “unambiguous” meaning (“the courageous judge challenges the King...”).<sup>41</sup> Yet “History is rarely so neat.”<sup>42</sup> Did Cover mean to say that the “folktales” are subject to but one interpretation?

The better reading of Cover, one which understands the claims of “Folktales” in relation both to “*Nomos* and Narrative” (which came before it) and “Obligation: A Jewish Jurisprudence of the Social Order”<sup>43</sup> (which followed it), has him insisting that whole worlds of creativity and commitment arise within spheres of interpretive disagreement about the meaning of the sacred jurisdictional stories. As Suzanne Stone has demonstrated, Cover embraced (what he took to be) the specifically Jewish principle which accepts and even celebrates the coexistence of conflicting interpretations of laws and stories, and reconceived Anglo-American constitutionalism in its image.<sup>44</sup> In suggesting the differing meanings that have been found traditionally in Cover’s two prophetic texts -- meanings which support “judicial independence” in some but not all respects -- I understand myself to be applying a Coverian method. What is yielded by this method may require, however, that the emphasis be placed somewhat differently. Courage as a specifically prophetic (and judicial) virtue -- the courage to stand “naked,” as it were, before the King<sup>45</sup> -- recedes, and imaginative sympathy (with the situation of God and humankind facing one another) looms larger.<sup>46</sup> It is less decisive that the prophet stand alone, or

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<sup>41</sup> “Folktales,” 188.

<sup>42</sup> “Folktales,” 189.

<sup>43</sup> 5 *J. Law and Religion* 65 (1987).

<sup>44</sup> Suzanne Stone, “In Pursuit of the Counter-Text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory,” 106 *Harvard L. Rev.* 813 (1993), 828-829. Professor Stone makes a cogent case that Cover overstates or perhaps even misconceives interpretive pluralism in Jewish law: *id.* at 834-847.

<sup>45</sup> “If the judge does not call the King to account -- if the King is not judged -- then the judge will not stand there, as Nathan, as Shimon, as Edward Coke, stripped of institutional protection against the power that ordinarily stands behind the Court.” “Folktales,” 190. But neither Nathan nor Shimon was naked unto royal power; *see* sections III-VI, *infra*.

<sup>46</sup> “Prophecy... may be described as exegesis of existence from a divine perspective.... [The prophet] discloses a divine pathos, not just a divine judgment. The pages of the prophetic writings are filled with echoes of divine love and

stand on behalf of “impersonal law” over and against power, than that the prophet personalize the divine/human relationship and elicit a personal-communal response to divine wrath and love.

A great deal depends, of course, on whether a judge who undertakes a “commitment” to “heed” the prophets thereby belongs (or can belong) to the interpretive communities within which the stories have been received and transmitted. Which interpretive communities will mediate to the judge the meaning and message of these ancient texts, embedded as they are in matrices of association by no means transparent to the “outsider”? Is it necessary (or even possible), in yielding to Nathan and to Shimon the authority to invest Harlan with operative significance, to understand their stories as they have been understood by the rabbis? Or are judges to edit the tradition of narrative reception according to their own institutional needs and interests? (They must edit, because their life-situation or context differs from that in which the stories were told and transmitted earlier; but if they edit, do they lose the specific leverage that the stories are said to exert?) Does the meaning of the stories survive transplantation into the body of Anglo-American constitutionalism?

I will argue that if what Cover called “an independent hermeneutic”<sup>47</sup> is independent in relation to the texts, officers, and claims of the state, it is nonetheless dependent in relation to the wider traditions of textual reception. If a judge is going to admit Nathan into the intimacy of conscience, it had better be the Nathan known to the Biblical traditions. Any other Nathan is just a metaphorical Harlan, and for that we do not need to admit the sacred into the “sacred narratives of jurisdiction.”

### III. NATHAN REBUKES DAVID

I will briefly relate the two “prophetic” narratives which Cover juxtaposes to the celebrated account of Lord Coke’s confrontation with King James. One is the story, recounted in chapters eleven and twelve of the second book of Samuel, of how King David committed a wrong for which he was rebuked by Nathan the Prophet. The other, which I will recount in section V of the essay, is an account which the Talmudic tractate *Sanhedrin* puts forward to explain the Mishnah, “The king does not judge, and we do not judge him.” Central to the explanation is a narrative that tells how

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disappointment, mercy and indignation. The God of Israel is never impersonal... [The prophet] was a person overwhelmed by sympathy for God and sympathy for man.” Abraham Joshua Heschel, The Prophets (1962) vol. 1, pp. xiv, 24, 121 (emphasis deleted).

<sup>47</sup> Note 31, *supra*.

Shimon ben Shetah, a Sage and chief judge of the high court of Sanhedrin, asserted the jurisdiction of his court over King Yannai. These are stories of memorable figures who, though they lacked royal might themselves, nonetheless called powerful kings to account. So much is evident without need for further attention to narrative detail. The point of looking into the stories more closely is to inquire how far or in what respects these memorable figures who call kings to account were specifically engaging in prophecy, or judging, or doing the work of judges-as-prophets. And so we proceed to Nathan's rebuke.

David, who after many wars had succeeded Saul as King, and to whom God had expressed favor and promises through Nathan, nonetheless did what was wrong in God's eyes. Struck by the beauty of a married woman, Bathsheba, David called her to him and slept with her. She became pregnant with David's child. Bathsheba's husband, Uriah the Hittite, was a soldier in David's army. David told Uriah, who had been away in the king's service, to go home to Bathsheba, presumably so that he would sleep with her and so the pregnancy would not create trouble. Uriah did not do as David told him to, but slept outside the King's door. David again summoned Uriah, and asked him why he hadn't returned home. Uriah replied that the ark of the covenant, and the two kingdoms of Israel and Judah, and Uriah's commander and David's army, were all encamped in tents, and that under those circumstances Uriah would not return to the comforts of home. David then ordered Uriah's commander: "Set ye Uriah in the forefront of the hottest battle, and retire ye from him, that he may be smitten, and die."<sup>48</sup> The commander did as he was ordered, and Uriah died in battle. Bathsheba went into mourning; afterward David sent for her and she became his wife (he also had other wives). She bore a son. "But the thing that David had done displeased the LORD."<sup>49</sup>

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<sup>48</sup> 2 Samuel 11:15 (KJV).

<sup>49</sup> 2 Samuel 11:27 (KJV). Instead of transliterating the Tetragrammaton, the holy name of God, the KJV has "the LORD". This mark of respect follows the tradition of substituting the name or epithet "Adonai" for the Tetragrammaton when Bible verses or prayers are read aloud. Where a translator quoted in this essay makes use of a more pious substitute, such as "Hashem" (the [holy] name), I follow that translator accordingly. Where a translator quoted in this essay makes use of a less pious translation or transliteration, such as a form of the Tetragrammaton supplied with vowels, I substitute ["the LORD"] in square brackets. Where a translator quoted in this essay uses "God" to translate *elohim*, I follow that translator accordingly. In passages other than those referring to a specific text within the Biblical tradition (e.g. Bible or Talmud), I speak of "God".

God sent Nathan to David. Nathan said to David: There were two men, one rich, one poor. The rich man had many sheep and cattle; the poor man had only one ewe lamb, which he cherished as a daughter.

And there came a traveller unto the rich man, and he spared to take of his own flock and of his own herd, to dress for the wayfaring man that was come unto him; but took the poor man's lamb, and dressed it for the man that was come to him. And David's anger was greatly kindled against the man; and he said to Nathan, *As the LORD liveth, the man that hath done this thing shall surely die: And he shall restore the lamb fourfold,*<sup>50</sup> because he did this thing, and because he had no pity. And Nathan said to David, *Thou art the man.*<sup>51</sup>

Nathan reminded David that God had delivered and favored him, and anointed him king. “Wherefore hast thou despised the commandment of the Lord, to do evil in his sight? thou hast killed Uriah the Hittite with the sword, and hast taken his wife *to be* thy wife, and hast slain him with the sword of the children of Ammon.”<sup>52</sup> Nathan told David that God would make him suffer publicly for his secret wrongdoing. “And David said unto Nathan, I have sinned against the LORD. And Nathan said unto David, The LORD also hath put away thy sin; thou shalt not die. Howbeit, because by this deed thou hast given great occasion to the enemies of the LORD to blaspheme, the child also *that is* born unto thee shall surely die.”<sup>53</sup>

Psalm 51 expresses the contrition with which David confessed, “I have sinned against the LORD.”

{To the chief Musician, A Psalm of David, when Nathan the prophet came unto him, after he had gone in to Bathsheba.}  
Have mercy upon me, O God, according to thy lovingkindness: according unto the multitude of thy tender mercies blot out my transgressions. Wash me thoroughly from mine iniquity, and cleanse me from my sin. For I acknowledge my transgressions: and my sin *is* ever before me.... Behold, I

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<sup>50</sup> David's judgment is in accordance with the law given in Exodus 21:37 BHS (= Exodus 22:1 KJV): “If a man shall steal an ox, or a sheep, and kill it, or sell it; he shall restore five oxen for an ox, and four sheep for a sheep.” David's punishment is in accord with his own judgment on the rich man, as he experiences great suffering through four of his own children (B. Yoma 22b).

<sup>51</sup> 2 Samuel 12: 4-7 (KJV).

<sup>52</sup> 2 Samuel 12:9 (KJV).

<sup>53</sup> 2 Samuel 12:13-14 (KJV).

was shapen in iniquity; and in sin did my mother conceive me. Behold, thou desirest truth in the inward parts: and in the hidden *part* thou shalt make me to know wisdom. Purge me with hyssop, and I shall be clean:<sup>54</sup> wash me, and I shall be whiter than snow.... Create in me a clean heart, O God; and renew a right spirit within me. Cast me not away from thy presence; and take not thy holy spirit from me.... Deliver me from bloodguiltiness, O God, thou God of my salvation: *and* my tongue shall sing aloud of thy righteousness. O Lord, open thou my lips; and my mouth shall shew forth thy praise. For thou desirest not sacrifice; else would I give *it*: thou delightest not in burnt offering. The sacrifices of God *are* a broken spirit: a broken and a contrite heart, O God, thou wilt not despise....<sup>55</sup>

As he acknowledged his wrong and yearned for forgiveness, so David suffered terribly. “And the Lord struck the child that Uriah’s wife bare unto David, and it was very sick.”<sup>56</sup> For seven days, as the child lingered, David fasted and would not sleep in his rooms. But when the child died, David ceased weeping; he rose, broke his fast, and worshipped God. “David comforted Bathsheba, his wife. He went to her and lay with her, and she bore a son. She called him Solomon. But [the LORD] loved him and sent instructions through Nathan the prophet that he was to be called Jedidiah by the grace of [the LORD].”<sup>57</sup>

Solomon succeeded David as King, and went on to build the Temple. Thus was fulfilled the oracle of Nathan, through whom God promised to David:

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<sup>54</sup> “As one defiled by contact with the dead (Numbers 19:6), or a leper (Leviticus 14:4) was cleansed of his impurity by the use of hyssop in the act of sprinkling, so he [David] prays to be figuratively purified in the same way.” Soncino Books of the Bible: Psalms (A. Cohen, ed. {date}), 162 n.9. B. Yoma 22b (Soncino ed.) explains how David was “punished on his own body” for the “sin against Uriah”: “Rab Judah said in the name of Rab: For six months David was smitten with leprosy, the Sanhedrin removed from him, and the Shechinah [the presence of God] departed from him, as it is written... ‘Restore unto me the joy of Thy salvation’ (Psalm 51:14 BHS = KJV 51:12).”

<sup>55</sup> KJV Psalm 51:1-3 (= BHS 1-5), 5-7 (= BHS 7-9), 10-11 (= BHS 12-13), 14-17 (=BHS 16-19).

<sup>56</sup> 2 Samuel 12:15 (KJV).

<sup>57</sup> 2 Samuel 12: 24-25, translation in P. Kyle McCarter, Jr. The Anchor Bible: II Samuel (1984) at 293.

And when thy days be fulfilled, and thou shalt sleep with thy fathers, I will set up thy seed after thee, which shall proceed out of thy bowels, and I will establish his kingdom. He shall build an house for my name, and I will stablish the throne of his kingdom for ever. I will be his father, and he shall be my son. If he commit iniquity, I will chasten him with the rod of men, and with the stripes of the children of men: But my mercy shall not depart away from him.... And thine house and thy kingdom shall be established for ever before thee: thy throne shall be established for ever. According to all these words, and according to all this vision, so did Nathan speak unto David.<sup>58</sup>

#### IV. “YOU ARE THAT MAN!”

##### A. THE TERMS OF THE PROBLEM

Within the anti-statist model developed in the “Folktales” essay and summarized in section II of this essay, *supra*, the argument and the action of the story of Nathan rebuking David could be stated in the following form. (1) David broke the law. (2) Nathan judged David according to the law, (3) even though Nathan stood before David “stripped of institutional protection”<sup>59</sup> against the powerful King. (4) In so doing, Nathan vindicated an independent jurisdictional tradition. These propositions, which might be expressed in the formula “the king is under the law,” interpret the Nathan narrative as if its meaning were essentially identical to (Cover’s interpretation of) the story of Lord Coke.

Though some of the propositions might find support, the formula “the king is under the law” does not express the meanings and associations of the Nathan story within the Biblical tradition. It does not capture the memory of the story within the tradition, or express the dispositions toward belief and action with which the memory is associated. Within both Jewish<sup>60</sup>

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<sup>58</sup> 2 Samuel 7:12-17 (KJV).

<sup>59</sup> “Folktales,” 190.

<sup>60</sup> Psalm 51:15 BHS (= 51:13 KJV): “Then I will teach transgressors Thy ways, and men grown old in sin how they may return to thee,” and commentary by Rabbi Samson Raphael Hirsch, *The Psalms*, vol. 1, books 1&2 (1960), p. 368. Louis Ginzberg, *The Legends of the Jews*, vol. iv (1913), p. 103: “God Himself brought [David] to his crime, that He might say to other sinners: ‘Go to David and learn how to repent.’”

and Christian<sup>61</sup> traditions, the story of David and Bathsheba, of Nathan's rebuke and David's subsequent suffering, has been received and understood as offering a lesson in how to repent.<sup>62</sup> That is why the story serves as a "folktale of justice" which adds depth of meaning and association to our memory of Justice Harlan as a prophet who bids us "atone for the wrong this day done".

The story of Nathan rebuking David expresses a dispositionally powerful memory precisely because of associations which the formula "the king is under the law" conceals. The very enrichment which narrative promises depends upon a restoration of these associations. The formula expresses, in effect, just what the anti-statist or anti-positivist judge already believes or is inclined to believe. Yet to support such beliefs, narrative is hardly necessary (ideology will do). The work of Coverian recollection consists in recovering precisely the intense and intensely specific meanings which sacred narrative bears.

At the end of the day, I think it safe enough to say that the Biblical tradition turns the propositions comprising the formula "the king is under the

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<sup>61</sup> Augustine on Psalm 51: "For many men will to fall with David, and will not to rise with David. Not then for falling is the example set forth, but if thou shalt have fallen for rising again." "Whoever thou art that hast sinned, and hesitatest to exercise penitence for thy sin, despairing of thy salvation, hear David groaning. To thee Nathan the prophet hath not been sent, David himself hath been sent to thee." Augustine, Expositions on the Book of Psalms, in The Nicene and Ante-Nicene Fathers, first series, vol. viii, pp. 190-191. Though Justice Harlan was a Presbyterian (*supra* note 39), his Calvinist theological assumptions would not have strayed far from these affirmations of Augustine's. Compare Calvin:

[S]ince it is the Lord who forgives, forgets, and wipes out, sins, let us confess our sins in order to obtain pardon.... "I acknowledged my sin to thee," says David, "and I did not hide my iniquity; I said, 'I will confess my transgression to the Lord'; and thou forgavest the iniquity of my heart." [Psalm 32:5] .... "Have mercy upon me, O God, according to thy great loving-kindness." [Psalm 51:1 (= BHS 51:3)].... In this way, when David was rebuked by Nathan he was pricked by the sting of conscience, and confessed his sin before both God and men. "I have sinned," he said, "against the Lord." [2 Samuel 12:13]

John Calvin, Institutes of the Christian Religion (ed. John McNeill), vol. I (1960), p. 634.

<sup>62</sup> But the story is not solely a lesson in repentance, for it also conveys or evokes the whole aspiration for Davidic kingship: its promise, achievement, and longed-for restoration.

law” upon their head. (1) David did not break the law. (2) In rebuking David, Nathan was not applying the substantive law to his case. (3) Nathan acted on behalf of “the state”; he served the Davidic house and more specifically furthered Solomon’s succession to power. (4) In rebuking David, Nathan was not primarily drawing upon independent jurisdictional traditions. Nathan’s story *was* David’s story.

But in reversing the formula we approach no closer to the truth, by which I mean the story’s effect in disposing those who remember it to feel, to believe, and to act in ways potentially significant to the judge. The formula remains deceptive because it flattens out the dimension of meaning on which Cover insists in his conception of law as *nomos*. That dimension of meaning concerns the divine/human relationship as indispensable to a right understanding and right ordering of existence. To begin to fill out what the formula flattens, we must consider who David is -- within the Biblical tradition.

Any account of David’s wrongdoing, and of the nature and effect of the rebuke and penance meted out to him, must maintain coherence with the strong overall commendation of David in the Biblical tradition generally. On the one hand, Nathan informs David that it will not fall to him to build the Temple.<sup>63</sup> But on the other hand, the Temple is built by Solomon. This shows that though God has punished David for his wrongdoing, David’s faithful response and repentance preserve God’s promise to David, that the kingship would follow in his line and that his son would build the Temple. The Temple itself was a visible sign of God’s forgiveness of David; it could not have been built by Solomon had the union of David and Bathsheba been forever tainted by David’s wrongdoing. A midrash in tractate *Sanhedrin*<sup>64</sup>

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<sup>63</sup> 2 Samuel 7:4-17; cf. 1 Chronicles 22:7-10 (David recounts to Solomon that God had told David that the Temple would be built by his son, who would be a man of peace, not of war.)

<sup>64</sup> B. Sanhedrin 107b; similar accounts are given in B. Shabbath 30a-b, and B. Mo’ed Katan 9a. God explains to David that he is indeed forgiven for his wrongdoing, but that God will not publicize this forgiveness until after David’s death. The manner in which God does ultimately make known His forgiveness of David, that is the effectiveness of Solomon’s invoking David’s name, is explained by a trait of David’s that the Sages understood to be central to the action of the Bathsheba story: David’s yearning to be remembered in prayer as were the Patriarchs Abraham, Isaac, and Jacob. The patriarchs were tested by God, and they withstood the test; David asked to be tested, and though God forwarned him that the matter would be adultery, David did not withstand the test. B. Sanhedrin 107a. Yet as Moses was finally answered by God when Moses exclaimed “Remember Abraham, Isaac, and Israel, Thy servants,” Exodus 32:13, so Solomon was finally

recounts how God kept His promise, to David, to publicize His forgiveness of David during the lifetime of Solomon. When Solomon sought to bring the Ark into the Holy of Holies, the gates would not open. They remained tightly shut though Solomon recited twenty-four prayers, and conjured the gates to open.<sup>65</sup> But the gates opened when Solomon cried out, “God! Turn not away the face of Your anointed one! Remember the pieties of David, your servant.”<sup>66</sup> Such publicity upon “the pieties of David” shows that it is wrong to fasten upon his wrongdoing and neglect the greater cycle of repentance, forgiveness, and cleansing.

A Gemara in Tractate *Shabbath* makes the point succinctly.

R. Samuel b. Nachmani said in R. Jonathan’s name: Whoever says that David sinned is merely erring, for it is said, “And David behaved himself wisely in all his ways; and the Lord was with him.” 1 Samuel 18:14. Is it possible tht sin came to his hand, yet the Divine Presence was with him? Then how do I interpret, “Wherefore hast thou despised the word of the Lord, to do that which is evil in His sight?”<sup>67</sup>

How can the tradition maintain its firm grip on two realities -- that David was an upright man uniquely favored by God, and that David deserved his rebuke at the hands of Nathan -- without compromising one or the other? R. Samuel b. Nachmani’s answer: “He [David] wished to do [evil], but did not.”<sup>68</sup> David had a bad intent, but his conduct toward Bathsheba and Uriah was not illegal.

The tradition expresses this solution quite clearly in Psalm 51.<sup>69</sup> In his petition for forgiveness and cleansing, David prays, “Against thee, thee only, have I sinned.”<sup>70</sup> Rabbi Samson Raphael Hirsch declares:

These words irrefutably show that, according to the teaching of our sages, David’s sin with Bathsheba and his conduct toward Uriah were violations of the spirit rather than of the letter of the

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admitted to bring the Ark into the Holy of Holies when Solomon called on God to remember the pieties of David.

<sup>65</sup> By reciting Psalms 24:7-9 and 2 Chronicles 6:42.

<sup>66</sup> B. Sanhedrin 107b (Artscroll ed.)

<sup>67</sup> B. Shabbath 56a (Soncino ed.).

<sup>68</sup> *Ibid.*

<sup>69</sup> Text at note 55, *supra*.

<sup>70</sup> Psalm 51:4 (KJV) = 51:6 (BHS).

legal code of the land. (*Shabbath* 56 b.) But in the sight of God both these acts of David were grievous crimes. “Therefore,” David tells the Lord, “Thou art justified in all that Thou hast told me through Nathan, and in any decree that Thou wouldst wish to ordain against me. I willingly accept my punishment in advance because I am aware of my guilt.”<sup>71</sup>

It should be clear, even from what has thus far been said, that when Nathan rebukes David, he is not understood by the Biblical tradition to be acting as a judge in the strict sense. He is not defending the law against the King’s lawless conduct; what the King did was not illegal. Instead, Nathan as prophet acts at God’s behest to stimulate David’s own awareness of his wrongdoing, and to bring forward the round of repentance, penitence, forgiveness, and renewed promise that prophecy turns in furtherance of the basic terms of the divine-human relationship. In a manner of speaking, Nathan is giving an “advisory opinion” rather than “deciding a case or controversy”. But his “advisory opinion” serves the community’s moral and political life in a way that might well be described as “Constitutional”. For the Psalm concludes by firmly linking earnest personal penitence and the building up of Jerusalem, the city of justice.

For Thou dost not demand that I bring sacrifices, and Thou dost not desire ascent offerings. The [proper] offering to God is a broken spirit; a broken and a contrite heart, O God, Thou wilt not despise. First do Thou good in Thy favor unto Zion, build thou the walls of Jerusalem; Then wilt Thou demand the sacrifices of righteousness....<sup>72</sup>

The elements of the Sages’ solution to the problem (as posed, for example, by R. Samuel ben Nachmani, *supra*), are four. (1) David did not commit adultery when he slept with Bathsheba, nor did he commit an illegal killing when he sent Uriah the Hittite to the thick of battle to be killed there. (2) But David did act from a bad intent, which was unacceptable before God. (3) But even David’s bad intentions spring in part from his greatness of character. (4) And the story of how David became aware of his guilt, and how he proceeded from guilt to earnest penitence and on through suffering to forgiveness and the public perception of forgiveness, is normative for the divine-human relationship and in that sense perennially instructive.

#### B. DAVID DID NOT COMMIT ADULTERY

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<sup>71</sup> Hirsch, *The Psalms*, *supra* n. 60, pp. 363-364.

<sup>72</sup> Psalm 51:18-21a (BHS, as translated by Hirsch, *supra* n. 60, pp. 369-370) = Psalm 51:16-19a (KJV).

The Sages explained that David did not break the law against adultery when he slept with Bathsheba. “Whoever goes out to a war of the House of David writes a bill of divorce [a *get*] for his wife.”<sup>73</sup> The point of this practice was to enhance a woman’s freedom to remarry in the event that her husband died in battle, or was missing in action. On one view of the matter, in the event that the husband should die in battle, the divorce would take effect as of the time of the *get*’s delivery to the wife.<sup>74</sup> Assuming that Uriah, as a soldier going to war in David’s service, had delivered a *get* to Bathsheba prior to her sleeping with David, then her status in point of law at the time of her intercourse with the King would have been that of a widow, even though Uriah was still alive at the time. His subsequent death in battle would have made the divorce take retroactive effect.

The Nathan narratives serve in part to defend the legitimacy of the succession of Solomon.<sup>75</sup> To that extent their “folktale of justice” is more apologetic and state-serving than Cover admits. Though Nathan was sufficiently “other than the King” to rebuke David, his “otherness” should not be exaggerated. Indeed, Nathan has been described as a “court prophet,” even as “a public functionary at the royal court”; he acted “more as a privy councillor than as a prophet.”<sup>76</sup>

To a degree, these views of Nathan have resulted not so much from the internal traditions of Biblical narrative (as expressed in midrash, aggadah, liturgy, prayer, and so on), as from the more external work of historical-critical and source-critical scholarship. In Cover’s model, they reflect to that extent the insights of History, not the lessons of Folktale. But rabbinic traditions also stress that Nathan served the house of David, and more specifically the Solomonic succession.

Consider the Sages’ further exploration of the legal status of the sexual encounter between David and Bathsheba. Under the law, when a *prima facie* case that a married woman has committed adultery has been made out, the woman becomes forbidden to her husband;<sup>77</sup> and “if

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<sup>73</sup> B. Ketubot 9a (Steinsaltz ed.). 1 Samuel 17:18, in which Jesse instructs David to “inquire about the welfare of your brothers, and take their pledge,” is adduced as evidence of this tradition in the House of David.

<sup>74</sup> For this and competing views, *see* notes to Ketubot 9a-b (Steinsaltz ed.), p. 113.

<sup>75</sup> Leonhard Rost, The Succession to the Throne of David, trans. Michael D. Rutter and David M. Gunn (1982).

<sup>76</sup> These and other characterizations are collected and considered in Gwilym H. Jones, The Nathan Narratives (1990), 20-21.

<sup>77</sup> B. Ketubot 9a.

[Bathsheba] had been forbidden to return to her husband, she would also have been forbidden to marry David, for an adultress is forbidden not only to her husband, but also to the man with whom she committed adultery.”<sup>78</sup> And if David and Bathsheba had been prohibited from marrying, it would seem to follow that their second son, Solomon, could not have been a valid heir to the Davidic kingship, nor could he have fulfilled God’s promise to David concerning the building of the Temple. Thus the Sages, in tractate *Ketubot*, take pains to demonstrate that in the case of David and Bathsheba, there was no evidence to support one element of the *prima facie* case.<sup>79</sup> Had Uriah lived, Bathsheba would not have been forbidden to him as an adultress; no more was she forbidden to David. Nathan’s rebuke of David did not express a legal judgment upon his union with Bathsheba (which would have cast doubts on the Solomonic succession), but instead provided David with the God-given opportunity to repent of wrongdoing and be cleansed of sin.

Yet as readers of Biblical narrative, we may not be entirely satisfied with this explanation of why what David and Bathsheba did was not adultery. If we are not satisfied, it is because, as readers, we are told (as if by omniscient narrator) just what David and Bathsheba did. Even if one or more of the elements of the *prima facie* case<sup>80</sup> could not be proved under the law, we know, because we are told in second Samuel, that David and Bathsheba had sex with one another; told, indeed, that Bathsheba became pregnant by David.

As if to meet this problem, the Sages offered a second argument in Tractate *Ketubot*. A woman does not commit adultery if she submits to a man, not her husband, under duress. Bathsheba could not resist the King’s demands;<sup>81</sup> she submitted under duress, and thus there was no adultery.

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<sup>78</sup> Ketubot 9a (Steinsaltz ed.), commentary (p. 110).

<sup>79</sup> The halachah, sensitive to evidentiary problems in proving adultery, provides that a woman becomes forbidden to her husband only if two conditions are met: “seclusion” (she was alone with another man long enough for intercourse to occur) and “warning” (the husband has warned his wife not to have contact with a certain man). If the conditions are met, the woman is forbidden to her husband until she proves her innocence of adultery by means of the ordeal of the bitter waters (as discussed in B. Sotah 2a-b). In the case of David and Bathsheba, the condition of “seclusion” was met, but not the condition of “warning”; there is no Scriptural suggestion that Uriah had ever warned Bathsheba to avoid David. B. Ketubot 9a.

<sup>80</sup> See text at notes 77-79, *supra*.

<sup>81</sup> Ketubot 9a-b (and note by the Soncino editor). The Biblical account does not say that Bathsheba submitted under duress; but the Sages may have meant that,

This yields the same result as before; Bathsheba would not have been forbidden to Uriah had he lived, and by the same token she was not forbidden to David.

But by drawing attention to the element of compulsion in David's conduct toward Bathsheba, the Sages arouse rather than allay moral misgivings; though David is acting, in this respect, more or less as Samuel had warned that kings would act,<sup>82</sup> it hardly appears that he is doing as an upstanding king should. Thus the Sages preserve the ethical and spiritual space of Nathan's rebuke and of Psalm 51, a space of fault occasioned and experienced and finally blotted out, even as they locate that space outside the jurisdiction of judges to enforce the law.

### C. DAVID DID NOT COMMIT AN UNLAWFUL KILLING

Nathan rebukes David for sending Uriah to the front to be killed: "And thou has slain him with the sword of the children of Ammon."<sup>83</sup> Again we ask: Is Nathan acting here as a judge, applying the law courageously even to the King? Was it unlawful for David to get Uriah out of the way by sending him to the front, there to be struck dead by the enemy?

A Gemara in tractate *Shabbath* explains that it was not unlawful for David to punish Uriah with death, because Uriah was a rebel against the King.<sup>84</sup> He refused to obey David when the King ordered him to return home to Bathsheba. Even his speech betrayed Uriah's disobedience, for he spoke of "my master Joab," thus dignifying his commander with the an honorific ("my master") that should have been reserved for the King.<sup>85</sup> Since Uriah rebelled, the King could send him to his death.

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whatever her state of mind may have been, Bathsheba could not have resisted the King had she desired to do so, and that therefor a woman in her position does not become forbidden to her husband.

<sup>82</sup> The prophet/judge Samuel warns the people that a king will take from them what he wishes to take (1 Samuel 8:10-18), but they are insistent that they must have a king. God tells Samuel, "Hearken unto their voice, and make them a king." 1 Samuel 8:22. Samuel reluctantly obeys. His role in selecting and anointing Saul (1 Samuel 10:1) and in anointing the young David (1 Samuel 16:13) suggests that while prophet/judges may "speak truth to power," they also serve to legitimate power.

<sup>83</sup> 2 Samuel 12:9.

<sup>84</sup> B. Shabbat 56a.

<sup>85</sup> *Id.* and Artscroll editor's note 28 *ad. loc.*, recording the views of Rashi and the Maharsha.

But the Gemara goes on to express reservations about the way in which King David responded to Uriah's disobedience. Rabi understands Nathan's rebuke, "You struck Uriah the Hittite with the sword," to mean, "you should have judged Uriah in the Sanhedrin for his act of rebellion against you, but you did not so judge him."<sup>86</sup> These reservations nicely express Cover's generalization: the prophetic judge must rebuke the King when the King behaves lawlessly. But it is significant that the tradition finds this answer alone insufficient. Perhaps David was within his powers when he acted summarily; but even so, he was stained by his treatment of Uriah,<sup>87</sup> and he required cleansing if he (and his kingship, with all the hopes that hang upon it) were to be restored. Nathan's rebuke of David helped bring about that cleansing and restoration.

#### V. SHIMON CONFRONTS YANNAI

The Mishnah, in chapter two of *Sanhedrin*, defines the legal status of the Kohen Gadol (High Priest) with respect to judicial process and to certain marital rights and obligations. The Mishnah goes on to define the legal status of a king in these same contexts. That status includes both a disability and an immunity: "A king may neither judge nor be judged; he may neither testify nor be testified against."<sup>88</sup> The Gemara discusses this Mishnah in the following terms:

Rav Yosef said: They taught these rulings only with regard to Kings of Israel, but kings of the Davidic dynasty may judge and be judged. For it is written, *O House of David, so says Hashem, "Execute justice in the morning"* (Jeremiah 21:12). If we may not judge [a king of the Davidic dynasty], how could they judge others? Why, it is written, *Search within*

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<sup>86</sup> *Id.* Artscroll editor's note 20 *ad. loc.* summarizes differing views on the question of whether the King could summarily execute a rebel, or was required instead to convene a Sanhedrin.

<sup>87</sup> Another move traditionally made, to preserve the premise that David did wrong and yet to diminish the sense that he specifically wronged Uriah, is to enhance David's claim to Bathsheba while undercutting Uriah's. "[F]rom the first, Bathsheba had been destined by God for David, but by way of punishment for having lightly promised Uriah the Hittite an Israelitish woman to wife, in return for his aid in unfastening the armor of the prostrate Goliath, the king had to undergo bitter trials before he won her." Ginzberg, *The Legends of the Jews*, vol. iv, *supra* n. 60, at 103. Bathsheba was predestined for David from the world's beginning: B. Sanhedrin 107a.

<sup>88</sup> B. Sanhedrin 18a (Artscroll edition).

*yourself, and search others* (WVAqw" Wvv.Aqt.hi) (Zephaniah 2:1); and Reish Lakish explained this to mean, First correct yourself and then correct others.<sup>89</sup> But why may kings of Israel not judge or be judged? Because of an incident that once occurred. A slave of King Yannai<sup>90</sup> killed a person. Shimon ben Shetaḥ<sup>91</sup> said to the Sages: “Set your eyes upon the accused and we shall judge him.” [The Sages] sent the following message to [Yannai]: “Your slave killed a person.” [Yannai] sent his slave to [the Sages]. [The Sages] then sent the following message to [Yannai]: “You too must come here, for the verse states, *And its [the ox’s] owner had been warned by witnesses* (Exodus 21:29). The Torah says that the owner of an ox should come and stand by his ox.” [Yannai] came to the court and sat down. Shimon ben Shetaḥ said to him: “King Yannai, stand on your feet and they [the witnesses] will testify against you.

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<sup>89</sup> ~yrixea] jveq; %K rx;a;w. ^m.c.[; jveq;. Resh Lakish is punning on the verbs **VV;q'** (gather) and **jv;q'** (adorn: beautify yourself, then beautify others), which sound similar to one another though they do not share a common root (*shoresh*).

<sup>90</sup> Alexander Jannaeus may be the historical counterpart to King Yannai, though Cover shows that *Sanhedrin*'s account of the contest between Shimon and Yannai closely matches an account in Josephus of the prophetic denunciation of Hyrcanus II by Samaias, a sage of Sanhedrin. Cover, “Folktales” pp. 185-186; Josephus, *Jewish Antiquities* (Loeb Classical Library, Josephus vol. 7, trans. Ralph Marcus [1961]) XIV.143-184, pp. 523-547.

<sup>91</sup> Though the immediate context of this contest between Shimon (the chief judge of Sanhedrin) and Yannai is supplied by the wrong committed by Yannai's servant, the larger context is the struggle by the Pharisees to preserve, apply, and transmit the Oral Torah. See B. Kiddushin 66a. Shimon stands within the line of descent of the Oral Torah itself. “Moses received the Law from Sinai and committed it to Joshua, and Joshua to the elders, and the elders to the Prophets; and the Prophets committed it to the men of the Great Synagogue.” Pirkei Avot 1:1 (*The Mishnah*, 1933; Herbert Danby, trans.) From the Great Synagogue, the Law ultimately passed to five pairs of sages, one pair in each generation: and Shimon ben Shetaḥ belonged to the third pair in the sequence. His vital role is expressed in the saying, “And the world was bereft of Torah knowledge until Shimon ben Shetaḥ came and returned the Torah to its former standing.” B. Kiddushin 66a (Artscroll ed.).

And you are not standing before us [the judges]; rather, you are standing before the One Who spoke and the world came into being, as it is stated: *And the two parties to the dispute shall stand etc. before Hashem* (Deuteronomy 19:17). [Yannai] responded to [Shimon ben Shetaḥ]: “I will act not in accordance with what you say, but in accordance with what your colleagues say.”

[Shimon ben Shetaḥ] turned to the judges on his right and they cast their faces toward the ground. He turned to the judges on his left and they cast their faces toward the ground. Shimon ben Shetaḥ said to them: “You are men of thoughts! May the Master of thoughts come and exact retribution from you!” Immediately, the angel Gavriel came, knocked them to the ground, and they died. At that time [the Sages] declared: A king may neither judge nor be judged. He may neither testify nor be testified against.

The Gemara gives uncertain direction to the judge who would be “upright”.<sup>92</sup> The path of courage and justice, it would seem, has been blazed by Shimon ben Shetaḥ ; but the path of the jurisdictional rule is marked instead by the all-too-human failings of the associate judges of Sanhedrin, Shimon’s colleagues. As Cover says, “the incident is put forward to account for a rule of law which, itself, seems to owe more to the cowardice of Shimon’s colleagues than to the courage of their leader.”<sup>93</sup> Thus the story expresses a “very common paradox of jurisdiction;” in place of the expected message, “Courts judge Kings courageously and impartially,” the norm is rather that “they do not judge them at all.”<sup>94</sup>

VI. “STAND! BEFORE THE ONE WHO SPOKE AND THE WORLD CAME INTO BEING”

#### A. METONYMICAL, NOT METAPHORICAL

The Gemara begins and ends with gestures of distancing. Far from conflating all jurisdictional issues into one sacred prototype, the Gemara stresses sequencing, succession, and transition. If our text urges judges to be prophets, then, it is under no illusion that those faced with jurisdictional choices may simply substitute ancient narratives for their own, and through substitution of terms solve the equation of choice. I will express our text’s

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<sup>92</sup> Text at note 24, *supra*.

<sup>93</sup> Cover, “Folktales” 184.

<sup>94</sup> *Id.*

stress on succession not substitution in the maxim, “judges as prophets: metonymical, not metaphorical”. Before defining the maxim, let us notice how the Gemara stresses succession.

The opening move belongs to Rav Yosef. He explains that the Mishnah’s rule of royal disability and immunity applies only to the “Kings of Israel,” that is, to the later kings (perhaps Hasmoneans such as Yannai or, more likely, his successors), not to kings of the House of David. This is to make a cutting precisely between the action of the Nathan/David story and that of later stories. David could judge and be judged.<sup>95</sup> As we have seen, the Nathan narrative depends thematically on this assumption -- even though Nathan is not precisely judging David (under the law), and David in delivering his opinion of the rich man in the parable is not precisely giving judgment in a legal case. Rav Yosef says that the situation of the court confronting royal power is exactly not that of Nathan rebuking David. To be a prophetic judge is to remember that one is not Nathan, and that the power one is judging is not David.

The Gemara closes with a second act of distancing, this time accomplished by (anonymous) Sages who declare the Mishnaic rule of royal disability and immunity. The story is meant to explain the declaration of a rule which changes jurisdiction. Though one might admire Shimon’s courage,<sup>96</sup> the rule under discussion comes about precisely as a consequence of what Shimon did. As Rav Yosef begins (in effect) by observing, “You are not sitting in judgment on David -- remember that,” so the anonymous Sages end by declaring, “You are not Shimon sitting in judgment of Yannai -- remember that.”

Yannai was not a King of the Davidic house. But before the jurisdictional Mishnah (of disability and immunity) was declared, Shimon might well have considered that he could generalize from David’s situation;

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<sup>95</sup> “[T]he kings of the Davidic dynasty should serve as judges. Accordingly, we must assume that they could also be judged, for our Sages taught: ‘Correct yourself and afterwards, correct others.’ Were the kings themselves not subject to the scrutiny of a court of law, they would have no right to judge others.” Commentary, Halakhah 7, in Mishneh Torah: Hilchot Melachim U’Milchamoteihem, ch. 3, p. 54.

<sup>96</sup> Or perhaps not; his bravado does cause the mass death of his judicial colleagues. In many ways Shimon acts just like Yannai, though on behalf of quite different aims. In another paper -- “‘Overwhelmingly Instructed by a Glance’: Oral Torah and Judicial Character” -- I examine the Shimon/Yannai narratives in more detail, and ask whether Shimon exhibits judicial traits that Cover lamented rather than admired.

if David could be judged, then so can Yannai.<sup>97</sup> The consequences of Shimon's bold move stimulated a contraction of jurisdiction.<sup>98</sup> Maimonides explained that unlike kings of the Davidic dynasty, "the [other] kings of Israel... [may] neither sit in judgement nor be judged. They may not give testimony, nor is testimony given them. This is because they are arrogant and the matter may cause a tragedy and loss to the faith."<sup>99</sup> The death of the associate judges, occasioned when Shimon attempted to assert his court's jurisdiction over Yannai, could be described as a "tragedy".

The story's meaning, then, is framed by a double distancing. As Yannai was not David (he was not of the Davidic house), so "your" king (the one whose conduct you hope to restrain judicially) is not Yannai (royal amenability to judicial control has been altered by the Sages' enactment). As Shimon was not Nathan (Nathan succeeded in stimulating royal atonement, but Shimon did not, in part because Yannai was "arrogant"), so you, judge, are not Shimon (your jurisdiction has been contracted by enactment of the Sages, in part at least as a consequence of Shimon's gambit).

Let us return, with this interpretation of the Gemara in mind, to Cover's main claims. One might read Cover as urging that judges are, or can be, or should be prophets. He certainly does insist that the legitimating objective of jurisdiction is "prophetic not bureaucratic". But consider the words that follow that affirmation:

As a judge, one must be other than the King not because of the need for specialists in dispute resolution, but because of the need to institutionalize the office of the Prophet who would say to the King, *as* Nathan said to David, "You are that man"; *as* Shimon b. Shetaḥ said to Yannai, "Stand! before He who

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<sup>97</sup> Presumably Shimon would have been less eager to accept the corollary: if David could judge, so could Yannai.

<sup>98</sup> "[U]ntil the time of Yannai [kings] could judge and we could judge them. For if it is not so, how could they have judged him? And why [did they find it] necessary to decree that the king may not judge and we may not judge him?" Keseph Mishneh (David Margolis, trans.), discussing Maimonides, ch. 3, halakhah 7: Mishneh Torah. The Keseph Mishneh contends that the judges of Sanhedrin had a (discretionary?) jurisdiction over the kings; that Shimon was exercising that jurisdiction in the case of Yannai; that the decree of the Sages eliminated the judges' jurisdiction over the Kings of Israel, leaving intact their jurisdiction over the Davidic kings. (I am indebted to Mordecai Finley for the concept of jurisdictional contraction.)

<sup>99</sup> Maimonides, Mishneh Torah: Hilchot Melachim U'Milchamoteihem, ch. 3, halakhah 7.

spoke and the World was created; As, Coke said to James I,  
etc.<sup>100</sup>

It is clear enough from this that Cover's conception is not, "Judges are prophets," but "judges as prophets". But the formulation, "judges as prophets," remains ambiguous. Does it mean that judges are in certain respects *like* prophets; that judging is analogous to prophesying?

I will call such an interpretation of "judges as prophets" metaphorical. This position was forcefully articulated, independently of Cover's work, by Michael Perry.<sup>101</sup> Yet critics found the metaphor unhelpful,<sup>102</sup> and Perry himself has expressed misgivings.<sup>103</sup> I think it clear that Cover does not

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<sup>100</sup> "Folktales," 189-190 (emphasis added).

<sup>101</sup> In his early book, The Constitution, the Courts, and Human Rights (1982), 98-99, Perry declared that under certain circumstances, nonoriginalist judicial review "represents the institutionalization of prophecy. The function of noninterpretivist review in human rights cases is prophetic: it is to call the American people -- actually the government, the representatives of the people -- to provisional judgment."

<sup>102</sup> Throughout his critique of The Constitution, The Courts, and Human Rights, Mark Tushnet makes it clear that he understands Perry's claim to be metaphorical. Tushnet, "Legal Realism, Structural Review, and Prophecy," 8 Univ of Dayton L. Rev. 809 (1983) at 829 ("Perry's use of the religious metaphor is revealing...."); 830 n. 69 ("One wonders, however, about the need for a religious metaphor and an elaborate analytic apparatus to support general conventional conclusions...."). Cf. Tom Grey, "The Constitution as Scripture," 37 Stanford L. Rev. 1, 24-25 (1984) (the Justices of the Supreme Court are not so much prophets as supervisors of "a dispute-resolution bureaucracy").

<sup>103</sup> In his contribution to a previous Southern California Law Review Symposium, Perry explained: "This is not to say that judges are moral 'prophets,' however. This *metaphor*, which I used in my book, is misleading." Perry, "The Authority of Text, Tradition, and Reason: A Theory of Constitutional 'Interpretation'," 58 So. Cal. L. Rev. 551, 574 n. 73 (emphasis added). Perry had already made it clear that he conceived of "judges as prophets" as just an "analogy," and an inexact one at that. "[T]he usefulness of the biblical analogy is limited, for, unlike prophecy, noninterpretive review is coercive, and there is a radical difference between prophecy and coercion." *Id.* at 125. In his subsequent book, Morality, Politics, and Law: A Bicentennial Essay (1988), at 147, Perry still maintains the analogy but in a chastened form.

Perry continues to regard the Plessy dissent as prophetic ("In his prophetic dissent in Plessy, Justice Harlan shattered the shameful separate-but-equal myth"), but also stresses that "the state law upheld in Plessy v. Ferguson... violated the original understanding of the Fourteenth Amendment." Perry, "Brown, Bolling,

mean to be saying that judges are analogous to prophets, or that the “folktales” declare this to be so. Far from presenting judges as metaphorical prophets,<sup>104</sup> Cover’s “folktales” suggest that judges are distanced from prophesy by time and changed circumstance.<sup>105</sup> Judges are metonymical prophets, not metaphorical prophets.<sup>106</sup>

In folkloric memory, judges do not analogize themselves to prophets; one might say that judges as lawyers could draw such analogies (perhaps far better ones) quite nicely without the aid (and the messy baggage) of oral tradition. Instead of a claim to resemblance, the folkloric memory achieves a

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and Originalism: Why Ackerman and Posner (among Others) Are Wrong,” *supra* n. 12, at 67-68 (citations omitted).

Professor Cover did not refer to Perry’s work in “Folktales,” though he was aware of it as early as his “*Nomos* and Narrative” (1983), in which he refers to Perry’s earlier book (57, n. 158), and aligns Perry with Owen Fiss in a contrast to his own view of the perils of judging in a world of copresent *nomoi*. Nor would Cover accept Perry’s “radical difference between prophecy and coercion,” *supra*.

<sup>104</sup> The Nathan narrative, for its part, could be said with equal truth to present a prophet (Nathan) as a metaphorical judge.

<sup>105</sup> “Prophecy had ceased, but the rabbis regarded themselves as heirs to the prophets, and this was proper, for they had thoroughly assimilated the prophetic world-view and made it their own.” Yosef Hayim Yerushalmi, Zakhor: Jewish History and Jewish Memory (1989), 21.

<sup>106</sup> I take the distinction between metaphor and metonym from Claude Levi-Strauss. Metaphor is a relation of resemblance between units in different series. Metonym is a relation of contiguity within a single series. Within a conceptual system, metonymy recruits something or someone into a relation of contrast or succession. Claude Levi-Strauss, The Savage Mind (1966), 207, 52, 106. When we give a flower a Linnaean taxonomic name (Latin designation of genus and species), we bring the flower into an orderly system of differentiations; we “metonymize” the flower. *Id.*, 212-213. I understand Cover to be “metonymizing” judges, bringing them into series of contrasts (prophets rebuking kings) and successions (Davidic kings give way to the Kings of Israel; Kings of Israel give way to the various authorities who have legitimate claims to rule in the diaspora, etc.; Prophets rebuking Davidic kings give way to Sages contesting with the Kings of Israel, etc.)

In rhetoric, metonymy sometimes names a figure of speech in which a part expresses the whole, as in “They struggled to overthrow the crown” (that is, the king, or yet more broadly, the monarchy). But this relation of *pars pro toto*, expressed in literary “synecdoche” (*see* A. F. Scott, Current Literary Terms: A Concise Dictionary (1965), 286), is narrower than Levi-Strauss’s concept of metonymy, as Levi-Strauss acknowledges, The Savage Mind at 205.

double differentiation or double distancing. First, the prophets are not who we are; they are precisely who we remember and aspire to; and both memory and aspiration are forms of separation. Second, it is not that judges resemble prophets, but that the difference between judges and state officials is like the difference between prophets and kings. In Levi-Strauss's nice formulation, "[i]t is not the resemblances, but the differences, which resemble each other."<sup>107</sup>

#### B. AN ALMOST-INDEPENDENT JUDGE

The Gemara relates a bipolar struggle. It is Shimon against Yannai, Judge against King. This rigorous duality is enhanced by the main action of the story, in which the middle term -- the Sadducee judges of Sanhedrin,<sup>108</sup> caught between a rock and a hard place -- are eliminated from the scene with dramatic finality. The "upright judge"<sup>109</sup> stands alone. He is both "other than the King"<sup>110</sup> and "stripped of institutional protection against the power that ordinarily stands behind the Court."<sup>111</sup>

But a third party surfaces repeatedly in the tales of Yannai and Shimon. Related to Yannai as his wife and also as his successor to the throne, related to Shimon as his sister, Shalome<sup>112</sup> supplies a principle of mediation and connection which transforms the contest between Yannai and Shimon and complexifies the narratives, modulating their message about judicial role and character.

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<sup>107</sup> Claude Levi-Strauss, *Totemism* (1963) at 77 (emphasis omitted).

<sup>108</sup> Our Gemara does not identify the craven associate judges as Sadducees; but cf. a story told in *Megillat Taanit*, 10. "[W]hen the Sadducees sat in the Sanhedrin, which they controlled, King Yannai was with them," and no one but Shimon knew how to give responsa based on the Torah. As each Sadducee proved incapable of adducing evidence from the Torah to meet Shimon's arguments, Shimon would replace him with one of Shimon's own students. "He kept doing this day after day, until all the Sadducees were removed, and a Sanhedrin of like mind to his was seated in authority." *Ibid.*, in Hayim Bialik and Yehoshua Ravnitzky, eds. *The Book of Legends [Sefer Ha-Aggadah]*, trans. William Braude, p. 171.

<sup>109</sup> Text at note 24, *supra*.

<sup>110</sup> Text at note 7, *supra*.

<sup>111</sup> Text at note 59, *supra*.

<sup>112</sup> Her name is sometimes rendered in English-language sources as "Salome," a Hellenization of the Hebrew; e.g., B. Taanit 23a (Artsroll editor's note 2). Josephus names her "Salina [Salivna], by the Greeks called Alexandra [VAlexandra]." *Jewish Antiquities* (*supra* n. 90) XIII.320, pp. 388-389.

In Cover's binary model, folktale presents the judge as taking a courageous and independent stand (the Lord Coke celebrated in common law memory) while history sounds a prudential alarm (Lord Coke groveled before the angry king, as well he might, if the jurisdictional canon is to survive). The *Sanhedrin* account of Shimon's confrontation with Yannai can be read as honoring the fortitude of the chief judge and scorning the timidity of his colleagues. But other Talmudic accounts reveal a Shimon who preferred to trick Yannai rather than confront him, and who "fled in fear" when his trickery was exposed.<sup>113</sup>

Rashi reports that Shalome hid Shimon during Yannai's purge of the Sages, and thus saved his life.<sup>114</sup> In this view of things, Shimon was not so alone or so vulnerable when he challenged the king; he had special protection through his sister, the king's wife. And it is Shalome's intervention that renders it safe for Shimon to come out of hiding. When Yannai wants Shimon back, it is to Shalome that he turns: "Yannai said to his wife, R. Shimon's sister, 'Send for him to come back.'" Shalome then makes it possible for Yannai's wishes to be carried out, but only if her price is met. "She replied, 'Swear to me that you will not cause him distress, and send him your signet ring, so that he may feel it is safe to come.'"<sup>115</sup>

The halakhah is one of separation of powers: the king does not judge, nor is he judged. But the aggadot conclude with Yannai's royal ring on Shimon's judicial finger.<sup>116</sup> Shimon is twinned to Yannai; he is not fully "other than the king".

A prophet who "fled in fear" does not match expectations, perhaps; but we do not need to turn from "folktale" to "history" to witness the sage's prudence. Nathan had the courage to rebuke the king, but also the wisdom to bow before him: "And they told the king, saying, Behold Nathan the prophet. And when he was come in before the king, he bowed himself before the king with his face to the ground."<sup>117</sup> Face-downward is a posture seemingly better suited to the craven associate judges. As Zalman Shazar observed, "his bowing is very inconsistent with a prophet's demeanour;

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<sup>113</sup> B. Berakoth 48a; Palestinian Talmud, tractate Berakoth 7:2 (trans. Tzvee Zahavy, pp. 263-265); cf. *The Book of Legends*, *supra* n. 108, p. 201. A slightly different rendition is given in *Genesis Rabbah* (R. Dr. H. Freedman, trans., 1939) 91:3, pp. 836-837.

<sup>114</sup> B. Kiddushin 66a, Artscroll editor's note 24 *ad. loc.*

<sup>115</sup> *Ibid.*

<sup>116</sup> Cf. Megillat Taanit 11 (*The Book of Legends*, *supra* n. 108, p. 171.)

<sup>117</sup> 1 Kings 1:23 (KJV).

perhaps when [Nathan] first appeared he was not a prophet.”<sup>118</sup> The solution is worse than some but perhaps better than others.

When Shazar, soon to be President of Israel, and David Ben-Gurion, founder of the state and late Prime Minister, gathered with scholars in the early 1960’s to discuss the Nathan narratives, they puzzled about the paradox: a prophet in the King’s court. Shazar concluded that “David promised Bathsheba Solomon’s succession, but his reluctance to implement the promise almost caused more bloodshed. This is where Nathan stepped in; Nathan wanted to expedite the execution of that promise.”<sup>119</sup> “And Nathan’s prophecy is the foundation of the House of David.”<sup>120</sup> Ben-Gurion agreed. “Nathan is a great man, because he is responsible for making David’s kingdom live forever.”<sup>121</sup>

A kingdom that lives forever: an understandable concern of a founder like Ben-Gurion, though not quite the view of Nathan that Cover had in mind. But a valid one, surely. As a “folktale of justice,” the story of Nathan rebuking David belongs not only to judges and their heirs, but to kings and their heirs. Not only the obvious jurisdictional texts of positive law, but also the “sacred narratives of jurisdiction,” lay claim upon us all -- even as we receive their lessons differently.

But not so very differently. Ben-Gurion went on to say: “David was a great man because he admitted his fault. When Nathan said, ‘You are that man,’ David says he has sinned. And after that confrontation, he never wronged Bathsheba again.”<sup>122</sup> From the judge’s perspective, Nathan is celebrated for standing up to power. From the king’s perspective, Nathan was a great man because he served the kingship. But the two views converge on the point of atonement. Nathan made it possible for David to “admit his fault,” and never to wrong Bathsheba again as he had terribly hurt her: coercing her to bed, sending her husband to his death, occasioning the death of her newborn son. The greatness of the prophet proved symbiotic

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<sup>118</sup> “Prophet in the Courtyard of the King: The Story of Nathan the Prophet” (Hebrew), transcript of Meeting #67 of the Eyun Yerushalmi BiTanakh (Jerusalem, 1969), p. 7 (trans. David Margolis).

<sup>119</sup> *Id.*, 10.

<sup>120</sup> *Id.*, 9.

<sup>121</sup> *Id.*, 13.

<sup>122</sup> *Id.*, 14.

with the greatness of the nation-builder -- “but the irony is that the nation-builder could not build the temple.”<sup>123</sup>

## VII. CONCLUSION

“Judges as prophets” can be taken as a metaphorical way of asserting claims about judging that we already know (or hope) to be true. Cover wanted to move beyond metaphor. I have followed him by taking the prophetic texts seriously as part of a canon of sacred texts that speak earnestly of jurisdiction.

But to take the texts seriously is precisely to be wary of the “independent hermeneutic,” the specifically judicial interpretation. Though judges may follow their own rules and methods of interpretation of narrative, they approach the “folktales” independently only at the risk of losing the special leverage that these sacred texts exert against the de-sacralizing of the law-world. This means that judges must understand the folktales, so far as this is possible, within the traditions that formed, transmitted, and received them. Judicial independence should not be conceived as hermeneutic independence.

Recalled within their traditions, however, the “folktales of justice” do not address themselves uniquely to judges. In Cover’s typology, they are the inheritance not only of judges but also of kings. Judicial independence should not be conceived as unique recipient of an unshared canon.

And when the stories are understood in their traditional contexts, bearing and enriching their traditional range of meanings, it becomes apparent that their lessons are not, finally, about the courage to judge the powerful impersonally and independently. Courage and initiative are surely attributed to Nathan and to Shimon as “prophets,” but these attributes may be moderated or even negated as required by other and more central themes. The identity of the judge as “other than the king” is not the main message of the “folktales of justice”.

With these conclusions in mind, let us return to Justice Harlan: to our memory of him, and to our memory of him remembering. The year 1883, a dozen years before *Plessy*, found Harlan struggling to draft his dissent in *The Civil Rights Cases*.<sup>124</sup> Alone among the justices, Harlan had voted to uphold the public accommodations provisions of the 1875 Civil Rights Act. Frederick Douglass and other supporters cheered him on, but as the autumn

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<sup>123</sup> *Ibid.*

<sup>124</sup> 109 U.S. 3, 26 (1883).

days of 1883 dwindled, Harlan could not satisfy himself with what he had written. An admiring biographer takes up the tale:

On a Sunday morning early in November when the discouraged Harlan, his opinion still unwritten, had gone to church, his wife had an inspiration. She remembered an inkstand that Chief Justice Taney had used to write all his opinions, and which had been given to Harlan by the marshal of the Supreme Court in 1877. Mallie rummaged around til she found the inkstand; then she cleaned it up, filled it with ink, and put it on her husband's desk. When Harlan returned home and found the inkstand, which he thought had been lost, he had a burst of fresh energy and inspiration. As Mallie Harlan said later, "The memory of the historic part that Taney's inkstand had played in the *Dred Scott* decision, in temporarily tightening the shackles of slavery upon the Negro race... seemed to act like magic in clarifying my husband's thoughts.... His pen fairly flew on that day and... he soon finished the dissent."<sup>125</sup>

Later, in *Plessy*, Harlan would describe the Court as committing another *Dred Scott*. Already, in his earlier dissent, Harlan was struggling to avoid being and becoming Roger Taney. Taney's inkstand reclaimed for Harlan his most urgent memories.

The inkstand accomplished its work of recollection and motivation only because Mallie Harlan placed it upon her husband's desk. Then he could define the evil to be resisted, and the path of resistance. Within the inkwell's opaque depths he discerned an image of Nathan, no independent genius but a court prophet like himself, and tried like Nathan to bring his court and country to penance and forgiveness. Also he saw Shimon confronting Yannai, and in that moment he remembered the cuttings of distance and difference. He knew that he could not be Nathan because his court and country were not the house of David; nor could he merely reenact the confrontation with Yannai, for from Shimon he had inherited the legacy of contracted jurisdiction. Not knowing how to bring about atonement, he could only gesture toward its absence, and in so doing name it as the norm by which he would measure his own conduct and character, and the conduct and character of his court and country. "The judgment this day rendered" will not "atone for the wrong this day done."

Professor Cover has dusted off the folktales of justice and placed them on our desk, and on the desks of judges. It is an act of intervention,

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<sup>125</sup> Frank B. Latham, *The Great Dissenter: John Marshall Harlan, 1833-1911* (1970), pp. 92-93.

like Mallie Harlan's. Our nearer memories speak differently to us as we choose to make more distant pasts our own. And they direct us toward correspondingly different futures.

How can there be atonement for what Mallie called "tightening the shackles of slavery upon the Negro race"? Judges as prophets can call for it, but it is not theirs to give. In South Africa, the Truth and Reconciliation Commission has gone further perhaps than any other judicial (or quasi-judicial) institution to bring about forgiveness, reconciliation, and healing. Whether or not we choose that way of coming to terms with uncorrected wrong and unarticulated guilt, we must be sobered when we remember a limit which no court or Commission can transcend.

A black African woman sits listening to her husband's killer. Hearing, for the first time, how her husband died, she is asked whether she can forgive the man who killed him.

Speaking slowly, in one of the native languages, her message came back through the interpreters: "No government can forgive." Pause. "No commission can forgive." Pause. "Only I can forgive." Pause. "And I am not ready to forgive."<sup>126</sup>

The prophets teach respect for this widow's suffering, even as they teach that she is wrong when she says, "Only I can forgive". But judges as prophets have no standing to earn her forgiveness, or God's. They can lead me to "acknowledge my transgressions," but they cannot "deliver me from bloodguiltiness." Still, "The sacrifices of God are a broken spirit: a broken and a contrite heart, O God, thou wilt not despise..."; from such sacrifices, may the walls of Jerusalem be built.<sup>127</sup>

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<sup>126</sup> Timothy Garton Ash, "True Confessions," The New York Review of Books, vol. xlv, no. 12 (July 17, 1997).

<sup>127</sup> Psalm 51; see text at note 55, *supra*. Robert Gordon, "Undoing Historical Injustice," in Austin Sarat and Thomas R. Kearns, ed. Justice and Injustice in Law and Legal Theory (1996), at 65-66, expresses a preference for "structural" reform over "redemption of sin" as modes of response to historical injustice. Though that preference is reasonable within the horizon of political morality, it is strictly inconceivable within the prophetic tradition. The prophets insist upon atonement and turning toward God as absolute existential imperatives, as they insist upon justice as the means and direction of that turning; cf. Isaiah 1:17, 1:27.