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Lawyers Serving Gods, Visible and Invisible

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A critique of the American legal profession can be framed through the metaphor of idolatry, specifically the proclivity of lawyers to serve visible rather than invisible interests in their work. This proclivity has ramifications ranging from broad matters like lawyers' responses to deeply embedded social injustices to specific matters such as the excessive focus on pecuniary interests in ordinary legal representation and the high level of dissatisfaction that many lawyers experience in their careers. Using as a lens biblical teaching concerning idolatry, this article begins by describing “visible” as opposed to “invisible” interests in the context of legal practice. It then argues that lawyers, clients, and ultimately society could benefit from lawyers paying greater attention to invisible interests.
INTRODUCTION

Religious ideas can sometimes offer a distinctive lens or vantage point for gazing upon ordinary life. For example, seeing a person as created “in God’s image” may lead one to ask a different set of questions (e.g., is that person being treated with dignity?) and assert a different set of values (e.g., that human life is precious) than one might ask or assert without that religious metaphor.  

2. The metaphor of humans as created “in God’s image” comes from Genesis 1:26-27. An ancient Rabbinic illustration of how values can become associated with a metaphor is found in the Mishnah (c. 200 CE), where, when discussing how to instruct witnesses in capital cases, the Rabbis link the pricelessness, equality, and uniqueness of each human life to the biblical story of the first person, Adam, being created in God’s image. According to the Mishnah, prior to a witness testifying, a judge should instruct the witness:

It was for this reason that man was first created as one person [Adam], to teach you that anyone who destroys a life is considered by Scripture to have destroyed an entire world; and anyone who saves a life is as if he saved an entire world. And also, to promote peace among the creations, that no man would say to his friend, “My ancestors are greater than yours.” . . . And also, to express the grandeur of [God]: For a man strikes many coins from the same die, and all the coins are alike. But [God] strikes every man from the die of the First Man, and yet no man is quite like his friend.

Mishnah Sanhedrin 4:5.

More recently, the Catholic Church has used the image of humans as created in God’s image to stress the importance of human dignity in its progressive economic social teachings. See, e.g., Pope John Paul II, Centesimus Annus (“[T]he guiding principle . . . of all of the Church’s social doctrine, is a correct view of the human person and of his unique value, inasmuch as ‘man . . . is the only creature on earth which God willed for itself.’ God has imprinted his own image and likeness on man (cf. Gen. 1:26), conferring upon him an
One need not, of course, invoke religious language to discuss subjects like human dignity and worth, but religious teachings can lend insights into them. Here I suggest that another fundamental religious teaching, namely the biblical prohibition against idolatry, provides a useful lens for critiquing the American legal profession. Akin to worshiping a visible rather than invisible God, many lawyers have a proclivity to focus on visible rather than invisible interests in their work. This proclivity has ramifications ranging from the “small” issue of low job satisfaction among lawyers, to the broader issue of the tendency of many lawyers to focus excessively on their clients’ pecuniary rather than non-pecuniary interests, to the even broader issue of the failure of many lawyers to undertake the prophetic work of confronting deeply embedded social injustices.

To develop this argument, I work in two stages. First, I describe the biblical concept of idolatry and its development within Jewish tradition and what I mean by “visible” as opposed to “invisible” interests in the context of legal practice. In taking a Jewish approach to idolatry, I do not mean to suggest that Judaism is alone in its concern about idolatry—far from it. Christianity and Islam, to name but two other religions, have long banned idolatry, and many traditions, both Abrahamic and non-Abrahamic, have stressed the importance of the invisible. Rather, I approach this subject through Jewish lenses for that is the religious tradition that I know. Second, I turn to the specific topics incomparable dignity...
mentioned above. From "small" matters such as attorneys' choices in their own careers to broad issues of social injustice, the metaphor of idolatry offers a useful lens for critiquing some foundational aspects of American legal practice.

Not all readers of this paper, of course, will be members of an Abrahamic faith, and certainly not all readers of this paper will be Jewish. Whatever one's background, I hope the ideas here will be of use. The critique of the American legal profession presented here does not rest upon being a member of a particular religious community or having a particular view of the Bible. Indeed, it is possible to write a critique of lawyers serving visible rather than invisible interests in their work without reference to religious literature at all. Yet, religious teachings are what have led me to form this critique, and, for me, religious language is helpful in articulating it.

I. IDOLATRY IN BIBLICAL AND JEWISH THOUGHT

Of the many activities prohibited in the Bible, the practice of idolatry ranks among the very highest. In the book of Exodus, the Ten Commandments explicitly prohibit idolatry, soon followed by the Golden Calf story in which the lesson is taught in the breach. Numerous biblical passages reinforce this theme, as does subsequent Rabbinic and post-Rabbinic literature. Under traditional Jewish law, refraining from idolatry is one of only three prohibitions for which a Jew, if threatened with death, is required to sacrifice his or her life rather than commit (the other two are forbidden sexual relations [e.g., rape or incest] and murder). As to why idolatry is prohibited, multiple theories exist, but as to the fact that Judaism prohibits idolatry, there can be no doubt. Indeed, one of the most famous of Jewish midrashim (i.e., extra-biblical stories, often highly inventive, seeking to explain missing details in the Bible) links the rejection of idols to the founding of Judaism itself. Why did God select Abraham to be the first Jew? The answer, one midrash suggests, is because

5. See Exodus 20: 3–5 ("You shall have no other gods before me. You shall not make for yourself an image in the form of anything in heaven above or on the earth beneath or in the waters below. You shall not bow down to them or worship them. . .").

6. See Exodus 32.


8. See generally HALBERTHAL & MARGALIT, supra note 4.


10. HALBERTHAL & MARGALIT, supra note 4, at 1–8.
Abraham recognized that the idols in his father Terah’s idol store were merely statues and had no real power.  

What did this prohibition against idolatry do? At the most basic level, this prohibition insisted that the God who is worshipped is invisible. Verbal descriptions of God might be allowed—the Bible itself occasionally portrays God in highly anthropomorphic terms—but not visual representations. Psychologist Sigmund Freud, who along with analyzing people also enjoyed analyzing religions, believed that this insistence on God’s invisibility was one of Judaism’s most significant contributions, for once God was made invisible, the need for abstraction in religious thought became paramount (Likely, it was also essential to Judaism’s longevity, for unlike a physical idol, an invisible God could not decay with time or be destroyed by conquerors, as twice were the great Temples in Jerusalem). Put differently, this negative ban was also a positive opportunity, a springboard for the development of new ideas that would characterize Judaism across the ages. Lawyers, of course, are not in their professional role engaged in religious worship. However, this distinction between the visible and the invisible provides a useful lens for

11. Rabbi Hyya The Great (c. 200 CE) told the following story about why Abraham left his father Terah’s home:

Terah was a worshipper of idols. One time he had to travel to a place, and he left Abraham in charge of his store. When a man would come in to buy [idols], Abraham would ask: How old are you? They would reply: fifty or sixty. Abraham would then respond: Woe to him who is sixty years old and worships something made today - the customer would be embarrassed, and would leave. A woman entered carrying a dish full of flour. She said to him: this is for you, offer it before them. Abraham took a club in his hands and broke all of the idols, and placed the club in the hands of the biggest idol. When his father returned, he asked: who did all of this? Abraham replied: I can’t hide it from you - a woman came carrying a dish of flour and told me to offer it before them. I did, and one of them said ‘I will eat it first,’ and another said ‘I will eat it first.’ The biggest one rose, took a club, and smashed the rest of them. Terah said: what, do you think you can trick me? They don’t have cognition! Abraham said: Do your ears hear what your mouth is saying?


12. See HALBERTAL & MARGALIT, supra note 4, at 37 (on verbal versus visual representations of God).

13. SIGMUND FREUD, MOSES AND MONOTHEISM 95 (Aziloth Books 2013) (1939) (“Among the precepts of Mosaic religion is one that has more significance than is at first obvious. It is the prohibition against making an image of God, which means the compulsion to worship an invisible God. . . . [This prohibition] signified subordinating sense perception to an abstract idea; it was a triumph of spirituality over the senses; more precisely an instinctual renunciation accompanied by its psychologically necessary consequences.”).
critiquing American lawyers and suggests, too, some foundational opportunities for the profession’s growth.

What is a visible interest and what is an invisible interest? In the legal realm, the essential distinction rests not upon whether an interest is physically visible as with a physical object, but upon whether it is recognized. A law school graduate deciding between two job offers might ask, “What does each job pay?” A supervising district attorney reviewing the records of junior attorneys might ask, “How many cases did each attorney win?” A managing partner assessing the productivity of an associate might ask, “How many hours did this associate bill?” A plaintiff in a tort action might ask his lawyer, “How much money can we get in a settlement?” A defendant in that same action might ask, “How much money will we have to pay?” By “visible,” I don’t mean that such interests are physically visible but rather that they are apparent, obvious, or socially recognized. Indeed, visible interests are often tied to the existing social order, for what people see when they look at the world is part of what helps maintain the world-as-it-is.¹⁴

Invisible interests have a different flavor. Sometimes they relate to conscience and morality. Sometimes they concern feelings and hopes. Sometimes we discover them because we search for them, and sometimes they call to us to be recognized, not because the world-as-it-is insists upon them but because the world-that-could-be calls them out to us. They are the inner voice that leads the prosecutor to cease prosecuting a defendant whom he believes to be innocent (even if he might prevail at trial), that leads the lawyer to take a job that speaks to her heart (and not necessarily her paycheck), and that leads the social activist to protest a social wrong, not knowing where that protest will lead.

The line between these two categories is not a perfect one, and I do not mean to suggest that visible interests are coterminous with pecuniary interests or that invisible interests are coterminous with morality, though often pecuniary interests are visible and often moral interests are invisible. The essential distinction is between those interests that are readily recognized and those interests that are not as readily recognized, and even then, sometimes that line can be blurry.¹⁵ Further, I do not mean to suggest that invisible interests are

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¹⁴. See Part IV infra (discussing denial’s role in maintaining social injustice).

¹⁵. Consider the example of whether a prosecutor will cease prosecuting a defendant whom he believes to be innocent even if he might prevail at trial. Winning a trial is a visible interest for a prosecutor since the world, including his superiors, will recognize that victory. Yet the moral call to refrain from prosecuting the innocent is also recognized in the cannons of legal ethics. See ABA MODEL RULES OF PROFESSIONAL CONDUCT 3.8 (a), (d) 2017 (prosecutors shall “refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause” and “make timely disclosure to the defense of all evidence or
necessarily progressive while visible interests are inherently regressive. Most importantly, I do not mean to suggest that persons should concern themselves solely with invisible interests. My argument here is not that lawyers should ignore visible interests, but that lawyers should pay more attention than they typically do to invisible ones. With this backdrop in mind, let me turn to three examples, proceeding from the microscopic to the macroscopic. Each bespeaks the importance of lawyers recognizing invisible interests along with visible ones.

II. THE POOR MENTAL HEALTH OF LAWYERS

Empirical research over the past several decades into the mental health of law students and lawyers has consistently found very troubling results. Both lawyers and law students fair quite poorly on a variety of measures of well-being. Further, these poor results appear in large part to be a product of legal information known to the prosecutor that tends to negate the guilt of the accused"). Is it fair to call the prosecutor’s interest in winning at trial visible but not the prosecutor’s ethical duty to refrain from prosecuting the innocent? As I wrote, there is some blurriness here. The cannons of legal ethics do recognize such a duty, however, the prosecutor’s inner voice of conscience itself is not by definition socially recognized. Further the extent to which an interest is socially recognized may depend upon the setting. In some district attorney’s offices the interest in avoiding wrongful conviction may be as well recognized as the interest in winning at trial, but in other offices it may not.

16. See Connie J.A. Beck, Andrew H. Benjamin, & Bruce D. Sales, Lawyer Distress: Alcohol-Related Problems and Other Psychological Concerns among a Sample of Practicing Lawyers, 10 J. LAW & HEALTH 1, 2 (1995) ("The findings of research reported in this study, in conjunction with earlier studies, suggest that the professional and personal well-being of lawyers is in serious jeopardy. Lawyers are working more, reducing vacation time, spending less time with family members, are prone to alcohol abuse, and face high levels of psychological distress."); Lawrence S. Kreiger, What We’re Not Telling Law Students – And Lawyers – That They Really Need to Know: Some Thoughts-in-Action Toward Revitalizing The Profession from its Roots, 13 J. LAW & HEALTH 1, 3–4 (1998–99) ("It is hardly debatable any longer that the profession and its practitioners are suffering broadly from many serious problems. Indeed, studies have concluded that lawyers and law students are much more likely than the general population to experience emotional distress, depression, anxiety, addictions, and other related mental, physical, and social problems."); Susan S. Daicoff, Lawyer, Know Thyself: A Psychological Analysis of Personality Strengths and Weaknesses 113–130 (2004). I recommend, too, Walter O. Weyrauch’s pioneering psychological study of German lawyers from a half century ago. Wrote Weyrauch:

[L]egal education and legal processes [may] provide attraction and an outlet to a specific kind of personality. Preoccupation with rules or rituals, intellectualization of disturbing human problems, and seemingly detached and “cold” rationalizations are factors known to the psychiatrist from his contact with patients and familiar to anyone who has dealt with lawyers and law students. A profile of lawyers seems to emerge, some kind of a collective portrait of the styles in which lawyers think,
education and legal practice. For example, one of the landmark studies of students and alumni of three major law schools from the mid-1980s revealed that, while the level of depression among members of the general population was only 3–9 percent, 17–40 percent of the law students and alumni suffered from depression. Noteworthy, students entering law school had depression rates similar to the general population, but those rates skyrocketed while in law school and remained markedly elevated in legal practice.

What causes such psychological distress among lawyers and law students? Numerous factors have been suggested. For law students, the Socratic method, high-stakes exams, large class sizes, excessive workloads, and the highly competitive job market have all been suggested. For practicing attorneys, "billable hour expectations, law firm hierarchies, competition against colleagues within firms, and the absence of opportunities for creativity" have all been seen as culprits. Yet not all law students and not all attorneys speak, and act. They tend to be defensive toward such disciplines as sociology and psychology. They frequently adhere to a philosophy of individualism, denying that their actions could be governed by behavior patterns. They emphasize legal skills and professional responsibilities. Prestige and status are very important to them. They think in terms of respect and power hierarchies, and this may reflect in their involvment in questions of propriety, etiquette, procedure, jurisdiction, and reciprocal recognition.


17. Andrew H. Benjamin et al., The Role of Legal Education in Producing Psychological Distress among Law Students and Lawyers, 11 AMERICAN BAR FOUNDATION RESEARCH J. 225, 249 (1986) ("Law schools may be training lawyers to contend with the harsh realities of professional practice; yet excessive workload and time management difficulties do appear to set in motion an unfortunate cycle: lawyers may find that too much work and too little time make it difficult to cope with their work (or their lives), which distresses them; the experience of failure and/or hassles leads to even less adequate coping and greater distress."); Todd D. Peterson, Stemming the Tide of Law Student Depression: What Law Schools Need to Learn from the Science of Positive Psychology, 9 YALE J. HEALTH POLICY, LAW & ETHICS 357, 359 (2009) ("We also know that the problems law students suffer are tied directly to the law school experience. Before they enter law school, students show no signs of elevated psychological distress compared to the general population, but just six months into school, their negative symptom levels increase dramatically. The research seems to suggest that law school is to blame for the alarmingly elevated levels of student distress."); LAWYER, KNOW THYSELF, supra note 15, at 123–24.


19. Id. at 246.


experience psychological distress, and the salutogenic question of what helps many law students and attorneys lead happy, well-balanced lives despite such pressures has garnered the attention of researchers as well.

Law professor Lawrence Krieger and psychology professor Kennon Sheldon are two of the leading scholars exploring this question, and their findings are intriguing. In 2015, Krieger and Sheldon published an empirical study of more than 6,000 lawyers from across the country. They found that external motivations for doing work such as income and status had very little correlation with well-being but that internal motivations for doing work such as “autonomy, relatedness, competence, internal motivation, or intrinsic values” correlated strongly with well-being. They explain further:

External factors, which are often given the most attention and concern among law students and lawyers (factors oriented towards money and status—such as earnings, partnership in a law firm, law school debt, class rank, law review membership, and U.S. News & World Report’s law school rankings), showed nil to small associations with lawyer well-being. Conversely, the kinds of internal and psychological factors shown in previous research to erode in law school appear in these data to be the most important contributors to lawyers’ happiness and satisfaction.

Noteworthy was that a lawyer’s income, “the external factor most predictive of well-being, . . . was less predictive than the internal factor with the weakest association with well-being (intrinsic values . . . ).” As they describe, “[the data] established a distinct dichotomy of factors bearing on lawyer well-being, [with external factors far less significant than the internal ones].”

How does this relate to idolatry? The critical point is that the external goals that so many law students and lawyers pursue, such as class rank, earnings, and law firm partnership, are visible ones, while internal factors, such as autonomy, relatedness, internal motivation, and intrinsic values, are largely invisible to the outside world. Yet it is precisely these invisible factors that appear to keep lawyers well. This is not to suggest that law students and lawyers should pay no attention to external factors, but that if they care about their own well-being,

23. Id. at 618–19.
24. Id at 554.
25. Id.
26. Id. at 585.
27. Id.
they should also pay attention to the invisible ones. Indeed, a simple prescription for psychological health for law students and lawyers might be stated thus: Look first toward how the work makes you feel on the inside rather than how the world views it from the outside, and do not sacrifice the former for the latter. Be particularly careful not to be seduced by the appeals of status and money.

III. LAWYERING TO THE VISIBLE

The pitfalls of excessively focusing on the visible do not end with a lawyer’s choice of employment. During the course of legal representation, multiple factors may lead attorneys toward serving visible rather than invisible interests. Let us consider two: workplace incentives, in particular time pressures, that many attorneys face and, relatedly, presumptions that attorneys often make about their clients’ goals.

The fiduciary duty that lawyers hold toward their clients is a bedrock of legal ethics. A lawyer should attempt to advance the client’s lawful goals rather than the lawyer’s own interests. Workplace pressures, however, can make this difficult. As Christine Parker and David Ruschena discuss, in the civil realm high billable hour goals can “pressure [attorneys] to bill more and more on the same files, . . . [causing] over-working, over-servicing, or, in some cases, falsifying the amount of time spent on a file.” On the criminal side, reports of grossly excessive caseloads in understaffed public defender’s offices and inadequate legal representation for the indigent are legion. As one ABA
study concluded, "thousands of persons are processed through America's courts every year either with no lawyer at all or with a lawyer who does not have the time, resources, or in some cases the inclination to provide effective representation." Consider, for example, the caseload carried by public defenders in parts of Louisiana:

In the 16th judicial district, up to 50 poor defendants are convicted and sentenced—at once—for major felonies carrying up to decades in prison, while the single public defender representing all of them struggles to present any of the facts and arguments in their separate cases. And in the 20th district, exactly one lawyer is now employed to run a defender's office that covers two parishes and more than 900 cases.

Or consider this finding made during a recent evaluation by Minnesota's legislative auditor of its own public defender system:

During our site visits, we observed public defenders under such time pressures that they often had about 10 minutes to meet each client for the first time, evaluate the case, explain the client's options and the consequences of a conviction or plea, discuss a possible deal with the prosecuting attorney, and allow the client to make a decision on how to proceed.

One lawyer responsible for more than 900 cases? Ten minutes to process a case from meeting the client for the first time through accepting a plea?

Admittedly, these are extreme examples. However, such extreme examples can be instructive. If time is scarce, lawyers take shortcuts.
happens, the temptation to assume rather than discuss the client’s goals is especially great, and less visible interests are likely to lose out to more visible ones. What is the goal of the criminal defendant? Minimizing prison time. What is the goal of the civil defendant? Paying as little money as possible. But what about clients’ other interests, such as developmental, moral and relational ones? Many crimes, for example, are driven in part by drug addiction. In some of those cases, might the defendant (and ultimately society) be well served if the defendant enters a drug treatment program as part of a plea agreement? If an attorney has but ten minutes to process the entire case, discussing such a path with the client, while not impossible, seems very unlikely. Further, what about the collateral consequences of conviction, such as the loss of voting rights and access to services (e.g., public housing) that often accompany a felony conviction? Will these even be mentioned? In the civil setting, might some parties care more about the quality of the ongoing relationship with the opposing party or with “doing the right thing” than about exactly how much money they receive in a settlement? Time in jail and money paid are visible interests while relationships and morality are comparatively invisible. Time pressures can drive lawyers to focus excessively on their clients’ visible interests while ignoring or minimizing their invisible ones.

Even when time pressure is not an issue, other factors may lead attorneys to overlook their clients’ invisible interests. Prosecutors are duty bound to seek justice rather than merely victory, but career pressures can lead them astray, causing them to excessively pursue the visible goal of conviction rather than

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36. See Nat'l Council on Alcoholism and Drug Dependence, Inc., Alcohol, Drugs and Crime, https://www.ncadd.org/about-addiction/alcohol-drugs-and-crime (last modified June 27, 2015) (“At the most intense levels of drug use, drugs and crime are directly and highly correlated and serious drug use can amplify and perpetuate preexisting criminal activity.”).


39. MODEL RULES OF PROF'L CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS'N 2015) (“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”).
the invisible goal of justice.\textsuperscript{40} Usually such pressures are implicit, but occasionally they are made explicit. Consider the compensation system one Colorado District Attorney adopted for the attorneys working in her office:

The message here is quite clear: convictions are what matter.

On the civil side, too, incentives can work to skew lawyers’ attention toward the visible. Many injured parties of course want monetary compensation, a visible result.\textsuperscript{42} Yet some injured parties also want the injurer to acknowledge, if not apologize, for what occurred.\textsuperscript{43} Plaintiffs’ lawyers typically work on a contingency fee basis, commonly one-third of the settlement.\textsuperscript{44} One-third of a million-dollar settlement is worth quite a bit to a plaintiff’s attorney ($333,333), but what is one third of an apology worth to that attorney? As Nick Smith writes, “[w]ithin modern incentive structures, most plaintiffs’ attorneys would prefer not to make a living on the prospect of receiving one-third of an apology.”\textsuperscript{45} Again, invisible interests may take a back seat to visible interests in legal representation, not because they are unimportant

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to the client but because the fee structure does not encourage lawyers to attend to them.

Finally, the influence of the reductionist, zero-sum orientation that many lawyers take to their work should not be overlooked. Roughly three and a half decades ago, Leonard Riskin offered a pathbreaking critique of what he dubbed the "lawyer's standard philosophical map," including the win-lose orientation and litigation (or "rule-based") focus that so many lawyers bring to their work. Within such a framework, visible, monetary interests are the attorney's primary focus. Riskin described this as follows:

[O]n the lawyer's standard philosophical map, quantities are bright and large while qualities appear dimly or not at all. When one party wins, in this vision, usually the other party loses, and, most often, the victory is reduced to a money judgment. This "reduction" of nonmaterial values—such as honor, respect, dignity, security, and love—to amounts of money, can have one of two effects. In some cases, these values are excluded from the decision makers' considerations, and thus from the consciousness of the lawyers, as irrelevant. In others, they are present but transmuted into something else—a justification for money damages.

Along with incentives and time pressures, habitual mindsets may determine what is visible and invisible to attorneys when they serve their clients.

IV. LAWYERS AND SOCIAL INJUSTICE

Lawyers often profess to hold the goal of creating a just society. For example, the preamble to the ABA Model Rules of Professional Conduct states, "[a] lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice." But what does it mean to create a just society? What sort(s) of justice does our legal system promote?

One way to think about those questions is to differentiate between what one might call case-by-case justice and social (or systemic) justice. Case-by-case justice is the goal of reaching a just outcome by fair means in a particular case. This is the bread and butter work of most lawyers. A dispute arises—one car accidentally collides with another, a teller is accused of robbing the store

48. Id. at 44–45.
49. MODEL RULES OF PROF’L CONDUCT, Preamble at 2 (AM. BAR ASS’N 2012).
where he works, a married couple is seeking a divorce and is fighting over where the children will live—and in each case the legal system exists to resolve the controversy if the parties cannot resolve it on their own. In contrast, social justice refers to broader, deeper matters such as racism, classism, sexism, and heterosexism (to name but a few problems) that affect society as a whole, typically for generations. Sometimes, of course, conflicts exist at the intersection of these two domains, as with “cause” lawyering in which a test case is brought to challenge a socially-discriminatory law or practice. Further, social injustices can certainly influence many individual disputes, as when jurors decide cases based not on the facts but upon a bias like racism. Microscopic matters of case-by-case justice and macroscopic matters of social justice are not hermetically sealed from one another but often interwoven. Still, in many respects, case-by-case justice and social justice are different conceptual creatures.

It is clear that lawyers do a great deal of work on matters of case-by-case justice. That is how the vast majority of lawyers earn their livelihoods. But what about matters of social justice? To what extent do lawyers take these on as well? Approximately fifteen years ago, legal ethicist Thomas Shaffer argued that lawyers do not do so nearly enough. Shaffer asserted that lawyers should act more like the ancient Hebrew prophets, standing apart from their society and decrying the unjust patterns with it. What qualities does it take to play that role? It takes courage and, as lawyers frequently benefit from the status quo, it may also take some self-sacrifice. It also takes a particular skill: vision. The special capacity of the Biblical prophet lay in the ability to see what other people overlooked, to perceive not simply the visible way that the society was but the invisible way that the society should be from the Divine perspective. Shaffer explains this argument more below:


52. As Rabbi Abraham Joshua Heschel writes of the Hebrew Bible prophets, “The prophet’s task is to convey a divine view... He speaks from the perspective of God as perceived from the perspective of his own situation.” Abraham Joshua Heschel, THE PROPHETS x (1969); see also Id. at xi (“What impairs our sight are habits of seeing as well as the mental concomitants of seeing. Our sight is suffused with knowing, instead of feeling painfully the lack of knowing what we see. The principle to be kept in mind is to know what we see rather than to see what we know.”) Critical to the prophet’s vision is the capacity to see beyond the existing society. “The task of prophetic ministry,” writes Christian theologian Walter Brueggeman, “is to nurture, nourish, and evoke a consciousness and perception.
[O]ur neglect of a prophetic focus has to do with the facts that we are too well off, and that we manage the system we benefit from. We lawyers. We lawyers, who have deceived ourselves. We have lost (or have never developed) our ability to be angry at the injustice around us. First, we don't see the injustice around us, as the Prophets did, because we are too comfortable—so that seeing injustice, and naming it for what it is, would disturb our comfort.53

The myriad ways in which social injustices manifest themselves are not, of course, invisible to those who suffer under them. However, to the dominant group that imposes them, they often are, for ignorance and denial serve as critical mechanisms in maintaining social injustices.54 As Stephanie Wildman and Adrienne Davis describe, “[t]he invisibility of privilege strengthens the power it creates and maintains. The invisible cannot be combated, and as a result privilege is allowed to perpetuate, regenerate, and re-create itself.”55 Hence, fostering social awareness is usually essential in the long struggle of confronting social injustice.

Does American legal education train students to see the invisible, to see the social injustices around them? Generally speaking, I do not believe that it does.56 Training lawyers to see the deep social injustices in society has never been a central part of American legal education. Consider, for example, two of the great social injustices that have afflicted American society for generations: racism and sexism. Some professors do, of course, discuss subjects like race and gender in their courses, especially in courses such as constitutional and family law. But when in American history have courses in “race and law” or “gender and law” been required elements of American legal education?57 When
have they been tested on the Bar exam? A contrast can be made between the legal profession and the social work profession, another discipline deeply involved with helping people who are experiencing problems. The basic standards required by the Council on Social Work Education (the accrediting body for social work programs) require as core competencies that students learn to "engage in diversity and difference in practice" and "advance human rights and social and economic justice."58 The ABA basic standards for law school accreditation involve no similar language. The closest requirements are that law schools train students to "exercise... proper professional and ethical responsibilities to clients and the legal system" and gain "[o]ther professional skills needed for competent and ethical participation as a member of the legal profession."59

Then, too, there is the important question of whether, as a historical matter, the legal system itself (i.e., the law and the lawyers who run it) tends to be a progressive, neutral, or perhaps even regressive force when it comes to pursuing deep matters of social justice?60 Fully answering that question is beyond my scope here, but in thinking about that question, some skepticism toward the legal system’s tendency to advertise itself as a justice-promoting creature is warranted.61 I am not claiming that the law cannot be used to


60. For discussions, including critical ones, of lawyers as agents of social justice, see generally Martha R. Mahoney et al., Social Justice: Professionals, Communities, and the Law (2003), Susan D. Carle, Lawyers’ Ethics and the Pursuit of Social Justice (2005), and Critical Race Theory: The Cutting Edge (Richard Delago & Jean Stefanic, eds., 2013).

61. For two fine critiques at quite different levels, see Kenneth B. Nunn, Law as a Eurocentric Enterprise, 15 Law & Ineq. J. 323 (1997) (philosophically critiquing law as a product of European materialism and white supremacy) and Walter O. Weyrauch, The Personality of Lawyers, supra note 15, at 79 (suggesting that the legal personality may be anti-democratic and favor the status quo) ("[L]awyers as a group, contrary to common beliefs and formal resolutions, may have personality traits that counteract or retard a wide distribution of democratic values among persons. Without being fully conscious of the social function of their behavior, they may participate in power plays and rationalize their decisions in seemingly objective standards. In fact those standards may cover up unconscious
promote social justice. Legislation such as the Civil Rights Act of 196462 or a case like *Brown v. Board of Education*63 are clear historical illustrations of the law being used to combat the social injustice of segregation. So, too, international human rights norms have played a critical role in protecting vulnerable people throughout our world. One might think as well of the careers of lawyers such as Thurgood Marshall and Ruth Bader Ginsburg, who, first as attorneys and later as Supreme Court Justices, did so much to battle racial and gender inequality respectively. There can be no doubt that many lawyers have worked *through* the legal system as a means of creating greater social justice.

Yet lawyers and the law can also work against advancing social justice concerns too. The history of the American legal profession and its leading educational institutions sadly reflects the extensive efforts made by the profession’s elite across many decades to prevent newcomers such as Blacks, women, and Jews from entering and advancing in their ranks.64 More broadly, it is possible, if not probable, that legal systems and their associated patterns of thought and activity tend more toward maintaining an existing social order than changing an existing social order. “Law and order” are two words we pair together far more often than “law and social change.”

The law itself can serve as a potent tool in *rationalizing* ongoing social injustices.65 Native American legal scholar Robert Williams’s assessment of the role of law in the conquest of North America is very telling. “The West’s conquest of the New World,” wrote Williams,” [a]bove all... was a *legal* enterprise” in which law served to justify the processes of conquest and subordination.66 So, too, some of the most penetrating historical critiques of the American legal system demonstrate our legal system’s ability to perpetuate racism rather than undermine it, beginning with our nation’s pro-slavery Constitution, through antebellum judicial support of slavery, and, to this day, the role “colorblind” laws play in maintaining a level of racial subordination.67

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Social activist Audre Lourde once argued, “the master’s tools will never dismantle the master’s house. They may allow us temporarily to beat him at his own game, but they will never enable us to bring about genuine change.” While I do not know whether Lourde is correct in her use of the word “never,” I accept her deep insight that when it comes to social justice the tools needed to dismantle an unjust system can be very different from the tools (including law) needed to create and maintain that system. Further, I do suspect that on many foundational issues of progress toward greater social justice, legal systems have tended to be more often “neutral” or even “followers” rather than “leaders.”

How different the history of our society would be if the group so concerned with the administration of justice—lawyers—had taken upon itself the task of trying to recognize the deep social injustices which underlie so many aspects of our social reality and acted upon them. How different our society could be in the future if we lawyers, as a profession, now take upon ourselves that task. Many of the greatest opportunities to advance justice in our world may be found in tackling the social injustices which undergird society. To do that, we need to learn to see the invisible.

CONCLUSION

The biblical prohibition against idolatry is ancient. The relevance of that prohibition for modern lawyers is not. Here I have argued that the biblical prohibition against idolatry provides a useful lens for critiquing the American legal profession. Whether it concerns the “small” issue of low job satisfaction among lawyers, the broader issue of the tendency of many lawyers to concentrate exclusively on particular interests like money and jail time when representing clients, or the even broader issue of the role of lawyers in confronting—or more often failing to confront—deeply embedded structural injustices, too often our profession focuses on visible factors and ignores invisible ones. By no means is this to claim that lawyers who do such things actually practice idolatry. Rather it is simply to assert that this biblical teaching offers a useful lens for better understanding our profession.

It is natural to think of the biblical prohibition against idolatry in negative terms, as a ban indicating what adherents were not allowed to do. But it can also be understood positively. Through rejecting the worship of idols, adherents began their unfolding journey of worshiping and following their invisible God.
I believe that a positive framing applies here, too. The goal of this paper is not simply to criticize our profession's proclivity to focus on the visible, but to suggest that opportunities for foundational growth await our profession. Through greater attention to the invisible, lawyers could become happier people, their clients could be better served, and our broader society could be made more just. I hope that our profession seizes those opportunities.