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Dear Nootbaar Conference Participants:

Below are some materials (an abstract, introduction, and outline) briefly sketching my paper. It is very much a work-in-progress. I welcome your feedback, either during the conference or following it.

Sincerely,

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“Lawyers Serving Gods, Visible and Invisible”

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Abstract

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 structural 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 Jewish teaching concerning idolatry, this paper 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 through lawyers paying greater attention to invisible interests.

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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 In this paper, I suggest that another 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 structural injustices.

To develop this argument, I work in two stages. First, I describe the concept of idolatry within Judaism and what I mean by “visible” as opposed to “invisible” interests in the context of legal practice. In taking a Jewish approach to this subject, 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 as well.³ Rather, I approach this subject through Jewish lenses because I am a Jew and that is the religious tradition that I know. Second, I turn to the specific topics mentioned above. From “small” matters such as attorneys’ choices in their own careers to broad issues of structural injustice, the metaphor of idolatry offers a useful lens for understanding and critiquing some foundational aspects of American legal practice.

² The metaphor of humans as created “in God’s image” comes from *Genesis* 1:26–27. A fine illustration of how values can become associated with a metaphor comes in *Mishnah Sanhedrin* 4:5, where 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 (“‘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.’”).

³ For a general background, including differences regarding iconography, see *Idolatry: Abrahamic religions*, WIKIPEDIA, https://en.wikipedia.org/wiki/Idolatry#Abrahamic_Religions (last visited Jan. 30, 2016).

Idolatry in Jewish Thought

Judaism's prohibition against idolatry is firmly rooted in the Bible. In the book of Exodus, the Ten Commandments explicitly prohibit idolatry,⁴ soon followed by the Golden Calf story in which the lesson is taught in the breach.⁵ Numerous other biblical references reinforce this theme,⁶ as does subsequent Rabbinic and post-Rabbinic literature.⁷ As to why idolatry is prohibited, multiple theories exist, but as to the fact that Judaism prohibits idolatry, there can be no doubt.⁸ Indeed, one of the most famous of Jewish *midrashim* (i.e., stories, often highly inventive, commenting on 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 Abraham recognized that the idols in his father Terah's idol store were merely statues and had no real power.⁹

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 may be allowed—they certainly exist in the Bible—but not visual representations.¹⁰ (Indeed, the great Jewish atheist Sigmund Freud thought that this insistence on God's invisibility was one of Judaism's greatest contributions, for once God was made invisible, the need for abstraction in

⁴ See *Exodus* 20: 3–5 (“You shall have no other gods before me. You shall not make for yourself an idol, whether in the form of anything that is in heaven above, or that is on the earth beneath, or that is in the water under the earth. You shall not bow down to them or worship them.”)

⁵ See *Exodus* 32.

⁶ See, e.g., *Deuteronomy* 4:15; 5:23.

⁷ See generally Moshe Halberthal & Avishai Margalit, *IDOLATRY* (1992).

⁸ *Id.* at 1–8.

⁹ Rabbi Hiyya the Great (c. 200 CE) tells 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? Terah took Abraham and passed him off to [King] Nimrod.

Genesis Rabbah 38:13, as translated by

http://www.sefaria.org/Bereishit_Rabbah.38.13?lang=bi&with=all&lang2=en.

¹⁰ See Halbertal & Margalit, at 37 (on verbal versus visual representations of God).

thought became paramount, as did the possibility of creativity.¹¹) Lawyers, of course, are not in their professional role engaged in religious worship; however, this distinction between the visible and the invisible, as well as the call for caution toward excessively focusing on the visible, provide a useful lens for both understanding and critiquing American lawyers.

What is a visible interest and what is an invisible interest? When thinking about the legal realm, the essential distinction rests not upon whether an interest is physically visible as with a physical object, but whether it is recognized. A law school graduate deciding between two job offers asks, “What does each job pay, and how many hours will I have to work?” A supervising district attorney reviewing the records of junior attorneys asks, “How many cases did each attorney win?” A managing partner assessing the productivity of an associate asks, “How many hours did this associate bill?” A plaintiff in tort action asks his lawyer, “How much money can we get in a settlement?” A defendant in that same action asks, “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. Note too that 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.

Invisible interests have a different flavor. Sometimes they relate to conscience and morality. Sometimes they concern feelings and hopes. 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.¹² They are the inner voice that leads the prosecutor to cease prosecuting a defendant that 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), that leads a judge to decide the prior precedent was not intended for this sort of case, 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 and that invisible interests are coterminous with morality, though often pecuniary interests are visible and often moral interests

¹¹ 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”).

¹² One might make the connection by way of rough analogy to the biblical story of the burning bush in *Exodus* 3, wherein the voice of God calls out, “I will be whom I will be.” *Exodus* 3:14.

are invisible. Further, I do not mean to suggest that invisible interests are necessarily progressive while visible interests are inherently regressive. Visible interests are very important to our world too. Rather, the essential distinction is between those interests that are readily recognized and those interests that are not as readily recognized.¹³ With this distinction in mind, let me turn to three examples. Each bespeaks the importance of lawyers recognizing invisible interests along with visible ones.

[AN OUTLINE OF THE REMAINING SECTIONS FOLLOWS ON THE NEXT PAGE.]

¹³ Sometimes interests may change between being visible and invisible, either because what was not previously recognized becomes recognized or because what was once recognized is now overlooked.

Outline of Remaining Sections

I. Lawyers and Their Mental Health

Numerous studies over the past forty years have shown poor levels of mental health among both law students and lawyers. What causes this problem? There is not one single answer that question, however, recent empirical research by Lawrence Krieger and Kennon Sheldon argues that lawyers driven by external motivations are at much greater psychological risks than lawyers motivated by internal reasons. “External factors, which are often given the most attention and concern among law students and lawyers (factors oriented toward 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.¹⁴ External factors are largely visible while internal factors are largely invisible. The latter, however, are critical to lawyer well-being.

II. The Proclivity of Lawyers to Focus on Their Clients’ Visible Interests

Clients, like lawyers, possess both visible and invisible interests. Though I cannot prove it empirically, it is my sense that lawyers all too often focus on their clients’ visible interests and overlook their invisible ones. What are such visible interests? In civil cases, the most obvious are pecuniary, and in criminal cases, the most obvious is incarceration. Yet clients have interests well beyond these. For example, in the criminal context, one might see attaining a conviction as a visible interest for many prosecutors, while serving justice, which could lead a prosecutor to drop an unsupported case, as an invisible interest. In the civil context, an illustration of this comes from the subject of apology, a topic I studied for many years. Apologies touch upon important invisible interests (e.g., relational interests, moral interests, etc.) that lawyers commonly overlook.

III. Lawyers Confronting Social Injustices

How often do lawyers take on the prophetic role of confronting deeply entrenched social injustices? At a basic level, lawyers commonly serve the existing social order, for that is the work that, among other things, most readily pays the bills. Yet, as Thomas Shaffer argued, there is a role for lawyers too in stepping outside of the existing social order, seeing what is wrong with it, and calling out for change. Drawing on the writings of Abraham Joshua Heschel and Walter Brueggemann, I shall suggest that lawyers engaged in this important work are usually serving society’s invisible rather than visible interests – they are serving the society-that-could-be rather than simply the society-that-now-is.

¹⁴ Lawrence S. Krieger & Kennon A. Sheldon, *What Makes Lawyers Happy?: A Data-Driven Prescription to Redefine Professional Success*, 83 GEO. WASH. L.REV., 554, 554 (2015).