"Is Agape the Last, Best Hope for the Legal Profession?"

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Let me begin with my take-away point: Lawyers who seek to practice agape by acting as moral subjects in their client relationships do not face an easy road. Indeed, the road is getting more difficult by the day. But I believe that this road does not only make the practice of agape more difficult, it also makes the continued viability of the legal profession – as opposed to a mere marketplace of legal services providers – more tenuous.

I approach agape through the ministry of Martin Luther King Jr. When we love those "who oppose us," according to Dr. King, we speak of agape. Agape "means nothing sentimental or basically affectionate; it means understanding, redeeming good will for all men, an overflowing love which seeks nothing in return." Agape "is the love of God working in the lives of men," and thus "[w]hen we love on the agape level we love men not because we like them, not because their attitudes and ways appeal to us, but because God loves them." The key, for King, was that agape is a "disinterested love" in the sense that "it is a love in which the individual seeks not his own good, but the good of his neighbor," and does not discriminate "between worthy and unworthy people" or based on "any qualities people possess."

Agape, as envisioned and practiced by King, does not passively take the shape of the neighbor's own stated preferences. On one hand, there is the danger of paternalism that accompanies love that is too far removed from the lived experience of the neighbor; on the other hand, though, stepping into the neighbor's shoes does not mean that we reflexively adopt the neighbor's subjective understanding of her own best interest. Sympathy for the neighbor gives agape its real-world traction, but agape's implications cannot be defined solely by the neighbor's lived experience. Agape pushes the lover and the loved to look beyond themselves.

Even within the black community of his own city, King showed that love is not passive. King worked to motivate the community to organize and persist in the Montgomery bus boycott. King put his own being into the shoes of his neighbor (painfully aware of their exhaustion and humiliation), but he pushed the neighbor to embrace a reality that may have laid beyond their view at the time (eventually they came to see that it was more honorable).

In loving his neighbor – friend or foe, black or white – King was a subject, investing himself in the neighbor in order to see the world through the neighbor's eyes, but insisting that the neighbor expand their view to encompass a truer, less isolated vision of their own well-being.

So what insights does King's practice of agape offer to lawyers? Legitimate concerns about trumping the client's moral agency do not warrant the lawyer abdicating her own moral agency. Especially in cases involving large and sophisticated clients, lawyers and clients tend not to engage each other on the moral dimension of the representation. More often than not, it seems, the lawyer permits the client's moral assertion to hold sway without engaging it – even when, as is usually the case, those assertions are never made explicit. This is a primary dynamic underlying the "lawyer as mouthpiece" paradigm. The lawyer pursues the client's objectives to the brink of illegality, never bothering to unpack the moral implications of the chosen course or to give the client reason to reflect on those implications as part of the decision-making process.

Take Enron, for example. Enron's lawyers appear to have offered little resistance, or even reflection, on the path charted by Enron's managers. Similar stories have emerged in the wake of other companies' collapse, including the case of Refco, for which the company's Mayer Brown attorney, Joseph Collins, ended up in jail for helping executives conceal millions of dollars in debt even though he offered technical justifications for non-disclosure of the debt and testified at trial that he was acting at his client's direction.

While many critics would accuse the attorneys for Enron or Refco of being "too loyal" to their clients, in reality they were not loyal enough – they acted as conduits for the client's stated objectives, not as moral subjects calling the clients to reflect critically on the wisdom and implications of those objectives. When lawyers ignore moral intuitions about a client's plan, they may be ignoring potential grounds for liability, or at least grounds for a deeper conversation about the client's long term best interests.

Lawyers who fail to heed agape's admonition to act as subjects in their relationships with clients will be unable to serve as a needed reality check. In Enron's case, in particular, this meant that the managers' narrowly defined vision of the corporation's best interests went unchallenged. Much of the debacle might have been averted, in Deborah Rhode's view, if the lawyers had "brought a stronger, more objective and more critical voice to the disclosure process." If we expect lawyers to help their clients steer clear of these debacles (as we should), we are looking to lawyers for more than technical expertise. To the extent that these companies' lawyers acted as empty vessels by which their clients could achieve their own perceived interests, the lawyers served neither the client's actual interests nor the interests of the non-shareholder constituents with whom the client's interests are invariably linked. These companies

needed a relationship with a moral subject possessing legal expertise, not simply a series of transactions with a technician possessing legal expertise.

Admittedly, agape may still appear to be an uneasy fit for the corporate lawyer. Most of the human beings whose interests were marginalized in these episodes – shareholders, rank-and-file employees, community members who depend on the company's continued viability – are not in direct relationship with the lawyer. They are far from the action and out of sight. Practicing agape in the context of a face-to-face relationship with a real human being is challenging enough; practicing agape in the context of representing a corporate entity made up of far-flung and often anonymous stakeholders seems more difficult by an order of magnitude.

So how does agape apply to distant and impersonal relationships? This is not a question that was foreign to Dr. King. From the outset of his ministry, he preached agape to congregants whose oppressors included distant legislators and judges. In such contexts, agape aims less at the particular needs of the distant individual and more at what we cannot help but know about human well-being. Indeed, the conditions necessary for the flourishing of distant individuals will often be the same conditions necessary for the flourishing of those who stand before us. Racist views harmed the well-being of both the whites who jeered participants in the Montgomery bus boycott and the government officials who erected the legal framework that made the boycott necessary. The non-violence that marked the behavior of King's congregants toward the jeerers in their immediate path had positive effects that spilled over into city councils and state legislatures across the region. Conversely, by elevating the short-term interests of the company's executives over the long-term interests of the company's shareholders and other stakeholders, Enron's lawyers did neither group any favors. Witness the fates of Ken Lay and Jeffrey Skilling. One clue about what it means to practice agape in a distant and impersonal relationship may be to remember what it means to practice agape in the relationship that lies before us.

As I mentioned at the outset, the road of agape in the legal profession may be growing more difficult. Competitive pressures are pushing law firms to greater efficiencies, but those efficiencies can make the attorney-client relationship more difficult to distinguish from any other provider-consumer transaction. Clients understandably have become more aggressive about reducing costs, and our globalized economy provides an array of avenues by which to do so. It remains to be seen how these changes will alter the nature of the attorney-client relationship, and

whether they will contribute to marginalizing the attorney's role as trusted personal advisor and normalizing a conception of the attorney as technician. There is reason to believe that trust may lose its place as a constitutive element of the attorney-client relationship as the relationship itself becomes less personal, more distant, and more fungible. As the relationship becomes more tenuous, it may lack the resources to support any function beyond the strictly technical, and the lawyer may not have the requisite knowledge or standing to act as anything more than a mouthpiece. The lawyer as subject may recede even further from view.

Trust in the fullest sense requires more than the awareness that legal remedies are available in the event that the trust is breached. Trust, as a willingness to make one's self vulnerable to another, is relational. An arms-length transaction between two interest-maximizing individuals may often require a certain degree of trust, but that is not the quality of trust that has made possible the attorney's roles as counselor, advocate, and public citizen. Trust as rational calculation may work fine in my relationship with "a" car dealer, but how will it work in my relationship with "my" attorney?

It is this sort of relational trust – by which I mean a client's trust in the relationship itself, as opposed to the client's trust in the market or regulatory safeguards in which the relationship is embedded – that is essential to a lawyer's practice of agape, but that is under increasing pressure today. The boundaries between the provision of legal services and the provision of other business-related services are quickly blurring, and lawyers need to come to grips with the fact that one's status as a "professional" is of decreasing relevance to one's success meeting the demands of customers. The blurring of these boundaries can be best captured by several overlapping trends, all of which will shape the long-term viability of relational trust – and with it, the capacity to practice agape.

Globalization: Today's corporate lawyers not only face intense competition from the law firm across town; due to our globalized economy, they now face competition from firms across the ocean, and firms in some foreign jurisdictions have competitive advantages due to recent regulatory reforms. Even more problematic is the fact that the global provision of legal services involves less personal connections between provider and client. The lack of face to face interaction is not conducive to trust. Researchers have found that visual contact significantly increases cooperation rates in social dilemmas even though the ability to see the other participants does not change the payoffs. I'm not sure if skype can fill the void. Beyond the

importance of visual contact, though, the global provision of legal services often occurs without the shared background of cultural norms and values in which trust is rooted. Trust relationships develop from a sense that we are responsible for each other.

We know that trust and distrust are contagious. Even while stretching and "thinning" the attorney-client relationships, globalization ratchets up the level of interconnectedness dramatically. If the pro-competition reforms in other countries make trust less of a hallmark of the attorney-client relationship by making the relationship just like any other provider-consumer relationship in the marketplace, the effects will not easily be kept off American shores.

By outpacing personal familiarity and the reach of law, the global economy tests the boundaries of both affective and cognitive trust between lawyers and clients. A lack of trust may contribute to the tendency to use lawyers for their technical competence on discrete tasks, rather than relying on them for a wider ranging advisory role.

Much of the focus on outsourcing focuses on the fact that an overseas third party is being brought into the attorney-client relationship, but there is another element to the outsourcing phenomenon that is just as important from the standpoint of relational trust: outsourcing is based on the disaggregation of legal services. If legal services, like manufacturing, can be stripped down to their component parts and tasked to the lowest cost provider, is relational trust still part of the equation? Are attorneys selling a product, or are they selling, in a very real sense, a relationship? Put simply, can relationships be disaggregated?

Other contributing factors include the rise of in-house counsel, the decline of self-regulation, the potential rise of multi-disciplinary practice, and the continued deterioration of trust-enhancing culture within law firms. On this last factor, studies show that "the best way to determine whether or not a person is trustworthy is to ask him whether or not he trusts others." A lawyer whose workplace is devoid of relational trust will not be well equipped or inclined to contribute to relational trust's flourishing with clients.

Given these trends, it may be more accurate to say that the legal profession is moving from a paradigm of "trusting in" to "trusting that," a distinction productively mined by Claire Hill and Erin O'Hara in other contexts. For our purposes, what I'm trying to capture with the labels is the notion that, perhaps lawyers' distinctive service was providing business with a "thickness" of relationship that allowed clients to trust "in" the lawyer. And now as lawyers' services have grown less distinctive and their firms have marginalized non-economic values, perhaps clients

are asked only to trust "that" a lawyer will not act contrary to the client's interests in a specific scenario. If the legal profession is now resigned to using ethics rules, contract, or other market incentives to ensure that corporate clients can accurately predict how their lawyers will behave in a given situation, rather than cultivating a more general trust that the lawyer, because she is a lawyer, is worthy of the client's trust, what have we lost?

If the emerging model of trust for the legal profession is best expressed as trust "that" an attorney will perform the discrete task for which she is hired, much as we trust a photocopier technician to get the machine running again, then contract and market incentives should be more than sufficient. But if lawyers are more than technicians, then clients are losing something when the thinning of trust contributes to the thinning of the attorney-client relationship. And of course, attorneys are losing something too, not just in the loss of their distinctiveness among market providers, but also in the loss of a sense that they are involved in a vocation that entails more than technical competence.

There may be regulatory fallout as well – it is not clear why the public should value and support a whole web of privileges and powers for attorneys if attorneys are engaged simply in a series of self-interest-maximizing market transactions, removed from the relationships of trust in which a more fulsome understanding of the client's well-being and the public interest can be productively explored.

At the same time, changes to the profession make trust more important, for as the role expectations of attorneys become more fluid and uncertain, the background assumptions that shape the attorney-client relationship become fewer in number and weaker in strength. As globalization accelerates, "system trust" is in short supply. There is a void to be filled, but only if interpersonal trust is available. Trust is needed given the unpredictability of social life and the indeterminacy of social interaction. Given the trends discussed above, it would not be surprising to find that indeterminacy in the provision of legal services is rising. As role negotiability increases in a system, opportunities for trust correspondingly increase.

Legal education has a role to play in emphasizing the importance of trust. Patient-physician trust is driven by relationship factors (how well patients know their doctor and how much choice they had in picking doctor) and personality traits (whether the doctor is good listener and whether they project confidence), not from physician demographics or professional characteristics. Law schools do not fulfill their potential on this front simply by having students

learn what Rule 1.6 says about confidentiality; they should also have students think about, talk about and practice the relational aspect of the lawyer's work. Corporate clients' definition of attorney effectiveness "moves beyond excellent technical competence toward excellent relationship skills." Very little time in law school is spent on client counseling exercises, for example, or on the importance of empathy and perceptual clarity. Listening skills can – and often must – be taught. Clients care about an attorney's capacity for reflective moral judgment, but if law schools treat moral conversations as ill-suited for the classroom, will our graduates be prepared to meet clients' expectations?

If lawyers only bring technical competence to the table, much of what lawyers do can be stripped down to separate tasks and distributed to other providers. But what if the bundle of tasks is more than the sum of its parts?

Agape reminds us that seeking the good of the client requires the lawyer to act as a moral subject, not as a mouthpiece. The attorney's provision of legal services occurs in the context of a real human relationship with her client, whether the client is an actual person or an organization managed by, and created to serve the interests of, actual persons. The richness of the relationship will be a function, in part, of the tasks for which the attorney has been retained. The opportunities for, and appropriateness of, moral engagement will vary from a one-time routine closing on a home sale, to document-intensive discovery work, to an ongoing counseling role in a business, to a contentious child custody case. Whether or not the practice of agape manifests itself in every case, agape can shape the lawyer's self-conception and deepen her commitment to active participation in facilitating the client's well-being in a way that cannot easily be limited to certain categories of legal practice.

Over the coming years, one key indicator of the health of the legal profession as a profession will be the viability of agape as a hallmark of the lawyer's calling.