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Lecture

MARTIN LUTHER KING JR.'S LESSONS FOR LAWYERS IN A TIME OF MARKET DISRUPTION

Robert K. Vischer*

When I was a second-year litigation associate, I was given my first case to manage on my own. It struck me as a dry, run-of-the-mill breach-of-contract case turning on the allegedly shoddy production of packaging material. On my first visit to the client's office, I met with the mid-level manager who supervised the manufacturing process that led to the complaint's allegations. I was planning to spend an hour focusing on our discovery plan. Instead, I spent more than an hour simply listening before we started to talk about the specifics of the complaint, much less a discovery plan. The manager needed to tell me his story, sharing how this had upset his life, how the allegations threatened his career, and how the anxiety had created strain in his family. Before my knowledge of the discovery rules could become a relevant resource, my ability and willingness to sympathize with the personal turmoil he was experiencing was the most important professional skill I possessed. Even a "dry" contract case required me to step into the shoes of another human being.

At the time, though, I did not recognize my initial conversations with the manager as a core element of professional competence. I assumed that I was stepping out of the attorney's role until the point when he was ready to start talking about the discovery plan, as if engaging him as a person was conceptually separable from engaging him as a client. I bear much of the responsibility for my narrow view, but I wonder how my introduction into the profession might have contributed to my early conception of the lawyer's work. Whether "hired gun," "mouthpiece," or "photocopier technician," the rhetoric on which our professional narrative is built often gives short shift to the thickness of relationship that lies at the center of our work, properly understood.

At the risk of sounding wildly naïve and unrealistic, let me suggest that what is too often missing from our conception of the lawyer's work is a rich and full understanding of the human person. The absence is starkly

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apparent when one considers the anthropological commitments that permeated the work and worldview of Martin Luther King Jr. Though he was not a lawyer, he was an advocate for the interests of others, and he was a Christian who was able to live out his beliefs in ways that were accessible and influential to those who did not share the underlying religious premises. While King's moral duties were not constrained by the more particular fiduciary duty that lawyers owe to their clients, I believe that lawyers overstate the degree to which their moral agency is so constrained, and in doing so, abdicate moral responsibility for their work. Lawyers who endeavor to practice with the person at the center, as King did, will act as: (1) subjects; (2) healers; (3) prophets; and (4) realists.

Let's take a step back and contextualize this discussion. As even a casual observer knows by now, the legal profession—or perhaps more accurately, the legal services market—is in a period of dramatic and wrenching change. Richard Susskind offers some stark prophecies about the future of lawyers.¹ He focuses on three main drivers of change: “the ‘more-for-less’ challenge, liberalization, and information technology.”² He argues:

[R]egarding legal work as bespoke in nature is an unhelpful—if often romantic—fiction. I accept that some legal issues that arise do call for the application of acute legal minds and the handcrafting of tailored solutions. But I believe much less legal work requires bespoke treatment than many lawyers would have their clients believe. More than this, I contend that deploying bespoke techniques in many instances is to adopt cottage-industry methods when mass production and mass customization techniques are now available to support the delivery of a less costly and yet better service.³

The legal jobs he sees in the future hardly conjure up images of Atticus Finch: legal knowledge engineer, legal technologist, legal process analyst, and legal project manager.⁴ All trends seem decidedly against a more person-centered approach to practice. The focus is currently on efficiency,

¹ RICHARD SUSSKIND, TOMORROW'S LAWYERS: AN INTRODUCTION TO YOUR FUTURE 3 (2013).

² *Id.*

³ *Id.* at 24.

⁴ *Id.* at 111; see HARPER LEE, TO KILL A MOCKINGBIRD 4-5 (referencing a main character from Harper Lee's book whose profession was a lawyer).

streamlining the process, and avoiding unnecessarily “bespoke” provisions of legal services.⁵

Susskind’s forecast not only stands in tension with King’s model of the trusted counselor and advocate, but also with a more lawyer-specific prescription offered twenty years ago by Anthony Kronman. In his widely discussed book, *The Lost Lawyer*, Kronman lamented the fact that, from his vantage point in the early 1990s, he was witnessing the demise of “the belief that the outstanding lawyer—the one who serves as a model for the rest—is not simply an accomplished technician but a person of prudence or practical wisdom as well.”⁶ As this ideal receded from view, Kronman worried that “lawyers will find it harder to believe their work provides intrinsic fulfillment of any kind” and thus will conclude “that their yearning to be engaged in some lifelong endeavor that has value in its own right can no longer be satisfied in their professional work.”⁷ Kronman was generally prescient, but there is one point on which he might have been overly optimistic. “Of course,” he emphasized, “the external benefits of law practice remain as obvious as before.”⁸ Kronman presumed that the lost ideals of the profession are bad for the lawyer’s ability to derive meaning from legal practice and for the country’s traditional reliance on lawyers as statesmen.⁹

What if, though, the failure to reclaim this traditional lawyer’s role not only hurt the lawyer’s ability to derive meaning from her work and contribute to the social good, but also made lawyers expendable?¹⁰ Did the loss of what Kronman referred to as “the lawyer-statesman” ideal give rise to a conception of the lawyer’s role which made that role susceptible to market-driven obsolescence?¹¹

Note that I am not suggesting that Susskind’s forecast is wrong; he is undoubtedly better at this sort of prediction than I am. But the future he predicts is not static nor is the outcome certain. He recognizes that there will still be a place for personal, face-to-face legal counseling; he just does not think there will be *much* place for it.¹² But surely lawyers have some capacity to shape the dynamic, even if the future is not entirely in our

⁵ SUSSKIND, *supra* note 1, at 24.

⁶ ANTHONY KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 2 (1993).

⁷ *Id.* at 3.

⁸ *Id.*

⁹ *Id.* at 3–4.

¹⁰ Thanks to my colleague Jerry Organ for helpful conversations developing this line of thought.

¹¹ KRONMAN, *supra* note 6, at 3.

¹² See SUSSKIND, *supra* note 1, at 10–14 (discussing how technology in the profession will alter the way lawyers will handle their business).

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hands. Indeed, there is some evidence that we are already failing to provide law students with the broad range of competencies that legal employers want.¹³ If we train lawyers only to be technicians, if lawyers conceive of themselves as only technicians, it will be harder for clients to know what they might be missing when they ask their lawyers to function only as technicians.

What is the alternative? Kronman's understanding of the lawyer-statesman entails legal work that begins and ends in relationship. He referred to the quality of judgment that lawyers must possess as one of "imaginative sympathy," which includes both compassion and detachment.¹⁴ "To ensure that he remains sufficiently detached to survey the alternatives from a vantage point different from any of their own internal points of view," according to Kronman, "it is necessary that he hold something in reserve even while making a maximum effort at sympathetic understanding."¹⁵

Lawyers who follow King's example and Kronman's advice will act as subjects, not as objects. In other words, they become an active participant in a dynamic relationship—a subject—not a passive vessel or conduit for client demands. Kronman emphasized that both counseling and advocacy roles caution that "a lawyer cannot be the mere minister to [the client's] ambition that the narrow view portrays him as being," for both roles demand "practical wisdom," not just "technical knowledge."¹⁶ Lawyers give voice to their clients, without a doubt, but a lawyer is more than a mouthpiece. A lawyer dedicated to the client's best interests will not presume to equate the client's well-being with the maximization of her independence and autonomy.

King regularly offered agape as the model for engaging a world that was hostile to the goals of the civil rights movement.¹⁷ "Agape" is the term used in the Bible to denote sacrificial love, in contrast to "phileo," which focuses more on the lover's feelings for another, rather than on how the lover can meet the other's needs.¹⁸ When we love those "who oppose

¹³ See Neil W. Hamilton, *Changing Markets Create Opportunities: Emphasizing the Competencies Legal Employers Use in Hiring New Lawyers (Including Professional Formation/Professionalism)*, 65 S.C. L. REV. 547, 552-53 (reporting survey data showing that both large and small law firms consider trustworthiness, strong relationships, ability to inspire confidence, and good judgment as "[v]ery [i]mportant to [c]ritically [i]mportant").

¹⁴ KRONMAN, *supra* note 6, at 72.

¹⁵ *Id.*

¹⁶ *Id.* at 134.

¹⁷ MARTIN LUTHER KING JR., *A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING JR. 8-9* (James Melvin Washington ed., 1986) [hereinafter *A TESTAMENT OF HOPE*].

¹⁸ *Id.* at 8.

us,” according to King, we speak of agape.¹⁹ 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.”²⁰ The key for King was that agape is a “disinterested love” in the sense that “[i]t 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.”²¹ The importance of these demands for the civil rights movement is obvious, and King made it explicit by asserting that “the best way to assure oneself that love is disinterested is to have love for the enemy-neighbor from whom you can expect no good in return, but only hostility and persecution.”²²

Crucially, agape itself springs from the loved one’s needs.²³ Loving the white man, according to King, was a response to the white man’s needs, for “his soul [was] greatly scarred” by segregation.²⁴ “[T]he white man need[ed] [the] love [of the African American] to remove his tensions, insecurities, and fears.”²⁵ Even within the black community of his own city, King showed that love is not passive—it pushes and challenges. King worked to motivate the community to organize and persist in the Montgomery bus boycott.²⁶ In leading the boycott, King asked his followers to look beyond the hardship it entailed over months of walking, and by saying this, he was not acting as a passive conduit for the community’s stated preferences.²⁷ He later wrote that the people, even though they were “exhausted by the humiliating experiences that they had constantly faced on the buses . . . came to see that it was ultimately more honorable to walk the streets in dignity than to ride the buses in humiliation.”²⁸

King’s approach resonates with Kronman, who emphasized that the lawyer must assess the client’s judgment from “the perspective of the client’s own interests,” which requires the lawyer “to place himself in the client’s position by provisionally accepting his ends and then imaginatively considering the consequences of pursuing them, with the

¹⁹ *Id.*

²⁰ *Id.* at 8–9.

²¹ *Id.* at 19 (citation omitted).

²² *Id.*

²³ A TESTAMENT OF HOPE, *supra* note 17, at 19.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 425.

²⁷ *Id.* at 425–28.

²⁸ MARTIN LUTHER KING JR., STRENGTH TO LOVE 150 (Fortress Press Ed. 1981) [hereinafter STRENGTH TO LOVE].

same combination of sympathy and detachment the lawyer would employ if he were deliberating on his own account.”²⁹ King put his own being into the shoes of his congregants—acknowledging the hardship caused by walking miles back and forth to work every day—but he pushed them to embrace a reality that may have laid beyond their view at the time.

Agape’s lessons for lawyers will go nowhere unless lawyers actually conceive of themselves as subjects, a task that is easier said than done. They are not empty vessels or mere extensions of the client’s autonomy. To be sure, lawyers must also acknowledge their clients as subjects. Replacing the “lawyer as mouthpiece” paradigm by elevating the lawyer’s own moral convictions as a trump card over the client’s own commitments and priorities does not further agape. Lawyers must guard against overreaching and remain cognizant of the power disparity in many attorney-client relationships, especially when clients are not sophisticated in legal analysis or experienced with the intricacies of the legal system. If the lawyer and client are both subjects, they will act as partners in a moral dialogue and remain open to the possibility that their partner in the endeavor may teach them something.

Pushing back against the view of the “lawyer as mouthpiece” is only possible if trust finds fertile ground in the relationship. The client must trust that the attorney has the client’s best interests at heart, and that widening the conversation to encompass considerations beyond the maximization of the client’s legal rights and privileges need not invariably function as an entryway for the attorney’s own interests. The attorney must trust the client enough to listen authentically, to step beyond her own assumptions long enough to encounter the client as a subject, not as an object, and to question whether her own perspective accurately reflects the client’s best interests. The attorney-client relationship requires mutual trust because approaching the other as a subject requires mutual vulnerability.

Trust in the legal profession is under tremendous strain right now given market dynamics and pressure to become less distinct from other business service providers.³⁰ Large law firms have arguably become less conducive to trust. As they grow more dependent on mergers and lateral hiring, they compromise their ability to build a culture shaped by nonmonetary values. Steven Harper cites an end-of-year email from the

²⁹ KRONMAN, *supra* note 6, at 130.

³⁰ See Robert K. Vischer, *Big Law and the Marginalization of Trust*, 25 GEO. J. LEGAL ETHICS 165, 187 (2012) (explaining that the legal profession is currently transitioning from “trusting in” to “trusting that”).

chair of global law firm K&L Gates to the firm's partners spread over forty-eight worldwide offices:

Many of you came from different cultures. I don't care about your prior acculturation. . . . We are a US-based global law firm. US law firms operate on a cash basis of accounting. Our fees must be collected by midnight within the fiscal year in which they are due. . . . I couldn't care less whether it appeals to you. It is who we are and therefore it is who you are.³¹

If pursuit of the bottom line is the only value shared among partners, trust may be in short supply, for trust does not flourish apart from relationships. A lack of trust among lawyers can impair trust between lawyer and client, for studies show “that trust and distrust are contagious.”³² Technology can put additional strain on trust, but need not crowd out the trust-facilitating bond that can develop between lawyer and client. As John McGinnis and Russ Pearce point out, relationships of trust “allow the lawyer to facilitate clients to see their long-term legal self-interest, even when clients’ passions and confusions cloud that interest.”³³ They continue by stating, “[m]achines are unlikely to perform this bonding function and, thus, will be unlikely to substantially affect this important aspect of the lawyer-client relationship.”³⁴ Lawyers committed to agape may not be able to change firm cultures single-handedly, but they will remain cognizant of the importance of trust as they build relationships with both colleagues and clients. Technology stands to transform much of the legal services industry.³⁵

Agape not only helps prevent the attorney and client from being isolated from each other, but it can also help the attorney avoid the mistake of presuming that the client is isolated from others. King's invocation of agape was geared toward the neighbor's development of closer human relationships—breaking down walls between enemies and encouraging the shared pursuit of higher purposes among friends.³⁶ To understand why, we need to account for King's belief in the

³¹ STEVEN HARPER, *THE LAWYER BUBBLE: A PROFESSION IN CRISIS* 118 (2013).

³² Vischer, *supra* note 30, at 176.

³³ John O. McGinnis & Russell G. Pearce, *The Great Disruption: How Machine Intelligence Will Transform the Role of Lawyers in the Delivery of Legal Services*, 82 *FORDHAM L. REV.* 3041, 3055 (2014).

³⁴ *Id.*

³⁵ SUSSKIND, *supra* note 1, at 10–14; see also Theresa A. Gabaldon, *Virtual Virtuous Living: How Can The I-Generation of Lawyers Best Love And Serve Its Neighbors?*, 43 *VAL. U. L. REV.* 1045, 1047–61 (2009) (discussing how technology is further transforming the legal profession).

³⁶ A TESTAMENT OF HOPE, *supra* note 17, at 19–20.

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interconnectedness of humanity and the unifying narrative of the universe.

In one of the most famous lines from his *Letter from Birmingham Jail*, King proclaimed that “[i]njustice anywhere is a threat to justice everywhere.”³⁷ He did not mean that injustice unchecked will eventually affect everyone; instead he was making the more radical claim that injustice anywhere harms the human community to which we all belong. As he put it in another context, “[w]e are [all] caught in an inescapable network of mutuality, tied in[to] a single garment of destiny[, and thus,] [w]hatever affects one directly, affects all indirectly.”³⁸ This view of the world, which emanates from a theological tradition called personalism, fundamentally shaped his witness, as he worked tirelessly to repair the breach in what he referred to as “the beloved community.”³⁹ In a real sense, King was a healer.

Viewing King’s work as a ministry of healing can help underscore its distinctiveness. His advocacy for the law’s expansion and enforcement of individual rights was not geared toward the maximization of autonomy, as today’s rights rhetoric often seems to be. King instead looked to rights as tools to help repair the breach in the human community.⁴⁰ His work to enhance the legal and political standing of the individual was inseparable from his work to restore the human community.

Agape teaches lawyers to treat their clients, and themselves, as subjects, not objects.⁴¹ However, personalism broadens the relational view, challenging lawyers to recognize their potential role as healers—counselors who can help repair breaches in the human community.⁴² Personalism speaks not only to the way we relate to our clients, but also to the way we would hope our clients relate to others.⁴³ A lawyer should not operate from the presumption that the default function of legal representation is to maximize the client’s self-interest, as defined in narrow, individualist terms.

For example, the collapse of Enron was made more likely by lawyers who were too willing to figure out a way to accomplish whatever their client expressed a desire to do, rather than stepping back and having a

³⁷ *Id.* at 290.

³⁸ *Id.*

³⁹ IRA G. ZEPP, JR., THE SOCIAL VISION OF MARTIN LUTHER KING JR. 193–94, 209 (1989) (footnote omitted).

⁴⁰ *See, e.g.*, A TESTAMENT OF HOPE, *supra* note 17, at 423–29 (providing one example, the Montgomery bus boycott, of how Martin Luther King used rights to correct flaws in the community).

⁴¹ *Id.* at 19–20.

⁴² ZEPP, *supra* note 39, at 194.

⁴³ *Id.*

conversation about what should be done.⁴⁴ Enron's lawyers appear to have offered little resistance to, or reflection on, the path charted by Enron's management.⁴⁵ This acquiescence prevented the lawyers from helping Enron executives take a broader view of the company's interests. Personalism's lessons are not that Enron's investors must sacrifice their profits for the greater good, but from the personalist perspective, Enron's own interests are invariably wrapped up with, though not always identical to, the interests of its investors, employees, customers, and members of the surrounding community. The fact that devotion to short-term share price has proven to be a recipe for disaster would not surprise King, who insisted on the empirical reality of the human community.⁴⁶

Just as lawyers need to engage clients as subjects, lawyers should encourage clients to view third parties as subjects, not as objects. This does not just speak to the lawyer's view of the third party, but also speaks to the lawyer's view of the client. For example, the lawyer should not treat the client as isolated from the rest of the human community. We are not talking about the ultimate direction of the representation, because the lawyer owes deference to the client first. If the client persists with an isolating and narrow conception of her self-interest, then the lawyer's only choice is to withdraw or abide by the client's direction. The important point is for the lawyer to have the conversation with the client, not to hijack the representation. The conversation itself may look different depending on the context. For instance, a lawyer committed to treating her client as a subject must also remain cognizant of power disparities in the relationship. A lawyer reminds a client of her relational commitments in different ways depending on the length of the relationship, the scope of the matters involved, and the client's dependence on the lawyer as the only practical source of legal services, among other factors.

So, we know King practiced agape and that he was a healer.⁴⁷ Furthermore, King was a prophet. He advocated for a natural, moral law as an impetus for legal and social reform.⁴⁸ Most famously, in his *Letter from Birmingham Jail*, King applied the moral law to critique segregation: "Any law that uplifts human personality is just. Any law that degrades human personality is unjust. All segregation statutes are unjust because segregation distorts the soul and damages the personality. It gives the

⁴⁴ See ROBERT K. VISCHER, MARTIN LUTHER KING JR. AND THE MORALITY OF LEGAL PRACTICE: LESSONS IN LOVE AND JUSTICE 94-97 (2013) [hereinafter MARTIN LUTHER KING JR. AND THE MORALITY OF LEGAL PRACTICE] (analyzing the problems that led to Enron's demise).

⁴⁵ *Id.*

⁴⁶ A TESTAMENT OF HOPE, *supra* note 17, at 36-37, 293 (discussing King's view on liberalism, neo-orthodoxy, and existentialism).

⁴⁷ *Id.* at 256; ZEPP, *supra* note 39, at 194.

⁴⁸ A TESTAMENT OF HOPE, *supra* note 17, at 293.

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segregator a false sense of superiority and the segregated a false sense of inferiority.”⁴⁹

King’s worldview formed his prophetic stance. Respect for the human person serves as the benchmark for justice. A lack of respect not only denies the dignity of the person disrespected, but also of the person who failed to show respect. The call to justice is about more than lifting up the marginalized and oppressed; it is about restoring the relationships that are breached by marginalization and oppression and connecting us all as mutually-dependent beings. King, the prophet, calls for justice by calling to restore community.

A lawyer who embraces King’s prophetic ethics will speak truth to power. This is difficult to capture in regulatory reforms or discrete action items. The implications are broader and deeper in two ways. First, prophetic lawyers call the client to confront reality, including the reality of the human community, despite how torn and frayed it might be. The client has a role to play, and a prophetic lawyer can – with due deference toward the client as ultimate decision-maker – remind the client of that role. For example, John Yoo ignored the reality of the human community when he advised the Bush Administration that torture might be permissible under the necessity defense because “any harm that might occur during an interrogation would pale to insignificance compared to the harm avoided by preventing [a terrorist] attack.”⁵⁰ Yoo ignored the reality of the human community, labeling torture “insignifican[t]” because the harm avoided casts another human being as a means to an end, regardless of whether torture can ever be justified.⁵¹ In these, and less dramatic episodes, lawyers too often facilitate their clients’ stated objectives by pushing third parties to the margins of the human community, or at least to the margins of the client’s cognizance of the human community.

Second, prophetic lawyers call the legal profession to confront reality and to imagine its role in repairing the human community. Occasionally, this requires lawyers to adopt a confrontational stance toward the profession. Tom Shaffer believes that the Hebrew prophets “would say that the trouble with us [lawyers] is not that we tend to be uncivil to one another,” but rather, “[t]hey might say that we are too civil, civil to the wrong people, civil in the wrong direction.”⁵² Our real problem might be

⁴⁹ *Id.*

⁵⁰ Memorandum from Jay S. Bybee, Office of the Assistant Attorney General, to Alberto R. Gonzales, Counsel to the President 41 (Aug. 1, 2002), <http://f11.findlaw.com/news.findlaw.com/wp/docs/doj/bybee80102mem.pdf>, archived at <http://perma.cc/S7DF-78R4?type=pdf>.

⁵¹ *Id.*

⁵² Thomas L. Shaffer, *Lawyers as Prophets*, 15 ST. THOM. L. REV. 469, 470 (2003).

that “we are not angry enough.”⁵³ What if the profession stepped back from its relentless quest to prevent nonlawyers from providing any service that could remotely be construed as “practicing law,” put economic protectionism firmly to the side, and instead focused on the public’s well-being by balancing the need for affordable services against the need for attorney-client relationship protections? A prophetic lawyer must recognize that associations can be every bit as self-absorbed as individuals, and even more socially corrosive.

Finally, King was a Christian realist; a tradition that dates back to Augustine.⁵⁴ King was heavily influenced by the leading twentieth-century figure in Christian realism, Reinhold Niebuhr.⁵⁵ In King’s words, “Niebuhr made me aware of the complexity of human motives and the reality of sin on every level of man’s existence,” including “the glaring reality of collective evil.”⁵⁶ Niebuhr emphasized the persistence of inordinate self-love as the root of suffering that marks the human condition.⁵⁷

Many lawyers work to keep morality out of their client relationships because they are skeptical about their ability to be neutral, objective arbiters. This skepticism results in a less-than-inspiring vision of the lawyer’s role. Law is a complicated machine, and lawyers need to make sure it runs, but what it is used for is none of the lawyer’s business. King and Niebuhr might urge lawyers not to permit realism to slide into cynicism. Their realism included affirmative claims about the nature of the human person and the responsibilities that flow from it.⁵⁸ Accordingly, lawyers who take their client’s interests seriously may need to reconsider their reluctance to raise moral considerations.

Further, we need not rely solely on the claims in the abstract – we can see Christian realism lived out in King’s work. As a public advocate in the prophetic tradition, King displayed unwavering commitment to the

⁵³ *Id.*

⁵⁴ See MARTIN LUTHER KING JR. AND THE MORALITY OF LEGAL PRACTICE, *supra* note 44, at 31 (discussing the origin of Christian realism from St. Augustine and Reinhold Niebuhr’s modern influence); STRENGTH TO LOVE, *supra* note 28, at 135–36 (explaining Christian realism in further detail).

⁵⁵ STRENGTH TO LOVE, *supra* note 28, at 135–36.

⁵⁶ *Id.*

⁵⁷ REINHOLD NIEBUHR, THE ESSENTIAL REINHOLD NIEBUHR: SELECTED ESSAYS AND ADDRESSES 169 (Robert McAfee Brown ed., 1986).

⁵⁸ See, e.g., *id.* at 169 (“there is no level of human moral or social achievement in which there is not some corruption of inordinate self-love”); STRENGTH TO LOVE, *supra* note 28, at 136 (“I am now convinced that the truth about man is found neither in liberalism nor in neo-orthodoxy. . . . Protestant liberalism defined man only in terms of his essential nature, his capacity for good; neo-orthodoxy tended to define man only in terms of his existential nature, his capacity for evil.”).

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common good. He was under no professional compulsion to place a particular client's interests above those of the broader community. However, his advocacy reflected a view of reality that changes the assumptions we make about an individual's best interests, especially within the attorney-client relationship.

King was optimistic about the arc of history, but his optimism was not the sort that allowed him to sit back and watch society's natural tendencies work themselves out over time. King credited Niebuhr's work for helping him see liberalism's sentimentality and false idealism.⁵⁹ Particularly problematic was the notion that education would eventually eradicate racism through intellectual enlightenment, given the unavoidable fact that "reason is darkened by sin."⁶⁰ As such, humans have an uncanny ability "to use our minds to rationalize our actions," and thus, liberals need to recognize that "reason by itself is little more than an instrument to justify man's defensive ways of thinking."⁶¹ As King explained in an interview, "the most pervasive mistake I have made was in believing that because our cause was just, we could be sure that the white ministers of the South, once their Christian consciences were challenged, would rise to our aid."⁶² Alternatively, King resisted focusing exclusively on the human capacity for evil by striving to keep both good and evil in view.⁶³ King knew that the capacity for good made his struggle for civil rights possible, but the capacity for evil made the struggle necessary.

"Christian realism is premised on a pair of anthropological claims: (1) humans are sinful and therefore fallible, but (2) humans are social and therefore accountable."⁶⁴ Lawyers tend to focus on the first while ignoring the second. Our own fallibility cautions lawyers against denying the client's moral agency or delegating their own moral agency to the profession as a whole. Our social nature reminds lawyers that the maximization of a client's legal rights may not always be in keeping with the client's best interests.

There are broader lessons here. To the extent that our political and legal discourse marginalizes moral considerations or reflects a conception of the human person as an isolated bundle of rights and interests, we are not only jeopardizing the common good – we are defying reality. Niebuhr and King may be able to help lawyers dispel the apparent conflict between individual autonomy and social accountability.

⁵⁹ STRENGTH TO LOVE, *supra* note 28, at 135–36.

⁶⁰ A TESTAMENT OF HOPE, *supra* note 17, at 36.

⁶¹ *Id.*

⁶² *Id.* at 344–45.

⁶³ *Id.* at 36.

⁶⁴ MARTIN LUTHER KING JR. AND THE MORALITY OF LEGAL PRACTICE, *supra* note 44, at 251.

Lawyers, in their more noble moments, will defend an amoral conception of lawyering on the ground that it checks lawyers' temptations to favor their own interests over the interests of their clients. This skepticism toward the lawyer's ability to check her own self-interest also shapes the profession's regulatory framework. For example, the profession forbids – and will punish – the attorney from accepting certain representations that create conflicts of interest, even if there is no showing of actual harm to the client. We do not want lawyers to put themselves in a position where their own interests will tempt them to give less than zealous representation to the client. We do not defer to the lawyer who objects, "but I am a self-disciplined person who can rise above my own interests and serve my client!" "No," the profession responds, "the will to power can never be adequately checked, so we will take the decision out of your hands." Niebuhr might be pleased by this line of thinking.

The problem is that this healthy skepticism is often insufficient to overcome the profession's devotion to the economic interests of lawyers. Several years ago, the ABA revised its conflicts rule to permit a firm to overcome a conflict by screening the conflicted lawyer from the case, so a lawyer representing a plaintiff in a lawsuit could be hired by the defendant's firm in the middle of the case, and that firm could still represent the defendant against the plaintiff even though the plaintiff's lawyer is now part of the firm.⁶⁵ The ABA will defend the rule as a prudent acknowledgment of lawyer mobility, and will urge critics to trust firms' ability to screen effectively. The curious fact is that the ABA rejected this proposal several times in the past, but in the midst of the worst economic downturn in years in the legal profession, the profession made it substantially easier for lawyers to get hired even when a conflict would traditionally have prevented it.⁶⁶ Niebuhr might notice a bit of self-interest moving the levers of power.

The more fundamental problem, though, is that the skeptical side of realism is as far as some of the modern legal profession's self-conception gets, but it is not as far as Niebuhr went. As did King, Niebuhr explored the relationship between love and justice.⁶⁷ "For Niebuhr, the norm that

⁶⁵ See MODEL RULES OF PROF'L CONDUCT R. 1.10 (2015), available at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_10_imputation_of_conflicts_of_interest_general_rule.html, archived at <http://perma.cc/JZ54-HTTQ> (stating the rule for client-lawyer relationships and the general rule of conflict of interests).

⁶⁶ See Carolyn B. Lamm, *Staying on Message*, A.B.A. J., Jan. 2010, at 8 (defending the amendment as "particularly important for the employment prospects of those whose careers are affected by the recession").

⁶⁷ Thomas C. Berg, *Church-State Relations and the Social Ethics of Reinhold Niebuhr*, 73 N.C. L. REV. 1567, 1590-91 (1995).

continues to call humans to further achievement is the law of *agape*: the demand to express sacrificial love for all humans, even when they do not reciprocate."⁶⁸ Further, he observed that "love is the law of life, even when people do not live by the law of love," and that justice can "prove to men and nations that there are limits beyond which their rebellion cannot go."⁶⁹ At the same time, justice will not bring repentance "if love does not shine through the justice," which does not happen unless and until the punished behold "the executor of judgment suffering with and for the victim."⁷⁰ Those who strive for perfection learn that "perfection is love and not justice," and thereby "obtain mercy while they learn to be merciful."⁷¹ Those who "imagine themselves righteous," by contrast, "are consistently condemned."⁷²

The elusiveness of justice does not excuse a failure to seek it. "Niebuhr never used his realism to excuse hopelessness or inaction."⁷³ He urged Christians, despite their knowledge of human sinfulness, to overcome the temptation "to disavow their own responsibility for a tolerable justice in the world's affairs."⁷⁴ Justice can be an imperfect approximation of the law of love. As such, justice can be a more authentic measure of love than the "insufferable sentimentality," which has afflicted the Church through the years, as though the world's problems would be solved "if only men would love one another."⁷⁵ While "love may be the motive of social action," Christians must recognize that justice is "the instrument of love in a world in which self-interest is bound to defy the canons of love on every level."⁷⁶

One reason why realism did not weaken King's commitment to justice is that his realism had a firm foundation, which is not simply teetering on the abyss of a bottomless skepticism. "As a realist, Niebuhr emphasized the importance of grounding our worldview on an accurate understanding of the human person, including the social and transcendent dimensions of human nature."⁷⁷ We are not freestanding bundles of legal interests waiting to be maximized; instead, we are

⁶⁸ *Id.*

⁶⁹ NIEBUHR, *supra* note 57, at 14, 29.

⁷⁰ *Id.* at 29

⁷¹ *Id.* at 63; MARTIN LUTHER KING JR. AND THE MORALITY OF LEGAL PRACTICE, *supra* note 44, at 254.

⁷² NIEBUHR, *supra* note 57, at 63.

⁷³ MARTIN LUTHER KING JR. AND THE MORALITY OF LEGAL PRACTICE, *supra* note 44, at 283.

⁷⁴ NIEBUHR, *supra* note 57, at 86.

⁷⁵ *Id.* at 96.

⁷⁶ REINHOLD NIEBUHR, AN INTERPRETATION OF CHRISTIAN ETHICS xxxii (1956).

⁷⁷ MARTIN LUTHER KING JR. AND THE MORALITY OF LEGAL PRACTICE, *supra* note 44, at 283.

relational in that human nature entails our fulfillment in the lives of others.

Christian realist lawyers are working toward the good, alongside our clients, and we are capable of entering into relationships with our clients centered on certain understandings that flow from our shared human nature. One such understanding is that our clients themselves are social beings who are accountable to other social beings. In other words, the starting point for the attorney-client relationship should not be the assumption that the client wishes to maximize her own legal interests without accounting for her social commitments and obligations.

The realist's awareness of the corrupting power of excessive self-love means that skepticism is necessary. Blind deference to the justice of "the system" is never in order. Realist lawyers in the molds of Niebuhr and King know love should not shun power, and power should not shun love. Lawyers shun power when they abdicate responsibility for justice to a professional interest group. They shun love when they equate justice with rights, and forget that rights are the means for restoring just relationships. Lawyers must account for a fallen world in our understanding of our professional roles. A lawyer cannot ignore the power dimension of legal practice or the profession's capacity to dress up its own interests as the public interest. Realist lawyers take to heart Niebuhr's caution that privileged groups engage in pervasive self-deception and consistently identify their own interests as universal.

Legal ethicists are wise to incorporate the fallible nature of lawyers into their traditional justification of the lawyer's role. However, they may be overemphasizing one dimension of that fallibility while largely disregarding other dimensions. Prudent concern for the client-directed nature of legal representation should not be allowed to obscure the importance of moral engagement between lawyer and client. No lawyer has a monopoly on moral truth so as to justify silencing the client or subverting the rule of law. The potential for moral engagement to be abused does not change the need for engagement. King's realism always brought to light aspects of our life together that we may prefer to ignore. For the legal profession, one such aspect is the fact that technically proficient legal advice will not always serve the client's interests fully.

At the same time, our fallen human condition is relevant to the lawyer's work. Indeed, our fallen condition may tend to reveal itself among people who are drawn to the practice of law differently than it does in others. Lawyers' tendency to define themselves by their intellectual achievements, their perfectionism, and their drive to win can foster unhealthy isolation, an avoidance of vulnerability, and a fear-driven self-reliance. Large law firms have realized the awesome profit-maximizing

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power unleashed by building a permanent competition among highly driven individuals who are afraid to fail. For reasons reflected in the travails of John Gellene, Joseph Collins, Enron, and others, it is unclear whether unleashing this power serves either the rule of law or client well-being.⁷⁸ Instead of accounting for the reality of lawyers' fallen nature, some aspects of modern legal practice may capitalize on that fallen nature in the pursuit of short-term interests. For both lawyers and clients, ignoring the reality of our social nature is a costly proposition.

Both King and Niebuhr saw law's power to serve as a needed bulwark against the tendency of inordinate self-love to bring alienation and disconnection to the human condition. The starting point for the attorney-client relationship should not be the assumption that the client wishes to maximize her own legal interests without accounting for her social commitments and obligations. The importance of acknowledging the social dimension of a client's nature, and correspondingly, her well-being, is not limited to headline-grabbing cases. When a client asks his lawyer to help negotiate the settlement terms of his divorce, decide how aggressively to interpret applicable environmental regulations, comply with arguable disclosure obligations in a real property sale, or write a hostile letter to the opposing counsel, the lawyer has a choice. She can start from one of two premises: (1) that the client's interests should be defined narrowly in terms directly traceable to the client's immediate and tangible benefit; or (2) that the client's interests include an account of her decision's impact on those with whom she is in a relationship. The realist lawyer will not push the client toward certain results – to do so would be to ignore both the client's dignity and the lawyer's fallibility – but she will avoid assumptions about the client's nature that defy reality, including the social nature of the human person.

The realist lawyer cannot defer to the ABA for a proper accounting of reality, much less for an account of how the law of love can be reflected in our pursuit of justice. It depends on the lawyer to take reality seriously. The Christian realism, championed by Niebuhr and King, takes an unflinching view of the fallen person. Yet, lawyers are missing the point if they conclude that the fall totally obscures the person. The flight from relationships – both ours and those of the client's – is a flight from reality and realism.

⁷⁸ See MILTON C. REGAN JR., *EAT WHAT YOU KILL: THE FALL OF A WALL STREET LAWYER* 6 (2004) (explaining the downfall of Gellene); MARTIN LUTHER KING JR. AND THE MORALITY OF THE LEGAL PRACTICE, *supra* note 44, at 94, 97 (discussing Joseph Collins and Refco's collapse, and Enron's risky business decisions).

If we are tempted to dismiss King's example as hopelessly ambitious for today's lawyers, perhaps we are setting our expectations too low as a profession. As Kronman reminds us:

[O]ne important element in a group's claim to professional status has very often been the belief that the work its members do engages a sufficiently broad range of human capabilities to have a transformative effect on the members' personalities, to shape their identities in a lasting way by promoting the development of a distinctive professional character.⁷⁹

Will the market erode—or has it already eroded—our distinctive professional character?

The qualities of character modeled by King—subject, healer, prophet, and realist—set the bar high indeed. Are all those roles needed in any given case? Of course not. Sometimes technical expertise is all that is required. Nonetheless, if we presume that lawyers bring nothing else to the table, clients have no reason to expect more than technical expertise. As Susskind reminds us, that which can be disaggregated and divided among the lowest bidders as discrete tasks tends to short-circuit any role that would require coherent—much less comprehensive—knowledge of the client and her overarching needs and interests. Kronman diagnosed the disease twenty years ago, but he may not have realized that it was potentially fatal.

I write “potentially” because lawyers still have something to say about their future, even it is only on the margins. But to speak into the future, we need to answer a more fundamental question about who we are in the present and who we are as professionals. Can we still serve as trusted counselors who help clients look beyond themselves, not despite their best interests, but in service to their best interests? If this idea can still gain traction in today's profession, we could do worse than look to King as a model.

⁷⁹ KRONMAN, *supra* note 6, at 371.

