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INTEGRITY IN THE PRACTICE OF LAW

TEACHING INTEGRITY IN THE PROFESSIONAL RESPONSIBILITY CURRICULUM: A MODEST PROPOSAL FOR CHANGE

*Mary C. Daly**

INTRODUCTION

One of the most important lessons taught by legal theorists over the past thirty years is that, in our legal discourse, we should search out the voices of those who have been historically excluded from the conversation, or who are present but remain silent. In thinking about the subject matter of the conference that prompted this essay, integrity in the law, I was struck by the absence of one, very particular voice, John Feerick's. This was a conference in his honor, yet he was neither a keynote speaker nor a panelist. Finding the absence of his voice anomalous, I asked him to describe his concept of what it means to be a lawyer of integrity, and to provide me with a list of the men and women who modeled that concept.¹

I. JOHN'S CONCEPT OF INTEGRITY

John's thoughts on being a lawyer of integrity will not surprise you. Let me quote some of them:

Staying with your principles even if holding on to your principles won't promote your advancement or at times may bring you grief and make you unpopular . . . holding on to who you are and being yourself at all times as best you can . . . strikes me as being at the heart of integrity. . . . [N]ot giving up your principles in order to promote yourself

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1. Now, I also asked John for a list of men and women who have failed to demonstrate that integrity, but John, being John, steadfastly resisted my request.

Be yourself and do what you think is right. Struggling with the pressure we all have to wrestle with what is right or wrong Seeking out the help of others with the hard decisions of life.²

John's list of individuals who model integrity is revealing.³ Not surprisingly, it leads off with the names of a number of individuals at Fordham College and Law School who played a significant personal role in John's life. Such influential figures include Professor William Frasca, a professor of political science, who planted the seeds of John's love of the Constitution;⁴ Professor Leonard Manning, who nurtured those seeds during John's years as a student at the Law School;⁵ Professor Ray O'Keefe⁶ and Dean William Hughes Mulligan,⁷ who, in John's own words, "taught us so much through their humor and insights of human nature;"⁸ and Joseph Crowley, who introduced John to labor law, the subject to which he devoted a large part of his career as a lawyer, and who served as John's first Associate Dean. In his eulogy upon Joe's death, John described him in these words: "He was constantly asked to serve in positions requiring integrity, fairness and ability. There was no one in whom people could more easily place their trust and confidence than Joe."⁹

2. Telephone message from John D. Feerick, Professor of Law and former Dean of Fordham University School of Law (Feb. 3, 2003) (on file with the author).

3. Memorandum No. 1 from John D. Feerick (undated) (on file with the author); Memorandum No. 2 from John D. Feerick (undated) (on file with the author). It is beyond the purview of this essay to explore the philosophical underpinnings of the concept of integrity in the practice of law. I would nonetheless note that John's reflections on the characteristics of a lawyer of integrity share a common core with descriptions of the "good reader" fashioned by legal moral philosophers. *E.g.*, Edward J. Eberle, *Three Foundations of Legal Ethics: Autonomy, Community, and Morality*, 7 *Geo. J. Legal Ethics* 89, 110-13 (1993). The philosophers' call for "good judgment" in the practice of law is largely indistinguishable from John's reflections. *E.g.*, David Luban & Michael Millemann, *Good Judgment: Ethics Teaching in Dark Times*, 9 *Geo. J. Legal Ethics* 31 (1995). To explore this topic more fully, *see, e.g.*, Sharon Dolovich, *Ethical Lawyering and the Possibility of Integrity*, 70 *Fordham L. Rev.* 1629 (2002); Serena Stier, *Legal Ethics: The Integrity Thesis*, 52 *Ohio St. L.J.* 551 (1991); *see also* Anthony T. Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (1993) [hereinafter *The Lost Lawyer*]; Anthony T. Kronman, *The Value of Moral Philosophy*, 111 *Harv. L. Rev.* 1751 (1998).

4. Obituary, *Dr. William R. Frasca Dies; Fordham Professor Was 53* (on file with the author).

5. John D. Feerick, *In Memoriam: Leonard F. Manning*, 51 *Fordham L. Rev.* xiii (1983); Obituary, *Leonard F. Manning*, N.Y. L.J., Jan. 7, 1983, at 2.

6. Professor O'Keefe, a member of the faculty from 1955 to 1963, is one of the most beloved teachers in the Law School's history. He is remembered with fondness by the thousands of students to whom he taught torts. Telephone Interview with Associate Dean Michael Lanzarone (Oct. 16, 2003).

7. John D. Feerick, *A Dedication to the Honorable William Hughes Mulligan*, 65 *Fordham L. Rev.* 1 (1996); John D. Feerick, *Dedication to William Hughes Mulligan*, 7 *Fordham Intell. Prop. Media & Ent. L.J.* 1 (1996).

8. Memorandum No. 2, *supra* note 3.

9. John D. Feerick, *Joseph R. Crowley—A Tribute*, 54 *Fordham L. Rev.* 457, 457 (1986).

It is not hard to understand how these men came to be on John's list. Throughout their careers, each of them demonstrated a ferocious love of learning and a passion for the subject matter they taught. Their commitment to their students and to the institutions at which they taught was legendary.

Thus, the first lesson on the meaning of integrity that I took from John's list is that integrity is a virtue exercised over a lifetime. Integrity is not a single event, a moment in time when a fearsome soul steps forward to object to a manifest wrong and then steps back into obscurity. Integrity is a habit of mind that stays the course of a lifetime. To Harvard professor Charles Ogletree, integrity "is an obligation to oneself."¹⁰ To Yale professor Stephen Carter, "integrity . . . requires that we try to live our ideals."¹¹ John's vision is no different.

The second lesson on integrity that John taught me is that integrity is exercised within a community, not in solitude. The men of integrity on John's list were not isolated academics who confined their passion for the law to the privacy of scholarly journals. They were exceptional teachers, indefatigably committed to instilling that passion in their students. Their mission, moreover, extended beyond the classroom and academic subject matters. They looked to the well being of the whole person.¹² Were their students happy? Were they weighed down by personal distress? Were their strengths outside of academia being acknowledged and reinforced?

The third lesson gleaned from John's list is that integrity is an institutional virtue as well as a personal one. The passion for learning and devotion to students that the men on John's list demonstrated shaped the character of their departments and schools. Fordham College and Law School were more than mortar-and-brick institutions of higher learning, transmitting knowledge from one generation to another. They were dynamic, organic institutions that respected and nurtured the whole personhood of their students, faculty members, administrators, and staff.

John's list of persons of integrity did not stop at Fordham's borders, however. Undoubtedly reflecting his own commitment to public service, it included government officials and private individuals whose

10. Charles J. Ogletree, Jr., *Personal and Professional Integrity in the Legal Profession: Lessons from President Clinton and Kenneth Starr*, 56 Wash. & Lee L. Rev. 851, 869 (1999).

11. Stephen L. Carter, *Toward an Integral Politics*, America, Feb. 17, 1996, at 12.

12. During John's student years, the Society of Jesus operated Fordham College and Law School. *Cura personalis*, "caring for the whole self," is a core principle of Jesuit pedagogy. See Helen M. Whall, *Caring for the Whole Faculty*, Conversations on Jesuit Higher Educ., Fall 2003, at 11; see also Michael J. Buckley, S.J., *The Catholic University as Promise and Project: Reflections in a Jesuit Idiom* (1998); David Riesman, *Reflections on Catholic Colleges, Especially Jesuit Institutions*, 34 J. Gen. Educ. 106 (1982).

responsibilities and actions propelled them into the public arena: Cyrus Vance, Birch Bayh, Herbert Brownell, James White, Paul Freund, Robert McKay, Leslie Arps, and William Meagher.

Cyrus Vance was Secretary of State in the Carter Administration, but resigned as a matter of principle in opposition to the President's planned military rescue of the American hostages in Iran. A pillar of the New York Bar, a partner at Simpson Thacher & Bartlett, and a President of the Association of the Bar of the City of New York, Vance held a plethora of high-level government positions, ranging from Secretary of the Army to lead negotiator in the Croatian civil war. He was a member of numerous government commissions, including the Commission on Government Integrity, which John chaired.¹³ In words that echo John's reflections on integrity, one commentator noted of Vance, "[H]is legacy is of a decent man trying to cope with a nasty, brutal world in which the right answers are usually not clear and the consequences of decisions almost always have downsides."¹⁴

Birch Bayh was a U.S. Senator from Indiana, from 1963 to 1981. He chaired the Senate Subcommittee on Constitutional Amendments.¹⁵ Bayh vigorously opposed many powerful initiatives to amend the Constitution out of a firm conviction that the success of these initiatives would transform the Constitution into a code. Yet, he staunchly championed the Twenty-fifth Amendment in 1969, to provide for an orderly transition of power in the event of a disability preventing the President from performing the functions of that office.¹⁶

Herbert Brownell was the Attorney General in the first Eisenhower Administration. Because Eisenhower's strengths lay in military and foreign affairs, Brownell exercised extraordinary influence over the President's domestic policies. He played a leading role in persuading the President to put the force of the Executive Branch behind the Supreme Court's decision in *Brown v. Board of Education*. Brownell's most lasting contribution was Eisenhower's appointment of the federal judges who ultimately assumed the responsibility for enforcing *Brown's* mandate against the vigorously resisting southern

13. Marilyn Berger, Obituary, *Cyrus R. Vance, Confidant of Presidents Who Resigned a Top Post, Dies at 84*, N.Y. Times, Jan. 14, 2002, at B6; Douglas Brinkley, *Out of the Loop*, N.Y. Times, Dec. 29, 2002, § 6 (Magazine), at 43.

14. James Klurfeld, *We Could Use More Straight Shooters Like Cyrus Vance*, *Newsday*, Jan. 17, 2002, at A36.

15. *Academy of Law Alumni Fellows Profile* (on file with the author).

16. See Birch Bayh, *One Heartbeat Away* (1968); Birch Bayh, *The White House Safety Net*, N.Y. Times, Apr. 8, 1995, § 5, at 23 [hereinafter *Safety Net*]; Interview by Paige E. Mulhollan with Birch Bayh, at <http://www.lbjlib.utexas.edu/johnson/archives.hom/oralhistory.hom/bayh-b/Bayh.pdf> (last visited Sept. 10, 2003).

states.¹⁷ To those who knew him, Brownell was considered “[g]entl[e] in manner, strong in deed.”¹⁸

James White was the Consultant to the ABA Section on Legal Education and Admission to the Bar from 1973 to 2001. The Council of the Section is one of the most powerful players in U.S. legal education because it is responsible for accrediting law schools. Although the Council is not well known to outsiders, it is a flashpoint for critics of legal education and is in the unenviable position of never being able to satisfy those critics. At the center of the debate surrounding legal education, the Council is condemned by some for alleged excesses of regulation, while simultaneously accused by others of regulatory cowardice.¹⁹

Paul Freund was a prominent constitutional law scholar at Harvard Law School, whose commitment to writing a multi-volume history of the Supreme Court was so strong that he declined an appointment to the Court in order to complete the project.²⁰

Robert McKay, the Dean of New York University School of Law from 1967 to 1975, had a distinguished career as a scholar and an educator. He built countless bridges spanning the often troubled waters between the practicing bar and the legal academy. He was a tireless champion of mandatory pro bono and continuing legal education in the face of relentless opposition.²¹ McKay was not afraid to take a stand on controversial issues. He chaired the New York State Special Commission on Attica and refused to back down from the Commission’s findings that were critical of Governor Nelson Rockefeller and state prison authorities. As the *New York Times* editors observed upon his death, “In an age marked by suspicion of both leadership and the legal profession, Robert McKay was in a trusted class by himself. . . . [H]e gave leadership to every cause that benefited the law, democracy and justice.”²²

Leslie Arps²³ and William Meagher²⁴ were the driving forces that

17. Eric Pace, Obituary, *Herbert Brownell Jr., Eisenhower Attorney General, Dies at 92*, N.Y. Times, May 3, 1996, at A29.

18. Theodore R. Kupferman, *The Lawyer’s Bookshelf*, N.Y. L.J., Aug. 9, 1993, at 2 (reviewing Herbert Brownell, *Advising Ike: The Memoirs of Attorney General Herbert Brownell* (1993)); see also *Memorial for Herbert Brownell 1904–1996 President of the Association 1962–1964*, 51 Rec. of the Ass’n of the B. of the City of N.Y. 610 (1996).

19. Ken Myers, *Jim Who? Academic James P. White is a Quiet Power in Legal Education*, Nat’l L.J., Nov. 22, 1993, at 1.

20. *In Memoriam: Paul A. Freund*, 106 Harv. L. Rev. 1, 18 (1992). Although it is not specifically noted in the Harvard tribute, Freund’s refusal to be nominated is well known within the legal community.

21. Glenn Fowler, Obituary, *Robert McKay, 70, Legal Scholar Who Led 1971 Attica Panel, Dies*, N.Y. Times, July 14, 1990, at 20; Steven B. Rosenfeld, *The Legal Profession’s Quiet Evangelist*, N.Y. L.J., Sept. 18, 1990, at 2.

22. Editor, *A Lawyer to Trust*, N.Y. Times, July 18, 1990, at A20.

23. Dennis Hevesi, Obituary, *Leslie H. Arps Dies; A Founding Member of Major*

took a small law firm and transformed it into a legal giant with twenty-three offices around the globe, employing one thousand seven hundred fifty lawyers.²⁵

In reflecting on John's non-Fordham choices for his list of individuals exemplifying integrity, I could not help but notice that this group shared the same character traits as the earlier one. For these men too, integrity was a lifelong commitment, that commitment was demonstrated within a community, and the community, acting through its institutional persona, fulfilled its own obligation to act with integrity. These names also added a new dimension to my understanding of John's concept of integrity. Integrity involves looking beyond one's self, beyond one's community, and even beyond one's institution. Integrity is a virtue intimately associated with the common good. In an interview on the occasion of his seventieth birthday, describing what he hoped would be his legacy, Vance said, "I hope for being a reasonably decent, honest person who tried to do some things for the country that might have lasting effect and create a better life for a large number of people."²⁶ Similarly, Birch Bayh's tireless support for the Twenty-fifth Amendment sprang from his drive to "better prepare[] the nation . . . for tragedy."²⁷

II. THE CHALLENGE OF INTEGRITY IN THE PRACTICE OF LAW

My ruminations on John's list and my efforts to tease out the constitutive parts of his concept of integrity were not simply an idle, academic exercise. There is a new mantra to my professional breathing these days: Enron—Vinson & Elkins,²⁸ Arthur Andersen—Nancy Temple,²⁹ Tyco International, Inc.—Mark Belnick.³⁰ This

Law Firm, N.Y. Times, July 16, 1987, at D22; Obituary, *Leslie H. Arps*, N.Y. L.J., July 16, 1987, at 2.

24. Obituary, *William R. Meagher*, N.Y. L.J., Oct. 28, 1981, at 2.

25. See <http://www.skaddenarps.com> (last visited Sept. 5, 2003).

26. Berger, *supra* note 13, at B6.

27. *Safety Net*, *supra* note 16, at 23.

28. See *In re Enron Corporation Securities, Derivative & ERISA Litigation*, No. H-01-3624, 2002 U.S. Dist. LEXIS 26261 (S.D. Tex. Aug. 15, 2002); Mike France et al., *One Big Client, One Big Hassle*, Bus. Wk., Jan. 28, 2002, at 38; Susan P. Koniak, *Who Gave Lawyers a Pass? We're Pointing the Finger at Everyone but the Real Culprits in Corporate Scandals*, Forbes Mag., Aug. 12, 2002, at 58.

29. The story of Temple's infamous e-mail, reminding the partners who were working on the Enron audit of Andersen's document retention policy, is well known. See, e.g., *Destruction of Enron-Related Documents by Andersen Personnel: Hearing Before the Subcomm. on Oversight and Investigations of the Comm. on Energy and Commerce*, 107th Cong. (2002), at <http://energycommerce.house.gov/107/action/107-80.pdf>. The e-mail was the subject of intense public scrutiny. See, e.g., Richard A. Oppel Jr. & Kurt Eichenwald, *Arthur Andersen Fires an Executive for Enron Orders*, N.Y. Times, Jan. 16, 2002, at A1.

The jury that convicted Andersen did not focus on this memorandum. It apparently concluded that another memorandum, written by Temple in which she suggested revisions to an Andersen document discussing the Enron audit, constituted

mantra replaced an earlier one: the S&L crisis—Jones, Day & Kaye Scholer;³¹ the Tobacco litigation—Council for Tobacco Research.³² This mantra, of course, replaced still an earlier one: *National Student Marketing*—White & Case;³³ *In re Carter & Johnson*—Brown & Wood.³⁴ In short, our current scandals are nothing new. The names of the law firms and the amount of the monetary loss may have changed, but the challenge of integrity in the practice of corporate law has not.

With this realization in mind, my study of John's list was further energized by my pursuit of the elusive holy grail sought by all professors of professional responsibility: What more can law schools do to promote integrity in their students?³⁵ What more can the legal

obstruction of justice. See Ken Brown, *Pair of Jurors Caught Some Z's During Arthur Andersen Trial*, Wall St. J., June 24, 2002, at C3; Kurt Eichenwald, *Andersen Guilty in Effort to Block Inquiry on Enron*, N.Y. Times, June 16, 2002, at A1; Carrie Johnson, *Judge Urged to Uphold Andersen Verdict*, Wash. Post., Aug. 1, 2002, at E3; Jonathan Weil et al., *Auditor's Ruling: Andersen Win Lifts U.S. Enron Case*, Wall St. J., June 17, 2002, at A1. That conclusion has been the subject of controversy with at least one prominent legal ethicist expressing vigorous disagreement. See Stephen Gillers, *The Flaw in the Andersen Verdict*, N.Y. Times, June 18, 2002, at A23; see also Joan C. Rogers, *Lawyers Debate Best Way to Advise Clients on Editing, Shredding Records Post-Andersen*, 18 ABA/BNA Lawyers' Manual on Prof'l Conduct 484 (2002); David Hechler, *Lawyers See Lessons in Trial of Andersen*, Nat'l L.J., June 24-July 1, 2002, at A1.

30. See Laurie P. Cohen & Mark Maremont, *Tyco Dealings with Ex-Unit-Director Scrutinized*, Wall St. J., Sept. 24, 2002, at C16; Opinion, *The Tyco Mystery*, Wall St. J., Mar. 25, 2003, at A16; Andrew Ross Sorkin, *New Charges in Tyco Case Involve Bonus for Ex-Counsel*, N.Y. Times, Feb. 4, 2003, at C1; see also Laurie P. Cohen, *Two Journeys: How a Tyco Lawyer Channeled Windfall into Unlikely Cause*, Wall St. J., June 4, 2003, at A1.

31. See *In re Am. Cont'l Corp./Lincoln Sav. & Loan Sec. Litig.*, 794 F. Supp. 1424 (D. Ariz. 1992); Susan Beck & Michael Orey, *They Got What They Deserved*, Am. Law., May 1992, at 68; see generally American Bar Association Working Group on Lawyers' Representation of Regulated Clients, Laborers in Different Vineyards? (Discussion Draft, Jan. 1993); William H. Simon, *The Kaye Scholer Affair: The Lawyer's Duty of Candor and the Bar's Temptations of Evasion and Apology*, 23 Law & Soc. Inquiry 243 (1998); Symposium, *In the Matter of Kaye, Scholer, Fierman, Hays & Handler: A Symposium on Government Regulation, Lawyers' Ethics, and the Rule of Law*, 66 S. Cal. L. Rev. 977 (1993).

32. See Bruce A. Green, *Thoughts About Corporate Lawyers After Reading The Cigarette Papers: Has the "Wise Counselor" Given Way to the "Hired Gun"?*, 51 DePaul L. Rev. 407 (2001); see also Stanton A. Glantz et al., *The Cigarette Papers* 235-338 (1996).

33. See *SEC v. Nat'l Student Mktg. Corp.*, 457 F. Supp. 682 (D.D.C. 1978). The facts of this case became the plot for the novel *The Comfort Letter*, by Arthur Solmssen. For an interesting review of the book, applying several behavioral psychology theories, see Richard W. Painter, *Irrationality and Cognitive Bias at a Closing in Arthur Solmssen's The Comfort Letter*, 69 Fordham L. Rev. 1111 (2000).

34. See *In re Carter & Johnson*, Exchange Act Release No. 34,17597, 22 SEC Docket 292 (Feb. 28, 1981).

35. I am firmly of the view that an individual's moral character is not unalterably fixed by the time he or she reaches young adulthood. I think that new virtues can be learned and exercised over the course of a lifetime. For a most helpful overview of the debate on this issue, see Russell G. Pearce, *Teaching Ethics Seriously: Legal*

profession do to facilitate integrity in its members? The presence of the adjective “more” is deliberate. While I am the last to claim that law schools and the legal profession have done enough to promote integrity, they certainly have not ignored it. Professional responsibility stands out as a crown jewel of the United States legal system, especially when its position is compared to the one it holds in other legal systems. It is taught in law schools and continuing legal education courses, constantly fought over in the courts, and enforced through court-supervised agencies that are staffed by professionals.³⁶

Where I think we have notably failed as legal educators, however, is in our casual indifference to the learning of other disciplines. Dilemmas relating to integrity in professional practice are certainly not the exclusive domain of lawyers. Other professions have had to grapple with ethical issues as complex as ours and are forced to use moral reasoning and judgment to resolve ethical issues. We do a disservice to our students and to the legal profession by ignoring the insights of these other disciplines.

For example, organizational and management theory can greatly contribute to our understanding of how integrity is exercised in a corporate or law firm setting. Behavioral theory can shed much light on why some lawyers who genuinely perceive themselves as persons of integrity are unaware of the wrongdoing around them.³⁷ Cognitive

Ethics as the Most Important Subject in Law School, 29 Loy. U. Chi. L.J. 719, 732-35 (1998). See also Elliott M. Abramson, *Puncturing the Myth of the Moral Intractability of Law Students: The Suggestiveness of the Work of Psychologist Lawrence Kohlberg for Ethical Training in Legal Education*, 7 Notre Dame J.L. Ethics & Pub. Pol’y 223 (1993); Arthur J. Schwartz, *It’s Not Too Late to Teach College Students About Values*, Chron. of Higher Educ., June 9, 2000, at A68. For an extended analysis of the debate, see Symposium, *Teaching Values in Law School*, 36 U.S.F. L. Rev. 591 (2002).

Even if my belief is wrong, law schools can still inculcate “professional” values in their students, one of the most important of which must be integrity. In the words of Professor Max Bazerman, a leading business ethics scholar: “What [law schools] can do . . . is teach students to be aware of the systematic errors in people’s thinking that can start a basically normal person ‘down the slippery slope to unethical decisions.’” Holman W. Jenkins, Jr., *How Could They Have Done It?*, Wall St. J., Aug. 28, 2002, at A15.

36. Mary C. Daly, *The Dichotomy Between Standards and Rules: A New Way of Understanding the Differences in Perceptions of Lawyer Codes of Conduct by U.S. and Foreign Lawyers*, 32 Vand. J. Transnat’l L. 1117, 1134-57 (1999). Of course, in the real world, the “crown jewel” is blemished. Too often, lawyers ignore professional codes of conduct or fail to interpret them correctly, courts overlook ethical violations, understaffed and under-funded disciplinary authorities pursue only the most egregious instances of misconduct, and some law schools still send the wrong message about the subject’s importance by assigning professional responsibility courses to junior or adjunct faculty who fail to teach with the appropriate degree of academic rigor.

37. To avoid needless repetition, this article will not for the most part discuss the social science theories and experiments that Professor Luban explores in his accompanying article. David Luban, *Integrity: Its Causes and Cures*, 72 Fordham L. Rev. 279 (2003). That article is essential reading for anyone who believes, as I do, that professional responsibility professors who ignore the psychological

science can show how human beings are hard-wired to respond differently to certain types of moral dilemmas. It is not idle speculation to imagine that at least a handful of the lawyers snared in some of the more notorious corporate scandals over the past thirty-some-odd years would have behaved differently if they had been exposed to other disciplines' insights into how to handle challenges to integrity.³⁸

A. Management Theory

Management theory teaches two important lessons: first, each institution has its own culture and values, independent of the rhetoric expressed in employee handbooks, company posters, and mission statements; and second, the conduct of an organization's leaders is the best measure of its commitment to ethical behavior.³⁹ For example, Enron had a model written code of conduct, but the code had little to do with actual practices.⁴⁰ What if the lawyers had attentively

underpinnings of moral reasoning are plainly guilty of educational malpractice. Clinical scholars have marshaled compelling arguments for exposing law students to social science theories. *E.g.*, Laurie Morin & Louise Howells, *The Reflective Judgment Project*, 9 *Clinical L. Rev.* 623 (2003); Joseph W. Rand, *Understanding Why Good Lawyers Go Bad: Using Case Studies in Teaching Cognitive Bias in Legal Decision-Making*, 9 *Clinical L. Rev.* 731 (2003); Ian Weinstein, *Don't Believe Everything You Think: Cognitive Bias in Legal Decision Making*, 9 *Clinical L. Rev.* 783 (2003).

38. Professor Max Bazerman of the Harvard Business School has been a leader in this area. *E.g.*, David M. Messick & Max H. Bazerman, *Ethical Leadership and the Psychology of Decision Making*, 37 *Sloan Mgmt. Rev.*, Winter 1996, at 9. At least one leading business commentator has attempted to apply Professor Bazerman's insights to the behavior of Enron's high-level officers. *See* Jenkins, *supra* note 35, at A15. Business schools and law schools have come under sharp criticism for their respective failures in ethics education. *E.g.*, Debra Schlee, *Empty Ethics and Reasonable Responsibility: Vocabularies of Motive Among Law and Business Students*, 22 *Law & Soc. Inquiry* 619 (1997); *see also* Lynnley Browning, *M.B.A. Programs Now Screen for Integrity, Too*, *N.Y. Times*, Sept. 15, 2002, § 3, at 4; Penelope Patsuris, *Can Integrity be Taught?*, *Forbes.com*, Oct. 4, 2002, at <http://www.forbes.com/home/2002/10/04/1004virtue.html>.

39. The accuracy of the observations from which these lessons are drawn is strikingly revealed in a recent insider's look at the collapse of Arthur Andersen. *See* Barbara Ley Toffler & Jennifer Reingold, *Final Accounting: Ambition, Greed, and the Fall of Arthur Andersen* (2003). Ms. Toffler's chronicle is especially worth reading because she is a former Professor of Business Ethics at the Harvard Business School, who left that position to become the partner in charge of Andersen's ethics consulting group at its Chicago headquarters.

40. *See* Enron, *Code of Ethics* (2000), <http://www.thesmokinggun.com/graphics/packageart/enron/enron.pdf>; Tom Zeller, *The Tao of Enron: Well, It Sounded Good*, *N.Y. Times*, Feb. 24, 2002, § 4 (Week in Review), at 5. The gap between the conduct that Enron's Code called for and the behavior that the company's management and employees exhibited exists throughout corporate America. *See generally* Robert Jackall, *Moral Mazes: The World of Corporate Managers* (1988). For an excellent overview of the role of corporate conduct codes, *see* Note, *The Good, the Bad, and Their Corporate Codes of Ethics: Enron, Sarbanes-Oxley, and the Problems with Legislating Good Behavior*, 116 *Harv. L. Rev.* 2123 (2003).

observed the company's operational culture as opposed to its rhetorical culture? A Harvard Business School case study quotes an Enron official's description of Jeffrey Skilling's decision-making process as follows: "It was all about creating an atmosphere of deliberately breaking the rules."⁴¹ Similarly, Salomon Brothers encouraged extreme risk taking in the pursuit of profits. When one of its most productive traders deliberately flouted government regulations by submitting false bids to the Treasury Department, the Chairman and CEO regarded his conduct as "an aberration" and declined to make its reporting a matter of high priority.⁴² Even Salomon's own General Counsel chose to characterize the trader's behavior as an "attitudinal problem."⁴³ Similarly, Brown & Wood lawyers could not bring themselves to report the CEO of National Telephone Company to its board of directors when his extreme entrepreneurialism—which was responsible for the company's stunning financial success—transformed into open and notorious violations of the securities law.⁴⁴

I am not suggesting that law firms ought to withdraw from representing cutting edge, innovative, hard hitting clients, or even those that walk close to the line. Professional responsibility and professional *hara-kiri* are not synonyms. A "high risk" client need not be abandoned. Indeed, abandonment is probably socially undesirable, because it deprives the client of a "wise counsel"⁴⁵ who could urge restraint and obedience to the law. What I am suggesting is that law firms and in-house counsel should learn from management theory the importance of assessing their clients' institutional culture represented by its day-in, day-out operations as opposed to its rhetorical culture represented by employee handbooks, company posters, and mission statements.

Management theory teaches that high risk clients warrant

41. Katherine S. Mangan, *The Ethics of Business Schools: Corporate Scandals Put Spotlight on Relationships Between Professors and Companies*, Chron. Higher Educ., Sept. 20, 2002, at A14. Some scholars have even concluded that "the same qualities that investors and analysts so admired about Enron—its aggressiveness, its obsession with earnings growth, the devil-may-care attitude of top executives—led to its undoing." *Id.* Professor Langevoort has made a similar observation. See Donald C. Langevoort, *The Organizational Psychology of Hyper-Competition: Corporate Irresponsibility and the Lessons of Enron*, 70 Geo. Wash. L. Rev. 968 (2002).

42. *In re Gutfreund*, Exchange Act Release No. 34,31554, 52 SEC Docket 2849 (Dec. 3, 1992), 1992WL 362753, at *8.

43. *Id.*

44. *In re Carter & Johnson*, Exchange Act Release No. 34,17597, 22 S.E.C. Docket 292, 298-319 (Feb. 28, 1981).

45. For a helpful discussion of the role of a lawyer as a "wise counsel," see Green, *supra* note 32, at 407-14. The pedigree of this image is a distinguished one. See Louis D. Brandeis, *The Opportunity in the Law, in Business: A Profession* 329 (William S. Heine & Co. 1996) (1914). Dean Kronman has devoted considerable intellectual energy to promoting the role of the "lawyer-statesman." See generally *The Lost Lawyer*, *supra* note 3.

monitoring, not abandonment. Enron's successes might not have evolved into as serious a set of scandals if Vinson & Elkins—and the company's own General Counsel, a former Vinson & Elkins partner—had placed the client on an “ethics watch,” alerting their lawyers to the company's atmosphere of deliberate rule-breaking. The same is true for Salomon Brothers and National Telephone Company. *Even if* the general counsel and the law firms in question were unable to persuade their misbehaving clients to conform their conduct to the requirements of the law, the lawyers certainly would have been in a better position to evaluate their *own* professional responsibility obligations. They might have done themselves a great favor if they had instructed the individual lawyers assigned to those clients in a manner consistent with fundamental precepts of organizational behavior.

Rarely do the character flaws of a lone actor fully explain corporate misconduct. More typically, unethical business practice involves the tacit, if not explicit, cooperation of others and reflects the values, attitudes, beliefs, language, and behavioral patterns that define an organization's operating culture. Ethics, then, is as much an organizational as a personal issue.⁴⁶

The importance of recognizing institutional culture is best illustrated by one of the few “success stories” associated with Enron's collapse. Stephen Hall, a third-year associate at Stoel Rives, a Portland Oregon law firm, was assigned to review certain strategies that Enron used to buy and trade electric energy. Hall wrote a draft memorandum concluding that some aspects of the strategies were unlawful. The partner who reviewed the memorandum strengthened its language to make it more powerful,⁴⁷ and Enron subsequently received advice that it almost certainly did not want to hear. The willingness of Stoel Rives to give that advice stands out starkly in comparison to the conduct of Enron's in-house counsel,⁴⁸ and at least

46. Lynn Sharp Paine, *Managing for Organizational Integrity*, Harv. Bus. Rev., March-April 1994, at 106.

47. See *Examining Enron: Developments Regarding Electricity Price Manipulation in California—Part IV: Hearing Before the Senate Comm. on Commerce, Science, and Transp.*, 107th Cong. (2002) (opening statement of Stephen Hall), at <http://commerce.senate.gov/hearings/051502hall.pdf>; see also Paul Braverman, *Under the Klieg Lights*, Am. Law., July 2002, at 18; Richard A. Oppel Jr., *Enron Traded Amid Doubts, Senate is Told*, N.Y. Times, May 16, 2002, at C1.

48. The one exception was Jordan Mintz. Mr. Mintz was the General Counsel of Enron's Global Finance unit. He was so concerned about the now-infamous partnership transactions that he hired outside counsel for advice. He also used his office to protect a junior lawyer from inappropriate pressure by a company official. For a more specific description of Mr. Mintz's conduct, see Symposium, *Panel Discussion: Enron: What Went Wrong?*, 8 Fordham J. Corp. & Fin. L. S1, S23 (2002) (remarks of Mary C. Daly); Tom Hamburger, *Enron Had Early Warning on Partnerships*, Wall. St. J., Feb. 7, 2002, at A10; Tom Hamburger & John Emshwiler, *Enron Officials Sought Lawyer's Dismissal Over Negotiations with Outside*

one of its outside law firms.⁴⁹ That Stoel Rives gave the unwanted advice surprised only those who were not familiar with the law firm. The firm prides itself on its commitment to ethical behavior and its implementation of institutional incentives that promote professional responsibility in the broadest sense of the term.⁵⁰ Business ethicists have long noted the importance of such incentives in creating a moral consciousness within organizations.⁵¹

B. Behavioral Psychology

Behavioral psychology too has an important part to play in the professional responsibility curriculum, if we are to nurture a sense of integrity in law students.⁵² Cognitive biases are powerful screens, blocking otherwise observant lawyers' perception of wrongdoing by clients and colleagues. For example, would Enron have turned out so

Partnership, Wall St. J., Feb. 6, 2002, at A3; Miriam Rozen & Brenda Sapino Jeffreys, *But What Happens When Andy Fastow Starts Fighting Back?*, Tex. Law., Mar. 4, 2002, at 1; see generally *The Final Collapse of Enron—Part 2: Hearing Before the Subcomm. on Oversight and Investigations of the Comm. on Energy and Commerce*, 107th Cong. 36-90 (2002) (testimony of Jordan Mintz), at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_house_hearings&docid=f:77987.pdf.

49. While all the facts surrounding Vinson & Elkins' representation of Enron are not known, the firm's conduct has been the subject of much criticism. See, e.g., Robert W. Gordon, *Portrait of a Profession in Paralysis*, 54 Stan. L. Rev. 1427, 1435-38 (2002); see also William C. Powers et al., *Report of Investigation by the Special Investigative Committee of the Board of Directors of Enron Corp.*, 2002 WL 198018 (2002); Roger C. Cramton, *Enron and the Corporate Lawyer: A Primer on Legal and Ethical Issues*, 58 Bus. Law. 143 (2002); Deborah L. Rhode & Paul D. Paton, *Lawyers, Ethics, and Enron*, 8 Stan. J.L. Bus. & Fin. 9 (2002).

50. Peter R. Jarvis & Mark J. Fucile, *Inside an In-House Legal Ethics Practice*, 14 Notre Dame J.L. Ethics & Pub. Pol'y 103 (2000); see also Elizabeth Chambliss & David B. Wilkins, *Promoting Effective Ethical Infrastructure in Large Law Firms: A Call for Research and Reporting*, 30 Hofstra L. Rev. 691, 710-11 (2002); see generally Ted Schneyer, *A Tale of Four Systems: Reflections on How Law Influences the "Ethical Infrastructure" of Law Firms*, 39 S. Tex. L. Rev. 245 (1998).

51. E.g., Jackall, *supra* note 40; Tony Simons, *The High Cost of Lost Trust: When Employees Doubt a Manager's Integrity, the Problems Can Show Up on the Bottom Line*, Harv. Bus. Rev., Sept. 2002, at 18.

52. I am hardly the first legal academic to make this observation. Professors Donald Langevoort and Richard Painter have long been champions of applying behavioral psychology to both clients' and lawyers' conduct. E.g., Donald C. Langevoort, *Where Were the Lawyers? A Behavioral Inquiry into Lawyers' Responsibility for Clients' Fraud*, 46 Vand. L. Rev. 75 (1993); Donald C. Langevoort & Robert K. Rasmussen, *Skewing the Results: The Role of Lawyers in Transmitting Legal Rules*, 5 S. Cal. Interdisc. L.J. 375 (1997); Richard W. Painter, *Lawyers' Rules, Auditors' Rules and the Psychology of Concealment*, 84 Minn. L. Rev. 1399 (2000) [hereinafter *Lawyers' Rules*]; Richard W. Painter, *The Moral Interdependence of Corporate Lawyers and Their Clients*, 67 S. Cal. L. Rev. 507 (1994). Professor Luban's article makes an important contribution to this literature. See Luban, *supra* note 37. For a brief but penetrating discussion of social and organizational influences on lawyers' attitudes, see Tanina Rostain, *Waking Up from Uneasy Dreams: Professional Context, Discretionary Judgment, and The Practice of Justice*, 51 Stan. L. Rev. 955, 961-70 (1999).

disastrously if the lawyers at Vinson & Elkins had thought about prospect theory as they closed deal after deal, transferring the company's losses off its balance sheets? I certainly cannot say so for sure, but those thoughts might have given them greater pause. Prospect theory offers the tantalizing insight that decision-makers are "risk preferring when deciding between two decisions that result in a loss."⁵³ Skilling and his cohorts at Enron clearly knew that disclosing the company's financial predicament would have quite dire consequences in the marketplace; they certainly appreciated that nondisclosure posed as great a threat to the company's survival. The same observations hold true for the principal of the National Telephone Company and the top level management at Salomon, who failed to take any meaningful action when they became aware of the rogue trader's conduct. Knowledge of what are called "risk preferences" might have helped the lawyers in these situations as well. Managers who dread the loss of their own money—in the form of bonuses and stock options—as well as the shareholders' and creditors' may prefer the legal risk of concealment over the market and reputational risk of disclosure.⁵⁴

Cognitive conservatism and decision simplification offer equally valuable insights into why lawyers fail to perceive what, in hindsight, were obvious red flags that should have alerted them to serious problems. Law firms, no less than corporate clients, are guilty of "over-optimism," a world-view that minimizes unfavorable results. Most dangerous of all are "commitment" and "self-serving beliefs" that discourage lawyers from recognizing their clients' defalcations or their own ethically perilous course of action.⁵⁵

C. Cognitive Science

In addition to management theory and behavioral psychology, room needs to be made for cognitive science in the professional responsibility curriculum. For generations, moral reasoning was principally the domain of philosophers. Cognitive scientists have now breached the perimeters. Sophisticated imaging equipment has enabled these scientists to observe the changes in the brain that occur as an individual struggles to reach conclusions with moral implications.⁵⁶ A discussion of imaging experiments fits perfectly in

53. *Lawyers' Rules*, *supra* note 52, at 1414.

54. *Id.* at 1414-17.

55. *Id.* at 1421 n.90. Such beliefs may help to explain, for example, why Vinson & Elkins stands accused of failing to bring "a stronger, more objective and more critical voice to the disclosure process." Powers et al., *supra* note 49, at *15.

56. See Joshua D. Greene et al., *An fMRI Investigation of Emotional Engagement in Moral Judgment*, 293 *Science* 2105, 2106-07 (2001); Jorge Moll et al., *Frontopolar and Anterior Temporal Cortex Activation in a Moral Judgment Task: Preliminary Functional MRI Results in Normal Subjects*, 59 *Arq. Neuropsiquiatr* 657, 661-63 (2001); see also Sandra Blakeslee, *Watching How the Brain Works as it Weighs a*

that part of the professional responsibility curriculum devoted to the concepts of neutrality, non-accountability, instrumentalism, and role-differentiation.⁵⁷

The easiest experiment with which to engage the students' attention involves a subject's response to two discrete situations. In the first, a runaway trolley threatens the lives of five individuals. If the subject throws a switch, one person will die and four will be saved. In the second, the subject and a stranger are now standing on a bridge over the trolley tracks. If the subject pushes the stranger off the bridge and onto the tracks, the stranger will die, but the lives of the trolley's five passengers will be saved.⁵⁸ Imaging shows that subjects process the two situations in different parts of the brain. Scientists regard the first situation as one calling for an impersonal decision (i.e., whether to throw the switch), and the second situation as calling for a personal response (i.e., whether to kill another individual). The impersonal decision is processed in an area of the brain that performs functions principally relating to memory; the personal response occurs in an area that suppresses those functions and performs functions relating to emotions.⁵⁹

While the brain imaging studies are only in their infancy, they certainly merit the attention of anyone who is seriously engaged in

Moral Dilemma, N.Y. Times, Sept. 25, 2001, at F3 [hereinafter *Watching How the Brain Works*]. Brain imaging is enabling cognitive scientists to study an eclectic range of human activities such as economic decision making and romantic attachments, which were previously within the almost exclusive domain of other disciplines. See, e.g., Sandra Blakeslee, *Brain Experts Now Follow the Money*, N.Y. Times, June 17, 2003, at F1; Emily Eakin, *Looking for that Brain Wave Called Love; Humanities Experts Use M.R.I.'s to Scan the Mind for the Locus of the Finer Feelings*, N.Y. Times, Oct. 28, 2000, at B11.

Professor Tanina Rostain has called for empirical research that would include exploring "the functions of feeling in ethical judgments." Tanina Rostain, *The Company We Keep: Kronman's The Lost Lawyer and the Development of Moral Imagination in the Practice of Law*, 21 Law & Soc. Inquiry 1017, 1038 & n.72. In the same vein, the brain imaging studies have prompted one prominent philosopher to call upon his colleagues to do an about face and, rather than discounting emotion, acknowledge it "as an important part of people's moral reasoning." Laura Helmuth, *Moral Reasoning Relies on Emotion*, 293 Science 1971, 1972 (2001). Both proposals certainly have the support of this author.

57. E.g., Robert F. Cochran, Jr. & Teresa S. Collett, *Cases and Materials on the Legal Profession* 147-65 (2d ed. 2003); Stephen Gillers, *Regulation of Lawyers: Problems of Law and Ethics* 393-422 (6th ed. 2002); Geoffrey C. Hazard, Jr. et al., *The Law and Ethics of Lawyering* 20-39, 1217-28 (3d ed. 1999); Deborah L. Rhode & David Luban, *Legal Ethics* 87-150 (3d ed. 2001); Roy D. Simon, Jr. & Murray L. Schwartz, *Lawyers and the Legal Profession* 289-99 (3d ed., The Michie Company 1994) (1979).

58. Greene et al., *supra* note 56, at 2105.

59. *Id.* at 2106-07; Moll et al., *supra* note 56, at 661-63. Other brain imaging experiments offer support for these conclusions, demonstrating that emotionally charged moral and nonmoral social judgments trigger neural activity in different brain sectors. See Jorge Moll et al., *Functional Networks in Emotional Moral and Nonmoral Social Judgments*, 16 NeuroImage 696 (2002).

professional responsibility pedagogy. They suggest that when confronted with difficult ethical dilemmas, lawyers, like other human beings, may be naturally predisposed to resolve the dilemmas through an emotional circuitry of which they are completely unaware. That circuitry, moreover, is the product of the observations the lawyers will have made about other individuals' emotional responses, such as parents and teachers, in making moral judgments.⁶⁰

Knowledge of the existence and formation of this circuitry should add a new dimension to classroom discussions of behavioral psychology.⁶¹ It should promote a greater self-awareness of the decision-making process that lawyers use in analyzing ethical issues with a significant personal response component. It may help to explain how a lawyer whose moral compass generally points in the correct direction can be oblivious to circumstances suggesting wrongdoing by a client. For example, a lawyer whose emotional circuitry is wired to avoid interpersonal conflict may not consciously observe the telltale signs, because suspicion of the wrongdoing would require confrontation which might disrupt the relationship between fellow lawyers or between the lawyer and the client.⁶² Gender differences may also play a role in the interpretation of signs of wrongdoing, and in how lawyers try to resolve ethical dilemmas.⁶³

60. *Watching How the Brain Works*, *supra* note 56, at F3.

61. *See supra* notes 56-60 and accompanying text.

62. Confrontation in an ethically perilous situation is especially difficult for a lawyer who is tied to a client by personal, political, ethnic or religious affiliations. Affiliations of this nature undoubtedly played a significant role in the apparent blindness of the lawyers to their clients' wrongdoing in the O.P.M. scandal. *In re O.P.M. Leasing Serv., Inc.*, 30 B.R. 642, 643 (Bankr. S.D.N.Y. 1983) ("For further background information detailing the complexity, ingenuity, economic imperatives and often bizarre nature of the various OPM transactions including the ones in question here, see the Trustee's Report filed with this Court on April 25, 1983 pursuant to Section 1106(a)(4) of the Bankruptcy Code (the "Code")."); *see also* Stuart Taylor, Jr., *Ethics and the Law: A Case History*, N.Y. Times, Jan. 9, 1983, § 6 (Magazine) at 31.

Cyrus Vance, whom John singled out as a model of integrity, described his experience of the emotional tug-of-war between his personal and professional loyalties as follows:

There are also forces of a more personal nature whose sway over individuals cannot be underestimated. It is often a personally painful task to accuse others. It cuts against the grain of a lifetime of social training. It is also frequently a thankless task. I still remember vividly one of the most difficult events in my career as senior partner of my firm. I had to report one of the lawyers in the firm to the disciplinary authorities at the bar association and appropriate law enforcement officials for prosecution as a result of his misconduct.

Cyrus Vance, *Foreword: Legal Ethics and Government Integrity*, 18 Fordham Urb. L.J. 153, 154 (1990-91).

63. *E.g.*, Rand Jack & Dana Crowley Jack, *Moral Vision and Professional Decisions: The Changing Values of Women and Men Lawyers* (1989); *see also* Mary Field Belenky et al., *Women's Ways of Knowing: The Development of Self, Voice, and Mind* (1986); Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations*

Awareness of how the brain processes impersonal and personal moral dilemmas differently would also contribute to a richer understanding of why so many lawyers are uncomfortable with the constructs of neutrality, non-accountability, and role-differentiation.⁶⁴ At the core of these concepts is the assumption that lawyers can—and should—disable their emotional circuits. To act in accordance with these constructs, lawyers must exclusively draw upon the memory area of the brain, framing the ethical conundrum that confronts them as if it were strictly an impersonal one. Brain imaging studies show that this task is far more difficult than anyone before realized. Taken to their logical conclusion, the studies suggest that the task may ask lawyers to be less than fully human.

The brain imaging studies also bring a new perspective to the longstanding debate between those who believe that students' ethics are permanently formed before they ever set foot in their first law school class, and those who believe that understandings of what constitutes ethical behavior can evolve over a lifetime.⁶⁵ While human beings may be wired to use certain parts of their brain in making moral judgments, depending on the personal or impersonal nature of the dilemma, an individual's awareness of the circuitry's existence may itself become an integer in the moral calculus applied to solve the dilemma.

CONCLUSION

Will exposing students to management theory, behavioral psychology, and cognitive science increase the likelihood that they will act with greater integrity when confronted with future Enrons than did previous generations of lawyers? The answer to that question takes us full circle back to John's thoughts on the meaning of integrity.

on a *Women's Lawyering Process*, 1 Berkeley Women's L.J. 39 (1985). Of course, not all psychologists agree with the thesis that men and women reason through ethical dilemmas differently. *E.g.*, Cynthia Fuchs Epstein, *Deceptive Distinctions: Sex, Gender, and the Social Order* (1988).

64. These studies may also have significant implications for cross-border practitioners and academics who study comparative legal ethics. One expert has pointed out that the brain imaging studies "provide tools to understand why people with different cultural backgrounds can arrive at different conclusions about moral dilemmas If people's gut-level emotions are organized differently as a result of their backgrounds . . . they may reason differently about what is right or wrong." *Watching How the Brain Works*, *supra* note 56, at F3 (summarizing the comments of Dr. Jonathan Cohen, a Princeton University professor of psychology, who was actively involved in the brain imaging studies); see Jill J. Ramsfield, *Is "Logic" Culturally Based? A Contrastive, International Approach to the U.S. Law Classroom*, 47 J. Legal Educ. 157 (1997); John R. Snarey, *Cross-Cultural Universality of Social-Moral Development: A Critical Review of Kohlbergian Research*, 97 Psychol. Bull. 202 (1985); Hua Hsu, *Orienting the East*, Village Voice, Apr. 16-22, 2003, at <http://www.villagevoice.com/issues/0316/edhsu.php>.

65. For a succinct and helpful overview of the debate, see Pearce, *supra* note 35, at 732-35.

John said, “[H]olding on to who you are and being yourself at all times as best you can . . . strikes me as being at the heart of integrity.” It strikes me that knowledge of other disciplines, such as management theory, behavioral psychology, and cognitive science enables us to better know who we are, and to be ourselves as best we can. If I am right, there is no stronger argument for incorporating them into the professional responsibility curriculum.

Notes & Observations