

February 2017

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Recommended Citation

Kenneth W. Starr, *Morality, Community, and the Legal Profession*, 5 WYO. L. REV. 403 (2005).

Available at: <http://repository.uwyo.edu/wlr/vol5/iss2/1>

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MORALITY, COMMUNITY, AND THE LEGAL PROFESSION

*Kenneth W. Starr**

One is struck these days with the outpouring of concern throughout our society about not simply the legal system but more generally excesses in the marketplace. Moral judgments seem terribly clouded by ancient vices, especially avarice, one of the great sins of humanity, and the narcissistic desire for fame and for notoriety.

By way of sad example, a federal grand jury in Houston last July indicted former Enron Chairman and Chief Executive Officer Ken Lay on charges of conspiracy, securities fraud, bank fraud and making false statements to a bank. Throughout his professional career, Lay had committed himself admirably to a host of philanthropic and community activities too lengthy to recount here.¹ Together with codefendants Jeff Skilling and Richard Causey, Enron's former CEO and Chief Accounting Officer, respectively, Lay is now, however, accused of overseeing a massive corporate conspiracy to "cook the books" at Enron in an effort to inflate the company's stock price and reap a personal financial windfall.² While Lay allegedly benefited to the tune of \$217 million between 1998 and 2001 through the exercise of stock options and sale of restricted Enron stock, the ensuing collapse of Enron's false empire wiped out the retirement savings of thousands of Enron employees and decimated the portfolios of investors.³

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1. See generally <http://www.kenlayinfo.com/public/default.aspx>.

2. Press Release, U.S. Department of Justice, Former Enron Chairman and Chief Executive Officer Kenneth L. Lay Charged with Conspiracy, Fraud, False Statements (July 8, 2004), available at http://www.usdoj.gov/opa/pr/2004/July/04_crm_470.htm.

3. See Superseding Indictment at 6, U.S. v. Causey, Cr. No. H-04-25 (S-2) (S.D. Tex. filed July 7, 2004).

Under way right now in New York is the trial of another nonlawyer by the name of Bernie Ebbers, a former basketball coach who worked with young people for a number of years.⁴ He was the Chairman, Chief Executive Officer, and indeed a founder of what was once known boldly as WorldCom. The alleged accounting fraud that infected WorldCom and for which he is standing trial was so massive that the accountants now suggest that it amounted to \$11 billion. At trial, WorldCom's Chief Financial Officer Scott Sullivan testified very simply: "I falsified the financial statements of our company." He elaborated on that, but he falsified it. Let the record show this was a public company, with shareholders depending on the integrity of those individuals, men and women in positions of high authority.

That confessional statement provides us with an executive summary of this enormous financial loss, grievous to many people, certainly to employees of WorldCom. But even more it reflects a further diminution and loosening of a very fundamental bond in our community; the bond of trust that is necessary for any society to flourish, especially so for a market economy. Mr. Sullivan testified that Bernie Ebbers and the other senior officers were substantially involved in what he called "the deceit." Sullivan further stated that "we did not disclose these accounting adjustments" that were at the core of the fraud—and the "we" included all of senior management, which includes lawyers.

Also in New York the trial of Dennis Kozlowski is under way, accused of hiding from Tyco's board of directors what may now seem to be a modest sum; only \$150 million, paid to himself and generously on his part to his chief financial officer.⁵ According to the prosecutors in their opening statement, "this was a carefully planned, massive theft." Tyco is a publicly held corporation. In the South, HealthSouth's chief executive officer Richard Scrushy was accused and is in trial for masterminding a \$2.7 billion accounting fraud by the old fashioned method of simply ordering his subordinates to inflate earnings, and instead of resigning they did what they were told to do.⁶

4. Ebbers was subsequently convicted on March 15, 2005 on nine counts of conspiracy, securities fraud, and false regulatory filings. See Brooke A. Masters, *WorldCom's Ebbers Convicted*, WASH. POST, March 16, 2005, at A1.

5. Kozlowski, the former chief executive officer of Tyco International Ltd., is being retried in New York Supreme Court on charges of, *inter alia*, grand larceny and securities fraud following an earlier mistrial due to juror improprieties. See *Ex-Tyco Director Testified on Loan Program*, BUSINESS WEEK ONLINE, Mar. 22, 2005, available at http://www.businessweek.com/ap/financialnews/D89071FO1.htm?campaign_id=apn_home_down.

6. As the first chief executive officer to be tried for charges of false corporate reporting under the Sarbanes-Oxley Act, Scrushy initially faced 58 criminal counts in the U.S. District Court for the Northern District of Alabama. See *Complaint for Injunctive and Other Relief, SEC v. Scrushy*, CV-03-J-0615-S (N.D. Ala. filed Mar. 19, 2003), available at <http://www.sec.gov/litigation/complaints/comphealths.htm> (last visited May 2, 2005).

Now one might say your examples are business executives, not lawyers, but we also know that there have been stories about the role of lawyers and trials involving the role of lawyers, so the issue is not simply one for business schools or for economics departments but it is also one for our schools of law. Where were the lawyers, including of course both the outside as well as the inhouse lawyers? What are the lessons that we are to glean from this, in addition to refocusing on the fundamental, bedrock quality of basic integrity?

In each of these large corporate scandals, regardless of criminal culpability, indeed regardless of any eventual civil liability questions, what we do know beyond any doubt is that the public was misled, the public was deceived. And the upshot of that was the substantial diminishing of confidence in the ethics of the marketplace. And naturally Congress responded as one would expect Congress to do, as did regulatory authorities, especially the Securities and Exchange Commission, with statutory and regulatory initiatives the most prominent of which is known to the corporate community as Sarbanes-Oxley.⁷ But there are other issues that are competing quite directly for the attention of the legal community that are in fact placed right on the doorstep of lawyers. Lawyers in public service, lawyers in the U.S. Justice Department and the White House who authored or were otherwise privy to the “torture memorandum” as it is now called, the August 2002 memorandum concerning the appropriateness of treatment of suspected al Qaeda members captured in the war on terror. We have just been through a very rancorous confirmation hearing for our new Attorney General Judge Gonzalez, a man with a very distinguished record but nevertheless the rancor at that hearing was quite palpable. Why? Because of issues with respect to the judge’s interpretation of the Geneva Conventions, their applicability to Guantanamo and other detainees, and the treatment of even U.S. citizens. In light of these issues and in a broad sense, lawyers—and especially international lawyers—are focusing on our membership as a nation in the international community. And while perhaps this seems remote and far away to many of us, the issues that are raised both by these corporate scandals involving lawyers inside and outside and by these international activities involving public lawyers brings us right to home to the question of what is it that we expect of lawyers?

The vision that I set forth herein is going to sound very much not like a set of rules, but rather as a vision based more on foundational principles. And I also want to lift up a vision, call it a lens, through which I will be analyzing the role of lawyers, and I am going to call it, without apology, a moral vision, the moral equation. One of my guides is authored by Notre Dame’s much beloved law school professor Tom Shaffer and Pepperdine’s

7. Sarbanes-Oxley Act of 2002, 15 U.S.C. §§ 7201-7266 (LexisNexis 2005).

own Bob Cochran entitled *Lawyers, Clients, and Moral Responsibility*.⁸ We once were happy as a society to talk about morality; we are a bit more cautious about it these days. I am not going to be. I am not going to be cautious at all. And so if I give offense I apologize in advance, but the observations that follow will be lifting up a moral vision.

Let me begin with a case that occurred some few years ago but continues to swirl in the minds of those who think about professional responsibility and consider what is the role of the lawyer. This is a murder case in Utah, analyzed in some detail by my esteemed Pepperdine colleague Bob Cochran in a separate law review article.⁹ As detailed by Professor Cochran, the case involved a double murder, and the murderer who confessed was Von Lester Taylor. Mr. Taylor broke into a cabin in Utah and what happened was a great horror. He shot and killed two persons, a mother and a grandmother, he wounded the father, he kidnapped two young daughters, and he tried to set the cabin on fire. He was promptly apprehended before he did further mischief to the two daughters. Taylor pled guilty to double murder and his attorney, a private attorney in Utah, sought to portray him in a death case as, in the words of Mr. Levin, the counsel, "remorseful, contrite, and repentant."¹⁰

Listen to the morality in those terms. That is not technical legal jargon. Mr. Levin in going to the jury of citizens is using the language of morality. Remorse, contrition, repentance; there is even a bit of theology there. What was he trying to do? He was trying to avoid the death penalty for his client. In the course of his closing argument, Mr. Levin described his approach in counseling, as a criminal defense lawyer, guilty clients: "I feel it's my obligation to get [guilty clients] to take the first step, and that is to come forth, admit their wrongdoing [and live with] . . . the appropriate punishment."¹¹ He argued that the guilty plea was that first step on the road, as it were, to recovery; a recovery of his fundamental morality as a human being, accepting the responsibility for the horrific acts that he had committed. And because of the client's taking that first step, the attorney went on, his life should be spared. The jury sentenced him to death.

8. THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., *LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY* (1994).

9. See Robert F. Cochran, Jr., *Crime, Confession, and the Counselor-at-Law: Lessons from Dostoyevsky*, 35 HOUS. L. REV. 327, 331 (1998).

10. *Id.* at 329 (citing Stephen Hunt, *Judge Rules Defense Was Adequate for Killer, Judge Affirms Job of Public Defender*, SALT LAKE TRIB., June 10, 1995, at B1, available at 1995 WL 3140868).

11. *Id.* (citing excerpts of defense counsel Levine's closing arguments as quoted in *State v. Holland*, 876 P.2d 357, 362 (Utah 1994) (Stewart, J., concurring)).

This tactic by the lawyer was severely criticized on grounds of professional responsibility by two justices of the Utah Supreme Court.¹² This kind of lawyering, they contended, was utterly incompatible with our adversary system. These justices stated: "It is not the role of defense counsel to persuade a defendant to plead guilty because counsel concludes that the defendant committed a crime," for "the practical effect of that philosophy is to nullify our adversarial system and to deny the defendant the effective assistance of counsel."¹³ The justices went on to suggest that the defense counsel should simply explain the options to the client and then allow the client to make the choice of whether to plead guilty.¹⁴

So what is the lawyer's proper role in this context? The widely accepted role which we inherit as part of our legal culture is that of the zealous advocate who deliberately will put on a set of blinders and will ask the client to do the same thing. The lawyer at times will want to blind herself to the facts: "Do not tell me whether you committed the offense. I don't want to know that." Not all lawyers, but it is not an uncommon practice.

Furthermore, the lawyer in the adversarial and traditional model wants the client to likewise for his or her own sake put on a set of blinders. "Even if you're inclined to talk to the police, don't. Give the police nothing. Exercise your constitutional right to remain silent." It is part of our beloved and fundamentally important constellation of textually enumerated rights—the Fifth Amendment privilege. "Put the government to the task of proving all elements of the charged offense beyond a reasonable doubt; we may not even have to put on a case."

My colleague, Professor Cochran, who himself was a trial lawyer in Virginia but has spent the last two decades thinking and reflecting on these kinds of issues of professional responsibility, wonders about this traditional adversarial model. He inquires whether there is a role for a lawyer to engage in reasoned moral discourse, going beyond simply, as Justices Stewart and Durham of the Utah Supreme Court would say, just identifying quite neutrally the options and allowing the client to decide. Is it permissible, Professor Cochran inquires, to broaden the lens of moral inquiry in this professional relationship and to be in moral dialogue to identify the client's options and to help assess the needs of the client more holistically? Professor Cochran worries about what I would call the moral isolation of the criminal defendant. Let me quote from a law review article just a few years ago from Professor Cochran:

12. *Holland*, 876 P.2d at 361 (Stewart, J., concurring) (arguing in a concurrence joined by Justice Durham that "Levine has demonstrated . . . a fundamental and underlying misconception of the defense attorney's role").

13. *Id.* at 362-63.

14. Cochran, *supra* note 9, at 330 (citing *Holland*, 876 P.2d at 362).

Lawyers who prohibit client confession may protect the client's freedom *vis a vis* the state, but they limit the client's freedom in another sense. They impose isolation on the client. . . . They ignore the possibility that the client might seek goals other than freedom, such as forgiveness, reconciliation, and a clear conscience; they ignore the possibility that the client might want to confess.¹⁵

With what I think is penetrating insight, Professor Cochran contends that the traditional adversarial model—the client clams up, eschews transparency, and puts the government to the task of proving the case—may in fact be profoundly disserving to the client's deepest needs as a human being by indulging an irrefutable presumption or premise that freedom, liberty, is the *summum bonum*, the highest good. And to deepen the conversation, Professor Cochran looks to literature, including in particular the haunting works of the nineteenth century Russian novelist Fyodor Dostoyevsky, celebrated author of *Crime and Punishment* and *Brothers Karamotsov*. Professor Cochran, having mastered the literature of Dostoyevsky writes this: "The novels of Fyodor Dostoyevsky recognize the importance of freedom, but they place it in perspective; they suggest that confession, forgiveness, reconciliation, and a clear conscience may be of greater importance than freedom."¹⁶ He goes on:

Dostoyevsky's stories show the bitter fruit of unconfessed guilt: deception of self and others, additional evil, hyperactivity, moral neutrality, hypocrisy, isolation, guilt feelings, and loss of identify. He shows that confession can bring peace, joy, forgiveness, reconciliation, and a renewed sense of one's identity, but that it can also bring damage to reputation, stress, criminal punishment, and damage to family.¹⁷

Dostoyevsky valued community and he worried as a lover of mother Russia about the loss of community in the context of the criminal justice system. This is a provocative and deeply controversial vision of the lawyer of the next century. Not of the past century, because that was the lawyer of the adversarial model. But what Professor Cochran and frankly others around the country are lifting up is the lawyer as a genuinely involved and helpful moral actor, and is grounded in the vision of the lawyer in community. Like the client, the lawyer under this view should not be atomistic and isolationist. The lawyer should be ever mindful of community and its demands and the potential need for the defendant, the client, to reenter com-

15. Cochran, *supra* note 9, at 331

16. Cochran, *supra* note 9, at 332.

17. Cochran, *supra* note 9, at 333.

munity, and indeed to be aware of the client's perhaps profoundly deeply felt desire to reenter community.

Now this perhaps is not as unorthodox as it may seem at first blush because the criminal law already recognizes this acceptance of responsibility. Our federal judges are now struggling with what to do with the criminal sentencing guidelines and their signposts, but what we do know is that historically the acceptance of responsibility—"do you accept responsibility for what you have done?"—is a moral term, not a technical legal term. Lawyers talking to judges at sentencing time will say "my client accepts his or her responsibility, he or she is genuinely sorrowful." As my occasional client, Walter Fauntroy, who served alongside Dr. King says, "Is the person filled with godly sorrow?" You might not talk that way in front of a judge, but pastors talk that way. Acceptance of responsibility we say is a good thing, but why? Why don't we, if we really believe in the adversarial model, simply put the premium on success in the marketplace, namely in the trial? That is, shouldn't we be saying if we truly believe in the adversarial model that if you beat the rap, you take the government's best shot but are left standing, then you should be honored. Society should praise you and honor you because you are a success. The government tried to take you down, but you and your lawyer came out on top, and now you're a free man or woman, we praise you, we honor you, and now enjoy your freedom.

At a very basic level of broadly shared notions of justice, that does not sound right. We may say that we like it that someone beat the rap, but we don't want society to operate that way, because don't we at least in the western tradition believe that, as Cicero put it, "justice renders to every one his due."¹⁸ Isn't that what we say when we talking about due process? It is not just process, it is that process which is due, tethered closely to society's norms and those norms unfold, they evolve, and they mature, as the Supreme Court has said in *Trop v. Dulles*.¹⁹ Our sense of fairness has both a substantive and procedural dimension when we pause and analyze it, including a sense of proportionality, that the punishment should fit the crime, but surely we also say crime—once there has been procedural fairness—should involve some form of sanction. It may not be incarceration, it may be restitution to the victim, but there has to be some form of justice, of giving that which is due because you took that which did not belong to you, or you took a human life, or you injured someone.

Aren't we uncomfortable at least at a moral level saying it is okay to convict an innocent person? We recoil at that. And especially do we recoil

18. MARCUS TULLIUS CICERO, *DE RE PUBLICA—DE LEGIBUS I*, 15 (Clinton Walter Keyes trans., Harvard University Press, 1928).

19. See *Trop v. Dulles*, 345 U.S. 86, 101 (1958) ("The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.").

these days with focuses on the importance of DNA evidence where we know it is vitally important. And thus certainly all reasonable persons in American society would say we cannot tolerate the execution of an innocent person. That's the community speaking the voice of morality, that we as a just society are aspiring to be a more just society, and we the larger community simply will not tolerate—if we can stop it—unfairness to our own.

In the current age we are quite willing to impose demands on instruments of societal power even to those who are outside of our community. The Supreme Court's decision just last June in the Guantanamo detainee case makes this powerfully clear. The case of *Rasul v. Bush*²⁰ involved non-U.S. persons who have never been on U.S. soil and who were taken into custody in the theater of battle in Afghanistan. Many protest their innocence that they were swept up, but it is not disputed they were physically there and they are non-U.S. persons. And yet our Supreme Court speaking through the voice of Justice Stevens said our writ runs even to them, that there must be some basic elemental fairness extended even to those persons who are outside our community. That's how strong our shared sense of fairness is. What's more, a very respected federal judge in Washington, D.C., Judge Robertson, has declared now that those Guantanamo detainees apprehended in the theater of battle in Afghanistan who come before U.S. military commissions or tribunals are entitled to even greater procedural protections than the government is already providing under a fairly elaborate military order, one that includes a presumption of innocence.²¹ Indeed, we applaud those moral values embodied in exquisitely transnational and deliciously multicultural documents such as the Universal Declaration of Human Rights, entered into by the global community in the wake of the unspeakable horrors of World War II. And lawyers are continually invoking these transnational documents and calling on persons of good will everywhere to abide by these documents and to act as responsible members of a broad global community.

At an even broader level, one that transcends the very important but nonetheless narrow duties of a lawyer representing her client, I invite our attention to a powerful statement of the lawyer's duty in community. In particular let me focus on an important book, now some few years old, by the immediate past dean of the Yale Law School, Anthony Kronman. The book is entitled, sadly, *The Lost Lawyer*.²² While that is discouraging enough, the subtitle is likewise not a real cause for celebration: *Failing Ideals of the Legal Profession*. Dean Kronman speaks in explicitly moral terms and his vision is rather apocalyptic. The first words of the book: "This book is about a crisis in the American legal profession. Its message is that the

20. 124 S. Ct. 2686 (2004).

21. See *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152 (D.C. Cir. 2004).

22. ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 2-3 (1993).

profession now stands in danger of losing its soul.”²³ While Yale has a divinity school, the law school doesn’t ordinarily speak I think in those theological terms of a community losing its soul.

Why? Why speak in terms of community, why speak in terms of a profession in danger of losing its soul? Let me make it clear, Dean Kronman is not a theologian, but he is a trained philosopher who achieved a doctorate in philosophy before he entered law school. This is a book of moral philosophy and it is about right and wrong. And yes, I will go ahead and say it; it is about good and that which is non-good, that which society once called evil. Dean Kronman writes about a crisis in the profession, what he calls a crisis of morale, and these are his words:

This crisis is, in essence, a crisis of morale. It is the product of growing doubts about the capacity of a lawyer’s life to offer fulfillment to the person who takes it up. Disguised by the material well-being of lawyers, it is a spiritual crisis that strikes at the heart of their professional pride.

This crisis has been brought about by the demise of an older set of values that until quite recently played a vital role in defining the aspirations of American lawyers. At the very center of these values was 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. It is of course rewarding to become technically proficient in the law. But earlier generations of American lawyers conceived their highest goal to be the attainment of a wisdom that lies beyond technique—a wisdom about human beings and their tangled affairs that anyone who wishes to provide real deliberative counsel must possess. They understood this wisdom to be a trait of character that one acquires only by becoming a person of good judgment, and not just an expert in the law. To those who shared this view it seemed obvious that a lawyer’s life could be deeply fulfilling. For the character-virtue of practical wisdom is a central human excellence that has an intrinsic value of its own.²⁴

Notice the moral language. Dean Kronman yearned for a return to the age of what he calls the lawyer-statesman. The lawyer, the man or woman of wisdom, lawyers of discernment, persons of great judgment. He lifts up the example of Lincoln in facing the unprecedented task of saving

23. *Id.* at 1.

24. *Id.* at 2-3.

the union. Lincoln did not rely upon his coursework or his CLE credits. He of course had not taken any course, nor was there CLE. He had only undertaken the great course of informal study followed by apprenticing. He relied rather on wisdom, on judgment born of vast experience, and deep but limited reading grounded in Shakespeare and the Bible, and of course that ubiquitous source of wisdom and learning on the American frontier, as well as in Philadelphia law offices, *Blackstone on the Common Law*.

A century later emerged the towering example of Robert Jackson, a great Justice of the Supreme Court for whom William Hobbes Rehnquist clerked. A farm boy in western New York, Robert Jackson could not afford to go to college, so like Lincoln he read. And guess what he read; Shakespeare and the King James Version of the Bible. He finally marshaled enough resources to attend one year and only one year of law school, as it was then known as the Albany Law School, and there he fell under the spell of a dynamic young state senator from down-state, Franklin Delano Roosevelt. With this limited, call it deprived, background, Robert Jackson, self-educated farm boy, became one of the towering influences in twentieth century American law and is grievously under appreciated in the American legal system. He is remembered more popularly in history for his remarkable role as a sitting justice as chief U.S. prosecutor at the war crimes tribunal in Nuremberg, a product, of course, of World War II. Jackson is best remembered in American constitutional law for his magnificent opinions in cases like *West Virginia State Board of Education v. Barnette*,²⁵ where he lifted up the vision in the most eloquent language in our judicial literature of freedom of the mind. Or the steel seizure case where he told President Roosevelt's successor, President Truman, that he had exceeded his authority as the President of the United States and that concurring opinion now serves as the canon for separation of powers analysis.²⁶ This was a great man. A lawyer-statesman who tried cases in Jamestown and elsewhere but who could also argue cases in the United States Supreme Court and try Nazi war criminals in Nuremberg with brilliance, and one who wrote greatly, not just judicial opinions but avocationally as well.

Is it over? Dean Kronman seems to think so. Moreover, he thinks that the ideal has a present and clear danger for the American political system. Drawing from Tocqueville's observations about the American aristocracy, it is *not* the landed gentry—the folks who own plantations or vast farms or even ranches—that is the aristocracy, rather the aristocracy is the lawyer. That is the person who is guiding the fortunes of the polity, not exclusively but disproportionately for the profession. It is Dean Kronman's vision that

25. 319 U.S. 624 (1943)

26. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634-55 (1952) (Jackson, J., concurring).

[T]he demise of the lawyer-statesman ideal means that the lawyers who lead the country will on the whole be less qualified to do so than before. They will be less likely to possess the traits of character—the prudence or practical wisdom—that made them good leaders in the past. Like ripples on a pond, the crisis of values that has overtaken the legal profession in the last twenty-five years must thus in time spread through the whole of our political life with destructive implications for lawyers and nonlawyers alike.²⁷

Think of it. We should be more qualified, but at least according to this vision, our polity itself is going to suffer from the demise of this vision, a moral vision of the lawyer.

Now one may rightly say that Lincoln and Robert Jackson and similar worthies, giants in the law, lived in a radically different time. It was a time not only of a smaller and more cohesive bar, but also perhaps of a small-town America which has long since disappeared. There is indeed a sense that an entirely different era is upon us, which we can simply call the post-Enron and post-WorldCom era, and perhaps it is even the post torture memo era. While there remains a good deal of still-unfolding commentary, the lawyer among others in a business context now operates much more by the mandate of Congress in a transparency mode, requiring not an adversarial nature but requiring specific steps that boil down to this: “Go up the ladder.” If potential wrongdoing is afoot, you do not sit on the information, you report it up the chain of command. The notion is very controversial and a number of bar associations are troubled by this because it tugs at the traditional attorney-client privilege. But what the profession now has is a congressionally mandated honor code implemented by the Securities and Exchange Commission.

Let me be clear that although this is the law of the land and must be scrupulously obeyed, there is another voluntary model of moral conduct in the marketplace and that is the culture of Johnson and Johnson. I had the privilege in private practice to deal with the Johnson & Johnson culture, and in the course of that I found myself being steeped into the culture. In my world view as a Christian we all sin and fall short of the glory of God, so I am not holding any company up as a complete model of perfection. But for those who remember the Tylenol tampering scare, the instantaneous decision made by Johnson & Johnson senior management was “total recall *now*.” They did so without consulting with crisis management advisors, without the lawyers issuing a legal opinion; they simply repaired to their own statement of corporate ethics. And when they read the statement of corporate ethics, the interests of the shareholders were last on the pole. The first obligation to

27. KRONMAN, *supra* note 22, at 4.

Johnson & Johnson as stated by its own corporate code of ethics was “to our physicians and our consumers.” From the Johnson & Johnson perspective, the physicians and health care providers who use and apply and administer our products and our consuming public who go to pharmaceutical stores or Costco and avail themselves of our product, we owe our first moral obligation to them.

Did that give rise to a shareholder derivative suit: “You mean you’re not trying to maximize shareholder wealth?” Well guess what? By following their own rule of ethics, Johnson & Johnson stock quickly recovered and it has had a magnificent run even by Warren Buffett standards. Why? Because the people have confidence that there is a culture of morality and caring.

This is the culture of right-doing. It is thoughtful, it is deeply analytical, but it is driven by principle, grounded by a moral vision of the good. The fundamental idea of the culture of right-doing is that we all live and move and have our being in moral community and not in isolation, and that to the extent that our models are driven by the isolationist model we may want to start rethinking them. We celebrate our communities and we cluster into communities according to birth and family relationships, but as we mature and grow we then develop and apply our own moral vision and world view that brings us to do things and to assemble and associate together as we wish. But it is not simply community, where one simply asks “Is there a community here? Great, I want to join it.” You want to know the purpose of the community, the mission of the community. In short, the community defines itself by principles, by mission.

And so I leave you with these principles:

The principle of integrity. This is foundational, and non-negotiable; in law, in business, and indeed in life itself.

The principle of human dignity of all persons. Human dignity of course encompasses that which we speak of so rightly in our profession, and that is civility. You treat nobody in an uncivil way.

The principle of excellence, that we will not only be competent but we are going to do our very best. If we are going to “just do it,” why not do it the best.

And then there is the principle of compassion, which so easily breaks into familiar subcategory of pro bono work. Our pro bono commitments reflect our compassion as citizens, citizens at home reaching out into underserved communities and addressing their needs, not just legally, but more broadly.

Perhaps Cicero best embraces these community-defining principles with a quote that is both unifying and moral: "Justice; the skill to treat with consideration and wisdom those with whom we are associated."²⁸ A less minimalist vision than "to each person his or her due," one in which "consideration" can certainly be read to countenance civility and the inherent dignity of all persons. It may even embrace compassion.

28. MARCUS TULLIUS CICERO, *DE OFFICIIS* (Walter Miller trans., Loeb ed., Cambridge: Harvard University Press, 1913), *available at* http://www.arts.cuhk.edu.hk/~lha/latin_lessons/officium/virtue.html.

