

BY DEBORAH L. RHODE

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# ALIGNING OUR ETHICAL COMPASS

I am deeply honored to be here  
and am especially grateful to Cheryl  
Preston for making it possible.  
I am also grateful to all of you  
for showing up for a talk on the  
challenges of leadership. You are  
among the future leaders who  
will be grappling with critical  
problems, so there is some value  
in discussing the fix we're in and  
what needs to be done about it.



The massive moral meltdowns recently on display in Enron et al. have made clear the need for more attention to issues of moral leadership. These financial scandals have been estimated to cost as much as \$7 trillion in shareholder losses. The resulting wave of indictments, bankruptcies, investigations, and felony convictions makes clear that we have more than a few bad apples at leadership levels and more than enough lawyers willing to look the other way. In public opinion polls, only a quarter of Americans think that top executives are honest, but only a fifth think that lawyers are. We narrowly lose to used car salesmen in the race to the bottom of ethics ratings.

Surveys of employees also suggest that business and professional leaders aren't doing enough to foster ethical workplace cultures. Results vary somewhat, but they generally indicate that between a quarter to three-quarters of employees observe misconduct, only about half of which is reported. Of course, these estimates and surveys focus only on misconduct, not broader issues involving corporate social responsibility.

This portrait is hard to reconcile with the somewhat platitudinous party line of publications on moral leadership. These generally insist that ethics pays and that professionals and their employers do well by doing good. If that were true, there would appear to be a lot of smart people out there unable to do the math. And if virtue were always its own reward, we might expect to see more of it than has recently been on display. In some contexts principles come at a price, and a variety of forces conspire to compromise ethical judgment. Among those forces are skewed incentives, situational influences, peer pressure, and diffusion and displacement of responsibility. Let me say a word about each.

#### **SKewed REWARD STRUCTURES**

Corporate leaders who are too preoccupied with maximizing short-term profits may end up with decisions that undermine or compromise long-term values. Enron's plummet from the nation's seventh largest corporation to a bankrupt shell has been partly attributed to its relentless focus on immediate profits. In its pay-for-performance culture, those who didn't make their numbers were

humiliated and sometimes terminated; and ethics and accounting rules were seen as technicalities made to be stretched or circumvented. A *New Yorker* cartoon during the Enron debacle captured the mindset. It featured a CEO handing some corporate document to a lawyer with the instruction, "Diddle with this, Benson, until there's some truth to it." The result of this mindset was a lot of fudging on numbers and, ultimately, felony convictions, massive civil liability, and major losses of jobs and pensions. The attorneys who blessed these dubious financial transactions, like those involved in earlier financial scandals such as the massive savings and loans collapse, faced profit pressures of their own. Much of their billing was attributable to a single client possibly engaged in fraud, and they didn't want to acquire knowledge that might suggest that the conduct crossed legal boundaries.

#### **SITUATIONAL INFLUENCES**

A variety of situational pressures can also undermine moral conduct. A famous example of the influence of time pressures grows out of an experiment by Princeton psychologist John Darley. It found that students training for the ministry who were en route from a lecture on the Good Samaritan were unlikely to behave like one if they were late for another obligation. Most students hurried right by a moaning man in seeming need of medical care rather than stopping and providing assistance.

Once individuals yield to situational pressures, then other cognitive biases often kick in to entrap them in more serious misconduct. One such bias is the desire to reduce cognitive dissonance by rationalizing misconduct that would otherwise suggest a gap between one's principles and practices. Professionals, including lawyers who pad expenses or inflate their hours to meet unrealistic quotas, offer such rationalizations: their work is really worth more than the time they actually spent, or everyone else does it and expects it. The result is that auditors find fraud in about 5 to 10 percent of bills they review and questionable practices in another 25 to 35 percent. Such practices include overstating hours, performing unnecessary work, and double billing multiple clients for the same time or task. Leaders of firms with oppressive hourly billing requirements often

wink and nod at these abuses, and they fail to address the structural incentives that perpetuate it. Yet the rationalizations that support petty dishonesty in billing can readily spill over to other issues.

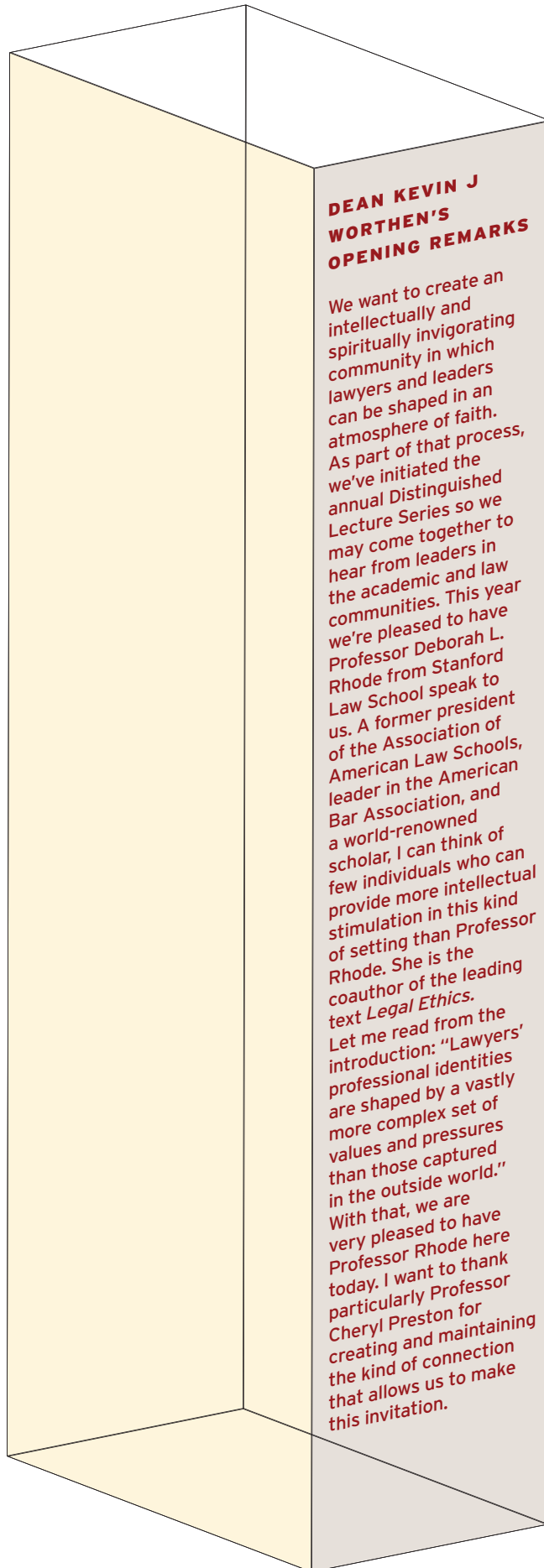
Another way of rationalizing complicity in dubious conduct involves redefining it. Euphemisms can serve that function, and a recent case study of the problem involves the highly publicized role of federal lawyers in drafting "torture memos" in the aftermath of the 9/11 terrorist attacks. Two of the most controversial memoranda came from the Office of Legal Counsel (OLC) and concluded that the Geneva Conventions do not cover al Qaeda or Taliban captives, a view almost universally rejected by experts in the field and, ultimately, by the Supreme Court.

Did lawyers involved in preparing these memos all believe that the methods they legitimated were morally justified and consistent with international human rights? We don't know. But what we do know is that peer pressure and the desire to remain a team player often induces individuals to adjust their ethical compass.

In his famous essay "The Inner Ring," C. S. Lewis describes the way that gradual immorality entraps those who long to be part of the leadership circle. He writes,

*Just at the moment when you are most anxious not to appear crude, or [naïve], or a prig—the hint will come. It will be the hint of something which is not quite in accordance with the technical rules of fair play; something which the public, the ignorant, romantic public, would never understand; . . . but something, says your new friend, which . . . "we always do." And you will be drawn in, if you are drawn in, not by desire for gain or ease, but simply because at that moment . . . you cannot bear to be thrust back again into the cold outer world. . . . And then, if you are drawn in, next week it will be something a little further from the rules, and next year something further still. . . . It may end in a crash, a scandal, and penal servitude; it may end in millions [and] a peerage. . . . But you will be a scoundrel. [C. S. Lewis, *The Weight of Glory and Other Addresses*, (San Francisco: HarperSan Francisco, 2001) 153–54]*

Lewis' description also captures the predicament of gradual acculturation to problematic conduct—what is known colloquially as the "the boiled frog" problem. A



**DEAN KEVIN J  
WORTHEN'S  
OPENING REMARKS**

We want to create an intellectually and spiritually invigorating community in which lawyers and leaders can be shaped in an atmosphere of faith. As part of that process, we've initiated the annual Distinguished Lecture Series so we may come together to hear from leaders in the academic and law communities. This year we're pleased to have Professor Deborah L. Rhode from Stanford Law School speak to us. A former president of the Association of American Law Schools, leader in the American Bar Association, and a world-renowned scholar, I can think of few individuals who can provide more intellectual stimulation in this kind of setting than Professor Rhode. She is the coauthor of the leading text *Legal Ethics*. Let me read from the introduction: "Lawyers' professional identities are shaped by a vastly more complex set of values and pressures than those captured in the outside world." With that, we are very pleased to have Professor Rhode here today. I want to thank particularly Professor Cheryl Preston for creating and maintaining the kind of connection that allows us to make this invitation.

frog thrown into boiling water will jump out of the pot. A frog placed in tepid water that gradually becomes hotter and hotter will calmly boil to death.

These pressures to be a team player and the incremental erosion of moral principle can be especially pronounced in contexts where professionals lack accountability for collective decision making. That is often true of lawyers; their individual reputations rarely suffer, and malpractice doctrine and insurance often insulate them from personal liability for involvement in illegal client conduct. A famous study by Wharton professor Scott Armstrong illustrates the pathologies that too often play out in organizational life where moral responsibility is defused. The experiment asked 57 groups of executives and business students to assume the role of an imaginary pharmaceutical company's board of directors. Each group received a fact pattern indicating that one of their company's most profitable drugs was causing an estimated 14 to 22 "unnecessary" deaths a year. The drug would likely be banned by regulators, because a competitor offered a safe medication with the same benefits at the same price. More than four fifths of the boards decided to continue marketing the product and to take legal and political actions to prevent a ban. By contrast, when a different group, this time individuals, with similar business backgrounds were asked for their personal views on the same hypothetical, 97 percent believed that continuing to market the product was socially irresponsible.

If we are serious about addressing these biases and pressures that impair ethical decision making, then we need to make professional, business, and policy leaders more knowledgeable about remedial strategies. For example, the value of ethical codes, consultants, and compliance structures both for law firms and their organizational clients should neither be overstated nor overlooked. Much depends on whether they are viewed as more than "window dressing" for someone to peddle a slightly sleazy transaction. Good "optics" was how one manager discussed Enron's ethical code, and shortly after the recent collapse, copies of the document were selling on eBay, advertised as "never been read." But some evidence suggests that when codes of conduct are well enforced, developed in consultation with employees, and respon-

sive to real concerns without being overly vague or legalistic, they can play a constructive role. The same is true of ethics training, law firm ethics counsel, whistle-blower protections, and related compliance structures. We also need to provide more positive recognition and reinforcement for lawyers and other employees who hold on to moral principles in their professional relationships. Both informal ethical codes and organizational reward structures need to do much more to foster basic ethical norms of honesty, fairness, and respect for public interests.

A second major ethical challenge involves diversity. I'll focus briefly on gender, both because that is my field and because a widespread assumption is that the "woman problem" has been solved.

The facts, however, suggest otherwise. Despite almost a half century of equal opportunity legislation, women's opportunities in legal, corporate, and political settings are anything but equal. In the United States women are a majority of the electorate but hold only 15 percent of congressional seats and slightly over 20 percent of state legislative positions. In management women account for about a third of MBA classes but only 16 percent of board members, 8 percent of top leaders, and 2 percent of CEOs in Fortune 500 companies. In law about half of new entrants are female, but less than a fifth of law firm partners, federal judges, and law school deans are female. The gap widens for women of color, who account for only about 4 percent of congressional legislators and 1 percent of corporate officers, law firm partners, and general counsels.

Yet for many constituencies the most convenient explanation for women's underrepresentation in leadership positions is women's choices. For example, Lisa Belkin's widely circulated cover story in the *New York Times Magazine* on the "opt-out revolution," claimed women are underrepresented in leadership positions less because "the workplace has failed women" than because "women are rejecting the workplace." "Why don't women run the world?" asks Belkin. "Maybe it's because they don't want to."

Such explanations capture only a partial truth. Almost a fifth of women with graduate or professional degrees are not in the labor force, compared with only 5 percent of similarly credentialed men. Yet what fades

from the "opt-out" narrative are the biases that drive women's decisions and constrain the opportunities for those who opt in. Also missing are the choices that men make, as spouses, policy leaders, and employers, which often limit the choices available to women.

One of the most intractable sources of inequality is the mismatch between the traits

notice and recall information that confirms their prior stereotypes. So, for example, when employers assume that a working mother is unlikely to be fully committed to her career, they more easily remember the times when she left early than the times when she stayed late. These perceptions can, in turn, prevent women from getting assignments that would demonstrate their capa-



traditionally associated with women and those with professional success. What is assertive or authoritative in men often seems abrasive in women, who risk seeming too feminine or not feminine enough. Having children makes women, but not men, appear less competent and less available to meet workplace responsibilities. Moreover, as psychologists note, people are most likely to

bility and commitment, and a cycle of self-fulfilling predictions is established.

A related problem involves what psychologists label "in-group favoritism." People are more likely to prefer and to assume competence among those who are like them in important ways, such as gender, race, and ethnicity, and more likely to include them in informal networks of mentoring and support.



The problem is captured in a *New Yorker* cartoon featuring a boardroom with all men and one woman, where the chair of the meeting announces, "That's an excellent point Miss Tighe. Now let's just wait for one of the men to make it."

The extent of the problem in law firms emerged clearly in a survey released just this last August by the ABA Commission on Women in the Profession. There, 44 percent of women of color and 39 percent of white women—but only 2 percent of white men—reported being passed over for desirable work assignments. About 60 percent of women, but only 4 percent of white men, felt excluded from formal and informal networking opportunities.

opt-out point, if women are not choosing to "run the world," it's partly because men are not choosing to run the washer/dryer.

Gender inequalities in family roles pose particular challenges for women in leadership positions requiring total availability. Hourly requirements in most professions have increased dramatically over the last two decades. What has not changed is the number of hours in the day. Technological innovations like e-mail, faxes, and BlackBerry cell phones have created as many problems as they have solved. Although they make it increasingly possible for women to

work at home,

upper-level positions. Not all formal mentoring programs, part-time policies, or diversity education initiatives are effective. Employers need to know what is and what isn't working and to make appropriate responses.

For example, although California now requires mandatory sex harassment training, what satisfies the requirement leaves much to be desired. The programs I have reviewed both highlight overly obvious or overly trivial examples of harassment and exaggerate the risk of

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A final challenge regarding women's full representation in professional and leadership roles involves work-family conflicts. The home is no more an equal opportunity employer than is the workplace, except that in domestic matters the presumptions of competence are reversed and men are assumed to be unable or unwilling to assume an equal share of responsibility. Despite a significant increase in men's caretaking work over the last two decades, women continue to shoulder about 70 percent of the responsibilities in dual career couples. In one representative survey of high-achieving women, 4 of 10 felt that their husbands created more domestic work than they contributed. Double standards in domestic roles are deeply rooted in cultural attitudes and workplace practices. Working mothers are held to higher standards than working fathers and are often criticized for being insufficiently committed, either as parents or professionals. These mixed messages leave many women with the uncomfortable sense that whatever they are doing, they should be doing something else. When asked how women can solve the work-family conflict, Gloria Steinem aptly answered: "Women can't, until men are asking that question, too." To return to Belkin's

they also make it increasingly impossible not to. Many high-achieving women remain tethered to their office, and total availability is less the exception than the rule. Although the vast majority of law firms and corporate employers have part-time policies, they are often unavailable for partners or upper-level managers. And few of those eligible feel able to use them. In law less than 5 percent of lawyers take such status, and those who do often feel that their hourly limitations are not respected and that they are treated as second-class citizens in terms of assignments and career advancement. Inadequate public support for child care adds to women's work in the home and limits their opportunities in the world outside it.

We do not lack for plausible reform strategies. The most important factor in ensuring equal access to leadership opportunities is a commitment to that objective, which is reflected in workplace priorities, policies, and reward structures. That, in turn, requires accountability. Decision makers need to be held responsible for results in recruitment, retention, and promotion, as well as in practices that influence those results, such as evaluation, assignments, mentoring, and work-family accommodation. Accountability requires monitoring employees' perceptions of fairness as well as their representation in

personal liability  
for unintended offenses.

According to some courses, statements such as "You look nice in that dress" or acts of chivalry like holding a door open fall into a "dangerous grey area." Even inadvertent offenders can reportedly risk losing not only their "reputation" but also their "home, car, and life savings." For the clueless in California, some training includes instruction on what forms of workplace hugging are permissible. Although frontal hugs apparently are unacceptable, side hugs or squeezes may be unobjectionable. But then again, maybe not. Too many individuals may end up seeing these required programs—and the legal doctrine that they describe—as overblown reactions to oversensitive women who should get a life, not a law. As one exasperated male supervisor put it in his evaluation, "This appears to be a course designed by idiots for idiots."

We can and must do better. And law schools can help in this mission by keeping the issues on the agenda of students like you, who will soon be leaders in our profession and in public policy. Your mission is to take up the challenges we have left unmet. As the social critic Elinor Smith once noted, "It has long since come to my attention that people of accomplishment rarely . . . [stayed] back and let things happen to them. They went out and happened to things." So go forth and make the world better. Thank you for joining me here today to address some crucial challenges that await your efforts.