

RESEARCHING LAW

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INTERNATIONAL PERSPECTIVES ON LAWYER PROFESSIONALISM AND ETHICS

The Fellows of the American Bar Foundation Research Seminar in Honor of Wm. Reece Smith, Jr.

Sponsored by Carlton Fields, P.A.

The ABF Fellows Research Seminar was held on February 11, 2006 in Chicago.

Dianna Kempe of Paget, Bermuda, served as moderator of the seminar. She noted that the event was facilitated by The Fellows of the American Bar Foundation and honors the career of Wm. Reece Smith, Jr. Kempe acknowledged the important role of ABF Life Fellow Leonard Gilbert who conceived the idea for the seminar. She also expressed deep appreciation to Reece Smith's law firm, Carlton Fields, for sponsoring the event, and extended a special thank you to two members of the audience, Gary Sasso, President of Carlton Fields, and Sylvia Walbolt, the firm's Chair. Kempe observed that the

distinguished panel included academics as well as practitioners from both civil law and common law jurisdictions. She pointed out that while the business community now routinely works in the international arena, lawyers are just beginning to move beyond national borders so the discussion should prove informative to those interested in the burgeoning field of transnational legal practice.

Terror, Torture, and the Normative Judgments of Iraqi Judges

ABF Senior Research Fellow John Hagan reported that he would be speaking with his collaborator **Gabrielle Ferrales** and that they would be reporting on research conducted with their third co-

author, Guillermina Jasso, a Professor at New York University. The focus of their research is groups of Iraqi judges who take two-week courses on such issues as international human rights, criminal law procedure, and court administration at a central European city. By gaining access to these judges, the researchers were able to engage them in an experiment to determine "how they are able to bring normative order to the kinds of cases they confront within the framework of the current insurgency in Iraq that features both torture and terror." Some 100 judges attended these courses during 2004 and 2005, which is about 10 percent of the total number of judges in Iraq. All of the

Seminar Panel Members

Geoffrey C. Hazard, Jr.
Claire Miskin
Emilio Gonzalez de Castilla
Dianna Kempe
Robert E. Lutz



Dedicated to the Study of Law, Legal Institutions, and Legal Processes

Judges who rated highest on the fear scale and who attached the greatest importance to issues of police protection were most likely to punish Coalition guards for torturing suspected Al Qaeda terrorists more severely

judges received their education in Iraq, and they are almost entirely male, with the exception of seven females, three of whom attended the courses. Hagan noted that the judges in the study are a remarkable group. "And, most sadly, several of the judges who attended the courses were subsequently assassinated after their return to Iraq."

The events that were transpiring in Iraq during the time the judges were taking the courses are relevant to the research, Hagan observed. The first photographic evidence associated with the torture at Abu Ghraib prison was publicized in April and May of 2004, and the first group of judges met in September of 2004. In November of 2004, the difficult retaking of Fallujah began, and the second meeting of judges, in November and December of 2004, took place as those events were

unfolding. In January 2005 the election of the Transitional National Assembly that went on to develop an Iraqi constitution immediately preceded the third judges' meeting in April 2005.

The theoretical framework of the study provides a way to assess the decision-making process in which these judges engage and the impact of the insurgency, Hagan pointed out. The first vantage point is the classic rule of law model that uses formal standards that would be involved in sentencing criminal cases, such as degree of harm suffered by the victim, the prior record of the offender, and "the level of responsibility in a hierarchy of command that an individual, who might be involved in torture, occupied." The second approach is a contrasting notion of the rule of law, sometimes known in social science as conflict theory, which puts more emphasis on variables like race or ethnicity. "Command authority again might be a relevant consideration but in quite a different way if one assumes that those who are more powerful are least likely, for example, to receive severe sentences." The third construct is a mixture of legal considerations and other factors that may have a bearing on the outcomes, such as emotions like fear, which research has shown can produce ambivalence in decision making.

The approach that he and his colleagues used in trying to understand how Iraqi judges make decisions is the factorial survey method, Hagan reported. The judges read a short vignette description of fifty hypothetical cases that involved a terrorist who was being tortured by a prison guard, and then they each rendered what they regarded as a just sentence. Various factors were manipulated randomly within the context of the cases, including the

extent of the injury, which was measured quantitatively by actual days of hospitalization. In addition, with the last group of judges, the researchers were able to analyze how particular combinations of factors, specifically the nationality of the guards and the terrorists, influence the kinds of decisions the Iraqi judges made.

Gabrielle Ferrales described the project's research design. She reported that the researchers took all the case characteristics and generated



through statistical means an entire population of two million fact patterns. From this population, a random sample of 50 fact patterns was extracted to present to each judge. By randomizing the case characteristics, the researchers were able to avoid spurious or false associations among the factors. Each packet that the judges received contained 50 case vignettes and an instruction sheet (all translated into Arabic) that advised the judges that they could assign any sentence they felt was just, for example, three months, six months, nine years, death, or no punishment. This option provided them "with wide latitude in assigning a prison sentence." In addition, an attitudinal survey was included, which measured how the judges rate the importance of such issues in Iraq as assassinations, kidnappings, rapes, property crimes, and police protection. From this information, the researchers developed a "fear scale." On the 20-point fear scale, the mean for the judges was nearly 18. Similarly, on a 5-point police protection scale, their mean was near 4. Clearly, Ferrales noted, fear and inadequate police protection are issues of great concern to these judges.

John Hagan reported that the



researchers first compared the sentences assigned by the judges in the three groups.

When the group that met in November of 2004 was compared to one half of the judges who met in April 2005, and who all received exactly the same set of vignettes, there was a high degree of similarity despite the events that took place in Iraq during the time between the two meetings. The average sentence in the November group was about four and a half years; in half of the April group that read the same vignettes, the average sentence was four years. But the picture was very different for the second half of the April group who read vignettes that specified the nationality of the guards and the prisoners. The average sentence imposed by these judges increased by about 50 percent, close to six years on average.

Hagan reported that the researchers' next task was to try to understand what was producing these differences, and "we thought it highly likely to involve particular combinations of guards and prisoners." In fact, the analysis revealed that in situations involving a Coalition guard being sentenced for torturing an Al Qaeda prisoner there was a wide variation, with a standard deviation of 15 years, and a maximum sentence of 48 years. By contrast, when a Coalition guard was being sentenced for torturing an Iraqi prisoner—"something we might think of as the Abu Ghraib scenario"—there was much more consensus among the judges and a maximum sentence of 12 years. In all the different fact patterns

presented to the judges, "on average, the longest sentences were given to Coalition guards torturing Al Qaeda prisoners."

Yet there was clearly a broad range of sentences imposed on Coalition guards involved with Al Qaeda suspects. Of the nineteen judges rendering sentences, six sentenced Coalition guards very severely with, on average, more than ten-year sentences. But thirteen of the judges sentenced the Coalition guards to less than five years, a strong indication of ambivalence. An analysis of the relationship between the judges' attitudes and the sentences they rendered suggests that the variation in sentencing can be traced to the effects of their fear about the circumstances in which they are living and their concerns about inadequate police protection. Those who rated highest on the fear scale and who attached the greatest importance to issues of police protection were most likely to punish Coalition guards for torturing suspected Al Qaeda terrorists more severely. Judges who scored lower on the fear scale gave more lenient treatment to the Coalition guards who tortured Al Qaeda terrorists and imposed stiffer sentences on Coalition guards who tortured Iraqis. "The emotions of fear and police protection are certainly playing a role in what we are finding," Hagan pointed out.

But the role of emotions is not the whole story, he observed. The actual harm suffered by the victim, as measured by number of days of hospitalization, was an important predictor of the sentence. So while the results do not support a strict rule-of-law interpretation, "what was happening in these sentencing exercises could perhaps more accurately be called rule with law."

The Role of the Legal Complex in Advancing and Thwarting Political Liberalism

ABF Senior Research Fellow

Terence Halliday reported that he



would speak about the role of lawyers in the rise and fall of political liberalism. In 2002 the state-controlled

China Lawyers Association inaugurated a bold new service—an Internet forum—that allowed lawyers from all over China "to engage each other directly, cheaply, and easily." The forum has thrived, Halliday pointed out. By 2005 it had more than 35,000 registered users, representing about one third of the official Chinese legal profession. This electronic meeting place has become an arena for testing ideas, ethical ideals, and legal and political aspirations. In his examination of the forum, Halliday found that lawyers are using it to try to formulate what the rule of law might mean for China, how basic legal freedoms can be achieved in a country that has never experienced them, and how lawyers can mobilize to protect the fundamental rights of citizens. In the face of regular police torture and prosecution of criminal defense lawyers, "clarion calls for a spirit of sacrifice ring out across the forum." One lawyer who spent months in prison for trying to defend a person falsely accused of rape expressed the sentiments of many: "The only weapon to fight with and the only barrier to guard against the public power, especially abusive power, is the institution of lawyers."

And half a world away in North Africa a dramatic bid for political liberalism began in 1980 when Egypt established a supreme

constitutional court. For more than 15 years this court, in alliance with legal associations, opposition parties, and human rights groups, conducted a campaign to liberalize Egypt's authoritarian regime. Laws were struck down that limited freedom of the press, and the rights of legal defense and human rights groups were supported. "All these efforts were led by courageous lawyers in alliance with a thin civil society," Halliday pointed out. Shifting continents to present-day Venezuela, three of that nation's leading jurists are facing trial for an alleged conspiracy in a move that seems designed to neutralize them and drive them into exile. Each of these instances can be

While it is clear that the legal complex alone cannot produce or maintain political freedom, the evidence indicates again and again that lawyers, judges, and professors have often stood at the vanguard of political liberalism

viewed as a triumph or a tragedy for lawyers, and all speak to the contributions that lawyers can make to advance democracy.

For the past fifteen years, Halliday reported that he has been coordinating, with Lucien Karpik and Malcolm Feeley, an international network of scholars who in a variety of published works have been seeking to document empiri-

cally the contribution of the legal complex to political liberalism. The legal complex encompasses all the occupations of law: private lawyers, government lawyers, judges, prosecutors, and legal academics. To simplify the problem, the researchers chose to focus not on democracy in general but more precisely on the rise and fall of political liberalism. In the research context, political liberalism has three meanings. It first means that a politically liberal society has a moderate state with constitutionally binding ways of fragmenting state power. Secondly, political liberalism requires a civil society that does not owe its existence to the state and is expressed through voluntary associations such as political parties, religious groups, and, arguably most importantly, lawyers' associations. "The relative autonomy of lawyers' associations and their capacity and willingness to mobilize collectively is a primary indicator of the robustness of political liberalism in any society." Third, political liberalism also requires basic legal freedoms, such as due process and habeas corpus, and basic political rights, such as freedom of speech and freedom of association.

"The legal complex has a potential impact on political liberalism in three types of situations: in obtaining freedom, in maintaining freedom, and in defending freedom," Halliday observed. China offers a current instance of how lawyers can play pivotal roles in fighting to obtain freedom. His current research on China shows the movement toward political liberalism requires that the lawyers who are at the core of the legal complex have some kind of infrastructure around which they can build a coherent profession. Paradoxically, the Internet forum, although it does exist inside an official organization that is open to censorship, "offers a scaffolding on which a professional community is being built." The forum also contri-

butes to a second condition of mobilization—the emergence of a common identity and collective consciousness in the legal profession. In their postings on criminal defense, the Chinese lawyers are offering an explicit critique of the structure of power in the Chinese justice system, particularly the excessive powers of the prosecutorial service and the weakness of the courts. "Many criminal lawyers on the forum and outside the forum have acknowledged that they are engaged in the first skirmishes of what undoubtedly will be a protracted war and its outcome is not at all certain."

The nation of Kenya presents an interesting example of what techniques lawyers can employ to resist repression and champion political liberalism. From the time of Kenya's independence from Britain in 1962 until 2002, Kenya was ruled by a single political party. After the death of founding father Jomo Kenyatta, the new President, Daniel arap Moi, fostered a climate of political repression that produced "a subjugated judiciary, a frightened civil society, and the erosion of basic legal freedoms." But starting in the mid-1980s, the Kenya Law Society began to oppose Moi's repressive rule and later joined with the National Council of Churches in Kenya "to lead a growing opposition movement that challenged authority, staged mass rallies, and fought for the introduction of multi-party democracy." When Moi finally did accede to domestic and international pressure and allowed multi-party elections in 1992 and 1997, the law society joined with other organizations, notably church groups, "to widen the opening transition to a liberal political regime." In many settings, the organized bar and the church "may be the only two groups left standing in civil society within the confines of an authoritarian regime. When they join forces, their impact can be formidable." But churches,

like lawyers, do not always resist repression. "Discovering the conditions under which the legal-religious alliance mobilizes for freedom is a continuing investigation of our project," Halliday reported.

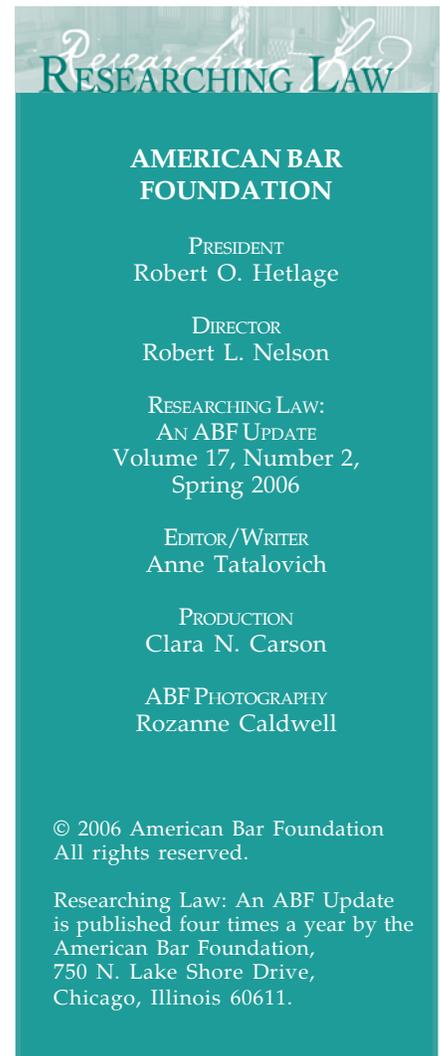
Lawyers can play a vital role in maintaining freedom, Halliday observed. Political liberalism can never be taken for granted, even in those countries where it has existed for centuries. In 1992 in Sao Paulo, democratic Brazil's largest city, the police killed 1,500 people, which was about one-quarter of the homicides in that city. And in Buenos Aires, Argentina, the rate was about the same. "Yet government prosecutors have been exceedingly reluctant to bring cases against the police, and judges have been equally reluctant to convict." But in several Latin American countries, there is another option—private prosecutions. So lawyers used this avenue in very creative ways. Political Scientist Daniel Brinks has shown that when lawyers in these countries mobilize on behalf of victims, often in alliance with NGOs and in the context of a popular culture that supports rights protection, "the presence of a private prosecutor dramatically increased the likelihood of a successful prosecution against the police, sometimes by 300 to 400 percent."

But the legal complex can also fail to preserve freedom and "turn its back on flagrant abuses of the core elements of political liberalism," Halliday noted. One case of such failure that Halliday and his collaborators have assessed comes from Chile, a long-time democracy. After the overthrow of President Allende in 1973, General Pinochet suspended individual liberties, dissolved the constitutional court, and seized, tortured, and executed thousands of his political opponents. Sadly, this occurred with the connivance of the legal complex, Halliday observed. "Neither the

bench nor the bar nor the legal academy effectively resisted." Two factors are central to understanding the indifference of the legal complex. First, there was no independent, vocal legal academy in the Chile at that time. Legal education was largely a part-time enterprise for practitioners. "We have found that in several countries an independent professoriate, which has some autonomy from the state and the market, often provides the intellectual leadership, the manifestos, and the critiques that empower activists in the field." Second, independent courts did not involve themselves in questions that concerned the substance of justice. A strong culture of deference in the court system allowed senior judges to tightly control the entire judiciary and lower court judges seldom dared to dissent. "The courts deferred to Pinochet, legitimated his regime, dismissed thousands of habeas corpus filings, and supported egregious national security laws." The stance of Chilean courts under Pinochet is one of several instances where independent courts did not resist attacks on political liberalism but aided and abetted them so long as some kind of insulated legalism remained intact. Like Chile under Pinochet, the legal complex in present-day Venezuela is highly fractured. There have been bold efforts by brave lawyers, judges, and academics to resist President Chavez's attacks on constitutional rights. But the legal complex in Venezuela has no coherence or basis for collective action. "It can be picked apart by a skillful authoritarian, and it appears this is precisely what is happening," Halliday reported.

The research undertaken by Halliday and his collaborators has identified a number of conditions under which lawyers may act constructively in support of political liberalism or fail to do so. First, he noted, lawyers' ideals

make a difference. If lawyers are not attuned to the role of law in fostering the good political society or are immersed only in the technical practice of law, "there is no political consciousness on which to build." And if the legal complex has no capacity to mobilize collectively, then a repressive state can attack the segments of the legal community with impunity. Second, if there are no independent and authoritative courts to which lawyers can bring cases or if courts are denied jurisdiction over special tribunals set up to evade judicial review, lawyers have no stage on which to act and "political repression can breed and multiply." Third, if the legal complex cannot find allies in civil society, such as the media or



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religious groups, “then it is particularly vulnerable to a repressive state.”

While it is clear that the legal complex alone cannot produce or maintain political freedom, the evidence indicates again and again that lawyers, judges, and professors have often stood at the vanguard of political liberalism. Yet it must be admitted that there are cases where the legal complex has crumbled in the face of naked political power. It is the task of scholars to identify the conditions under which a heroic legal complex can prevail. “It is the calling of practitioners as lawyer leaders across the world to act on a heroic ethic that will produce, maintain, and defend political liberalism.”

[A copy of the complete text of Terence Halliday’s presentation can be obtained by sending an e-mail to halliday@abfn.org].

Political Oppression and the Role of the Bar

Geoffrey Hazard, Trustee Professor of Law, University of Pennsylvania, drew upon his recent book, a comparative study of legal ethics, that he completed with a colleague from Italy, Angelo Dondi. The book looks at the bar and the bench in worldwide and historical terms. “Among the phenomena we addressed was the situation of the bar and the bench in Germany in the period of Nazism, in Italy during Mussolini’s rule, and in Spain when Franco was in power.” Hazard noted that lawyers and legal academics in Italy played an important role in combating the oppression of Mussolini, although his regime was not nearly as intense or brutal as that of the Nazis or of Franco. One point came home to him as he listened to the previous exposition about the role of the bar in various nations across the world. “The problem of political oppression and the relation of our profession to it is within

Unhappily, the White House, in my opinion, seems to be indifferent to the virtues of the rule of law, which is snidely referred to as the “technicalities of lawyers”

memory of the Western legal tradition,” Hazard pointed out. The Nazis dealt with the bar and the bench by building a separate, parallel judicial system while allowing the “regular legal system to churn along in its traditional and conventional ways.” But the Nazis were also quick to short circuit that system in their attacks on various groups, certainly the Jews, but also the Catholic clergy and many of the Protestant clergy. “In Franco’s regime, there was a similar endeavor to bypass the standard legal system and to handle dissident groups through a parallel system.” In Mussolini’s Italy, the approach was to subvert the official system by a combination of repression and seduction.

Although he expressed some reluctance to do so, Hazard stated that “we really have to think about this problem in our own country today.” He expressed admiration for Senator Arlen Specter of Pennsylvania who, in recently confronting the Attorney General, spoke out about the administration’s disregard for legislation that is “unmistakably clear about the conditions under which agencies of the federal

government can conduct surveillance. I consider myself a conservative, although I have been largely apolitical throughout my career,” Hazard observed. “But the spectacle of the Attorney General of the United States making nonsensical statements about the meaning of the Foreign Intelligence Surveillance Act to the Senate is just nothing short of shocking.” This Attorney General is obviously deferential to higher authority situated in the White House. “But, unhappily, the White House, in my opinion, seems to be indifferent to the virtues of the rule of law, which is snidely referred to as the ‘technicalities of lawyers.’” Yet the “technicalities of lawyers” are the essence of the rule of law; we cannot have one without the other. “If we are at the point where the highest legal officer of the government cannot accept the fact that a statute requires reference to a court as a preliminary for making certain kinds of investigations, we have a serious problem.”

Fostering a Culture of Ethical Behavior

Claire Miskin, of London, England, pointed out that there is currently extensive discussion about ethics and the desirability of ethical behavior by lawyers. But she questioned whether the legal community is prepared to foster a culture in which ethical behavior is considered a desirable way to conduct oneself and to enforce the rules of ethics. When she was speaking recently about ethics to the leaders of a West Indian bar association, one lawyer pointed out that when you punish a breach of ethical behavior, you are, in fact, disciplining one of your friends. Miskin replied that this is certainly true, but while disbarring a lawyer is not something anyone enjoys, “that is exactly what you have to do if you are going to have a code of ethics that means anything.” Currently, in the European commu-

While disbarring a lawyer is not something anyone enjoys, that is exactly what you have to do if you are going to have a code of ethics that means anything

nity, there have been endless and learned exchanges about cross-border ethics and how people should behave. But there are few actual cases of lawyers being disciplined for transgressing ethical rules. "And I throw down the gauntlet to those who wish to revise these codes of ethics and say, 'Let us make sure that these codes are enforced rather than just talked about.'"

There is a sharp polarization in the legal profession now between those who practice law for the public good and those who are what might be called business lawyers, Miskin pointed out. "The significant difference between the two is the amount of money they earn." Those lawyers who make the most money enjoy the greatest prestige, and so young lawyers coming into the profession feel pressured to take a position where they will be highly compensated and attain greater stature. But this can place young lawyers in difficult positions when clients demand that they do something questionable and threaten to withdraw all their business if the lawyer fails to accommodate them. When the lawyer approaches an older lawyer

in the firm, he is often advised to comply with the request in order to retain the client. Lawyers in England are not exempt from this kind of situation, Miskin reported. She related the case of a senior commercial lawyer who was sent a brief in a case for the plaintiff. He read it and then put it aside. Some time later, he received the brief of a defendant and realized it was the same case. He went to a lawyer in his chambers who was more senior and said "What am I going to do? There is a large fee attached to this." The senior member said, "Forget you ever saw the brief for the plaintiff and carry on." This kind of behavior will continue unless a climate is created in which lawyers' reputations for honesty, proper behavior, and integrity are their most sacred qualities and "that philosophy is reinforced by proper disciplinary procedures that are frequently and tightly invoked."

Legal Practice in the NAFTA Era

Emilio Gonzalez de Castilla, from Mexico City, indicated that his commentary would focus on transborder legal practice between the United States and Mexico within the framework of the NAFTA treaty. Before the advent of NAFTA, there was no substantial transborder practice, Gonzalez de Castilla reported, because the Mexican law that was enacted in 1945 prohibited foreigners from practicing any profession in Mexico. That law was later deemed to be unconstitutional by the Supreme Court because it violated equal treatment but the foreign professional did have to obtain a degree and register it with the Mexican Ministry of Education in order to practice. Under a provision of the Mexican law, as amended, foreign lawyers would be able to practice law in Mexico in accordance with the rules of the international treaty, if any, or if

there is no treaty or rules within the treaty, in accordance with Mexican law that regulates professionals. NAFTA proposed the new concept of foreign law consultant. It was left to a working group composed of representatives from Canada, Mexico, and the United States to determine what the foreign law consultant would be allowed to do. The agreement that the working group eventually reached was that foreign lawyers could practice foreign and international law in Mexico, including arbitrations. Foreign lawyers could also set up firms in Mexico provided they were controlled by local lawyers.

"But that agreement, ultimately, was challenged by some U.S. law firms who wanted to practice local law in Mexico without going through the local law requirements," Gonzalez de Castilla reported. As a consequence, the recommendations of the working group were never submitted to the three governments for approval. Currently, the situation is that "a foreigner cannot practice local law in the host country unless the host country approves it, and in Mexico that means you need to complete a law degree and obtain a certifi-

Before the advent of NAFTA, there was no substantial transborder practice because Mexican law prohibited foreigners from practicing any profession in Mexico

cate." The U.S. members of the working group set up under the World Trade Organization are of the opinion that a foreign attorney should be able to fully practice law if they take just a postgraduate program. They point out that Canadian and Mexican lawyers can practice law in the United States if they complete a postgraduate program and are approved by the bar examiners. It is not necessarily, however, a license to practice nationwide in the United States but may be limited to just one jurisdiction, Gonzalez de Castilla pointed out. By contrast, once you are licensed in Mexico, you can practice anywhere in the country. Ethical issues also come into play, Gonzalez de Castilla noted. "Each country has its own standards about such issues as confidentiality, independence, collection of fees, and the duties that lawyers may owe to society."

Future developments in this area will depend in the near future on who is elected the next President of Mexico, Gonzalez de Castilla observed. Elections will take place in July, and there are three strong candidates, none with a clear majority. "If the left wing party wins, I think the integration process and foreign law consultant issue will come to a standstill at least for a couple years." If a president is elected from the right wing, "then we may face a more speedy resolution and the working group will likely begin to resolve the differences about ethical standards."

Defining the Ethics of Transborder Legal Practice

Robert E. Lutz, Professor of Law at Southwestern University Law School, addressed the contributions of the organized bar in the area of multijurisdictional practice. "Given the paucity of transnational, transjurisdictional norm-making institutions, the organized bar has been a major player in

Given the paucity of transnational, transjurisdictional norm-making institutions, the organized bar has been a major player in defining the terms of professionalism and the ethics of transborder legal practice

defining the terms of professionalism and the ethics of transborder legal practice." Yet until just a short time ago transnational professional services were largely non-existent, Lutz pointed out. "One qualified to be a provider of professional services almost exclusively by meeting requirements imposed by the particular country in which the person sought to provide them." But with the advent of technologies that facilitate the movement of persons, information, and services, pressure built to liberalize the process. These efforts "culminated in the 1994 issuance and acceptance by the United States—and now approximately 150 other countries—of the General Agreement on Trade in Services, which provides international rules to guide the transnational provision of services." Within this framework, the organized bar is engaging in a variety of activities that are directed to reducing barriers to the transnational practice of law.

In the United States there have been several developments that seek to reduce impediments and "arguably to advance widely

accepted forms of ethical conduct that will apply across borders." These undertakings include Ethics 2000, the American Law Institute's Law Governing Lawyers, the Multijurisdictional Practice Commission's recommendations and the efforts by individual state groups to follow its provisions, and codes of conduct that have been adopted by various groups of the bar, such as those applying to arbitrators, mediators, and judges.

On the international scene, "both national and international organizations of lawyers have contributed to the process." The General Agreement on Trade in Services has provided a forum for developing means and methodologies to liberalize the international practice of law. Groups in the American Bar Association are working with the U.S. Trade Representative, individual state bars, and the Organization of Chief Justices on the possible negotiation of mutual recognition agreements and reciprocal disciplinary enforcement agreements. The Association of European Law Societies (CCBE), the International Bar Association, and the Union Internationale des Avocats are working with the World Trade Organization and the European Union, among others, to promote liberalization efforts. In the realm of legal education, an initiative has been launched to establish an international association of law schools that would provide a forum for discussion of curriculum techniques in the training and education of transnational lawyers.

Among the conclusions that can be drawn from this activity is, first of all, that "bar associations, as non-governmental groups, are defining some of the terms and often the parameters of discussion in this area," Lutz observed. Second, the international community has willingly delegated the responsibility for setting and

implementing ethical standards to the organized bar. Third, the international community has also been willing to confer status on individual participants in international transactions and let them set their own ethical requirements, often by contracts that may incorporate codes of conduct and bilateral agreements for reciprocal disciplinary enforcement.

But there are a number of cautionary conclusions also, Lutz pointed out. Among the questions that have yet to be answered: Are the standards of professionalism that are being developed applicable to all societies and all forms of the practice of law? Are we exporting a view of the legal profession and its role in achieving justice that may be shared by the developed world, but not by others? Is the effect of this multijurisdictional practice an effort to promote an Americanization of the international legal profession? Does the globalization of standards increase the gulf between those who are beneficiaries of globalization and those who may be the "victims" of it?

A Role Model for the Profession

Moderator **Dianna Kempe** introduced the seminar's honoree, Wm. Reece Smith, Jr. She noted that most members of the audience know Reece so it was not necessary to provide a litany of his many accomplishments. "We have heard today that lawyers have to be heroes. Our honoree today is one of those heroes and one of those professionals of whom we can be sincerely proud." His achievements are well summarized by the wording on a plaque that was erected by Stetson Law School in his honor at a court house in Tampa, Florida. The plaque says: "An Advocate for Justice, an Educator of Minds, and an Inspiration and Role Model for the Profession." Kempe further noted that Reece Smith has been honored with

Our honoree today, Reece Smith, is one of those heroes and one of those professionals of whom we can be sincerely proud

prestigious awards from local, state, and national organizations. While engaged in trial and appellate practice in Tampa, Florida, he served at various times as President of the Hillsboro County Bar Association, the Florida Bar, the American Bar Association, and the International Bar Association. "He is a champion for justice and a national leader in the legal aid movement." Reece Smith served as Interim President of the University of South Florida and is a Distinguished Professorial Lecturer at Stetson University College of Law, where he has taught legal ethics and professional responsibility for the past fifteen years.

A Lifetime of Service

Wm. Reece Smith, Jr. thanked



Dianna Kempe for her gracious introduction. He related a quotation that he has used in various speeches, "A nation without ideals cannot long survive." He pointed out that the legal profession cannot do so either. "We need those ideals even though we have difficulty living up to them from time to time." By and large, however, "I am proud of my profession and proud to be a lawyer; it has been a fine career for me." Smith

extended his thanks to Leonard Gilbert and Dianna Kempe for organizing the program. He noted that Kempe was the first female president of the International Bar Association. Smith expressed his gratitude to the American Bar Foundation, The Fellows, and Robert Nelson "for associating my name with this splendid program today," and to the ABA co-sponsors: the Section of International Law; the Section of Science and Technology Law; the Tort Trial and Insurance Practice Section; the Senior Lawyers Division; and the Center for Professional Responsibility.

Smith also thanked Professor Hagan and his graduate student, Gabrielle Ferrales, whom he enjoyed meeting for the first time. He extended his thanks to Terry Halliday who, he noted, said nice things about him. "That is probably because he thinks I made such great speeches when I was President of the ABA and that's probably because he wrote some of them. I should also say that Geoffrey Hazard wrote some also."

Smith thanked the panelists who all, with the exception of Emilio Gonzalez, have been friends of his for a long time. He noted that he had the great pleasure of working with Emilio's father on the Council of the International Bar Association. "He is a distinguished lawyer and practitioner in Mexico City and remains active today, I am pleased to say."

"We are honored to have with us my good friend, Francis Neate, who is President of the International Bar Association, and his wife, Tricia." Smith noted that Giuseppe Bisconti was in the room and that he was an old friend who he had the pleasure of working with when he served as President of the International Bar Association and Bisconti was Vice President, later going on to serve as President.

Smith extended his thanks to all present for supporting the work of the American Bar Foundation, which is "truly important to the legal profession and the practicing lawyer. Its research efforts are indeed worthy of our support, both morally and financially." Smith

The American Bar Foundation's research efforts are indeed worthy of our support, both morally and financially

noted that he has been teaching professional responsibility at Stetson as an adjunct professor for 15 years because he was first given the opportunity by Bruce Jacob who was dean at that time, an experience for which he is most grateful. He also acknowledged the presence of Professor Roberta Flowers who has worked with him for a number of years. "She has one great burden that she must bear; she is the Wm. Reece Smith, Jr. Professor at Stetson Law School."

Smith also noted the presence of two long-time colleagues: Gibson

Gayle and Kenneth Burns. "The three of us started out in the Junior Bar Conference of the American Bar Association in the mid-1950s. We followed each other through the Junior Bar, as it was called then, and on into the House of Delegates. All three of us are past secretaries of the ABA, which is how we get lifetime seats in the House." He also extended his best wishes to Edie Burns and Martha Gayle, "who have been loving friends of mine for a very long time."

"Finally, I want to thank my law firm, Carlton Fields, not only for the contributions it made here today but for the support it has given me over many, many years, especially the opportunity to work in the organized bar." He expressed his gratitude to Sylvia Walbolt, who was his protégée and is now Chair of the firm. "She was the first woman hired on the west coast of Florida to practice with a law firm, and, according to the *National Law Journal*, is now one of the top ten female litigators in the country." Smith also thanked Gary Sasso, President of Carlton Fields, who, he noted, previously clerked at the U.S. Supreme Court and "has contributed so much to making the firm the fine organization that it is."

Contributions to the Wm. Reece Smith, Jr. Research Fund at the American Bar Foundation are invited. This new research fund will add to the ABF's dynamic research program in areas of great interest to Reece Smith throughout his career, including professionalism, pro bono legal services, and the role of the legal profession internationally to advance human rights and access to justice. Your contribution may be made by check, Visa, or Mastercard and can be spread over multiple years. Please send your contribution to the Wm. Reece Smith, Jr. Research Fund, American Bar Foundation, 750 N. Lake Shore Drive, Chicago, IL 60611. If you have questions or prefer to make your donation by credit card over the phone, please call 312/988-6521.

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INTERNATIONAL PERSPECTIVES ON
LAWYER PROFESSIONALISM AND ETHICS
The Fellows CLE Research Seminar in Honor of Wm. Reece Smith, Jr.
Saturday, February 11, 2006

Emilio Gonzalez de Castilla del Valle, Jr., Mexico City, Mexico, senior partner of Gonzalez de Castilla Abogados, SC
Emilio Gonzalez de Castilla del Valle earned his law degree at the Escuela Libre de Derecho, Mexico City, and his master's degree at Harvard University. He has spoken and published widely on civil and commercial contracts and litigation. He is a member of the faculty of the Escuela Libre de Derecho and is immediate Past President of the Mexican Bar Association.

John Hagan, John D. MacArthur Professor of Sociology and Law, Northwestern University, and Senior Research Fellow, American Bar Foundation

John Hagan conducts research and has published extensively in the areas of international criminal law, war crimes, the legal profession, youth crime, and war resistance. He is the author of *Justice in the Balkans* (2003), an investigation of the International Criminal Tribunal for the Former Yugoslavia (ICTY), an ad hoc tribunal in The Hague that was created in response to charges of ethnic cleansing and crimes against humanity during the conflict in the Balkans. In one of his current research projects, he is drawing on a unique set of data—interviews with refugees—to investigate whether the deaths in the Darfur region of the Sudan reflect genocide, counterinsurgency, or some combination of the two processes. He received a Ph. D. in sociology from the University of Alberta, Canada.

Terence Halliday, Senior Research Fellow, American Bar Foundation

Terence Halliday researches globalization of law in both markets and politics. One of his current research projects studies corporate bankruptcy law to learn how global norms are formulated and what mechanisms and impediments exist that affect their incorporation into the national legal systems of China, Indonesia and Korea. The research on politics involves the study of ways that the legal complex (e.g., lawyers, judges, prosecutors, law faculty) either contribute to the advance of political liberalism or help defend against its decline. He received a Ph.D. in sociology from the University of Chicago.

Geoffrey C. Hazard, Jr., Philadelphia, Trustee Professor of Law, University of Pennsylvania

One of the foremost experts on legal ethics in the United States, Geoffrey Hazard has taught on the faculties of the University of California, Berkeley, the University of Chicago, Yale University, and the University of Pennsylvania. He is author, among numerous publications, of *Civil Procedure* (5th ed., 2001, with Fleming James, Jr. and John Leubsdorf) and *Legal Ethics: A Comparative Study* (2004, with Angelo Dondi). Professor Hazard has received numerous professional awards and honorary degrees.

Dianna Kempe, QC JP, Paget, Bermuda, former Senior and Managing Partner, Appleby, Spurling & Kempe

Born in London, England, Dianna Kempe was called to the Bar of England and Wales in 1970 and to the Bermuda Bar in 1973. Prior to becoming Managing Partner at Appleby, Spurling & Kempe, her practice focused on insolvency matters, particularly cross-border issues. In 1992 she became the first woman in Bermuda to be appointed a Queen's Counsel, and in 2000 she assumed the presidency of the International Bar Association, a post she held until 2002. Ms. Kempe was recently appointed to the Council of the Section of International Law and Practice of the American Bar Association.

Claire Miskin, London, England, Barrister, Three Dr. Johnson's Buildings, Temple

Claire Miskin is Master of the Bench at Middle Temple, London, as well as a Recorder. She is former Chair of the International Practice Committee of the Bar Council, and has lectured in that capacity to lawyers and judges around the world on ethics, legal aid, and the establishment of independent bar associations. As a member of the General Professional Programme Committee of the International Bar Association, she has lectured in Croatia on freedom of speech and corruption.

Robert E. Lutz II, Los Angeles, Professor of Law, Southwestern Law School

Robert E. Lutz, a leading expert on public and private international law, received his J.D. from Boalt Hall School of Law, University of California, Berkeley. He has written widely on international business and environmental law and has served as editor of *The International Lawyer*. He is Past Chair of the ABA Section of International Law and Practice.

Ramón Mullerat, OBE, Barcelona, Spain, senior partner of Mullerat, was a scheduled panelist but was unable to attend the seminar because of weather problems in Europe. He is an expert in international commercial arbitration, and his firm specializes in domestic and cross-border corporate, financial, and commercial law.