Integrity in Legal Practice: A Report from the Third International Legal Ethics Conference, Gold Coast, Australia

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The International Legal Ethics Conference (ILEC3) was held at the Sheraton Mirage Hotel on the Gold Coast, Queensland, Australia from 13 to 16 July 2008. This was the third ILEC. The first was held at the University of Exeter, England, in 2004; and the second at the University of Auckland, New Zealand, in 2006.[1] A colloquium associated with this series was also held at the University of Canterbury, Christchurch, New Zealand, in 2005. ILEC3 was co-hosted by the Law Schools at Griffith University, Gold Coast, and The University of Queensland, Brisbane. As two of the organisers, we were greatly encouraged by the continued enthusiasm and support of those who had attended ILEC1 and ILEC2, and that the series is growing in both the breadth and the depth of support it is receiving from legal ethics scholars. ILEC3 attracted 165 delegates; 107 academics, professional regulators and practising lawyers contributed papers. The international strength of the conference was reinforced by the representation of contributors from Australia, Canada, England, Hong Kong, Japan, Kenya, New Zealand, Scotland and the United States. Although the series has always featured American speakers, delegates have tended to come from Commonwealth countries. A particularly promising feature of ILEC3 was the large number of scholars from the United States who attended and participated, some contributing two or three papers. Especially given the prominence of American work in the field, this bodes well for positioning the specialist ILEC series at the centre of legal ethics scholarship. It is a unique opportunity for international scholarly exchange in the field.

The program for ILEC3 was divided between daily keynote presentations in plenary sessions and streams run in parallel—three being held at any one time. There were separate streams on 'Lawyering; Business or Profession?'; 'Rethinking Legal Ethics'; 'Legal Ethics and the Future'; 'Models of Professional Regulation'; 'Character and Virtue'; 'Health and Contemporary Legal Practice'; 'Contemporary Legal Practice'; 'Ethical Issues in Mediation'; 'Empirical Studies of Lawyering'; 'Ethics of Judicial Decision-Makers'; 'Gender and the

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1 See Linda Haller, 'Professional Ethics and Personal Integrity: Report from the International Conference on Legal Ethics, Auckland, New Zealand' (2006) 9 *Legal Ethics* 13.

Profession'; 'Legal Education'; 'Ethical Conduct in Fiction'; and 'Ethical Decision-Making in Practice'. A 'Large Law Firms' stream was particularly active, having four separate sessions running through the conference.

The conference was opened with recognition of both its international representation and local hospitality. Professor Kim Economides (Exeter), the initiator of ILEC and former editor of *Legal Ethics*, introduced the conference as part of the ILEC series. A generous welcome to the country was also given by Uncle Graham Dillon, an elder of the Kombumerri and Ngarang-Wal people—the Aboriginal custodians of the Gold Coast region. This was followed by dancing, music (didgeridoo and sticks) and a smoking ceremony—for which the Sheraton took special care to turn smoke detectors off—by Noonuccal people from Stradbroke Island.

The ILEC series is academic, scholarly and critical in its focus. In addition to an increased depth of distinguished scholars, ILEC3 sought to enhance the scope of perspective and expertise of previous conferences by actively incorporating the local practising profession into the conference. The Monday program was therefore dedicated to academic, regulator and practitioner contributions on legal practice, and was opened by the Honourable Kerry Shine MP, Attorney General for Queensland, and the Honourable Paul de Jersey AC, Chief Justice of Queensland. Seizing his opportunity with a roomful of legal academics before him, the Chief Justice (whose contribution to raising both admission and disciplinary standards has been significant)[2] returned to a theme that he has notoriously pursued in lawyer admission applications in Queensland—the signal that law student misconduct gives of unsuitability for legal practice. The Honourable Ian Callinan AC QC, former Justice of the High Court of Australia, ended the day on a very different note—that raising the ethical responsibilities of advocates when they make decisions about the arguability of cases or alleging judicial bias may be expecting more of them than their traditional role can reasonably require.

The plenary sessions on the Monday opened the conference theme of Integrity in Legal Practice, and were designed to be of relevance to practising Australian lawyers. Professor Gino Dal Pont (Tasmania) examined recent changes in Australia—specifically the State-by-State implementation of the Model Laws on national legal practice that are intended to harmonise the regulation of Australian legal professions. He suggested that, on the whole, the Model Laws and the subordinate rules and regulations they bring with them should encourage a clearer articulation of ethical practice in the legal profession. This was illustrated by engagement with a broader academic discussion of ethics in Australia in a panel discussion involving the Legal Services Commissioners of New South Wales (Mr Steve Mark), Queensland (Mr John Briton) and Victoria (Ms Victoria Marles). The three commissioners, who together are the key professional regulators for most Australian lawyers, have themselves exemplified a high degree of mutual co-operation and assistance. In the panel discussion,

2 Reid Mortensen and Linda Haller, 'Legal Profession Reform in Queensland' (2004) 23 *University of Queensland Law Journal* 280, 283.

they identified future challenges in the increasing diversity of legal practice and the corporatisation of the profession.

The conference themes were introduced—and thoroughly analysed—by the other keynote speaker, Professor David Luban (Georgetown). His paper 'Tales of Terror: Lessons for Lawyers from the "War on Terrorism"' disputed the optimist view of role morality in the 'craft of lawyering' taken up later in the conference by Professor Brad Wendel (Cornell). Luban pointed to the newly coined phrase 'lawfare' (the use of law as a weapon in global militarism) as a natural product of the adversary impulse. Referring to Richard Wasserstrom's famous example of the overrepresentation of lawyers involved in the Watergate scandal,[3] Luban argued that it is unsurprising that so many US lawyers have been involved in the Bush administration's aggressive approach to foreign affairs. Luban cited the example of the 'torture memos' penned by Office of Legal Counsel lawyer and Berkeley Professor of Law, John Yoo. In those memos, Yoo took a series of illogical steps, under jurisprudential language, to reinterpret the UN Torture Convention and allow physically and psychologically intrusive methods of interrogation. Luban contended that it is the lawyer's counselling role that is of concern in this case. Without the check of the adversary system, lawyers become 'lawmakers' of 'secret law' on which clients invariably act. Luban contrasted the perverse outcomes of such aggressive partisanship to the very clearheaded (and brave) decisions of the Judge Advocate-General (JAG) lawyers, defending detainees, who were motivated by what they saw as a disruption of the rule of law. Luban therefore appeared to pre-empt Wendel's argument that fidelity to the law (and the adversarial process) produced, in this case, ethical lawyering.

A stunning parallel with Luban's account of the concerns of JAG lawyers defending Guantánamo Bay inmates was offered by another panel dedicated to the ethical issues for the lawyers who had represented Australian terror suspect Dr Mohamed Haneef—who turned out to be nothing more than a suspect. It also raised issues that challenge Dal Pont's argument that harmonised professional rules could bring greater clarity to ethical practice in Australia and the consistent application of rules by regulators. The panel included Haneef's Brisbane lawyers, Stephen Keim SC and Peter Russo. Keim illustrated the challenges for the commissioners when he reflected on his actions for Haneef. In this *cause célèbre*, Keim engaged the media (by releasing a transcript of police interviews) in defence of his client in the face of what he saw as a perversion of proper prosecutorial process. He was personally pursued by an embittered Australian Federal Police, which succeeded in establishing with the Queensland regulators that by releasing the police interview Keim was in technical breach of the Barristers Rule. However, Keim said he did not even turn his mind to the Barristers Rule when he released the police interview. Nor did the regulators think the breach amounted to substandard professional conduct. Like the JAG lawyers described by Luban, Keim understood his role of fearless advocate for his client (in the face of threats of professional discipline) as 'an essential incident of the judicial process' and argued strongly for

3 Richard Wasserstrom, 'Lawyers as Professionals: Some Moral Issues' (1975) 5 *Human Rights* 1, 3.

professional regulation which permits such practices. And permit them is what the Queensland regulators did.

On the Tuesday, Professor Bradley Wendel (Cornell) continued his significant contribution to the ILEC series. In his paper 'Legal Advising and the Rule of Law', Wendel echoed Professor William Simon's argument at ILEC2 that role morality should include jurisprudential analysis. While Wendel criticised Simon's version of fidelity to law as requiring a search for the 'fundamental values',[4] he similarly based his conception of ethical lawyering on the 'rule of law'.[5] Wendel's thesis, however, was that it is precisely *because* there is no consensus as to ordinary morality, and in turn the justice or fairness of any one legal outcome, that the rule of law gains its normative and ethical significance. Thus, Wendel contended that 'when lawyers are representing clients within a reasonably just political system, their role partakes of the positive value of the rule of law'. However, he did not simply articulate a standard conception argument that all such lawyers are 'good people'. He argued for a renewed interest in 'the craft of lawyering' which he defined as an instinctive professional habit of (many) lawyers to distinguish between 'legal alchemy' (going beyond the lawful authority as bounded by a client's legal entitlement) and 'fidelity to law'. While the distinction is not always an easy one, he claimed that this approach delivers a more reliable path for a lawyer to act ethically, as the law is well equipped to provide prescriptive rules about interpretation of the law. He concluded by contending that a substantial task of legal ethics is then to examine individual instances of lawyers engaging in an abuse of power (if purportedly in the service of client demands), rather than theoretical challenges to role morality.

In this thesis, Wendel diverged not only from the theories of Simon, but also significantly from the views of another keynote speaker, Professor Deborah Rhode (Stanford). Rhode responded to Wendel's work in a rather different way to Luban. Her paper 'Personal Integrity and Professional Ethics' also examined role morality. Yet Rhode emphasised the core claim of the moral activist position that reference to an adversarial tradition does not answer, let alone exhaust, morality. She cited examples in the corporate world that increasingly restrict scope for ethical consideration and that demand complete devotion to the client's project. Thus, Rhode called for personal accountability for the consequences of professional action. Her paper considered the multiple meanings of 'integrity', and how these ideas can and should be applied to legal practice. She argued for a synthesis of the common and philosophical notions of integrity that impel lawyers to reflect on their principles and conduct their professional lives according to 'consistent, disinterested and generalizable principles'. While Rhode's thesis appeared to converge with the conclusions of Luban and Wendel, she contended that lawyers must take account of more than relevant laws. A lawyer

4 Simon articulated this thesis most famously in 'Ethical Discretion in Lawyering' (1988) 101 *Harvard Law Review* 1083; and *The Practice of Justice: A Theory of Lawyers' Ethics* (Harvard University Press, 1998), 138–69.

5 While he conceded that 'the concept of the rule of law has a lot of baggage associated with it', Wendel argued that 'there is a core' concept that the institution of the law only retains its validity (its 'legality') because it 'emphasises constraint on the arbitrary exercise of power'.

must also weigh other, equally important, societal interests drawn from outside the legal canon and professional tradition. She suggested that, far from doomsday predictions of an oligarchy of lawyers, we can understand this as an ethical exercise when it is performed in good faith.

The keynote speakers, and dozens of papers in the conference streams, reminded delegates that legal professions around the world carry models of poor—even bad—legal practice; and—no surprise to readers of this journal—that legal ethicists offer a bewildering array of responses to them. On the final day of the conference, the keynote speakers joined in a roundtable discussion of such 'hard cases' and how (or whether) to educate lawyers for ethical decision making. Moderated by Associate Professor Christine Parker (Melbourne), the roundtable tested these ideas by debating three questions from three philosophical stances. Luban claimed the role of the interrogating Socrates, despite noting that the latter was famous for his 'prodigious ugliness'. Rhode assumed the role of the 'integrator'—the 'philosophically informed and empirically ground ethicist'; and Wendel—'the new generation'—played Plato.

Luban's first question was self-reflective: does legal ethics need philosophical foundations? Answering his own question, Luban suggested that, if nothing more, philosophical ideas 'organise' his teaching of legal ethics. Rhode agreed with his approach, contending that such 'tools' allow students to think more systematically and deeply about problems. In addition to ethical theory, Rhode explained the insights provided by disciplines such as psychology and law and economics. In respect of interdisciplinary study, Wendel finally found some common ground with the other panelists; he advocated the use of social psychology as a useful tool for empirical scholarship. However, as regards teaching and ethical theory, Wendel provided a distinctly alternative perspective. He quipped that 'the word utilitarianism has [never] been uttered in my classroom'. As a matter of pedagogy, he contended that he considered it a duty to equip graduates with the 'risk management' skills of knowing the law which could practically only be achieved by an exclusive focus on black letter law. He cited in support the many discipline cases in his teaching textbook which concerned practitioners whose failure was a lack of knowledge of the law, rather than trespassing on 'ordinary morality'. He further argued that the 'rationality of law' provided something analogous to ethics. That is, the law is not morally empty; rather it carries important evaluative concepts such as loyalty and the fiduciary nature of the lawyer–client relationship.

Wendel sought to define and distinguish what we mean by 'legal ethics'. Cognisant of Rhode's critique that he is 'doing legal ethics without the ethics', he contended that we can teach distinct fields of professional regulation that practically serve practitioners and philosophical approaches. Rhode continued to disagree, pointing out that this approach omits 'all the critical perspectives on the regulatory process and access to justice'. This diversity of position then provided an appropriate segue for Luban to introduce the second question: do differing underlying philosophical views yield different results in difficult cases? The panel debated two real life scenarios to test this.

In the first scenario, Luban related a story about the difficult position faced by a senior New York prosecutor when he was told to pursue a case he believed to be weak and possibly unjust (leading to the conviction of innocent men). The prosecutor decided to 'throw' the case. This example prompted a heated debate among those on the stage and in the audience. Not surprisingly, Wendel's views gave pre-eminence to the adversarial process (including the proper and just functioning of the relevant prosecutorial bureaucracy) and differed from the conclusions of Rhode and Luban; the latter contending that this case was a 'no brainer' in supporting the decision of the prosecutor. Rhode pointed out that the 'system', which may be broadly legitimate, does not always lead to just results. Consequently, it is important to think about what it means 'to do justice in a second best world'. From the audience, Dr Tim Dare (Auckland) countered that we must not demand too much of lawyer role morality. It does not need to provide a full account of morality. Rather individuals may seek alternative avenues for achieving justice, such as law reform. Wendel agreed with this proposition, suggesting that Rhode's demand for critical perspectives may require responses outside the lawyer role.

The second scenario was introduced by Rhode as an early professional dilemma to which she had never found a satisfactory answer. The case involved a legal aid client she had met during a law school internship. The client confessed to a breach of welfare rules, disclosure of which would have meant the loss of a pension and resulting hardship. When she sought advice from her supervisor, Rhode was simply told that it was a 'difficult case' and was left to decide herself on what course to take. Many years later, Rhode conceded that she had not arrived at a correct answer except that in certain cases 'selective ignorance' is necessary. Turning to Wendel's assertion as to the morality of fidelity to the law, she inferred from this case that the law neither exhausts morality nor provides an answer for the role of the lawyer.

The final question asked for predictions of future directions for the field. Luban's answer was to provide a brief historical account of the field, from its philosophical flourishing in the 1970s in the work of Wasserstrom, Simon and Gerald Postema;[6] to empirical work of a more descriptive nature; and finally a 'new flowering of interest in the philosophical side'. It seemed appropriate that as the new generation, Wendel argued for a place for philosophical inquiry *and* research employing interdisciplinary tools. This fitting end to the conference provided both an insight into the diversity of views and approaches on show, and a taste of the exciting future work in the field. Indeed, Rhode took the opportunity to call for suggestions about the next ILEC and the importance of forging scholarly connections for collaborative work around the world.

We look forward to fostering and maintaining these links within the ILEC series and beyond. As organisers, we acknowledge the material support of the College of Law, the Bar Association of Queensland, the Queensland Law Society, the Queensland Legal Services Commissioner and the Queensland Department of Justice. In the meantime, we take a last look back at ILEC3 to recognise the enormous efforts of our co-organisers, Associate

6 Gerald Postema, 'Moral Responsibility in Professional Ethics' (1980) 55 *New York University Law Review* 63.

Professor Michael Robertson, Mr Kieran Tranter and Dr Lillian Corbin of Griffith University, and thank them for the vision, initiative and organisation they demonstrated in bringing this conference together.