



**“LEGAL ETHICS AND PROFESSIONALISM IN COMPARATIVE PERSPECTIVE:
THE CASE OF ARGENTINA”**

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Good Afternoon! And welcome to the keynote conference on Legal Ethics in Spain and the Americas by Dr. Rodolfo Luis Vigo. If you don't mind, I would like to read a summary of his bio. Dr. Vigo is an expert on judicial ethics; he was a Supreme Court Justice in Santa Fe, Argentina from 1988 to 2007. In 2007 he was appointed Executive Secretary of the Iberian-American Commission on Judicial Ethics. He is currently a member of the National Academy of Law and Social Sciences in Cordoba; chairman of the Argentina Law Philosophy Association, and a Law and Political Sciences professor at different universities. Dr. Vigo is also a roving professor at the Bonaterra Campus of Pan-American University Law School. I would also like to note that this conference is sponsored by the Tinker Foundation, and is part of the Justice in Mexico Project sponsored by said Foundation. Thank you, Doctor, for being here. Welcome!

Thank you very much! It is of course an honor to be able to participate among so many colleagues and experts on Ethics; I regret not being able to be here this morning, I am certain I would have learned a great deal. My conference will focus on judicial ethics in this geographical and cultural space known as Latin America.

As we get started, it might be worthwhile to very briefly talk about what 'judicial ethics' means. My talk will address – since the title of the conference can be a somewhat ambiguous within the definition of legal ethics – I will talk about judicial ethics in particular, as was agreed, which has certain unique characteristics in comparison with the ethics of other legal professions.

As I was saying, when you attempt to define a particular discipline, the first thing you need to do is to define what that discipline does, and then, from that perspective, the subject that performs the discipline we are about to study.

Obviously the subject in regards to legal ethics is no doubt that main character of today's civil law, which is the judge. And, very quickly, we could define a judge as having the following characteristics. A judge is a human being; obvious as that may sound, it's worth mentioning, particularly on the subject of ethics, that our character is someone who will have all the strengths and weaknesses of a human being. So then, a judge is a human being who has been granted certain powers by the people; the people through the institution it has established, be it Congress, the Judicial Appointment Commission, the President, the Governor... in any event, the source of power in a democratic society is, of course, the people. So then, the people have conferred upon this person a certain power that consists of using the laws currently in effect to rationally arrive at a fair solution to the legal case being heard under his jurisdiction.

Continuing along with this basic characterization of the judge, who is that person who is bestowed with this power as a result of meeting certain qualifications, this is another requirement. The judge is given these powers, at least in today's society, because that person meets certain qualifications. And what qualifications do we require of a person in order to bestow this power upon him? Basically, we say that they have to have six... up to six qualifications.

First of all, particular physical qualifications: there are without a doubt certain physical limitations that would preclude your being a judge. We would not assign as a judge, a criminal judge, someone who was blind, for example, just like we would not give a driver's license to someone who was visually impaired, we would not grant him or her that power. Ok, then, so physical qualifications; psychological qualifications; scientific qualifications, he or she has to know about the law; also technical qualifications, he or she does not only have to know the law, but also how to apply it, because we do not need this person to teach law, but to enforce it, to make determinations during cases.

Again, we have physical, scientific, technical, and now managerial or administrative qualifications. A judge also manages, administers, human resources, material resources, he manages time, has to give orders and delegate tasks to his or her aides, and so on. And, finally, ethical qualifications. In the traditional

perspective of our culture inherited from Europe, the only one of these qualifications we demanded of a judge was, mainly... what did we require of someone we wanted to serve as a judge? Basically that they knew the law, right? In other words, just the scientific qualifications. Because Europe still had some weight, as did the 19th Century, and the image of Montesquieu. The judge was the 'Voice of the Law', an inanimate entity. So what we expected of a judge was for him to know the law, because he was going to be asked to make sense of legal regulations and to project, through syllogism, a solution to the case.

Today, we know that the law offers more than one answer and we cannot be so naïve as to assume that by requiring only scientific qualifications we could guarantee compliance with what the people intended, because this judge will have discretionary power, will be able to choose legal answers from major and minor legal precedent, the opinions of the majority, the minority, etc.

As a result, the more Al Capone knows about the law, the worse off we are. It would be better if Al Capone does not know a lot about the law; the more he knows about the law, the more difficult he would be to control today; he will join the majority, the minority, or put forth a new answer, etc. So, very briefly, that is the profile we want for a judge. By the way, as you know there have been two models of constitutional law: The model organized in Europe and in France in the 19th Century, where the judges enforced the law, but not the Constitution, because the constitution was not a legal issue in Europe in the 19th Century, the constitution as law did not come about but until recently, after the Second World War... That is why constitutional law in Europe came, to a certain extent, from the American Constitutional law model... the difference between the two models of modern constitutions – France and the United States – is that in France it was considered a political matter, one only for legislators, the constitution spoke only to the legislator, while the U.S. Constitution spoke to everyone, and particularly to judges, because they had to enforce the highest law. But that was in the U.S., and then Europe started sort of copying, through constitutional courts, the idea that the constitution is a legal matter and judges, in order to decide on common law, also had to decide on constitutional law.

Such is the human being on whom the people have bestowed the power to rationally interpret current laws to arrive at a fair resolution of cases, once that person has proven to meet certain qualifications, and I would stress the ethical qualifications. So, from what perspective does judicial ethics study this person, this judge? We can study him from the political perspective, we can study him from many angles, but... from which does Ethics study him? Ethics studies him from the perspective of ensuring that this person will make the commitment of trying to be the best judge he can be for the people of that time and that place.

Excellence! Ethics is a call to excellence. And here we have the difference between what the law demands of a judge and what Ethics demands of him. The law asks that he meet certain minimum requirements. The law is always but a fragment of Ethics. For example, relationships between neighbors: the law requires obviously that I do no harm to my neighbor, that I don't break a bottle on his head, that's what the law requires. Ethics of course also requires that I do no harm to my neighbor, but it requires something more. It asks, for example, that I help if it's within my power to do so, that I greet them with a certain pleasantness, that is what Ethics demands. The law cannot ask me to be nice, pleasant, to help in some way, and so on. It is easy to see the difference between the law, which is a certain minimum, and Ethics, which is the maximum. Ethics asks for the maximum, and it is a calling, aimed at convincing me, at my internalizing it so that I make that commitment to Excellence. 13:40

This is the reason why Ethics not only rejects the bad judge, but also rejects the mediocre judge (in Argentina we say "the one who just warms the bench"), anyway, the one that sort of works. To give you a specific example, a case comes before me and I say "well, there is already precedent on this issue" and then someone approaches me and says "there is a new sentence, a new book". Mediocrity would say... it would even go against the spirit of law for me to tell my aide "I am too busy, I already know enough about this issue, so there is no point in consulting other jurisprudence, don't make me waste my time! I can use that time to go play whatever" Mediocrity!

Mediocrity and the law can coexist, but mediocrity and ethics cannot coexist. Because Ethics is about the maximum, the law is about the minimum... "I can't ask any less of you". The law of course asks me to be

independent. But the law cannot get into my head, into my conviction if I should decide, when passing a sentence, to choose that legal answer provided to me by the law that allows me to favor someone I like. I can twist it in such a way that the law cannot tell my dependence. But of course, I am truly convinced that in my independence I will try to have only my legal ethics conscience decide on a matter, on a case.

Ethics then is the ultimate commitment, and so it rejects mediocrity. The law has enough with a certain minimum. The rule of law would not tolerate my putting a sentence for sale to the highest bidder, but Ethics demands that I don't put my decisions up for sale and so much more, provided that I want to be that judge par excellence.

Now that we have a basic definition of what we mean when we talk about Ethics, the next question is: Why is Judicial Ethics so talked about these days, and why has ethics begun to turn into codes of Ethics? Mexico is a good example. Your Federal Judicial Branch passed its Code of Ethics for the Federal Judicial Branch in 2004, if I'm not mistaken. That same year, Mexico City, the Federal District, passed its own Code of Ethics, and within months several states passed their own. Several countries have them. So, if one of you came up to me, someone who is against Ethics or is not willing to follow judicial codes of Ethics, what arguments would I have in favor of Ethics and Codes of Ethics? What arguments would I have to convince you to choose Ethics and choose to follow Codes of Ethics? Well, let me give you some arguments very quickly. The first argument is the legitimacy crisis judges suffer; we judges suffer, as do all the authorities in our countries, a legitimacy crisis. People do not trust us, and that can really hurt, but then we talk to our U.S. colleague and realize that the difference is that their people do trust their judges. And you feel jealous, because sometimes you make a lot of efforts and still we all live this reality. So, since there is this huge legitimacy crisis, we have to bet on everything at our disposal to recover that legitimacy. Then, if the Mexican judges get together to look for judicial excellence, to think about how to regain that trust; for example, by passing a Code of Ethics that includes 17 virtues, as does the Code of Ethics for the Federal Judicial Branch, and so on, I think it conveys an interesting message to society: judges are interested in excellence, they are worried about this crisis, they are going to adopt a Code of Ethics, and not one imposed by Congress. This Code of Ethics that was adopted in Mexico was adopted by the judiciary itself, and that is important in terms of regaining that trust.

The second argument is precisely, one could say, to fulfill the constitutional mandate. All constitutions, for better or worse, state that judges will continue in their duties as long as they exhibit good behavior, or I think the Mexican Constitution states that "as long as they continue to be qualified", and goes on to describe the qualifications, etc. but, now, the Constitution is extremely exiguous, and very synthetic, so the Code of Ethics becomes a step further from the qualifications required in the Constitution for becoming a judge, what the Constitution requires to continue serving as a judge. That's why I say that Codes of Ethics do not go against judges, but in favor of them. For example: if the Code of Ethics establishes what we can or cannot receive as judges, this gives us peace of mind. In the U.S., there are a lot of answers on this issue, as well as in the Iberian-American Judicial Code of Ethics passed last year; we have adopted a criterion taken from the UN's Bangalore Principles, which is from a reasonable point of view, I mean, let's say someone gives me a tie for my birthday, well, that's more or less OK, but if they give me a car, it's not, of course! That looks like something else! Within reason... and that is not a reasonable gift. In the U.S. I think there are some Codes of Ethics that set specific value amounts... but we're digressing into a different Ethics discussion. In a word, they complete the Constitution. They give us judges greater peace of mind, because now we know what to expect, how we need to address attorneys, what gives we can or cannot receive, etc. It gives judges greater peace of mind because now they not only have that vague mandate of the constitution, now they have a mandate that's more explicit than the constitution through a Code of Ethics... they can sleep better at night.

The third argument in favor of judicial ethics is judicial tradition. As you know, the great professions were always considered as a certain honor conferred upon those assigned to those tasks. Moreover, there is an American writer, the great political law philosopher, McIntyre, who defines corruption quite interestingly, saying that "corruption is when someone serves in a position created by the people to provide a certain service that was considered to be very good and that they are corrupt when they no longer provide it for its intended purpose, the one that legitimized that service, but instead for other purposes, such as money,

fame, or power. If I am a teacher, but I'm not interested in teaching, I despise teaching, but I do it for the prestige, for the power, then I have become a corrupt teacher, because I am not providing my service for its intended purpose. The tradition of the 'great professions', we have doctors and their Hippocratic Oath... these great professions were not assigned for social stature, but given to those who met certain ethical requirements. That is why the Romans said that in order to be a judge you first had to be a good person, then an expert on law and the truth. To be honest, I would rather be judged by someone who is first a good man rather than by someone who is only an expert in the law.

So, these great traditions in a way seem to share this concern with Ethics, which we have lost due to the codifying force of Europe. Because along came Europe and said: "the law is one thing and morals are another; we want you to be the voice of the law, and we don't want to get into anything else." The law is one thing, and morals are another. This whole fantasy that today, pushed by constitutional law, pushed by constitutionalization, we have finally done away with that fantasy and have included in the Constitution principles, moral values, human rights... I think we are at a place where we can regain that intimate connection they have always had. Exercising the profession of attorney, of lawyer, because of the honor it represents.

A fourth argument in favor of judicial ethics and codes is to strengthen weak wills. It's never a waste of time to remind people of the obvious. You have to study! All judges know they have to study, but it's still a good thing to have the bylaws for Iberian-American judges, and the Iberian-American Code of Ethics say that, for example, continuous education is compulsory. In the United States, at least at the Federal level, judges have to take courses, even those who are retired, have to have x number of hours of training. People cannot just be left to their own conscience. No! Here comes the Code of Ethics that requires that I continue getting training, thus strengthening the will of the weak, to have a code that has all these requirements. And these are things we all know we should do; I don't think any of them would catch us by surprise. I'm going to mention some of the 13 principles of the Iberian-American Code of Ethics, all of them very obvious. But it's good to have them reminded to us once in a while. Sometimes that reminder of the obvious ends up strengthening our will and leading us to do what we ought to do.

A fifth argument in favor of a Code of Ethics is to have an objective measure of who is a good and who is a bad judge. An objective measure, it is not my conscience anymore! No. "I am sort of a liberal judge in these matters." No, no! You can be as liberal as you wish, but we have set a standard for a judge. One of the requirements we set for judges is austerity, or financial restraint. The Judicial Code of Ethics in my Province requires judges to have a certain Republican Austerity. I can't drive around in a red Ferrari! I can't! Even if I have the money, even if I'm not corrupt, I can't. Because the people want judges who are more or less austere, not judges who are, as we say in the street, "flashy". As you know, we Argentines are not known for being humble, but a judge who is not austere is even worse! There need to be objective measures; this is very important to have objective measures. Because learning Ethics is different from learning law. The learning of ethics is about earning recognition by others. To be recognized as someone who provides his service ethically. If society recognizes you and makes you feel like you have a certain position... the praises from your peers, the praise that reaches you indirectly. Law without question recurs to penalties. Ethics has more than penalties, it has rewards. Ethics awards recognition. If we go back in history, we have for example the teachings of Thomas Aquinas, who said that the greatest award a good governor could receive was friendship. But alas, we have damaged the definition of friendship; the notion of friendship coined by Aristotle; to have the friendship of your citizens, that is the reward for a good governor. Today, one could say to have the people love you, respect you, give you your due.

That is another argument, and I would give you one final argument in favor of codes of ethics, because in this day and age... in the year 2000... if I wanted to pinpoint the moment when Ethics started to take hold in our continent, I would say in the year 2000, when the first Code of Ethics of this new generation of Codes of Ethics is passed. There are some old codes of ethics in Central America, but none were very effective. In the year 2000 a Code of Ethics is passed in Costa Rica, setting in motion a very solid process that has been growing and that is starting to reach the boiling point. Last year, when the 22 chairmen from Iberia-America - Mariano Arzuola Buitrón represented Mexico - passed this Code of Ethics and create the Iberian-American Commission for Judicial Ethics, in 2006... and a month ago I was in Mexico for 2 days, at

their Supreme Court, for the second meeting of the Iberian-American Commission for Judicial Ethics, during which we decided the recipient of the Iberian-American Judicial Merit Award, to be given at the Brazil summit in March, 2008, to someone from Costa Rica.

In a word, the Code of Ethics today has taken root; I really think that our judicial culture has incorporated it. That is why it is so important – I was saying to our colleague from the U.S. – it is very important to learn from this much richer experience they have in the U.S. We just started crawling a few years ago; overcoming a lot of resistance from the European culture... “that the law is one thing and morals is another”, all those things which conspired against morals. But although this is a new topic, I think it is here to stay in our countries, the process has been unleashed, and I, as Secretary of the Iberian-American Commission, am constantly getting requests. We have now been asked to draft a Code of Ethics for Costa Rica, for instance.

Very briefly, these are some of the justifications for ethics and codes of ethics. I did not mention all of them, I brought 12 justifications, but I think I have shared enough of them to give you an idea of what we can say in favor of ethics.

We have talked about the judge, we have talked about the point of view of judicial ethics, we have talked about judicial codes of ethics. Now I would like to share with you the particularities of judicial ethics, of the ethics that's concerned with judges, of the law, when it is concerned with judges. There is a difference between the way an attorney looks at things and the way that ethics looks at things. And I say this because one of the main problems ethics has is lawyers. Attorneys want to turn ethics into a legal issue, out of habit, by inertia. And so I will talk about some differences between how attorneys and ethics look at things.

For example: first difference; I am certain that in the field of law no one would question the existence of a statute of limitations. A certain time has passed, the statute of limitations for the crime has expired, they can no longer prosecute me for that crime. In Ethics there is more uncertainty, you at least question whether there is a statute of limitations. “My decisions used to be able to be bought, but that was a long time ago, I am now a good judge, things are different now.” I remember the Senate hearings when Thomas was a Supreme Court nominee and was accused of sexual harassment. It wasn't an issue of criminal liability, but one of ethical liability. How could he be confirmed as a Supreme Court Justice when there were questions on the issue? Society demands that we have a certain degree of integrity, and gives us but one chance to do it. It does not tell us that it is sentencing us to not being able to work, what it is telling us is “I don't want you as a judge”, I gave you a chance, and you wasted it. And I'm not saying it's right, what I am saying is that there is an argument; there is no argument for saying that it never expires, but there is an argument for questioning whether ethics violations expire.

Another difference, the law is ruled by the principle of presumption of innocence, but we could ask ourselves whether ethics are ruled by a presumption of innocence, or a presumption of guilt. That is the question... do I keep this judge? A judge that has put himself in a questionable position, do I keep him? I mean, now that his authority has been undermined, that he is in a questionable position... I have served for many years, 19 years, in court to remove judges in my Province; it is made up of two attorneys, we are six justices, two licensed attorneys appointed by the Bar – we have mandatory membership – two attorneys, one from one city and one from another, from the two largest cities, a councilman, and a senator, but the majority is represented by the six justices.

I never forget the case of a judge who, well, strictly speaking had done nothing wrong, but what he did had meant basically to have all his authority before the community taken away. The community then, from all walks of life, from the parishioner to the representatives of the different clubs, when asked about the judge their first reaction was to smile... “Oh, that judge, what can I tell you”, that was their first comment. Strictly speaking he had not done anything, but what he had done was enough to take away all his authority. And it was enough to have him come in and give his statement to convince us that he did not meet the ethical qualifications required in order to be a judge. Because the way he explained his judicial behavior was truly a shame. Presumption of innocence – talking about the law – and presumption of guilt.

Third difference between law and ethics: as attorneys we are used to having to look at things ex post facto; judges, attorneys, we are always looking into others' past actions to try and find something, to be able to say "a-ha! Got you! Now you're going to pay!" That's what I mean by looking at things ex post facto: looking into the past. Ethics are more interested in looking ahead: to what extent is this person sincere and converts. I can give you a new chance looking to the future; this is why in ethics, confession and repentance are words that have enormous importance, while in the field of law they have none. If I went to a judge and said "I am sorry, and I promise that I will never do it again", the truth is my confession would be of little relevance.

I'm going to touch on some topics without going into too much detail, since time is short. It's just that there is a lot to talk about! In the Masters in Judicial Studies, we spend 35 classroom hours on the subject of Ethics: codes, a series of things, case studies... but getting back to our topic, let's talk about the different liabilities a judge can incur in. There eight different types of liability a judge can incur in, let's see if you agree with what they are; perhaps there are more, but I would say there are at least eight.

First there is criminal liability: I can commit a crime – do something that is classified as such – and I would be subjected to a proceeding in which a prosecutor will accuse me and a criminal court judge will decide my case based on the penal code and the procedural code by either finding me guilty or not guilty.

Second, there is civil liability. Several countries allow a person to sue for damages. Judges can cause damage, and the person who suffered the damage can sue us in civil court based on the Civil code and the Civil Procedural code, and the case will end with a decision either ordering me to redress the damage or granting me acquittal from the suit. 41:19

Third, there is what we call administrative liability. The judiciary is an administration; it issues resolutions, bylaws, forms that judges have to fill out, and if we fail to fill them out, for example, we could be administratively liable, which is prosecuted like any other administrative liability.

Fourth, we have political, or constitutional, liability. The power of the State is divided among, as a minimum, three branches; one-third to the Executive Branch, one-third to the Legislative Branch, and one-third to the Judicial Branch. Based on this, the Constitution establishes a series of checks and balances, and we can definitely be removed pursuant to the Constitution.

Fifth we have liability for failure to follow the bylaws of an association, an organization, or a company. There is an Association of Justices, and I have to answer for my actions according to the Association bylaws: Failure to attend the Justices Dinner, failure to pay my dues, etc.

Sixth we have social liability. A judge is supposed to be in tune with... I cannot be unaware of the problems of my community, I have to be in tune with them: e.g., what the economic crisis meant for them. I am not a Swedish judge, I am an Argentinean judge and I have to be aware of the problems my society faces.

Seventh, there is scientific liability, something very important that our communities do not enforce. Judges apply the law, we decide it, we state it. After our decisions, the law is either better or worse off; it is damaged by my declaring something as unconstitutional when I should not have, or I achieved a right, or whatever. When damage has been done to the law, scientific, or academic, liability must be enforced by academia, by faculty. To study the decisions and applaud them, or criticize them, to back a minority decision to say... it's a great thing, this minority decision... and to fight to make it a majority decision, which is something still unseen in our communities. Academic liability; what a judge has done, not to remove him, but to recognize achievements, and point out deficiencies in what the judge has done as far as his decisions.

And, finally, ethical liability; which can be considered as a separate liability thanks to Codes of Ethics. If there are no codes of Ethics, ethical liability would have to be addressed under disciplinary, political, or other liabilities. But many Codes of Ethics do consider ethical liability. How? Though Ethics Courts and

Ethics Advisory Boards. This issue I would like for us to look at in more detail. So ethics liability is a new type of liability that Codes of Ethics have now defined as a new liability. The Code of Ethics for my Province of Santa Fe, which was passed in 2002, includes an Ethics Court and an Ethics Advisory Board. There are codes of ethics, I think, in Mexico City, there is one that was recently passed, a Code of Ethics for Administrators of Justice, after the "Jurica Declaration", which included the creation of an Ethics Committee. These Ethics Committees begin to enforce this particular liability. And I wanted to discuss this in greater detail because I feel this is perhaps the newest development on the subject of ethics. How are these courts of ethics constituted? They have a lot of power, why? Because their power comes from the Code of Ethics, and codes of ethics are generally Great Principles. If you look at the Mexican Federal Code of Ethics for the Judicial Branch, you will find that it contains The Seventeen Virtues of the Judiciary, some of them unique to the Mexican culture; patriotism, for example, is one of the virtues. In Argentina it might be considered unthinkable to include it as a virtue, but each culture has its own peculiarities. The problem that judges face is: who is going to judge my patriotism, my dignity, my decorum? Who, Mother Theresa? Who? That is why I say that Ethics Courts have to apply Great Principles, which for the most part are not specific; they don't have that precision of penal codes, which state, for example: "whoever commits murder shall be prosecuted". Codes of Ethics say "all who exercise this profession shall not behave in a way that is detrimental to the integrity of the profession." This little formula is more or less in all the codes of ethics, for podiatrists, attorneys, physicians, architects, everybody. So, who is going to judge how I affect the integrity of the profession? Here is this ethics court that has to issue decisions based on these principles, these somewhat vague formulas contained in every code of ethics. Ergo the significance of ethics courts. Who do we assign to them? The idea is to have them be people of the highest ethical authority, earned through their whole life. In the case of the Santa Fe Court of Ethics, they are retired judges who are appointed by recommendation of the same justices who would be judged by them.

This Court is given legitimacy by the same judges who will be judged – right now it is made up of retired judges, and obviously if they were appointed it is because they have incarnated ethics for many years, so they have the unquestioned authority earned over their lifetime; as well as retired attorneys... there is this little-known figure of attorneys who actually retire, but in my country there are retired attorneys; those who are no longer practicing, they are retired, receiving a pension, no longer active in the profession, and professors. And the idea of appointing retired persons is that they have a proven track record. It's one thing to be very ethical if it's only your first year of practice, and quite another to have a track record of 40 years of very ethical professional behavior. Without a doubt, the person who was very ethical for 40 years will continue being so for the next 4, 5, 10 years he has left in his life. That's sort of the idea, to have them be people of the utmost ethical integrity, and in the academic field I have met some people whom I greatly respected. As the Classics say, when you respect a subject so much, you end up respecting the teacher of that subject. And I have had some professors in my life, particularly Kalinosky, a French professor who... if he had ever judged my ethics, and had called me one day and said: "someone has filed a complaint that you do not prepare your classes well, your way of teaching is truly a shame", "no one understands a thing, you have no room for questions." And if this person who has so much authority in my mind, whom I respect so much intellectually and consider a master in many senses, if he were to look at me and say: "I think they are right, you are a disaster as a professor", I believe that if I have an ethics conscience, these types of statements about my lack of ethics, coming from a person of the utmost ethical authority – whose authority I acknowledge – will affect me in some way or will somehow achieve what we want from penalizing in ethics matters.

These ethics courts have to be made up of people of the utmost ethical authority and professional diversity; as I said, attorneys, judges, professors, and so on, and it is those who would be judged by them who would be acknowledging that ethical authority.

How is an ethics liability case born? It starts with the filing of a claim; the claim can be of course corroborated by others, or it can come without corroboration by others. Experience would dictate that it is better if it comes corroborated by others, because this acts as a filter, at least in our culture, there are other cultures where corroboration would be unnecessary; but essentially this ethical liability proceeding needs to be completely informal, flexible, because, once again, it depends on the authority of this court of ethics. This is how I imagine an ethics proceeding: there is a claim and it is heard by the Ethics Court,

which limits its decision to saying “we have received a claim, we have notified the alleged perpetrator”... the basic proof in an ethics proceeding is the testimony, the statement of the claimant, because this is not a legal proceeding, it is an ethics proceeding; the statement, the acknowledgement, “yes, I did wrong, give me another opportunity.” In this case we should not be thinking about producing proof, and arguing about this proof, that would be to turn it into a legal case; it is not, it is an ethics case. This is an informal environment where people with the highest ethical authority, trusted by even the person who committed the ethics violation; they have to come to acknowledge it somehow, whether they have committed an ethics violation. And the penalty in our culture I think could be one of two things. There are Codes of Ethics that contemplate a private reprimand; in this case, if the Ethics Court decides that there was in fact a violation, the person who committed it is informed of the fact and he receives a reprimand in private. Or the decision can be made public; the community will be informed of the verdict, of the fact that there was an ethics violation, so in this sense it is a public reprimand.

Now, another alternative is when the ethics violation is so significant... this claim that started as one of an ethics violations is discovered to be a very serious offense. The Court of Ethics, without prejudice to judging it an ethics violation, turns the case over to a criminal court, to a court for the removal of judges, to a political court, to a jury court, etc. That is how the court of ethics works.

In addition to courts of ethics, ethics codes have also created ethics advisory boards. That is, judges on many occasions have questions... I have to continue towards a judgment, and I don't know who to go to for advice. There can be an Advisory Board where you can voice your concern; you are a conscientious judge and you want to ventilate the concern. “I don't know what to do, a girl came before me in a proceeding, and it turns out that she was my girlfriend many years ago, should I step aside? What do I do? This Advisory board does not even have to know who I am, they hear my concern, they help me think it through, and they hand me their decision. This is a good back up, if the issue explodes tomorrow, I have consulted the Board and they gave me an answer which I followed.

In conclusion, in these last few minutes I have left, I would like to share what I see as the landscape of codes of ethics. There are different roads to a Code of Ethics: First, codes of ethics brought about correctly, and brought about authoritatively. Sometimes codes of ethics come from the Supreme Court, which one day decides to issue a Code of Ethics; that's OK for a legal code, but not for one on ethics. Ethics has to be shaped, to be built by means of a rational discussion that involves not only judges, but also attorneys, and others who work in the judicial branch, and law professors, and community organizations. A dialogue, you cannot rush a Code of Ethics through. When a process is started to draft a code of ethics, it is a process that has to take some time, a year, at least. That's how the one for the Federal Judicial Branch was done, with a lot of consultation; I found it very appropriate that it had that environment of dialogue, of plurality, or rationality, to start shedding light on it, instead of an act of authority. Codes borne of a rational dialogue... authoritative codes, such is the landscape of ethics codes in Latin America.

Second aspect: the structure of the codes. There are codes that appeal to the structure of principles. The Iberian-American Code speaks of 13 principles; the Mexican Code speaks of virtues, there are others that speak of values, of assets. The Code of Conduct for United States Judges speaks of 7 canons. The terminology varies. We chose to speak of principles, because we have a whole legal theory based on rules and principles... anyway, a whole theory behind doing it this way, of choosing this alternative for structuring the code.

Third aspect of codes of ethics: codes of ethics with penalties, and without them. The Mexican Codes of Ethics do not specify penalties; they are left up to the ethical conscience of the judge. That's one way, but I think that the model that inspires us most is the U.S. model, because they have a much richer experience; I think there has to be some sort of penalty mechanism, and experience tells us that, after implementing a Code of Ethics, there has never been an avalanche of claims, of problems for the judges, which is sometime what judges fear. There are also Ethics Courts that limit themselves to finding that there was an ethics violation, they do not penalize, they turn the case over to the Supreme Court so that it can dictate the penalty. The only thing the Ethics Court say is “we find that there was a violation that merits a penalty” and then they send it to the Supreme Court for the penalty to be imposed.

As you can see, this landscape of codes of Ethics is very varied.

In closing, I will very quickly summarize. The Iberian-American Code of Judicial Ethics was created in 2004. There was the Copal Judicial Summit in Salvador, where I gave a presentation to Supreme Court Chairmen; one of the deliverables of this Summit was the creation of a model code for Iberia-America; the actual drafting is assigned, near the end of 2004, to Manuel Atienza, who many of you might know, and to myself; we worked for a long year. And the Justices, the Supreme Court Chairmen, created a Committee of Justices that validated what we were doing, because as Aristotle said “the best can be the enemy of the good”, and since we were academics, we could have been thinking of impossible things. And they did correct us – one of the principles of ethics is motivation – these Justices cut out most of the part about motivation, and it was presented and passed in Lisbon in March of 2006, not officially, but it was signed by the Chairmen, and then formally passed in June during the 2006 Dominican Republic Judicial Summit. At this summit, not only was the code passed, but the 9 members of the Iberian-American Commission were also designated. Mexico is represented by former Supreme Court Justice Juan Diaz Romero – he was an acting Supreme Court Justice when he was designated, but he retired at the end of that year; there is Spain, Portugal, Puerto Rico, Costa Rica, El Salvador, Brazil, Chile, Uruguay; the Executive Secretary of the Iberian-American Commission was also designated at this meeting where the 9 members were selected, out of many candidates. I was elected Secretary, but the nomination for Secretary was given by the Spain Supreme Court Chairman, in other words, there was only one candidate.

Ok, the Code contains 13 Principles, this is the first part, I will read them very quickly, and it creates the second part, the Iberian-American Commission on Judicial Ethics. I will quickly read the Thirteen Principles, and with that I will close:

First Principle. – Independence. Each Principle has several Sections; the Section One states the purpose of the Principle, Section Two tries to define the Principle, and the remaining Sections are the scope of the Principle, like regulations.

Independence, Impartiality, Motivation, Knowledge and Training, Justice and Equality, Institutional Responsibility, Courtesy, Integrity, Transparency, Professional Secrecy, Prudence, Diligence, and Professional Honesty, those are the 13 Principles. These principles gather, in a way, judicial ethics in Iberia-America, because when we drafted them we of course had to take into account the different codes of ethics that existed in Iberia-America and the world; because there are Codes of Ethics in countries such as Japan and Chile, of course in Europe, in Italy, and in our continent in Canada, in the United States, in Mexico, like we mentioned, even Cuba has a Code of Ethics; Puerto Rico, Costa Rica, El Salvador, Honduras, Peru, Chile, Paraguay, and some Provinces in Argentina. As you can see, this is a process that is barely starting, but, as I said before, it is one that is here to stay.

Thank you very much!

Question and Answer Session

We want to thank you on behalf of the School of Law for being here, as well as the Tinker Foundation for their sponsorship and... I don't know, are we going to have a questions & answers session? We still have some time? OK, let's open the floor to your questions.

Q: [inaudible question... speaker did not use a microphone]

A: Great question, thank you! I can think of 2 answers... could you repeat the question, or should I? As I understood it, I had said that ethics demands the maximum, while the law demanded the minimum, and that judges have to choose answers according to the law. What happens when the answers offered by the law are unfair? Her question is: what happens when the judge has to judge the ethics of the legal system, what these days is called the 'ethical validity of the system'? What would have happened if we had been judges in Nazi Germany? Before I get to the answer, I would like to talk to you a bit about how to verify the

ethical qualifications of a judge. Judges have to inspire trust, right? Particularly to the losing party, am I wrong? The winning party will surely and generously trust us, but the losing party would look for even the slightest suspicion to take advantage of, am I wrong? What do you want from this judge? Can you see who he is, or can't you? The ethical qualifications I was referring to can be verified. Today we talked about and tipped our hats to what happens in the U.S.; when you have a [Supreme Court] nominee, he or she is investigated by those who know about his or her ethical qualifications. Who are they? The people who shared in his or her life; in my case, my peers at the school where I teach: the administrative staff at my school knows if I'm the typical arrogant Argentinean or just a regular Argentinean. They know how I treat my male students... my female students. How am I as a teacher? What do my neighbors think? My neighbors know if I get into a fight with my wife; they can hear dishes flying, and my wife leaves in tears and the kids come out crying and with a black eye. They know about all of that, right?

At my club – and I'm just thinking out loud with this example – what happens with the tennis court I had reserved for an hour? Do I go up to them and say "I'm a judge, and I'm staying for two hours"? So, I pay my taxes, I obey traffic laws, all of this starts creating an ethical identity which is recognized and will be decisive if we are to inspire trust. Again, how do I verify the ethical qualifications of a judge? Yours is known by your friends, your neighbors, your teachers, that is how it is done. In my case, my friends, my students, my neighbors, my peers, the other members of my club, and so on, they know whether I'm responsible, whether I'm honest, all the qualities I need in order to be a judge.

Back to the question of what we would have done if we had been judges in Nazi Germany... I'm going to introduce a very important theory, which is the 'levels of injustice in the rule of law'. There is a formula that comes from Nuremberg, from Radbruch, who back in '47 in a course he taught after returning to Germany... after having been a positivist, he returns saying "I am a positivist no more." He defines what he coined as 'extreme injustice' by saying that "extreme injustice is not rule of law". So then, we have a law approved by Parliament and published in the Federal Register, and which does not violate the constitution, that constitution made under orders from the high leader, the Fuehrer, and so there it is. But its content is in itself an extreme injustice. Extreme meaning self-evident, meaning extensive, that it is not unfair only to me, but to everyone. Before an extreme, self-evident, extensive injustice, what I really must do is not enforce it, because it is not the Rule of Law. Because if I enforce it what could happen to me is what happened to all those Nazi leaders after Nuremberg, or what happened to the Communist Germany judges when the Berlin Wall fell. They were tried and convicted because they had enforced laws that, due to their extreme injustice, were not legal, did not follow the Rule of Law. What I have to do is not enforce them because although they have almost all the external characteristics of law, they are not legal. And you might say: "but I make my living as a judge." Here we have a subjective problem, you cannot do that as a judge. You are asked to follow the Rule of Law, the laws that follow the Rule of Law, and must oppose when they do not. *Juris Dictum*, we say in the legal field. Normally, we would just say the law, but in some pathological cases we must say "the law and the right." It's not me who says this is so, the code of conduct of Iberian-American judges, approved in 2001 in Cancun by the Iberian-American Judicial Summit, rather in the Canaries; but says in Article 43 that judges, when making a decision – Article 43 which is entitled "The Principle of Equality" – judges, when making a decision must always keep in mind the human background of these conflicts, and will do their best to justly temper unfavorable personal, family, or social consequences. In other words, we have to assess what the law states, the unfavorable consequences, am I clear?

Q: This morning, a speaker was saying that Ethics can be lived under any religion, or even without religion. Can we talk about a truly atheist ethics, one that is ashamed of religious values? Or does it unavoidably have to do with the Creator, who somehow instilled these ethics principles in humans?

A: This is an extremely important subject in today's political and legal philosophy. It is the debate, for example, between John Rawls and Habermas on Public Reason, but I will try to respond in very simple fashion.

Is there a natural morality? Of course there is. St. Thomas of Aquinas, in his polemic with Acah, Cusa, etc. theological volunteerism. There is a natural morality; I cannot kill another, I respect life because the Ten

Commandments say so and also because logic tells me so. Now, the teachings of the Catholic faith, which is the one I know and practice, state that Faith confirms reason; it confirms it and elevates it. So, a person can behave perfectly well on natural morality alone, but if you are also aided by your faith, so much the better! But you definitely can behave appropriately on natural morality alone.

Q: Professor, towards the end of your talk you mentioned some Iberian-American countries that do have a Code of Ethics. What could we expect in a trial in those countries that don't have codes of ethics, like Venezuela, for example?

A: Funny you should mention it. There is a process in Venezuela, a bill, with a series of articles for a Code of Ethics. I would say this: the problem with something becoming fashionable is that everyone wants to do it, right? Some will do it begrudgingly, without really wanting to. And the issue is that Ethics have become fashionable, which can be both strength and a weakness. We don't only need for there to be codes of ethics, but above all we need them to be a parameter to measure the qualifications of a potential judge, that is the issue. To be investigated, not just to be required to know the law... how do you treat your maid? Do you pay your taxes? How is your professional performance? What kind of member are you at this club? Ethical qualifications are easy to understand, because there are habits in our social life, such as honesty, responsibility, diligence, reservation, integrity, transparency, trust, which is what they are going to require of us later; and you can have a double personality, I mean, in my private life I'm a mess, but in my judicial duties I am spectacular. Psychologists would say, "Watch out, he is schizophrenic".

But I think we have to bet not only on having these codes, but to have ethical qualifications, to have a rule of ethics. Not only to have codes of ethics in all the countries that do not have one yet, but to have them be enforced, particularly when appointing.

Q: You made a very clear effort to separate questions of ethics from questions of law, opposite to the 19th Century tradition. But today, when most modern constitutions have included them and consider many of these values or principles as regulation, what happens on a constitutional enforcement level, so to speak, what happens when a principle becomes law because it is mandated by the Constitution, but it is also an ethics mandate? I was thinking of impartiality.

I think in this case that distinction we made about the law demanding the minimum could work very well. Let's see, the law requires impartiality, it has all the regulations that indicate when a judge must be disqualified... if my brother is being tried, well maybe deep inside I know that I could serve impartially, I have said many times that I think I could perform my duty even if I was trying my brother, but the law forbids it.

Ethics, on the other hand, asks that "if I see something uncivil, stand aside", and in this sense ethics agrees with the law in order to inspire trust, etc. But ethics demands more, to stand aside even if the condition is not that the accused is a relative, if you feel compromised because you have a problem with that person, or because you were going to use your decision to get in good favor with that guy, if you do this analysis... and the law allows you to continue performing your duty, but if deep inside you feel compromised, step aside.

Ethics demands the same thing that the procedural code demands, that if it's my brother who is being tried, I should step aside... ethics demands this as well, you know, inspiring trust, and so on... But ethics demands that and much more. Any time I feel compromised, because sometimes - the experience of a judge - sometimes we issue a finding although we would have liked to find something else. It's happened to me, at least. I served 19 years as a justice, but 4 more as an appeals judge, and many times a colleague, a professor has appeared before me and I did not have to step aside. Maybe he is not a close friend, but I would have liked to see him win his appeal, and I made him lose it, and truth is I would have liked him to win... he is a good person, upstanding, I see that he had to appeal his case, he was poorly defended during the original trial, anyway, a thousand different circumstances. You can even be completely convinced because this is an honest person, but he loses the case, that's what I'm talking about. Someone comes in who I know but is not a close friend, and I continue to hear the case; the law

sleeps in peace, but ethics does not sleep so peacefully, it is worried about how independent, how impartial I will be.

Q: And with that, now we thank Dr. Rodolfo Vigo for making the long trip, and on so short notice. We also want to thank the Tinker Foundation for making this conference possible, as well as San Diego University's Trans-Border Institute, and I personally want to thank my colleagues from the School of Law and some others who helped me make all this possible: Fernanda, Susana, Juan Pablo, Jonathan, Manuel, and Alfredo. Thank you, everyone! And special thanks to all of you for having attended! Have a great afternoon!