

**Laudation**

for Stuart Couch, Charlotte, North Carolina, USA

**Award of the honorary *pro reo* prize for 2009  
by the Arbeitsgemeinschaft Strafrecht im Deutschen Anwaltverein  
(Criminal Law Section of the German Bar Association)**

Berlin, 14 November 2009, 11:00-11:30 a.m.

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I.

Prizes and awards are bestowed in much the same way all over the world. The process could hardly be simpler, as it is based on three fundamental principles: order, solemnity and hierarchy. It must have a certain order as it proceeds from beginning to end; it should be uplifting in a dual sense – for the recipient and for those who witness it; and it always reveals the workings of a hierarchy of some sort. The bestowers of the award have something to give, something the witnesses to the process assume the individual who is to receive it would like to have. Thus the individual in question receives a gift and the bestowers hold that gift in their hands. They show it to the individual designated to receive the award in advance, and then they present it to him. That appears to involve a relationship of above and below – at least until the moment in which the award is actually bestowed.

When all is said and done, of course, the hierarchy of giving and receiving is leveled through the distribution of the burdens borne by the givers and receivers in the award process. While the recipient, if he or she is smart, never expects an award but lives out his day-to-day routine only to be pleasantly surprised by the news of his selection, the jury must work hard (and risk being accused of having chosen the wrong person later on). It must think and search, examine and argue, read and justify ...

As far as one can tell from the vantage point of an outsider, our jury – Ms. Von Galen and Messrs. Holzhaider, Leitner and Meyer-Goßner – have done precisely what our award culture expects of them. They have thought and searched, examined and read, and they have ultimately selected the military prosecutor Stuart Couch of Charlotte North Carolina as the recipient of the honorary prize bestowed by our task group: the “*pro reo*” award. And they have justified their choice in a focused and convincing manner.

## II.

The jury has explained that Mr. Couch volunteered for appointment as a military prosecutor in investigative proceedings in Guantánamo and that he asked to be relieved of those duties in 2004. He had no doubts about the guilt of the accused individual. His reservations related to conformity of the interrogation methods used to obtain evidence with the principles of U.S. military and criminal law as well as international law. He expressed these doubts in public and justified his decision on the basis of legal and ethical concerns. Everyone in this room is familiar with these concerns, and I needn't recite them here.

The jury emphasized that Mr. Couch responded to a profound conflict of values by choosing in favor of human rights and opposing torture. To that I would add that Mr. Couch raised his voice in support of a culture of liberty and the rule of law that has characterized Western societies for centuries. That culture is an outgrowth of the political philosophy of the Enlightenment, but it has been overshadowed by Guantánamo and its consequences.

That all sounds laudable, indeed heroic, and indeed it is. It is a confirmation of a violation of human rights at the very scene of that violation, a public negation of the negation of justice, and that deserves the praise of defense attorneys. But it should surprise no one to learn that that is not the whole truth. It is only its surface. We do not know the whole truth. But we must account for it in some way and find a place for it if we are to gain even an inkling of what must have happened when Mr. Couch said "no." A heroic act was committed, but it was accompanied by uncertainty, isolation, anxiety and possibly pain as well, and that is part of the truth that lies behind the events.

## III.

That truth comes to the surface in press accounts in which it is reported that there was only one subordinate officer who defied the orders of his superior to commit acts of violence, or when we learn of the arguments brought forth in opposition to Mr. Couch's decision: that he should do his duty like his fellow officers instead of playing missionary, that refusing to do what is expected of every decent investigator, namely to solve the case, would not make him a better person.

Those are the arrows that pierce the heart of an individual who finds himself unable to go along with the crowd – arrows that identify him as an outsider and isolate him morally in his everyday world, and which may actually bring him to his knees. We are all familiar with these marginalizing processes, though perhaps not through first-hand experience. The small and great stories of resistance to prevailing irrationality draw their power from these processes, and it is they which make the truth of such resistance complete.

#### IV.

What I said about public award processes at the outset was also only half of the truth. An award process surely needs a certain solemn order, and it surely exhibits the features of a hierarchy that distinguishes the institutions that bestow an award from the individual who receives it. But that is not always the whole story. In many constellations this hierarchy is affected by an element which sets its mechanics in motion and triggers its automatic responses. And that is the case here as well. This dynamic is typical of the situation in which we find ourselves. I would like to talk about that briefly in conclusion.

In many cases, the selection of a given individual as a recipient for a prize or public award is a foregone conclusion that is quite rightly of little consequence in the public mind: The outcome was more or less expected. It is acceptable; it is not worth further discussion, and so it is relegated to the files.

Yet there are also circumstances under which the bestowing institution cannot conceal itself under the mantel of the giver of gifts but must instead, whether it wishes to or not, enter the theater of debate, of conflicting opinions and positions; circumstances under which the bestowing institution takes a stand, shows its colors and exposes itself to criticism. In doing so, it negates the hierarchical distinction between itself and the individual upon whom it bestows the award. It takes a place alongside that individual and accepts that individual's cause as its own. And it does so publicly.

I think that has happened here. The Criminal Law Section of the German Bar Association (Arbeitsgemeinschaft Strafrecht im Deutschen Anwaltverein ) has not only given Mr. Stuart Couch an award; it has taken its place at his side and made his cause its cause as well.

Opposition to state-sanctioned torture is no longer a foregone conclusion in Germany. It was for decades in the past, when the horrors of Nazi violence were still very much alive in our hearts and minds and when laws and other standards were enacted for the purpose of condemning torture in Germany and elsewhere in the world. But that has been changing for some time. We retreat in the face of imagined scenarios of terrorist threats to entire cities and regions that can only be averted through the exercise of violence against individuals by the state. We argue about the obligation to shoot down a hijacked airliner full of innocent people before it kills even more innocent people. We cite the human dignity of an abducted victim as grounds for justifying "torture in the interest of saving lives" – that is, the legal use of state-imposed force against a silent offender.

These debates have grown quiet recently, but they are neither concluded nor resolved. Our normative social dialogue is still burdened by a deep rift between those who would never resort to torture as a means of saving lives even in cases involving severe harm and those – presumably the majority of people – who accept a relative weighing of endangered rights and would open the door to state-sanctioned violence just a bit under certain circumstances.

One needs no prophetic powers to conclude that these issues are still unresolved. Something may occur any day that reveals the normative rift that separates us. And at some point we will be forced to decide as a society whether we have the right to reject testimony in our orderly legal proceedings that has been obtained elsewhere through torture. The dispute regarding the constitutionality of such testimony and its impact on police laws and the criminal justice process has sent out sparks

here and there that have since been extinguished. But it is still waiting behind the curtain. We can see it coming.

Thus opposition to torture is by no means a foregone conclusion in our society, and disputes about its justification are truly not characterized by pale and elegant academic rhetoric. They go straight to the heart of the matter. They evoke deep-seated fears – on both sides – and they leave no doubt in anyone’s mind that the foundations of our normative order are being tested. But other things are at stake as well: human dignity, the right to protection by the state, and the control of power.

In bestowing this award on Stuart Couch, the Criminal Law Section of the German Bar Association has taken a stand. With this award, it has publicly chosen sides in this torn normative landscape. I find that more than gratifying. And to be honest, it does not surprise me, either. For where else could defense attorneys possibly stand but on that side? And thus – viewed from the standpoint of ethics and the mission of the defense attorney – perhaps the whole thing was a foregone conclusion after all.