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Foreword, Criminal Law Symposium

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FOREWORD

Matthew S. Steffey*

The papers in this symposium cover a range of criminal law topics. Four address the philosophy or reality of criminal practice. Two others call for a change in a feature of Constitutional law, one arguing for broader protection of the integrity of the home when police seek to effect a warrantless arrest of a suspect who answers his door, the other arguing for greater assurance that prospective jurors in capital cases are open to both death and life as possible sentences. Another Article and a student Comment debate limits of federal authority over arguably local crime, and a final student Note discusses the United States Supreme Court's recently confirmed limits on suspicionless drug testing.

In *Other Crimes, Wrongs, or Acts Evidence in Mississippi Courts*,¹ Robert M. Ryan provides a primer on the interplay between Mississippi Rules of Evidence 404(b)² and 403.³ Ryan explains that courts recognize how evidence of other crimes, wrongs, or bad acts committed by a criminal defendant can be extraordinarily prejudicial; hence improper admission of other bad acts evidence is often reversible error. So is a trial judge's failure to give a tailored limiting instruction, one that both forbids improper use of the evidence as proof of criminal character or propensity *and* that identifies the permissible use of the evidence, for example, as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.⁴ Ryan further argues that, under Rule 403, the potential prejudice should be weighed against the marginal probative value of the other bad acts evidence, after considering alternative, less prejudicial means of proof.

In *Are Capital Defense Lawyers Educable? A Moderately Hopeful Report From the Trenches*,⁵ David L. Szlanfucht examines Georgia death penalty appeals from 1973 through 1998 as a sample test of whether, as United States Supreme Court capital punishment law has become more settled, lawyers have made fewer egregious mistakes during capital trials.⁶ Noting that the frequency of ineffective assistance of counsel claims is decreasing, as is the frequency of apparently egregious errors at trial, Szlanfucht concludes that lawyers are making fewer obvious blunders, and doing a better job generally, in representing capital defendants.

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1. 19 MISS. C. L. REV. 345 (1999).

2. MISS. R. EVID. 404(b) sets forth when evidence of "other crimes, wrongs, or acts" is admissible.

3. MISS. R. EVID. 403 sets forth the balancing test to determine when "relevant" evidence may be properly excluded as unfairly prejudicial.

4. See MISS. R. EVID. 404(b).

5. 19 MISS. C. L. REV. 305 (1999).

6. Szlanfucht defines egregious mistakes according to criteria set out in William S. Geimer, *A Decade of Strickland's Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL RTS. J. 91 (1991).

In her Article, *The Role of the Defense Attorney in Mitigating the Nonviolent Youthful Offender and Locating the Appropriate Alternative Sentence*,⁷ Vicki L. Gilliam suggests that defense lawyers have a duty to present the human face of young offenders to the criminal justice system. Defense counsel should work to identify a client's problems and find the most appropriate means available to address them. Gilliam reports that, as of September 1999, 1422 offenders ages 14-21 were serving sentences in a Mississippi Department of Corrections facility, while only 235 were in the boot-camp like Regimented Inmate Discipline Program, and 79 were in the house-arrest like Intensive Supervision Program. Gilliam believes that a youthful client, particularly one who has committed a nonviolent crime, can receive a sentence more appropriate than incarceration, one that may help him address underlying problems and work toward rehabilitation. The attorney should undertake an investigation, including interviews, to determine the causes of a client's behavior, and then ascertain an appropriate alternative sentence, such as diversion to a treatment program, alternative sentencing offered by the Mississippi Department of Corrections, the Regimented Inmate Discipline Program, a Restitution Center, non-adjudication of guilt, shock probation, house arrest, or others. Gilliam recognizes that an alternative sentence will require the consent of the prosecutor or court approval, but reasons that consent or approval will be easier to obtain if the lawyer is armed with the necessary information on her client and a reasoned, detailed plan.

This symposium also includes an essay by Larry S. Pozner, which was first delivered as an address after being named President of the National Association of Criminal Defense Lawyers. In *Why Do We Do It?*,⁸ Pozner argues passionately that criminal defense lawyers are indispensable guardians of liberty. Citing examples of governmental injustice ranging from the World War II internment of American citizens of Japanese ancestry, to the McCarthy era, through the abuses employed by local governments to thwart the assertion of civil rights by African-Americans, and to the present day, Pozner reasons that a vigorous defense bar is a necessary systemic check against potentially tyrannical government.

In *The Constitutionality of Warrantless Doorway Arrests*,⁹ Jack E. Call argues for a rule, either as a matter of Constitutional law or police department policy, mandating police inform a suspect about to be arrested in the doorway of his home that he has a right to require that the police obtain an arrest warrant. Existing Supreme Court decisions bracket the issue by allowing warrantless arrests in public, but disallowing warrantless entry of a home absent exigent circumstances. At present, some lower courts permit police to make a warrantless doorway arrest so long as the police do not coerce or deceive in calling the suspect to the door, and so long as the suspect does not retreat into the house. Other lower courts forbid warrantless doorway arrests unless the arrestee acquiesces in

7. 19 Miss. C. L. Rev. 361 (1999).

8. 19 Miss. C. L. Rev. 275 (1999).

9. 19 Miss. C. L. Rev. 333 (1999).

the arrest. Call suggests that informing a suspect subject to doorway arrest that police can be required to obtain a warrant would further important Constitutional values, as "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed."¹⁰ Moreover, in Call's view, even a voluntary police department policy to the same effect is prudent, as it would signal to citizens that the police highly respect the privacy and security of the home.

John Holdridge calls for the elimination of an incongruity he perceives in the qualification of jurors in capital cases in *Selecting Capital Jurors Uncommonly Willing to Condemn a Man to Die: Contradictory Readings of Wainwright v. Witt and Morgan v. Illinois*.¹¹ He begins with the premise that Supreme Court precedent requires exclusion of a juror whose views either for or against the death penalty would prevent or substantially impair her duty to act in accord with the instructions and her oath. He further argues that Supreme Court precedent should be read to require a prospective juror's views on capital punishment be evaluated in the abstract, not under the anticipated aggravating and mitigating circumstances of the case at hand. The problem, in Holdridge's view, is that lower courts have excused for cause jurors whose ability to vote *for* the death penalty is substantially impaired, yet have excused for cause *only* jurors who will *automatically* vote *against* the death penalty. Holdridge states that this problem is compounded when lower courts refuse to excuse for cause jurors disposed to impose the death penalty under the anticipated facts of the case, yet do excuse for cause jurors disposed to impose a life sentence under the anticipated facts. Holdridge concludes that the Supreme Court should, at the least, require courts to allow *both* case specific questions by the prosecution concerning a juror's willingness to impose a sentence of death *and* cure specific questions by the defense concerning a juror's willingness also to consider a sentence of life.

Two papers address the reach of congressional power over arguably local crime. Barry C. Campbell's student note¹² examines *Printz v. United States*,¹³ which declared certain provisions of the Brady gun control law unconstitutional. Steven A. Kohnke's comment¹⁴ analyzes whether the Supreme Court's recent decision in *United States v. Lopez*¹⁵ dooms federal law prohibiting the possession of marijuana. The final paper, Mary Jacq Watson's student Note,¹⁶ seeks to illustrate how the Supreme Court recently fortified the Fourth Amendment's requirement that government show "special needs" beyond ordinary law enforcement when it invalidated a Georgia law requiring candidates for certain state political offices to pass a random drug test.

10. *Id.*

11. 19 Miss. C. L. Rev. 283 (1999).

12. Barry C. Campbell, Note, *Federalism, the Constitution, and the Brady Act: States' Rights and the National Government*, 19 Miss. C. L. Rev. 393 (1999).

13. 521 U.S. 898 (1997).

14. Steven A. Kohnke, Comment, *Can Congress Do That? An Analysis of the Federal Prohibition on Marijuana Possession*, 19 Miss. C. L. Rev. 381 (1999).

15. 514 U.S. 549 (1995).

16. Mary Jacq Watson, Note, *Chandler v. Miller: The Civil Liberties Sky is NOT Falling*, 19 Miss. C. L. Rev. 421 (1999).

Each article in this symposium addresses a discreet issue, and collectively they suggest various interstitial reforms. Still, speaking broadly, all share the common theme of ensuring fairness in criminal prosecutions by enforcing some limit on the power of the state. The authors thus contribute to an ongoing conversation necessary for a free society, here by talking about the need to guard against: convicting an accused with evidence of his general criminal disposition or propensity; an untrained lawyer representing a capital defendant; imprisoning a youthful nonviolent offender when rehabilitative alternatives exist; allowing police further authority for warrantless arrests in the home; impaneling a jury predisposed to impose the death penalty; expansive federal authority over local crime; or increasing government authority to conduct suspicionless drug tests.