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I. INNOCENCE

DEADLY DILEMMAS II: BAIL AND CRIME *Larry Laudan and Ronald J. Allen* 23

This is another in a series of papers examining the interaction between the implications of the deadly dilemma of governing that virtually all governmental action involves unavoidable conflict between equally laudatory goals and the conventional way of thinking about social errors. Typically the pursuit of any particular goal has as its consequence precisely the kind of harm that is desired to be avoided. For example, serious felons are sent to prison in part to protect innocent parties from their future predations, but those same felons often prey upon fellow prisoners, including murder. Moreover, felonies committed in prison only begin the catalogue of "wrongful" consequences to "innocent" individuals flowing from incarceration. If it is sufficient to end a social practice because it causes innocents to die, then we are obliged to eliminate prisons—and hospitals for that matter.

The point cuts even deeper. Virtually every governmental decision affects who will live and die. Whether roads are built, where, and to what standard of safety do this. Decisions on welfare programs do, as does the allocation of medical research funds or the choice to fund research instead of primary education, or vice-versa, or whatever. To the extent such matters are considered in the literature at all, the explicit treatment of errors by both the legal system and legal scholars has been curious both analytically and normatively. The simplest example of this is the virtually exclusive focus of both on false positives (false findings of liability, civil or criminal) and false negatives (false findings of no liability). This neglects two fundamental issues: first that there are four possible findings at trial, the two mistakes and the two possible correct verdicts; second and even more importantly, that sensible social regulation must be concerned not just with outcomes at trial and the resultant effect on litigation behavior but also with the effect of trial decisions on primary behavior. In sum, we suggest that sensible social policy must involve an analytically sound approach to decisions involving such deadly dilemmas. As we have demonstrated in previous work, the failure to do so leads to both analytically and morally perverse results in some areas. We demonstrate that same failure here in the context of pre-trial release decisions. We also suggest a modification of current practice that might ameliorate costs without altogether eliminating bail.

THE ROBERTS COURT'S FAILED INNOCENCE PROJECT *Janet C. Hoeffel* 43

In this article, Professor Hoeffel discusses the Roberts Court's obvious struggle with its actual innocence jurisprudence. It is a struggle that was only theoretical in the days before DNA exonerations. While the Court had two opportunities to clarify the role of wrongful convictions in the criminal justice system, it has declined to do so. In *House v. Bell*, the Court ratcheted up the standard of proof for freestanding constitutional claims of innocence to a level no petitioner could understand, much less meet. Then, in *District Attorney's Office for the Third Judicial District v. Osborne*, the Court held that the one manner in which a litigant might in fact meet that standard—through conclusive DNA testing of the state's evidence—was not constitutionally mandated. Through analysis of these two cases and two other cases that came before the Roberts Court, Professor Hoeffel concludes that the majority of the Court is so cowed by the power of DNA that it has exaggerated its potential impact on the criminal justice system. As a result, it has closed doors on the few men and women who can prove their innocence.

TAKING REASONABLE DOUBT SERIOUSLY *Arnold H. Loewy* 63

In recent years, we have discovered a spate of factually innocent people who have been convicted. In this article, Professor Loewy contends that the failure of juries to take reasonable doubt seriously contributes to this phenomenon. Professor Loewy via an illustrative fictitious case explains that juries might be reluctant to give the defendant the benefit of a reasonable doubt because of their concern about putting dangerous criminals back on the street. He then asks whether we really want juries to take reasonable doubt seriously. Concluding that we do, he examines how we can do that. Loewy concludes that the best way to that is with a jury instruction that sharply distinguishes proof beyond a reasonable doubt from clear and convincing evidence. Only if the jury really understands that dichotomy is it likely to understand that it cannot convict merely on clear and convincing evidence. The article suggests an instruction that would accomplish this purpose. The author concludes that while this instruction is not constitutionally mandated, it is constitutionally permissible and should be adopted.

WHITE COLLAR INNOCENCE: IRRELEVANT IN THE HIGH STAKES RISK GAME *Ellen S. Podgor* 77

When one thinks of "wrongful convictions and reliability in the criminal justice process" one often thinks of street crime convictions of defendants later proven innocent through DNA or other scientific evidence. But this essay presents a new dimension to this issue—the white collar crime context. Three stories are considered here: Arthur Andersen LLP, Jamie Olis, and Jeffrey Skilling—all of whom proceeded to trial after criminal charges were brought against them. These three are contrasted with KPMG, Gene Foster, and Andrew Fastow, all of whom secured plea agreements or deferred prosecution agreements with reduced sentences and finite results. The concern here is that innocence or guilt does not always frame the judicial process in white collar cases. The risk of trial becomes so great that in order to minimize the possible consequences, innocence becomes an irrelevancy. Although the plea bargain to trial differential existed for many years in crimes outside the white collar crime context, the high sentences now being given to individuals and entities charged with white collar crimes place these crimes in comparable stead with street crimes. This gives pause to whether the next phase of wrongful convictions might move beyond street crimes into the white collar world.

THE ROLE OF INNOCENCE COMMISSIONS: ERROR DISCOVERY, SYSTEMIC REFORM OR BOTH? *Kent Roach* 89

This article examines the role of innocence commissions as emerging criminal justice institutions. It draws a distinction between commissions devoted to the correction of errors in individual cases and commissions which make systemic reform recommendations in an effort to prevent wrongful convictions in future cases. The British and Scottish Criminal Cases Review Commission and the North Carolina Innocence Inquiry Commission are examined as examples of the former type of commission while Canadian public inquiries and commissions in Illinois, California and Virginia are examined as examples of the latter type of commission. Innocence commissions have had difficulties combining error correction and systemic reform because there are differences and tensions between the two functions. Error correction commissions play a quasi-judicial role while systemic reform commissions often engage in political compromise and advocacy. Although there is a need for both error correction and systemic reform with regard to wrongful convictions, more attention needs to be paid to the precise objectives and limitations of innocence commissions as new and fragile criminal justice institutions.

SECOND THOUGHTS ON DAMAGES FOR WRONGFUL CONVICTIONS *Lawrence Rosenthal* 127

After the DNA-inspired wave of exonerations of recent years, there has been widespread support for expanding the damages remedies available to those who have been wrongfully accused or convicted. In this article, Professor Rosenthal argues that the case for providing such compensation is deeply problematic, whether advanced in terms of no-fault or fault-based liability. Although a regime of strict liability is sometimes thought justifiable as a means of creating an economic incentive to scale back such liability-producing conduct to optimal levels, this rationale has little application to the criminal justice system. Instead, a regime of strict liability would operate as a kind of perverse wealth transfer—from those most in need of government assistance to the exonerated—without reducing the risk of error in the criminal process. Given the nature of this wealth transfer, the case for compensation as a means of providing social insurance against wrongful convictions is equally flawed. As for a regime of fault-based liability, both tort law and constitutional law have long wrestled with the problem of wrongful convictions, and have erected many doctrinal obstacles to a regime of fault-based liability. These doctrinal obstacles reflect considerable skepticism about the wisdom of damages for wrongful convictions—a skepticism that Professor Rosenthal argues is warranted. Even if the law were to remove all doctrinal objections to fault-based liability for wrongful prosecutions and convictions, such a regime could not be confidently expected to induce police and prosecutors to take all cost-justified precautions to reduce the risk of wrongful prosecution or conviction. Instead, our current regime of political accountability for wrongful convictions is likely to be about the best that we can expect for identifying and reducing the risk of wrongful prosecutions and convictions.

INTENTIONAL WRONGFUL CONVICTION OF CHILDREN *Victor Streib* 163

Intentional wrongful convictions in cases involving child offenders may occur when judges have insufficient evidence proving any crime by the child but feel a strong need for the courts to intervene in the child's life and behavior. They believe that the negative factors attached to such a status are worth suffering if the child gains entry into a desired state program. This is wrongfully convicting the child "for the child's own good." Juvenile court judges too often receive knowledge of the child's background and previous record prior to any trial or hearing in order to devise the best result for the child. A jury, however, would never be given that information prior to the trial. The solution here may be to provide for jury trials in juvenile court.

Another cause of these cases is the defense attorney who does not challenge the state's prosecution zealously but who cooperates with the state in shunting the child off to the desired program. We also may not be taking seriously the requirement that children's offenses be proven beyond a reasonable doubt, and we should seek means to better insure that it is maintained. Many jurisdictions limit access to the most desirable treatment programs to those children found guilty of an offense in juvenile or criminal court. Simply being found to be a status offender or a child in need of services is not sufficient for admission. This might tempt a judge to wrongly convict a child intentionally as a justifiable means to that desirable end.

RELIABILITY, JUSTICE AND CONFESSIONS: THE ESSENTIAL PARADOX *Russell L. Weaver* 179

This paper deals with the issue of "reliability" in the criminal justice process, and the rising number of wrongful convictions that have been identified in recent years. Using modern evidentiary techniques, a rising number of individuals have been found "innocent" of the crimes for which they have been convicted. These instances of wrongful conviction have involved individuals who spent time on death row, awaiting execution, only to be completely exonerated. There are various reasons for these wrongful convictions, including prosecutorial misconduct and systemic failures such as inadequate indigent representation. This paper focuses on another systemic failure: difficulties with the confessions process that lead to invalid confessions.

II. EXCLUSION AND OTHER REMEDIES

THE IRRELEVANCY OF THE FOURTH AMENDMENT IN THE ROBERTS COURT *Thomas K. Clancy* 191

Since John Roberts Jr. became Chief Justice of the Supreme Court, there has been a measurable decline in the number of cases addressing Fourth Amendment questions. This article examines the reasons for that decline and predicts the substantial elimination of Fourth Amendment litigation in the Roberts Court. The prediction is based on several premises, including the lack of interest of the Justices on the Court concerning search and seizures principles and two significant recent cases, *Pearson v. Callahan* and *United States v. Herring,* which presage a significant decline in the number of lower court cases addressing the merits of the Fourth Amendment and, consequently, fewer cases worthy of Supreme Court review. If these premises hold true, the Fourth Amendment, while remaining the most commonly *implicated* aspect of the Constitution, may lose its status as the most frequently *litigated* part. What will remain is a residual, complex jurisprudence with little relevance.

THE FOURTH AMENDMENT, THE EXCLUSIONARY RULE, AND THE ROBERTS COURT: NORMATIVE AND EMPIRICAL DIMENSIONS OF THE OVER-DETERRENCE HYPOTHESIS *Donald Dripps* 209

This essay engages in the risky business of predicting future Supreme Court developments. In the first part, I analyze the evidence suggesting that the Roberts Court might abolish the exclusionary rule. The critique of exclusion in *Hudson v. Michigan* is both less and more probative than appears at first blush. Part II turns to some less obvious evidence pointing in the direction of retaining the exclusionary rule. First, abolition of the exclusionary rule is inconsistent with the *Hudson* majority's apparent content with prevailing police behavior. Second, abolition of the exclusionary rule would curtail the power of the Supreme Court. Part III offers a prediction of a somewhat different sort. If the Court were to abolish the exclusionary rule, the exclusionary rule would return, in some form, in a decade or

so. Prediction is hazardous. I hazard, however, the prediction that the Roberts Court will not abolish the Fourth Amendment exclusionary rule.

REPLACING THE EXCLUSIONARY RULE: FOURTH AMENDMENT VIOLATIONS AS DIRECT CRIMINAL CONTEMPT *Ronald J. Rychlak* 241

The exclusionary rule, which bars from admission evidence obtained in violation of the Fourth Amendment's prohibition of unreasonable searches and seizures, is a bedrock of American law. It is highly controversial, but there seems to be no equally effective way to protect citizens' rights. This paper proposes that an admissibility standard be adopted that is in keeping with virtually every jurisdiction around the world other than the United States. Thus, before ruling evidence inadmissible, the court would consider the level of the constitutional violation, the seriousness of the crime, whether the violation casts substantial doubt on the reliability of the evidence, and whether the admission of the evidence would seriously damage the integrity of the proceedings. In order to protect citizen's rights, this paper also proposes that Fourth Amendment violations be treated like direct criminal contempt of court. Thus, if a judge determines that there has been a serious Fourth Amendment violation, the offending officer could be summarily punished. Inasmuch as this punishment can be comparatively severe and is directly aimed at the offending officer, it should have a strong deterrent effect. Moreover, since a judge would be empowered to impose a penalty with minimal process beyond that which would have already taken place, it would be a more reliable deterrent than even the existing exclusionary rule.

MAPP V. OHIO'S UNSUNG HERO: THE SUPPRESSION HEARING AS MORALITY PLAY *Scott E. Sundby* 255

The exclusionary rule is back under the judicial magnifying glass. Recent opinions, most notably by Justice Scalia, have sparked speculation that the Roberts Court is inclined to overrule *Mapp v. Ohio* and send Fourth Amendment disputes back to the realm of civil suits and police disciplinary actions. As the Court's rulings have made clear, any reevaluation of the exclusionary rule's future will be conducted under the now familiar rubric of whether the rule's "benefit" of deterring police misbehavior outweighs the "cost" of lost evidence and convictions.

This essay argues that if any such reevaluation does occur, the Court must take into account something overlooked in evaluations of the past: the benefits of a suppression hearing itself. The hearing acts much like a morality play for those involved in the nitty gritty of law enforcement—police, judges, prosecutors, and defense attorneys—by instructing everyone involved both as to the Fourth Amendment's rules and why those rules are of a constitutional magnitude mandating honor and respect. And because the exclusionary rule reaches a wide variety of police behavior—unlike civil suits and disciplinary proceedings which reach only the most egregious instances of misbehavior—the suppression hearing becomes an invaluable public forum for providing transparency and promoting police compliance with the Fourth Amendment. In short, the suppression hearing is the exclusionary rule's unsung hero, and in the end offers the Court a means to find the truest measure of the exclusionary rule's costs and benefits.

FOURTH AMENDMENT FEDERALISM AND THE SILENCING OF THE AMERICAN POOR *Andrew E. Taslitz* 277

In *Virginia v. Moore,* police officers searched Moore incident to an arrest for a minor traffic infraction for which Virginia statutory law in fact prohibited arrest. The officers found cocaine on Moore's person, arresting him for that crime too. The United States Supreme Court ultimately found that the arrest for the traffic infraction and the subsequent search were valid under the federal Constitution's

Fourth Amendment. Central to the Court's reasoning was its insistence that the state statute was irrelevant. Any contrary conclusion, explained the Court, would wrongly make the Fourth Amendment's meaning vary from place to place. Professor Taslitz argues in this essay, however, that the Amendment's meaning does, and should, sometimes so vary. Indeed, he explains, *Moore* itself illustrates how a place-blind jurisprudence can disempower poor racial minorities, whose voice, articulating a more therapeutic approach to crime, is heard more clearly by local legislatures than by the more distant and punitive state ones. Permitting the state to declare the injustice of arrest for minor offenses while providing no remedy when that injustice nevertheless occurs frees police to arrest the politically weak for such offenses while merely citing the politically powerful. A more geography-centric view of the Fourth Amendment would minimize these and other risks of unequal and unreasonable state invasions of the privacy, property, and locomotive rights that the Amendment protects.

III. JUDICIAL PROCEEDINGS

MELENDEZ-DIAZ AND THE RIGHT TO CONFRONTATION — *Craig M. Bradley* 315

In *Crawford v. Washington,* the Supreme Court overruled *Ohio v. Roberts* and adopted new law concerning the use of hearsay testimony at criminal trials. This was based on the Sixth Amendment's command that "In all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ." On its face this provision seems to say that the accused has the right to cross-examine anybody who testifies for the prosecution at trial, whether as a live witness or through hearsay. The Supreme Court acknowledged much of this in *Crawford,* but limited the right of cross-examination to "testimonial" but not "nontestimonial" hearsay. That is, testimony as to "statements made under circumstances which would lead an objective witness to believe that the statement would be available for use at a later trial," including police interrogations, are "testimonial" and cannot be used unless the declarant is available for cross-examination. On the other hand, "nontestimonial" statements, such as 911 calls or other "statements about events as they were actually happening" may be presented at trail with no need for cross-examination.

In *Melendez Diaz v. Massachusetts*, the question was whether the testimony of experts who had performed scientific tests was "testimonial" or "nontestimonial." Since such tests are performed for use at a later trial, the Court, under the above *Crawford* formulation, concluded that they were "testimonial" and consequently couldn't be used unless the expert who performed the tests was available to testify at trial. This article, while agreeing with the outcome in *Melendez-Diaz*, argues that the testimonial/non-testimonial distinction makes no sense. As is evident from the Sixth Amendment itself, it applies to *all* testimony in court. However, as the Supreme Court has recognized in other cases, notably *Scott v. Illinois,* limiting the Sixth Amendment right to trial by jury to cases where imprisonment is an option, sometimes practical concerns must limit recognition of an Amendment's reach. Accordingly, this article proposes that the right to confront witnesses be limited to cases in which the defendant is able to demonstrate a need to cross-examine witnesses, rather than the rule of *Crawford* that limits the right based on the nature of the evidence itself. This would be both truer to the language of the Amendment and, more importantly, more clearly advance the overriding goal of fairer trials.

STACKING IN CRIMINAL PROCEDURE ADJUDICATION — *Luke M. Milligan* 331

The institutionalist branch of "Law and Courts" studies how judges incorporate institutional constraints into their decision-making processes. Congressional constraints on judicial review, as the literature currently stands, fall into one of two general classes: overrides and Court-curbing measures. This taxonomy, however, is incomplete. Neither overrides nor curbing measures are needed to explain the not uncommon situation where a policy-oriented Justice deviates from a pre-

ferred vote based on the belief that such a vote will prompt Congress to alter an "insulated base rule" in a way that disrupts the Justice's larger policy agenda. An "insulated base rule" is a Congressional policy decision that cannot, as a legal or practical matter, be modified by the Court. Examples include Congressional decisions to appropriate funds, to enact certain types of mitigating legislation, or to orient legislation in particular constitutional clauses. A Justice's consideration of this third constraint (i.e., how a vote will affect a particular "insulated base rule") is a process I call "stacking." Leaving more sophisticated theoretical models and large-scale empirical studies for a later time, this paper illustrates adjudicative "stacking" through close study of the Supreme Court's recent opinions in *Virginia v. Moore.*

STUDENT NOTES

No Tax for "Phantom Income": How Congress Failed to Encourage Responsible Housing Consumption with Its Recent Tax Legislation — *Rue Toland* 345

In the midst of the recent housing crisis, Congress passed two key pieces of federal tax legislation in an attempt to stem the tide of foreclosures and prevent further economic collapse. These two bills, the Mortgage Forgiveness Debt Relief Act in 2007 and the Housing and Economic Recovery Act in 2008, both sought competing goals: lessening the harm to existing homeowners, and encouraging purchases by new homebuyers. However, neither bill adequately addressed one of the root causes of the housing crisis, namely homeowners obtaining mortgages that, for whatever reason, they could not afford. Indeed, the tax incentives these bills created would likely perpetuate that problem.

Instead of passing legislation that would provide tax incentives favoring responsible home purchasing, Congress enacted new laws that encouraged the very sort of risky behavior that led to the housing crisis in the first place. An analysis of the Congressional debates prior to the passages of the Mortgage Forgiveness Debt Relief Act and the Housing and Economic Recovery Act demonstrates that this failure stemmed in part from a misunderstanding by the legislators regarding how the new provisions of the Tax Code would work. This note explores the tension between the need for a short-term fix and the necessity of a responsible long-term economic behavior evident in the Mortgage Forgiveness Debt Relief Act and the Housing and Economic Recovery Act.

Don't Bet On It: Casinos' Contractual Duty to Stop Compulsive Gamblers from Gambling — *Irina Slavina* 369

To address the problem of compulsive gambling, most states with commercial casinos have enacted statewide self-exclusion programs—a mechanism by which patrons petition to be physically removed from a casino if they are discovered on the premises. The casinos in the remaining states voluntarily instituted facility-based programs to assist problem gamblers in fighting their addiction.

But besides having any intended effect, these programs provided gamblers with a new ground for lawsuits—breach of contract. This note argues that neither states nor individual casinos should be liable to self-excluded patrons for breach of contract, even if they enter a casino and lose money while gambling.

First, no contract exists between the states and self-excluding gamblers because in administering the self-exclusion programs the states simply fulfill their preexisting statutory duty and, in any event, the states are shielded from such lawsuits by sovereign immunity. Likewise, casino-administered programs do not create contractual relationship due to lack of consideration. Casinos are not bargaining for their patrons to refrain from gambling. Rather, casinos are simply providing their patrons with an accommodation or social service to promote responsible gaming.

But even if the contract was established, every self-exclusion form contains an exculpatory clause that prevents any liability on the part of the states and casinos. These clauses should be enforceable as dictated by public policy. To hold otherwise would shift the main responsibility for compliance from the patron to the casino which would be counter-productive to the program's goals.

SEPARATING CHURCH AND STATE: TRANSFERS OF GOVERNMENT LAND AS CURES FOR ESTABLISHMENT CLAUSE VIOLATIONS *Paul Forster* 401

The note examines one of the issues currently before the Supreme Court in *Salazar v. Buono*, the case concerning a Latin cross war memorial in the Mojave dessert. The issue is whether the government may, by transferring land to private parties, cure Establishment Clause violations caused by permanent displays that contain religious imagery. The article surveys the Court's Establishment Clause jurisprudence as it applies to permanent displays, discussing the sometimes-used and sometimes-ignored *Lemon*-endorsement standard and the potential shift to a coercion standard. It concludes by arguing that even under the *Lemon*-endorsement standard, courts should often allow the type of remedial transfer at issue in *Buono*, and it suggests how judges can police such sales in order to ensure that they pass constitutional muster.

FREE SPEECH & TAINTED JUSTICE: RESTORING THE PUBLIC'S CONFIDENCE IN THE JUDICIARY IN THE WAKE OF *REPUBLICAN PARTY OF MINNESOTA V. WHITE* *Gregory W. Jones* 441

The United States Supreme Court's 2002 decision in *Republican Party of Minnesota v. White* was the first shot fired in an ongoing battle over judicial campaign ethics. The *White* decision invalidated a Minnesota Canon of Judicial Conduct prohibiting judicial candidates from announcing their views on disputed legal or political topics. Subsequent to White, numerous states have faced challenges to their judicial canons of conduct by groups advocating for an increased breadth of permissible speech in judicial campaigns. While White and its progeny have safeguarded the first amendment rights of judicial candidates, significant concerns have been raised regarding how best to preserve judicial impartiality in an era of modern campaigning. Preserving the remaining canons of judicial conduct is vital to avoid transforming judicial elections into the highly politicized contests typical of the executive and legislative branches of government. Moreover, modifications to current judicial disqualification and recusal standards are needed to place the appropriate emphasis on the importance of maintaining judicial impartiality. Finally, significant changes must be made to the way the courts handle recusal motions to ensure that a judge is never allowed to unilaterally evaluate his own impartiality. As judicial campaign spending continues is meteoric rise, the need to preserve the public's confidence in the judiciary has never been greater.

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