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Articles

Introduction: Second Criminal Procedure Discussion Forum

Russell L. Weaver*

On November 12-13, 2004, the Washington & Lee University School of Law, Vanderbilt University Law School, and the University of Louisville's Louis T. Brandeis School of Law co-sponsored the Second Criminal Procedure Discussion Forum at the University of Louisville.¹ As with the first two forums, the purpose of this forum was to bring together a small group of prominent criminal procedure scholars to discuss matters of common interest. The papers being published in this symposium are "discussion papers" that were submitted by the participants prior to the meeting and formed the basis for the discussions.

One focus of this year's forum was the 9/11 attack on New York's World Trade Center and the struggle to find a proper balance between civil rights and the need to combat terrorism. A number of the discussion papers discuss this balance. For example, Professor John Burkoff's paper, *The Fourth Amendment and Terrorism*, argues for a balance between anti-terrorism efforts and civil liberties even in "desperate" times. He concludes by arguing that we "must continue to

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respect the value of preserving Fourth Amendment rights and constitutional traditions, even when it is painful to do so, and even when it hampers some activities undertaken by law enforcement officers, actions that are sincerely intended (but not permitted) to fight crime . . . and terrorism.” Professor Arnold Loewy’s article, *The Cowboy and the Cop: The Saga of Dudley Hiibel, 9/11, and the Vanishing Fourth Amendment*, examines the impact of 9/11 on one criminal procedure decision (the *Hiibel* case) and discusses the implications of that case for Fourth Amendment analysis. The remaining papers discuss terrorism issues from international perspectives. Professor Geoffrey Bennett’s paper, *Legislative Responses to Terrorism—A View from Britain*, offers a British perspective on terrorism issues. Professor Kent Roach and Professor Gary Trotter examine the issue from a Canadian perspective focusing on *Miscarriages of Justice in the War Against Terror*.

The other discussion papers deal with an entirely different issue: the presence and impact of discretion in the criminal justice system. As any student of criminal justice knows, discretion is present at all levels of the system and is exercised by both police and prosecutors. Most of the papers in this group focus specifically on prosecutorial discretion. Professor George C. Thomas, III’s article, *Discretion and Criminal Law: The Good, the Bad and the Mundane*, argues that discretion is inevitable in enforcement and prosecution and offers suggestions about how the adverse aspects of discretion might be restrained. In her article, *Jose Padilla and Martha Stewart: Who Should be Charged with Criminal Conduct?*, Professor Ellen Podgor analyzes expanding notions of prosecutorial discretion and concludes that the prosecutorial system “demands considered oversight.” Some of the other papers focus on particular aspects of prosecutorial discretion, or specific responses to the problem of discretion. Professor Victor Streib writes about *Prosecutorial Discretion in Juvenile Homicide Cases*, Professor Ronald Wright’s article, *Prosecutor Guidelines and the New Terrain in New Jersey*, examines some of the ways in which New Jersey has tried to “promote more uniform and accountable decisions from prosecutors in the state,” and Professor Michael Seigel and Professor Christopher Slobogin, in their article titled *Prosecuting Martha: Federal Prosecutorial Power and the Need for a Law of Counts*, express concern about “redundant charging” and suggest that courts develop a “law of counts” to restrain discretion. Professor Janet Hoefel’s article, *Prosecutorial Discretion at the Core: The Good Prosecutor Meets Brady*, expresses concern that “suppression of evidence favorable to the accused is a system-wide norm which is accepted and condoned legally, ethically and socially,” and suggests ways of dealing with the problem. Last, but far from least, Professor Donald Drripp’s article,

Overcriminalization, Discretion, Waiver: A Survey of Possible Exit Strategies, addresses the relationship between substance and procedure and their impact on discretion.

The final set of papers in this group deal with the issue of discretion in the context of police investigations. Professor Andrew Taslitz's article, *Racial Profiling, Terrorism, and Time*, examines the problem of police discretion in the context of racial profiling. He expresses concern that "the Court's temporarily confused Fourth Amendment jurisprudence has led to the constitutional near de-regulation of racial profiling," and concludes that it is "time to call in the Time-Cops to clean up the high Court's dangerous and temporally ill-formed abdication of its constitutional obligation to check and balance other branches of government. . . ." Finally, my article, *Investigation and Discretion: The Terry Revolution at Forty (Almost)*, examines how the *Terry* decision has dramatically expanded police discretion over the last forty years and raises concern about the future of the *Terry* doctrine.
