PROLOGUE TO DISCUSSION OF MY ARTICLES

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It goes without saying that I am extremely grateful to the law school and the *Texas Tech Law Review* for deciding to make this year's Criminal Law Symposium about my articles. My gratitude extends to today's participants, every one of which I am proud to call a friend.

The first panel will discuss articles that I have written in play form. Though far from a playwright myself, I have found that presenting different viewpoints from different people's mouths is a good way to ventilate the issues.

I wrote my first "play" way back in 1970 and titled it: *Punishing Flag Desecrators: The Ultimate in Flag Desecration*.[1] The play begins when a Russian immigrant, who had just escaped from the Siberian prison camp he had been sent to for burning the Russian flag, arrives at his brother's apartment in New York only to learn that his brother has been convicted of burning the American flag.[2]

They walk through the streets of New York and see various ways the flag has been used and misused.[3] In Act II, they arrive at the law school where an advanced seminar is discussing the merits of a First Amendment defense for flag burners.[4] The characters in the class are, to be sure, stereotypes, but they do ventilate the issues well.

The final act is at the Supreme Court where the Court reverses the conviction of the New York flag burner on First Amendment grounds.[5] The opinion—more or less—anticipated the case *Texas v. Johnson*,[6] which was decided nineteen years later in 1989.

One of my most rewarding memories of the article was a phone call I received from a lawyer in Gastonia, North Carolina, who told me that everybody was talking about the article. Some agreed with me and some didn't, but they all agreed that it presented great food for thought. Obviously, as a then-untenured associate professor, that was good to hear.

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1. Arnold H. Loewy, *Punishing Flag Desecrators: The Ultimate in Flag Desecration*, 49 N.C. L. REV. 48 (1970).
2. *Id.* at 49–50.
3. *Id.* at 50–52.
4. *Id.* at 55–56.
5. *Id.* at 71, 85–86.
6. Texas v. Johnson, 491 U.S. 397 (1989).

I wrote my next play for my first Criminal Law Symposium here at Texas Tech.[7] The Symposium considered whether part of the Supreme Court's calculus in granting rights to criminal defendants was predicated on the belief that most of the citizenry would be ignorant of their rights, and consequently, granting them would not harm law enforcement. The class, again made up of caricatured students, debated that issue and ultimately concluded that, in many cases, ignorance was something the Court consciously desired.[8]

My final play was a dialogue on hate speech in the *Florida State Law Review*.[9] In that, I envisioned an American and a German lawyer sitting next to each other on a flight from Frankfurt to Washington.[10] Each tried to persuade the other that their version of free speech was better (the German view is that dignitary interests trump free speech as opposed to the American view that speech interests are more important than dignitary interests).[11] In the end, neither was able to persuade the other that his view was correct.[12] I believe that the dialogue had to end that way because, based on my own discussions with German professors, it is clear to me that neither side would be able to persuade the other.

Our second panel will be discussing my articles on confessions. In my view, confessions differ from searches in that the wrong lies in using the confessions rather than in obtaining them. This differs from the Fourth Amendment, where the wrong stems from obtaining the evidence and the exclusionary rule is simply a remedy.[13] I develop that dichotomy in a *Michigan Law Review* article called *Police-Obtained Evidence and the Constitution: Distinguishing Unconstitutionally Obtained Evidence from Unconstitutionally Used Evidence*.[14] Because obtaining an involuntary confession is not a per se violation of the Constitution, failure to give *Miranda* warnings is also not a violation of the Constitution.[15] But use of a confession obtained thereby is a constitutional violation.[16]

Additionally, the Sixth Amendment's right to counsel creates, or should create, a different basis for excluding confessions. The Court's *Miranda v.*

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7. Arnold H. Loewy, *Police, Citizens, the Constitution, and Ignorance: The Systemic Value of Citizen Ignorance in Solving Crime*, 39 TEX. TECH L. REV. 1077 (2007).

8. *Id.* at 1077.

9. Arnold H. Loewy, *A Dialogue on Hate Speech*, 36 FLA. ST. U. L. REV. 67 (2008).

10. *Id.* at 67.

11. *Id.* at 67–78.

12. *Id.* at 78.

13. *See* Arnold H. Loewy, *Police-Obtained Evidence and the Constitution: Distinguishing Unconstitutionally Obtained Evidence from Unconstitutionally Used Evidence*, 87 MICH. L. REV. 907, 910 (1989).

14. *Id.*

15. *Id.* at 917–18 (quoting People v. Varnum, 427 P.2d 772, 775 (Cal. 1967) (en banc) ("The basis for the warnings required by *Miranda* is the privilege against self-incrimination, and that privilege is not violated when the information elicited from an unwarned suspect is not used against him.").

16. *Id.* at 916–17.

Arizona jurisprudence makes clear that an unwise waiver of the right to counsel is irrelevant.[17] *Miranda* in particular, and the Fifth Amendment in general, are only concerned with voluntariness simpliciter,[18] but because the real (as opposed to prophylactic) right to counsel kicks in only after the onset of judicial proceedings, [19] wisdom should matter. For the most part, the Court seems to recognize this in its Sixth Amendment jurisprudence,[20] but sometimes it doesn't.[21]

The third panel will discuss my Fourth Amendment articles. My signature article in this area is my 1983 Michigan article, *The Fourth Amendment as a Device for Protecting the Innocent*.[22] In that article, I argued that because the Fourth Amendment allows searches and seizures based upon probable cause and with a warrant, its real purpose is to minimize intrusions on the innocent while maximizing the number of allowable searches of the guilty.[23] With this view of the Fourth Amendment, the guilty are simply incidental beneficiaries of a rule designed to protect the innocent.[24] Consequently, the evidence unlawfully obtained from searches and seizures must be excluded so that the police will not have an incentive to search other people who may, indeed, be innocent.[25]

Unsurprisingly, this is a somewhat controversial hypothesis. Like so many other things, the Supreme Court follows it sometimes,[26] but not always.[27] One of my more controversial uses of this test was a few years ago at this very symposium when I argued that universal collection of DNA should not constitute a search because it creates no risk to the innocent person.[28] Many have disagreed with that hypothesis, including at least one on today's Fourth Amendment panel.[29] But of course, the point of the academy is not always—or even usually—to solve a problem as much as it is to get people talking about the problem.

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17. Oregon v. Elstad, 470 U.S. 298, 316 (1985) ("This Court has never embraced the theory that a defendant's ignorance of the full consequences of his decisions vitiates their voluntariness.").

18. *See* Moran v. Burbine, 475 U.S. 412, 421 (1986).

19. *See* Maine v. Moulton, 474 U.S. 159, 168–70 (1985).

20. *Id.*

21. Arnold H. Loewy, *Why the Supreme Court Will Not Take Pretrial Right to Counsel Seriously*, 45 TEX. TECH L. REV. 267, 271 (2012) (discussing Kansas v. Ventris, 556 U.S. 586 (2009)).

22. Arnold H. Loewy, *The Fourth Amendment as a Device for Protecting the Innocent*, 81 MICH. L. REV. 1229 (1983).

23. *Id.* at 1229.

24. *Id.* at 1230.

25. *Id.* at 1266.

26. *See* United States v. Jacobsen, 466 U.S. 109, 123 n.23 (1984) (citing Loewy, *supra* note 22); United States v. Place, 462 U.S. 696 (1983).

27. *See* Oliver v. United States, 466 U.S. 170 (1984).

28. *See* Arnold H. Loewy, *A Proposal for the Universal Collection of DNA*, 48 TEX. TECH L. REV. 261, 263 (2015).

29. David Gray, *Arnold Loewy: Thought Leader, Champion of the Innocent, Prognosticator, Surveillant*, 52 TEX. TECH L. REV. 107 (2019).

The final panel will talk about my substantive criminal law articles, including those about punishment. Perhaps my signature article in this area is called *Culpability, Dangerousness, and Harm: Balancing the Factors Upon Which Our Criminal Law Is Predicated.*[30] There, I challenged those who argued that culpability is the sole basis for criminal law.[31] I believe that it does, and should, balance dangerousness and harm in assessing the severity of a crime.

In regard to punishment, I have argued against the death penalty, primarily on utilitarian, rather than moral grounds. I concede that the death penalty might be appropriate if it did more good than harm, but that is not the case.[32]

To summarize my writings, I would say this: I have strived for balance. Defendants should not always win and neither should the government. Rather, the criminal law works best when the merits of a controversy are not obscured by whose ox is gored.

And so, I now turn to our first panel which my colleague and friend, Patrick Metze, will moderate.

30. Arnold H. Loewy, *Culpability, Dangerousness, and Harm: Balancing the Factors on Which Our Criminal Law Is Predicated*, 66 N.C. L. REV. 283 (1988).

31. *Id.* at 289.

32. Arnold H. Loewy, *Why Capital Punishment Should Be Abolished*, 51 TEX. TECH L. REV. 31, 39 (2018).