FOREWORD

In our first article, Professor Timothy P. O'Neill offers a criticism of the constricted application of the protections against unreasonable searches and seizures under the Supreme Court's current Fourth Amendment jurisprudence. He reveals the flaws in the current rule-based paradigm which emphasizes factors such as probable cause and warrants, and contends that courts need to adopt a more flexible, standard-based analysis focusing instead on concepts such as the reasonableness of police conduct. He uses the recent decision of *United States v. Whren*, dealing with the issue of pretext arrests, as an illustration of the need to reevaluate our treatment of Fourth Amendment protections, and as an opportunity to examine a growing body of academic writing expressing disapproval with the Court's current application of privacy protections. Professor O'Neill offers two alternative ways to continue the fight to outlaw pretext arrests. He suggests that some of the trivial statutory pretexts can be attacked under a due process "void-for-vagueness" analysis. He also explains, by analogizing to society's views of modern seat belt laws, that there may be some valid statutory violations which are so minor that any seizure by the police would be considered "unreasonable" under the Fourth Amendment.

In our second article, John P. Safranek, M.D., and Stephen J. Safranek assess the impact of the recent Supreme Court decision *Washington v. Glucksberg* on the Court's application of the right to autonomy to protect individual interests against state interference. In *Glucksberg*, the Court upheld a Washington State statute banning assisted suicide. Although it found that the decision to end one's life is a personal, self-defining act, the Court refused to apply the right to autonomy to protect this decision and subordinated it to countervailing state interests. The authors argue that *Glucksberg* marks a significant reversal of the extension of the right to autonomy from political and social entities to individuals. One troubling result is that a number of important rights grounded in the right to autonomy are left without rational justification. Moreover, the authors argue, by choosing to balance the interests of individual autonomy against the interests of the state, the Court in *Glucksberg* imposed its own moral ethos to limit the scope of the right to personal autonomy. The authors assert that the Court, as an agent of the

state, thereby violated its own prohibitions against state prescription of moral theory. In addition, the authors suggest that judicial review of contemporary concepts of autonomy is particularly unjustified in today's morally diverse, post-modern American society. They conclude that the Court's decision imperils the practice of judicial review and demands constitutional justification for the imposition of its moral views to delimit the scope of personal autonomy.

In our third article, Graham B. Strong challenges the traditional notion that the thought processes useful to the lawyer are exclusively those that are analytical in nature. Drawing upon both symbol and science, he explores the range and power in legal work of complementary, nonanalytical processes of thought. The lawyer's left hand functions in the article as a symbol for the aspect of the legal mind that processes information not in sequence, but simultaneously; not in parts, but by the whole; not by abstract categorization, but by concrete pattern recognition. That symbol is supported by an examination of the evidence of modern neuroscience regarding the functional distinctions between the left and right cerebral hemispheres of the human brain. Professor Strong correlates the scientific evidence with a set of tasks critical to the practice of law, and concludes that nonanalytical processes of thought play a surprisingly important role in the work of the lawyer, especially in the perception and discrimination of emotion, in receiving and conveying information in the form of a narrative, and in the creative generation of factual hypotheses in the everyday practice of law.

Our first comment argues against the efforts of states to obtain special advantages in their Medicaid reimbursement suits against tobacco manufacturers. Using Florida's Medicaid Third-Party Liability Act as an example, the author argues that recent statutory changes to traditional subrogation theories, such as the elimination of affirmative defenses against the state, are inequitable insofar as they afford the state advantages in a trial that would be unavailable to an individual plaintiff. Inequity stems not only from the fact that states like Florida are afforded strict liability advantages in lawsuits that are nearly identical in other respects to the standard liability suits of individual plaintiffs, but also from the fact that the states possess "unclean hands," having profited greatly from excises taxes on the sale of cigarettes. The author suggests that these inequities arise in all states pursuing either state-created causes of action that eliminate affirmative

defenses or various other non-subrogation claims such as equitable restitution and unjust enrichment. To resolve these inequities, the author argues that states should either pursue their claims against the tobacco companies using traditional subrogation theories or seek alternative means of offsetting their Medicaid expenses, such as higher cigarette excise taxes.

In our second comment, the author examines the recent parental rights movement in the United States. The author begins with a description of various parental rights initiatives, including Colorado's proposed Amendment 17, the proposed Federal Parental Rights and Responsibilities Act of 1995, and other states' proposed legislation regarding parental rights. After outlining the various successes and defeats of such legislation, the author discusses the existing protections for parental rights, including Supreme Court decisions involving the constitutional rights of parents to raise their children as well as existing state statutory protections. The author then presents the arguments for and against parental rights legislation and concludes that such legislation is unnecessary in light of Supreme Court precedent and existing state statutory protection. In conclusion, she argues that such legislation has the potential to compromise the safety of children.

In our final comment, the author discusses attorney-client privilege and the duty of client confidence as they pertain to legal communications over the Internet. To lay a foundation, the author explains how electronic mail is transmitted over the Internet and explores security concerns caused by this medium. Faced with a dearth of case law in this new field, the author examines analogous case law from postal and wireless communications to predict a lawyer's duties when communicating with his or her client using e-mail. The author suggests that future courts might not find a reasonable expectation of privacy in e-mail sent over the Internet and that, therefore, duties of confidence and care may attach. As such, attorneys using the Internet to communicate confidential or privileged information to their clients could be liable for malpractice or guilty of ethical violations. To avert such consequences, the author concludes by suggesting that lawyers either refrain from using the Internet to communicate sensitive information to their clients or employ commercially-available encryption technology to ensure privacy.

THE EDITORS