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A Response To Professor Graham

It is gratifying to have a scholar of Professor Graham's stature read, much less comment, on my efforts. It is further gratifying to see that Professor Graham seems to share my view that the current situation, as described in my Comment, is indefensible. Where the Professor Graham and I part company, however, is on my proposed solution.

Professor Graham argues that turning to the Constitution to guarantee a defendant his right to present his defense under these circumstances is "a bit like firing a canon ball at a gnat."¹ I suppose that whether or not one agrees with this position depends on whether one views the Constitution as a fail-safe provision designed to be turned to as a last resort, or as the foundation of our government and society, from which all of our rights as citizens' emanate.

Professor Graham points to my statement that the Supreme Court's devotion to Federalism is "mostly admirable" and suggests that, if so, state courts should be forced to rely on legislative rules developed within their own states in order to solve the problem. Professor Graham's solution is less than satisfactory.

First, as pointed out in his Article, state courts tend to undervalue the authority of legislative rules of evidence. Thus, relying on state legislatures to provide the solution would be less than effective. Therefore in my opinion, the proper recourse is through the court system itself, and the tool left to the court system is the Constitution. Further, the system that Professor Graham proposes, even if the state courts *were* to properly value the state legislatures' evidence codes, would be unlikely to rectify the situation. The problem exists in the first place because state *courts* vary in their method of evaluating defense evidence. There is little reason to believe that various state *legislatures* would be more consistent in their results.

The only effective method to provide consistency following Professor Graham under this solution would be for Congress to mandate that all state legislatures implement a uniform code of evidence in state courts throughout the nation, and that all state courts give deference to this code. Such a solution could hardly be described as respecting federalist principles, and certainly could not withstand constitutional scrutiny.

Lastly, while I continue to maintain that federalism is an important and admirable principle generally, I believe that there is a point beyond

1. Kenneth W. Graham, *Evidence of Innocence Offered by the Criminal Defendant: "Not So Fast"; Response*, U. MIAMI L. REV. 1103, 1114 (2001).

which such devotion cannot go. There is a large divide between respecting a state legislature's right to determine what constitutes a crime in a given state, and allowing that state's court system to frustrate a defendant's exercise of the fundamental rights guaranteed in the Constitution. Judicial federalism, where it affects fundamental rights, leads to absurd results in a system that values equality and the due process of law.

BRETT C. POWELL