IT'S A WONDERFUL RULE: REFLECTIONS ON THE LIFE AND CAREER OF PROFESSOR WILLIAM A. SCHROEDER THROUGH THE LENS OF FEDERAL RULE OF EVIDENCE 404(A)

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The [character] inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge.
The United States Supreme Court[1]

Even the worst person can probably find someone who will say good things about him, and even the best people have detractors.
Professor William A. Schroeder[2]

My friendship with Bill Schroeder was bracketed by Federal Rule of Evidence 404(a), the character evidence rule. Rule 404(a) precipitated our friendship at the beginning of my academic career, and it was one of the last things we talked about before Bill died. In criminal cases, Rule 404(a) generally prohibits prosecutorial use of a person's character or character trait to prove that on a particular occasion, the person acted in accordance with the character or trait.[3] Another provision of the rule, the Mercy Rule, permits a criminal defendant to introduce evidence of his good character to suggest reasonable doubt that he committed the charged offense.[4] If there was ever a person who lived his life by the principles of an evidentiary rule, it was Bill Schroeder and Rule 404(a).

Professor William A. Schroeder passed away in Carbondale, Illinois, on August 28, 2016, at the age of seventy-three.[5] In his thirty-two years as a faculty member at the Southern Illinois University School of Law, he earned a reputation as a brilliant, albeit eccentric, professor with a gift for

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1. Michelson v. United States, 335 U.S. 469, 475–76 (1948).
2. William A. Schroeder, *Evidence Issues in Assault and Homicide Cases Where Self-Defense is Claimed*, 58 J. MO. B. 70, 75 (2002).
3. *See* FED. R. EVID. 404(a).
4. The Mercy Rule is contained in Fed. R. Evid. 404(a)(2)(A).
5. Obituary: William A. Schroeder, SOUTHERN ILLINOISAN (Aug. 31, 2016), http://thesouthern.com/news/local/obituaries/william-a-schroeder/article_a7272777-024a-5d55-9ad7-749add04e517.html.

explaining complex legal doctrines in simple and memorable language. One of his distinguishing characteristics was his compassion for people who had made mistakes in their lives but were trying to do better; he strongly believed that no one should be defined by his or her past misdeeds. He believed in change and redemption. He believed in second chances. In fact, he believed in giving everyone at least one chance, even if conventional wisdom suggested otherwise.

I met Bill in the fall of 2005, when I was on the interview circuit to become a law professor. One of the features of the professorial hiring process is an event called a "job talk," in which the candidate gives a scholarly presentation to the entire faculty. The job talk is designed to help the faculty determine whether the candidate has the scholarly bona fides to make a contribution to the legal academy, as well as the communication and classroom control skills necessary to survive as a teacher. Under the best of circumstances, the job talk is a stressful experience for the candidate; a botched presentation can negate a full day of positive interviews and interactions with faculty, staff, and students. In my case, the stress level was elevated: while brushing up on my research in my hotel room the night before I gave my presentation, I discovered that the only other academic in the country to have written on my fairly obscure topic was none other than Bill Schroeder, and his opinion was exactly the opposite of mine.

The Quixotic thesis of my presentation was that a 2000 amendment to Rule 404(a) stripped away some of the critical and time-honored protections the rule formerly granted to criminal defendants. The nefarious purpose of the amendment, in my view at that time, was to confer a tactical, and possibly unconstitutional, advantage on prosecutors in homicide and assault cases where self-defense was at issue. Prior to the 2000 amendment, Rule 404(a) permitted criminal defendants to introduce evidence of the victim's negative character traits for violence or aggression to suggest that the victim had started the confrontation, yet at the same time, the Rule also allowed the defendant to exclude evidence of his own negative character for the very same traits.[6] Thus, the rule gave a slight advantage to defendants in homicide or assault cases where self-defense was at issue. The 2000 amendment corrected this imbalance by permitting the prosecution to respond to defense attacks on the victim's character by introducing evidence that the defendant had the same character traits.

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6. *See* Memorandum from Honorable Fern M. Smith, Chair, Advisory Committee on Evidence Rules to Honorable Anthony J. Scirica, Chair, Standing Committee on Rules of Practice and Procedures, May 1, 1999, at 3 (noting that the proposed amendment was modified after public comment to narrow the use of the accused's character from "pertinent" character traits to the "same" character trait that the accused raised as to the victim, but otherwise identifying no controversy or opposition to the rule).

I may well have been the only person in the country genuinely troubled by the amendment, which had passed with little comment or controversy several years earlier.[7] In truth, the amendment was designed not to impede justice, but rather to further the search for truth by preventing criminal defendants from presenting a misleading view of the facts (and their own character) to juries. Professor Schroeder's view on the matter was more pragmatic than mine, reflecting the mainstream view on the use of this evidence at trial. As he wrote in the Journal of the Missouri Bar: "If the defendant can show his victim's propensities, fairness suggests that the state should be able to balance this with evidence of the defendant's propensities."[8] In contrast, I did not believe the state was entitled to fairness or balance at the expense of doing away with one of the few advantages the common law had conferred on a criminal defendant at trial.

At 10:00 p.m. the night before the event, I did not have the time or energy to create a new job talk. I called a friend who was on the faculty at another law school, who advised me to continue with my job talk, but acknowledge, as deferentially as possible, that my opinion differed from Bill's. Conventional wisdom is that a candidate should avoid controversy at a job talk, such as might arise when attacking or disagreeing with the opinions of a full professor on the faculty who could make or break one's candidacy. My friend wished me luck, suggesting that if nothing else, the job talk would be good practice for the next time.

The next day, I stood in front of the assembled faculty, including Bill Schroeder, in the moot court room at the School of Law. After introducing myself, I announced that the purpose of my presentation was to prove Bill Schroeder's opinion about Rule 404(a) in self-defense cases wrong. This certainly got the faculty's attention, and Bill's. Rather than being offended, Bill was delighted. He was impressed I would have the effrontery to attack him head-on in my job talk, even though (as he often reminded me) mine was the incorrect viewpoint. For several years afterward, he told the story to students in his evidence and criminal procedure classes, noting that he decided at that moment to vote favorably on my candidacy.

What he did not tell the students was how he painstakingly helped guide me to a more orthodox, responsible, and correct view of the rule as he reviewed drafts of my article on the subject. When I arrived on campus in the fall of 2006, Dean Peter Alexander assigned Bill to be my faculty mentor. Dean Alexander sensed Bill would be able to help me grow and develop as a professor: we shared academic interests in evidence and

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7. The proposal passed 9-1 in a meeting of the Advisory Committee on the Federal Rules of Evidence. *See* Advisory Committee on Evidence Rules, Minutes of the Meeting of April 12–13, 1999, at 15, http://www.uscourts.gov/sites/default/files/fr_import/499minEV.pdf; *see also* Smith Memorandum, *supra* note 6, at 3.

8. Schroeder, *supra* note **Error! Bookmark not defined.**, at 74.

criminal law, but more importantly, Bill was patient and willing to invest the time to curb a new professor's imprudent non-scholarly impulses. Bill went to work on me right away, beginning with revamping my job talk thesis on Rule 404(a) so I could turn the presentation into a publishable law review article. Through Bill's scribbled comments in the margins of my article drafts and lengthy discussions in our offices, I came to understand that the amendment was neither nefarious, nor was it particularly harmful to criminal defendants. My article became much more nuanced, scholarly rather than argumentative, as I learned to write about evidentiary issues from the standpoint of a professor rather than an advocate in an adversary proceeding.

For the next ten years, Bill continued to be my faculty mentor, even after I gained tenure, moved into an administrative position, and became a full professor. He played a significant role in every one of my scholarly publications, helping to refine my ideas, shape the structure and organization of my work, and pointing out areas of emphasis that I had not previously considered. Nearly every one of our scholarly discussions ended with Bill smiling and saying, "I'm pleased to know that my existence has served a useful purpose today."

Bill loved scholarship. During his prolific career, he published twenty-three articles, three book chapters, and four books.[9] He was always working on multiple projects, and his desk was strewn with disorderly piles of journal articles, books, and advance sheets for newly published cases. When he had a spare moment in his office, he wrote, hunched over and leaning forward towards his computer monitor, pecking away on the keyboard with intense concentration.

He told me that in his entire academic career, he never once missed a publishing deadline. In fact, several years ago, he was involved in a terrible automobile accident that caused him to be hospitalized for several weeks. The timing of the accident was unfortunate for Bill; it occurred during the window of time he had allotted to write the annual update to his Courtroom Handbook on Missouri Evidence, an influential practitioner treatise he had first published several years before. He insisted his secretary bring his computer and research materials to the hospital, where he worked on the update in between physical therapy sessions. He turned it in by the original deadline.

Among Bill's many talents as a scholar was his organizational ability, something that may come as a surprise to anyone who ever saw his office or the interior of his car. For example, when he wrote his Courtroom Handbook on Missouri Evidence, Missouri was (and still is) a common-law

9. *See* Publications of William A. Schroeder, S. ILL. U. SCH. OF L., http://law.siu.edu/our-people/faculty/emeritus-faculty/schroeder-publication.html (last visited Mar. 17, 2017).

evidence jurisdiction, meaning that its evidentiary doctrines were mostly to be found in case law, as well as in statutes and court rules. Common-law evidence jurisdictions present special problems for lawyers and judges, who have to search through multiple sources to find evidentiary doctrines and rules; as one professor put it, "It was very difficult for . . . judges and lawyers to get through a trial without a code."[10] Bill's solution was to organize all these disparate sources under the framework of the Federal Rules of Evidence—the evidentiary code most lawyers and judges learn in law school.

He did the same thing for Illinois (also a common law evidence jurisdiction at the time) in his Courtroom Handbook on Illinois Evidence and Illinois Supreme Court Judicial Benchbook on Evidence. In 2011, Illinois adopted an evidentiary code based on the Federal Rules of Evidence,[11] and Bill's organizational structure proved providential; practitioners and judges instantly had available treatises that had already organized Illinois' extensive body of common law cases, statutes and rules into categories based on the new evidentiary code.

Bill also had a gift for writing clearly, in a way that was accessible to practitioners, judges, and academics. Many of his law review articles were cited not only by other law professors in their own scholarly articles, but also by lawyers in briefs to appellate courts, including state Supreme Courts, federal Courts of Appeal, and the United States Supreme Court.[12] His scholarly works were also cited in judicial opinions by numerous courts,[13] including the United States Supreme Court in *United States v. Leon*.[14]

One reason Bill's writing was so accessible is that he never forgot what it was like to be a practicing lawyer. Before and during his academic career, he tried cases, wrote briefs, and argued appeals. In Carbondale, his services were much in demand by the local and regional bar; he appeared pro hac vice in many local causes of action. His specialty was criminal defense, in particular the difficult cases that required compassion for the defendant, an ability to see past sometimes horrific fact patterns to find violations of a defendant's constitutional rights, and a creative approach to drafting motions and making arguments.

He viewed most criminal defendants through the empathetic, yet pragmatic, lens that is the hallmark of a truly dedicated criminal defense

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10. *See* Helen W. Gunnarson, *All Hail the Illinois Rules of Evidence*, 98 ILL. BAR. J. 620 (Dec. 2010) (announcing January 1, 2011, as the effective date for the Illinois Rules of Evidence), https://www.isba.org/ibj/2010/12/allhailtheillinoisrulesofevidence.
11. *Id.*
12. *See generally* Vitae of William A. Schroeder, http://law.siu.edu/_common/documents/vitae/schroeder.pdf.
13. *See generally id.* (citing several examples).
14. 468 U. S. 897, 916 n.14, 925 n.26 (1984).

attorney. He recognized that many criminal defendants had endured poverty, abuse, mental illness or below-average intelligence, unemployment or underemployment, and a lack of opportunity. "There, but for the grace of God, go I" was an aphorism he believed to be true. He did not use these factors to excuse their crimes; in fact, one of his favorite sayings was, "95% of defendants are more or less guilty of 95% of the charges against them." He did, however, recognize that the typical defendant was often overmatched when pitted against experienced law enforcement officers and the nearly limitless prosecutorial resources of state and federal governments. He viewed it as part of his calling in life to fight for them.

As with all his other professional endeavors in life, Bill approached criminal defense with a mix of energy, humor, a keen legal mind, and memorable language. In 2009, I joined the Illinois Bar on motion, and Bill immediately asked me to work with him as local counsel on a messy and complicated rehearing of a gruesome murder case from a few years earlier in which our client had played, at best, an ancillary role. Bill had represented our client on appeal and won a completely new trial based on ineffective assistance of trial counsel. On the rehearing, I was counsel of record, and he was given leave to represent his longtime client pro hac vice, under my putative direction. "I will, of course, rely on your expertise as a longstanding member of the Illinois bar to help me on this case," he said.

At our client's unsuccessful bond reduction hearing, Bill explained to the judge that she was no criminal mastermind and presented little danger to the community: "She's not particularly intelligent," he said, "but she's not really dangerous. Throughout this entire case, she simply did what other people told her to do, and since they are all still in jail, she presents little danger to anyone. In fact," he continued, "she's like a log, slowly floating down the stream without a sense of direction, carried by the current. If she hits something she might cause some damage, but anyone with any sense could just get out of her way."

In addition to representing local criminals, Bill was always willing to assist law students accused of wrongdoing or Honor Code violations. For many years, the Student Bar Association appointed Bill as the student representative for Honor Code cases. Even after he retired, students continued to seek him out for representation. He had a sound understanding of human nature, the impact of various administrative sanctions on a student's career prospects, and a persuasive approach to negotiations with investigators that permitted him to achieve satisfactory results for students.

The key to Bill's effectiveness as an advocate was his empathy for others and his dedication to second chances. He firmly believed that anyone could overcome a checkered past, provided that the legal or administrative systems in place would permit it to happen. Few things

made him angrier than bar association character and fitness committees that held distant acts of juvenile—or even adult—misconduct against recent graduates. If he believed that a former student had truly changed and overcome past misdeeds, he would write letters of appeal and represent that person, pro bono, in administrative hearings. More often than not, these efforts were successful, and there are many people practicing law in the region who owe their bar licenses to Bill's zealous advocacy on their behalf.

In and out of the classroom, Bill was tremendously popular with students. They appreciated his knowledge, his wit, and his obvious love for teaching. I cannot count how many times he stopped by my office on the way to class: "I'm off to mold young minds," he would say. "Wish me luck." He would stand at the front of the classroom, a can of Diet Coke in his hand, an ear-to-ear grin on his face. "Okay," he would say, addressing a student as "Mr." or "Ms.," "now it's your time to shine." The student would begin discussing the case, and after a few seconds, Bill would take over, his lecture a fascinating stream-of-consciousness journey that wove together constitutional principles, case law, anecdotes, "Schroederisms,"[15] and practice tips. Students who simply laughed at the stories and did not take notes found his final examinations almost impossibly difficult, but students who listened, engaged with the material, and took notes found his courses enlightening and insightful. Many of our alumni have told me that they won cases or motions, years after graduating, based on seemingly casual statements Bill had tossed out in the middle of a lecture.

Teaching was everything to Bill. We used to joke with each other that he had accomplished all his retirement goals the first few hours after signing his paperwork. When he retired, he was so eager to get back into the classroom that he taught classes for free because university retirement system rules did not permit us to pay him until a certain amount of time had elapsed. After he was again eligible to teach for pay, we kept him on the schedule for at least one class per semester.

The last few months of his life, Bill's health deteriorated markedly. He did not know what was wrong, and he journeyed to St. Louis multiple times for tests and consultations. I drove him on one of the trips, and I broached the topic of taking a break from teaching until he could get his health in order. "Don't do that to me," he said. "You know how much it means to me." We settled on a compromise: I would co-teach his senior

15. A Schroederism is a pithy statement that captures important truths about the criminal justice system. A few of my favorites: "These guys were not mental giants." "There really never is a good time for adventures with law enforcement." "If you're going to grow marijuana, grow it in your neighbor's field, not your own." "The right to remain silent only works for those who remain silent." "A grand jury would indict a potted plant." Numerous Schroederisms are available for perusal at The Church of Bill Schroeder Facebook page.

writing seminar in the fall, and if he needed to take time off for medical treatments, I would be available to take up the slack.

Unfortunately, Bill never made it into the classroom for that course. He was in the hospital most of the first week of the semester, and he passed away just before the second week began.

The day before he died, I stopped by the Carbondale Memorial Hospital to visit him. Although he was weak, he was optimistic about being released from the hospital early the next week. I talked to him about the seminar, the students, and their proposed paper topics. He admonished me not to forget to discuss a particular line of Supreme Court cases on search and seizure.

He did much of his talking through his longtime friend and business partner, Amy Curry, who sat by his bedside, listened to his whispers, and translated them for the people in the room. After a time, it was obvious he was tired and needed to rest. I asked if I could bring a book to him, and he replied that he had plenty of books if he needed them. I asked if I could stop by the next day to read to him, and he said perhaps.

An idea occurred to me. "Before I leave," I said, "would you like me to read your favorite rule of evidence out loud?" He smiled, that familiar ear-to-ear grin, and nodded his head vigorously. "Why not?" he asked. Just as I started reading, a nurse came into the room to record some of his vital signs. I paused. The nurse said she could come back in a few minutes, but Bill insisted that she stay and listen to me read the rule aloud. She demurred, arguing that she did not have the background to understand what we were talking about. Bill again insisted, and she stood at the foot of the bed as I read Rule 404 aloud. As I read, Bill's lips moved along with the words. From time to time, Bill would stop me to explain a concept to the nurse.

When I finished reading, Bill declared Rule 404 to be "wonderful," and asked the nurse to agree. She nodded her head. "It's a wonderful rule," he said, still smiling. I clasped his hand, told him I loved him, and promised to stop by the next week and update him on our class. And that was the last time I saw my friend and mentor, Bill Schroeder.