Current Issues in Constitutional Criminal Law

Inns of Court – James E. Doyle Chapter

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Presenter Biography

John P. Gross is a Clinical Associate Professor of Law at the University of Wisconsin Law School and Director of the Public Defender Project. Professor Gross teaches courses in criminal law, criminal defense and trial practice. He began his legal career as a staff attorney with the Legal Aid Society in New York City. After eight years as a public defender, he joined the faculty of Syracuse University College of Law as a Practitioner in Residence and subsequently became Director of their Criminal Defense Clinic. He left Syracuse to become Indigent Defense Counsel for the National Association of Criminal Defense Lawyers where he worked on indigent defense reform and authored a series of reports documenting the failings of indigent defense delivery systems. He then joined the faculty at the University of Alabama School of Law where he directed their criminal defense clinic for several years before joining the Defender Association of Philadelphia as their Director of Policy and Practice prior to joining the faculty at the University of Wisconsin Law School.

Current Issues in Constitutional Criminal Law

Police Use of Force

A review of the law governing the use of force, including deadly force and less than lethal force by members of law enforcement.

The Supreme Court has repeatedly stated that any use of force by law enforcement officers must be reasonable under all the surrounding circumstances. The Court has been reluctant to announce more specific rules regarding the use of force because the Court recognizes that in the real world, law enforcement officers confront a wide variety of situations where they might need to use force to prevent a crime from occurring or to apprehend a suspect. With that in mind, the law regarding the use of force needs to be flexible.

The Court has placed limitations on when an officer can use deadly force to apprehend a fleeing suspect. In *State v. Garner*, the Court held that officers could use deadly force to

apprehend a fleeing suspect but only when the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others. *Garner* involved the use of deadly force against an unarmed teenager who was suspected of a burglary, a felony, who after being ordered to stop by a police officer, attempted to climb a fence to avoid apprehension. While the Supreme Court acknowledged that the failure to apprehend someone suspected of felony was not ideal, the Court went on to hold that:

> The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so.

In a later case, *Graham v. Connor*, the Court held that the use of force "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." The Court went on to say judges should be somewhat deferential to law enforcement officers who have a difficult job:

> The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments - in circumstances that are tense, uncertain, and rapidly evolving - about the amount of force that is necessary in a particular situation.

There is an important aspect of the *Graham* decision that is often overlooked. The law of self-defense uses a "reasonable person" standard. If someone other than a member of law enforcement shoots and kills another person and claims they acted in self-defense, the jury is instructed to consider whether a "reasonable person" in the defendant's position would have thought they needed to use deadly force to prevent serious bodily harm or death. In *Graham*, by using the phrase "reasonable officer", the Supreme Court created a standard where both an officer's training and department specific use of force policies become relevant when determining whether a "reasonable officer" would have behaved in the same way.

For example, take a situation where an officer shoots and kills a fleeing suspect who was driving their vehicle toward the officer. How would a "reasonable officer" behave in this situation? If the officer has been trained that they should regard a vehicle being driven in their direction as a deadly weapon and that they therefore have the right to fire at the driver of the vehicle, then a jury might conclude that the officer acted reasonably. On the other

hand, if the officer has been trained to prioritize their own safety and move out of the path of an oncoming vehicle and that they should not regard the vehicle as a deadly weapon, then a jury might conclude that the officer acted unreasonable and that their use of force was excessive.

Finally, in *Barnes v. Felix*, the Court rejected the idea that when evaluating the reasonableness of an officer's use of deadly force, judges should only consider whether the use of deadly force was reasonable at the time deadly force was used, something referred to as the "moment-of-threat" rule. Some judges had adopted the view that the actions of law enforcement that preceded the need to use deadly force were not relevant to determining whether their use of deadly force was reasonable. In Felix, the Court reiterated that the standard to be applied is whether the use of force was reasonable under the "totality of the circumstances" and that there is no time limit to that inquiry. The Court noted that:

> While the situation at the precise time of the shooting will often matter most, earlier facts and circumstances may bear on how a reasonable officer would have understood and responded to later ones. Prior events may show why a reasonable officer would perceive otherwise ambiguous conduct as threatening, or instead as innocuous.

Wisconsin Statute Governing Use of Force

75.44 Law enforcement use of force.

(2) Use of force.

(a) The sanctity of human life. In serving the community, law enforcement officers shall make every effort to preserve and protect human life and the safety of all persons. Law enforcement officers shall also respect and uphold the dignity of all persons at all times in a nondiscriminatory manner.

(b) Use of force. When using force, a law enforcement officer is required to act in good faith to achieve a legitimate law enforcement objective. A law enforcement officer is authorized to use force that is objectively reasonable based on the totality of the circumstances, including:

1. The severity of the alleged crime at issue.
2. Whether the suspect poses an imminent threat to the safety of law enforcement officers or others.
3. Whether the suspect is actively resisting or attempting to evade arrest by flight.

(c) Deadly force. A law enforcement officer may use deadly force only as a last resort when the law enforcement officer reasonably believes that all other options have been exhausted or would be ineffective. A law enforcement officer may use deadly force only to stop behavior that has caused or imminently threatens to cause death or great bodily harm to the law enforcement officer or another person. If both practicable and feasible, a law enforcement officer shall give a verbal warning before using deadly force.

175.47 Review of deaths involving officers.

(2) Each law enforcement agency shall have a written policy regarding the investigation of officer-involved deaths that involve a law enforcement officer employed by the law enforcement agency.

(3) (a) Each policy under sub. (2_ must require an investigation conducted by at least 2 investigators, one of whom is the lead investigator and neither of whom is employed by a law enforcement agency that employs a law enforcement officer involved in the officer-involved death.

(5) (a) The investigators conducting the investigation under sub. (3) (a) shall, in an expeditious manner, provide a complete report to the district attorney of the county in which the officer-involved death occurred.

(5) (b) If the district attorney determines there is no basis to prosecute the law enforcement officer involved in the officer-involved death, the investigators conducting the investigation under sub. (3) (a) shall release the report, except that the investigators shall, before releasing the report, delete any information that would not be subject to disclosure.

Administrative Warrants

Immigration and Customs Enforcement (ICE) agents typically rely on administrative warrants to justify an arrest. These warrants are issued by an administrative officer who is called an “immigration judge”. The title “judge” in the context of immigration enforcement is a little misleading. These officials are not part of the judicial branch of the federal government. Article III of the United States Constitution creates a judicial branch that is separate from the executive, the President, and the legislative, the House of Representatives and the Senate. An “immigration judge” is an attorney appointed by the United States Attorney General to preside over administrative removal proceedings. The job of an “immigration judge” is defined by statute, specifically the Immigration and Nationality Act. They work for the Executive Office for Immigration Review (EOIR) within the Department of Justice (DOJ).

While they are supposed to act independently and impartially when conducting hearings, they are still under the supervision of the Attorney General, who is appointed by the President. Their authority is limited by statute, for example they are specifically prohibited from holding any part of the Immigration and Nationality Act unconstitutional. The hearings they preside over are also less formal than the proceedings in federal courts, for example they are not obligated to follow the Federal Rules of Evidence, and litigants have fewer procedural protections, for example there is no right to have assigned counsel in a deportation proceeding.

These immigration judges lack the same authority and independence that a member of the judicial branch has because their authority is limited by a statute passed by Congress and their independence is compromised by the fact that they are considered at-will federal employees who can be fired for little or no reason. The reporter Radly Balko of The Watch found that President Trump has fired about one of every seven immigration judges, most of whom either had higher rates of granting asylum or were former immigration defense attorneys. All while there is currently a backlog of almost 3.5 million cases. And in an effort to replace all of those fired immigration judges, the DOJ has a recruitment campaign where they are seeking "deportation judges" not "immigration judges".

So, in the context of immigration enforcement, an administrative warrant issued by an immigration judge permits an ICE agent to arrest the person named in the warrant in any location open to the public. But it does not give the ICE agent the authority to forcibly enter that person's home or enter private property without the owners consent to make an arrest. To enter someone's home to make an arrest an ICE agent would need a judicial arrest warrant.

Electronic Service Providers: State v. Gasper (Wisconsin 2026)

A private search is not a government search. The Fourth Amendment is inapplicable to a search which has been completed by a private party as that search frustrates an individual's expectation of privacy. The Fourth Amendment is implicated, however, if the government exceeds the private search. Gasper does not argue that the government viewed more than the one video provided, nor does he argue that anything else of significance was in the video. Gasper relies entirely on the argument that the government exceeded Snapchat's private search because a person in the government was the first to open and view the video and did so without a warrant.

We conclude that the private search doctrine applies. It is undisputed that Snapchat performed a private search when it scanned and flagged the single, 16-second video as

Child Sexual Assault Material. The government did not exceed the scope of Snapchat's search when it viewed the video because any expectation of privacy Gasper may have had in the video was frustrated by the private search, and there was virtual certainty that law enforcement would not find anything of significance beyond what the private search revealed.

Geofence Warrants: Chatrie v. United States (Petition for SCOTUS Review Granted)

This case concerns the constitutionality of geofence warrants. For cell phone users to use certain services, their cell phones must continuously transmit their exact locations to their service providers. A geofence warrant allows law enforcement to obtain, from the service provider, the identities of users who were in the vicinity of a particular location at a particular time.

In this case, law enforcement obtained, and served on Google, a geofence warrant seeking anonymized location data for every device within 150 meters of the location of a bank robbery within one hour of the robbery. After Google returned an initial list, law enforcement sought - without seeking an additional warrant - information about the movements of certain devices for a longer, two-hour period, and Google complied with that request as well. Then - again, without seeking an additional warrant - law enforcement requested de-anonymized subscriber information for three devices. One of those devices belonged to petitioner Okello Chatrie. Based on the evidence derived from the geofence warrant, petitioner was convicted of armed robbery.

The questions presented are: 1) Whether the execution of the geofence warrant violated the Fourth Amendment. 2) Whether the exclusionary rule should apply to the evidence derived from the geofence warrant.

United States v. Chatrie (U.S. Court of Appeals for the Fourth Circuit)

Blood Draws: Mitchell v. Wisconsin (2019)

A four-justice plurality of the Court concluded that when a driver is unconscious and cannot be given a breath test, the exigent-circumstances doctrine generally permits a blood test without a warrant. Justice Samuel Alito announced the judgment of the Court and delivered a plurality opinion.

Writing for himself, Chief Justice John Roberts, and Justices Stephen Breyer and Brett Kavanaugh, Justice Alito noted that blood alcohol concentration (BAC) tests are searches

subject to the Fourth Amendment. As such, a warrant is generally required before police may conduct a BAC test, unless an exception applies. The "exigent circumstances" exception allows the government to conduct a search without a warrant "to prevent the imminent destruction of evidence." The Court has previously held that the fleeting nature of blood-alcohol evidence alone does not automatically qualify BAC tests for the exigent circumstances exception, but additional factors may bring it within the exception. For example, in *Schmerber v. California*, the Court held that "the dissipation of BAC did justify a blood test of a drunk driver whose accident gave police other pressing duties, for then the further delay caused by a warrant application would indeed have threatened the destruction of evidence." Similarly, a situation involving an unconscious driver gives rise to exigency because officials cannot conduct a breath test and must instead perform a blood test to determine BAC.

Under the exigent circumstances exception, a warrantless search is allowed when "there is compelling need for official action and no time to secure a warrant." The plurality pointed to three reasons such a "compelling need" exists: highway safety is a "vital public interest," legal limits on BAC serve that interest, and enforcement of BAC limits requires a test accurate enough to stand up in court.

The plurality suggested that on remand, Mitchell can attempt to show that his was an unusual case that fell outside the exigent circumstances exception (perhaps because police conceded that they had time to get a warrant to draw his blood).

Canine Searches: Rodriguez v. United Sates (2015)

The Court held that the use of a K-9 unit after the completion of an otherwise lawful traffic stop exceeded the time reasonably required to handle the matter and therefore violated the Fourth Amendment's prohibition against unreasonable searches and seizures. Because the mission of the stop determines its allowable duration, the authority for the stop ends when the mission has been accomplished. The Court held that a seizure unrelated to the reason for the stop is lawful only so long as it does not measurably extend the stop's duration. Although the use of a K-9 unit may cause only a small extension of the stop, it is not fairly characterized as connected to the mission of an ordinary traffic stop and is therefore unlawful.

The Court of Appeals of Wisconsin recently declined to adopt the so called "canine instinct exception" to the Fourth Amendment's warrant requirement in Wisconsin v. Campell.

Police Interrogations Inside of Schools: State v. KRC (Awaiting Decision from Wisconsin Supreme Court

In June 2022, a school official removed twelve-year-old "Kevin" from class and brought him to a police officer. The officer, wearing a police vest and serving as the school resource officer, questioned Kevin for approximately ten minutes while a second officer, armed and uniformed, stood between Kevin and the closed door. The questioning ceased only after Kevin made an incriminating statement about an allegation that he had struck another student's groin. Neither officer provided *Miranda* warnings, nor did they offer to call Kevin's parents during this encounter. Following this encounter, the State filed a juvenile delinquency petition against Kevin. The circuit court denied Kevin's motion to suppress the statements from his interrogations and, after a bench trial, found him guilty. The court of appeals affirmed the denial of Kevin's suppression motion.

Issues presented: 1) Whether K.R.C. was "in custody" under the Miranda standard and should have been provided with Miranda warnings. 2) Whether K.R.C's inculpatory statements were involuntarily procured by coercive police tactics.

The Right to Counsel Crisis in Wisconsin

Media Coverage

https://pbswisconsin.org/news-item/wisconsins-shortage-of-public-defenders-means-felony-cases-take-longer-to-resolve/

https://spectrumnews1.com/wi/milwaukee/in-focus/2025/10/09/public-defender-shortage--in-focus--megan-carpenter

https://spectrumnews1.com/wi/milwaukee/news/2025/01/20/lawsuit-lingers--as-public-defender-shortage-persists-

https://theappeal.org/wisconsin-public-defense-constitutional-crisis-is-forcing-people-to-sit-in-jail/

Why Our Public Defender Systems are Collapsing, National Association for Public Defense Blog (6/5/2023) by John P. Gross

For over half a century, our public defense systems have struggled to provide people with adequate representation. It is no secret that these systems have been chronically underfunded. Full-time public defenders often lack the time necessary to provide the type of representation their clients deserve because of excessive caseloads. Private attorneys who are willing to accept criminal cases must contend with hourly pay rates that don't even

cover their overhead expenses. Our public defense systems are not necessarily designed to fail, but they are designed to come as close to failure as possible.

These systems have survived in large part because there were law students willing to become public defenders despite the challenges, and there were attorneys in private practice willing to take criminal cases even if they were unprofitable. All the attorneys working in these systems did so, at least in part, because of their commitment to Gideon's "noble ideal" that every defendant should stand equal before the law. But that commitment is wavering under the weight of economic and social forces that have been building up for over a decade.

Indigent defense providers have always dealt with excessive caseloads and have consistently asked for additional funding to hire more attorneys. And while excessive caseloads are still a problem, the more pressing problem indigent defense providers face is the inability to hire and retain attorneys. Indigent defense providers have gone from worrying about whether an attorney has too many cases, to worrying about whether they can hire enough public defenders or find attorneys who are willing to take cases. Applications to public defender officers are down, attrition is up, and there are many places where private attorneys simply refuse to take criminal cases.

I believe there are four factors that have created what amounts to a shortage of attorneys willing to become public defenders or willing to participate in assigned counsel systems.

The first is law school enrollment. Law school enrollment grew fairly steadily over the course of 50 years until it peaked in 2010 at just over 147,500. In 2010 we were coming out of the Great Recession, which had hit the legal profession hard. While law firms were laying off lawyers during the recession, recent college graduates who couldn't find entry level jobs thought of law school as a good investment. The result was a glut of recent law school graduates fighting for fewer jobs in the slowly recovering legal marketplace. Law school no longer seemed like a good investment and applications fell drastically each year from 2010 to 2014.

In response, law schools admitted fewer students. By 2017, enrollment had dropped to 110,000, less than enrollment in 1975. And while we have seen a slight uptick in enrollment since then, enrollment remains down 20% from its peak. Meanwhile, the number of criminal cases filed in state courts has remained consistent during that same period, typically between 14 and 15 million a year, peaking in 2019 at more than 15,356,000. So, over the past decade, law schools have produced significantly fewer graduates while the number of criminal cases filed in state courts remained the same.

This decade long drop in the number of law graduates is finally impacting the broader legal profession. Since 2020, the number of lawyers in the United States has been decreasing, something that hasn't happened since 1915.

The second factor is the rising cost to attend law school and the corresponding increase in student loan debt. The average law school graduate now has $120,000 in law school loan debt. According to the ABA, 33% of law graduates surveyed report taking a job that is less focused on public interest because of student loan debt. Law graduates simply can no longer afford to take jobs that are low paying, even if they would prefer to do those jobs because they align with their values. And while some have touted loan forgiveness programs as a potential solution to the problem of student loan debt, to qualify for the Public Service Loan Forgiveness Program takes at least 10 years and requires 120 monthly payments.

The third factor is that salaries for public defenders and compensation rates for private attorneys who participate in public defense systems haven't increased despite a significant increase in the cost of living. Not only are public defender salaries low, but they are also decreasing relative to the cost of living. For years, the salaries for public defenders have remained flat. From 2018 to 2022, the average public defender salary increased just 2.4%. During that same period, the consumer price index rose almost 20%. Recent law graduates are also facing rising housing costs. Over the last two years the median rent rose 18% and peaked last year at over $2,000 a month.

According to the National Association for Law Placement, the average starting salary for a public defender was $59,700 in 2022. If we assume that is gross income and we assume a 22% federal income tax rate, that means the average starting public defender's net pay is $46,566. If that same public defender has $120,000 in student loan debt at 4.99% with a 20-year term, they will have a student loan payment of $791 a month or $9,492 a year. If they are also paying $2,000 a month in rent, then they will be paying $33,492 a year for housing and loan repayment, almost 72% of their net income.

Compensation for members of the private bar who choose to participate in public defense systems is just as bad. In many places across the country the compensation rates for lawyers willing to take criminal cases have been frozen for years. Lawyers in New York haven't seen their hourly rate increase in 18 years while lawyers in Tennessee and Wisconsin waited more than 20 years for a raise. In their Standards for Providing Defense Services, The ABA recommends that "every system should include the active and substantial participation of the private bar." The private bar's participation in public defense systems creates elasticity: if caseloads increase for public defenders, the private bar can step in and accept more cases. But the meager compensation offered to members of the

private bar has driven them out of our public defense delivery systems. Instead of being elastic, our public defense delivery systems are rigid and about to crack.

The fourth factor is the COVID-19 pandemic. The effects of the pandemic on the sustainability of public defense systems were two-fold. First, there was the impact of the "Great Resignation". The job of a criminal defense attorney was already stressful enough but the increased risk of contracting COVID-19 in jails and prisons made the job life threatening for some. If people were thinking about leaving or retiring, the pandemic provided the incentive to do just that. Second, with courts shut down due to the pandemic, caseloads rose significantly across the country. Caseloads were barely manageable before the pandemic so the backlog that was created by court closures just added fuel to the fire.

Margins have always been slim for public defenders. It was the type of work and not the amount of pay that attracted people to the job. While public defenders don't do it for the money, they still need money to do it. The economic reality is that when the price of a legal education goes up and the cost of living goes up while salaries remain steady, public defenders are effectively making less money than they did a decade ago. Factor in a sharp and steady decrease in the number of law graduates and the increase in resignations and retirements caused by the pandemic and you can see why many offices are now understaffed. And this has created a vicious circle: understaffing causes excessive caseloads and excessive caseloads cause attrition which causes understaffing.

And I don't see any short-term solutions to persistent understaffing. Law schools aren't going to produce more graduates or lower tuition costs, the cost of living isn't going to come down, and legislators are not going to approve significant pay raises for public defenders. But even if they did, and a career in public defense became economically viable, law schools simply aren't producing enough graduates to fill the ranks of depleted public defender offices across the country. And raising hourly rates for members of the private bar is unlikely to lure attorneys back into the practice of criminal law. Again, it is hard to imagine a legislature adopting an hourly rate for assigned counsel comparable to the actual market rate for legal services, but even if they did, it is even harder to imagine attorneys who have spent years in civil practice suddenly filling the assigned counsel rolls in public defense systems.

It shouldn't come as a surprise that a system that has spent half a century in crisis eventually collapses. Perhaps we should be surprised that it has survived this long and managed to provide a vernier of legitimacy to our criminal legal system. I think that many of us who have worked in our public defense systems for a significant amount of time have concluded that for things to get better, they must get worse. I think the worst is upon us.