

CRIMINAL JUSTICE ROUNDTABLE

Vanderbilt University

October 26 & 27, 2018

Friday, October 26

12:00-1:00—Lunch (Bass, Berry Sims Room, second floor)

1:00-2:00—Matthew Tokson (Utah), *The Normative Fourth Amendment*; Commentator: Ricardo Bascuas (Miami).

This Article offers a new theoretical approach for determining the scope of the Fourth Amendment. It develops a normative model of Fourth Amendment searches, one that explicitly addresses the balance between law enforcement effectiveness and citizens' interests inherent in Fourth Amendment law. Drawing on Fourth Amendment jurisprudence and privacy theory, it emphasizes surveillance's concrete impacts, including its deterrence of lawful activities, interference with relationships and communications, and measurable psychological harms. The normative model's pragmatic focus allows it to capture the fundamental harms and benefits of surveillance while remaining workable for courts. The normative approach is consistent with the language, history, and purposes of the Fourth Amendment, and its values are echoed throughout the relevant caselaw. It also has important practical advantages over current doctrine: it is adaptable to technological change, encompasses non-privacy harms such as coercion and discrimination, reflects Fourth Amendment values more fully than other approaches, promotes judicial transparency, and is better able to address large-scale surveillance programs. Further, the normative approach can help resolve a variety of novel or difficult Fourth Amendment questions involving emails, internet browsing, financial records, household trash, and more.

2:15-3:15—Maria Ponomarenko (NYU), *An Agency Like Any Other*; Commentator: Richard Re (UCLA).

Public rulemaking appears, at least in theory, to be a logical answer to the problems that have plagued policing for decades. What touched off the rulemaking movement was the realization that police officers possessed vast stores of discretion, which they exercised with little guidance from politically accountable officials, or from the residents who were directly impacted by the officers' decisions. And yet, there are serious reasons to doubt whether rulemaking—either along the lines of the federal model, or some of the proposed alternatives—is in fact a viable strategy for governing the police. One important obstacle to police rulemaking is that policing agencies have fewer incentives than do traditional administrative agencies to adopt rules. The other key obstacle to police rulemaking has implications not only for the feasibility of APA-style rulemaking requirements, but also for the present broader push to “democratize” policing by creating opportunities for the public to participate in police decisionmaking. It simply is not realistic to think that the public can get these systems under control by providing periodic comment on some of the more salient aspects of police department rules. This paper suggests that a more promising alternative to rulemaking is to create “regulatory intermediaries”—entities within government, such as commissions or inspectors general, which can stand in for the public and help govern the police.

3:30-4:30—Trevor Gardner (U. Washington), *Immigrant Sanctuary as the “Old Normal”: A Brief History of Police Federalism*; Commentator: Rob Mikos (Vanderbilt)

Three successive presidential administrations have opposed the practice of immigrant sanctuary, at various intervals characterizing state and local government restrictions on police participation in federal immigration enforcement as reckless, aberrant, and unpatriotic. This Article finds these claims to be ahistorical in light of the long and singular history of a field the Article identifies as “police federalism.” For nearly all of U.S. history, Americans within and outside of the political and juridical fields flatly rejected federal policies that would make state and local police subordinate to the federal executive. Drawing from Bourdieusian social theory, the Article conceptualizes the sentiment driving this longstanding opposition as the orthodoxy of police autonomy. It explains how the orthodoxy guided the field of police federalism for more than two centuries, surviving the War on Alcohol, the War on Crime, and even the opening stages of the War on Terror. In constructing a cultural and legal history of police federalism, the Article provides analytical leverage by which to assess the merits of immigrant sanctuary policy as well as the growing body of prescriptive legal scholarship tending to normalize the federal government’s contemporary use of state and local police as federal proxies. More abstractly, police federalism serves as an original theoretical framework clarifying the structure of police governance within the federalist system.

6:00-9:00: DRINKS AND DINNER AT GIOVANNI’S, 909 20TH AVE. SOUTH (SEE MAP)

Saturday, October 27

8:00-8:30: Breakfast (Bass, Berry, Sims room)

8:30-9:30—Rachel Harmon (Virginia), *The Law of the Police*; Commentator: Ronald Allen (Northwestern)

The book is intended to guide students in discovering the primary laws and doctrines that govern local police and enable students to evaluate the many ways we regulate police conduct. To that end, the casebook emphasizes several questions. What is policing like? What are the laws that empower and constrain police conduct, and what are the comparative advantages and disadvantages of the various institutions and forms of law that govern policing? What are the mechanisms by which law influences what police actually do? How well do those mechanisms work? And finally, how does information about policing play a role in their regulation? The book presents primary materials including cases, statutes, and regulations, and background materials to prepare students to participate in litigation, legal reform, and policy debates regarding policing.

9:45-10:45—Deborah Denno (Fordham), *How Courts Respond to Childhood Trauma in Criminal Cases*; Commentator: Christopher Slobogin (Vanderbilt).

Childhood trauma often has lasting effects. Neurobiological and epidemiological research suggests that abuse and adverse experiences during childhood can heighten the likelihood that an individual will suffer from brain dysfunction, which can, in turn, be associated with disorders related to

criminality and violence. Yet much of this research is based on psychological studies of children and attempts to predict their behavior. Few studies have also included a focus on how or whether indicators of childhood trauma are examined in prosecutions of adults—i.e., criminal proceedings. The purpose of this research is to analyze the role of childhood trauma within criminal cases to assess the methods that courts use to weigh and process this information, particularly when neuroscientific evidence is introduced to measure the trauma’s impact more precisely. Taking cases from an original, large-scale, empirical research project, this article will assess the extent to which, and the methods whereby, courts in criminal cases weigh and respond to trauma experienced by defendants in their past (i.e., as children).

11:00-12:00—Margareth Etienne (Illinois), *Sex, Aging and the Right to Consent*; Commentator: Nancy King (Vanderbilt).

This Article lies at the intersection of Criminal Law and Elder Law, and examines the question of consent as a defense to sexual assault in cases of dementia. When it comes to consent and timing, it is fairly well settled law in most jurisdictions that have considered the matter that consent can be granted prospectively and yet withdrawn at any time. The vast majority of cases involving these issues concern young to middle-aged women (and men) in date rape scenarios or stranger rapes. Modern advances in medicine and healthcare, which have promulgated the extension of the average life expectancy, provide us now with a new context in which to explore questions of sexual autonomy and consent in the later chapters of life. A recent Iowa case illustrates the controversy. At age 78, Henry Rayhons was prosecuted and tried for criminal sexual abuse, a third-degree felony. He was accused of having sex with his wife, Donna Lou Rayhons, against her doctor’s orders. When Donna Rayhons was diagnosed with Alzheimer’s, Henry continued to care for her until she was placed in a nursing home. However, based on her condition and her adult children’s requests, the nursing home staff and doctors prohibited Mr. Rayhons from having sex with his wife and moved her to shared room. Although he denied having sex with his wife on the date charged in the indictment, Henry Rayhons admitted to investigators that Donna still enjoyed and occasionally asked for sex. This case enables us to revisit standard claims and theories of consent, not in a date rape or stranger rape context, but in the equally fraught context of aging and dementia. The questions of consent and capacity are not new to the law, particularly as criminal courts have endeavored to articulate the negative case: the right to deny consent. This Article uses the Rayhons case to consider the affirmative case: the right to grant consent. In other words, who decides and at what point did Mrs. Rayhons lose the right to consent to sex?

12:00-1:00—Lunch (Faculty Lounge, second floor)