

(Cite as: 72 St. John's L. Rev. 1367)

Saint John's Law Review
Summer-Fall 1998

**The Relationship of "Stop & Frisk" Doctrine to Substantive Criminal Law: A
Roundtable Discussion**

***1367 THE CONSTRICTED MEANING OF "COMMUNITY" IN COMMUNITY POLICING**

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In a conference in which the dominant approach has been approving of the Terry doctrine and contemporary police practices, I want to play a somewhat contrarian role. Substantive criminal laws forbidding relatively harmless behaviors can serve the police as a substitute for the authority to carry out Terry stops, as Tracey Meares [\[FN1\]](#) and Debra Livingston [\[FN2\]](#) point out. While I refer to Terry and substantive law as alternatives, what we have now is a situation in which the police have both Terry and an ever-expanding substantive authority from quality of life laws. When I use the term "quality of life" laws I refer to laws dealing with behavior that cannot be classified as serious crime. [\[FN3\]](#) They have two functions. First, the behavior forbidden is itself arguably a disruption of the civility of public ***1368** life. [\[FN4\]](#) Secondly, the enforcement of such laws--and the general knowledge that such laws are enforced--can indirectly affect serious crime. [\[FN5\]](#) For example, gangs may no longer congregate in public places and people may refrain from carrying guns on the streets if they are at significant risk of being arrested under one of a plethora of quality of life laws. Such laws might include those forbidding panhandling, [\[FN6\]](#) or drinking in public, [\[FN7\]](#) or--my personal favorite as a temporary Manhattanite--jaywalking. [\[FN8\]](#) I don't think anybody is going to say jaywalking is a serious crime. If the city decides seriously to enforce rules against jaywalking, it's for different reasons. (At a minimum, I find it hard to believe that anyone except Mayor Giuliani would think jaywalking is a crime against which we want to devote any significant police resources.)

***1369** Although the term "quality of life crimes" is relatively recent in popular discourse, we have had laws dealing with such crimes for a very long time. In effect, these were the crimes forbidden in the law held unconstitutional in *Papachristou*. [\[FN9\]](#) As the facts in that case make apparent, such rules spread an exceedingly wide net which can be--and in that case rather clearly was--applied in a highly discriminatory fashion. One of the arrests challenged in *Papachristou* involved the stop of a car in which two black men and two white women were riding. [\[FN10\]](#) The more recent quality of life statutes define the forbidden behavior more precisely than did the Cleveland or the Jacksonville loitering ordinances and thus avoid the vagueness that was the basis of the Supreme Court's holding of unconstitutionality. Nonetheless, both because of the lack of precision at the margins and, more importantly, because of the breadth of their coverage, they still provide the opportunity for almost unfettered discrimination in enforcement.

Consider, for example, laws against wearing gang colors, loitering near an automated teller machine [\[FN11\]](#) or jaywalking. [\[FN12\]](#) I have jaywalked, hung around the entrance to an ATM, and worn the colors associated with Crips or Bloods. [\[FN13\]](#) You will not be surprised to hear that I have never been stopped by a police officer for doing so, even when I have engaged in the behavior directly in front of an officer. I have not been arrested, I believe, because as an apparently middle class, clearly middle-aged, white female, I'm not the sort of person they want to stop for those behaviors. ***1370** [\[FN14\]](#) Similarly, the web of traffic laws can allow a police officer to stop virtually any motorist within a minute and a half of first observing him for an obscured license plate, a cracked tail

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light, or a failure to signal a turn. [FN15] I walk through Manhattan, and I see at least 100 traffic offenses every two blocks. Often there are police standing on the corner, presumably seeing what I see, yet I have not yet seen a single traffic arrest. Non-enforcement of low-level criminal laws, though it encourages a certain disrespect for the law, is less troubling than discriminatory enforcement. The latter is facilitated by the existence of laws that make us all potential criminals and the lack of any effective legal limitation on the officer's decisions of whom and when to arrest. As Whren [FN16] made clear, the only constitutional limit on an officer's arrest decision is whether the officer has seen some law broken. It is constitutionally irrelevant why he or she has chosen to enforce this law against this person at this time. Pretext evaporates in the presence of probable cause or, presumably, reasonable suspicion.

The tenets of community policing [FN17] are that maintaining order and preventing low level disruptions of public space are important, both for creating a viable community and for their indirect effect on the rate of serious crime. [FN18] Community *1371 policing thus involves providing the police tools such as quality of life laws and encouraging them to use those tools. Yet these are laws that no rational person would want enforced 100% of the time according to their terms. Thus, an inevitable cost of a community policing approach is that it encourages and legitimizes police discretion. [FN19] Inevitably, that discretion is subject to misuse--a misuse that is likely to be directed at members of particular classes and particular races. While some elements of the local community will applaud such policing, which clears the streets of "undesirables," and makes them safer for the law-abiding, [FN20] other elements of the community will perceive that discretion as racist. [FN21] Data indicates that the necessarily discretionary enforcement of traffic laws, for example, is racist at least in effect, if not in intent. [FN22] All of which brings us to *1372 the nub of the problem. Is there any way, as Professor Stuntz noted, to give the police adequate means to do their job while minimizing the racial impact of their behavior?

Tracey Meares and Debra Livingston both suggest that a community control approach to the relationship among policing, community concerns and law provides a more effective approach than the old fashioned rule of law/individual rights approach associated with the Warren Court and with decisions like *Papachristou*. One positive aspect of such an approach is that it acknowledges, as the Warren Court's approach rarely did, the interest of minority communities in effective policing. [FN23] As Randy Kennedy has pointed out, [FN24] members of minority communities are disproportionately the victims of crime as well as the victims of misdirected police discretion. [FN25]

I want to raise here, however, one small criticism of the community policing model, especially insofar as it is seen as an adequate political response to the problems of racialized law enforcement. The communities that suffer from under-enforcement and over-enforcement aren't exactly the same community, even when they can each be described as "minority communities." A community policing model tends to empower those who want more policing at the expense of those who want more control of the police. The former group is likely to be more politically organized. Their members and representatives are more likely to go to forums organized by the police to discover the mood and needs of the "community." Meanwhile, those who are most disproportionately the objects of police enforcement of quality of life laws are young black men. [FN26] Both because of their ages and because many of them have criminal records, many will be ineligible to vote. Even if they can legally *1373 vote, they are a group whose political alienation makes them unlikely to participate in any effective way in the political process. The disjuncture between the cultural styles affected by this group and those of the police make attempts to communicate across that divide difficult.

Furthermore, the "community" whose interests are to be considered in a community policing model is often ill-defined or defined in a way disproportionately likely to exclude those whose interests are in less aggressive policing. What are the boundaries of the community? Is it, for example, the entire city of New York or a local community defined by the boundaries of a particular police precinct? The proponents seem to be suggesting a more localized model, with the paradigm of responsiveness to a particular, often minority, community in Harlem or Washington Heights. But not all local communities are minority. If the police are responsive to the residents in a white, middle class neighborhood, they will be encouraged to enforce laws against outsiders who don't belong and who, under that model, have no voice in defining the mission of the police in that precinct. If the precinct boundaries largely overlap downtown business districts, then the community is presumably the people who run the businesses and who want to make the streets safe for affluent shoppers.

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In that regard, let me suggest as a paradigm for the dangers of police responsiveness to "community" concerns the situation underlying the case of *Pottinger v. City of Miami*. [\[FN27\]](#) That case involved a challenge to the police response to homeless people in Miami. Discovery in the case showed that police "sweeps" to remove homeless people from the streets were often a response to complaints by merchants that the plethora of homeless people was deterring other people from coming there and supporting the businesses by shopping. [\[FN28\]](#) The police responded by arresting homeless people and hauling them away for quality of life infractions: sleeping in public, drinking in public, loitering, urinating in public, etc. [\[FN29\]](#) My personal favorite was the arrests for littering. Again, I will admit to being an unarrested criminal; I *1374 have dropped a gum wrapper on the sidewalk instead of the litter basket on occasion. Homeless people, however, were arrested for littering. [\[FN30\]](#) In some cases, the police were quite creative: When a homeless person would lay a piece of cardboard down so he was not sleeping right on the cold concrete of the sidewalk, the police would deem that an instance of littering worthy of a custodial arrest. Creative, hard-fought lawyering by--yes--the ACLU, along with some documented outrageous police behavior led ultimately to a settlement in *Pottinger*. [\[FN31\]](#) Terry itself, cognizant of the racial context of low-level police enforcement, can be seen as an attempt to provide some legal means of controlling the police. Subsequent cases, however, make clear that the Constitution will not provide an effective means to respond to misdirected police discretion. [\[FN32\]](#) Community policing similarly is unlikely to provide an effective means of control. We should not forget, however, the range of unconstitutional "rule of law" tools. State constitutions can be construed to provide greater protections than the Federal Constitution; states can by statute choose to control their own police forces and police departments can by rule choose to control the discretion of patrol officers. One particular limitation, which might come from any of those sources, seems particularly sensible. Even if certain quality of life offenses are defined as criminal, they need not be made a legitimate basis for a full custodial arrest or for a permanent criminal record. [\[FN33\]](#) It is unclear, even from a purely law enforcement perspective, if it is sensible to permit or encourage *1375 police to spend the resources for a custodial arrest for jaywalking, littering or turning without signaling. When we add in the social cost of race and class patterned enforcement, the case for legally enforceable limitations on the authority to execute such arrests becomes still stronger.

Of course, as an academic, I have the advantage of spinning out ideas without having to test them in the real world or even, in a context like this, turning them into concrete proposals. Our next speaker, Judge Keenan, has been in that real world and we can now hear his thoughts about criminal procedure and substantive criminal law.

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[\[FN1\]](#). See [Tracey L. Meares, Terry and the Relevance of Politics, 72 St. John's L. Rev. 1343 \(1998\)](#).

[\[FN2\]](#). See [Debra Livingston, Police Patrol, Judicial Integrity and the Limits of Judicial Control, 72 St. John's L. Rev. 1353 \(1998\)](#). Professor Livingston develops this analysis in more depth in her article, [Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing, 97 Colum. L. Rev. 551 \(1997\)](#) [hereinafter *Quality of Life*]. Laws that forbid relatively harmless behaviors include those which regulate unreasonable noise, "automobile cruising," panhandling, and camping. [Id. at 627](#). Although these public order laws include specific criteria which govern enforcement, the police still retain a high level of discretion. See [id. at 593](#). This discretion is exercised during the investigation of the facts, application of the law, and when the police decide to make an arrest, give a citation, or simply ignore the violation. See [id.](#) Any attempt by the courts to regulate police discretion by invalidating these laws, may actually be detrimental to communities. See [id. at 594](#). It can increase the already dominant role of private police and actually promote misconduct by the public police because they will continue to make arrests in violation of other laws. See [id. at 627-34](#).

[\[FN3\]](#). See Steve Marshall, et. al., *New York Tackling Quality of Life Crimes*, USA Today, July 7, 1994, at 3A (quoting Rudolph Giuliani, Mayor of New York City, as stating that quality of life crimes, such as panhandling, public drinking, and graffiti, are legally considered "misdemeanors and petty offenses").

[\[FN4\]](#). For example, it has been viewed that beggary represent the destruction of social order and the collapse of the American work ethic. See [Robert C. Ellickson, Controlling Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning, 105 Yale L.J. 1165, 1182 \(1996\)](#); see also [Young v. New York City Transit Auth., 903 F.2d 146, 149 \(2d Cir. 1990\)](#) (noting that an ordinance prohibiting panhandling and begging on the subways was

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designed to eliminate the feeling of harassment and fear felt among passengers of the subway system when they were panhandled); William J. Bratton, *The New York City Police Department's Civil Enforcement of Quality-of-Life Crimes*, 1 J.L. & Pol'y 447, 449-50 (1994) (suggesting that the disruption of public life is due to the chaos created by low-level offenders, such as aggressive panhandlers, illegal vendors, and homeless persons).

[FN5]. See [Dan M. Kahan, *Between Economics and Sociology: The New Path of Deterrence*, 95 Mich. L. Rev. 2477, 2488 \(1997\)](#) (suggesting that social influence can deter major crimes because orderliness within a community demonstrates to outsiders that crime will not be tolerated); Dan M. Kahan, [Social Influence, Social Meaning, and Deterrence](#), 83 Va. L. Rev. 349, 368-73 (1997) (suggesting that the 40% drop in murders, 30% drop in robberies, and 25% drop in burglaries in New York City since 1993 are due to strict police enforcement of minor violations).

[FN6]. See, e.g., [D.C. Code Ann. § § 22-3311](#) to 3316 (1981 & Supp. 1998); [La. Rev. Stat. Ann. § 97.1](#) (West 1986 & Supp. 1998); [N.C. Gen. Stat. § 153A-126](#) (1997); [N.Y. Comp. Codes R. & Regs. tit. 21 § 1050.6](#) (1995) (prohibiting begging and panhandling on the transit system).

[FN7]. See, e.g., [Ark. Code Ann. § 5-7-212\(c\)-\(e\)](#) (Michie 1997); [Iowa Code Ann. § 123.46\(2\)](#) (West 1997); see also [City of Lake Charles v. Henning](#), 414 So.2d 331 (La. 1982) (holding that a city ordinance that prohibited drinking alcoholic beverages from an open container in public contributed to public welfare); [People v. Elhage](#), 537 N.Y.S.2d 375 (App. Div. 1989) (holding that a city ordinance which prohibited possession with the intention of consuming alcohol in a public place benefited the public).

[FN8]. See, e.g., [Ala. Code § 32-5a-212\(c\)](#) (1989) (requiring pedestrians to use only the crosswalk when there are adjacent intersections controlled by traffic signals); see also [Minn. Stat. § 169.21\(3\)](#) (1986 & Supp. 1998); [N.J. Stat. Ann. § 39:4-34](#) (West 1997); [Utah Code Ann. § 41-6-79](#) (1997).

[FN9]. [Papachristou v. City of Jacksonville](#), 405 U.S. 156 (1972).

[FN10]. See [id. at 158-59](#). Justice Douglas' disbelief of the police officer's claim "that the racial mixture in the car played any part in the decision to make the arrest" is apparent. [Id. at 159](#).

[FN11]. See Livingston, *Quality of Life*, supra note 7, at 622 n.388 (discussing a San Francisco law which made it illegal to loiter for more than one minute within 30 feet of an ATM); see also Ellickson, supra note 9, at 1224-25 (discussing ordinances prohibiting begging in proximity to an ATM).

[FN12]. See Livingston, *Quality of Life*, supra note 7, at 622 n.338; see also New York, N.Y., *Rules*, tit. 34 § 4-04 (1992).

[FN13]. The Crips and the Bloods are among the most notorious, widely proliferated street gangs. See Malcolm W. Klein, *The American Street Gang* 102 (1995) (discussing the presence of the Bloods and the Crips in fifty-three cities). Members of the Crips and the Bloods wear colored bandannas to indicate their membership in their respective gangs. See Irving A. Spergel, *The Youth Gang Problem* 98 (1995) (discussing the manner of dress of numerous street gangs).

[FN14]. Livingston notes that the overbreadth of rule-like formulations which make my behavior "criminal" does not, in fact, solve the problem of discretionary enforcement practices. See Livingston, *Quality of Life*, supra note 7, at 616-18.

[FN15]. In one Texas community, 37% of all arrests were made by police "traffic enforcement personnel," and only about half of those arrests were for traffic offenses. David A. Sklansky, [Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment](#), 1997 Sup. Ct. Rev. 271, 299; see also [David A. Harris, Car Wars: The Fourth Amendment's Death on the Highway](#), 66 Geo. Wash. L. Rev. 556, 559-60 (1998) (discussing discretion ceded to police under existing Supreme Court precedent).

[FN16]. [Whren v. United States](#), 517 U.S. 806 (1996).

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[FN17]. "Community policing" is a theory of law enforcement that emphasizes cooperation between the police and the citizens of the community, as well as greater police involvement in neighborhood affairs, and enforcement of quality-of-life laws. See Livingston, *Quality of Life*, supra note 7, at 575-76 (comparing the policies of community policing to those common to other theories of law enforcement); Wesley G. Skogan & Susan M. Hartnett, *Community Policing Chicago Style 5* (1997) (defining community policing)

[FN18]. Studies conducted in Chicago communities in which Chicago's community policing approach, CAPS (Chicago Alternative Policing Strategy), was newly implemented showed a strong correlation between policing against low-level disorder and a reduction in serious crime. See *id.* at 228-35. Residents of the CAPS neighborhoods consistently reported a decrease in more serious criminal activities after the program was established. See *id.*

[FN19]. One commentator has gone so far as to claim that quality of life laws extend to police officers "dictatorial power over the streets." Vivian Burger, *The Bill of Rights, Community Policy, and Community Democracy*, 1 *Mich. L. & Pol'y Rev.* 387, 388 (1996) Burger notes:

However sensible or proper the actions of a specific officer may appear initially in an isolated instance, maintaining order through loitering and similar types of statutes implicates systematic issues.... Unchecked power played out primarily in a manner invisible to outside monitors has always presented a significant specter of arbitrariness, selective enforcement, and discrimination.").

Id.

[FN20]. See, e.g., Wesley G. Skogan, *Disorder and Decline* 51-57 (1990) (claiming broad consensus in favor of such forms of quality of life law enforcement).

[FN21]. See Livingston, *Quality of Life*, supra note 7, at 589 and sources cited therein.

[FN22]. See Tracey Maclin, *Race and the Fourth Amendment*, 51 *Vand. L. Rev.* 333, 344-54 (1998). While in theory a constitutional violation has occurred if there is a pattern of intentional racial targeting, it is almost impossible to prove this unless the police officer is more honest than most police officers are likely to be, since the Supreme Court has refused to find violations of the equal protection clause on the basis of even statistically indisputable patterns of racialized decision making. See *McCleskey v. Kemp*, 481 U.S. 279 (1987) (finding no violation despite huge disparities in the infliction of capital punishment based on the race of offender and of victim). Consider also to the debate over the 100-to-1 differential under the Federal sentencing guidelines between crack cocaine, primarily sold by African-Americans, and cocaine powder, a drug more commonly used and sold by whites. Appellate courts have refused to find this disparity a basis for departing from those guidelines, and the Congress has similarly declined to change the guidelines to reflect a less racialized pattern. See generally *United States v. Washington*, 127 F.3d 510 515-17 (6th Cir. 1997); Randall Kennedy, *Race, Crime and the Law* 364-86 (1997).

[FN23]. See generally Livingston, *Quality of Life*, supra note 7, at 571-73 (noting that the community relations experimentation, which set the stage for the development of the community policing theory, revealed that part of the hostility inner city residents felt towards police resulted from the perception that the police permitted crimes in poor neighborhoods that they would not permit in other neighborhoods).

[FN24]. See Kennedy, supra note 28 at 69-75.

[FN25]. See generally *id.* at 138-67.

[FN26]. See generally Gary Stewart, *Black Codes and Broken Windows: The Legacy of Racial Hegemony in Anti-Gang Civil Injunctions*, 107 *Yale L.J.* 2249, 2249-57 (1998).

[FN27]. 810 F. Supp. 1551 (S.D. Fla. 1992).

[FN28]. See *id.* at 1581.

[FN29]. See *id.* at 1559-60.

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[\[FN30\]](#). See id.

[\[FN31\]](#). The opinion notes that the police often impermissibly confiscated the possessions of homeless people arrested for such quality of life offenses and roused them from public parks shortly before the parks were to open (in effect, for the non-homeless population). See id. at 1556-59. The documentation collected for the litigation included a heartbreaking photograph of possessions collected and burned by the police from a gathering place of homeless men, including a partially burned Bible (personal recollection of author).

[\[FN32\]](#). See, e.g., [County of Sacramento v. Lewis](#), 118 S. Ct. 1708 (1998); [Ohio v. Robinette](#), 519 U.S. 33 (1996); [Whren v. United States](#), 517 U.S. 806 (1996). See generally [David A. Harris, Car Wars: The Fourth Amendment's Death on the Highway](#), 66 Geo. Wash. L. Rev. 556 (1998).

[\[FN33\]](#). [People v. Howell](#), 403 N.E.2d 182, 183 (N.Y. 1980) (mem.) suggests that the use of full custodial arrests for traffic infractions is problematic under New York law. My hope is that this notion be clarified and expanded both to non-traffic minor crimes and to other jurisdictions.

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**The Relationship of "Stop & Frisk" Doctrine to Substantive Criminal Law: A
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***1351 STOP AND FRISK AND SUBSTANTIVE CRIMINAL LAW PANEL: INTRODUCTION**

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Welcome back to the final panel of the conference, on the relation of stop and frisk doctrine to substantive criminal law.

Since I am a visiting professor at St. John's, I can take two positions. First, as a quasi-outsider, I want to thank John Barrett and Charles Bobis and the rest of the people from St. John's who organized the conference. Second, as a quasi-insider, I want to express my thanks and admiration to all the panelists for their contributions to an absolutely spectacular conference. Thank you all.

This is a roundtable, not a panel, on the relationship of stop and frisk to substantive criminal law, a topic which has floated through the conference in a number of places, most clearly in the comments earlier today of Professor Tracey Meares. [\[FN1\]](#) The four of us on the dais will each speak very briefly, and then we're going to open it up, I hope, to a lot of questions.

I remember that when I first taught Terry, [\[FN2\]](#) it occurred to me that Officer McFadden could probably have arrested Terry for loitering and avoided the whole stop and frisk issue. I recently had one of our trusty law librarians obtain for me the relevant Cleveland ordinance that was apparently in effect at the time of Terry. [\[FN3\]](#) Let me read to you the section that seems applicable:

Whoever is found loitering about any barroom, gambling device, or about pools on baseball, prizefights, or horse racing; or is *1352 found wandering about the streets, either by day or by night, without being able to give a reasonable and satisfactory account of themselves . . . [or who] obtains his living by criminal means and practices . . . [or] is the companion and associate of criminals or other dissolute persons shall be guilty of a misdemeanor. . . . [\[FN4\]](#)

(I can't resist, amongst an audience of lawyers, adding one of the other forbidden activities: "loiter[ing] around Courts of Justice, or other public places, for the purpose of soliciting the employment of professional services. . . .") [\[FN5\]](#)

The participants in this roundtable discuss how and why Officer McFadden, or contemporary police departments, might operate under stop and frisk and/or under substantive criminal laws, such as this or more modern variations. Our first speaker is Debra Livingston of Columbia Law School. Our second speaker is William Stuntz of the University of Virginia Law School. I will then speak briefly and our final speaker will be the Honorable Judge John Keenan of the Southern District of New York.

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[FN2]. See [Tracey L. Meares, Terry and the Relevance of Politics](#), 72 St. John's L. Rev. 1343 (1998).

[FN3]. [Terry v. Ohio](#), 392 U.S. 1 (1968).

[FN4]. This "suspicious persons" ordinance was later declared unconstitutional. See [City of Cleveland v. Forrest](#), 223 N.E.2d 661 (Cleveland Mun. Ct. 1967).

[FN5]. Cleveland, Ohio, Code § 13.0935 (Supp. 1951).

[FN6]. Id.