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Police Patrol, Judicial Integrity, and the Limits of Judicial Control

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POLICE PATROL, JUDICIAL INTEGRITY, AND THE LIMITS OF JUDICIAL CONTROL

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I want to thank St. John's for inviting me to be part of this reexamination of *Terry v. Ohio*[1]—and particularly for this opportunity to participate in a roundtable discussion on the relationship between stop and frisk doctrine and the substantive law. This is an important and timely topic and I am happy to see it being discussed in such a serious venue.

When I was preparing my remarks for today, I thought I should call them, "*Terry* and the Substantive Law: A Hard, Hard Problem." Fortunately, I have sworn off titles with colons, so I settled on "*Police Patrol, Judicial Integrity, and the Limits of Judicial Control.*" My remarks (like some of the ones you have already heard) are going to point out some difficulties in regulating street encounters through the exclusion of evidence in criminal trials. In my case, however, I'm going to focus in particular on difficulties that emanate from the interaction between substantive and procedural law. More importantly, I am going to defend *Terry* for its frank recognition of these difficulties and for its partly implicit, partly explicit, call upon other actors—police, prosecutors, mayors, and legislators—for their assistance. To me, the strength of the *Terry* opinion—its integrity—lies in its modesty concerning the ability of the Court to affect police behavior in police-citizen encounters through the exclusion of evidence in criminal cases. The Court in *Terry* did not foster the illusion of judicial control. This, I will argue, was the better part of its wisdom.

So what is the current issue with *Terry* and the substantive law? The concern in many circles today is that police in some places may be employing the substantive law (not so much felonies and serious misdemeanors, but the range of quality-of-life

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[1] 392 U.S. 1 (1968).

offenses) to do aggressive stop and frisk—to have more face-to-face encounters with people in which police will frisk in order to find and remove weapons from the street. Some say this has happened in New York. The police here started enforcing laws against public drinking and other minor street misconduct, saying that these things affected the quality of life in public places. They were soon saying, however, that the enforcement of these laws led them to have more encounters with people, to do more frisks, and thus to deter people from illegal weapons possession on the street. In the words of one former Deputy Police Commissioner, enforcement of quality-of-life ordinances is important because it causes people to leave their guns at home "because they know they might get stopped."[2]

Now, notice that there may be nothing at all wrong with this aggressive use of stop and frisk, legally speaking. Sometimes an officer is authorized by law to make an arrest when he has stopped someone for a quality-of-life offense. The officer can perform a full search incident to arrest, and we need not concern ourselves with *Terry*. But let us assume the officer does not arrest, and even that local law does not authorize arrest for the infraction at issue. After *Terry*, the officer violates the Fourth Amendment when he or she gratuitously frisks while issuing a warning about public drinking. If the officer can point to some basis for the frisk, however, *Terry* is satisfied.[3] Our concerns about *Terry* and the substantive law, then, must be at least, in part, concerns about slippage—from lawful stop to unlawful frisk. Though, in fact, I think our concerns about "quality-of-life" enforcement are even broader—that they extend well beyond *Terry* and its focus on the circumstances in which a frisk is appropriate to a range of other questions. Why was *this* person selected to receive a summons for jaywalking? Why was this officer impolite or abusive to the citizen to whom the officer has given a warning about the commission of a minor offense?

How might a court respond to this range of concerns? Let

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[2] Ruben Castaneda, *As D.C. Police Struggle On, Change Pays Off in New York*, WASH. POST, Mar. 30, 1996, at A1; *see also* Eric Pooley, *One Good Apple*, TIME, Jan. 15, 1996, at 54, 56 (describing a New York City police official's observation that enforcement of public drinking law often permits officers to locate weapons on persons stopped).

[3] To be more precise, if the officer can articulate facts that support a reasonable suspicion that the person whom he has encountered is carrying a weapon, the officer is justified in performing a frisk. *See Terry*, 392 U.S. at 20-27.

me suggest two historical moves that courts have sometimes made, neither of which I think works, but both of which suggest how the interaction between substantive and procedural law limits the ability of courts to regulate street encounters.

First, a court might simply invalidate the substantive laws that authorize police to have coercive encounters with people on the street for things seemingly less important than the suspected commission of major index crimes. As an historical matter, courts have on occasion used doctrines like the facial vagueness doctrine to express implicit substantive judgments that the prohibitions embodied in certain laws "are not a constitutionally acceptable basis for ordering the relationship between police and citizen."[4] The problem with a wholesale resort to facial invalidation of substantive laws as a means of regulating street encounters, however, is that these quality-of-life offenses are not *only* about getting guns off the street. Public drinking, unreasonable noise, and even jaywalking can be the sorts of activities with which a community is legitimately concerned. And a court enters uncharted territory in deciding for itself what offenses are sufficiently important to be enforced by officers on the beat. It is true that local ordinances prohibiting minor misconduct have historically proven more vulnerable to facial invalidation than many other laws.[5] Perhaps for the reasons suggested here, however, no court has resorted to such invalidation as a principal means of regulating police-citizen encounters.

A court might next decide to elaborate procedure—to regulate more closely the behavior of the officer in these "quality-of-life" encounters as an aspect of Fourth Amendment or related state law. Maybe you cannot always order the passenger in a vehicle that has been lawfully stopped to get out of the car. Maybe you cannot ask for consent to search without advising the person detained for a minor offense that he will soon be free to go, or without having some degree of suspicion beyond probable cause to believe that the person has committed a quality-of-life

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[4] Robert C. Post, *Reconceptualizing Vagueness: Legal Rules and Social Orders*, 82 CAL. L. REV. 491, 498 (1994) ("[V]agueness doctrine functions . . . to oversee the kinds of judgments that can be made by government officials within the domain of police-citizen interactions.").

[5] *See* John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 215-16 (1985) (suggesting that invalidations based on vagueness may occur because the statutes involve "arbitrary and discriminatory enforcement" and lack of "fair warning").

infraction. The Supreme Court has declined to go down this road.[6] The New York courts, though, have gone in this direction to some extent. For you out-of-towners, in New York we have a four-tiered structure for the regulation of street encounters, a structure that is derived from a case called *People v. De Bour*.[7] New York courts say that an officer may not approach a citizen to request information on the street unless the officer has an objective, credible reason to do so.[8] If such a reason exists, the officer may ask basic, nonthreatening questions, but before more pointed questions can be asked—like, "What's in the bag?"—he must have a more compelling reason.[9] All this occurs before you get to what we would recognize as a *Terry* stop. And even when an officer has probable cause to believe that an individual has committed a minor offense, New York courts have sometimes used the *De Bour* framework to determine whether the officer who has stopped this individual may pose particular questions or ask for consent to search.[10]

In *People v. Hollman*, the New York Court of Appeals defended *De Bour*'s elaborate procedural framework—its attempt comprehensively to regulate all street encounters—by saying that this regulation was necessary to protect individuals from arbitrary or intimidating police conduct.[11] The approach taken in *De Bour* has not really worked to accomplish this end, however, and I am not sure the procedural approach generally holds much promise for addressing the problems that we have been discussing over the last two days. New York courts cannot seem to distinguish among all the categories in the New York law.[12] There

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[6] *See, e.g.*, Maryland v. Wilson, 117 S. Ct. 882, 884-86 (1997) (considering and rejecting claim that ordering a passenger out of a lawfully stopped automobile violated his Fourth Amendment rights); Ohio v. Robinette, 117 S. Ct. 417, 421 (1996) (rejecting contention that Fourth Amendment requires that a driver stopped for speeding be advised that he is "free to go" before his consent to search will be regarded as voluntary).

[7] 352 N.E.2d 562, 571 (N.Y. 1976) (describing how "various intensities of police action are justifiable as the precipitating and attendant factors increase in weight and competence").

[8] *See id.*

[9] *See* People v. Hollman, 590 N.E.2d 204, 206 (N.Y. 1992).

[10] *See, e.g.*, People v. Turriago, 644 N.Y.S.2d 178, 181 (App. Div. 1996) (holding that an officer lacked an adequate basis to ask for consent to search a vehicle stopped for speeding), *aff'd as modified and remanded,* 681 N.E.2d 350 (1997).

[11] *See Hollman*, 590 N.E.2d at 212.

[12] Professor Kamins, who has closely examined New York search and seizure law over a number of years, has observed that cases with almost identical facts produce different results. *See* BARRY KAMINS, NEW YORK SEARCH & SEIZURE 103

may be a simple explanation for this. Indefinite concepts like "probable cause" and "reasonable suspicion" acquire meaning as they are employed; while they cannot be defined in the abstract, they come to be well understood—by both courts and police—in application.[13] When indefinite categories multiply, however, they may not achieve this sense of coherency "as applied"—particularly in the context of exclusionary rule litigation involving warrantless street encounters, where the bias of hindsight generated by the discovery of incriminating evidence places acute pressure on fact-finding already.[14] When the law is confused, of course, we cannot pretend to have solved the problems that we have outlined, because we cannot assume that even conscientious police are able to abide by the rules that we have laid down.

So what is a court to do, and how does this relate to my title, *"Police Patrol, Judicial Integrity, and the Limits of Judicial Control"*? Here comes my defense of *Terry*. I was in Washington last December and, at that time, read through Chief Justice Warren's papers on *Terry*, particularly his correspondence with Justice Brennan. I thought I would read to you from a letter to the Chief Justice dated in March 1968, a few months before the opinion was issued. In this letter, Justice Brennan proposes a substantial rewrite of the draft *Terry* opinion. This rewrite is ultimately adopted in large part in the draft's final version. I am reading the portion of the letter in which Justice Brennan explains the reasons for his proposed rewrite:

> I've become acutely concerned that the mere fact of our affirmance in *Terry* will be taken by the police all over the country as our license to them to carry on, indeed widely expand, present "aggressive surveillance" techniques which the press tells us are being deliberately employed in Miami, Chicago, Detroit and other ghetto cities. . . . This seems to me particularly unfortunate since our affirmance surely does this: from here on out, it becomes entirely unnecessary for the police to establish

(1997).

[13] *See* William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 896-97 (1991) (describing how police officers and judges may "share a common understanding" of concepts as a result of repeated exposure to certain situations).

[14] *See* Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 852-53 (1994) (noting how discovery of incriminating evidence, coupled with hindsight, may distort and influence a court, especially in situations where the defendant is trying to exonerate himself).

> "probable cause to *arrest*" to support weapons charges; an officer can move against anyone he *suspects* has a weapon and get a conviction if he "frisks" him and finds one. In this lies the terrible risk that police will conjure up "suspicious circumstances," and courts will credit their versions. It will not take much of this to aggravate the already white heat resentment of ghetto Negroes against the police—and the Court will become the scapegoat.
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> The alternative would of course mean a reversal of this conviction—a holding that there is no constitutional authority to frisk for weapons unless the officer has probable cause to *arrest* for the crime of carrying a weapon. I recognize that the police will frisk anyway and try to make a case that the frisk was incident to an arrest for public drunkenness, vagrancy, loitering, breach of the peace, etc. etc.—but at times I think these abuses would be more tolerable than those I apprehend may follow our legitimating of frisks on the basis of suspicious circumstances.
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> This states frankly my worries. But if we are to affirm *Terry*, I think the tone of our opinion may be even more important than what we say. If I have exceeded the proprieties, I hope you will forgive me—I am truly worried.[15]

Justice Brennan was right to be worried about aggressive and racially discriminating stop-and-frisk practices. But he was also right to recognize that the interplay between substantive and procedural law limits the ability of criminal courts to regulate street encounters. After invoking this interplay, Justice Brennan suggested that the tone of the *Terry* opinion might be just as important as what it holds. The tone of *Terry*, I think, is strong in many ways. I would like to mention two, both of which contribute, in my mind, to the integrity of the opinion.

First, *Terry* strongly endorses the principle that when a court is presented with evidence that an officer has gratuitously frisked—that he has acted without reason publicly to humiliate a citizen on the street—that conduct violates the Fourth Amendment. That is a powerful message, and one that police and citizens can understand. It was also an important message in 1968, coming, as it did, in the wake of hundreds of tragic disorders in American cities, many of which began as a result of a bitter hostility between police and African American residents—a

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[15] Letter from William J. Brennan to Earl Warren 2-4 (Mar. 14, 1968) (available in Earl Warren Papers, Manuscript Division, Library of Congress.

hostility that itself had been fueled by indiscriminate stop-and-frisk practices.[16] In affirming that the frisk was subject to judicial control, the *Terry* Court affirmed its responsibility to enforce the Fourth Amendment when evidence of its violation is presented. In so doing, the Court affirmed its own integrity.

But I think my second point relates to judicial integrity as well. The opinion in *Terry* is strikingly honest in its acknowledgment that courts have limited capacity to regulate street-level encounters through the exclusion of evidence in the criminal trial. The *Terry* Court recognized that police perform a variety of tasks in interacting with citizens on the street—tasks that go well beyond enforcing the criminal law to include things like assisting the incapacitated and mediating quarrels that might lead to violence. These activities, the Court said, are beneficial to communities and cannot be prohibited prophylactically—as a means of preventing harassing and lawless behavior by officers on the street. The Court recognized that police engage in abusive conduct in street encounters for purposes wholly unrelated to any legitimate interest in investigating crime or keeping the peace. The Court frankly admitted that its decision was unlikely to stop such behavior—because the exclusion of evidence is unlikely to deter police who have "no interest in prosecuting or are willing to forgo successful prosecution in the interest of serving some other goal."[17]

Terry, then, does not do what I would consider a very dangerous thing in the area of street policing: It does not foster the illusion of judicial control. In fact, it does something quite different. In another letter by Justice Brennan concerning *Terry*, he advises Chief Justice Warren to move out of a footnote and into the text his discussion of the need for other parts of government to address police misconduct: "Now that the Court is rejecting the extreme position that an officer may stop a citizen only if he has probable cause to arrest him, critics of police abuses ought to be told that they should turn to other agencies of government for the cure."[18] In the final version of the opinion,

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[16] *See* REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 157-60 (1968) (noting that "deep hostility between police and ghetto communities" was a primary cause of urban riots between 1964 and 1968 and observing that "intensive, often indiscriminate, street stops and searches" contributed to this hostility).

[17] Terry v. Ohio, 392 U.S. 1, 14 (1968).

[18] Letter from William J. Brennan to Earl Warren 5-6 (Jan. 30, 1968) (available

the Court observes that its approval of legitimate and restrained investigative conduct—its approval of the frisk supported by reasonable suspicion—"should in no way discourage the employment of other remedies than the exclusionary rule to curtail abuses for which that sanction may prove inappropriate."[19]

So *Terry* first acknowledges the limitations of judicial regulation of police patrol through exclusion of evidence in criminal trials and then points to the need for a broader response. There are many elements to this response. Local political controls are essential—as exercised by mayors and legislative bodies charged with oversight of the police.[20] Civilian review of complaints brought against police officers can also be helpful in defining "the acceptable limits of police practices in enforcing laws and maintaining order."[21] Police departments themselves can assist in placing appropriate constraints on their officers by using departmental guidelines to inform the exercise of police discretion and to elaborate criteria for selective enforcement of "quality-of-life" offenses.[22] Training, supervision, and internal discipline are also important, as is the articulation of values within the police department to motivate line officers—many of whom became police officers at least in part because of an orientation to public service.[23] Finally, community policing, by making the exercise of police patrol discretion more visible and reorienting police patrol to community needs and expectations, can promote a closer working relationship between police and community residents.[24] This relationship itself can help ensure against police miscon-

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in Earl Warren Papers, Manuscript Division, Library of Congress.

[19] *Terry*, 392 U.S. at 15.

[20] *See* Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 653-58 (1997).

[21] Werner E. Petterson, *Police Accountability and Civilian Oversight of Policing: An American Perspective*, *in* COMPLAINTS AGAINST THE POLICE 259, 273 (Andrew J. Goldsmith ed., 1991).

[22] *See* Livingston, *supra* note 20, at 658-63.

[23] *See* JEROME H. SKOLNICK & JAMES J. FYFE, ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE 92-93 (1993) (noting that most police recruits are drawn to policing out of combination of self-interest—the desire for a "good, well-paid, and stimulating job"—and idealism); Robert Wasserman & Mark H. Moore, *Values in Policing, Persp. on Policing* (National Inst. of Justice, U.S. Dep't of Justice, Washington, D.C.), Nov. 1988, at 3-4 (noting that management by values is important in organizations like police departments, where output is hard to define, discretionary judgment is necessary, and opportunities for close supervision are limited).

[24] *See generally* Livingston, *supra* note 20, at 565-84 (outlining historical development and principal tenets of community policing).

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The modesty of *Terry*—its dispelling of the illusion of judicial control—focuses our attention on these broader reforms. This modesty is thus a strength of the opinion. Courts have a significant role to play in affecting police conduct on the street but they cannot do it all—and partly because of this interplay between substantive and procedural law. The *Terry* Court underscored that the task of placing reasonable constraints on police so as to secure the benefits of good policing for all communities remained unfinished in 1968, at the time of the *Terry* decision. That task remains unfinished today. But *Terry* points us in the right direction—to the integration of judicial, political, and administrative controls, rather than to an illusory reliance on exclusionary rule litigation alone.

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