CRIMINAL JUSTICE ROUNDTABLE
Vanderbilt University
November 4 & 5, 2022

Friday, November 4

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

1:00-2:00—Chris Slobogin (Vanderbilt), *Equality in the Streets: Using Proportionality Analysis to Regulate Street Policing*. Commentator: Chaz Arnett (Maryland)

There is a stark contrast between Supreme Court caselaw permitting street policing practices such as stop & frisk and the Court's recent tendency to strictly regulate technologically-enhanced searches that—coincidentally or not—happen to be more likely to affect white people and the middle class. If, as the Court has indicated, electronic tracking and searches of digital records require probable cause that evidence of crime will be found, stops and frisks should also require probable cause that a crime has been committed (in the case of stops) or that evidence of crime will be found (in the case of post-detention searches). This equalization is mandated by the Fourth Amendment's Reasonableness Clause and the Court's cases construing it, which endorse a "proportionality principle" that requires that the justification for a search or seizure be roughly proportionate to its intrusiveness. Applying the probable cause requirement to the streets would not prevent police from carrying out investigative detentions when they believe criminal activity "may be afoot." Rather, it would limit such detentions and subsequent searches to situations where they observe or have other good basis for believing that a person has engaged or is engaging in an attempted crime as defined by the law of the jurisdiction.

2:15-3:15—India Thusi (Indiana), *The Racialized Policing of Vice*. Commentator: Sara Mayeux (Vanderbilt).

The abolition of prisons and policing has entered mainstream discourse, bringing a race-conscious and anticapitalist critique of mass incarceration into public debate. This Article argues that three principles animate abolitionist organizing and thought: the principles of legacy, futility, and possibility. The Article applies two of these principles—legacy and futility—to evaluate the racialized history of vice policing in the United States. The legacy principle presumes people should center an institution's history in the maintenance of white supremacy in examining that institution's continued existence in modern society. The futility principle invites us to abandon futile attempts to resuscitate morally bankrupt institutions. It is closely linked to the legacy principle in that the legacy of an institution is instructive in understanding the futility in trying to reform that institution. Although the consumption and commercialization of certain pleasures has been criminalized in American society—as reflected in the criminalization of the purchase of narcotics and sexual acts—vice policing has been focused on maintaining racial segregation, containing vice in Black communities, and facilitating the surveillance of these communities rather than protecting and preserving the moral integrity of Black communities. Liberals who critique police and prison abolition as too radical often ignore this history (or are unfamiliar with it) and encourage more progressive activists to fix the bad parts of policing and preserve the good parts. While these reformers believe we should preserve the good parts of policing, this Article argues that harmful racialized vice policing has left very little good to preserve. In other words, the bad parts of policing are core to the way policing occurs.

3:30-4:30—Sam Kamin (Denver), *The Unreasonable Traffic Stop*. Commentator: Rob Mikos (Vanderbilt).

The Supreme Court announced in *Whren v. United States* that the sole criterion for evaluating the commencement of a traffic stop is the existence of probable cause to believe a traffic infraction had occurred. So long as the officers making the stop are able to point, even well after the fact, to any violation of the traffic laws, their actual, subjective motivations for the stop are legally irrelevant. Case-by-case determination of reasonableness is unnecessary in the traffic stop context, the Court has told us, because the balancing of interests has already been done. Unlike warrantless entries into homes, the use of deadly force, or unannounced warranted entries, a traffic stop "does not remotely qualify as … an extreme practice, and so is governed by the usual rule that probable cause to believe the law has been broken 'outbalances' private interest in avoiding police contact." In this article I will argue that the Court was half right in *Whren*: There *is* little need for case-by-case adjudication of the reasonableness of traffic stops. Given that the government interest in these stops is relatively low, that such stops pose a threat to both the officer and particularly to those stopped, and that other less-intrusive means are nearly always available to serve the government's stated interest in traffic enforcement, courts should presume that the use of armed, sworn officers to conduct traffic stops is unreasonable. There may in fact be cases where the use of such officers to effect stops to enforce the traffic laws is reasonable, but the burden should be on the government to persuade a court of that fact. This straight-forward change in the law would significantly reduce needless police stops thereby increasing privacy, improving relationships between the police and those they serve, and reducing the dangers of traffic stops, all at little cost to public safety.

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

<u>Saturday, November 5</u>

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

8:30-9:30—Lucian Dervan (Belmont), *Bargained Justice: Victims of Plea Bargaining*. Commentator: Nancy King (Vanderbilt).

Most research on the impact of plea bargaining focuses on the accused. This piece examines two ways in which plea bargaining may affect the victims of crime through analysis of a series of sexual assault prosecutions. First, the article surveys cases in which the coercive nature of plea bargaining led innocent defendants to falsely plead guilty and, as a result, the police to close the case. This phenomenon of false pleas of guilty in response to coercive incentives harms victims of crime because the actual perpetrator is able to escape detection and prosecution. In addition to leaving the original victim's interests unvindicated, this phenomenon also creates a situation in which additional persons may become victims where the unidentified perpetrator goes on to commit further offenses. Second, the article surveys cases in which the significant discretion afforded prosecutors within the plea bargaining system led to unjustly lenient sentences based on improper motivations, such as political influence or bias. This phenomenon of using discretion to permit culpable perpetrators to receive unjustly lenient sentences harms victims because the perpetrator is able to escape appropriate punishment and also creates situations in which additional persons may become victims where the perpetrator goes on to engage in additional criminal conduct because they are not being incapacitated. In both situations identified in this article, therefore, the plea bargaining system leaves the interests of victims unvindicated and, in some cases, may actually lead to additional victims or victimizations. The identification of these two situations

in which plea bargaining negatively impacts victims supports arguments for the reform of the plea bargaining system and, in particular, efforts to reduce the coercive incentives that lead to false pleas of guilty and to the creation of more oversight and auditing to ensure the discretion inherent in the system is not being used improperly.

9:45-10:45—Jackie Ross (Illinois), *Making Sense of Youth Crime: Intelligence Analysis in the American and French Police.* Commentator: Andrea Roth (Berkeley).

This comparative empirical study of policing in the U.S. and France draws on ten years of field work in and asks: when do police find the notion of "gang" crime useful to making sense of collective action by juveniles? French efforts to analyze local crime problems were often driven by uncertainty about whether gang affiliation was useful to the analysis, and hence by efforts to conduct a triage among different forms of collective juvenile offending to ascertain the role that gang affiliation might be playing; in the US, by contrast, gang affiliation was assumed to be the main driver of collective juvenile offending involving drugs or violence. Despite significant national differences, however, we contend that police analysis of collective juvenile offending is patterned by the same five distinct professional cultures or "intelligence regimes in both the U.S. and France. The same problem can be looked at in fundamentally different ways even within a single police department, depending on the intelligence regime through which the problem is refracted. The approaches of cities like Marseille and Chicago that privilege the same intelligence regime in their approach to collective juvenile crime wind up having much more in common with each other than they do with other cities in their own countries that view such problems primarily through the lenses of different intelligence regimes.

11:00-12:00—Larry Rosenthal (Chapman), *Litigating Originalism from Heller to Bruen*. Commentator: Alex Kreit (N. Kentucky)

The Second Amendment is on a jurisprudential march. An individual right to "keep and bear arms" for purposes unrelated to militia or military service was not recognized until the Supreme Court's 2008 decision, applying what it took to be the original meaning of the Second Amendment, in *District of Columbia v. Heller*. Last Term, the Court, in *New York State Rifle & Pistol Association v. Bruen*, invalidated a statute requiring a permit to carry concealable firearms on a showing of particularized need. Part I notes that by the time of *Bruen*, the Court had taken to ignoring the Second Amendment's preamble altogether; a position difficult to reconcile with the view taken of preambles in both the framing era and *Heller* itself. The Court had also taken to ignoring the significance of demonstrable ambiguity in the meaning of the Second Amendment's operative clause—an ambiguity that even *Bruen*, albeit inconsistently, acknowledged. These errors seriously distorted the Court's purportedly originalist analysis. Part II focuses on the lawyering of those who defended the laws at issue in these cases and demonstrates that the Court's errors mirror serious litigating errors by the attorneys defending the laws at issue in these cases. Part III offers a guide for avoiding the kind of errors reflected in the thus-far unavailing efforts to defend challenged firearms regulation from Second Amendment attack, in both Second Amendment litigation and other areas of constitutional law.

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