

# ARTICLES

## THE STOP AND FRISK OF CRIMINAL STREET GANG MEMBERS

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### I. INTRODUCTION

Crime, and what to do about it, has dominated the American domestic agenda since the Warren Court rulings in the 1960s, the backlash from which has helped propel politicians into office since Richard M. Nixon captured the White House in 1968. Serious debate about crime, however, occurs in a form of societal schizophrenia, not so much because crime concerns the dark side of man, but because talk of crime as a social prob-

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lem has come to be dominated by racial overtones.<sup>1</sup> The racial problem is two dimensional: 1) lawlessness by young, poor, black males occurs in disproportionate numbers; and 2) police lawlessness against young black males occurs to a devastatingly discordant degree. Emphasis on the latter dimension reached a high water mark among civil libertarians and the black intelligentsia during the hey day of the Warren Court. This article sounds the trumpet to place emphasis on the former dimension as well.

The problem of black-on-black crime is not easily discussed. Because problems which implicate race inexorably touch on racism, there is a paralysis of analysis of matters such as black-on-black crime. Racial uneasiness of a historical, psychological, and political making, undercuts American homogeneity and leaves smoldering wounds from bitter and divisive, ongoing and longstanding social conflicts. Thus, no solution to any aspect of the problems confronting blacks in America escapes the singe of deeply felt charges and countercharges of racism.

The purpose of this article is to suggest (most specifically to the black intelligentsia) that serious consideration be given to crime prevention measures such as the "stop and frisk" of criminal street gang members by making identifiable membership in a criminal gang alone constitute reasonable suspicion.<sup>2</sup> The vehicle for discussion is a proposed congressional bill, H.R. 4441, which would authorize law enforcement officers to stop and frisk criminal street gang members on the basis of reasonable suspicion.<sup>3</sup> The basic premise in engaging in a constructive debate of this proposed bill is that allowing police to stop and frisk on the basis of reasonable suspicion makes sense except where risk of abuse by inexperienced or malevolent police actors is substantial.

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1. The recent emergence of feminist jurisprudence and its emphasis on domestic violence has added sex as an additional demographic basis by which the American people are divided.

2. Civil libertarians weaned on the Warren Court's premier concern to block abusive police practices may instinctively recoil at the suggestion of allowing police the authority necessary to protect law abiding citizens. But the choice between oppressive law enforcement and community safety is a false one. Providing criminal suspects with due process, and freedom of association, even where association facilitates the commission of crime, are important markers of a civilized society. Any exception seems to be just a slippery slope, or two, away from the erosion of liberty, which is at the heart of benchmark constitutional values. But this argument, too, falsely assumes that there is no trustworthy observable difference between law abiding citizens and criminals, or at least not one that certain members of law enforcement are willing to honor when it comes to the black community. Rather than unnecessarily limiting all police officers to stave off abuse by a few bad police officers, concerns about abusive oppressive law enforcement are better met by training and diversifying the police force, authorizing citizen's review with firing authority, and increased vigilance from the bench and bar. Thus, it is understandable that in some quarters consideration of a proposal to stop and frisk of criminal street gangs may collapse under the rhetoric of civil liberty, long before such consideration becomes serious. Regrettable, but understandable.

3. H.R. 4441, 103d Cong., 2d Sess. (1994). An in-depth discussion of this bill follows at Part IV, *infra*. Although there are numerous and very important concerns about H.R. 4441 such as federalism—the role of the federal government *vis-a-vis* the state governments to deal with crime, federal jurisdiction post *United States v. Lopez*, 115 S. Ct. 1624 (1995), vagueness and overbreadth, First Amendment freedoms (right of association) and Second Amendment freedoms (right to bear arms)—the purpose of this article is to anticipate and address a broad side Fourth Amendment attack only. Given the focus here of suggesting a re-thinking of the balance between crime control and due process in street encounters, even the limit to the Fourth Amendment discussion makes for a rather lengthy article.

In Part Two of this article, I describe a social liberal-conservative rhetorical dichotomy in which racial matters are debated, crime being no exception. Part Two is a discussion which re-visits the Court's initial reasoning in *Terry v. Ohio*<sup>4</sup> and tracks the Court's expansion on the use of stop and frisk methodology. Part Three is an evaluation of the Fourth Amendment concerns against unreasonable searches and seizures and argues in favor of H.R. 4441's proposed application of stop and frisk methodology to criminal street gangs. Part Four contains a discussion of the abuse of *Terry* as a tool for harassing politically disfavored minorities. In conclusion, I suggest that proper hiring and supervising of good police officers, firing of bad police officers, requiring police officers to live in the community they police, and extensive use of citizen's review board to augment internal police investigations might do more to deter police officers from going bad than relying solely on the exclusionary rule. Given the problems presented by gang violence, society needs to afford responsible police officers who deal with criminal gangs broader latitude. The basic point is that increased police discretion must be commensurate with a greater exercise of control over the police by the executive, at all levels of government. Holding the police in check by a strong executive in conjunction with the judiciary's use of the exclusionary rule strikes a better balance between individual liberty and community safety than is possible with judicial remedies alone.

## II. WHEN COMMON SENSE IS UNCOMMONLY SENSIBLE

Before going further, it will save much gnawing at the conscience to set the parameters of the discussion. First, promoting the stop and frisk of criminal street gangs does not in any way endorse an indiscriminate "get tough" show of force targeted against young black males. The lesson of history is as plain as the lesson of physics: for each and every misguided police action there is an equal and opposite community reaction consisting of violence, contempt, and discontent. Make no mistake, generations of careful and sensitive police work in the inner cities will be necessary to undo the legacy of wanton police abuse which has deeply poisoned the psyche of so many young black males across America.<sup>5</sup> Nor is there a suggestion that the problem of crime is limited to blacks.<sup>6</sup> What is true, how-

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4. 392 U.S. 1 (1968).

5. See Steve Berg, *Pistol-Packing Youth Challenge a Nation's Civility, Feed Gun Debate*, BOSTON STAR TRIB., Jan. 30, 1994, at 1A.

6. See Clarence Page, *Message to Jackson: The Problem is Crime, Not Blacks*, CHI. TRIB., Jan. 5, 1994, at 15; Jack Germond and Jules Witcover, *Black-on-Black Crime is Not a Problem of Race*, THE BALTIMORE SUN, Jan. 24, 1994, at 2A. Recent articles in law journals have discussed the practice of unfairly placing a black face on crime. See MIKE DAVIS, CITY OF QUARTZ: EXCAVATING THE FUTURE IN LOS ANGELES 270 (1990). The frightening visage of the lawless "gangbanger" belongs to a person of color. See Jeffrey J. Mayer, *Individual Moral Responsibility and the Criminalization of Youth Gangs*, 28 WAKE FOREST L. REV. 943, 958 (1993) ("The fight against street gangs is a fight against African-American, Hispanic, and, to a lesser degree, Asian youth violence and not against the general plague of American violence. The perceived moral breakdown and unhealthy social ties attributed to gangs are problems now associated with the predominantly minority underclass."). Not surprisingly, only predominantly black and Hispanic gangs have been targeted in nuisance lawsuits. Because society equates criminality with race, innocent activities by all minorities, whether gang members or not, are often perceived as criminal. See Regina Austin, *"The Black Community," Its Lawbreakers, and a Politics of Identification*,

ever is that in terms of direct day-to-day effects, the major criminal problem for blacks is black criminals, not lawless police officers, and not white criminals.<sup>7</sup> This is true because most crime is committed geographically close to the home of the criminal. Thus, statistics bear out that with blacks, the same as with whites, crime is largely intraracial, not interracial in effect.<sup>8</sup> In short, the major problem in crime is gangs, not just black or white gangs, but all gangs, whether organized, rich and influential, or merely semi-formal street operations. There is much to be said on the pathologies of inhumanity, but that discussion is for another day.<sup>9</sup>

The suggestion here is that armed violence, especially among teenagers, in urban America, coupled with the deepening morass of amorality found among the criminal element might require society to reconsider whether the preeminent judicial concern for individual liberty should be tempered by a concern for community safety by re-thinking appropriate police investigative methods at the early stages of crime prevention and apprehension. Perhaps the changing urban tableau of escalating criminal violence makes it worthwhile to focus less on the civil liberties of individuals and more on civil responsibilities for community safety. As the demands of society have changed over time, perhaps the need for crime control becomes more urgent. The debate between due process and crime control models of law enforcement is an old one.<sup>10</sup> And if the recent political returns are to be taken seriously, it may be that communities ravaged by drug related criminal violence might very well opt to place greater emphasis on realistic checks on criminal action in lieu of unrealistic checks on police action.

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65 S. CAL. L. REV. 1769, 1773 (1992) (“[B]ased on the behavior of a few, street crime is wrongly thought to be the near exclusive the [sic] domain of black males; as a result, black men of all sorts encounter an almost hysterical suspicion as they negotiate public places in urban environments.”); Richard T. Ford, *Urban Space and the Color Line: The Consequences of Demarcation and Disorientation in the Postmodern Metropolis*, 9 HARV. BLACKLETTER J. 117, 136-39 (1992) (discussing Howard Beach incident).

7. “Today’s Black street gangs are more volatile, more destructive and more criminally-oriented than their predecessors. They are also better organized to enact these negative traits. Due to the saturation of drugs in the Black community, Black street gangs have organized a network of drug trafficking that generates high profits which they are not willing to relinquish. And because of the hopelessness and despair that fester in the Black community, they have more than a sufficient number of consumers to support this lucrative enterprise.” USENI EUGENE PERKINS, *EXPLOSION OF CHICAGO’S BLACK STREET GANGS: 1900 TO THE PRESENT* (1987).

8. Mark Hornung, *Sound Bites Don’t Prevent Crime*, CHICAGO SUN-TIMES, Oct. 19, 1994, at 41, quoting John J. DiIulio, Jr., the political science professor at Princeton University who reveals to the police what victims of crime have known far too long:

The pathology of violence in America is mainly black-on-black crime. America does not have a crime problem; inner city America does. . . . Crime in America is predominantly intraracial, not interracial. More than 80 percent of violent crime committed by blacks are against blacks, and more than 73 percent of violent crime committed by whites are against whites. Violent crime is of epidemic proportions in urban areas, while things haven’t changed all that much elsewhere. . . . From 1987 to 1989, the average rate of crime victimization among urban residents was 92 percent higher than among rural residents, and 56 percent higher than among suburban residents.

Crime in America is predominantly intraracial, not interracial.

*Id.*

9. An excellent start is found in Rosado Caleb, *America the Brutal; Violence in America*, 38(9) CHRISTIANITY TODAY, Aug. 15, 1994, at 20.

10. See generally HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* (1968).

In the 1960s, freedom from abusive police lawlessness was a paramount concern of black communities, and their causes were ably taken up by civil rights leaders united in their stand against the enemy from without. In the 1990s, freedom from plain lawlessness is of paramount concern. If the cause of black-on-black crime is being taken up by civil rights leaders at all today, it is not being done ably and this is mainly, so it seems, because the enemy is within.<sup>11</sup>

Re-examining the balance between due process and crime control requires discussion of several preliminary issues, which ought to be considered simultaneously, but can only be discussed sequentially. First, as alluded to earlier, there is the question of honestly discussing a problem afflicting black America without becoming mired in racism, either in outcome or by assumption, polite or otherwise.<sup>12</sup> Second, there is a call for the black intelligentsia and other concerned Americans to approach the problem of crime without becoming mired in the tried and untrue social liberalism of the past, but instead to engage the problem openly and critically. Third, in light of the suffering visited on black communities by criminal violence and increasingly integrated and educated police forces, there must be a willingness in the black community to re-think knee-jerk objections to the efficacy of the stop and frisk technique—the primary police method for controlling street confrontations.

Consider the plight of blacks, especially in the urban criminal setting. The proliferation of gang and drug related violence in urban America makes the time ripe to consider such a proposal.<sup>13</sup> “Gangs have turned America’s inner-city streets into a war zone. The rising death toll, commonly blamed on the drug trade, probably owes more to the spread of powerful guns. But teenage nihilism may be the most lethal factor of all.”<sup>14</sup>

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11. Louis Farakhan, though largely considered extremist by mainstream media, has a long established reputation especially among younger blacks, for his opposition to drugs and violence. See James Popkin, *Propagandists or Saviors?*, U.S. NEWS & WORLD REPORT, Sep. 12, 1994; Clarence Page, *Should the CHA Turn For Security to the Nation of Islam*, CHI. TRIB., Feb. 16, 1994, at 16. A more recent and mainstream black leader, and certainly the most surprising in his willingness to deal openly with black-on-black crime, is the Reverend Jesse Jackson. The Reverend Jesse Jackson, among others, has made black-on-black violence his new crusade of the 1990s. The Reverend Jesse Jackson noted: “There is nothing more painful to me at this stage in my life than to walk down the street and hear footsteps and start thinking about robbery. Then look around and see somebody white and feel relieved . . . . After all we have been through. Just to think we can’t walk down our own streets, how humiliating.” *New Frontier; Jesse Jackson Calls It Top*, CHICAGO SUN-TIMES, Nov. 29, 1993, at 4. See generally, Clarence Page, *Jesse Jackson’s “Bad Black Brother,”* THE BALTIMORE SUN, Jan. 11, 1994, at 9A; Elizabeth Gleick, *Stand and Deliver*, PEOPLE, Apr. 11, 1994, at 97; Fen Montaigne, *Aghast at Black-on-Black Violence, Jesse Jackson Raises a Voice of Eloquence Against Crusade Against Crime*, NEWS TRIB., Jan. 30, 1994, at D2.

12. See E.N. Carpenter II, *Race to Catastrophe: Some Reflections on the Race Problem and Racism*, 60(16) VITAL SPEECHES, June 1, 1994, at 498; Chuck Rasch, *Can Social Problems be Solved in a Politically Correct Way*, Gannet News Service, Jan. 6, 1994, Thursday; Richard Cohen, *Common Ground on Crime*, WASH. POST, Dec. 21, 1993, at A23.

13. In newspapers, on television, and in rap music, gang culture has merged into popular culture. Two infamous Los Angeles gangs, the Bloods and the Crips, are household names across America. In the cities they are also a source of unremitting fear. Behind the grim images lie grim statistics. Called everything from “crews” (in Washington, DC) to “posses” (in Raleigh, North Carolina), gangs operate almost everywhere bar the smallest towns—and there, too, sometimes. A survey by the National Institute of Justice in 1992 found that the police knew of nearly 5,000 gangs with 250,000 members in America’s 79 largest cities. THE ECONOMIST, Dec. 17, 1994, at 21.

14. *Id.* at 21.

Ending gang violence, which exploits teenage nihilism and is fueled by the drug trade, is the driving concern here. These are matters of individual responsibility for a concerned citizenry. "Since the late 1800s teenagers (usually poor male immigrants) have banded together in America's cities to act tough and fight over turf. But where gangs were once regarded with a certain vague romanticism—think of "West Side Story"—they now inspire an appalled fascination."<sup>15</sup> For several sweltering days in the summer of 1994, all America could talk about was Robert Sandifer. A member of one of Chicago's notorious street gangs, the Black Disciples, Sandifer was suspected of having sprayed bullets from a semi-automatic pistol into a group of teenagers on the city's poverty stricken South Side. One young girl was killed. Days later, so was Sandifer—by his own gang. What shocked the country was the fact that Sandifer, a twenty three-times convicted felon, was only eleven years old.<sup>16</sup>

An editorial appearing on the pages of the Pittsburgh Post-Gazette put the problem in a most appealing perspective:

While the voters and the candidates are riveted by the topic of crime and punishment, almost no one is talking about the underlying issue—a generation of young men, overwhelmingly young black men, murdered or imprisoned.

The drug and gun wars that have turned the streets of many urban neighborhoods into free-fire zones is lethal, but, in general, contained. Yet candidates trip over each other to reinforce the false premise that all Americans are increasingly in danger.

According to the federal Bureau of Justice Statistics, the rate of violent crime in the nation is about identical to what it was 20 years ago when statistics were first gathered. The rate of theft is down 35 percent since that time and the rate of burglary is down 47 percent.

Most Americans—contrary to popular belief—are statistically a little safer than they used to be. But for one group of citizens, the opposite is true.

The violent-crime rate among young black males is at a peak. The homicide rate among all young men aged 15-19 more than doubled between 1985 and 1991. Men aged 20-24 suffered the highest homicide rates, while men aged 15-34 account for half the homicides committed. Black men make up a disproportionate share of all those victim groups.

But the drug and gun wars are not just claiming lives, they are claiming lifetimes. Prisons are overflowing. The number of inmates recently topped 1 million. For every 100,000 U.S. residents, 373 are imprisoned. That is up from 139 per 100,000 residents less than 15 years ago and puts the United States just behind Russia in the rate of incarceration.

And guess what? The inmates are, proportionately, overwhelmingly black. At the end of last year, 1,432 blacks out of every 100,000 blacks were in prison—more than seven times the 203 white inmates for every 100,000 whites.

Thus it is no exaggeration to suggest that an entire generation of young black men—those in the impoverished inner cities, in particular—are in danger of being lost. When you add up the cost of the crime, the expense of criminal justice, the price tag of incarceration and the loss of human resources to commu-

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15. *Id.*

16. *Id.*

nities across the nation, it's clear that this is a bill that the nation cannot afford to keep paying.

Disputes will continue over the relative value of prevention programs—pumping money into education, job training, recreation, drug treatment, family support services and the like. We believe that such programs have merit, but their effects are best measured in the long term.<sup>17</sup>

Bacons from distant, but opposing, horizons search out very different solutions to the problem of black-on-black crime. From the right, the spotlight shines on individual character; from the left it shines the spotlight on government character. The solution from the left is to invoke government intervention to eliminate the so-called root causes of crime and thereby eliminate crime itself. The solution from the right, spotlighting the traditional folklore of American success, emphasizes individual accountability. Social conservatives operate thus from a paradigm which incorporates industry and hard work,<sup>18</sup> pioneering spirit,<sup>19</sup> and intelligence or know-how.<sup>20</sup> Social liberals for their part, de-emphasize individual accountability and propound such ideas as relaxation of the drug laws<sup>21</sup> or redistribution of income to fund government social programs such as midnight basketball.<sup>22</sup> Social conservatives argue that attacking moral decay<sup>23</sup> and empowering individuals to provide for their own needs in accordance with

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17. PITTSBURGH POST-GAZETTE, Nov. 4, 1994, at B2 (Editorial) (reprinted with permission per telephone discussion with Mr. John Allison, Editorial Department). Similar comments inundate the editorial pages of newspapers across America. See e.g., Bob Herbert, *In America; A Sea Change on Crime*, N.Y. TIMES, Dec. 12, 1993, at A15; Mike Littwin, *Forget About Blame: Black-on-Black Crime Begs for Solutions*, THE BALTIMORE SUN, Jan. 11, 1994, at 1D; Dero Murdock, *Taking Crime Seriously in the Black Community*, WASH. TIMES, Jan. 13, 1994, at A21.

18. Esteem for hard work or industry is "embedded in our folklore, myths and legends." In her Wall Street Journal article (April 6, 1993), Lynne Cheney, the former chairman of the National Endowment for the Humanities under the Bush Administration, and now a fellow of the American Enterprise Institute, argued that hard work was a core traditional American value. She wrote that clergyman and writer Parson Weems, one of our nation's most effective myth makers, gave us not only George Washington, the child who refused to lie, but also the man who worked from dawn to dusk. "Neither himself nor any about him," wrote Weems, "were allowed to eat the bread of idleness." Our earliest immigrants noted how central the idea of hard work was to America. Jean de Crevecoeur wrote in 1782: "We are all animated with the spirit of industry which is unfettered and unrestrained." In 1840, the French historian Alexis de Tocqueville observed that in America, "to work is the necessary, natural, and honest condition of all men."

19. An excellent example of pioneering spirit is Harriet Tubman, who was born into slavery in Maryland, worked involuntarily as a field hand, and married a fellow slave involuntarily. She escaped and became the lead conductor of the Underground Railroad, through which fugitive slaves traveled North to freedom. Tubman rescued some 300 slaves, including her parents. SARAH BRADFORD, *HARRIET TUBMAN: THE MOSES OF HER PEOPLE* (1886).

20. America has proven fertile ground for can-do intelligence. Perhaps the best example is presented by the creative genius of Dr. George Washington Carver, scientist, botanist, chemurgist, educator, and 20th century statesman, who brought agricultural reinvigoration to the post-Reconstruction South. He recommended the planting of peanuts and sweet potatoes to enrich the soil and then discovered more than 300 by-products for the peanut and 118 by-products for the sweet potato. LINDA O. McMURRAY, *GEORGE WASHINGTON CARVER: SCIENTIST AND SYMBOL* (1981).

21. Kurt L. Schmoke, *An Argument in Favor of Decriminalization*, 18 HOFSTRA L. REV. 501, 506 n. 25 (1990). Mayor Schmoke also recommends *inter alia* "[i]nstit[uting] a clean needle exchange program as a way to reduce the spread of AIDS." See *Legalization of Illicit Drugs—Impact and Feasibility, Part I: Hearings Before the House Select Comm. on Narcotics Abuse and Control*, 100th Cong., 2d Sess. 190, 204-205 (1988) (testimony of the Honorable Kurt L. Schmoke, Mayor of Baltimore).

22. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 30701.

individual needs and abilities will reach the desired result of "equality" faster, if it is to be reached at all. For social conservatives, the root cause of crime is criminals—people who turn to crime not for lack of opportunities or upward mobility, but because they lack moral fiber.<sup>24</sup> As noted at the outset, nihilism, especially among teenagers, appears to be at the core of the disintegration of American society. In contrast, social liberals look to government intervention to bring about broad notions of "equality" and thereby eradicate the root causes of crime.

It should come as no surprise that social liberals and social conservatives are concerned about the same social phenomena and with the same degree of compassion. The difference between the two camps comes in how they identify the specific problem to be acted upon: government intervention versus individual accountability. A middle ground could be fashioned if, on the one hand, social conservatives would affect less disinterest in the unhealthy aspects of too much dissonance between the "haves" and "have nots", and if on the other hand, and far more importantly, social liberals would bring into their discussion, the role that the individual must necessarily take in bettering his own lot.<sup>25</sup> While there is much that government is willing and may be able to do, what makes society viable and frees people is individual accountability. If personal freedom and personal responsibility are not interchangeable with government restraint and government responsibility, they are as different as liberty and tyranny.

In the area of black-on-black crime, where the spotlight all too often illuminates more with heat than with light, comes now the question: Which way now? Is it back to basics and the tenets of social conservatism or should blacks, like the fictional lemmings in movie land, continue the mad rush over the cliff of social liberalism? As it concerns the plight of black folks, government redistribution of income to ameliorate the root causes of crime may have some allure. After all, blacks through a century of slavery and beyond have contributed in many ways to America's great material wealth.<sup>26</sup> But the central question, largely unexamined by many of the black intelligentsia, is which holds out the greater promise for the advancement of blacks: continued reliance on government social engineering,

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23. George F. Will, *Failure to Nurture the Moral Sense Led to Today's Dark and Bloody Ground*, ATL. J. & CONST., Dec. 16, 1993, at A18.

24. Even the Reverend Jesse Jackson is quoted as saying, "[black-on-black] killing is not based upon poverty; it is based upon greed and violence and guns . . . [it is] a product of spiritual surrender, ethical collapse and degenerative self-hatred." Mike McManus, *One Hundred Churches in One Hundred Cities*, THE BALTIMORE SUN, Jan. 21, 1994, at 17A.

25. Give a man a fish and you feed him for a day. Teach a man to fish and you feed him for life. The adage contrasts self-entrepreneurial productivity with the welfare state.

26. Thus, Dr. Martin Luther King, Jr. used a particularly apt analogy when he said:

We've come here today to cash a check. When the architects of our republic wrote the magnificent words of the Constitution . . . they were signing a promissory note to which every American was to fall heir . . . Instead of honoring this sacred obligation, America has given the Negro people a bad check . . . [But] we refuse to believe that there are insufficient funds in the great vaults of opportunity of this nation.

Dr. Martin Luther King, Jr., *I Have A Dream, Keynote Address of the March on Washington, D.C. for Civil Rights* (Aug. 28, 1963), in A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR. 217 (James M. Washington ed., 1986) (hereinafter *Keynote Address*); Martin Luther King, *I Have a Dream, Washington, D.C.* (Aug. 28, 1963) in 1 ENCYCLOPAEDIA BRITANNICA EDUCATIONAL CORP., THE NEGRO IN AMERICAN HISTORY 175 (1969).

which rewards those chosen in the back corridors of government, replete with ulterior motives and hidden agendas; or free market principles which rewards and punishes individual character on the basis of merit or the lack thereof? When the question is plainly put, so too can the answer be plainly put. Free of government condescension, free of value-laden government coercion, free of oppressive, and counter-productive income redistribution, blacks will make up lost ground far more quickly on their own in the marketplace than in fighting for government relief or social reparation. Not only will blacks be empowered by their own success, self-made success has no strings attached.<sup>27</sup> Finally, America will be so much the better for reversing the trend in this country toward balkanization and the political quagmire of victimization, real or imagined.<sup>28</sup> This also means that black criminals cannot hide behind the assumption of racism. If blacks are to stand in the spotlight, black criminals cannot stay in the shadows.

It is not too much to say that the single most destructive force preventing the black community from achieving success today is so-called "benign racism."<sup>29</sup> Benign racism as practiced by self-serving, aggrandizing politicians and academicians has a negative impact of immense magnitude.<sup>30</sup> The condescending practice of benign racism, like the attitude of "romantic paternalism," which "put women, not on a pedestal, but in a cage,"<sup>31</sup> enslaves rather than sets blacks free.<sup>32</sup> Liberals misread the lesson of history when they endorse racial discrimination, but in reverse. The true lesson of racism in this country is that racial discrimination itself is bad. Given the history of racial discrimination, it is hard to imagine why blacks would trust the same government that discriminated against blacks to continue to practice racial discrimination only this time *ostensibly* on behalf of blacks.<sup>33</sup> This blind faith in a benevolent government is all the more incomprehensible once considered against the backdrop of the realistic shortcomings of government—a lack of wisdom, a lack of detached neutrality, and a lack of

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27. "Even Jesse Jackson, long bemoaning the 'victimization' of his people, . . . has started speaking sensibly of personal black responsibility." Ken Adelman, *A Possible Cure for Urban Violence*, SAN DIEGO UNION-TRIB., Jan. 12, 1994, at B6.

28. Moreover, the study of public policy would be scaled back from the divisive demagoguery pitting class interests against class and returned to its positive roots in political economy, such as utilitarianism, Pareto optimality, and other broad based ethical principles.

29. It is with some trepidation that black conservatives utter this sentiment publicly. See Robert C. Newberry, *Conservative Blacks Will Become More Visible*, HOUSTON POST, April 19, 1994, at A17. As reaction to Supreme Court Justice Clarence Thomas, and economists Thomas Sowell and Walter Williams make plain—"Hell truly hath no fury like that of a liberal scorned." The full quotation from William Congreve's play, "The Mourning Bride," Act III, Scene 8, is: "Heaven hath no rage like love to hatred turned, nor hell a fury like a woman scorned."

30. The political resurrection of Malcolm X may reflect a realization that except for a few middle income blacks, the policies of social liberalism do not benefit black America, and more importantly may precipitate a complete re-examination of the state of black Americans. Ronald K. Fitten, *X = A Symbol of Frustration and Hope—Can Blacks fill a Leadership Void by Looking Back*, SEATTLE TIMES, Nov. 15, 1992, at A1.

31. *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (plurality opinion) (discussing gender inequality).

32. Dr. Martin Luther King spoke with uncanny prescience, lost upon affirmative action racists, when he talked about his dream where all God's children are judged by the character of their minds and not the color of their skin. *Keynote Address*, *supra* note 26, at 217.

33. As Adlai Stephenson is quoted as saying, "a liberal is a guy who will lynch you from a lower branch." *Charlie Rose Interview of Mort Sahl*, Transcript #1090-3, Apr. 7, 1994, available in LEXIS, News Library, Current News File.

technical competence. One thing is certain: government social programs of social liberalism, such as midnight basketball, are not the solution to crime.<sup>34</sup> The social liberalism which spawns such programs is factually corrupt, analytically impoverished, and morally bankrupt.

Social liberalism is factually corrupt because it explicitly assumes that blacks, even upwardly-mobile blacks, lack the intelligence, character, and physique to compete in a racially heterogeneous society. While condescendingly down playing the abilities of blacks, social liberalism is all but insufferable in ignoring its own condonation of racist policies, which contribute to a criminal environment, such as sectionalized public housing, watered-down curriculums in public education, crime control containment of mass retail illegal drug sales to the urban underworld, *etc.*

Government programs to ameliorate the so-called root causes of crime spawned by social liberalism are analytically impoverished because the income redistribution schemes of social liberalism penalize good social traits to subsidize bad social traits. The financing of government social programs, a drain on the public trough, constitutes a tax on the productive behavior of law-abiding citizens to subsidize the counterproductive behavior of law violators.<sup>35</sup> Disincentives such as these are downward-spiraling drains on the good society, creating an ever-increasing need for greater, and never-ending, transfers from an ever-decreasing pot. This relationship is one of cause and effect—the nourishing subsidy for such counterproductive behavior is the crushing tax burden which productive behavior is made to bear. It strains credulity beyond the wildest imagination to trust a government value-laden conduit, through which flows resources coerced from a group of citizens it knows not, and spent *ostensibly* on behalf of another group of citizens it knows even less.

Social liberalism is morally bankrupt because social engineering, like the judgments of the 'poor' individuals it displaces, necessarily involves the bias of culture and values associated with personality. The irony could hardly be more compelling. A major point in critical legal studies—one of

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34. It is understood that social programs like midnight basketball are merely a proxy for investment in urban America beyond building new prisons. However, taxpayer money is far too precious to even consider in the same breath as such speculative give-a-ways. One possible investment alternative to midnight basketball might be a federal and state tax break in the inner city to help lure an infusion of private sector jobs, of the early to bed and early to rise variety, and which, unlike recreation programs, boasts a track record in helping to make people healthy, wealthy, and wise during the depression.

35. The debate on redistribution of income or wealth is well-worn. One incontrovertible downside to income transfers is that for all the innate fairness interventionists associate with equality in enjoyment of the fruits of labor, it is undeniably true that inequality reigns in the production of those fruits. Thus, regardless of how small or urgent the redistribution of fruits, redistribution unavoidably creates economic disincentives in the production of such fruits—diminish the rewards of labor and you diminish the productivity of labor. This means that income transfer comes at the expense of producing less income. The other side of the equation is that the recipients of the income transfer will get the fruits of labor without trading on productivity. If the reason why such recipients have no productivity on which to trade is that they voluntarily engage in unproductive behavior; then redistribution also means that productive behavior is penalized to reward unproductive behavior. It is conceivable that a society that valued some measure of equality in sharing the fruits of labor might be willing to accept a smaller pie to achieve a so-called equitable distribution as well as the disincentives such distribution necessarily entails. The political question is whether such a trade-off is worthwhile given that the distortion in economic incentives only worsens the *a priori* arrangement even as it shrinks the pie to be redistributed.

the key intellectual forces reinvigorating social liberalism—is the recognition that while law may be intrinsically objective, it is from its inception and throughout its implementation, designed to accommodate the bias of the dominant culture and the values associated with powerful, prominent personalities in society.<sup>36</sup> Yet, the solutions of social liberalism invariably comprise grand schemes to use the government to replace traditional values which flourish in the free marketplace of ideas, with a forced indoctrination of alternative values. Such alternative values may very well resonate with a generation lost to sex, drugs, and rock and roll, but they have no more to do with the true concerns of the disaffected than the refrain of Marie Antoinette to “let them eat cake.”<sup>37</sup> True progressive policies for today’s poor would mirror the policies by which the poor have always progressed: not hedonism, but moralism; not government programs, but entrepreneurship; not social engineering, but free market opportunity. Today, people, black as well as white, reject state-mandated values and bias for they mark a gross departure from democratic principles and the primacy of individuality, the crown jewels of Western civilization.<sup>38</sup>

In the 1960s, during the heyday of the Warren Court, Americans waged a civil rights revolution. As voting and freedom from state enforced discrimination became a reality for blacks in the 1960s, oppressive law enforcement, composed of white cops transported like an occupational army into black communities across the country, threatened the upward mobility of blacks and made social malaise manifest. In the 1990s, the civil rights revolution is history, and the problem for black communities comes from within.<sup>39</sup> Black culture is on the verge of imploding because of the inner

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36. Ironically, critical legal studies and its offshoots recognize the bias and value judgments in the traditional or majoritarian structure, but ignore their own bias and value judgments. Thus, the solution of social liberalism to correct for traditional bias and values is to alter the demographic mix of decision makers to carry on with decisions, ever-paternal and ever-coercive.

37. J. ROUSSEAU, *THE CONFESSIONS*, bk. VI, at 254 (J. Cohen trans., 1953) (recounting the thoughtless saying by a great princess when told that the peasants had no bread, “Well, let them eat cake.”)

38. Of course “freedom” can be explained away as simply a matter definition. One definition speaks to the freedom of choice; the second speaks to the freedom from choice. Armen A. Alchian and William R. Allen, two University of California at Los Angeles economists, call this “freedom as you like it.” ALCHIAN & ALLEN, *EXCHANGE & PRODUCTION: COMPETITION, COORDINATION, & CONTROL* 53 (1983). The definition of freedom hailed by social liberalism is that of subjects of a totalitarian state: “You could say that people in [a totalitarian state] are freer, because they are free—that is, prevented—from undertaking the task of making uninformed choices, which they might later regret. . . .” While the Democratic party, and to a lesser extent the Republican party, continue a headlong plunge to socialism-to-totalitarianism of the sort warned against by Aldous Huxley in *Brave New World* (1942), the post-World War II experience in Eastern Europe, the African and Latin American countries, the former Soviet Union, and now even China and Cuba, gives the lie to the boasts of equality and improved efficacy of the state-run economy. See also F. A. HAYEK, *THE ROAD TO SERFDOM* (1976).

39. It is instructive as one recounts some of the important landmarks in American history to observe how the concerns of black America have changed over time. To take the 60s-90s axis, for consistency sake, consider that in 1460, as serfdom was dying a natural death in Europe, the enslavement of blacks caught on in Portugal. PETER M. BERGMAN AND MORT N. BERGMAN, *THE CHRONOLOGICAL HISTORY OF THE NEGRO IN AMERICA* 1 (1969). But in the 1490s, according to legend, Pedro Alonzo Nino was a black crew member on Columbus’s first voyage to the West. *Id.* at 2. Blacks came to America in chains and by the 1660s, the American colonies had begun to enact laws dealing with slaves. *Id.* at 15. But, by the 1690s, the Quakers had begun to caution against slavery. *Id.* at 22. At end of the 1760s political discontent against the British was brewing and Crispus Attucks, a black man, led a fray against British soldiers, which precipitated

forces flowing from black-on-black criminals involved in illegal drug trafficking and armed with high-tech, explosive weaponry. This threat is no less malevolent because of its self-destructive character. Today average blacks, like their white counterparts, are failed by the liberal policies of political and intellectual institutions of higher learning. There is a chasm of dissonance between the backward looking aims of 1960s social liberalism, and the average person, black or white, with whom traditional values evoke a powerful resonance of meaning. The stark new reality of drugs and violence suggests a new battleground for black survival. Today, the tyranny of concern is less police lawlessness and more just plain lawlessness. There is no need for fidgeting or finesse.<sup>40</sup> Plain lawlessness compels plain solutions.<sup>41</sup>

### III. CONSTITUTIONAL BACKGROUND OF REASONABLE SUSPICION

#### A. *The Fourth Amendment*

The language of the Fourth Amendment has stood for over two centuries as the bulwark of individual freedom from governmental abuses in the execution and design of law enforcement. It expressly provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."<sup>42</sup> The reasonableness clause is purposed to guarantee the privacy, dignity, and security of persons suspected of criminal activity against the arbitrary and invasive acts by state actors even if acting pursuant to the state's interest in enforcing its criminal law mandate.<sup>43</sup>

Fourth Amendment privacy is the analytical concept by which the boundary between individual autonomy and the authority of the state is properly drawn. Justice Brandeis, in his often cited dissent *Olmstead v. United States*, best captured its essence many years ago:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of

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the Boston Massacre; Attucks was the first man killed in the American Revolution. *Id.* at 30. But in the 1790s, with the American revolution barely becoming history, the American black remained a slave and counted, for voting and tax purposes, as only three-fifths of a person. U.S. CONST., Art. I, § 2, par. 3. In the 1860s, in the midst of the American Civil War, President Abraham Lincoln's emancipation proclamation freed the slaves. But during the 1890s, blacks faced legal segregation under *Plessy v. Ferguson*. 163 U.S. 537, 540 (1896) (upholding racial segregation of railroad passengers).

40. *Taking Crime Seriously*, WASH. TIMES, Sep. 7, 1994, at Part A. The black man who mugged a civil rights heroine recognized her, but mugged her anyway. He said "You're Rosa Parks, aren't you?" He then beat her as she lay sprawled on her bed and stole \$53 from her. Police said he needed the money for crack cocaine.

41. An interesting view cautioning against over-reaction to gangs is found in Jeffrey J. Mayer, *Individual Moral Responsibility and the Criminalization of Youth Gangs*, 28 WAKE FOREST L.REV. 943 (1993).

42. U.S. CONST. amend. IV.

43. *Camera v. Municipal Court*, 387 U.S. 523 (1967). See also *Delaware v. Prouse*, 440 U.S. 648 (1979); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976).

rights and the right most valued by civilized men. To protect, that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.<sup>44</sup>

The concept of reasonable suspicion is not found in the wording of the Fourth Amendment. Rather, its constitutional origin owes to the landmark decision of *Terry v. Ohio*.<sup>45</sup> *Terry* upheld the admissibility of evidence found during a brief detention and limited search for weapons, *i.e.*, "stop and frisk."<sup>46</sup> The stop and frisk search based upon reasonable suspicion serves both due process interests in liberty and community interests in security. The concept of reasonableness protects against arbitrary and capricious invasions against the liberty interest of innocent people, while simultaneously providing an appropriate basis for stops and frisk in the interest of preventing crime.

### B. *The Terry Decision*

*Terry* is frequently criticized, at least in its application, by civil libertarians as a law and order-oriented decision. However, Chief Justice Earl Warren, who presided over the greatest expansion of due process rights for criminal suspects in the history of the Supreme Court, wrote the opinion in *Terry*.<sup>47</sup> The decision was a pragmatic compromise between the needs of community security and concerns about police abuse of individual liberty.

In *Terry*, Police Detective Martin McFadden, a street-wise, plain clothes "cop on the beat" on patrol in downtown Cleveland, observed Terry and two other men, repeatedly walk by a store window on Huron at the corner of Euclid Avenue. Detective McFadden had not seen the men before and became suspicious of their overly casual demeanor. It appeared they were casing the store. Detective McFadden approached the three men and asked their names. He feared they might be armed. Detective McFadden spun Terry around and felt a pistol, which he retrieved. Detective McFadden then ordered the three to the store and completed the "pat down" of their outer garments.

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44. *Olmstead v. United States*, 277 U.S. 438, 478 (1932) (Brandeis, J., dissenting) (upholding a warrantless wiretap without the consent of either party), *overturned by Katz v. United States*, 389 U.S. 347 (1967). It is not too much to analogize to George Orwell's *1984*. The story is about a man whose job requires him to re-write history as recorded in newspapers. One day, in his own mind, he wonders about the meaning of life in a totalitarian state. He innocently begins to question authority by secretly keeping a diary and dreaming about love. Both acts defy the established order. Soon he discovers love with the woman of his dreams and they both yearn to be free. Big brother, the state, with watching eyes discovers the insolence of this independence. Big brother takes over the lives of the couple. Like laboratory animals, they are subjected to physical, psychological, and emotional torture until they become human wrecks, completely dependent on the approval of the state to maintain the will to exist.

45. 392 U.S. 1 (1968).

46. In *Mapp v. Ohio*, 367 U.S. 643 (1961), the Supreme Court gave teeth to constitutional prohibitions by adopting the exclusionary rule against evidence obtained by searches and seizures in violation of the Constitution in state courts. The effect of *Terry* was to recognize an exception to the exclusionary rule for evidence found within the proper scope of a "stop and frisk" search based upon reasonable suspicion.

47. *Terry* was an 8-1 decision. Justice William Douglas, concerned about the possibility of police abuse, was the lone dissenter.

At trial the prosecution argued that the seizure of the weapon from Terry was admissible evidence because it was arguably seized following a search incident to a lawful arrest, one of the exceptions to the warrant requirement. The trial court rejected the prosecution's argument, since a lawful arrest is premised upon probable cause, of which a suspicious demeanor alone is not. Appearances alone do not a criminal make. However, the trial court denied the defense motion to suppress on the ground that Officer McFadden, on the basis of his experience, "had reasonable cause to believe . . . that the defendants were conducting themselves suspiciously, and some interrogation should be made of their action."<sup>48</sup> Purely for his own protection, the trial court held, the officer had the right to pat down the outer clothing of these men who he had reasonable cause to believe might be armed.

The trial court made a distinction between an investigatory "stop" and an arrest, and between a "frisk" of the outer clothing for weapons and a full-blown search for evidence of a crime. The frisk, it held, was essential to the proper performance of the officer's investigatory duties, for without it "the answer to the police officer may be a bullet. [A]nd a loaded pistol discovered during the frisk is admissible."<sup>49</sup> Approved at every level of intermediate appellate review on somewhat altered rationales, the Supreme Court ultimately upheld the admissibility of the weapon, returning to the common sense rationale of the trial court.

It is frequently pointed out that McFadden was white and Terry was black and that therefore arguably the stop may have been racially motivated.<sup>50</sup> But the racial hypothesis is obviously not proved simply because it may exist, particularly if the hypothesis of reasonable police work is equally viable. Even so, one might well speculate that if such ostensibly innocent behavior as occurred in *Terry* subjects one to a stop and frisk, then that is reason enough to view any invigoration of the reasonable suspicion concept with a jaundiced eye. "[C]onduct typical of a broad category of innocent people provides a weak basis for suspicion."<sup>51</sup> However, this criticism must be tempered by the realization that law-abiding citizens are distinguishable from criminals and the vast majority of beat cops are able to make such a distinction. Remember that the reasonable standard requires a collective weighing of all the facts and inferences drawn must be demonstrably reasonable, objective and articulable—not mere hunches.<sup>52</sup> Assumptions to the contrary are demeaning, and no less so when embraced by those claiming to speak out against racial prejudice. The truth of the matter is that a good many law enforcement officers are motivated to en-

48. *Terry*, 392 U.S. at 8.

49. *Id.*

50. See, e.g., David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 IND. L.J. 659 (1994); Alexander E. Eisemann, *Addressing the Pretext Problem: The Role of Subjective Police Motivation in Establishing Fourth Amendment Violations*, 63 B.U. L. REV. 223 (1983); Marcell Solomon, *Project: District of Columbia Court of Appeals Project on Criminal Procedure: III. Search and Seizure*, 27 HOW. L.J. 745 (1984); Gregory Howard Williams, *The Supreme Court and Broken Promises: The Gradual But Continual Erosion of Terry v. Ohio*, 34 HOW. L.J. 567 (1991).

51. *United States v. Crawford*, 891 F.2d 680, 681 (8th Cir. 1989).

52. *Reid v. Georgia*, 448 U.S. 438 (1980) (*per curiam*).

force the law, rather than to harass, and so too, a good many blacks are law-abiding citizens.

Can the racial hypothesis seriously replace the hypothesis of sound police work in the case of *Terry*? It is interesting to reconstruct Officer McFadden's thought process to see whether it reflects reasonable, necessary law enforcement work or mere prejudice and caprice. Let us collect and weigh of all the facts and inferences drawn to see whether they demonstrate reasonableness of an objective and articulable nature or mere hunches. Consider first, three men, new to the neighborhood, walking back and forth before a store, without any apparent interest in making a purchase. One might innocently walk back and forth before a store window trying to decide whether to buy an item featured in the window, or to catch the eye of a store clerk inside or to preen before the window, or even just to idly past the time, while perhaps deep in thought. But reasonable, objective evidence separates such innocence from what happened in *Terry*. In *Terry* there were three men who were new to McFadden's patrol beat, a beat he had walked for some thirty years. Newness was a relevant factor. One can be in one's own neighborhood or usual haunts without having a particular reason. However, people go to a new place for a reason. What was the reason? Because Terry walked back and forth before the store window, it was rather an obvious deduction to say that the store itself was the reason for their presence. Thus, the store window was the second relevant factor. Yet they did not go into the store as a shopper might. The number of men was the third relevant factor because it suggests that their reason required three men, whose collective resources, ingenuity, and morale would increase their likelihood of success.<sup>53</sup> Finally their overly casual demeanor suggested a desire to hide their true reason. While these circumstances certainly do not foreclose all innocent objectives by any means, they certainly support a reasonable conjecture about a likely criminal objective. Waiting for more obvious indicia of criminal activity would limit crime prevention to only the most obvious and open criminals. The armchair theorist in the comfort of a politically correct womb may be willing to wait for more compelling evidence of crime, but the shopkeeper and his or her customers on the scene whose lives and property depend on their wits would probably evaluate the risks with more meaningful intensity.

### C. *The Reasonable Suspicion Standard*

In validating the admissibility of weapons seized during stop and frisk police procedures on the basis of reasonable suspicion, the Court in *Terry* explicitly recognized that crime prevention, not just its apprehension, is a constitutionally legitimate role for law enforcement. Whether in its appre-

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53. A common law misdemeanor formulated by the English Star Chamber in the *Poulterers Case*, 77 Eng.Rep. 813 (1611), conspiracy is a combination by two or more persons to accomplish a criminal or unlawful act, or to do a lawful act by criminal or unlawful means. The conspiracy to commit the object offense is a separate offense from the object offense. The gravamen of the offense of conspiracy is the dangers of concerted activity, which are three in number: namely, 1) resources; 2) efficiency; and, 3) planning and encouragement. See *United States v. Feola*, 420 U.S. 671 (1975). The two independent values served by prohibiting conspiracy apart from the objective offense are the protection of society from the dangers of concerted activity, and the inchoate nature of the crime of conspiracy, which allows for earlier police intervention.

hension or prevention, police response to crime is fraught with the same two risks. First, involuntary street confrontations of criminal suspects involve an inherent danger to life, limb, and property of innocent bystanders as well as to those of law enforcement personnel. Second, speaking to human frailty and inevitable prejudice of police officers, there is the danger of trampling individual liberty and crushing of human spirit.<sup>54</sup> Thus, the Court's task in *Terry* was to devise a constitutionally acceptable standard enabling law enforcement personnel to disarm suspects at the outset of a confrontation while maintaining the Warren Courts' historic concern for eradicating police harassment and arbitrary and capricious invasions of personal liberty. The "stop and frisk" search based upon reasonable suspicion met this challenge.

In *Terry*, the Court found constitutional justification for the reasonable suspicion standard despite the absence of textual support in the Fourth Amendment by virtue of the limited focus of the search. First, the frisk is singularly premised on safety. Unlike an all-encompassing search for evidence permitted on the basis of probable cause, the stop and frisk search is limited to a search for weapons only. Therefore the stop and frisk is limited in scope to items in the outer garments that feel like a weapon, and is limited in time to a brief pat down. The search may be expanded to contraband found during the course of the weapons search only on the basis of plain feel.<sup>55</sup>

The Court in *Terry* endorsed the common sense holding of the Ohio trial court. It simply did not make sense to ignore the subtle, streetwise reasoning of the cop on the beat in detecting crime before it occurred, as long as such reasoning consisted of articulable, objective, rational inferences as opposed to mere hunches and stereotypes expressive of insidious bias against certain targeted groups.

#### D. *Constitutional Underpinnings of the Reasonable Suspicion Standard*

Prior to the landmark case of *Camara v. Municipal Court*,<sup>56</sup> express Fourth Amendment terms such as "cause" and "search" were considered to be monolithic. "Probable cause" had a single meaning, and "searches" and

54. Justice Douglas was at pains to observe as much when he bluntly assailed "... the casual arrogance of those [law enforcement personnel] who have the untrammelled power to invade one's home and to seize one's person." *Mapp v. Ohio*, 367 U.S. 643, 671; *reh'g denied*, 368 U.S. 871 (1961) (Douglas, J., concurring).

55. In *Minnesota v. Dickerson*, 113 S. Ct. 2130, 2135-39 (1993), the Court adopted a "plain feel" exception to the Fourth Amendment's warrant requirement for the seizure of contraband in the context of a *Terry* search. Specifically, the Court held that police officers could seize non-weapon contraband, detected during a protective pat-down search of the sort permitted by *Terry*, so long as the search stayed within the bounds delineated by *Terry*. *Id.* at 2136 (adopting the "plain-feel" exception but deciding that police officer's search exceeded *Terry*'s bounds and seizure unlawful because contraband not immediately apparent). In *Terry*, the Court held that a police officer can, on the basis of reasonable suspicion, conduct a pat-down search to determine if the person is carrying a weapon. 392 U.S. at 24, 30. This search, however, is not meant to discover evidence of crime; it is limited to that which is necessary to discover weapons. *Id.* at 26. If the search goes beyond what is necessary to determine if the suspect is armed, then it is no longer valid under *Terry*, and its fruits must be suppressed. *Sibron v. New York*, 392 U.S. 40, 65-66 (1968) (handed down the same day as *Terry*).

56. 387 U.S. 523 (1967).

“seizures” were all-or-nothing concepts.<sup>57</sup> *Camara* cracked the monolith by recognizing a different form of probable cause applicable to administrative searches (such as inspections for housing or fire code regulations) that did not require individualized suspicion.<sup>58</sup> Under *Camara*, inspection searches are conducted not with the suspicion that any one given individual may be in violation of the law, but rather as a way to ensure compliance with administrative regulations. The *Camara* search was based on a general standard of reasonableness, which unlike “stop and frisk,” has textual support in the Fourth Amendment. The Court evaluates reasonableness by reference to a balancing test in which the competing interests of individual privacy and crime control are weighed against each other.

*Terry* broke the monolith entirely by recognizing a limited search for weapons on the basis of reasonable suspicion.<sup>59</sup> The import of *Terry* is that it transported *Camara*’s “reasonableness” balancing test from the realm of administrative searches to traditional criminal investigations, and used it to determine the reasonableness of a warrantless search and seizure, rather than to merely define probable cause. *Terry* is important for establishing two distinctions in Fourth Amendment jurisprudence. First, *Terry* recognized that both searches and seizures can vary in their intrusiveness. The *Terry* search is a limited search, a frisk outside of outer garments. It is limited to a pat down feel for weapons. Second, *Terry* recognized a “cause” based on “reasonable suspicion,” a lesser standard of cause than “probable cause.” Reasonable suspicion requires articulable, objective facts, but gives appropriate credence to subtle reasoning based on experience and police training.

Properly understood, *Terry* is a plus both for libertarians concerned about due process of law as well as for communitarians concerned about crime control. It is a plus for crime controllers because it validates a crime prevention role for law enforcement and gives the cops constitutional approval for police methods apropos for this purpose; namely, the “stop and frisk” technique. It is a plus for due processors because it brings Fourth Amendment analysis to bear on everyday police encounters with the general population and limits the admissibility of evidence obtained from those encounters to reasonable invasions. As Justice Harlan noted in his concurring opinion in *Terry*, the initial question in the stop and frisk technique is not whether the frisk was reasonable, but whether the cop was reasonable in stopping the individual to conduct an impromptu investigation in the first place.<sup>60</sup> In short, all *Terry* holds is that where there is objectively reasonable suspicion that violent criminal activity is afoot, the police may close in, investigate, and in the interest of safety, conduct a limited weapons search to disarm the suspect pursuant to an on-the-scene investigation. Moreover, methodology such as this is appropriate for members of criminal street gangs.

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57. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE 185-88 (1991).

58. *Id.*

59. *Id.*

60. *Terry*, 392 U.S. at 1, 32-33 (Harlan, J., concurring).

### E. *Extensions of Terry*

Almost immediately after the Court handed down *Terry*, the lower courts, with virtually routine affirmance by the Supreme Court, began the work of shaping the contours of "stop and frisk." In so doing, they extended *Terry* beyond its original fact pattern and indeed, perhaps beyond its reasoning as well. Thus, much of the factual predicates and fine reasoning of *Terry* no longer have dispositive significance for stop and frisk. In consequence, no modern analysis of the appropriateness of new applications for *Terry* makes sense without exploring the scope of stop and frisks as broadened under the progeny of *Terry*.

First, *Terry* emphasized the personal experience of Officer McFadden to determine what facts were significant in finding reasonable suspicion: "It would have been poor police work indeed for an officer of 30 years experience in the detection of thievery from stores in this same neighborhood to have failed to investigate [Terry's] behavior."<sup>61</sup> However, the Court has allowed that an officer's observations may properly be supplemented by "consideration of the modes or patterns of operation of certain kinds of lawbreakers."<sup>62</sup> The fact that a suspect's behavior and appearance conforms to a drug courier profile does not by itself constitute "reasonable suspicion," but it does have evidentiary significance.<sup>63</sup> In addition, the Court has allowed a finding of reasonable suspicion upon hearsay information obtained from an informant.<sup>64</sup> In *Michigan v. Long*,<sup>65</sup> the Court ex-

61. *Terry*, 392 U.S. at 23.

62. *United States v. Cortez*, 449 U.S. 411, 418 (1981), *reh'g denied*, 455 U.S. 1008 (1982). Similarly, membership in a criminal street gang in effect invokes the profile methodology to support a finding of reasonable suspicion.

63. *United States v. Sokolow*, 490 U.S. 1, 7-8 (1989); *Reid v. Georgia*, 448 U.S. 438 (1980) (*per curiam*) (holding that an officer lacked reasonable suspicion to detain a suspect in an airport who fit a drug profile in that he: 1) arrived from a "drug source" city; 2) arrived early in the morning when law enforcement activity is reduced; 3) appeared to conceal the fact that he was travelling with another person; and, 4) had no luggage except for shoulder bags. The Court stated that except for factor 3, the factors described a large number of innocent travellers. The Court disposed of the furtive conduct by noting that the officer's suspicion was no more than an "inchoate and unparticularized hunch." In *Florida v. Royer*, 460 U.S. 491 (1983), the Court upheld detention of an airport traveller based upon reasonable suspicion where Royer: 1) travelled from a major drug source city; 2) paid for ticket in cash with a large sum of small bills; 3) travelled under an assumed name; and 4) appeared to be nervous.

64. *I.N.S. v. Delgado*, 466 U.S. 210, 217 (1984) held that all that is required to justify a *Terry*-level search or seizure is "some minimal level of objective justification." The Court has stated that the "reasonable suspicion" standard cannot be "readily, or even usefully, reduced to a neat set of rules." *United States v. Sokolow*, 490 U.S. 1, 7 (1989) (*quoting* *Illinois v. Gates*, 462 U.S. 213, 232 (1983)). Instead, the justifiability of a *Terry*-type seizure or search, as with probable cause, must be evaluated on the "totality of the circumstances - the whole picture." *United States v. Cortez*, 449 U.S. 411, 417 (1981), *reh'g denied*, 455 U.S. 1008 (1982). Reasonable suspicion, as with probable cause, may be based in whole or in part on hearsay. Reasonable suspicion requires a lesser quantum of evidence and lesser reliability than probable cause. *Alabama v. White*, 496 U.S. 325, 330 (1990). The same two factors of knowledge and veracity apply in a *Terry* context, but a lesser showing is required to meet that standard. *Id.* at 329. The veracity prong is discussed in *Adams v. Williams*, 407 U.S. 143 (1972), where the Court sustained a *Terry* stop and frisk based in part on an informant's personal tip that would not have justified an arrest or a search based on probable cause. The knowledge prong is discussed in *Alabama v. White*, where the Court held that an anonymous tip by itself was insufficient to justify a forcible stop of defendant as the caller provided no basis for knowledge and, being anonymous, provided no basis for verification either. However, the Court upheld the forcible stop because the police corroborated various aspects of the anonymous tip.

tended *Terry* to a weapons search of the passenger compartment of an automobile stopped during a lawful investigation of its driver. In *Maryland v. Buie*,<sup>66</sup> the Court held that incident to an arrest of a person in a residence, the police may automatically, *i.e.*, without additional probable cause or reasonable suspicion, conduct a protective sweep of "spaces immediately adjoining the place of arrest." A protective sweep of a residence is a quick and limited search of a premises, incident to an arrest and conducted to protect the safety of law enforcement officers or innocent bystanders. It is narrowly confined to a cursory visual inspection of those places in which a person may be hiding.<sup>67</sup>

Second, *Terry* dealt with the government interest in "crime prevention and detection."<sup>68</sup> But in *United States v. Hensley*,<sup>69</sup> the Court held that a *Terry*-level seizure is also permitted to investigate a crime already committed. However, a seizure that is reasonable in the crime prevention context will not necessarily be permissible in the crime investigation setting. The factors that go into the *Terry* balancing inquiry are not the same as for a probable cause determination, *i.e.*, exigent circumstances and convenience. There is a government interest in the not so subtle purpose of H.R. 4441 to disarm criminal street gangs, which must be balanced against Second Amendment rights.

Third, *Terry* made repeated reference to the risk of armed violence in street encounters, and, indeed, the frisk search theoretically is a search limited in scope to weapons and not a general search for evidence. Strictly speaking, the Court has not ruled on the use of *Terry* in misdemeanors or non-violent crimes. However, the Court passed over without comment the decreased likelihood of finding a weapon during an airport frisk in *Florida v. Royer*.<sup>70</sup> There is even the suggestion that because fingerprinting is a less serious invasion, a suspect may be transported to the police station and briefly detained for fingerprinting on the basis of probable cause.<sup>71</sup> While not all criminal street gangs are routinely motivated to engage in armed violence, it is not surprising that most become involved in armed violence simply due to their armed presence during even relatively minor criminal activity.

Fourth, significant facts under *Terry*, of which the courts should be mindful, are the duration of the detention, whether there is forcible movement of the suspect, and whether "less intrusive means" exist. *Terry* involved a brief detention of a few minutes before Officer McFadden found the weapons, which then justified the arrest. The Court has predicated the justifiability of a seizure on less than probable cause in substantial part on

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65. 463 U.S. 1032, 1049-1050 (1983).

66. 494 U.S. 325, 332 (1990).

67. This is not to say that the Court has sounded retreat on its rejection of the so-called 'compact exception' in *Ybarra v. Illinois*, 444 U.S. 85 (1979). *Buie* suggests that a pat down of persons found in the immediate area of an arrest, who are not the subject of the arrest, would require reasonable suspicion that the individuals were armed and dangerous.

68. *Terry*, 392 U.S. at 22.

69. 469 U.S. 221 (1985).

70. 460 U.S. 491 (1983).

71. *Hayes v. Florida*, 470 U.S. 811, 816-17 (1985).

the brevity of the detention.<sup>72</sup> There is no bright line limit to duration, but in *United States v. Sharpe*,<sup>73</sup> the Court upheld a 20-minute stop on a public highway based on three temporal factors: 1) the officer pursued his investigation in a diligent and reasonable manner; 2) the method of investigation was likely to confirm or dispel suspicions quickly; and, 3) the detention lasted no longer than was necessary to effectuate the purpose of the stop. Increased police intervention into the happenings of criminal street gangs may be upsetting to their members, but brief *Terry* stops at the outset are probably less officious than following gang members around waiting for an independent basis for reasonable suspicion to materialize.

The forcible movement of a suspect, beyond administrative convenience to exit a line of traffic, may convert a *Terry* stop into an arrest, if the movement constitutes a significant interference with the liberty interest of the suspect. If a suspect is transported to another site from his home or some other place where he has a right to be, particularly if the interrogation could have taken place where the detention arose, the Court would treat the seizure as a *de facto* arrest.<sup>74</sup> Thus, where a *Terry* stop exceeds the minimum interference with individual liberty needed to allay suspicion about possible criminal activity being afoot, suspects may be afforded suppression relief under the exclusionary rule.<sup>75</sup>

Fifth, the reasonableness of a *Terry* search may turn on the existence of less intrusive means. In *Florida v. Royer*,<sup>76</sup> Justice White, speaking for a four-justice plurality, asserted that when a suspect is seized under the *Terry* principle, "the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicions in a short period of time." Thus, in *Royer*, the officers could have used a canine sniff to allay suspicion that the suspect's luggage contained marijuana rather than have opened it and subjected it to a visual search. How-

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72. See, e.g., *Dunaway v. New York*, 442 U.S. 200 (1979); *Florida v. Royer*, 460 U.S. 491 (1983); *United States v. Place*, 462 U.S. 696 (1983).

73. 470 U.S. 675 (1985).

74. In *Florida v. Royer*, 460 U.S. 491 (1983), police agents moved the defendant to a small room forty feet away from the point of interception, which was a factor constituting an arrest. However, a seizure is not tantamount to an arrest merely because the police moved the suspect against his will from one location to another for reasons of safety or security during an investigatory detention. See *Pennsylvania v. Mimms*, 434 U.S. 106 (1977), where the defendant was ordered out of his vehicle. The Court held this was a *de minimis* intrusion.

75. In this regard, it is interesting to compare how courts view the limits of detention under a *Terry* analysis compared with the warnings requirement for custodial interrogation under a *Miranda* analysis of the same fact pattern. See generally Yeager, *Rethinking Custodial Interrogation*, 28 AM. CRIM. L. REV. 1 (1990). The landmark case of *Miranda v. Arizona*, 384 U.S. 436 (1966), held that a Fifth Amendment right to counsel attaches as a procedural safeguard against uncounseled admissions exacted by the police during a custodial interrogation and that these rights would be protected by a warnings requirement. The central point here is that a custodial arrest would trigger *Miranda* warnings, if viewed solely as a Fifth Amendment seizure of the person (arrest); however, the same fact pattern, if viewed as a Fourth Amendment seizure of the person under *Terry* would not trigger *Miranda* warnings, since *Terry* searches do not qualify for *Miranda* warnings under *Berkemer v. McCarty*, 468 U.S. 420 (1984) (traffic stop/citation does not rise to the level of coercion requiring a *Miranda* warning because the detention is brief, clearly understood to be temporary, and is conducted on the open road in full view of the public). As the contours of *Terry* continue to expand to accommodate escalating force on the streets, the coercive nature of the *Terry* detention increasingly begins to implicate the requirements of *Miranda*.

76. 460 U.S. 491 (1983).

ever, *United States v. Sokolow*<sup>77</sup> demonstrated that the *Royer* least intrusive means doctrine applies only in a *Royer* context where the issue is whether the length of an investigatory seizure was excessive, and not whether the police used the least intrusive means to verify their suspicions.<sup>78</sup>

Sixth, and by far the most stunning extension of *Terry*, is the 'plain feel' rule. In *Minnesota v. Dickerson*,<sup>79</sup> the Supreme Court adopted a "plain feel" exception to the Fourth Amendment's warrant requirement for the seizure of contraband in the context of a *Terry* search. Specifically, the Court held that police officers could seize non-weapon contraband detected during a protective pat down search of the sort permitted by *Terry*, so long as the search stayed within the bounds delineated by *Terry*.<sup>80</sup> In *Terry*, the Court held that a police officer can, on the basis of reasonable suspicion, conduct a pat down search to determine if the person is carrying a weapon.<sup>81</sup> The *Terry* search, however, is not meant to discover evidence of crime; it is limited in scope to that which is necessary to discover weapons.<sup>82</sup> If the search goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under *Terry*, and its fruits must be suppressed.<sup>83</sup> As the Court said in *Terry*, "a search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope."<sup>84</sup> The expansion of *Terry* to include greater invasions

77. 490 U.S. 1 (1983).

78. See also *Michigan v. Long*, 463 U.S. 1032, 1052 (1983) (holding that a *Terry*-type weapons search of an automobile is valid even if the police could have adopted alternative means to ensure their safety to avoid the intrusion involved in a *Terry* encounter). In *United States v. Sharpe*, 470 U.S. 675 (1985), the Court limited its use of the least intrusive means doctrine even in length of detention cases. In upholding a 20-minute search, the Court stated that "[t]he question is not simply whether some other alternative was available, but whether the police acted unreasonably in failing to recognize it or pursue it."

79. 113 S. Ct. 2130, 2135-39 (1993).

80. *Id.* at 2136 (adopting the "plain feel" exception but deciding that police officer's search exceeded *Terry*'s bounds and seizure unlawful because contraband not immediately apparent). *Dickerson* is of grave concern because it blurs the theoretical line which limited a *Terry* search to hard objects, which could be weapons and soft objects, which might be evidence, but certainly posed no threat as a weapon. Perhaps this blurring is only a judicial recognition that law enforcement officers only know how to search one way—all the way, a point first made by then-Judge Cardozo in *People v. Chigles*, 237 N.Y. 193, 197-198 (1923).

81. 392 U.S. at 24, 30.

82. *Id.* at 26.

83. *Sibron v. New York*, 392 U.S. 40, 65-66 (1968) (handed down the same day as *Terry*). To be frank, there is a fallacy of realism in *Terry* (that a less intrusive search could be based on a lesser form of cause). In reality, cops seem to search one way—all the way—regardless of the basis of the search.

84. *Id.* at 17-18. See, e.g., *Moore v. Texas*, 855 S.W. 2d 123 (Tex.Ct.Crim.App. 1993). In *Moore*, Officer Charles Tompkins responded to a police radio transmission which indicated that a large group of people had gathered, some of them gang members. Upon arriving at the scene, Officer Tompkins stopped and frisked Moore because he was on the scene and was wearing a "T-shirt and light colored shorts [short pants]." Tompkins explained, "specifically, anybody that we stop at night [in] a dark area, we will probably stop and frisk them."

Officer Tompkins further described his frisk of Appellant in the following language: "I just simply ran the hands over the outside of the cloths and the 'waistline'." The witness further related that before he could complete the search of Appellant's outer garments, Appellant put his hand in his "right back pocket." The officer said he then "moved [Appellant's] hand away, and . . . [resumed] . . . feeling for any weapons again, he [Appellant] reached back in his pocket again." At that point, in accordance with Tompkins testimony, Tompkins and the other officer, "moved Appellant up to the car" and searched the back pocket retrieving a "match box and a pill container." On cross examination Tompkins candidly admitted that when he first confronted

of Fourth Amendment liberty interests in privacy and property quite properly reflect a changing panorama in the deteriorating mores in society and its crime fighting needs. Changes in the legal contour of *Terry* reflect changes in the reality of street encounters. The purpose of a *Terry* search is to neutralize the suspect. Thus, while it is true that *Terry* searches now allow cops to draw and point weapons as well as make individuals lie prostrate on the ground (which is not terribly different from the facts in *Terry*), it is also true that the world of the 1990s is not the world of the 1960s—not even the world of race riots of the 1960s. Today, high technology weapons are extremely prevalent in the general population on the streets, even among women and children. Today, every police encounter with a stranger raises the possibility of armed violence. Because of the possibility of drug intoxication, it often takes more to neutralize suspects in the 1990s than it did in the 1960s. Arguably, the inflation of force which occurs in *Terry* seizures merely reflects a necessary indexing with the inflation of violence in society generally. To put it another way, if the courts did not take into account this inflation, very routine police encounters would arguably constitute a seizure raising *Miranda* concerns. Hence, it makes little sense to evaluate today's common sense procedures in terms of yesterday's excessive force.

#### IV. STOP AND FRISK OF GANG MEMBERS

In the spring of 1994, with ubiquitous crime again at center stage casting a long shadow on the political landscape, Professor James Q. Wilson, the noted University of California at Los Angeles criminologist, wrote an interesting piece for the New York Times Magazine, entitled "*Just Take Away Their Guns.*"<sup>85</sup> As the title of his article suggests, Professor Wilson proposed a stunningly obvious solution to begin dealing with the problem of streets overrun with crime, drugs, and armed violence.<sup>86</sup> Inspired by

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Moore, he "had no idea" whether Moore had or had not "committed a crime." The officer further admitted on cross-examination that he "had no reason to believe that [Appellant] was involved in [the shooting incident]."

The court strongly agreed with Moore's contention that Officer Tompkins's seizure of the match box from his back pocket exceeded the scope of the investigative stop authorized by *Terry* v. Ohio, citing, *inter alia*, *Lippert v. State*, 664 S.W.2d 712, 721 (Tex. Cr. App. 1984); *Davis v. State*, 829 S.W.2d 218, 221 (Tex. Cr. App. 1992). Judge Onion wrote in *Lippert*, that, though a *Terry* stop and frisk is justified, once the officer satisfies himself that the suspect has no weapons, the officer has no valid reason to further invade the suspect's right to be free of police intrusion absent probable cause to arrest. *United States v. Thompson*, 597 F.2d 187 (9th Cir. 1979); *State v. Allen*, 93 Wash.2d 170, 606 P.2d 1235, 1236-1237 (1980).

In *Davis*, Judge Malone wrote that,

*Terry* permits a search for only those weapons that could reasonably harm the police officer. If in the course of a pat down frisk the officer satisfies himself that the suspect has no such weapons, the officer has no valid reason to further invade the suspects right to be free of police intrusion absent probable cause to arrest.'

*Davis v. State*, 829 S.W.2d 218 at 221.

85. James Q. Wilson, *Just Take Away Their Guns*, N.Y. TIMES MAGAZINE, Mar. 20, 1994, at 46-47.

86. This article leaves for another day a full discussion detailing the causes in the surge in violence attributable to criminal gangs, answers to which are not entirely known. Briefly, gangland and the sudden surge in violence, according to the conventional wisdom, stems from the emergence of crack cocaine as the poor urbanite's drug of choice. According to this view, gangs have "gone corporate." THE ECONOMIST, December 17, 1994, at 21. The demand for crack co-

Wilson's article, on May 17, 1994, Congressman Rob Portman (R-Cincinnati, Ohio) and Congressman Gary Condit (D-San Diego, California) introduced a bill in the House of Representatives that would allow police to stop and frisk members of criminal street gangs.<sup>87</sup> House Rule 4441 reads, in pertinent part:

Section 1. General Rule. It shall constitute a reasonable suspicion, sufficient to support a constitutional stop and frisk by a law enforcement officer, that the officer knows or has reason to believe that the person who is subject to that stop and frisk—

- (1) actively participates in a criminal street gang; and
- (2) knows that such criminal street gang engages in a pattern of criminal street gang activity.

Section 2. Definitions.

As used in this Act—

- (1) the term "criminal street gang" means any ongoing organization, association, or group of 3 or more persons, whether formal or informal—
  - (A) having as one of its primary activities the commission of one or more criminal acts described in paragraph (2)
  - (B) having a common name or common identifying sign or symbol; and
  - (C) whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity; and
- (2) the term "pattern of criminal gang activity" means the commission, attempted commission, or solicitation of 2 or more criminal offenses that are committed on separate occasions or by 2 or more persons and constitute one of the following crimes:
  - (A) Assault with a deadly weapon or by means for force likely to produce great bodily injury.
  - (B) Robbery.
  - (C) Unlawful homicide or manslaughter.
  - (D) The sale, possession for sale, transportation, manufacture, offer for sale, or offer to manufacture of a controlled substance.
  - (E) Shooting at an inhabited dwelling or occupied motor vehicle.
  - (F) Arson.
  - (G) The intimidation of witnesses and victims.
  - (H) Grand theft of any vehicle, trailer, or vessel.
  - (I) Any other crime that is a crime of violence (as defined for the purposes of title 18, United States Code) that carries a risk of physical injury or death of an individual.<sup>88</sup>

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caine has spurred gangs to turn themselves from loosely organized groups into highly structured, brutally efficient, businesses. However, recent studies show that the number of crimes remains stable although the brutality in those crimes has risen. *Id.* at 23. Thus "the right question in light of these studies then revolves not around why gangs are getting violent more often, for they may not be, but why the same incidence of gang violence is getting more lethal. One answer is simple: weapons are becoming more sophisticated, potent and deadly. But the answer increasingly appears to be found in the bravado and machismo of the youthfulness of gang members." *Id.* Jeffrey Haynes, an anti-gang counsellor in Chicago, estimates that 80% of boys aged 13 to 15 in the South Side area are involved in gangs. *Id.* The youth movement in gang soldiers may be due in part to the lure of quick cash associated with drugs and the relaxed criminal penalties for juveniles. In short, the problem of gang violence is but symptomatic of the preeminent social ills facing America, namely nihilism, which is particularly prevalent among teenagers.

87. H.R. 4441, 103d Cong., 2d Sess. (1994). A complete copy of the bill and Congressman Portman's sponsoring speech is attached as an appendix.

88. *Id.* The full text and introductory remarks are contained in an appendix to this article.

House Rule 4441 is expressly intended by its authors to clarify by federal codification the rule intermittent in some courts that membership in a criminal street gang—people who associate for the express purpose of committing crime—is tantamount to reasonable suspicion that such a member may be involved in an imminent crime and may be armed.<sup>89</sup> Reasonable suspicion permits a law enforcement officer to conduct a limited detention and search of the suspect for weapons, commonly known as a ‘stop and frisk’ pat down. Weapons found during a pat down are admissible in the prosecution’s case in chief under the landmark holding of *Terry v. Ohio*.<sup>90</sup>

There are many implications arising out of proposed H.R. 4441. First, H.R. 4441 potentially implicates a First Amendment right of association,<sup>91</sup> and could be challenged on void-for-vagueness and overbreadth grounds.<sup>92</sup> Second, one need look no further than its intellectual inspiration from Professor Wilson’s article to see an assault on the Second Amendment, at least as applied to criminal street gang members.<sup>93</sup> Third, H.R. 4441 would legislatively link membership in a street gang to the term “reasonable suspicion,” and it would therefore empower law enforcement officers to conduct a limited detention and search of criminal street gang members, not as a matter to be determined *ad hoc*, but as a codified police power.<sup>94</sup> House Rule 4441 would place this power within the scope of the frisking privilege of an investigating police officer in everyday street encounters. Fourth, it provides legislative endorsement for the profile methodology to detect crime by providing that membership in a criminal street gang constitutes reasonable suspicion. And fifth, H.R. 4441 interjects legislative decision making into what has heretofore been a juridical matter developed within the realm of common law decision making. In addition, House Rule 4441 raises legitimate questions concerning federalism—the role of the federal

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89. The preamble to H.R. 4441 reads: To clarify that a reasonable suspicion, sufficient to support a constitutional stop and frisk by a law enforcement officer, includes membership in a criminal street gang that engages in a pattern of criminal gang activity. *Id.*

90. 392 U.S. 1, 21 (1968).

91. “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances.” U.S. CONST. amend. I. For a discussion of the unique concerns of gang member profiles, including issues of freedom of association under the First Amendment of the United States Constitution, see Richard T. Ford, *Juvenile Curfews and Gang Violence: Exiled on Main Street*, 107 HARV. L. REV. 1693; Monique M. Salazar, *Terry Stops and Gang Members in New Mexico: State v. Jones*, 24 N.M. L. REV. 463 (1994).

92. See Peter W. Poulos, *Chicago’s Ban on Gang Loitering: Making Sense of Vagueness and Overbreadth in Loitering Laws*, 83 CAL. L. REV. 379 (1995); Christopher S. Yoo, *The Constitutionality of Enjoining Criminal Street Gangs as Public Nuisances*, 89 NW. U.L. REV. 213 (1994).

93. U.S. CONST. amend. II provides that “[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” To the extent supporters of H.R. 4441 may see it as a way of imposing gun control in the inner cities, such a hope is misguided. Gun-control laws do not work. Daniel Polsby, *The False Promise of Gun Control*, ATL. MONTHLY, Mar., 1994. What is worse, they act perversely. While legitimate users of firearms encounter intense regulation, scrutiny, and bureaucratic control, illicit markets easily adapt to whatever difficulties a free society throws in their way. Also, efforts to curtail the supply of firearms inflict collateral damage on freedom and privacy interests that have long been considered central to American public life.

94. See Donald B. Allegro, *Police Tactics, Drug Trafficking, and Gang Violence: Why the No-Knock Warrant Is an Idea Whose Time Has Come*, 64 NOTRE DAME L. REV. 552 (1989).

government *vis-a-vis* the state governments to deal with crime—and federal jurisdiction post *United States v. Lopez*, 115 S. Ct. 1624 (1995). However, this article is limited in scope to delving into the Fourth Amendment considerations. These Fourth Amendment considerations include, mainly, the balancing of governmental intrusions into individual rights of privacy and property possession against the community's need for safety. This balance is the preeminent concern posed by a proposal to stop and frisk the members of criminal street gangs. For despite other legitimate and sensitive constitutional concerns, if this proposal can withstand a broad side Fourth Amendment attack, the prospect of less firepower capacity in low-level street gang activity bodes well for urban America and surely makes the idea of stop and frisk of criminal street gang members worthy of serious debate.<sup>95</sup>

### A. *Legislative Articulation of Fourth Amendment Concepts*

Perhaps the most intriguing aspect of H.R. 4441 is that it provides a method for broad-based community interests to be interjected through the political process into determining the Fourth Amendment standard of reasonable suspicion. In *Katz v. United States*,<sup>96</sup> the seminal case in defining Fourth Amendment protections, the Court set out a two-prong test to determine when law enforcement activity amounted to an invasion of privacy, the pre-eminent value which the Fourth Amendment is purposed to protect.<sup>97</sup> The *Katz* test holds out Fourth Amendment protection against police invasion of personal privacy where: 1) a person exhibits an actual subjective expectation of privacy; and, 2) the subjective expectation is one that society is prepared to recognize as objectively reasonable.<sup>98</sup> In the event that government invasions of privacy are unfounded, the tainted evidence may be excluded in a criminal trial. The first prong of the *Katz* test

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95. See Terence R. Boga, *Turf Wars: Street Gangs, Local Governments, and the Battle for Public Space*, HARV. C.R.-C.L. L. REV. 477 (1993) (discussing local ordinance initiatives as a response to street gangs).

96. 389 U.S. 347 (1967).

97. In *Boyd v. United States*, 116 U.S. 616 (1886), the first case to interpret the Fourth Amendment, the Court found the protection of property, not privacy, to be behind the text. According to *Boyd*, the odious practice of general warrants was fresh in the memories of the drafters. *Boyd* quoted extensively from the discussion and condemnation of general warrants in *Entick v. Carrington*, 19 Howell St. Tr. 1029, 1066 (1765) (Eng.), in which Lord Camden stated that "every invasion or private property, be it ever so minute, is a trespass." According to Lord Camden, as quoted in *Boyd*, "[t]he great end for which men entered into society was to secure their property. That right is preserved sacred and incommunicable in all instances where it has not been taken away . . . by some public good of the whole." *Boyd* concluded thus that "[i]t is not the breaking of his doors, and the rummaging of his drawers" that constitutes the essence of the Fourth Amendment offence; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property. Following *Katz*, the Fourth Amendment jurisprudence has emphasized the protection of personal privacy, with scarcely a mention of property interests considered separate and apart from personal privacy. However, in *Soldal v. Cook County, Illinois*, 113 S. Ct. 538 (1992) (White, J.), the Supreme Court addressed the Fourth Amendment's coverage of "seizures" and reinvigorated the right of private property. Justice White said that *Katz* and its progeny make clear that property rights "are not the sole measure of Fourth Amendment violations." That case did not, however, signal abandonment of the previously recognized protection for property under the Amendment. "[O]ur cases unmistakably hold," he emphasized, "that the [Fourth] Amendment protects property as well as privacy." *Id.* at 554.

98. 389 U.S. at 361 (1967).

goes to the personal expectation of the suspect. For example, activity conducted on a public street, whether or not associated with a criminal street gang, is not ordinarily conducive to privacy, and therefore the personal expectation for privacy on a public street is relatively low. The second prong of the *Katz* test, concerning objective privacy norms, explicitly takes into account societal expectations about what constitutes a reasonable expectation of privacy. The reasonable expectations of shell-shocked, weary, urban communities inundated with armed drug violence in the 1990s, may well allow society to place a higher premium on crime control than it did in the 1960s when judicial attention focused on due process considerations.

In the ordinary course of developing constitutional jurisprudence, societal norms are integrated into judicial decisions largely by judicial notice, often, but not necessarily, explicitly. Just what constitutes societal norms are judged by the courts, whose only legitimate source of information is what the lawyers for the prosecution and the defense, operating within limited financial resources, choose to offer, considering the facts and client considerations of the specific case at bar. Occasionally, courts receive, and may be influenced by, *amici curiae* briefs from fixed agenda groups in cases with far reaching implications. In contrast, an open congressional debate on H.R. 4441, preceded by staff work to research existing law and canvass popular opinion, expert commentary, opinions of interested persons, constituent views, and informed media discussions is a much more broad-based bellwether of society's expectations.<sup>99</sup> House Rule 4441 initiates debate on the constitutional balance between community safety and individual liberty in the public forum, not in the lofty ivory tower of academia, nor the shielded confines of the courtroom where notions of criminal justice are validated in unreal isolation, nor by dictatorial fiat by a judge who may be out of touch with reality. The public forum is the real marketplace of ideas where winning ideas must gain acceptance by striking a responsive chord in the community where such ideas are meant to take shape.<sup>100</sup> By shoring up public sentiment, H.R. 4441 will serve the laudatory goal of providing good evidence of society's expectations as to what should constitute reasonable suspicion in the context of police street encounters with criminal street gang members. The idea that the body politic should have a voice in shaping constitutional principles will sound strange to the paternal elites in government and academic institutions who apparently believe that citizens have just enough smarts to ante up for government salaries and hand over excessive amounts in taxes, but certainly not enough to understand so-called complicated social problems or weigh competing social values in constitutional balancing tests. However, judicial decision making, paid and enforced by, for, and of the people, would hardly suffer by an infusion of

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99. In this regard, H.R. 4441 has already achieved a measure of success, judging by the media response in Congressman Portman's home district in Cincinnati. See, e.g., *An Excessive Reaction*, CINCINNATI POST, May 21, 1994 (lead editorial); *Frisk'em: Portman Bill Applies Gun Control Where It May Really Reduce Crime*, CINCINNATI ENQUIRER, May 23, 1994 (lead editorial); *Against Stop and Frisk*, Cincinnati Herald, June 4, 1994 at 5 (letter to the editor); Milo Robeson Washington, *The Stop and Frisk Bill*, CINCINNATI HERALD, June 25, 1994, at 4 (guest editorial).

100. As Justice Robert Jackson admonished in *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949), if "doctrinaire logic" is not tempered "with a little practical wisdom," the Bill of Rights may be converted "into a suicide pact."

popular, common sense concerns about armed violence in communities across the country.<sup>101</sup>

Apart from engendering political debate, should H.R. 4441 become law, legal challenge of stop and frisks based on a federal statute would precipitate movement of the common law in this area. Of course, the prosecution of gang members is mostly a function of individual states, rather than the federal government. Thus H.R. 4441 would seem to promise minimal impact, at best, on criminal prosecutions. However, two considerations suggest H.R. 4441 would still be a worthwhile notion. First, any common law flowing from application of a federal standard in a federal court, to the extent that it re-shaped Fourth Amendment jurisprudence, would to that extent directly impact state proceedings under the Due Process Clause of the Fourteenth Amendment.<sup>102</sup> Second, though not directly applicable to

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101. In this regard, it is interesting to contrast the views of the American Civil Liberties Union with the views of real people in the debate over consent searches in Chicago. A nationwide eruption in drug related armed violence in public housing prompted the Clinton Administration to attempt systematic searches of public housing sweeps beginning with the Chicago Housing Authority [hereinafter CHA]. Andrew Stern, *Chicago Debate Over Housing Projects Flares Anew*, Reuters World Service, Apr. 23, 1994. Beginning in the summer of 1993, the CHA ordered its police department to sweep twelve residential buildings when the chairman of the board of commissioners determined the presence of random gunfire or intimidation by guns. The most notorious occasion triggering a sweep was random gunfire threatening workers installing window guards on buildings at the Robert Taylor homes. On April 7, 1994, U.S. District Judge Wayne R. Andersen (N.D.Ill.) issued a preliminary injunction against warrantless police searches of Chicago Public Housing units triggered by gun-related violence or intimidation in the absence of a clear and present danger. *Pratt v. Chicago Housing Authority*, 848 F. Supp. 792, 793 (N.D.Ill. 1994). Harvey Grossman of the American Civil Liberties Union hailed the judge's decision, but Beverly Dorsey, a resident of Chicago public housing, calling the decision a victory for drug dealers, said: "It ain't for decent people who want to live in a secure environment." *Judge Bans Warrantless Searches*, UPI, April 7, 1994. Tenants are less concerned about the Constitution considered in the abstract than they are about their safety.

1st Tenant: What good are my rights to me when I'm six feet under?

2nd Tenant: April the 3rd, 4th, 5th, 6th, 7th, 8th and 9th - we had a person killed every day. You can hear the children screaming out from all the gunshots.

*ABC World News Tonight* (ABC television broadcast, Apr. 15, 1994) (transcript on file with author).

Following Judge Andersen's ruling, President Clinton directed the Attorney General and the Department of Housing and Urban Development to attend to this crisis. Specifically, they were to devise a policy on sweeps and look at additional measures to promote security and community development to stop the violence. On April 16, 1994, Secretary of Housing and Urban Development Henry Cisneros and Acting Associate Attorney General Bill Bryson held a press conference to brief the public on their report to the President on fighting violent crime in the public housing projects. Their proposal consisted of a seven-point plan to conduct warrantless searches in public housing on the basis of consent. Again, "... most of the people who actually live in the projects are enthusiastic about the crackdown, which promises to bring a measure of security to their lives. Faced with the choice of having their space prowled by killers or patrolled by police, one can't blame them for preferring the latter." *A Welcome Attempt to Pacify the Projects*, *TACOMA NEWS-TRIB.*, Apr. 20, 1994, at A8. Interestingly, populist independent Ross Perot is reported to have suggested warrantless sweeps as a solution to inner-city drug infestation. Jamie Dettmer, *Man-made Champion of the American Dream*, *THE TIMES*, June 20, 1992. Ross Perot denied having made this suggestion during the 1992 presidential campaign. Ben Smith III, '92 *The People Decide a Special Section About the Election Runners-up; How George Bush Lost the Presidency and What Happened to Ross Perot*, *ATL J. & CONST.*, Nov. 4, 1992, at 5.

102. *Mapp v. Ohio*, 367 U.S. 643 (1961). *Mapp* is the all-important case applying federal standards to state courts via the Due Process Clause of the Fourteenth Amendment under the theory of incorporation. Under the Fourteenth Amendment Due Process Clause, the theory of incorporation makes applicable to the states various provisions contained in the first eight amendments to the U.S. Constitution. The theory also asserts that once one of the clauses of the first eight

criminal state proceedings, a federal statute defining membership in a criminal street gang as constituting reasonable suspicion would constitute persuasive, though not precedential authority, in state courts. By setting a national standard, a pre-emptive federal standard would promote uniformity among the states. A likely spillover from a national debate is further localized in debates among the several states, possibly spurring legislation tailored to respond the outcry of citizens in states inundated by urban centers. And because the standard sets a bright line rule in favor of admissibility of evidence seized pursuant to a proper *Terry* search,<sup>103</sup> it would further serve the ends of judicial economy by reducing long pretrial sessions on the admissibility of guns taken from gangsters and would strengthen the prosecution's position in plea bargaining. A noteworthy effect is that a rule of reason to clamp down on wanton, lawless crime, especially in urban neighborhoods, as well as to govern search and seizure, would go a long way toward restoring a measure of confidence in the functioning of government in general, and the criminal justice system in particular.<sup>104</sup> At a minimum, the federal experience would serve as an experiment from which data accumulation would inform the continuing debate over the efficacy and equality of criminal justice.

Although there is a legitimate concern that in practice, H.R. 4441 could be loosely interpreted, it is tightly written. It confines reasonable suspicion of gangs to those "whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity."<sup>105</sup> Moreover, the type of crime that H.R. 4441 is concerned with is not penny-ante, but serious felonies, such as assault with a deadly weapon or by means of force likely to produce great bodily injury; robbery; unlawful homicide or manslaughter; the sale, possession for sale, transportation, manufacture, offer for sale, or offer to manufacture a controlled substance; shooting at an inhabited dwelling or occupied motor vehicle; arson; the intimidation of witnesses and victims; grand theft of any vehicle, trailer, or vessel; and any other crime that is a crime of violence (as defined for the purposes of Title 18, United States Code) that carries a risk of physical injury or death of an individual.<sup>106</sup> These are very serious felonies indeed and present every bit as grave a crisis for urban America as drugged mass transit operators, which make drug testing reasonable. If it is not reasonable police work to keep tabs on people who expressly join forces to wreak serious crime on the general populace, then what is?

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amendments is incorporated, then Supreme Court interpretations of the clause are also incorporated the same as the constitutional text. Thus federal common law developed from a federal statute, such as would be the case if H.R. 4441 becomes law, would then become part of the dynamic of the Fourth Amendment jurisprudence.

103. *Terry v. Ohio*, 392 U.S. 1 (1968) (upholding the admissibility of evidence found during a brief detention and limited search for weapons, *i.e.*, "stop and frisk.") *Terry* distinguished between an investigatory "stop" and an arrest, and between a "frisk" of the outer clothing for weapons and a full-blown search for evidence of a crime. The frisk, it held, was essential to the proper performance of the officer's investigatory duties, for without it "the answer to the police officer may be a bullet, and a loaded pistol discovered during the frisk is admissible."

104. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989) (taking the position that law is better for clear-cut rules, which judges can use with precision, as opposed to fuzzy standards, which allow for the courts to interject personal value judgments).

105. H.R. 4441, 103d Cong., 2d Sess (1994), § 2, par. 1(C).

106. *Id.* at § 2 pars. (A)-(I).

The problem of police abuse is minimized by the very nature of criminal gangs. Prudent law enforcement should be especially careful in intervening where crime is inchoate. However, it is hard to imagine how it may be thought unreasonable to suspect a group who, according to the proposed statute, identify themselves by "having a common name or common identifying sign or symbol"<sup>107</sup> as people who commit criminal wrongs. Once police suspicion becomes focused on criminal street gangs, whose "primary activities," according to the proposed statute are "the commission of one or more criminal acts,"<sup>108</sup> there is precious little additional evidence to be generated short of the occurrence of the criminal act. Thus, waiting for more evidence of crime to develop as a safeguard against unwarranted police confrontation does not jibe with reality. If the common understanding of probable cause is the likelihood that something is more likely true than not, then surely it makes more sense to suspect criminal street gang members of armed violence of the kind for which criminal street gangs are infamous than to indulge the theoretical possibility that gang members stand on street corners simply to pass time. Magnanimous equality of suspicion—not bothering to distinguish criminal street gang members from law abiding citizens—is fatuously disingenuous and can only have uncritical theoretical appeal—at least for those with a macabre sense of humor.<sup>109</sup>

#### B. *The Role of Federal Legislation in Defining Constitutional Concepts*

There are two constitutional bases for enacting federal criminal procedure standards even where criminal prosecution is primarily a matter of state concern. First and foremost is the Commerce Clause, which gives Congress the authority to "regulate Commerce . . . among the several states."<sup>110</sup> The Commerce Clause is both the chief source of congressional regulatory power and, implicitly, a limitation on state legislative power.<sup>111</sup>

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107. *Id.* at § 2(B).

108. *Id.* at § 2(A).

109. Bill McClellan, *Guns, Reality Promise Intrigue for Coming Year*, ST. LOUIS POST-DISPATCH, Jan. 3, 1994, at 1C. In St. Louis, where the mayor and the police chief, in response to the city's record homicide count, promised to be "a little hard-nosed about looking" for guns, McClellan describing himself as a "wannabe liberal, a child of the Sixties," commented that white liberals, namely, the American Civil Liberties Union were the most powerful enemies of the mayor and the police chief, who are both black. Why? The American Civil Liberties Union was quick to sound a warning. "[The crackdown] could easily be utilized in a very discriminatory manner," said Judith Cromwell, an assistant director of the ACLU of Eastern Missouri. We almost have to wait to see if they go too far . . . [for example, by stopping] only black males between the ages of 18 and 24." Noting that 90 percent of the homicides in St. Louis last year were black, 88 percent were male and that for the most part, it was young black males shooting other young black males (and a few innocent bystanders)—Bill McClellan wondered if the police should start stopping middle-aged women too.

110. U.S. CONST. art. I, § 8.

111. See *United States v. Lopez*, 115 S. Ct. 1624 (1995) (giving new life to Commerce Clause challenges to federal legislation). In *United States v. Lopez*, the Court struck down the Gun-Free School Zones Act, 18 U.S.C. § 922(q), concluding that the Act exceeded Congress's power to legislate under the Commerce Clause. The first Supreme Court ruling in 60 years to strike down an act of Congress, *Lopez* brings into question the validity of many criminal laws that, like § 922(q), have only a tenuous relationship to interstate commerce. The Court found that the activity § 922(q) criminalized—gun possession near a school—was non-economic activity occurring within a single state. 115 S. Ct. at 1630-31. This finding was related to another in that by reaching beyond interstate economic activity into education and local criminal law enforcement, the law intruded "where States historically have been sovereign." *Id.* at 1632. Without a substan-

The best example of the use of the commerce clause in the criminal law area is enactment of the Racketeer Influenced and Corrupt Organizations Act (RICO) as part of Title IX of the Omnibus Crime Control Act of 1970.<sup>112</sup> Interestingly enough, RICO itself provides a separate basis for congressional input on Fourth Amendment reasonable suspicion standards, since criminal street gangs are often involved in interstate crime as retail agents in international narcotic drug distribution or interstate fencing of stolen property, to name two rather prominent criminal gang activities.<sup>113</sup>

A second constitutional basis for federal standards in criminal procedure is Section 5 of the Fourteenth Amendment to the United States Constitution, which authorizes Congress to enforce the Fourteenth Amendment by appropriate legislation.<sup>114</sup> House Rule 4441 could be viewed as implementing a due process concern for community safety.<sup>115</sup> There are, however, serious federalism concerns which weigh against en-

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tial connection to interstate economic activity, legislation in these traditional areas of state control overstep the power granted Congress. Turning to consider the proof required to convict under § 922(q), the Court found that the elements of the statute failed to tie it to interstate commerce. Unlike many other federal criminal laws, § 922(q) did not require that the Government prove, as a "jurisdictional element," that the defendant's conduct substantially affect interstate commerce. This commerce "nexus" would have ensured a case-specific finding of an effect on interstate commerce; the lack of a nexus meant that the law could be sustained only if the class of activity if regulated, as a whole, had a substantial effect on interstate commerce. *Id.* at 1631-32. In passing § 922(q), however, Congress did not find that gun possession near schools, as a class of activity, had such an effect. Because the law lacked a statutory link to interstate commerce, the Court ruled that § 922(q) exceeded the limits of the Commerce Clause.

As previously noted, this article is largely confined to a Fourth Amendment analysis of H.R. 4441, but it is likely that the interstate quality of gangs and their substantial drug trafficking activity would pass commerce clause muster under *Lopez*.

112. 18 U.S.C. §§ 1961-68 (amended 1988).

113. See Lesley S. Bonney, *The Prosecution of Sophisticated Urban Street Gangs: A Proper Application of RICO*, 42 CATH. U. L. REV. 579 (1993); William G. Skalitzy, *Aider and Abettor Liability, the Continuing Criminal Enterprise, and Street Gangs: A New Twist in an Old War on Drugs*, 81 J. CRIM. L. & CRIMINOLOGY 348 (1990) ("[I]f these [street] gangs are allowed to become entrenched nationwide in the drug distribution business [then] we are going to have a problem nationally on the scale that is going to be reminiscent of the Mafia in its heyday." The warning is ominous; the threat is real. Federal Law Enforcement Role in Narcotics Control in Southern California: Hearings Before the House Select Comm. on Narcotics Abuse and Control, 100th Cong., 2d Sess. 36 (1988) (testimony of Gary Feess, Assistant U.S. Att'y, C.D. Cal.). "The appearance of crack has given gang culture a terrible, almost irresistible momentum. Economic pathology, not surprisingly, is a more powerful causal factor than putative syndromes of 'family breakdown' or 'ghetto culture.' As the street supply [of crack] has burgeoned, gang rivalries have exploded into violent battles over sales territory and profit." Davis, *War in the Streets*, NEW STATESMAN & SOC'Y, Nov. 11, 1988, at 30. Robbins, *Armed, Sophisticated and Violent, Two Drug Gangs Blanket Nation*, N.Y. TIMES, Nov. 25, 1988, at A1.

114. Yale Kamisar, a law professor at the University of Michigan is quoted as making the juxtaposition of crime and the plight of blacks in commenting on the Warren Court's Fourteenth Amendment jurisprudence in Alexander Wohl, *Metamorphosis: The Court, The Bill, and Liberty For All*, 77 Aug. ABA J. 42 (1991). Kamisar states "In the sense that there was this concern about giving black citizens equal citizenship and equal rights, it is natural that this concern spilled over into fair treatment of black defendants in the criminal justice system."

115. In addition to the rights directly flowing from the text of the first eight amendments, the doctrines of fundamental rights and ordered liberty uses the Fourteenth Amendment Due Process Clause to adopt unenumerated guarantees of process under the heading of ordered liberty. Ordered liberty embraces those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and is "basic in our system of jurisprudence" and "is a right essential to a fair trial." See *Duncan v. Louisiana*, 391 U.S. 145, (1968).

croachment by the Congress into matters primarily of state concern.<sup>116</sup> Congress, through proposals such as House Rule 4441, has an important role to play in defining constitutional criminal procedure terms, notwithstanding federalism concerns because there is a legitimate body of federal crimes, many of which are intimately connected to the illegal drug market, the commercial mainstay of corporate gangs, and rightfully located within the jurisdiction of federal prosecutors.

House Rule 4441 is not the first foray into legislative interpretation of Fourth Amendment concepts. The best examples are regulations authorizing government inspections such as drug testing of key mass transit employees following accidents.<sup>117</sup> Drug testing constitutes the most invasive invasion of privacy and is permitted only when special government needs are present and safeguards are in place to prevent arbitrariness and unfairness in the collection of bodily fluids. Special government needs searches are Fourth Amendment searches, authorized by legislative and regulatory defined circumstances, not by determinations of individualized cause subject to judicial review.<sup>118</sup>

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116. See, e.g., Note, *Clear Statement Rules, Federalism and Congressional Regulation of States*, 107 HARV. L. REV. 1959 (1994); Bradford Russell Clark, *Judicial Review of Congressional Action: The Fallacy of Reverse Incorporation*, 84 COLUM. L. REV. 1969 (1984); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism For a Third Century*, 88 COLUM. L. REV. 1 (1988); Christopher L. Eisgruber, *Justice and the Text: Rethinking the Constitutional Relation Between Principle and Prudence*, 43 DUKE L.J. 1 (1993); William Van Alstyne, *Federalism, Congress, The States and the Tenth Amendment: Adrift in the Cellophane Sea*, 1987 DUKE L.J. 769 (1987); Elbert P. Tuttle & Dean W. Russell, *Separation of Powers: Preserving Judicial Integrity: Some Comments on the Role of the Judiciary Under the "Blending of Powers,"* 37 EMORY L.J. 587 (1988); Sol Wachtler, *Judicial Lawmaking*, 65 N.Y.U. L. REV. 1 (1990); Robert C. Wels, *Symposium Civil Rights and Federalism: Reconsidering the Constitutional Relationship Between State and Federal Courts: A Critique of Michigan*, 59 NOTRE DAME L. REV. 1118 (1984); Reed Dickerson, *Special Issue of Litigation: Statutory and Constitutional Interpretation: Statutes and Constitutions in an Age of Common Law*, 48 U. PITT. L. REV. 773 (1987); Bruce A. Ledewitz, *The Power of the President to Enforce the Fourteenth Amendment*, 52 TENN. L. REV. 605 (1985); James A. Gardner, *The Positivist Foundations of Originalism: An Account and Critique*, 71 B.U. L. REV. 1 (1991); James C. Rehnquist, *The Power that Shall Be Vested in a Precedent: Stare Decisis, The Constitution and the Supreme Court*, 66 B.U. L. REV. 345 (1986).

117. The Federal Railroad Safety Act of 1970 authorized the Secretary of Transportation to "prescribe as necessary, appropriate rules, regulations, orders, and standards for all areas of railroad safety." 84 Stat. 971, 45 U.S.C. § 431(a), discussed in *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602 (1989) (rejecting a broad based Fourth Amendment challenge to Federal Railroad Administration program mandating blood and urine tests of employees involved in certain train accidents and authorizing breath and urine tests to employees who violate certain safety rules).

118. Searches and seizures or inspections not based on reasonable suspicion received constitutional approval in *Camara v. Municipal Court*, 387 U.S. 523 (1967). Prior to *Camara*, Fourth Amendment terms such as probable cause and search had been construed unidimensional all or nothing concepts. *Camara* offered a re-conceptualization of these terms. *Camara* recognized a different form of probable cause based upon reasonableness rather than individualized suspicion. *Camara* applied its newly found reasonableness based probable cause to administrative searches. Reasonableness, the Court determined, could be assessed by invoking a balancing test, in which the individual's and society's interest are weighed against each other. Thus, in the case of special government needs searches, the probable cause requirement under the Fourth Amendment is based on the necessity and reasonableness of the government's conduct rather than on a quantum of individualized suspicion. Another factor in assessing the reasonableness of the administrative search is determined by balancing the special needs of the government against the degree of intrusion occasioned by the search. *Id.* at n.48.

Reason based probable cause does not, however, forsake the values underlying traditional probable cause. The values underlying traditional probable cause analysis are served by con-

Another example, albeit largely unused, is Section 3501 of Title 18 of the United States Code, which is "the statute governing the admissibility of confessions in federal prosecutions."<sup>119</sup> That provision makes a confession "admissible in evidence if it is voluntarily given."<sup>120</sup> Voluntariness is determined on the basis of "all the circumstances surrounding the giving of the confession."<sup>121</sup> Among those circumstances are whether the defendant "was advised or knew that he was not required to make any statement,"<sup>122</sup> "had been advised prior to questioning of his right to the assistance of counsel,"<sup>123</sup> and "was without the assistance of counsel when questioned."<sup>124</sup> It continues: "The presence or absence of any of the above-mentioned factors . . . need not be conclusive on the issue of voluntariness of the confession."<sup>125</sup>

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straining the special government needs searches to circumstances where abuse of individual liberty is limited to the extent possible. Thus, in establishing a basis for a special government needs search, the legislature or regulatory agency makes an *a priori* categorical assessment of a substantial interest motivating the purpose of the special government needs search evaluated as a class, not *ad hoc*. In *Brown v. Texas*, 443 U.S. 47, 51 (1979), Chief Justice Burger, in dictum, set down the central concern to guide the balancing of these competing considerations by stating that concern is "to assure that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field." To prevent such discretion, the Court stated that a seizure of a person must be based on individualized suspicion "or . . . be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers." Finally, the warrantless feature of suspicionless searches is necessary to effectuate the purpose of the search. In *Brown*, the Court articulated a three-part test to make the categorical assessment of a "substantial interest, which would permit a government invasion of privacy: 1) the gravity of the public concerns served by the seizure; 2) the degree to which the seizures advance the public interest; and 3) the severity of the interference with individual liberty." *Id.* at 50-51.

Assuming a substantial government interest, the next task is to justify the invasion absent a warrant. In *New York v. Burger*, the Court set out three conditions upon which the Court upheld a regulatory search without a warrant: 1) the regulatory scheme must advance a "substantial interest," such as to protect the health and safety of workers; 2) warrantless searches must be necessary to further the regulatory scheme; this condition is met if there is a serious possibility that a routine warrant requirement would allow the subjects of the regulations to conceal their violations of the rules, and thereby frustrate the administrative system; and 3) the ordinance or statute that permits warrantless inspections must, by its terms, provide an adequate substitute for the warrant, such as rules that limit the discretion of the inspectors, regarding the time, place and scope of the search. Because there is no discretionary determination to search based on a judgment that certain conditions are present, there are simply "no special facts for a neutral magistrate to evaluate." In *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990), the Court proffered another basis for a suspicionless searches; namely, there is no evidence which would constitute individualized suspicion short of an accident occurring. Such an occurrence risks the very harm sought to be prevented. Introducing notions of individual-based probable cause, or reasonable suspicion, into the special government needs model would create pretext problems. See *United States v. Martinez-Fuerte*, 428 U.S. 543, 559 (1975). Likewise, discretion to subject one individual to a more intrusive search than the next would raise a pretext problem.

119. *United States v. Alvarez-Sanchez*, 114 S.Ct. 1599 (1994).

120. §§ 3501(a) & (b).

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. § 3501(b). § 3501 was enacted to overturn *Miranda v. Arizona*, 384 U.S. 436 (1966), which held that a Fifth Amendment right to counsel attaches as a procedural safeguard against uncounseled admissions exacted by the police during a custodial interrogation, and created a warnings requirement to enforce this right. However, neither the Court nor the Department of Justice seems inclined to invoke § 3501. See *Davis v. United States*, 114 S.Ct. 2350, 1994 U.S. LEXIS 4827, \*14, \*20 (1994) (Scalia, J., concurring).

At the local level, an example of legislative definition of the search and seizure term “probable cause” is the mandatory arrest policy in cases involving an allegation of domestic violence adopted in various forms by local ordinance, adopted by cities such as Duluth, Minnesota and Cincinnati, Ohio. Under Fourth Amendment law, an arrest requires probable cause.<sup>126</sup> Ordinarily, probable cause, when based on hearsay, requires an officer to corroborate or otherwise affirm, through independent endeavors, the truth of an accusation. As judged upon the totality of circumstances test, the objective facts reported on and corroborated must provide a substantial basis for concluding that there is evidence of wrongdoing by the accused.<sup>127</sup> However, there is no common law case approving the arrest of an accused for an assault based upon events, which a police officer did not witness and for which the victim refuses to verify by signed statement. Despite the absence of such common law jurisprudence, the domestic violence ordinance requires an on-site police officer to arrest a person accused of domestic violence based upon the officer’s signed statement attesting to the offending events as told to him by the victim *even when the victim refuses to acknowledge the accusation by signature*.<sup>128</sup>

The mandatory arrest policy in cases involving an allegation of domestic violence expands the definition of probable cause to include a field allegation of domestic violence made or made known to the law enforcement officer responding to the call. By legislating that a field response to a call concerning domestic violence constitutes probable cause to make an arrest, even when the complaining party refuses to go forward with a formal allegation, city ordinances such as Cincinnati’s Domestic Violence Ordinance 12.412 weaken the constitutional role of the probable cause requirement as a shield against arbitrary arrests.

In summary, legislative definition of criminal procedure terms is neither new nor unwarranted. After all, the constitution itself is the product of a political convention, not a court. Moreover, a highly invasive infringement on individual liberty may be accepted on utilitarian principles. In the case of key personnel involved in the operations of mass transit, for example, a special government need is recognized to conduct drug testing despite the absence of any showing of individual suspicion. However, a free people should take no invasion of privacy lightly. Such infringements should be considered not as a matter of administrative ease, but as necessary to the preservation of life, liberty, and the pursuit of happiness. Steps to end the reign of gangs in urban America are necessary steps to promote the first goal of government—domestic tranquility.

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126. *Dunaway v. New York*, 442 U.S. 200 (1979); *Beck v. Ohio*, 379 U.S. 89 (1964).

127. *Illinois v. Gates*, 462 U.S. 213 (1983); *Massachusetts v. Upton*, 466 U.S. 727 (1984).

128. For example, under Cincinnati’s Domestic Violence Ordinance 12.412, probable cause includes the traditional definition of “facts and circumstances within the officer’s knowledge and of which he has reasonably trustworthy information sufficient to warrant a person of reasonable caution to believe the offense has been committed, and the accused . . . has committed the offense.” However, the Ordinance adds: “. . . a victim’s statement [signed either by the victim or the investigating officer on site] is probable cause.” O.R.C. 2935.03(B)(2)(a).

### C. *Statistically Based Criminal Profiles*

The Supreme Court first endorsed the use of criminal profiles in *United States v. Cortez*,<sup>129</sup> a drug courier profile case. In *Cortez*, the Court held that an officer's observations may properly be supplemented by consideration of the modes or patterns of operations of certain kinds of law-breakers.<sup>130</sup> However, Justice Marshall, dissenting in *United States v. Sokolow*,<sup>131</sup> warned of the dangers of a stop based solely upon an officer's subjective view that the characteristics of a "drug courier profile" were met:

Reflexive reliance on a profile of drug courier characteristics runs a far greater risk than does ordinary, case-by-case police work of subjecting innocent individuals to unwarranted police harassment and detention. This risk is enhanced by the profile's "chameleon-like way of adapting to any particular set of observations."<sup>132</sup>

Despite these misgivings, profile evidence is now a staple of criminal investigations and are applied to drug couriers and terrorists. Even the Internal Revenue Service uses profile evidence in deciding which returns to audit.<sup>133</sup>

Congressman Portman in proposing H.R. 4441 argues that the bill only clarifies existing common law by making plain that membership in a criminal street gang constitutes reasonable suspicion. Neither the reported appellate cases nor state statutes bear out this assertion. However, whether police, prosecutors, and trial courts, in suppression motions routinely equate membership in a criminal street gang with reasonable suspicion is not comprehensively researchable. It seems likely that to a certain extent, H.R. 4441 may go no further than endorsing actual front line practice. If so, this clarification makes eminent common sense. The reason why is that no reasonable person even remotely familiar with gang violence, and who has walked alone along a city street or through an isolated parking lot in gang territory, would not be alarmed at the approach of a gang member. Blacks are not immune from this sentiment.<sup>134</sup> It would be a very strange

129. 449 U.S. 411, 417 (1981), *reh'g denied*, 455 U.S. 1008 (1982). In *Florida v. Royer*, 460 U.S. 491, 506 (1983), the Supreme Court expanded the drug courier profile case law to stop and frisks of passengers at airports.

130. One problem with profile information is that it goes against the dominant criminal philosophical view in this country which assume free will and primacy of the individual. The not too distant uproar about the proposed scientific research to study DNA codes in violent inner-city children underscores the esteem in which tenets of individualism are held. *Sullivan Denies Study on Violence is Racist*, CINCINNATI ENQUIRER, Oct. 23, 1992, at A-7 (discussing violence research undertaken by Dr. Frederick Goodwin, National Institute of Mental Health, which focuses on biological influences on crime).

131. 490 U.S. 1, 11 (1989).

132. *Id.* at 13 (quoting Court of Appeals opinion in *United States v. Sokolow*, 831 F.2d 1413, 1418 (9th Cir. 1987)).

133. See *e.g.*, *Hobart Corp. v. EEOC*, 603 F. Supp. 1431 (N.D. Ohio 1984). Tax forms are analogous to "stop and frisk" because the basis for the audit turns solely on the view that certain facts such as employment status and the event of property exchanges permit a statistical probability that wrongdoing may have occurred.

134. As catalogued in note 11, *supra*, the Rev. Jackson's crusade against black-on-black crime began with his remarks to an audience of Operation Push in Chicago:

There is nothing more painful for me at this stage in my life than to walk down the street and hear footsteps and start to think about robbery and then look around and see it's somebody white and feel relieved. How humiliating.

and contorted rule of law that made police work against the very threshold of suspicion that move reasonable members of the body politic to alarm. It is in this sense that membership in a criminal street gang alone could constitute reasonable suspicion and, as such, membership alone in an organization formed and committed to criminal activity could support the use of gang profiles.

How is a criminal street gang member distinguishable from an innocent passerby? Easy. Members of a criminal street gang, who are not otherwise explicitly identified by informants or victims, go out of their way to identify themselves.<sup>135</sup> Visual presence is very much a part of the gang ambiance. Gang colors, jackets, or other distinct articles of clothing,<sup>136</sup> hair

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The Rev. Jesse Jackson, Nov. 27, 1993.

The story behind that statement begins on Aug. 27, 1991, four months after Jackson moved his family into a vintage 1886 red brick mansion in a once stately section of Washington, D.C. Alone in the house that day was Jackson's mother-in-law, Gertrude Brown, who was doing laundry in the basement. Climbing the stairs to the second story, she noticed some things were out of place. She did not notice the burglar lurking nearby. She went back to the basement, looked out the window and saw someone in checkered pants running from the house. The burglar made off with a radio, some jewelry and most important, the family's sense of personal security. "When somebody breaks into your house and robs it," Jackson remarks, "you just feel as if everything has been breathed on."

Eight months later, Jackson's wife, Jacqueline, was in the kitchen in the morning hours as her family slept. Leaving the house to take a bag of garbage to the curb, she noticed under the streetlights three black people, two men and a woman. She heard the woman encourage the first man to shoot the second. The second man ducked behind a dumpster. A shot was fired. The second man staggered down the street and collapsed. Mrs. Jackson moved toward the dying man but noticed the woman approaching, her hands plunged in her pockets. "She said, 'Call the police. A man's been shot,'" Mrs. Jackson recalls. "And she was expressionless. I was looking at her, but I didn't see her. So when I've been approached [by the police] about recognizing her, we were as close as the nose on my face, but I didn't see her and that troubles me."

Even before these incidents, a certain specter of violence had always haunted Jesse Jackson: The civil rights leader and two-time presidential candidate has been the target of innumerable death threats, many from white racists. But in his new home, the violence was coming from blacks and threatening his family. When a robber shot a grocer in a small store across the street, Jackson "refused to allow his wife and kids to shop there anymore," recalls longtime aide Frank Watkins. Then, last November 3, Mrs. Jackson heard some commotion down the block and joined her neighbors outside, only to find that three young men had been gunned down in the back seat of a car by two young men who had been sitting in the front.

That triple murder was the last straw. . . . Jackson called for a "victim-led revolution" and implored the crowd to take back the streets from the killers and drug dealers.

And soon, Jackson was calling youth violence and black-on-black crime "the premier issue of the civil rights movement today."

Paul Glastris and Jeannyne Thorton, *A New Civil Rights Frontier*, U.S. NEWS & WORLD REPORT, Jan. 17, 1994, at 38.

135. See MARTIN S. JANKOWSKI, *ISLANDS IN THE STREET: GANGS AND AMERICAN URBAN SOCIETY* (1991); see e.g., LUIS J. RODRIGUEZ, *ALWAYS RUNNING: LA VIDA LOCA: GANG DAYS IN L.A.* 41 (1993); KODY SCOTT, *MONSTER: THE AUTOBIOGRAPHY OF AN L.A. GANG MEMBER* 118 (1993); FELIX M. PADILLA, *THE GANG AS AN AMERICAN ENTERPRISE* (1992); LEON BING, *DO OR DIE* 12 (1991); JOAN MOORE, *GANGS AND GANG VIOLENCE: WHAT WE KNOW AND WHAT WE DON'T*, IN *GANG VIOLENCE PREVENTION* 23 (Alfredo Gonzalez, Shirley Better & Ralph Dawson eds., 1990).

136. Civil libertarians should be concerned about loose standards, but not overly alarmed about the prospect of the proper use of police discretion. Reasonable suspicion must be determined on a totality of the circumstances basis and thus no one factor is dispositive. Courts routinely show a willingness to hold beat cops to an appropriate threshold of reasonableness; witness the Court's discussion of the admissibility of drugs seized from the bag of a Minneapolis bus passenger coming from a "source city," Chicago, for drugs. The suspects were two black males

styles, and distinctive manners all provide objective positive evidence marking members of criminal street gangs.<sup>137</sup> Moreover, members of criminal street gangs make no secret of the territorial haunts they purport to rule. To those so inclined, criminal street gang membership is a badge of honor.<sup>138</sup> Of course, there may be social, political and emotional reasons to ape gang dress styles, without any intention to ape gang behavior. While a nervous citizen may be overly alarmed at the sight of any person not in professional dress, a streetwise cop, whose job it is to keep the peace, and who is specially trained in gang activity, would know the badge of criminal street gang membership. Gang membership is clearly susceptible to articulable, objective, reasonable discernment by well-trained and experienced members of law enforcement.<sup>139</sup>

#### D. Reasonable Suspicion of Gang Members

The United States Supreme Court has yet to decide the precise issue involving the use of gang profiles as a proxy for reasonable suspicion to justify a stop and frisk. Because members of criminal street gangs commit crimes, it makes sense for the police to develop specialized knowledge about gang activities and identification of gang members.<sup>140</sup> Such informa-

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wearing Chicago Bulls Starter jackets, who walked briskly, carried an athletic bag, and appeared apprehensive when questioned. *United States v. O'Neal*, 17 F.3d 239, 240-41 (8th Cir. 1994) (upholding the suppression). Commenting on the officers' testimony that "street gang members often wear Starter jackets," the Court noted many non-gang members wear Starter jackets as well. *Id.* at 242 n.4. The Court said that "[t]he mere fact that young people wear athletic jackets and carry athletic bags hardly presents a basis to believe that they are criminals." *Id.* at 241-42.

137. Care, augmented by a real understanding and concern for the communities, which are policed, must be exercised to avoid mistakes in identification based solely on dress styles. See ALEX KOTLOWITZ, *THERE ARE NO CHILDREN HERE: THE STORY OF TWO BOYS GROWING UP IN THE OTHER AMERICA* 193-98 (1991) (describing federal agent's accidental killing of African-American teenager going to work as a disc jockey, and subsequent unjustified description of victim by government and media as "a Black Gangster Disciple and suspected gun runner"). Cf. ELIJAH ANDERSON, *STREETWISE, RACE, CLASS, AND CHANGE IN THE URBAN COMMUNITY* 176-78 (1990) (arguing that African-American males often put up a front for self protection by altering their clothes, attitudes, or body language in an effort to intimidate others. For example: Frequently, young boys at Horner, a Chicago public housing project, claimed allegiance to one gang or another. Children as young as four or five at a neighborhood preschool program would arrive each day with their hats turned to the left, showing allegiance to the Vice Lords, or to the right, for the Disciples. A group of pre-teenagers like the Four Corners imitated their older counterparts. But there was no real organization or discipline; moreover, they didn't sell drugs); Laurie Goering & Flynn McRoberts, *Gang Colors, Fashions Paint Good Kids as Bad*, CHI. TRIB., Apr. 13, 1992, at C1 (commenting that many young people wear gang symbols made fashionable by mass marketing).

138. For example, in *People v. Gonzalez*, 596 N.E. 2d 783, 784-85 (Ill. 1992), the shooting victim, himself a gang member, testified that he went into a liquor store to buy candy with three friends. Outside the store, Gonzalez walked up within two feet of him and shot him after saying: "What's up, folks, GK." The victim was a member of a street gang whose members refer to themselves as "folks" and that GK means "Gangster Killer."

139. To be sure this is a job for top notch professionals. The inexperienced, those given to personal bias, and those law enforcement officers whose talents are not suited to street confrontations, should not be given the authority to investigate gangs. The risk of abuse and improper invasions of individual liberty outweigh the benefits to community safety where added precautions are not taken to ensure that stop and frisk techniques are properly executed.

140. See, e.g., Interim Hearing on Juvenile Gang Violence: Hearings on S.B. 2118 Before the California Senate Comm. on the Judiciary 6 (1986) (statement of Ira Reiner, Los Angeles District Attorney) ("Street gangs are not merely a grouping, a loose grouping of antisocial, crime-prone individuals. They are organizations that exist solely to engage in criminal activity.").

tion is obviously vital in solving, and in some cases preventing, many crimes. Thus law enforcement personnel receive training in all aspects of street gang characteristics. Informed law enforcement investigatory branches maintain files on gang activity, including photograph registries on known members of criminal street gangs. To be sure, the tracking of citizens raises serious libertarian concerns relating back to the historical abuses of conspiracy law.<sup>141</sup> Moreover, the line between criminal street gangs and organized activity serving legitimate political, social, and community needs, may be quite fine in many instances and therefore libertarians are rightly concerned about police practices that impinge on the rights of association.<sup>142</sup> Though mindful of these legitimate concerns, no government is safe in ignoring the need to make such fine distinctions to preserve community safety.<sup>143</sup> Thus, gang profiles are useful tools augmenting effective law enforcement and should be constitutionally permissible at the initial investigatory stages of suspected criminal activity.<sup>144</sup> This is not to argue either for blanket suppression or blanket admission of evidence derivative of a stop and frisk based upon a criminal street gang profile. The argument here is that law enforcement should not be denied the very same common sense that every day people use in confrontation with criminal street gangs, namely that gangs—consisting of people who openly conspire to commit serious felonies—should be dealt with generally as criminal suspects. To the argument that the courts are either unwilling or unable to draw the lines with sufficient discretion to prevent a slippery slide to harassing youths who are quite innocent, though dressed in gang styles, the cases which have dealt with the suppression of evidence derivative in part

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141. Perhaps Justice Jackson best expressed those historical abuses when he described the origins of the prohibition of criminal conspiracy:

The crime comes down to us wrapped in vague but unpleasant connotations. It sounds historical undertones of treachery, secret plotting and violence on a scale that menaces social stability and the security of the state itself. 'Privy conspiracy' ranks with sedition and rebellion in the Litany's prayer for deliverance. Conspiratorial movements do indeed lie back of the political assassination, the coup d'etat, the putsch, the revolution, and seizures of power in modern times, as they have in all history.

*Krulewicz v. United States*, 336 U.S. 440, 448 (1949) (Jackson, J., concurring).

142. "The most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures and of acting in common with them. The right of association therefore appears to me almost as inalienable in its nature as the right of personal liberty. No legislator can attack it without impairing the foundations of society." 1 A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 203 (P. Bradley ed., 1954).

143. In *Dennis v. United States*, 341 U.S. 494 (1951), Justice Jackson, perhaps reflecting his experience as the chief American prosecutor at the Nuremburg trials of Nazi war criminals, wrote of the growth of "permanently organized, well-financed, semi-secret and highly disciplined political organizations" of which the Communist Party was one example. He concluded:

The law of conspiracy has been the chief means at the Government's disposal to deal with the growing problems created by such organizations. I happen to think it is an awkward and inept remedy, but I find no constitutional authority for taking this weapon from the Government. There is no constitutional right to "gang up" on the Government.

*Id.* at 577. GEORGE E. DIX & M. MICHAEL SHARLOT, *CRIMINAL LAW* 585-86 (1987).

144. A different question is presented by developing gang profile knowledge, a form of expertise from which flows substantive testimony critical to the prosecution persons on the basis of associational activities. See, e.g., *People v. Brown*, 598 N.E. 2d 948 (Ill. 1992) (rejecting the use of expert testimony on drug distributor profiles). However, gang affiliation, if relevant to show motive or the *res gestae* of the crime would be admissible, because materiality would outweigh any prejudicial impact. *People v. Buchanan*, 570 N.E. 2d 344, 355-56 (Ill. 1991).

from gang profiles provides a telling counter-argument and demonstrates that courts can be quite sophisticated at judicial line drawing—if they care about the community.

For example, in *People v. Rahming*,<sup>145</sup> the Colorado Supreme Court dealt with a stop and frisk of criminal street gang members where the genesis for reasonable suspicion of the suspects, three young black males, was based, in part, on their identifiable gang apparel. In *Rahming*, a police officer, spotted the defendant as one of three men walking toward a car in an apartment complex parking lot. The individuals were outside the headquarters of the “MCGs,” who are leaders of the Bloods street gang, the rival of the Crips gang. The previous week, the officer had arrested residents of the building in connection with a drive-by shooting and an assault on a member of the Crips gang.

The officer had been a police officer with the Aurora Police Department for three and one-half years. He had not been formally trained in gang activities, but he had watched videotapes prepared by the Gang Intervention Unit of the Aurora Police Department, and he had some knowledge of gang activities based on his experience as an Aurora police officer. He testified that the chosen attire of Crips street gang members includes a blue coat, a blue-checkered coat, or a black Los Angeles Raiders team jacket. According to the officer, members of the Crips wear blue or black hats with either a Los Angeles Raiders insignia or “something with a C,” and wear their pants so that they hang loosely on their hips, “halfway down their buttock[s].”

The defendant was wearing tennis shoes, dark pants, and, in the officer’s words, “a gray and white — gray and white and blue checkered coat, a padded quilted type lumberjack coat.” One of the other two individuals was wearing a blue hat, a black Los Angeles Raiders coat, black jeans, and white BK, or, in the officer’s words, “Blood Killer,” tennis shoes with black strings in them. The remaining individual was wearing a sweater with a blue torso, white arms, and a yellow stripe. The officer could not remember what else that individual was wearing, and agreed with defense counsel that the sweater was a “typical sports sweater for a young person to wear.” There were not any bulges in the clothing of the individuals, or any other indication that any of them were carrying weapons.

The circumstances of the stop and frisk of *Rahming*, which followed a brief tailing, provided four additional factors besides the wearing apparel. However, the court rejected each factor in turn, and its rejection of the gang member profile is interesting because it shows how incisive courts can be in analyzing a well-developed reasonable suspicion suppression motion.

The officer placed great weight upon the fact that the individuals outside of the apartment building were dressed as members of the Crips street gang. This claim is weakened by the fact that the officer’s testimony at the pretrial hearing revealed that only one of the three individuals he observed was dressed in what might be called the distinctive uniform of the Crips gang, and that individual was not the defendant. However, even if the three individuals observed by the officer were unquestionably dressed as gang members, that fact, whether considered alone or in com-

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145. 795 P.2d 1338 (Colo. 1990).

bination with the facts of this case, would not have justified the officer's detention of the defendant. Courts upholding investigative detention of suspected gang members have done so on the basis of facts in addition to their appearance which created a reasonable and articulable suspicion that criminal activity "[had] occurred, [was] taking place, or [was] about to take place." *Wilson*, 784 P.2d at 327.<sup>146</sup>

The court was equally firm in rejecting an evidentiary search based upon on the so-called compact exception, *i.e.*, simply being in the immediate vicinity where criminal activity is afoot.

In *United States v. Flett*, 806 F.2d 823, 828 (8th Cir. 1986), the court held that the pat-down search of the defendant was justified by the defendant's presence in the home of a known gang member charged with a narcotic violation. In *United States v. Wheeler*, 800 F.2d 100, 103 (7th Cir. 1986), the court identified the following factors which justified the officer's investigative detention of the defendant: (1) a group of six or seven men entered a bar together; (2) the group initially behaved in a manner suggesting that they were "covering" the entrance; (3) some were recognized as members of the Outlaw Motorcycle gang; (4) some members of the group were wearing clothing with "Outlaw Motorcycle Club" printed on it; (5) some of the men had bulges in their clothing indicating the possibility of weapons; and (6) the Invaders, who frequented the bar, were hostile to the Outlaws, and a fight between the two gangs seemed likely.

The facts found by the trial court in this case do not support an articulable suspicion that, at the time the officer stopped the defendant, criminal activity had occurred, was in progress, or was about to occur. Our holding is not altered by the fact that the officer observed the defendant and the two other individuals outside of a building in which several leaders of the Bloods lived, or the fact that the officer had recently arrested residents of that building for their alleged involvement in a drive-by shooting and an assault on a member of the Crips. The officer did not observe anything which suggested that the individuals in question were engaged in any kind of criminal activity involving the Bloods. In fact, the individuals did nothing to suggest that criminal activity was afoot. The suggestion, made by the officer at the hearing, that the individuals he observed may have been about to commit a drive-by shooting, constituted a "hunch," or an "inchoate and unparticularized suspicion."<sup>147</sup>

Cases like *Rahming* undermine the argument that the courts either cannot nor will not make fine distinctions in drawing the line between community safety and individual liberty.

Likewise, in *In re Stephen L.*,<sup>148</sup> the one case which provides the most support for stop and frisk on the basis of gang membership, the court's focus on incriminating factors to validate the police officer's finding of reasonable suspicion—and not mere overreaction to an indeterminate allusions to an unsavory appearance or association—demonstrates that the stop and frisks are not unwarranted infringements on individual liberty. *In re Stephen L.* involved juvenile gang members who defaced a public building with graffiti. The facts of the incident were routine. On March 3, 1983, at approximately 6 p.m., as it was getting dark, Police Officer John Brown and his partner, Officer De La Roca, were on patrol in full uniform. They

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146. 795 P.2d at 1341-42.

147. *Id.*

148. 162 Cal. App. 3d 257, 208 Cal. Rptr. 453 (1984).

were assigned to the West Bureau CRASH (an LAPD detail dealing with street gangs), working in the Hollywood area. At that time, the officers were in the vicinity of Lemon Grove Park because they had received complaints regarding vandalism and graffiti written on the walls of the administration building. Lemon Grove Park was a known hangout for the Clanton Street gang and Officer Brown was aware of prior violent gang activity at this park.

Officers Brown and De La Roca entered the courtyard of the park's administration building area on foot and observed "freshly painted gang type graffiti on the walls," which was really new graffiti within a day or two old. The graffiti included the word "Clanton," the Clanton gang logo "C14," and numerous names and nicknames of members of the gang. When the officers entered the courtyard area they saw six gang men standing in a group, four of whom (not including Stephen) were recognized as members of the Clanton Street gang. The group was standing three to four feet from a wall with graffiti on it, and no one else was in the courtyard. As soon as the officers entered the courtyard and moved toward the group, the group split into two segments and apparently attempted to leave the area in two different directions. Until this moment, no words had been spoken. The officers detained the six youths "to make an investigation for possible vandalism." Officer Brown patted down the youths, including Stephen, looking for weapons and possibly spray paint cans; one of the considerations for which was the fact that there were six youths and only two officers. Officer Brown also testified that street gang members have been known in the past to carry weapons and felt that if they did have weapons, the officers would take them away from them for safety purposes. When Officer Brown patted down Stephen he felt a knife sheath on the right side of his belt, which was covered by his shirt and jacket. Officer Brown removed the knife from Stephen's person. Was a folding, locking-blade, buck knife with an approximately four and one-half inch-long blade.

At the juvenile proceeding, Stephen asserted that his detention and that the cursory search for weapons on him was constitutionally improper. The court's response was curt.

We are mystified, after a recital of the foregoing facts, just what improvement in conduct we are being urged to require of police officers in a situation such as here presented. Certainly, the patrolling of parks and recreational areas is desirable. The investigation of vandalism and persons found next to new instances of the same is an activity for which police officers are hired. Failure to cursorily search suspects for weapons in a confrontation situation in an area where gang activity and weapon usage is known from the officers' past experience would be most careless. Furthermore, it is the character of the incident and not the degree of acquaintanceship with suspects which should determine the conduct of a conscientious police officer. (Thus, it certainly should not be contended that the police officers were entitled to pat down search only the four suspects they previously knew and not [Stephen] who was an integral part of the group found next to the vandalized wall.)<sup>149</sup>

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149. 208 Cal. Rptr. at 454-455. "[H]unch[es]" are improper, but even a "furtive gesture" in some circumstances could constitute probable cause to justify a search. The accumulation of circumstances in this present case would have suggested dereliction of duty on the part of the police officers if they had not detained for investigation and taken the precaution of a pat down

Of course, H.R. 4441 is not concerned with misdemeanor juvenile crime, nor is H.R. 4441 needed to provide reasonable suspicion to stop and risk a juvenile gang caught virtually red handed. But the defense position in *In re Stephen L.* demonstrates the logical absurdity to which many of the Warren Court's search and seizure rulings inflict on criminal litigation, and consequently why an infusion of common sense from legislative populism may be necessary to right the course of criminal justice. The misapplication of criminal justice as well as the misapplication of *Terry* are two themes aptly demonstrated in the discussion of the next two cases.

The two most recent and direct cases to explicitly consider the practice of police investigation of criminal street gang members based solely on gang membership are *People v. Rodriguez*<sup>150</sup> and *State v. Jones*<sup>151</sup> from California and New Mexico state courts, respectively. Both cases rejected the use of gang profiles as a proxy for reasonable suspicion and did so under very different circumstances.

In *State v. Jones*, police officers approached three men walking down the street on the grounds that one of the men was a known gang member and a drug dealer. Initially, the officers conducted a pat-down of just the known gang member, but one of the officers decided to pat-down Jones as well because his appearance resembled that of a known gang. On appeal, the New Mexico court found that neither the initial stop nor the subsequent frisk met the threshold level of suspicion under the reasonable suspicion standard.<sup>152</sup> The court stated in no uncertain terms that it would not abandon "the requirement of individualized, particularized suspicion," calling such an interpretation a "leap of faith."<sup>153</sup> The New Mexico court was correct, but it did not strike down a *Terry* search, but rather a wrongful *Terry* search as discussed more fully in Part Three of this article.

The facts of *State v. Jones* seem to be a rather typical manifestation of a police encounter which exemplifies the abuse rather than the use of reasonable suspicion. *Terry* stops are permitted upon the premise that criminal activity is afoot, and the frisks are permitted solely to disarm the suspect, not to search for evidence. Because the real reason the police searched Jones was to look for drugs and not a reasonable fear of armed violence, the stop and frisk in *State v. Jones* required more than reasonable suspicion. Evidentiary searches require probable cause of which profile evidence should never comprise; it should never be the case that a person is adjudged a criminal merely because he looks the part.

*People v. Rodriguez* is the harder case in that while squarely on point, it flatly rejects the sentiments of H.R. 4441. It may or may not be right. However, it is certainly worth considering the underlying values of H.R. 4441 along side those embraced by *People v. Rodriguez*. At bottom, the

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search. The police officers here more than fulfilled the mandate of law with respect to detention. The record abounds with the required articulable facts for a detention. Furthermore, in conducting a pat down search: "The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." *Terry v. Ohio*, 392 U.S. 1, 27 (1968).

150. 21 Cal. App. 4th 232, 26 Cal. Rptr. 2d 660, 1993 Cal. App. LEXIS 1294 (1993).

151. 114 N.M. 147 (1992).

152. *Id.* at 150.

153. *Id.* at 150-51.

key question to ask is at what point does the laudable goal of promoting the rights of the class of criminal suspects (both the innocent as well as the guilty) impair too heavily the rights of the class of criminal victims. The balance, which the Warren Court struck in the sixties, may not have factored in the advent of drugs, guns, and gangs in all communities, but especially urban ones.

*People v. Rodriguez* involved police tracking of gang members by maintaining a photograph registry, rather than stop and frisks to extract guns.<sup>154</sup> In this case, Mynor Arnold Rodriguez, a minor tried as an adult, appealed his conviction of second-degree murder. He contended, *inter alia*, that his identification as a suspect resulted from a photograph obtained during an illegal "gang sweep" field interrogation and thus his motion to suppress the photograph and subsequent identifications should have been granted. The district court disapproved of the practice of stop and frisk of known gang members to create a police photograph registry of gang members, finding it repugnant to the Fourth Amendment, but sustained the conviction because the identification of the suspect was based on independent recollection and was not fruit of the illegal registry.<sup>155</sup>

The facts were as follows:<sup>156</sup> On October 21, 1990, Roberto "Eddie" Gonzalez, the murder victim, was walking to a convenience store in the City of Orange with his friends, Esteban De Paz, Juan Martinez, and Edmundo Sanchez. They had just crossed Tustin Avenue when three Hispanic youths riding bicycles overtook them. One, later identified as Rodriguez, got off his chrome bicycle and challenged Eddie to reveal any gang affiliation. Included in Rodriguez's comments was the phrase, "Puro South Side." When Eddie did not respond, Rodriguez punched him in the face. Eddie backed away, and Rodriguez pulled a small pistol from his pants, pointed it at Eddie's chest and pulled the trigger. When the gun failed to fire, Eddie reached towards Rodriguez as though he was trying to take the gun away from him. Rodriguez pulled back the top of the gun and shot again, striking Eddie in the chest and killing him.

Eddie's three friends were interviewed by the police and each gave a description of the shooter, whom they did not know. Later that day, the three were shown a "gang book" consisting of photographs of known members and associates of local gangs. Sanchez identified a picture of Rodriguez, taken three days before, as that of the shooter; De Paz selected the

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154. The State of California has a statute making membership in criminal street gangs a separate crime. Penal Code section 186.22, subdivision (a) punishes as a separate crime "[a]ny person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang . . . ." Although the officers here arguably had reason to suspect Rodriguez and his companions were street gang members, the statute carefully avoids punishing mere membership. "By using the phrase 'actively participates,' the California Legislature evidently sought to prevent prosecution of persons who were no more than nominal or inactive members of a criminal street gang. . . . To be convicted of being an active participant in a street gang, a defendant must have a relationship with a criminal street gang which is 1) more than nominal, passive, inactive or purely technical, and 2) the person must devote all, or a substantial part of his time and efforts to the criminal street gang." *People v. Green*, 227 Cal.App.3d at 700.

155. *Rodriguez*, 21 Cal. App. 4th at 238-39, 241.

156. *Id.* at 236-38.

photograph of another youth, and Martinez did not identify anyone from the book. After interviewing Rodriguez's father and uncle, police then went to the home of Angela Jackson, Rodriguez's girlfriend, and interviewed her. She told them Rodriguez had come by her house with a friend earlier that day and asked her to keep a chrome bicycle for him. He told her he had been present during a shooting and he was afraid the police might think he did it. He also changed his clothes and gave the ones he had been wearing to his friend. Rodriguez was arrested later that night.

On October 24, the police showed Eddie's three friends "photo line-ups," consisting of three folders of six photographs each, one of which included Rodriguez's booking photograph. All three identified Rodriguez as the shooter. De Paz and Martinez also identified Rodriguez as the shooter at trial. At trial, Rodriguez made a motion to suppress the "gang book" photograph and the subsequent identifications. The testimony at the hearing revealed that Don Hearn and John Whiteley, police detectives with the City of Orange, were assigned to the gang unit, which maintained a photographic file of known gang members and associates. The South Side F-Troop gang was one of the known gangs in the City of Orange.

On October 18, three days before Eddie Martinez was shot, Hearn and Whiteley saw Rodriguez and four companions standing together in front of an apartment complex on East Adams in Orange. Hearn knew the neighborhood was the turf of the South Side F-Troop gang and that the apartment complex was a common gathering place for gang members. South Side graffiti was written on the neighboring fences and walls, and Rodriguez and his companions were dressed in a manner consistent with gang membership. Rodriguez wore a jacket with the words "Dreamer" on the front and "F-Troop" on the back.

Hearn testified that the group appeared to be doing nothing more than talking and socializing. He and his partner, both in uniform, approached the group intending to get the youths' identification, take their pictures, and find out what gang they claimed. As he approached them, he told them to "stay there." He and Whiteley patted the youths down and ordered them to sit on the curb and the sidewalk. The officers then interviewed them one at a time, asking each about his name, address, date of birth, and so forth, and took a photograph of each one. The entire process took 15 to 20 minutes.

The trial court denied the motion to suppress, stating in pertinent part that "where the police are able to enunciate nexus, which is really the suspicion of either gang activity, membership or affiliation, . . . detention is allowed for [field identification] stops for intelligence-gathering purposes and it's permissible." On appeal, the district court disagreed. The district court agreed that the 15-20 minute interrogation to take a photograph of Rodriguez and include him in the gang registry constituted a seizure, which required, at a minimum, a reasonable suspicion basis.<sup>157</sup> The district court

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157. The officer detained Rodriguez; this was not a consensual encounter "which result[s] in no restraint of an individual's liberty whatsoever . . ." *Wilson v. Superior Court*, 34 Cal.3d 777, 784; 195 Cal.Rptr. 671, 678; 670 P.2d 325 (1983). A detention, on the other hand, occurs when, "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Michigan v. Chesternut* 486 U.S. 567, 573 (1988). A show

disagreed, however, with the trial court's conclusion that the detention of Rodriguez was permissible. Citing to, *Terry*,<sup>158</sup> the district court stated: "[I]n order to justify an investigative stop or detention the circumstances known or apparent to the officer must include specific and articulable facts causing him to suspect that 1) some activity relating to crime has taken place or is occurring or about to occur; and 2) the person he intends to stop or detain is involved in that activity."<sup>159</sup>

The Court then addressed the issue of whether membership in a criminal street gang constituted reasonable suspicion, and in sweeping language, answered the question in the negative:

The guarantees of the Fourth Amendment do not allow stopping and demanding identification from an individual without any specific basis for believing he is involved in criminal activity.<sup>160</sup> Mere membership in a street gang is not a crime.<sup>161</sup> Here, Detective Hearn testified Rodriguez and his companions were doing nothing suspicious when he approached them. Rather, he agreed that it was his department's policy to "stop individuals who [officers] believe may be involved in a gang and take the field identification information, in addition to a photograph, and then place that into police files for potential later use regardless of whether or not that individual is at that time involved in criminal activity . . . ." While this policy may serve the laudable purpose of preventing crime, it is prohibited by the Fourth Amendment.<sup>162</sup>

The Court's discussion of its analysis is a startling, perhaps unwitting, concession that it is operating in a civil liberties "due process" paradigm and is giving short shrift to tenets of law and order "crime control." The unexamined adherence to due process considerations, without regard for the shifting contours of modern society and the need for effective law enforcement to deal with organized criminal street gangs, elevates due process to a false plateau. The surreal perch on which concerns for due process sits leads the Court to reject police investigatory procedures, such as a photograph registry, even while lauding their success in practice. The constitutionality of such a detention "involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty."<sup>163</sup> Public concern and outrage over the crime and senseless violence caused by street gangs is understandably strong. In addition, the effectiveness of the "gang book" identification procedure is verified by its success in this case. But the police policy before us constitutes too significant an intrusion on individual liberties to be justified by the public inter-

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of official authority is sufficient to engender that belief in a reasonable person. *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (Stewart, J.). Here, the officers approached Rodriguez and his companions and ordered them to "stay there" while they were patted down for weapons. They were then told to sit down while the officers interviewed them one at a time. No reasonable person under these circumstances would believe he was free to leave. *Rodriguez*, 21 Cal. App. 4th at 238.

158. 392 U.S. 1, 21.

159. *Rodriguez*, 21 Cal. App. 4th at 239.

160. *Brown v. Texas*, 443 U.S. 47, 51-52 (1979).

161. *People v. Green*, 227 Cal. App. 3d 692, 699-700; 278 Cal. Rptr. 140 (1991). The officers did not contend that they had reason to suspect Rodriguez of more than mere membership in the South Side F-Troop gang and thus the California Penal Code section 186.22 did not apply.

162. *Brown*, 443 U.S. at 52.

163. *Id.* at 50-51.

est. A central concern in balancing these competing considerations in a variety of settings has been to assure that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field."<sup>164</sup>

*People v. Rodriguez* rejects the use of gang profiles with the rhetoric of a "Saturday night special." To call a police focus on criminal street gangs "arbitrary" and "unfettered," is to turn a blind eye to reality. It makes no sense to investigate from scratch a killing which has all the appearances of senseless gang violence. It is neither unfettered nor arbitrary for law enforcement to track members of a criminal street gang dedicated to law violation. Allowing a police photo registry of criminal street gang members is not the same as allowing police to keep tabs on the NAACP or Girl Scouts of America. Thus, the usual parade of horrors and slippery slope arguments need not be trotted out here. Law enforcement budgets are too strained from dealing with real crime to dedicate much attention to imaginary political crime.

In summary, the cases to date recognize that very important judicial line drawing is required to prevent reasonable suspicion from evaporating the protection of privacy and personal property guaranteed by the Fourth Amendment. The cases recognize that their decisions guide the personal decisions of law enforcement officers who must decide important questions in the fast moving dynamic of field circumstances. Finally, the cases demonstrate that the courts are well steeped in the civil libertarian "due process" mandates of the Warren Court, a full generation after it passed the mantle to a more law and order "crime control" oriented Burger and now Rehnquist Court. These considerations suggest that additional leeway be given to permit gang profile, as a proxy for reasonable suspicion, and the limited search and seizure permitted therefrom, would be applied under a watchful eye and with continued zealous safeguarding of individual liberty. Gingerly allowing the pendulum to swing toward community safety will not occasion a roughshod trampling of liberty. The pendulum swing may simply reflect a necessary adjustment of criminal procedure from rigid protection of the rights of criminal suspects to easing the procedure by which society identifies and deals with criminals. Guarded use of the stop and frisk of criminal street gangs by experienced, well trained, sensitive law enforcement officers is a reasonable expansion of "reasonable suspicion." The only liberty which it threatens are those who openly join criminal street gangs knowing that such gangs engage in a pattern of serious felony crime.

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164. *Id.* at 51; *cf.* Michigan Dept. of State Police v. Sitz, 496 U.S. 444 (1990) (slight intrusion on motorists stopped briefly at sobriety checkpoints does not violate Fourth Amendment).

## V. THE PROBLEM WITH STOP AND FRISK

### A. Lesser Protection for Invasion of Fourth Amendment Protected Interests

The concept of reasonable suspicion affords considerably less protection than does probable cause<sup>165</sup> for two reasons. First, it allows a police invasion of privacy or interference with liberty at a lesser threshold than does probable cause, albeit the invasive nature of the intrusion is limited in scope and character to a search for weapons and not evidence. Probable cause requires a suspicion to be more likely true than not before police are allowed to invade one's privacy or interfere with personal liberty.<sup>166</sup> Reasonable suspicion requires nothing more than a legitimate reason to suspect that criminal activity is afoot and that a brief detention is warranted and that the scope and character of the intrusion must be reasonably related to its purpose.<sup>167</sup> Second, unlike probable cause, the determination

165. Probable cause protects privacy and property interests from unreasonable invasions by the government by striking the balance between the competing concerns of individual liberty and furthering community interest in crime control. The Supreme Court observed that the "rule of probable cause is a practical, non-technical conception affording the best compromise that has been found for accommodating [the] often opposing interests" of "safeguard[ing] citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime" and "of giv[ing] fair leeway for enforcing the law in the community's protection." *Brinegar v. United States*, 338 U.S. 160, 176, *reh'g denied*, 338 U.S. 839 (1949). Probable cause equates to the common law concept of reasonable cause. *Draper v. United States*, 358 U.S. 307, 310 n.3 (1959). Thus, the Fourth Amendment requires that warrants shall not be issued except upon probable cause; see, e.g., *Horton v. California*, 496 U.S. 128 (1990) and no seizure, e.g., *Arizona v. Hicks*, 480 U.S. 321 (1987), including seizures of the person, e.g., *Dunaway v. New York*, 442 U.S. 200 (1979); nor searches, e.g., *Katz v. United States*, 389 U.S. 347 (1967), are reasonable without probable cause.

166. The Supreme Court has never quantified probable cause. To the contrary, in its fullest explication of the matter, the Court described probable cause as a "fluid concept" that turns on an "assessment of probabilities in particular factual contexts" and, therefore, is "not readily, or even usefully, reduced" to a mathematical formula. See *Illinois v. Gates*, 462 U.S. 213, *reh'g denied*, 463 U.S. 1237 (1983). The Court used phrases such as "fair probability" and "substantial basis" to articulate the quantum of evidence necessary to prove probable cause. The Court has stated that the probable cause standard does not demand any showing that such a belief be correct or more likely true than false, i.e., more than one half. *Texas v. Brown*, 460 U.S. 730, 742 (1983); see also *Illinois v. Rodriguez*, 497 U.S. 177, 184 (1990) ("[W]hat is generally demanded of the many factual determinations that must regularly be made by agents of the government . . . is not that they always be correct, but that they always be reasonable."). However, dictum in *Malloy v. United States*, 354 U.S. 449, 456 (1957) (condemning "arrests at large," in which one of three suspects was arrested in order to interrogate him) suggests that probable cause is more than one third. In short, reasonableness implies that be at least 50% certain for probable cause to exist. Of course, the courts will not stake out a quantified approach because it could turn every case into an endless debate on applied probability analysis. Although probability theory is quite well-developed theoretically, the empirical applications of probability theory are simply too complicated for legal determinations. See *Nathanson v. United States*, 290 U.S. 41 (1933); *Spinelli v. United States*, 393 U.S. 410 (1969); *Illinois v. Gates*, 462 U.S. at 239 (1983) (reaffirming *Nathanson*). The ephemeral nature of weather reports are a good example of the problematic nature of applied probability analysis. In short, what makes cause probable is that it is certain at the 50% confidence level; however, as a practical matter, there is enough play in the concept for advocacy on either side to win a few points at the margin.

167. Justification of an investigative detention depends on whether there were specific and articulable facts known to the officer which, taken together with rational inferences from these facts, created a reasonable suspicion of criminal activity which justified the intrusion into the defendant's personal security at the time of the stop. See also *United States v. Sokolow*, 490 U.S. 1 (1989). "The concept of reasonable suspicion, like probable cause, is not 'readily, or even usefully, reduced to a neat set of legal rules.'" *Id.*, quoting *Illinois v. Gates*, 462 U.S. 213, 232 (1983).

of what constitutes reasonable suspicion is intended to be decided by the cop on the beat, as opposed to a neutral and detached magistrate.<sup>168</sup>

As implied in the expansion of *Terry*, the stop and frisk, which is a lesser search and seizure based on reasonable suspicion and a lesser form of individual suspicion than probable cause, is fraught with analytical and applied difficulties. Law enforcement personnel tend to search one way—all the way—regardless of theoretical line drawing. Far too often, trial courts, and even the appellate courts, seem to fall in line with the law and order mentality that favors admission of evidence upon the seeming rationale that the end justifies the means. The major advantage of returning Fourth Amendment search and seizure standards to the monolithic terms expressed in the text of the Amendment itself is that it would eliminate any pretense that police and the courts consistently treat stop and frisk any differently than search and seizure. The disadvantage, of course, is that the community safety needs would remain paramount and the likely adjustment would be that the courts would then lower the threshold of probable cause to permit searches and seizures in street confrontations, but then evaluate the level of search on a variety of factors such as need, the degree of cause, the degree of intrusiveness, the time and inconvenience involved, all on an *ad hoc* basis. This would leave search and seizure law less, and not more, comprehensible.

### B. *Potential for Police Harassment*

Street confrontations are required to prevent the occurrence of reasonably detectable crimes in advance. The prevention rationale is strongest where violent crime is a distinct possibility. However, apprehension of criminals before the completion of crime is just as dangerous as apprehension after the completion of crime. Thus, it makes sense to permit cops to disarm suspects before the completion of a crime for the same reason it makes sense to do so after completion of a crime. The downside to this practice is the possible injury to individual liberty—a vitally important concern, to be sure.

Because of the grave potential for, and history of, abuse of *Terry*,<sup>169</sup> it is not easy to lend support to further the expansion of “stop and frisk”

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“The process does not deal with hard certainties, but with probabilities.” *Id.* quoting *United States v. Cortez*, 449 U.S. 411, 418 (1981)). Factors which are not by themselves proof of illegal conduct may give a police officer reasonable suspicion, and “there could, of course, be circumstances in which wholly lawful conduct might justify the suspicion that criminal activity is afoot.” *Sokolow*, 490 U.S. at 2. However, an officer who conducts an investigative detention must do so on the basis of more than an “inchoate and unparticularized suspicion or ‘hunch.’” *Id.* at 2, quoting *Terry v. Ohio*, 392 U.S. at 27.

168. *Johnson v. United States*, 333 U.S. 10, 14 (1948). Because of the lesser protection afforded by reasonable suspicion, it should be used to justify even limited invasions of privacy and interference with personal liberty with much greater caution than full fledged searches and seizures based on warrants issued by neutral and detached magistrates and based upon probable cause.

169. Retired Los Angeles Police Detective Mark Fuhrman who was spotlighted in the O.J. Simpson trial is just another example of the human corruption in the exercise of police power. According to trial transcripts, Fuhrman explained: “Most real good policemen understand that they would just love to take certain people and just take them to the alley and just blow their brains out. All gang members for one. All dope dealers for two. Pimps, three.” Det. Fuhrman further admitted to Kathleen Bell, a real estate agent in Redondo Beach and a social acquaint-

under H.R. 4441 no matter how well intentioned or crafted, no matter how serious the problem of gang violence. But the expansion under *Terry* does make sense, if the problem of police abuse is dealt with as aggressively and directly as street criminals. To properly deal with the problem of police abuse of reasonable suspicion requires re-assessing the nature of the problem of police abuse and the efficacy of relying solely on the exclusionary rule to deter cops from going bad.

The key problem with *Terry* is that while it makes sense in theory to talk about "reasonable suspicion," in practice one can argue that "reasonable suspicion" incorporates all the subjective bias and value judgments of the detaining officer. What is worse, because the reasonable suspicion standard is meant to be applied by the cop on the beat without intervention in advance by a neutral and detached magistrate, the reasonable suspicion standard may be applied with a predisposition toward prejudice and caprice because the law enforcement officer is often caught up in the competitive enterprise of ferreting out crime. However, the Court in *Terry* was careful to disavow giving credence to a police officer's "inchoate and unparticularized suspicion or hunch." The general concern was that, given human fallibility and human tendency to act on insidious predilections, law enforcement personnel should be limited in their discretion to the minimum necessary to ensure public safety. The Supreme Court has held that race, gender, economic impoverishment, and other demographic characteristics alone do not constitute objectively reasonable suspicion. However, even the Court sometimes sends out mixed signals.<sup>170</sup>

Unfortunately, it remains obviously and painfully true that in the minds of many police officers, the media, and white America, the stereotype of a young, black male, particularly out of the ghetto, invokes reasonable suspicion.<sup>171</sup>

Thus, in a society which truly valued individual liberty, reliance on "reasonable suspicion" to justify stop and frisks in street confrontations

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tance, that he hated blacks and that he would fabricate a reason to stop interracial couples. Det. Fuhman also told her he would like to see all blacks gathered together and burned. Larry Reibstein, *Up Against the Wall*, NEWSWEEK, Sep. 4, 1995, at 24. Los Angeles residents who have long complained of being stopped, harassed and beaten by police for no other reason than their skin color do not find that Mark Fuhman speaks in isolation. "This may be news to white folks, but it's like telling us the earth is round," Cole Richardson, a 37-year-old black accountant, said while eating breakfast and watching the Simpson trial on television at a Crenshaw-area restaurant. Aurelio Rojas, *L.A. Can't Shake Racial Tension: Fuhman Tapes Put Police Department Back on Hot Seat*, San Francisco Chronicle, Aug. 28, 1995, at A1. "What Fuhman did was break the code of silence that has been long maintained by racist rogue cops within the department who framed Latinos and African-Americans," said John Mack, president of the Los Angeles Urban League. Fred Bayles, *Once Model, LAPD Now Demoralized*, MAINICHI DAILY NEWS, Oct. 9, 1995, at 2.

170. *Cf. Ybarra v. Illinois*, 444 U.S. 85, 97 (1979) (Burger, C.J., dissenting) (arguing for a warrantless search of people found on the premises of a low-income bar at the time of an arrest or search of a place occurs, Chief Justice Burger in dissent stated, "[p]olice] are not required to assume that they will not be harmed by patrons of the kind of establishment shown here, *something quite different from a ballroom at the Waldorf*") (emphasis added). Chief Justice Burger's dissent in *Ybarra* implicitly suggests an endorsement of economic discrimination in the treatment of patrons of a blue-collar bar as opposed to the upper-class clientele of the Waldorf.

171. See e.g., ELLIS COSE, RAGE OF THE PRIVILEGED CLASS (1993); Mark Whitaker, *The Hidden Rage of Successful Blacks*, NEWSWEEK, Nov. 15, 1993, at 52; 20/20 (with Hugh Downs and Barbara Walters), ABC NEWS, Nov. 6, 1992, available in LEXIS, News Library, Current News File.

raises questions with far reaching implications for the governance of the body politic. A good society is one which balances competing interests, which pits the preservation of the state against the threat posed by criminal conduct, on one hand, and the liberty interest of the individual under threat by invasive police methods, on the other. Achieving this balance is no mean feat. Absolute liberty devolves to a state of nature, while absolute monarchy affords citizens no better life than that of the state of nature governed by unchecked brutes. Absolute liberty or government control are two ends to a spectrum, which merely trades one means of abuse of citizens for another. Thus, the proper balance between individual (gang) liberty and government control is a matter of line drawing to achieve the golden mean.

The line defining the appropriate balance between government control and individual liberty is one that unfortunately implicates political demographic considerations, since law abiding whites generally perceive themselves on one side and blacks on the other. The ability of a majority to unfairly burden the minority in order to benefit the majority was precisely the concern, which led to checks on the tyranny of the majority.<sup>172</sup> The racial aspects in drawing the line between due process and crime control are quite possibly intractable. Because this is so, attempts to make stop and frisk impartial must be re-doubled. Race consciousness sounds a cautionary note. Critical inquiry that does not stop to fully explore every assumption and implication for racial bias will poorly serve as a pillar of support in a bridge between black and white America.

Turning next to the Fourth Amendment concern for privacy, line drawing in the context of body searches brings to bear a complex set of values reaching across cultural, sociological and philosophical considerations. The invasion of bodily privacy by hands-on frisking raises fundamental and historic concerns for the dignity of man in civilized society. Of the many abuses of concern to a monarchical government from a distant shore giving birth to our great, but troubled nation, not inconsequential was the government's unrestrained power to invade the homes of citizens and violate individual privacy.<sup>173</sup> The key to the United States Constitution was the creation of a system of checks and balances which empowered government to perform necessary and limited powers, but which restrained the government from the arbitrary abuse of power.

Foremost among a short list of individual liberties express constitutional protection against an abusive government was the protection of personal privacy and private property. Thus, the constitutional framers wisely guaranteed the primacy of individual freedom over community interest in domestic safety. The proper balance between the two extremes of absolute deference to individual liberty and absolute concession to community interest in crime control was struck by the constitutional convention which begot the Constitution and the Bill of Rights. The proper balance as expressed in the Fourth Amendment is to permit reasonable, not arbitrary, governmental interference with individual liberty. Arguably, government

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172. THE FEDERALIST No. 51 (Madison) (Clinton Rossiter ed., 1961).

173. See *Katz v. United States*, 389 U.S. 347 (1967); *Boyd v. United States*, 116 U.S. 616 (1886) citing to *Entick v. Carrington*, 19 Howell St. Tr. 1029, 1066 (1765) (Eng.).

invasion of privacy is reasonable only where the government can establish before a neutral and detached magistrate a finding of probable cause. Any standard less than probable cause is an invitation to caprice and whim, masquerading as polite, and more often, not so polite, inquiry—more officious than official. While it is true that community safety would suffer if the Court were to ever reverse itself on the acceptability of the reasonable suspicion standard, since even marginally competent criminals might be expected to hide their criminal intent, arguably the community interest in crime control is outweighed by the primacy of individual liberty. Young black males who make up the brunt of those wrongly or unnecessarily checked out under the reasonable suspicion standard might well argue that they should not, as a minority class, bear the burden of abusive police methods even if such methods benefit the community as a whole.

Debating this balancing question, however, serves no real purpose. As a Supreme Court decision, *Terry* is the final law of the land. It has served as a strong precedent for more than a quarter of a century. Only the Supreme Court itself, in the absence of constitutional amendment, can overturn *Terry*. Given the current conservative stance taken by the Court, sounding the retreat on *Terry* seems unlikely in the federal judicial system. And the conservative mood of the country on matters of crime control makes state judiciaries less likely to rise above the federal floor on civil liberties in the area of street confrontations.<sup>174</sup> Thus, while the defense bar and the American Civil Liberties Union continue their important efforts to hold the line against arbitrary invasions of privacy, it is also important to consider the views of real people most affected by too much deference given to criminal suspects—people like Beverly Dorsey. She remains unconvinced that a victory for a drug dealer is a victory for America—“[such

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174. The jurisprudence of new federalism invokes state constitutions as a source for state courts to find protection of individual liberty independent of the direction followed by federal courts under the U.S. Constitution. See Girardat, *State v. Burkholder: Expansion of Individual Liberties Under the Ohio Constitution*, 47 OHIO ST. L.J. 221, 224 (1986); Wilkes, *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 KY. L.J. 421 (1974); Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977). Federal constitutional standards provide a floor for civil liberties. State constitutional guarantees may provide additional guarantees as well as protect against minimalist, illogical, or activist supreme court. Hancock, *State Activism and Searches Incident to Arrest*, 68 VA.L.REV. 1085, 1110 (1982); Stewart G. Pollock, *The Emergence of State Constitutional Law: Adequate and Independent State Grounds as a Means of Balancing the Relationship Between State and Federal Courts*, 63 TEX. L. REV. 977, 982 n.29 (1985) (discussing *Michigan v. Long*, 103 S.Ct. 3469, 34376 (1983)). To avoid federal review, a decision based upon state law must provide a plain statement that any federal law referred to in the opinion is purely advisory. See also *California v. Greenwood*, 486 U.S. 35, 43 (1988) (“Individual states may surely construe their own constitutions as imposing more stringent constraints on police conduct than does the Federal Constitution”); *Oregon v. Hass*, 420 U.S. 714, 719 (1975) (“a state is free as a matter of its own law to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards”); *Cooper v. California*, 386 U.S. 58, 62 (1966) (“our holding, of course, does not affect the State’s power to impose higher standards on searches and seizures than required by the Federal Constitution if it chooses to do so”); *Michigan v. Long*, 463 U.S. 1032 (1983) (state court rulings are final as to independently-based state constitutional provisions; *Long* also establishes a presumption in favor of federal constitutional review unless the state court unambiguously bases its independent analysis on its interpretation of the state constitution). In *Arizona v. Evans*, 115 S. Ct. 1185 (1995), Justice Ginsburg, writing in dissent, argued that the reversal of the *Long* presumption would better promote federalism.

victories are not] for decent people who want to live in a secure environment."<sup>175</sup>

Legitimate concern about police abuse suggests perhaps that police discretion should be limited to deterring easily preventable crime. From this view comes the argument for limiting the opportunity for police harassment by restricting the stop and frisk technique. The weakness in this solution is that it hinges on the placing of unreasonable limitations on good cops, when the problem of police abuse owes to a failure to displace bad cops. This is a debate that *Terry* already settled in favor of letting good cops do their job. It is a task for the executive at local levels to rid their systems of bad cops. Disallowing legitimate law enforcement procedures because of the existence of bad cops not only sacrifices community safety needlessly, but it buys into a solution of misplaced trust. Such a solution is based on the notion that the way to deal with a few bad law enforcement officers is to limit the police authority of all law enforcement officers, both good and bad. However, it is painfully obvious that any police authority is too great if it must accommodate the retention of bad cops.

In this regard, it is worth noting that the exclusionary remedy, though serving a laudatory goal, does so at great expense to justice, both in the abstract and in personal impact. Human decision making, even by the most experienced, trained, and restrained street-wise cop, is inevitably subject to invidious human bias and personal predilections. Perhaps the Court in *Terry* overestimated the promise of the American experiment of a grand melting pot. Unlike homogenous countries such as 19th Century England or 20th Century Japan, American society is incredibly diverse. Bridge building, let alone assimilation between the various and sundry groups making up the most heterogenous country in the world, has proven difficult. The problem remains that the inevitable human trait of the empowered majority is to view people who appear different—racial minorities in particular—as threats.

### C. *Solutions to the Problem of Police Harassment Under Stop and Frisk*

#### 1. *The Exclusionary Rule*

The Warren Court emphasized the exclusionary rule as the only effective way to deter police misconduct. There are two judicial doctrines expanding the scope of the exclusionary rule for Fourth Amendment violations. The first expansion is the "fruit of the poisonous tree" doctrine,<sup>176</sup> which expands the rule to evidence indirectly obtained from an initial violation.<sup>177</sup> A second expansion occasionally occurs as an application of the fundamental rights doctrine which may be used to expand application of the exclusionary rule beyond the express provisions of the Fourth

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175. *Judge Bans Warrantless Searches*, UPI, Apr. 7, 1994.

176. In *Nardone v. United States*, 308 U.S. 338 (1939), the Court established the fruit of the poisonous tree doctrine, which holds that all evidence derived from a violation of defendant rights must be suppressed, except for evidence which has become so attenuated as to dissipate the taint that the evidence will be admissible.

177. *Silverthorne Lumber Co. v. U.S.*, 251 U.S. 385 (establishing the independent source exception to the fruit of the poisonous tree doctrine).

Amendment to violations of unenumerated rights, which "shock the conscience."<sup>178</sup>

Because the primary remedy for a Fourth Amendment violation is the exclusion of evidence for consideration in a criminal trial in the government case-in-chief, applied Fourth Amendment analysis operates less to define an absolute sphere of individual privacy, property rights, and specifying restraints on invasion of such rights by the government, and more to superimpose a set of evidentiary rules governing the admissibility of evidence gathered during the course of a criminal investigation.<sup>179</sup> Thus, as a practical matter, the Fourth Amendment, under Warren Court rulings, is reduced in meaning as an instrument of societal justice and takes on value as a source of new evidence laws. Hence, the Fourth Amendment inquiry is reduced to asking whether a particular tangible object or oral statement, secured by the government, and intended for introduction during the prosecution's case-in-chief, should be excluded because the government obtained it in violation of the Fourth Amendment.<sup>180</sup>

The exclusionary rule serves as a remedy for various constitutional violations, but on differing rationales. When a violation implicates the Fourth Amendment, the purpose of the exclusionary rule is to deter police misconduct, not that of magistrates<sup>181</sup> or legislatures.<sup>182</sup> If an unlawful search and seizure has occurred, it does not diminish the probative value of the illegally seized evidence in any way.<sup>183</sup> Indeed, suppression of evidence for violation of the Fourth Amendment is available without regard for the trustworthiness of the evidence. In contrast, when the Fifth Amendment is implicated, as in the case of a coerced or otherwise dubious confession, suppression is invoked primarily on the theory that the evidence is tainted by unreliability and a conviction obtained by its use might be suspect. Because the exclusionary rule in the Fourth Amendment setting can lead to the inadmissibility of credible, material evidence, even for technical violations where there is no intent or gross unfairness to the accused, there is, and has been, long standing ambivalence towards the exclusionary rule owing to its certain costs, and often speculative benefits.<sup>184</sup>

178. See *Rochin v. California*, 342 U.S. 165 (1952); *Breithaupt v. Abraham*, 352 U.S. 432 (1954).

179. In *Romano v. Oklahoma*, 62 U.S. L.W. 4466 (U.S. Sup. Ct., June 13, 1994), Chief Justice Rehnquist writing for the majority denied an Eighth Amendment challenge to the admissibility of evidence regarding petitioner's prior death sentence did not amount to constitutional error. In a pointed comment Chief Justice Rehnquist stated that the Eighth Amendment does not establish a federal code of evidence to supersede state evidentiary rules in capital sentencing proceedings. Cf. *Payne v. Tennessee*, 501 U.S. 808, 824-825 (1991).

180. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE § 23 (1991).

181. See, e.g., *United States v. Leon*, 468 U.S. 897 (1984) (approving an objective, good faith exception for searches and seizures made pursuant to an invalid warrant).

182. *Illinois v. Krull*, 480 U.S. 340 (1987) (extending *Leon's* "good faith" exception to warrantless searches and seizures made pursuant to an invalid statute).

183. The "deterrence only" rationale is a shift from the initial application of the exclusionary rule. *Mapp v. Ohio*, 367 U.S. 643, *reh'g denied*, 368 U.S. 871 (1961). In *Harris v. New York*, 401 U.S. 222 (1971), the Court reaffirmed the impeachment exception in a Fifth Amendment case. The Court reasoned that the evidence was trustworthy and the purely speculative nature of the applicability of the exception would not encourage law enforcement misconduct. Justice Brennan's dissent noted that the exception undermines the deterrent objective and is inconsistent with the objective of preserving the courts from the taint of aiding and abetting the lawbreaker.

184. Although the exclusionary rule has been defended on the basis of the "imperative of judicial integrity," see, e.g., *United States v. Peltier*, 422 U.S. 531, 536-39 (1975), the majority

This ambivalence is, perhaps, nowhere better expressed than in the comments of Judge Schwelb delivered in *United States v. Washington*.<sup>185</sup>

In the words of Brutus, the "noblest Roman of them all", who was at once a tragic hero and one of Caesar's assassins,  
There is a tide in the affairs of men  
Which, taken at the flood, leads on  
to fortune.<sup>186</sup>

In recent years, as crime has risen, Fourth Amendment law has to some degree followed the election returns<sup>187</sup> and the Court has perceived a discernible judicial tide against the rigors of the automatic and uncritical exclusion of improperly secured evidence, no matter how unintentional the policeman's violation and how grievous the defendant's crime. How far that tide has come is uncertain, but if not now, one day soon, the "flood," will have to rise to address the problem of urban gangland violence. Perhaps the need to construe the Fourth Amendment in terms of the non-technical common-sense, man-in-the-street perspective has arrived.

From its onset, members of the Court attuned to the demands of judicial restraint, recognized that the exclusionary rule the Court recognized that the exclusionary rule was a judge-made rule, but not required by the constitutional, except as an enforcement mechanism.<sup>188</sup> Thus, shortly after the election of President Nixon, the Supreme Court saw four retirements (Chief Justice Warren, and Justices Douglas, Stewart, and Harlan) and, with President Nixon making good on his law and order campaign promises, experienced a transfer of voting power adherents of crime control (Chief Justice Burger, Justices Rehnquist, Justice Powell and Blackmun). After the shift in power, the post-Warren-*Mapp* Court immediately began to scale back expansive reading of the exclusionary rule developed under the judicial preference for warrants.<sup>189</sup>

opinion in *Stone v. Powell* effectively exposes the weak and inconsistent character of this justification insofar as it purports to be separate and distinct from the deterrent function. *Stone*, 428 U.S. at 485-86. See also *United States v. Janis*, 428 U.S. 433, 446-47 (1976).

185. (D.C. Superior Court 1982), Criminal No. M-12787-81 (Schwelb, J.).

186. SHAKESPEARE, JULIUS CAESAR act 4, sc. 3.

187. "No matter whether th' constitution follows th' flag or not, th' supreme coort follows th' illiction returns." FINLEY PETER DUNNE, MR. DOOLEY'S OPINIONS (1900).

188. *Mapp v. Ohio*, 367 U.S. 644, 685 (1961) (Harlan, J., dissenting); this position became an express holding of the Court in *Stone v. Powell*, 428 U.S. 465 (1976) (a state prisoner may not be granted federal habeas corpus relief upon the ground that the exclusionary rule was violated at his trial, at least where that issue had been fully explored in the appellate process provided by the state courts) citing to *United States v. Calandra*, 414 U.S. 338, 349-50 (1974) (exclusionary rule does not apply at grand jury). The rule operates as "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the person aggrieved. *Id.* at 348.

189. A central feature of Fourth Amendment jurisprudence is that the judicially preferable arbiter of probable cause is a "neutral and detached magistrate" rather than a police officer "engaged in the often competitive enterprise of ferreting out crime. *Johnson v. United States*, 333 U.S. 10, 14 (1948). See also *Robbins*, 453 U.S. at 437; *California v. Acevado*, 500 U.S. 565 (1991) (Blackmun, J.) (court ending years of confusion by applying the interpretation of the *Carroll* doctrine set forth in *Ross* now applies to all searches of containers found in an automobile).

In his concurring opinion in *Acevado*, Justice Scalia took the opportunity to explain the occurrence of anomalies in Fourth Amendment jurisprudence:

Although the Fourth Amendment does not explicitly impose the requirement of a warrant, it is of course textually possible to consider that implicit within the requirement of reasonableness. For some years after the (still continuing) explosion in Fourth Amend-

## 2. *Alternatives to the Exclusionary Rule*

As well-founded as fear of police harassment often is, unnecessarily limiting legitimate police discretion by strict application of the exclusionary rule is not the answer. Human decision making is likely to be afflicted by bad judgment and bad intentions. However, criminal justice would not be just without discretion by the officer charged with its implementation. Street confrontations require an element of trust. No law, no matter how tightly written, can eliminate human discretion in its application. Human discretion necessarily implies instances of abuse of discretion. Even so, the opportunity for abuse should be minimized. After all, we are a nation of laws, not of men. But eliminating discretion eliminates effectiveness, particularly in street encounters, which are incredibly rich with diversity and present ever-changing nuances. Individual liberty must be balanced against the needs of community security. This balance is invariably delicate, but it should be realistic. Law enforcement cannot be micro-managed by the cool, deliberate, dispassionate reasoning available to judges. Law enforcement requires quick, authoritative, decision-making in the heat of what may be a rapidly deteriorating moment. Decision-making in street encounters requires good cops working under proper incentives with effective checks. Without these conditions, no law, no matter how limited in discretion, is going to alter the propensity for bad cops to abuse their authority.

There are four ways to best avoid the abuses of *Terry*. First, pay for better qualified, better trained, and more diversified law enforcement police departments. The cop on the beat is the single most visible representative of the sovereign. He is the symbol of authority, not only in law enforcement, but also moral authority. He may be viewed as a helpful friend, or antagonistically, as causing fear and anxiety. But because law enforcement is the state's most important presence in the mind's of its citizens, law enforcement officers should be model citizens.

Second, a residency requirement that would require law enforcement officers to live in the area where they police would best foster understand-

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ment litigation that followed our announcement of the exclusionary rule in *Weeks v. United States*, 232 U.S. 383 (1914), our jurisprudence lurched back and forth between imposing a categorical warrant requirement and looking to reasonableness alone. By the late 1960s, the preference for warrants had won out, at least rhetorically.

The victory was illusory. Even before today's decision, the "warrant requirement" had become so riddled with exceptions that it was basically unrecognizable.

In my view, the path out of this confusion should be sought by returning to the first principle that the "reasonableness" requirement of the Fourth Amendment affords the protection that the common law afforded. I have no difficulty with the proposition that includes the requirement of a warrant, where the common law required a warrant; and it may even be that changes in the surrounding legal rules (for example, elimination of the common law rule that reasonable, good faith belief was no defense to absolute liability for trespass, *Little v. Barreme*, 2 Cranch 170 (1804)(Marshall, C.J.), see generally, Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1486-87 (1987), may make a warrant indispensable to reasonableness where it once was not. But the supposed "general rule" that a warrant is always required does not appear to have any basis in common law, see e.g., *United States v. Carroll*, 267 U.S. 132, 150-153 (1925), *Gelston v. Hoyt*, 3 Wheat 246, 310-311 (1818)(Story, J.) and *Wakely v. Hort*, 6 Binney 316, 318 (Pa. 1814) and confuses rather than facilitates any attempt to develop rules of reasonableness. . . .

*Acevedo*, 500 U.S. at 582-84 (Scalia, J., concurring).

ing and credibility between the police and the public it serves.<sup>190</sup> The only way to really bring about community-oriented policing is to require individual police officers to live in the communities which they police. Sensitivity training is too artificial to be truly helpful and is usually conducted with such insensitivity that it is counterproductive more often than not. However, it stands to reason that a white police officer is less likely to automatically view a young black male as a threat if the black youth is familiar to him as a neighbor. The connection of community—children playing together, car washes, and other community events—will lessen alienation and enhance understanding on both sides of the night stick.

Third, a citizen's review of citizen complaints of police abuse would interject diverse community values into law enforcement. In 1976, the birth of Crime Stoppers, a hotline to receive anonymous tips on criminal suspects,<sup>191</sup> was the first real step of communities to take back the streets, not only from criminals, but also from police abuse. Community-oriented policing is a network of police, citizens, government, and social agencies, which blend together to attack crime. However, a funny thing happened on the way to citizen crime watch, the citizens also watch the police. The police know it and act accordingly. Thus, the neighborhood police officer becomes a conduit between the neighborhood and the beat patrolman, and between the neighborhood and the government.<sup>192</sup> The famous Rodney King video is but one example of community vigilance working to check abusive police behavior.

The remaining step is to integrate community oversight and responsibility for investigating reports of police abuse, which currently meanders in the murky milieu of internal affairs departments. Community oversight makes eminent sense as the key check on police behavior. Because suppression of crime is supposed to serve the community, if police become too heavy-handed, then the community, which suffers the reaction is in the best position to determine when police suppression becomes oppression of the community itself. Furthermore, law enforcement officers who come forward to support allegations of abuse should be rewarded, and not ostracized, by a police department for declining to cover-up the misdeeds of rogue cops. The overwhelming demand for quality law enforcement personnel is demonstrated by communities which increasingly resort to private security to augment the police where civil authorities come up short.<sup>193</sup>

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190. See, e.g., *The Secret of Japan's Safe Streets*, THE ECONOMIST, Apr. 16, 1994, at 38.

191. *Neighborhoodly Intervention*, THE ECONOMIST, Nov. 27, 1993, at 28. Independent boards of directors—local business people, retired police officers, housewives—steer the programs. They also decide the value of rewards. Crime Stopper programs in the United States alone have solved almost 350,000 crimes and handed out \$32 million in rewards since its inception in Albuquerque, New Mexico, in 1976. Even school children—tired of drug dealers, locker thefts, smashed lavatories—have invited the program into their schools, where students run it. In some schools a “crime of the week” is announced at morning assembly. *Id.*

192. Allen Howard, *Trust Builds Between Beat Cops, Residents*, CINCINNATI ENQUIRER, Nov. 5, 1994, at B-1.

193. See, e.g., Ralph Blumenthal, *Private Guards Cooperate in Public Policing*, N.Y. TIMES, Jul. 13, 1993, at B1 (private security forces are the trend of the future, but there is concern about constitutional violations and inequities in the treatment of offenders); Ira A. Lipman, *Thugs With Badges*, N.Y. TIMES, July 3, 1993, at A19 (Ira A. Lipman, chairman of a private security firm, raises questions about the selection process and training of private security guards); Robert Hanley, *Private Town Guards Angering New Jersey*, N.Y. TIMES, July 22, 1993, at B7 (the small town

The fourth solution returns to the judicial branch. The vigilance of a conscientious criminal bar and an alert trial judiciary is of critical importance to make criminal justice truly just. Prosecutors should be mindful of their goal to do justice as well as to represent the community in criminal prosecutions.<sup>194</sup> Defense counsels should be alert to allegations of police brutality and aggressive in bringing such claims to the attention of the court.<sup>195</sup> Judges should adjudicate with greater understanding and concern for the rule of law and the community it serves.

The first three solutions look to the executive at the federal, but especially the state and local, level to solve the problem of bad police officers by emphasizing selection, training, and maturity and thus minimizing their chance of brandishing police power. This is done by 1) augmenting internal investigations of police misconduct with citizen's review boards thus maximizing the chance of detecting abusive behavior; and 2) by aggressively terminating bad police officers, an option that seems forlorn. These ideas are not new and the practical difficulties associated with them have been elaborately discussed elsewhere. These ideas may be viewed as naive once the dynamic of police academies, police unions, and local politics are taken into account. Indeed, perhaps it is because the prospect of local government ever rising above cronyism and personalities to address the problem of crime seemed unlikely that the Warren Court ushered in the era of federalized criminal procedure.<sup>196</sup>

However, this is one debate that should not be re-hashed. As a new generation of people grow weary of the current government's paradigm to provide for the needs of society,<sup>197</sup> there needs to be a complete break with the past. The wisdom of the past settled on a government structure, which put aside such an obvious solution as hiring good cops and firing bad cops in preference for sole reliance on the exclusionary rule as to deter bad cops. This experience was a learning exercise, but not one that needs re-hashing.

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of Sussex, New Jersey attempted to replace its official police force, which had been crippled by drug corruption, with a four-man private security firm. However, asserting concerns about the state's role in law enforcement regulation (and implicit fears about encroachment in the job market), the New Jersey State Attorney General won round one in opposition to the Sussex private security force). *New Jersey Court Bans Use of Guards as Police*, N.Y. TIMES, July 31, 1993, at A23; Diana Kim, *Taking Matters into Their Own hands*, L.A. TIMES, Aug. 5, 1993, at J1 (the police in the little town of Silver Lake, outside of Los Angeles, welcome the added assistance of neighborhood patrols).

194. AMERICAN BAR ASSOC., STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION 3d (1993), Standard 3-1.2(c) ("The duty of the prosecutor is to seek justice, not merely to convict.").

195. *Id.* at Standard 4-1.2(b) ("The basic duty defense counsel owes to the administration of justice and as an officer of the court is to serve as the accused's counselor and advocate with courage and devotion and to render effective, quality representation.").

196. Justice Douglas gave an explicit hint of the Court's impatience in *Mapp v. Ohio*, 367 U.S. 643, 671 *reh'g denied*, 368 U.S. 871 (1961) (Douglas, J., concurring), where he observed "the casual arrogance of those who have the untrammelled power to invade one's home and to seize one's person" makes this case imminently appropriate to adopt the exclusionary rule.

197. The rise of private security guards is one indication that crime control is receiving a prominent place on grass roots political agendas. See sources cited *supra* note 193.

## VI. CONCLUSION

Although numerous post Warren Court rulings expand on *Terry*, it is important to note that the stop and frisk of criminal street gang members under H.R. 4441 does not expand one iota the concept of reasonable suspicion beyond the Warren Court ruling in *Terry*. Indeed, the stop and frisk of criminal street gang members presents a better case for reasonable suspicion than the original fact pattern found in *Terry*. After all, *Terry* and his cohorts were an impromptu collection of conspirators preparing for armed robbery. Today, young people join criminal street gangs with the express purpose of doing criminal harm.

It must also be remembered that *Terry* did not authorize stop and frisks; it authorized the admissibility of guns found during a legitimate stop and frisk in the prosecution's case in chief. Thus, rejection of H.R. 4441 would imply that it is better to leave the police without specific guidance in conducting the stop and frisk of criminal street gang members.

The Court itself has but two passive constitutional remedies for abusive police practices during search and seizure—the exclusion of evidence derivative of constitutional violations or civil actions under Section 1983.<sup>198</sup> The Court could not order the cops to end stop and frisks. Thus, recognizing the judicial limitation of the threat of an exclusionary rule, which is supposed to deter abusive police investigatory activity, the Court in *Terry* argued that a judicial ban of stop and frisks would be counter-productive, since the threat of the exclusionary rule would not alter police behavior in cases where the dominant police agenda is crime prevention, not apprehension, and where the jails are already full and even have waiting lists. Further, it is worth bearing in mind that although the exclusionary rule serves to reduce the number of false arrests and detention by depriving law enforcement officers the benefit of arbitrary and capricious hunches, it only gives direct relief to those who are actually charged with a crime.<sup>199</sup> Thus, while the exclusionary rule promotes liberty interests in general, the rule only directly benefits those who would be convicted but for the excluded evidence. Relief for those incorrectly apprehended remains a civil action, but there is no relief from the uncivil actions of those who are incorrectly “not apprehended.”<sup>200</sup>

Finally, it is submitted that the proper hiring and supervising of good police officers, the firing of bad police officers, requiring police officers to live in the community they police, and citizen's review board to augment internal police investigations might do more to deter police officers from going bad than relying solely on the exclusionary rule. The problems presented by gang violence are greater than those which society faced during the hey day of the Warren Court. Society can no longer afford the luxury of employing a police force for protection, at the expense of adding an equal concern about protection from police abuse. Today the problem

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198. *Soldal v. Cook County*, 113 S. Ct. 538 (1992) (permitting a cause of action on violation of a property right to go forward under 42 U.S.C.A. § 1983, Section 1983).

199. See *People v. Defore*, 242 N.Y. 13, 21 (1926) (Judge Cardozo criticizing the exclusionary rule in observing that “[t]he criminal is to go free because the constable has blundered”).

200. “And the life of man, solitary, poor, nasty, brutish, and short.” THOMAS HOBBS, *LEVIATHAN* 185-6, 223-28 (C.B. MacPherson ed., 1975).

of crime requires a full commitment of resources. Gang violence necessarily requires stepped up police measures in response. The most important stepped up measure is a solid endorsement of the stop and frisk technique. The greater police discretion associated with stop and frisk should be allowed. The basic point remains, however, that the increase in police discretion must be offset by a commensurate greater exercise of control over the police by the executive, at all levels of government. Holding the police in check by strong initiatives exercised by the executive in conjunction with the judiciary's use of the exclusionary rule strikes a better balance between individual liberty and community safety than is possible with judicial remedies alone.