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Pragmatism, Originalism, Race and the Case against Terry v. Ohio

Lawrence Rosenthal



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CHAPMAN UNIVERSITY SCHOOL OF LAW



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*Pragmatism, Originalism, Race, and the
Case against Terry V. Ohio*

Larry Rosenthal
Chapman University School of Law

PRAGMATISM, ORIGINALISM, RACE, AND THE CASE AGAINST *TERRY V. OHIO*

Lawrence Rosenthal[†]

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Perhaps no decision of the United States Supreme Court concerning the Fourth Amendment’s prohibition on “unreasonable search and seizure,”¹ has received more criticism than *Terry v. Ohio*.² Rejecting an argument that “the authority of the police must be strictly circumscribed by the law of arrest and search as it has developed to date in the traditional jurisprudence of the Fourth Amendment,” the Court wrote that the reasonableness of a contested search or

[†] Professor of Law, Chapman University School of Law. I am most grateful to Scott Howe and George Thomas for enormously helpful comments on prior drafts. I am indebted as well to Isa Lang, Zachariah Moura, Ryan Odenwalder, and the staff of the Chapman University School of Law’s Rinker Law Library for enormously capable research assistance.

1. U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”).

2. 392 U.S. 1 (1968).

seizure should be assessed by “balancing the need to search (or seize) against the invasion which the search (or seizure) entails.”³ To strike the balance, the Court weighed the

general interest . . . of effective crime prevention and detection; it is this interest which underlies the recognition that a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest.⁴

The Court added: “[W]e cannot blind ourselves to the need for law enforcement officers to protect themselves and other prospective victims of violence in situations where they may lack probable cause for an arrest.”⁵ In light of these law-enforcement interests, the Court concluded that even absent probable cause to arrest, a brief detention and protective search of an individual comports with the Fourth Amendment “where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous”⁶

Terry has encountered a firestorm of criticism in the academy, where it is frequently denounced as granting the police excessively broad discretion that threatens the liberty of the innocent and which facilitates discrimination against minorities and others that the police are all too likely to view as suspicious.⁷ Beyond that, the pragmatism that animated *Terry* has come under attack within the Court itself. These days, the Court tells us: “In determining whether a search or seizure is unreasonable, we begin with history. We look to the statutes and common-law of the founding era to determine the norms that the

3. *Id.* at 21 (quoting *Camara v. Mun. Ct.*, 387 U.S. 523, 536-37 (1967)).

4. *Id.* at 22.

5. *Id.* at 24.

6. *Id.* at 30. Since *Terry*, the Court has repeatedly stressed that the *Terry* standard permits an investigative stop on a basis that would not permit an arrest. *See, e.g.*, *United States v. Arvizu*, 534 U.S. 266, 273 (2002); *Illinois v. Wardlow*, 528 U.S. 119, 123-24 (2000); *Alabama v. White*, 496 U.S. 325, 330-31 (1990); *United States v. Sokolow*, 490 U.S. 1, 7 (1989); *United States v. Hensley*, 469 U.S. 221, 227-29 (1985).

7. *See, e.g.*, Tovah Renee Calderon, *Race-Based Policing from Terry to Wardlow: Steps Down the Totalitarian Path*, 44 HOW. L.J. 73, 85-94 (2000); Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946 (2002); Sherry F. Colb, *The Qualitative Dimension of Fourth Amendment “Reasonableness”*, 98 COLUM. L. REV. 1642, 1648-63 (1998); Frank Rudy Cooper, *The Un-Balanced Fourth Amendment: A Cultural Study of the Drug War, Racial Profiling and Arvizu*, 47 VILL. L. REV. 851 (2002); Lewis R. Katz, *Terry v. Ohio at Thirty-Five: A Revisionist View*, 74 MISS. L.J. 423, 485-97 (2004); Tracey Maclin, *Terry v. Ohio’s Fourth Amendment Legacy: Black Men and Police Discretion*, 72 ST. JOHN’S L. REV. 1271 (1998); Thomas Regnier, *The “Loyal Foot Soldier”: Can the Fourth Amendment Survive the Supreme Court’s War on Drugs?*, 72 UMKC L. REV. 631 (2004); Omar Saleem, *The Age of Unreason: The Impact of Reasonableness, Increased Police Force, and Colorblindness on Terry “Stop and Frisk”*, 50 OKLA. L. REV. 451 (1997).

Fourth Amendment was meant to preserve.”⁸ It is, however, quite doubtful whether there is historical grounding for *Terry*’s approval of stop-and-frisk. Justice Scalia, for example, has complained that *Terry* “made no serious attempt to determine compliance with traditional standards, but rather, according to the style of this Court at the time, simply adjudged that such a search was ‘reasonable’ by current estimates.”⁹ Justice Scalia added that:

[T]here is good evidence . . . that the “stop” portion of the *Terry* “stop-and-frisk” holding accords with the common law—that it had long been considered reasonable to detain suspicious persons for the purpose of demanding that they give an account of themselves. This is suggested, in particular, by the so-called nightwalker statutes and their common-law antecedents.¹⁰

But, Justice Scalia could identify no “precedent for a physical search of a person thus temporarily detained for questioning.”¹¹ He continued: “I frankly doubt, moreover, whether the fiercely proud men who adopted our Fourth Amendment would have allowed themselves to be subjected, on mere *suspicion* of being armed and dangerous, to such indignity”¹² Legal scholars have similarly questioned whether *Terry* can be squared with the original meaning of the Fourth Amendment.¹³

It will be my task to offer a defense of the much-maligned *Terry* doctrine. Part I of the discussion that follows offers an account of urban crime over the past few decades and argues that there is a case to be made that *Terry*’s regime of stop-and-frisk deserves a good deal of the credit for the reductions in violent crime that major cities have experienced in recent years. Part II contends that, in light of the conditions that prevail in urban America, framing-era experience offers little reliable guidance for assessing reasonableness within the meaning of the Fourth Amendment. Although the historical support for *Terry*’s regime of stop-and-frisk is fairly debatable, framing-era judgments about stop-and-frisk were made in a context so dramatically different from contemporary urban law enforcement that they can offer no useful guide for assessing the constitutional mandate of reasonableness. Part III then turns to the pragmatic attacks on *Terry* and contends that they undervalue the importance of *Terry* to saving lives in the inner city. Value judgments offered by scholars who can afford to live in

8. *Virginia v. Moore*, 553 U.S. 164, 168 (2008); *accord, e.g.*, *Atwater v. City of Lago Vista*, 532 U.S. 318, 326 (2001); *Florida v. White*, 526 U.S. 559, 563 (1999); *Wyoming v. Houghton*, 526 U.S. 295, 299 (1999); *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995).

9. *Minnesota v. Dickerson*, 508 U.S. 366, 380 (1993) (Scalia, J., concurring).

10. *Id.*

11. *Id.* at 381.

12. *Id.* (emphasis in original).

13. *See, e.g.*, David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739, 1804-05 (2000); George C. Thomas III, *Time Travel, Hovercrafts, and the Framers: James Madison Sees the Future and Rewrites the Fourth Amendment*, 80 NOTRE DAME L. REV. 1451, 1514-16 (2005).

neighborhoods not plagued by violent crime, I respectfully suggest, should be taken with more than a grain of salt.

I. *TERRY* AND THE INNER-CITY CRIME DROP

In *Terry*, as we have seen, the Court justified the regime of stop-and-frisk in terms of the governmental interest in crime control. In fact, there is a case to be made that *Terry* deserves a significant share of the credit for the enormous decline in violent crime that the nation has experienced in the past two decades or so.¹⁴

A. *Recent Trends in Urban Crime*

Alfred Blumstein and Joel Wallman tell the story of violent crime over the past few decades:

Over the past 20 years, the United States has seen dramatic swings in violent crime. Its path can be broken into three periods: a rise, a drop, and a flattening. The rise period began in 1985 when a five-year national decline from 1980 was reversed almost entirely by a sharp spike in violence by adolescent and young adult males. This spike outweighed an ongoing downtrend in violence among the much larger older population that began at least as early as 1980. The rise period ended around 1993 with the beginning of a pronounced and much discussed crime drop in which the murder rate declined by 42% and robbery by 44%, resulting in levels not seen since the 1960s. The drop was succeeded by a third period, a flattening of violent crime rates beginning around 2000.¹⁵

The National Crime Victimization Survey reflects the same pattern. The violent victimization rate in the mid-1980s was approximately 40 per 1,000 population age twelve or older, then it started rising until it peaked at 52.2 in 1993, and from there it fell steadily until it reached 25.9 by 2001, a decline of 50.4% from its peak and by far the lowest since the survey had begun in 1973.¹⁶ After that, the violent victimization rate continued dropping, albeit less steeply, through 2009, the most recent year for which figures are available.¹⁷ By 2008,

14. Portions of the discussion in Part I track and update an argument I have previously advanced with respect to the role that gun-control laws play in urban policing. See Lawrence Rosenthal, *Second Amendment Plumbing after Heller: Of Standards of Scrutiny, Incorporation, Well-Regulated Militias, and Criminal Street Gangs*, 41 URB. LAW. 1, 6-37 (2009).

15. Alfred Blumstein & Joel Wallman, *The Crime Drop and Beyond*, 2006 ANN. REV. SOC. SCI. 125, 125 (2006).

16. CALLIE RENNISON, U.S. DEPARTMENT OF JUSTICE, CRIMINAL VICTIMIZATION 2001: CHANGES 2000-01 WITH TRENDS 1993-2001, at 11-12 (Sep. 2002).

17. JENNIFER L. TRUMAN & MICHAEL R. RAND, U.S. DEPARTMENT OF JUSTICE, CRIMINAL VICTIMIZATION 2009, at 2 tbl.2 & fig.1 (Oct. 2010).

the overall violent victimization rate was 63% below its peak.¹⁸ These aggregate statistics, however, tell only part of the story. The spike and subsequent decline in violent crime in recent decades were not uniform—they were disproportionately experienced by urban minority youth, and they were largely the product of trends in handgun-related crime.

Both the rise and decline periods involved youth crime. Between the mid-1980s and late 1990s, murder arrest rates rose sharply and then fell among youth below age twenty-four, while the arrest rate fell throughout the period among persons thirty and older.¹⁹ As Philip Cook and John Laub noted,

For adolescents, homicide commission rates more than tripled between 1984 and 1993, while they doubled for young adults ages eighteen to twenty-four. . . . Victimization rates followed the same intertemporal pattern, although at a lower level: youths are much more likely to kill than be killed All rates fell sharply after 1994.²⁰

The crime spike also involved urban crime; during this period, homicide rates were essentially flat in cities with populations below 250,000, and the rise and subsequent fall in homicide occurred in cities with populations exceeding 1,000,000.²¹ Virtually all of the increases in homicide during this period were a consequence of increases in handgun-related killings.²² This spike in handgun-related homicide was, again, concentrated among youth; from 1985 to 1994, the rate of handgun-related homicide for juveniles under eighteen increased more than fivefold and the rate for persons ages twenty to twenty-four more than doubled while the rate for adults twenty-five to forty-four remained essentially constant; by 2002, handgun-related homicide had returned to mid-1980s levels.²³

18. MICHAEL R. RAND, U.S. DEPARTMENT OF JUSTICE, CRIMINAL VICTIMIZATION 2008, at 2 (Sep. 2009).

19. See Alfred Blumstein, *Disaggregating the Violence Trends*, in *THE CRIME DROP IN AMERICA* 13, 20-25 (Alfred Blumstein & Joel Wallman eds., 2d ed. 2006).

20. Philip J. Cook & John H. Laub, *After the Epidemic: Recent Trends in Youth Violence in the United States*, in *CRIME & JUSTICE: A REVIEW OF RESEARCH* 1, 13 (Michael Tonry ed., 2002). For similar figures updating the analysis through 2005, see JAMES ALAN FOX, JACK LEVIN & KENNA QUINET, *THE WILL TO KILL: MAKING SENSE OF SENSELESS MURDER* 86-87 fig.5.1 (rev. 2008).

21. See FOX, LEVIN & QUINET, *supra* note 20, at 44-45 fig.3.2. To similar effect, see Blumstein & Wallman, *supra* note 15, at 127.

22. See COMMITTEE TO IMPROVE RESOURCES INFORMATION & DATA ON FIREARMS, NATIONAL RESOURCES COUNCIL, *FIREARMS AND VIOLENCE: A CRITICAL REVIEW* 61 (Charles F. Wellford, John V. Pepper & Carol V. Petrie eds., 2005) [hereinafter *FIREARMS AND VIOLENCE*].

23. See Blumstein & Wallman, *supra* note 15, at 132, C-4 fig.6. For a similar account covering somewhat differing time frames and age groupings, see FOX, LEVIN & QUINET, *supra* note 20, at 86-87 fig.5.1; Blumstein, *supra* note 19, at 29-35; Cook & Laub, *supra* note 20, at 26-27; Daniel Cork, *Examining Space-Time Interaction in City-Level Homicide Data: Crack Markets and the Diffusion of Guns Among Youth*, 15 *J. QUANTITATIVE CRIMINOLOGY* 379, 395-404 (1999); Garen Wintemute, *Guns and Gun Violence*, in *THE CRIME DROP IN AMERICA*, *supra* note 19, at 45, 48 fig.3.2.

The violent crime spike was also largely confined to African Americans and, to a lesser extent, Hispanics.²⁴ Homicide offending rates reflect this racial skew; in 1984, offending rates per 100,000 population were 5.3 for Whites and 32.8 for African Americans; at their 1991 peak the offending rate for Whites rose a bit to 5.7 while the African American offending rate skyrocketed to 50.4; but by 1998, the White offending rate had declined a bit to 4.7 while the African American rate had dropped to 28.3.²⁵ The same racial disparity is reflected in homicide victimization rates; between 1950 and 1998, virtually all of the variation in homicide victimization rates is found among African-American males, with homicide rates among African-American females and Whites remaining essentially constant.²⁶ Accordingly, when homicide rates are high, racial disparity is high; between 1979 and 1989, for example, the risk of homicide was approximately 7.8 times greater for African Americans than Whites and approximately 3.7 times greater for Hispanics.²⁷

The crime spike between the mid-1980s and early 1990s, accordingly, hit young, urban African Americans hard; from 1984 to 1993, the homicide victimization rate per 100,000 for Whites aged eighteen to twenty-four rose from 11.9 to 17.1, while the homicide rates for African-American males in the same age range rose from 67.9 to 183.4.²⁸ The racial disparities are even more dramatic when urban firearms-related juvenile homicide is considered; in 1989, in the midst of the homicide spike, the firearm homicide rate per 100,000 population in core counties was 27.71, but it was 143.9 for African-American males aged fifteen to nineteen and only 21.5 for White males in the same age range.²⁹ The non-firearms homicide rates, in contrast, reflected much smaller racial disparities; the rate was 3.8 for White males and 10.4 for African-American males aged fifteen to nineteen in core counties.³⁰ The subsequent decline in homicide victimization was also experienced disproportionately among African Americans aged fifteen to twenty-four, although their homicide victimization rates remained more than double that of either Whites or Hispanics in the same age group even after the crime drop flattened out in the 2000s.³¹

24. See Blumstein & Wallman, *supra* note 15, at 132 C.4 fig.6.

25. James Alan Fox, *Demographics and U.S. Homicide*, in *THE CRIME DROP IN AMERICA*, *supra* note 19, at 288, 295-97 tbl.9.2.

26. Augustine J. Kposowa, Glenn T. Tsunokai & James P. McElvain, *Race and Homicide in the U.S. National Longitudinal Mortality Study*, 4 *J. ETHNICITY IN CRIM. JUST.* 1, 11-13 figs.2 & 3 (2006).

27. *Id.* at 13-15 & tbl.1.

28. Fox, *supra* note 25, at 300 tbl.9.3.

29. Lois A. Fingerhut, et al., *Firearm and Nonfirearm Homicide Among Persons 15 Through 19 Years of Age*, 269 *JAMA* 3048, 3049 tbl.1 (1992).

30. *Id.* To similar effect, see Darnell F. Hawkins, *African Americans and Homicide*, in *STUDYING AND PREVENTING HOMICIDE: ISSUES AND CHALLENGES* 143, 152 tbl. 8.1 (H. Dwayne Smith & Margaret A. Zahn eds., 1999) [hereinafter *STUDYING AND PREVENTING HOMICIDE*].

31. See Blumstein & Wallman, *supra* note 15, at 128 C-2 fig.3.

Overall, during the 1990s, the homicide victimization rate declined 46% for non-whites, compared to a 36% decline for Whites.³² For males ages fourteen to seventeen, the African-American homicide victimization rate per 100,000 population dropped from its 1993 peak of 47.0 to 14.3 in 2003, while the White rate declined from 6.4 to 2.5; for males ages eighteen to twenty-four, the African-American homicide victimization rate dropped from 102.9 to 56.1, while the White rate dropped from 11.0 to 7.9.³³ Homicide offending rates showed a similar decline—for males ages fourteen to seventeen, the African-American homicide offending rate per 100,000 population dropped from its 1993 peak of 225.3 to 62.9 in 2003, while the White rate declined from 22.2 to 8.2; for males ages eighteen to twenty-four, the African-American homicide offending rate dropped from 328.8 to 186.7, while the White rate dropped from 31.8 to 21.6.³⁴

Despite these racial disparities in both violent offending and violent victimization, race appears to be a proxy for other factors. Rates of violent crime are particularly high in areas of concentrated poverty.³⁵ Among urban sociologists, there is widespread agreement that, with the decline of residential segregation, disadvantaged African-American communities increasingly suffered from an isolation effect, in which the absence of middle-class role models undermined the inculcation of middle-class values, including norms of law-abidingness.³⁶ These communities, accordingly, lack what sociologists call mechanisms of social control—a social infrastructure by which norms of law-abidingness are inculcated and enforced.³⁷ One study, for example, linked

32. FRANKLIN E. ZIMRING, *THE GREAT AMERICAN CRIME DECLINE* 10 fig.1.5 (2007).

33. James Alan Fox & Marc L. Swatt, *The Recent Surge in Homicides Involving Young Black Males and Guns: Time to Reinvest in Prevention and Crime Control*, tbl.8 (Dec. 2008), <http://www.jfox.neu.edu/Documents/Fox%20Swatt%20Homicide%20Report%20Dec%2029%202008.pdf>.

34. *Id.* at tbl. 9. It is worth noting, however, that between 2002 and 2007, African-American homicide victimization and offending rates among young males increased significantly, although they remained far below their historical peaks, while rates among Whites remained relatively flat. *See id.* at 1-2, figs.1-4.

35. *See, e.g.*, ELLIOTT CURRIE, *CRIME AND PUNISHMENT IN AMERICA* 120-47 (1998); GARY LAFREE, *LOSING LEGITIMACY: STREET CRIME AND THE DECLINE OF SOCIAL INSTITUTIONS IN AMERICA* 117-34 (1998); JAMES F. SHORT, JR., *POVERTY, ETHNICITY, AND VIOLENT CRIME* 50-54 (1997); Kposowa, Tsunokai & McElvain, *supra* note 26, at 13-25; Ronald C. Kramer, *Poverty, Inequality, and Youth Violence*, 567 *ANNALS AM. ACAD. POL. & SOC. SCI.* 123, 124-25 (2000); Lauren J. Krivo & Ruth D. Peterson, *Extremely Disadvantaged Neighborhoods and Urban Crime*, 75 *SOC. FORCES* 619, 620 (1996); Kenneth C. Land, Patricia L. McCall & Lawrence E. Cohen, *Structural Covariates of Homicide Rates: Are There Any Invariances Across Time and Social Space?*, 95 *AM. J. SOC.* 922, 932, 938-39 (1990); Janet J. Lauritzen & Robert J. Sampson, *Minorities, Crime, and Criminal Justice*, in *THE HANDBOOK OF CRIME AND PUNISHMENT* 58, 65-70 (Michael Tonry ed., 1998); Ruth D. Peterson & Lauren J. Krivo, *Macrostructural Analyses of Race, Ethnicity, and Violent Crime: Recent Lessons and New Directions for Research*, 31 *ANN. REV. SOC.* 331, 347-52 (2005); Robert J. Sampson, Stephen W. Raudenbush & Felton Earls, *Neighborhoods and Violent Crime: A Multilevel Study of Collective Efficacy*, 277 *SCI.* 918, 923-24 (1997).

36. *See, e.g.*, SHORT, *supra* note 35, at 55-74; WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* 7-9, 46-62 (1987); Edward S. Shihadeh & Nicole Flynn, *Segregation and Crime: The Effect of Black Social Isolation on the Rates of Black Urban Violence*, 74 *SOC. FORCES* 1325, 1330 (1996).

37. *See, e.g.*, ROBERT J. BURSIK, JR. & HAROLD G. GRASMICK, *NEIGHBORHOODS AND CRIME: THE DIMENSIONS OF EFFECTIVE COMMUNITY CONTROL* 15-18, 34-35 (1993); JOHN HAGAN, *CRIME AND*

increases in youth homicide among both Whites and African Americans during the crime-rise period with community-level measures of social and economic disadvantage.³⁸ Whatever the cause, the rapid changes in violent crime rates in the 1980s and 1990s were related to urban poverty; both the crime rise and fall periods were most pronounced in cities with the densest and most disadvantaged populations.³⁹

B. *The Cause of the Crime Rise*

There is something approaching a consensus among criminologists that the crime spike of the late 1980s and early 1990s was a function of the introduction of crack cocaine into major cities.⁴⁰ A number of studies have demonstrated that lagged increases in violent crime followed the introduction of crack to an urban area.⁴¹ Although there are fewer studies that reliably measure the proportion of violent crime that is drug-related, what is probably the best study of this issue—a sampling of homicides in New York City during an eight-month period in 1988—found that 52.7% of homicides were drug-related; of those, 60% involved crack, and 74% of drug-related homicides were classified as “systemic” or involving “the normally aggressive patterns of interaction within the systems of drug use and distribution” as opposed to homicides that were a function of the pharmacological effects of drugs or the economic compulsion to commit crimes to finance drug use.⁴²

DISREPUTE 67-99 (1994); DAN A. LEWIS & GRETA SALEM, FEAR OF CRIME: INCIVILITY AND THE PRODUCTION OF A SOCIAL PROBLEM 11-22 (1986); Francis T. Cullen, *Social Support as an Organizing Concept for Criminology: Presidential Address to the Academy of Criminal Justice Sciences*, 11 JUST. Q. 527 (1994).

38. See Kevin J. Strom & John M. MacDonald, *The Influence of Social and Economic Disadvantage on Racial Patterns in Youth Homicide Over Time*, 11 HOMICIDE STUD. 50, 62-65 (2007). For a meta-analysis of studies between 1960 and 1999 establishing that indicia of social disorganization and economic deprivation are the best predictors of crime, see Travis C. Pratt & Francis T. Cullen, *Assessing Macro-Level Predictors and Theories of Crime: A Meta-Analysis*, in CRIME AND JUSTICE: A REVIEW OF RESEARCH 373, 427-28 (Michael Tonry ed., 2005).

39. See Blumstein & Wallman, *supra* note 15, at 127.

40. See, e.g., ALFRED BLUMSTEIN & JACQUELINE COHEN, DIFFUSION PROCESSES IN HOMICIDE 6-9 (Nat'l Crim. Just. Ref. Serv. July 17, 1999); FOX, LEVIN & QUINET, *supra* note 20, at 87-88; BENJAMIN PEARSON-NELSON, UNDERSTANDING HOMICIDE TRENDS: THE SOCIAL CONTEXT OF A HOMICIDE EPIDEMIC 37-41 (2008); Alfred Blumstein & Richard Rosenfeld, *Explaining Recent Trends in U.S. Homicide Rates*, 88 J. CRIM. L. & CRIMINOLOGY 1175, 1209-10 (1998); Blumstein & Wallman, *supra* note 15, at 131; Cook & Laub, *supra* note 20, at 21-31.

41. See, e.g., Eric Baumer, et al., *The Influence of Crack Cocaine on Robbery, Burglary, and Homicide Rates: A Cross-City, Longitudinal Analysis*, 35 J. RES. CRIME & DELINQ. 316, 328-30 (1998); Cork, *supra* note 23, at 403-04; Jeff Grogger & Michael Willis, *The Emergence of Crack Cocaine and the Rise of Urban Crime Rates*, 82 REV. ECON. & STATS. 519, 525-28 (2000); Steven F. Messner, et al., *Locating the Vanguard in Rising and Falling Homicide Rates Across U.S. Cities*, 43 CRIMINOLOGY 661, 677-87 (2005); Graham Ousey & Matthew R. Lee, *Examining the Conditional Nature of the Illicit Drug Market-Homicide Relationship: A Partial Test of Contingent Causation*, 40 CRIMINOLOGY 73, 94-98 (2002).

42. Paul J. Goldstein, et al., *Crack and Homicide in New York City, 1988: A Conceptually Based Event Analysis*, 16 CONTEMP. DRUG PROBS. 651, 655-56, 681-82 (1989).

1. The Coming of Crack and the Rise of Violent Competition in Drug Markets

The impact of crack on violent crime was related to its economics. Because crack is relatively cheap, easy to manufacture, and intensely addictive, it can be sold at relatively high volume and profit.⁴³ In light of crack's profitability, the attraction of crack dealing in extremely disadvantaged urban neighborhoods is plain.

Given that crack is cheap and easy to manufacture, barriers to market entry are low, and therefore one would expect fierce competition. At the same time, drug traffickers have an economic incentive to suppress competition in order to enhance their market position, and one would hardly expect that norms of law-abidingness would be likely to restrain them. This theoretical conjecture is borne out by empirical evidence suggesting that drug traffickers use violence in an effort to suppress competition.

One study, for example, found that the magnitude and duration of the crime spike in large cities was related to the absence of cocaine hubs in nearby areas, suggesting that in cities not near other cocaine hubs, it is easier to create a territorial monopoly through the use of violence because of the greater ability of an aspiring monopolist to control supply.⁴⁴ Steven Levitt and Sudhir Venkatesh obtained the records of a large African-American gang involved in drug trafficking and found that, as the gang increased the turf it controlled, its market power increased as well.⁴⁵ Noting the relatively paltry wages paid to those at the bottom of gang hierarchy, Levitt and Venkatesh characterized the economic motivation of gang members thusly: "[T]he most reasonable way to view the economic aspects of the decision to join the gang is as a tournament, i.e., a situation in which participants vie for large awards that only a small fraction will eventually obtain."⁴⁶

Competition in drug markets, in turn, often leads to violence. The authors of the New York study, for example, concluded:

The entry of many small dealers into the crack marketplace has created a number of boundary disputes leading to violence. In an area as small as an apartment house, a tenement stoop, or a street corner, two or more crack dealers may be competing for the same customers. Dealers and customers interact in a highly volatile environment where disputes and conflicts are routinely settled by physical-force confrontation in which one or both of the parties tend to be carrying firearms. There appear to be efforts toward

43. See, e.g., HENRY H. BROWNSTEIN, *THE RISE AND FALL OF A VIOLENT CRIME WAVE: CRACK COCAINE AND THE SOCIAL CONSTRUCTION OF A CRIME PROBLEM* 33-36 (1996); Cork, *supra* note 23, at 381-84.

44. See PEARSON-NELSON, *supra* note 40, at 144-45.

45. See Steven D. Levitt & Sudhir Alladi Venkatesh, *An Economic Analysis of a Drug-Selling Gang's Finances*, 115 Q. J. ECON. 755, 781-82 (2000).

46. *Id.* at 773.

consolidation of these independents into larger organizations, and . . . this trend toward consolidation may involve considerable violence also.⁴⁷

If inner-city drug sales did no more than recycle the little money to be found in disadvantaged communities, its profitability would be limited. Control over locations that are readily accessible to outsiders from more affluent communities, however, should produce greater profits and, accordingly, give rise to the most intense competition for control of those particularly lucrative areas. The available empirical evidence supports this supposition. A study of two New York neighborhoods, for example, found that the area that was more accessible to buyers from other communities had more organized, profitable, and violent gangs.⁴⁸ A study of Milwaukee's drug-dealing gangs similarly concluded that the most profitable drug markets were those accessible to relatively affluent Whites from the more prosperous suburbs.⁴⁹ A study of drug dealing in Baltimore found that African-American neighborhoods with open-air drug markets frequented by White customers had unusually high homicide rates.⁵⁰ Indeed, the importance to relatively affluent White customers from outside the neighborhood of readily accessible and convenient drug markets helps to explain the popularity of open-air drug markets, which are prevalent in the inner city.⁵¹

2. *Urban Violence and the Criminal Street Gang*

One organization particularly well suited to the type of violent competition that accompanied the emergence of crack during the crime-rise period is the criminal street gang.⁵² A well-organized gang, unconcerned with norms of law-

47. Goldstein, et al., *supra* note 42, at 682.

48. See Jeffrey Fagan, *Drug Selling and Licit Income in Distressed Neighborhoods: The Economic Lives of Street-Level Drug Users and Dealers*, in *DRUGS, CRIME, AND SOCIAL ISOLATION: BARRIERS TO URBAN OPPORTUNITY* 99, 119-32 (Adele V. Harrell & George E. Peterson eds., 1992).

49. See John Hagedorn, *Gangs and the Informal Economy*, in *GANGS IN AMERICA III* 101, 114-19 (C. Ronald Huff ed., 2002) [hereinafter *GANGS IN AMERICA III*]; John M. Hagedorn, *Homeboys, Dope Fiends, Legits, and New Jacks*, 32 *CRIMINOLOGY* 197, 275-89 (1994).

50. See RALPH B. TAYLOR, *BREAKING AWAY FROM BROKEN WINDOWS: BALTIMORE NEIGHBORHOODS AND THE NATIONWIDE FIGHT AGAINST CRIME, GRIME, FEAR, AND DECLINE* 186-87 (2001).

51. See K. JACK RILEY, U.S. DEPARTMENT OF JUSTICE, *CRACK, POWDER COCAINE AND HEROIN: DRUG PURCHASE AND USE PATTERNS IN SIX U.S. CITIES* 16-17 (1997); BRUCE G. TAYLOR, ET AL., NATIONAL INSTITUTE OF JUSTICE, *ADAM PRELIMINARY 2000 FINDINGS ON DRUG USE AND DRUG MARKETS: MALE ARRESTEES* 24-25 (2001).

52. Among criminologists, the definition of a "gang" is a matter of some controversy. See, e.g., RANDALL G. SHELDEN, SHARON K. TRACY & WILLIAM B. BROWN, *YOUTH GANGS IN AMERICAN SOCIETY* 17-21 (2d ed. 2001); Richard A. Ball & G. David Curry, *The Logic of Definition in Criminology: Purposes and Methods for Defining "Gangs,"* 33 *CRIMINOLOGY* 225, 225 (1995); Finn-Aage Esbensen et al., *Youth Gangs and Definitional Issues: When is a Gang a Gang, and Why Does it Matter,* 47 *CRIME & DELINQ.* 105, 106 (2001). The definition offered by Ball and Curry is particularly useful for present purposes because it stresses structural features:

The gang is a spontaneous, semisecret, interstitial, integrated but mutable social system whose members share common interests and that functions with relatively little regard for legality but

abidingness, is ideally suited to create and enforce a territorial drug trafficking monopoly. Indeed, one consistent observation in the scholarly literature about gangs is their heavy involvement in drug distribution.⁵³ In its most recent *National Drug Threat Assessment*, the National Drug Intelligence Center concluded that “[i]n 2009, midlevel and retail drug distribution in the United States was dominated by more than 900,000 criminally active gang members representing approximately 20,000 domestic street gangs in more than 2,500 cities.”⁵⁴

Surveys of youth gang members reflect the involvement of gang youth in drug trafficking at much higher rates than other youth.⁵⁵ To similar effect, ethnographic research on gang crime reports that gangs endeavor to organize drug markets to maximize the economic benefits of drug dealing while using

regulates interaction among its members and features a leadership structure with processes of organizational maintenance and membership services and adaptive mechanisms for dealing with other significant social systems in its environment.

Ball & Curry, *supra*, at 240.

53. See, e.g., JAMES C. HOWELL & SCOTT H. DECKER, U.S. DEPARTMENT OF JUSTICE, THE YOUTH GANGS, DRUGS, AND VIOLENCE CONNECTION 2-5, 7 (Jan. 1999); C. RONALD HUFF, U.S. DEPARTMENT OF JUSTICE, COMPARING THE CRIMINAL BEHAVIOR OF YOUTH GANGS AND AT-RISK YOUTHS 4, 7 (Oct. 1998); HERBERT C. COVEY, SCOTT MENARD & ROBERT J. FRANZESE, JUVENILE GANGS 51-54 (2d ed. 1997); SCOTT H. DECKER & BARRICK VAN WINKLE, LIFE IN THE GANG: FAMILY, FRIENDS, AND VIOLENCE 153-71 (1996); MARTIN SANCHEZ JANKOWSKI, ISLANDS IN THE STREET: GANGS AND AMERICAN URBAN SOCIETY 120-21 (1991); JOAN W. MOORE, HOMEBOYS: GANGS, DRUGS, AND PRISON IN THE BARRIOS OF LOS ANGELES 75-93 (1978); FELIX M. PADILLA, THE GANG AS AN AMERICAN ENTERPRISE 97-117, 129-51 (1993); CARL S. TAYLOR, DANGEROUS SOCIETY 92, 97, 99 (1990); Brenda C. Coughlin & Sudhir Alladi Venkatesh, *The Urban Street Gang After 1970*, 2003 ANN. REV. SOC. 41, 43-45 (2003); Finn-Aage Esbensen & David Huizinga, *Gangs, Drugs, and Delinquency in a Survey of Urban Youth*, 31 CRIMINOLOGY 565, 573-75 (1993); Jeffrey Fagan, *The Social Organization of Drug Use and Drug Dealing Among Urban Gangs*, 27 CRIMINOLOGY 633, 635, 648-51 (1989); Ronald Glick, *Survival, Income, and Status: Drug Dealing in the Chicago Puerto Rican Community*, in DRUGS IN HISPANIC COMMUNITIES 77-101 (Ronald Glick & Joan Moore eds., 1990); Tom Mieczkowski, *Geeking Up and Throwing Down: Heroin Street Life in Detroit*, 24 CRIMINOLOGY 645, 648-49 (1986). To be sure, there is ample evidence that less structured and organized gangs are less effective drug sellers. See, e.g., MALCOLM W. KLEIN, THE AMERICAN STREET GANG: ITS NATURE, PREVALENCE, AND CONTROL 40-42, 126-29 (1995). Still, there is widespread agreement that better organized gangs have become adept at drug trafficking. See, e.g., ARLEN EGLEY JR., ET AL., U.S. DEPARTMENT OF JUSTICE, NATIONAL YOUTH GANG SURVEY 1999-2001, at 33-34 (July 2006); Scott H. Decker, *Youth Gangs and Violent Behavior*, in THE CAMBRIDGE HANDBOOK OF VIOLENT BEHAVIOR AND AGGRESSION 388, 392-93 (Daniel J. Flannery et al. eds., 2007) [hereinafter CAMBRIDGE HANDBOOK OF VIOLENT BEHAVIOR]; Finn-Aage Esbensen, et al., *Initiation of Drug Use, Drug Sales, and Violent Offending Among a Sample of Gang and Nongang Youth*, in GANGS IN AMERICA III, *supra* note 49, at 37, 39-40; Malcolm W. Klein, *Street Gang Cycles*, in CRIME 217, 219-21, 227 (James Q. Wilson & Joan Petersilia eds., 1998); Malcolm W. Klein & Cheryl Lee Maxson, *Gangs and Crack Cocaine Trafficking*, in DRUGS AND CRIME: EVALUATING PUBLIC POLICY OPTIONS 42, 47-52 (Doris Layton McKenzie & Craig D. Uchida eds., 1994) [hereinafter DRUGS AND CRIME].

54. NATIONAL DRUG INTELLIGENCE CENTER, U.S. DEPARTMENT OF JUSTICE, NATIONAL DRUG THREAT ASSESSMENT 2010, at 12 (Feb. 2010).

55. See, e.g., DECKER & VAN WINKLE, *supra* note 53, at 159-60; TERENCE P. THORNBERRY ET AL., GANGS AND DELINQUENCY IN DEVELOPMENTAL PERSPECTIVE 110-15 (2003); C. Ronald Huff, *Comparing the Criminal Behavior of Youth Gangs and At-Risk Youth*, in AMERICAN YOUTH GANGS AT THE MILLENNIUM 78, 81-82, n.3 (Finn-Aage Esbensen, Stephen F. Tibbets & Larry Gaines eds., 2004) [hereinafter GANGS AT THE MILLENNIUM].

the threat of violence to police competition.⁵⁶ The ethnographic studies also find that drug-dealing gangs endeavor to establish monopolies in identifiable turf in order to enhance their profitability.⁵⁷ The desire of gangs to maximize their profitability in impoverished communities is understandable; another observation frequently encountered in the ethnographic literature is that the lure of money is often central to the appeal of gangs in the inner city.⁵⁸

The need to control identifiable turf in order to limit competition, as well as the prevalence of open-air markets, necessitates the use of violence and intimidation tactics.⁵⁹ Gangs could hardly run open-air drug markets or obtain effective control over a neighborhood unless they were able to so cow law-abiding community residents that they were unlikely to complain to the police or testify in court.⁶⁰ Violent intimidation is also necessary to suppress competition.⁶¹ Unsurprisingly, the literature confirms the prevalence of gang intimidation as a means of inhibiting community cooperation with the authorities.⁶²

Most gang violence is a function of inter-gang competition.⁶³ Ethnographic studies consistently report that gang violence is most often a function of competition for turf.⁶⁴ It is harder to find quantitative analyses

56. See, e.g., DECKER & VAN WINKLE, *supra* note 53, at 163-64; JANKOWSKI, *supra* note 53, at 126-29; PADILLA, *supra* note 53, at 129-66; IRVING A. SPERGEL, THE YOUTH GANG PROBLEM: A COMMUNITY APPROACH 47-49 (1995); Ansley Hamid, *The Political Economy of Crack-Related Violence*, 17 CONTEMP. DRUG PROBS. 31, 61-63 (1990); Jerome H. Skolnick et al., *The Social Structure of Street Drug Dealing*, 9 AM. J. POLICE 1, 16-17 (1990).

57. See, e.g., PADILLA, *supra* note 53, at 137-41; TAYLOR, *supra* note 53, at 6; Jacqueline Cohen, et al., *The Role of Drug Markets and Gangs in Local Homicide Rates*, 2 HOMICIDE STUDS. 241, 246-47 (1998); Paul J. Goldstein, et al., *Crack and Homicide in New York City: A Case Study in the Epidemiology of Violence*, in CRACK IN AMERICA: DEMON DRUGS AND SOCIAL JUSTICE 113, 118-24 (Craig Reinerman & Harry G. Levine eds., 1997); John M. Hagedorn, *Neighborhoods, Markets, and Gang Drug Organizations*, 31 J. RES. CRIME & DELINQ. 264, 289-91 (1994).

58. See, e.g., G. DAVID CURRY & SCOTT H. DECKER, CONFRONTING GANGS: CRIME AND COMMUNITY 62-63, 137-40 (2d ed. 2003); JANKOWSKI, *supra* note 53, at 40-42; JOAN W. MOORE, GOING DOWN TO THE BARRIO: HOMEBOYS AND HOMEGIRLS IN CHANGE 42-44 (1991); PADILLA, *supra* note 53, at 101-03; SPERGEL, *supra* note 56, at 94; MERCER L. SULLIVAN, "GETTING PAID": YOUTH CRIME AND WORK IN THE INNER CITY 117, 222-50 (1989); TAYLOR, *supra* note 53, at 5-6, 10-12, 61, 99-102; Jeffrey Fagan, *The Political Economy of Drug Dealing Among Urban Gangs*, in DRUGS AND THE COMMUNITY: INVOLVING COMMUNITY RESIDENTS IN COMBATING THE ILLEGAL SALE OF DRUGS 19, 27-45 (Robert C. Davis, et al. eds., 1993); Joan W. Moore, *Understanding Youth Street Gangs: Economic Restructuring and the Urban Underclass*, in CROSS CULTURAL PERSPECTIVES ON YOUTH AND VIOLENCE 65, 71-72 (Meredith W. Watts ed., 1998).

59. See, e.g., DECKER & VAN WINKLE, *supra* note 53, at 163-64.

60. See, e.g., AL VALDEZ, GANGS: A GUIDE TO UNDERSTANDING STREET GANGS 19-20 (1997).

61. See, e.g., JANKOWSKI, *supra* note 53, at 126-31.

62. See, e.g., VALDEZ, *supra* note 60, at 19-20; Bruce D. Johnson et al., *Drug Abuse in the Inner City: Impact on Hard-Drug Users and the Community*, in 13 CRIME & JUSTICE: A REVIEW OF RESEARCH 35-37 (Michael Tonry & James Q. Wilson eds., 1990).

63. See Steven R. Wiley, *Violent Street Gangs in America*, Statement Before the Senate Committee on the Judiciary (Apr. 23, 1999), available at <http://hi-ho.ne.jp/taku77/refer/gang.htm>.

64. See, e.g., DECKER & VAN WINKLE, *supra* note 53, at 163-64; JANKOWSKI, *supra* note 53, at 161-62; PADILLA, *supra* note 53, at 137; WILLIAM B. SANDERS, GANGBANGS AND DRIVEBYS: GROUNDED CULTURE AND JUVENILE GANG VIOLENCE 83 (1994); TAYLOR, *supra* note 53, at 6; Scott H. Decker, *Collective and*

reflecting the role of gang competition on gang crime, but some exist. A study of gang-related homicides in Chicago from 1987 to 1994 found that 75% involved members of different gangs, and these were geographically clustered in areas of gang competition.⁶⁵ Another study of Chicago during the 1990s concluded that gang-related homicide was stimulated by the restructuring of public housing in Chicago, which disrupted stable divisions of gang turf, and therefore, produced inter-gang violence.⁶⁶ A study of gang-related homicides in Los Angeles between 1979 and 1994 found that the majority were inter-gang shootings.⁶⁷ A study of Los Angeles County showed the impact of inter-gang competition on homicide by demonstrating that the density of street gangs, population density, Latino and African-American population, and nearby high school dropout rates explained 90% of the variation in homicide rates in geographic areas from 1994 to 2002.⁶⁸ A survey of gang members in St. Louis found that nearly 90% had defended gang turf in the preceding year; the primary method of defending turf was through violence; and 95% of the fights for turf described by gang members involved firearms.⁶⁹ Further, as we have seen, competition in drug markets was a major cause of homicide in New York during the crime-rise period of the late 1980s.⁷⁰

Reliable statistics on gang-related crime are difficult to come by because of the difficulties and disparate practices in identifying crime as gang-related.⁷¹ Nevertheless, there is wide agreement among gang researchers that rates of

Normative Features of Gang Violence, 13 JUST. Q. 243, 258-59 (1996); Fagan, *supra* note 53, at 648-52; Sudhir Alladi Venkatesh, *The Social Organization of Gang Activity in an Urban Ghetto*, 103 AM. J. SOC. 82, 93-97 (1997).

65. See ILLINOIS CRIMINAL JUSTICE INFORMATION AUTHORITY, STREET GANGS AND CRIME: PATTERNS AND TRENDS IN CHICAGO 10-12, 14-16, 19-22 (Sep. 1996). Intriguing as well is a study of drug and gang-related homicide in St. Louis and Chicago between 1985 and 1995 that found in both cities that a drug or gang-related homicide tended to reduce the probability of a similar homicide in the same neighborhood for a year or so. See Cohen, et al., *supra* note 57, at 254-59. This result is consistent with the view that drug or gang-related homicides tend to stabilize local drug markets and therefore reduce violence for a time. See *id.* This result may be skewed, however, by the likelihood that retaliatory violence will occur on a rival gang's turf rather than in the same neighborhood. See *id.* at 259. Yet another study attributed the failure of Chicago to reduce homicide, during a period in which it was falling sharply in New York, to a series of prosecutions of gang leaders and the displacement of gangs in connection with the redevelopment of public housing projects in Chicago that destabilized gang structures and turf, thereby stimulating gang rivalries. See John Hagedorn & Brigid Rauch, *Housing, Gangs, and Homicide: What We Can Learn from Chicago*, 42 URB. AFF. REV. 435, 445-52 (2007).

66. See Hagedorn & Rauch, *supra* note 65, at 446-52.

67. H. Range Hutson, et al., *The Epidemic of Gang-Related Homicide in Los Angeles County From 1979 Through 1994*, 274 JAMA 1031, 1033 (1995).

68. See Paul L. Robinson, et al., *The Effect of Urban Street Gang Densities on Small Area Homicide Incidence in a Large Metropolitan County, 1994-2002*, 86 J. URB. HEALTH 511, 519-21 (2009).

69. See DECKER & VAN WINKLE, *supra* note 53, at 112-14. Nevertheless, there was apparently a good deal of intra-gang rivalry in St. Louis as well; more gang members were killed by members of their own gang than by members of rival gangs. See Scott H. Decker & G. David Curry, *Gangs, Gang Homicides, and Gang Loyalty: Organized Crimes or Disorganized Criminals*, 30 J. CRIM. JUST. 343, 350-51 (2002).

70. See *supra* text accompanying notes 42, 48.

71. See, e.g., COVEY, MENARD & FRANZESE, *supra* note 53, at 3-13; CURRY & DECKER, *supra* note 58, at 2-6; SHELDEN, TRACY & BROWN, *supra* note 52, at 22-24.

violent crime among gang members are high.⁷² One survey found that more than half of the homicides in Los Angeles and Chicago were gang-related, as were roughly one-quarter of the homicides in the 171 other cities with a population of over 100,000.⁷³ Another study found that in the twelve cities reporting the largest numbers of gang-related homicides, 40% of all homicides were considered gang-related.⁷⁴ At its peak in 1994, gang-related homicides represented one-quarter of all homicides in St. Louis.⁷⁵ Gang-related homicides appear to have risen disproportionately during the crime-rise period of the 1980s and 1990s; a study of gang-related homicide in Los Angeles County found that from 1979 to 1994, gang-related homicides increased from 18.1% to 43.0% of all homicides, with the use of semi-automatic handguns increasing from 5.3% in 1986 to 44.3% in 1994.⁷⁶

Gang-related homicide has distinctive characteristics: it is more likely to be committed in public, involve strangers, multiple participants, and firearms.⁷⁷ Gang-related homicide is also, by and large, youth homicide; one survey found that of all gang-related homicides from 1976 to 2005, 24.2% of the victims were under eighteen and 68.4% were ages eighteen to thirty-four.⁷⁸ Gang-related homicide is primarily an urban problem; the same survey found that 69.3% of all gang-related homicides occurred in cities with a population of over 1,000,000.⁷⁹ Even within urban areas, gang homicide clusters; the Los Angeles County study, for example, found that gang homicides were most likely to occur in areas of concentrated economic disadvantage.⁸⁰ The same pattern was observed in a study of gang-related homicide in St. Louis and Chicago.⁸¹ A

72. See, e.g., SHELDEN, TRACY & BROWN, *supra* note 52, at 98-101; THORNBERRY, ET AL., *supra* note 55, at 47-48; James C. Howell, *Youth Gangs: An Overview*, in GANGS AT THE MILLENNIUM, *supra* note 55, at 36-37; Cheryl L. Maxson, *Gang Homicide*, in STUDYING AND PREVENTING HOMICIDE, *supra* note 30, at 197, 197-98; Paul B. Stretsky & Mark R. Pogrebin, *Gun-Related Gang Violence: Socialization, Identity, and Self*, 36 J. CONTEMP. ETHNOGRAPHY 85, 86-87 (2007); Terence P. Thornberry, *Membership in Youth Gangs and Involvement in Serious or Violent Offending*, in SERIOUS AND VIOLENT JUVENILE OFFENDERS: RISK FACTORS AND SUCCESSFUL INTERVENTIONS 147, 147-48, 157-66 (Rolf Loeber & David P. Farrington eds., 1998). For a particularly careful study along these lines, see Rachel A. Gordon et al., *Antisocial Behavior and Youth Gang Membership: Selection and Socialization*, 42 CRIMINOLOGY 55, 69-78 (2004).

73. See FOX, LEVIN & QUINET, *supra* note 20, at 90. Although surveys of this type depend on police reporting, there is widespread agreement that police reports are generally a reliable means of measuring gang crime. See, e.g., KLEIN, *supra* note 53, at 13-14.

74. See Maxson, *supra* note 72, at 179.

75. See Decker & Curry, *supra* note 69, at 348.

76. See Hutson, et al., *supra* note 67, at 1033-34.

77. James C. Howell, *Youth Gang Homicide: A Literature Review*, 45 CRIME & DELINQ. 208, 210-12 (1999); Cheryl L. Maxson, *Gang Homicide: A Review and Extension of the Literature*, in GANGS AT THE MILLENNIUM, *supra* note 55, at 275, 287; Maxson, *supra* note 72, at 211-12. For example, 96% of gang-related homicides in Chicago from 1987 to 1994 involved firearms. See ILLINOIS CRIMINAL JUSTICE INFORMATION AUTHORITY, *supra* note 65, at 16.

78. FOX, LEVIN & QUINET, *supra* note 20, at 53 tbl.3.5.

79. *Id.* at 56 tbl.3.6. The National Youth Gang Survey, a United States Department of Justice survey of law enforcement agencies, also found that gang-related homicide is concentrated in the largest cities. See EGGLEY, et al., *supra* note 53, at 28-32.

80. See Hutson, et al., *supra* note 67, at 1035.

81. See Cohen, et al., *supra* note 57, at 251.

study of gang-related violence in Pittsburgh yielded the same conclusion.⁸² Yet another study similarly found that gang activity clusters in areas of concentrated disadvantage.⁸³ In short, gang crime mirrors the characteristics of the crime wave of the late 1980s and early 1990s which, as we have seen, was concentrated among urban minority youth.⁸⁴

Gang members themselves face enormous risks of violent victimization.⁸⁵ A study of Los Angeles County gang members during the crime-rise period, for example, estimated that they were sixty times more likely to be homicide victims than were members of the general population.⁸⁶ A study of gang members in St. Louis concluded that they had a homicide rate 1,000 times higher than that of the general population.⁸⁷ Sudhir Venkatesh's study of a large African-American drug trafficking gang found that over a four-year period, gang members had a 25% chance of being killed.⁸⁸

3. *Drugs, Gangs, and Firearms Crime*

As we have seen, the crime-rise period of the late 1980s and early 1990s involved a spike in firearms-related crime. Indeed, firearms play a central role in the world of both gangs and drug traffickers.

Given the violent world of gangs, it should come as no surprise that gang researchers find that gang members carry firearms at elevated rates.⁸⁹ A study of gang members in Rochester, for example, found that gang membership increased the likelihood of carrying a firearm between seven and twelve times, depending on age, even when controlling for past and current offending rates.⁹⁰ The same is true of those involved in selling drugs; research shows that those

82. See George E. Tita, Jacqueline Cohen & John Engberg, *An Ecological Study of the Location of Gang "Set Space,"* 52 SOC. PROBS. 272, 292-96 (2005).

83. See Pamela Irving Jackson, *Crime, Youth Gangs, and Urban Transition: The Social Dislocations of Postindustrial Economic Development,* 8 JUST. Q. 379, 379, 388 (1991).

84. See *supra* notes 19-31 and accompanying text.

85. See, e.g., DECKER & VAN WINKLE, *supra* note 53, at 173.

86. Armando Morales, *A Clinical Model for the Prevention of Gang Violence and Homicide,* in SUBSTANCE ABUSE AND GANG VIOLENCE 105, 111-12 (Richard C. Cervantes ed., 1992).

87. DECKER & VAN WINKLE, *supra* note 53, at 173.

88. Sudhir Venkatesh, *The Financial Activity of a Modern American Street Gang,* in GANGS AT THE MILLENNIUM, *supra* note 55, at 239, 242.

89. See, e.g., JOSEPH F. SHELEY & JAMES D. WRIGHT, IN THE LINE OF FIRE: YOUTHS, GUNS, AND VIOLENCE IN URBAN AMERICA 95-103 (1995); THORNBERRY, ET AL., *supra* note 55, at 123-25; Decker, *supra* note 53, at 391-92; Beth Bjerregaard & Alan J. Lizotte, *Gun Ownership and Gang Membership,* 86 J. CRIM. L. & CRIMINOLOGY 37, 46-53 (1995); Huff, *supra* note 55, at 83; Alan J. Lizotte et al., *Factors Influence Gun Carrying Among Urban Males Over the Adolescent-Young Adult Life Course,* 38 CRIMINOLOGY 811, 812-13 (2000).

90. THORNBERRY ET AL., *supra* note 55, at 131. Similarly, among a sample of ninety-nine St. Louis gang members they studied, Decker and Van Winkle found that that eighty owned firearms, the median number of firearms owned was four, and 75% were handguns. DECKER & VAN WINKLE, *supra* note 53, at 175-76.

involved in drug trafficking also carry firearms at elevated levels.⁹¹ One study found that involvement in what the subjects described as “high” levels of selling drugs increased the likelihood of carrying concealed firearms between eight and thirty-five times, depending on age.⁹² Studies of reports of shots fired in Pittsburgh during the early 1990s found that the emergence of gangs explained increases in reports of shots fired and drug sales in nearby areas.⁹³ A U.S. Department of Justice study of six large cities found that “70% of the people who report using crack and selling drugs also report carrying a firearm, compared to 62% who use marijuana and sell drugs, 67% who use heroin and sell drugs, and 64% who use powder cocaine and sell drugs.”⁹⁴

The prevalence of firearms among gang members and drug dealers, in turn, helps to explain the rise of the drive-by shooting, which gang researchers note is unusually common in gang-related shootings.⁹⁵ For example, drive-by shootings accounted for 33% of gang-related shootings in Los Angeles County between 1989 and 1994, with 590 victims, and nearly half of the persons shot at and a quarter of homicide victims were innocent bystanders.⁹⁶ The frequency with which innocent bystanders are shot vividly illustrates the disadvantage of a drive-by shooting—it is not easy to hit the intended target from a moving vehicle. The tactic makes sense, however, in light of the rate at which gang members carry firearms.⁹⁷ As we have seen, gang competition is the leading engine of gang-related violence, and if gang members believe that their targets are likely to be armed, the drive-by tactic often constitutes the safest way of approaching one’s target and then making a getaway.⁹⁸

Gang researchers find that the prevalence of violence in gang-dominated neighborhoods serves to make firearms more pervasive in those communities.⁹⁹ In particular, the perception of danger in high-crime neighborhoods becomes a

91. See, e.g., SHELEY & WRIGHT, *supra* note 89, at 75-76, 83-93; Alfred Blumstein, *Youth Violence, Guns, and the Illicit-Drug Industry*, 86 J. CRIM. L. & CRIMINOLOGY 10, 29-31 (1995); Lizotte et al, *supra* note 89, at 814-16.

92. See Lizotte, et al., *supra* note 89, at 826-28.

93. See George Tita & Greg Ridgeway, *The Impact of Gang Formation on Local Patterns of Crime*, 44 J. RES. CRIME & DELINQ. 208, 230-33 (2007); George Tita & Jacqueline Cohen, *Measuring Spatial Diffusion of Shots Fired Activity Across City Neighborhoods*, in SPATIALLY INTEGRATED SOCIAL SCIENCE 171, 195-201 (Michael F. Goodchild & Donald G. Janelle eds., 2004).

94. K. Jack Riley, *Homicide and Drugs: A Tale of Six Cities*, 2 HOMICIDE STUD. 176, 199 (1998).

95. See, e.g., KLEIN, *supra* note 53, at 117-18; Deanna L. Wilkinson & Jeffrey Fagan, *The Role of Firearms in Violence “Scripts”: The Dynamics of Gun Events Among Adolescent Males*, 59 LAW & CONTEMP. PROBS 55, 70 (1996).

96. H. Range Hutson, Deidre Anglin & Marc Eckstein, *Drive-by Shootings by Violent Street Gangs in Los Angeles: A Five Year Review*, 3 ACADEMIC EMERGENCY MED. 300, 300 (1996). In 1991 alone, there were more than 1,500 gang-related drive-by shootings in Los Angeles. See H. Range Hutson, Deidre Anglin & Michael J. Pratts, *Adolescents and Children Injured or Killed in Drive-By Shootings in Los Angeles*, 330 NEW ENG. J. MED. 324, 324 (1994).

97. See Hutson, Anglin, & Pratts, *supra* note 96, at 324.

98. See SANDERS, *supra* note 64, at 65-74; Howell, *supra* note 77, at 214-15.

99. See, e.g., Howell, *supra* note 77, at 216.

further stimulus to the carrying of firearms as a means of self-protection.¹⁰⁰ As Jeffrey Fagan and Deanna Wilkinson's ethnographic study of at-risk youth in New York explains, when inner-city youth live under the increasing threat of violence in an environment in which firearms are prevalent, not only are they more likely to arm themselves, but they become increasingly likely to respond to real or perceived threats and provocations with lethal violence, creating what they characterize as a contagion effect.¹⁰¹ There are statistical indications of contagion as well; a number of studies find that gang-related homicides have an independent and positive effect on the homicide rate.¹⁰² One study of homicide in New York, for example, found evidence of a contagion effect on firearms-related violence, which stimulated additional firearms-related violence in nearby areas.¹⁰³

Thus, the crime spike of the late 1980s and early 1990s created what Fagan and Wilkinson called an "ecology of danger" in high-crime communities in which the need to carry firearms and be prepared to use them came to be seen as essential.¹⁰⁴

C. *The Role of Stop-and-Frisk Policing in the Crime Decline*

As we have seen, the crime-decline that began in the early 1990s was extraordinary. Rates of violent crime reached levels not seen for some fifty years and have stabilized at those levels.

The most common explanation offered by criminologists for the crime decline is that it involved a decrease in crack-related violence and a stabilization of drug markets, although an explanation for this phenomenon is rarely offered.¹⁰⁵ A number of explanations, however, can be ruled out.

100. See BLUMSTEIN & COHEN, *supra* note 40, at 4-5; SHELEY & WRIGHT, *supra* note 89, at 102-03, 110-13; Lizotte et al., *supra* note 89, at 813-14; Stretsky & Pogrebin, *supra* note 72, at 105-08.

101. See Jeffrey Fagan & Deanna Wilkinson, *Guns, Youth Violence, and Social Identity*, in YOUTH VIOLENCE 105, 174 (Michael Tonry & Mark H. Moore eds., 1998); see also MARK R. POGREBIN, PAUL B. STRETSKY & N. PRAHBA UNNINTHAN, GUNS, VIOLENCE & CRIMINAL BEHAVIOR: THE OFFENDER'S PERSPECTIVE 69-71 (2009) (describing the violent responses of armed inner-city youth); David Hemenway, et al., *Gun Carrying Among Adolescents*, 59 LAW & CONTEMP. PROBS. 39, 44-47 (1996) (same).

102. See, e.g., Cohen et al., *supra* note 57, at 257-58; Jacqueline Cohen & George Tita, *Diffusion in Homicide: Exploring a General Method for Detective Spatial Diffusion Processes*, 15 QUANTITATIVE CRIMINOLOGY 451, 490-91 (1999).

103. See Jeffrey Fagan, Deanna L. Wilkinson & Garth Davies, *Social Contagion of Violence*, in CAMBRIDGE HANDBOOK OF VIOLENT BEHAVIOR, *supra* note 53, at 688, 701-10. For a similar finding about Chicago, see Elizabeth Griffiths & Jorge M. Chavez, *Communities, Street Guns and Homicide Trajectories in Chicago, 1980-1995: Merging Methods for Examining Homicide Trends Across Space and Time*, 42 CRIMINOLOGY 941, 965-69 (2004).

104. Fagan & Wilkinson, *supra* note 101, at 174.

105. See, e.g., FOX, LEVIN, & QUINET, *supra* note 20, at 92-96; Blumstein & Rosenfeld, *supra* note 40, at 1207-10; Blumstein & Wallman, *supra* note 15, at 130-31; Stephen D. Levitt, *Understanding Why Crime Fell in the 1990s: Four Factors that Explain the Crime Drop and Six that Do Not*, 18 J. ECON. PERSP. 163, 179-81 (2004).

1. *Unsupportable Explanations for the Crime Drop*

Perhaps the most logical explanation for a decline in drug-related crime is that the demand for illegal drugs—crack in particular—declined, reducing the incentives for violent competition to control crack markets. Yet, there is little evidence to support this supposition. Although it is difficult to measure the demand for cocaine, the available statistics suggest no dramatic reduction during the crime-drop era.¹⁰⁶ Cocaine-related emergency room admissions, for example, actually rose from 1994 to 2001, as did the proportion of emergency room admissions that involved crack.¹⁰⁷ Federal seizures of cocaine remained roughly constant from 1989 through 2002.¹⁰⁸ Trends in the price of crack were also not noticeably different during the crime-rise and crime-decline periods.¹⁰⁹ Nor is there much evidence of a decline in demand since then; in its most recent assessment, the National Drug Intelligence Center concluded that, in recent years, demand for cocaine and other illicit drugs has remained relatively constant and that the price of cocaine has actually increased even as purity declined.¹¹⁰

Since the crime wave of the late 1980s and early 1990s was concentrated among young urban minority males, one might look to a demographic explanation—perhaps there was a fall in the size of the high-crime urban youth cohort. Yet, there is much evidence discrediting this thesis as well. As we have seen, per capita victimization and offending rates rose during the crime spike and then fell even more dramatically, even in high-crime cohorts, indicating that crime rose and fell even within the high-crime cohort. Indeed, demographic studies have consistently found that there was no change in the size of the high-crime cohort that explains the rise, and then even larger decline, in rates of violent crime.¹¹¹

A particular demographic claim has been advanced by John Donahue and Steven Levitt, who argue that as much as half of the crime decline was a function of the legalization of abortion, which reduced numbers of

106. See Craig Reinerman & Harry G. Levine, *The Crack Attack: Politics and Media in the Crack Scare*, in *CRACK IN AMERICA: DEMON DRUGS AND SOCIAL JUSTICE*, *supra* note 57, 29-31 figs.2.1-2.3.

107. See SUBSTANCE ABUSE & MENTAL HEALTH SERVICES ADMINISTRATION, OFFICE OF APPLIED STUDIES, DEPARTMENT OF HEALTH & HUMAN SERVICES, EMERGENCY DEPARTMENT TRENDS FROM THE DRUG ABUSE WARNING NETWORK: FINAL ESTIMATES 1994-2001, at 50, 53 fig.3 (Aug. 2002).

108. See BUREAU OF JUSTICE STATISTICS, U.S. DEPARTMENT OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS: 2003, at 390 tbl.4.36 (Aug. 2004) [hereinafter *SOURCEBOOK*].

109. See OFFICE OF NATIONAL DRUG CONTROL POL'Y, EXEC. OFFICE OF THE PRESIDENT, THE PRICE AND PURITY OF ILLICIT DRUGS: 1981 THROUGH THE SECOND QUARTER OF 2003 at 9-10, 29 fig.10 (Nov. 2004).

110. See NATIONAL DRUG INTELLIGENCE CENTER, *supra* note 54, at 3, 28-29 fig.5, 61 tbl.B-1.

111. See, e.g., ZIMRING, *supra* note 32, at 56-60; Blumstein & Rosenfeld, *supra* note 40, at 1187-91; Blumstein & Wallman, *supra* note 15, at 140; Cook & Laub, *supra* note 20, at 22-25; Levitt, *supra* note 105, at 171-72.

disproportionately at-risk youth in post-legalization cohorts.¹¹² There have been a number of challenges to the methodology and evidence supporting this thesis.¹¹³ I will not enter this methodological debate here, except to note that some basic questions of timing seem to undermine this thesis. The Supreme Court held prohibitions on abortion unconstitutional in 1973.¹¹⁴ The abortion thesis accordingly suggests that crime rates should have already been falling for some time by 1993, when all teenagers had been born after legalization. Nevertheless, as we have seen, violent crime peaked in 1993, casting considerable doubt on the abortion thesis.¹¹⁵ For present purposes, however, most important is Donahue and Levitt's observation that crime declined sooner in the states that legalized abortion prior to 1973 than it did elsewhere.¹¹⁶ If the thesis about abortion were true, by now, the disparity between crime rates in early-legalization and other states should have diminished, if not disappeared.

As we will see, this prediction has not been borne out in New York City, where the crime decline has been particularly dramatic.¹¹⁷ Abortion may have played some role in the crime decline, but the New York data suggests that its role was limited, at least in that city. Indeed, Donahue and Levitt agree with this last point; they concede that abortion had less effect in New York than in most jurisdictions, speculating that because New York abortion rates are unusually high, the rates may have reached a point of diminishing returns in terms of crime reduction in that state.¹¹⁸

Another demographic explanation for the crime decline focuses on increases in rates of incarceration, which incapacitates potential offenders and offers the possibility of general deterrence, and some give it at least a portion of the credit for the crime drop.¹¹⁹ While incarceration probably had some effect on crime rates, sorting out its effects is a perilous business. For one thing, as we have seen, both the crime rise and ensuing decline occurred among youthful offenders, and incarceration rates are lower for youth.¹²⁰ For another, incarceration may have crime-generating effects; one study of incarceration in New York City found that high rates of incarceration in high-crime

112. See John J. Donahue III & Steven D. Levitt, *The Impact of Legalized Abortion on Crime*, 116 Q. J. ECON. 379, 407-15 (2001).

113. See, e.g., Blumstein & Wallman, *supra* note 15, at 141-42.

114. See *Roe v. Wade*, 410 U.S. 113 (1973).

115. For particularly powerful statistical attacks on the abortion thesis showing that even cohorts born before and well after legalization experienced enormous variability in violent offending rates during the 1980s and 1990s, see Cook & Laub, *supra* note 20, at 22-25; Theodore Joyce, *Did Legalized Abortion Lower Crime?*, 39 J. HUM. RES. 1, 1-2, 25 (2004).

116. See Donahue & Levitt, *supra* note 112, at 395-99.

117. See *infra* text accompanying notes 142-54.

118. See Donahue & Levitt, *supra* note 112, at 405-06.

119. See, e.g., Levitt, *supra* note 105, at 178-79 (arguing that incarceration explains one-third of the crime drop); William Spelman, *The Limited Importance of Prison Expansion*, in *THE CRIME DROP IN AMERICA*, *supra* note 19, at 97-129 (estimating that incarceration explains one-quarter of the crime drop). For a meta-analysis of studies of incarceration effects that afford it moderate significance in determining crime rates, see Pratt & Cullen, *supra* note 40, at 416-17.

120. See Cook & Laub, *supra* note 20, at 29-30.

communities adversely affect the economic prospects of offenders and their families, and therefore destabilize communities and ultimately contribute to increased crime rates.¹²¹ Indeed, in inner-city communities already plagued by social instability, high rates of incarceration may exacerbate social disorganization with criminogenic effects.¹²² Moreover, in the inner city, where demand for drugs is high and many residents likely believe that alternative sources of legitimate income are limited, the incentive to deal in drugs may be so great that the calculus of potential offenders is likely to be only marginally affected by an increase in drug prosecutions or sentences.¹²³ Whatever the reason, the evidence of a relation between incarceration rates and the crime drop is wanting; between 1975 and 2000, even as incarceration rates increased dramatically, there was no statistically significant relationship between incarceration and homicide rates.¹²⁴

Without satisfactory evidence supporting a demographic explanation for the crime drop, one might turn to economics. We have seen that violent crime concentrates in areas of economic disadvantage; it could follow that an improving economy drove rates of violent crime down in the 1990s. But again, the statistical evidence offers little support for this thesis; there is no relationship between local economic conditions and crime rates.¹²⁵ Nor does the national economy provide an explanation; inflation-adjusted wages were essentially flat from the mid-1980s to 1996, so economic explanations for the dramatic movements in violent crime rates during that period are unpromising.¹²⁶

John Lott and David Mustard suggested yet another possibility when they argued that crime declines are produced by laws authorizing the carrying of

121. See Jeffrey Fagan, Valerie West & Jan Holland, *Reciprocal Effects of Crime and Incarceration in New York City Neighborhoods*, 30 *FORDHAM URB. L.J.* 1551, 1588-95 (2003).

122. See Jeffrey Fagan & Tracey L. Meares, *Punishment, Deterrence, and Social Control: The Paradox of Punishment in Minority Communities*, 6 *OHIO ST. CRIM. L.J.* 173 (2008).

123. See Jeffrey A. Fagan, *Do Criminal Sanctions Deter Drug Crimes?* in *DRUGS AND CRIME*, *supra* note 54, at 188, 204-07. The same may be true of efforts to target the unlawful use of firearms in connection with drug trafficking through the use of felony prosecutions. See Steven Raphael & Jens Ludwig, *Prison Enhancement: The Case of Project Exile*, in *EVALUATING GUN POLICY: EFFECTS ON CRIME AND VIOLENCE* 251, 274-77 (Jens Ludwig & Philip J. Cook eds., 2003) [hereinafter *EVALUATING GUN POLICY*]. One study of an effort to target gun offenders for federal felony prosecutions in Richmond known as "Project Exile" found no statistically significant results. See *id.*; accord Jens Ludwig, *Better Gun Enforcement, Less Crime*, 4 *CRIMINOLOGY & PUB. POL'Y* 677, 691-98 (2005). A more recent study using a different methodology did find statistically significant crime reductions following the Richmond program. See Richard Rosenfeld, Robert Fornango & Eric Baumer, *Did Ceasefire, Compstat, and Exile Reduce Homicide?*, 4 *CRIMINOLOGY & PUB. POL'Y* 419, 436-38 (2005). Still, Richmond's homicide rate remained significantly higher than the average rate for cities with a population of 175,000 or more. See *id.* at 428-32 & fig.1. The same study found no statistically significant effects of Boston's effort to generate deterrence by direct communication with gang youth about the consequences of firearms possession and use. See *id.* at 434-35.

124. See ZIMRING, *supra* note 32, at 50-52.

125. See Richard B. Freeman, *Does the Booming Economy Help Explain the Fall in Crime?*, in *PERSPECTIVES ON CRIME AND JUSTICE: 1999-2000 LECTURE SERIES* 23, 40-41 (2001) [hereinafter *PERSPECTIVES ON CRIME AND JUSTICE*]; Levitt, *supra* note 105, at 170-71.

126. See ZIMRING, *supra* note 32, at 66-67.

concealed firearms, which are said to enhance the likelihood that an intended victim will be able to provide armed resistance.¹²⁷ The study's methodology, however, has been subject to fierce criticism.¹²⁸ In any event, Lott and Mustard studied the period from 1979 to 1992, prior to the crime-decline.¹²⁹ Ian Ayres and John Donohue then extended the analysis forward seven years and found no relationship between concealed-carry laws and crime reductions.¹³⁰ The debate has continued with more recent studies reaching divergent conclusions.¹³¹ Lott himself makes no effort, however, to establish that any significant portion of the crime drop since the early 1990s resulted from concealed-carry laws.¹³²

One more promising explanation for the crime decline involves the effect of policing. Steven Levitt found a statistical relationship between increases in the number of police and subsequent decreases in violent crime.¹³³ But this explanation is, at best, incomplete.

There are a great many studies regarding the effect of increased numbers of police or frequency of patrol, and their results are mixed.¹³⁴ Indeed, at the

127. See John R. Lott, Jr. & David B. Mustard, *Crime, Deterrence, and Right-to-Carry Concealed Handguns*, 26 J. LEGAL. STUD. 1, 65-66 (1997).

128. See, e.g., DAVID HEMENWAY, PRIVATE GUNS PUBLIC HEALTH 100-04 (2004); MARK V. TUSHNET, OUT OF RANGE: WHY THE CONSTITUTION CAN'T END THE BATTLE OVER GUNS 85-95 (2007).

129. See Blumstein & Wallman, *supra* note 15, at 134-35.

130. See Ian Ayres & John J. Donohue III, *Shooting Down the "More Guns, Less Crime" Hypothesis*, 55 STAN. L. REV. 1193, 1296 (2003). This finding has since been replicated. See FIREARMS AND VIOLENCE, *supra* note 22, at 125-51.

131. Compare, e.g., JOHN R. LOTT, JR., MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN CONTROL LAWS 170-336 (University of Chicago Press 3d ed. 2010) (finding crime reductions in an analysis updated through 2005), and Carlisle E. Moody & Thomas B. Marvell, *The Debate on Shall-Issue Laws*, 5 ECON J. WATCH 269, 291 (2008) (finding crime reductions as well); with Ian Ayres & John J. Donohue III, *Yet Another Refutation of the More Guns, Less Crime Hypothesis: With Some Help from Moody and Marvell*, 6 ECON J. WATCH 35, 55-56 (2009) (disputing crime reductions).

132. See LOTT, *supra* note 131, at 253-305. A similar claim—although not linked to declining crime rates—is that firearms are used for defensive purposes at very high rates. See, e.g., Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun*, 86 J. CRIM. L. & CRIMINOLOGY 150, 179-81 (1995). More recent work has cast great doubt on this claim. See, e.g., PHILIP J. COOK & JENS LUDWIG, U.S. DEPARTMENT OF JUSTICE, GUNS IN AMERICA: NATIONAL SURVEY ON PRIVATE OWNERSHIP AND USE OF FIREARMS 8-11 (May 1997); HEMENWAY, *supra* note 128, at 66-69, 239-40.

133. See Steven D. Levitt, *Using Electoral Cycles in Police Hiring to Estimate the Effect of Police on Crime*, 87 AM. ECON. REV. 270, 286 (1997); Steven D. Levitt, *Using Electoral Cycles in Police Hiring to Estimate the Effects of Police on Crime: Reply*, 92 AM. ECON. REV. 1244, 1244-46 (2002). During the current decade, interestingly, the modest increases in homicide victimization and offending among young African-American males during the current decade was accompanied by budget cuts leading to an 8.5% reduction in the number of police officers in cities with populations exceeding 250,000. See Fox & Swatt, *supra* note 33, at 5 tbl.10.

134. See COMMITTEE TO REVIEW RESOURCES ON POLICE POLICY AND PRACTICES, NATIONAL RESOURCES COUNCIL, FAIRNESS AND EFFECTIVENESS IN POLICING: THE EVIDENCE 224-25 (Wesley Skogan & Kathleen Frydl eds., 2004) [hereinafter FAIRNESS AND EFFECTIVENESS IN POLICING]; JOHN E. CONKLIN, WHY CRIME RATES FELL 60-63 (2003); John E. Eck & Edward R. Maguire, *Have Changes in Policing Reduced Violent Crime? An Assessment of the Evidence*, in THE CRIME DROP IN AMERICA, *supra* note 19, at 207, 209-17; Lawrence W. Sherman & John E. Eck, *Policing for Crime Prevention*, in EVIDENCE-BASED CRIME PREVENTION 295, 306-07 (Lawrence W. Sherman et al. eds., rev. 2006) [hereinafter EVIDENCE-BASED CRIME PREVENTION].

city level, the relationship between numbers of police and crime breaks down; there is little relationship between the size of a city's police force and the magnitude or duration of the crime spike.¹³⁵ Nor does it stand to reason that increased policing alone is likely to reduce crime, regardless of the tactics employed. Officers who merely drive through a neighborhood on patrol are unlikely to be very effective at disrupting drug or gang activity—a gang or drug dealer with a modicum of sophistication need only post a lookout who can warn his confederates to cease any overt criminality as the squad car drives past. It seems likely that the tactics police use must be at least as important as the number of officers.

In fact, the 1990s saw alterations in the tactics employed by a great many urban police departments that moved from more passive and reactive patrol to proactive efforts at intensive and aggressive patrol of specific high-crime areas.¹³⁶ There are no studies that assess on a national basis whether specific police tactics are statistically associated with crime reduction. Without such data, about the best we can do is examine the closest thing we have to a natural experiment in the efficacy of novel police tactics – the experience of a jurisdiction that has been particularly effective in reducing violent crime after the adoption of new tactics.

2. *The Experience of New York*

Homicide in New York City rose from a rate of 4.7 per 100,000 in 1960 to a 1991 peak of 31.0 in waves that roughly corresponded to drug epidemics, with the increases concentrated in firearms-related homicide.¹³⁷ New York was fairly typical of major cities during the crime-spike period; in 1990, its homicide rate was at the average for large cities, and as we have seen, it experienced the same gang and drug-related competitive pressures during the crack era that produced a spike in violent crime in the nation's major cities.¹³⁸ Ethnographic studies of drug dealing in New York City observed the prevalence of gang-organized drug dealing during the crime-rise period.¹³⁹ The overrepresentation of minorities among its homicide victims was also typical for large cities; in 1990, African Americans comprised 48.5% of New York's homicide victims and Hispanics comprised 30.9%, even though these groups

135. See, e.g., PEARSON-NELSON, *supra* note 40, at 152-54; Graham C. Ousey & Matthew R. Lee, *Homicide Trends and Illicit Drug Markets: Exploring Differences Across Time*, 24 JUST. Q. 48, 73 (2007); Pratt & Cullen, *supra* note 38, at 425-26.

136. See, e.g., Eck & Maguire, *supra* note 134, at 228-45; Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 572-84 (1997).

137. See Fagan, Wilkinson & Davies, *supra* note 103, at 688, 694-99.

138. See ZIMRING, *supra* note 32, at 139; *supra* notes 42, 44, 47-48, 98-104 and accompanying text.

139. See Richard Curtis, *The Improbable Transformation of Inner-City Neighborhoods: Crime, Violence, Drugs, and Youth in the 1990s*, 88 J. CRIM. L. & CRIMINOLOGY 1233, 1244-63 (1998); Jeffrey Fagan & Kolin Chin, *Violence as Regulation and Social Control in the Distribution of Crack*, in DRUGS AND VIOLENCE: CAUSES, CORRELATES, AND CONSEQUENCES 8, 21-24 (Mario De La Rosa, et al. eds., 1990).

comprised less than half of the city's population.¹⁴⁰ At the 1991 peak of New York's crime wave, the homicide victimization rate in New York was 58 per 100,000 population for African Americans, 44 for Hispanics, and 8 for Whites.¹⁴¹ The ensuing crime decline was far from typical, however, even in an era of declining rates of violent crime.

During the 1990s, the decline in each of the seven categories of "index" crime reported to the Federal Bureau of Investigation in New York was approximately double the decline in the rest of the country.¹⁴² By 2000, when compared to the other nine of the ten largest cities, New York had the lowest rates for five of the seven index crimes, and for murder, its rate of 8.7 per 100,000 population was dramatically below the remaining nine-city average of 16.3.¹⁴³ Indeed, New York outperformed every one of the nation's fifteen largest cities during the 1990s.¹⁴⁴ By 1998, the African-American homicide victimization rate had declined by more than two-thirds to 17 per 100,000 population, the Hispanic rate had declined by more than four-fifths to 8, and the White rate was at 4.¹⁴⁵ Moreover, New York has been able to keep driving its homicide rate down; New York's 2009 homicide rate was 5.6 per 100,000 population.¹⁴⁶

No non-police explanation for New York's success is apparent; for example, New York's growth in incarceration rates and decline in unemployment rates during the 1990s were smaller than the national averages.¹⁴⁷ In the late 1990s, the poverty rate in New York stabilized at about twice the national average, about where it was in the early 1990s, and no statistical relationship existed between New York's poverty, unemployment, and homicide rates in the 1990s.¹⁴⁸ As for drugs, there is no evidence of a decline in the demand for crack or other illegal drugs in New York associated with the crime-decline period.¹⁴⁹ As we have seen, abortion had a limited effect

140. ZIMRING, *supra* note 32, at 160 fig.6.8.

141. ANDREW KARMEN, *NEW YORK MURDER MYSTERY: THE TRUE STORY BEHIND THE CRIME CRASH OF THE 1990S* 54, graph 2.2 (2000).

142. ZIMRING, *supra* note 32, at 136-37 & fig.6.1.

143. *Id.* at 139-41 & fig.6.3.

144. *Id.* at 12-15. To similar effect, see KARMEN, *supra* note 141, at 23-28.

145. See KARMEN, *supra* note 141, at 54 graph 2.2.

146. See FEDERAL BUREAU OF INVESTIGATION, *CRIME IN THE UNITED STATES: PRELIMINARY ANNUAL UNIFORM CRIME REPORT, 2009* tbl.4, <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2009> (last visited Oct. 15, 2010) (providing the underlying population and homicide statistics from which I have calculated New York's 2009 homicide rate). Moreover, even though African-American homicide offending rates increased somewhat during the current decade, New York's African-American homicide offending rate fell by 21% between 2000-01 and 2006-07. See Fox & Swatt, *supra* note 33, tbl.7; see also A1 Baker, *Homicides Near Record Low Rate in New York City*, N.Y. TIMES, Dec. 29, 2009, at A1 (providing a decade-ending assessment of homicide rates in New York).

147. See ZIMRING, *supra* note 32, at 147, 229-32.

148. See KARMEN, *supra* note 141, at 197-98, 201-04.

149. See *id.* at 177-82. The federal government's estimates of the price of crack cocaine in New York during the 1980s and 1990s did not vary materially from that in other major cities. See OFFICE OF NATIONAL DRUG CONTROL POLICY, *supra* note 109, at 34 fig.15.

on crime rates in New York.¹⁵⁰ Moreover, if the legalization of abortion explained the crime decline, we would expect to see the disparity between the crime drop in early legalization states and others disappear over time.¹⁵¹ New York was an early legalization state, permitting widespread abortion in 1970.¹⁵² But, as we have seen, it outperformed other big cities in terms of reducing violent crime throughout the 1990s and beyond.¹⁵³ Similarly, as Franklin Zimring observed, New York City's crime drop did not cluster at the beginning of the 1990s, as one might expect if its head start in legalizing abortion explained the crime drop, and it experienced crime declines far in excess of those elsewhere in New York, suggesting that the cause of the decline cannot be found at the state level.¹⁵⁴

Most pertinent for present purposes, the size of New York City's police force increased substantially during the period of dramatic declines in violent crime in that city, and Hope Corman and H. Naci Mocan found a statistically significant relationship between the two.¹⁵⁵ Still, as we have seen, there is reason to doubt whether increases in the size of a police department alone are likely to drive down crime.¹⁵⁶ Moreover, as previously noted, the crime decline continued after 2000, even though the size of the New York police force declined significantly, with the number of officers in service dropping from 40,311 in 2000 to 36,101 by 2006.¹⁵⁷ Thus, the size of the police force seems, at best, an incomplete explanation.

As it happens, important changes in policing tactics corresponded to New York's crime drop. In 1991, not only did the size of New York's police force begin to increase, but it also adopted a community-policing model that employed an increased emphasis on foot patrols and low-level disorder.¹⁵⁸ In

150. See *supra* text accompanying notes 116-18.

151. See ZIMRING, *supra* note 32, at 148-49.

152. See Donahue & Levitt, *supra* note 112, at 383-84.

153. See ZIMRING, *supra* note 32, at 239 tbl.A4.3.

154. See *id.* at 148-49.

155. See Hope Corman & H. Naci Mocan, *A Time-Series Analysis of Crime, Deterrence, and Drug Abuse in New York City*, 90 AM. ECON. REV. 584, 588 fig.1, 595 (2000). Their data covered the period from January 1970 to December 1996. See *id.* at 586. Interestingly, there was no relationship between indicia of the prevalence of drug use and violent crime, suggesting, consistent with the account advanced in Part I.B above, that "drug-related violence stems mostly from interaction between sellers." *Id.* at 599.

156. See *supra* text accompanying notes 134-35. Moreover, as Franklin Zimring points out, Levitt's model predicts smaller declines in New York's crime rates as a result of increases in the size of the police force than actually occurred. See ZIMRING, *supra* note 32, at 153.

157. See Dennis C. Smith & Robert Purtell, *An Empirical Assessment of NYPD's "Operation Impact": A Targeted Zone Crime Reduction Strategy*, 13 (June 27, 2007), http://wagner.nyu.edu/faculty/publications/publications.php?pub_id=1133 (last visited Dec. 23, 2010). This decline in officers occurred even amidst the increased focus on counterterrorism efforts. See *id.*

158. See CIVIL RIGHTS BUREAU, OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK, THE NEW YORK CITY POLICE DEPARTMENT'S "STOP AND FRISK" PRACTICES: A REPORT TO THE PEOPLE OF NEW YORK FROM THE OFFICE OF THE ATTORNEY GENERAL 47-52 (Dec. 1, 1999), http://books.google.com/books?id=fGJTRZgvUBoC&pg=PR3&lpg=PR3&dq=new+york+attorney+general+stop+and+frisk+report+methodology+and+appendices&source=bl&ots=4WjcHJkxmV&sig=DKq92FH4w3rNtA4LDO_n_SVOHis&

1994, after the appointment of a new police chief, the department placed greater emphasis on aggressive stop-and-frisk tactics for misdemeanor arrests for drug and public-order offenses, adopted a system of statistical analysis that directed enforcement efforts at statistical “hot spots” of criminal activity, and imposed greater managerial accountability.¹⁵⁹ The tactic that the architects of the New York policing strategy of the 1990s chiefly credit for the crime drop is the use of “Broken Windows” policing tactics that focus on reducing signs of physical and social disorder in the streetscape.¹⁶⁰ In a later study, Mocan and Corman found that citywide felony arrest rates had a statistically significant effect in reducing all seven index crimes, and misdemeanor arrests had a statistically significant effect on robbery, motor vehicle theft, and grand larceny.¹⁶¹ In yet another study, George Kelling and William Sousa found an inverse relationship between New York precinct’s misdemeanor arrests between 1989 and 1998 and the rate of violent crime.¹⁶² The authors of these studies claimed that each provided support to the Broken Windows thesis.¹⁶³

To be sure, these studies have been challenged. Bernard Harcourt and Jens Ludwig, for example, attacked Corman and Mocan’s study by arguing that any time-series study of a single jurisdiction can be misleading, using as an example their own finding that successful New York Yankees teams were

hl=en&ei=YS2dTIS1GYG4sAOWudXVAQ&sa=X&oi=book_result&ct=result&resnum=1&ved=0CAYQ6AEwAA#v=onepage&q&f=false [hereinafter STOP AND FRISK REPORT].

159. See *id.* at 52-56. The emphasis on geographically targeted enforcement reflects the reality that, even within high-crime communities, crime is not uniform but instead tends to cluster at identifiable “hot spots.” See, e.g., BURSIK & GRASMICK, *supra* note 37, at 62-72; John E. Eck & David Weisburd, *Crime Places in Crime Theory*, in CRIME AND PLACE 1, 7-18 (John E. Eck & David Weisburd eds., 1995); John E. Eck, *Preventing Crime at Places*, in EVIDENCE-BASED CRIME PREVENTION, *supra* note 134, at 241-42; Lawrence W. Sherman, et al., *Hot Spots of Predatory Crime: Routine Activities and the Criminology of Place*, 27 CRIMINOLOGY 27, 27 (1989); Ralph B. Taylor, *Crime and Small-Scale Places: What We Know, What We Can Prevent, and What Else We Need to Know*, in CRIME AND PLACE: PLENARY PAPERS OF THE 1997 CONFERENCE ON CRIMINAL JUSTICE RESEARCH AND EVALUATION 3-9 (1998). As to the changes in the New York City Police Department in 1994, one study found that although crime continued to decline between 1994 and 2001, it did not do so at a statistically significantly greater rate than in the 1992-93 period. See Rosenfeld, Fornango & Baumer, *supra* note 123, at 435-36. This begs the question whether the crime decline would have continued absent the additional changes in tactics in 1994. As we will see, had the crime decline halted in 1994, there would have been a much stronger case that New York’s early 1990s crime decline was nothing more than regression to the mean.

160. See WILLIAM BRATTON & PETER KNOBLER, TURNAROUND: HOW AMERICA’S TOP COP REVERSED THE CRIME EPIDEMIC 152-56, 228-29, 233-39 (1998); George L. Kelling, *Why Did People Stop Committing Crimes? An Essay About Criminology and Ideology*, 28 FORDHAM URB. L.J. 567, 573-79 (2000). For the classic statement of the “Broken Windows” thesis, see James Q. Wilson & George Kelling, *Broken Windows*, ATLANTIC MONTHLY, Mar. 1982, at 31-38. For a more recent defense of the Broken Windows thesis, see William H. Sousa & George L. Kelling, *Of “Broken Windows,” Criminology, and Criminal Justice*, in POLICE INNOVATION: CONTRASTING PERSPECTIVES 77, 83-87 (David Weisburd & Anthony A. Braga eds., 2006) [hereinafter POLICE INNOVATION].

161. See Hope Corman & H. Naci Mocan, *Carrots, Sticks, and Broken Windows*, 48 J. L. & ECON. 235, 250-61 (2005). Mocan and Corman also found a far smaller relationship between economic variables and crime. See *id.* at 259-61.

162. See GEORGE L. KELLING & WILLIAM H. SOUSA, JR., THE MANHATTAN INSTITUTE, DO POLICE MATTER?: AN ANALYSIS OF NEW YORK CITY’S POLICE REFORMS 6-10 (1999).

163. See *id.* at 9-10; Corman & Mocan, *supra* note 161, at 262.

associated with a decline in New York's homicide rate.¹⁶⁴ In addition, Jeffrey Fagan and Garth Davies criticized Kelling and Sousa's findings by suggesting alternative explanatory variables and noting that if arrests reduced violent crime one would expect to see a lagged effect.¹⁶⁵ Beyond these criticisms, there are additional reasons to question the Broken Windows thesis. For one thing, one could believe that misdemeanor arrests are a poor proxy for Broken Windows policing, and felony arrests are even worse. Beyond that, one might believe that the studies are inconsistent. After all, Corman and Mocan found that felony arrests were related to reductions in homicide, while Kelling and Sousa found that it was levels of misdemeanor arrests that reduced violent crime. Perhaps these results can be reconciled; Corman and Mocan's citywide analysis may have obscured the effects of high levels of misdemeanor arrests at specific hot spots of crime. Still, these studies provide, at best, only indirect evidence to support the Broken Windows thesis.

Beyond that, the overall evidence of the efficacy of Broken Windows policing is open to question. Wesley Skogan's study, which aggregated data from six cities, found that physical disorder stimulated violent crime; however, Professor Harcourt found that any relationship disappeared when neighborhood poverty, race, and stability are held constant and that Skogan's results were unduly sensitive to data from a small number of neighborhoods,¹⁶⁶ although Professor Harcourt's methodology has been criticized as well.¹⁶⁷ Yet another study found no relationship between physical disorder on the Chicago streetscape, concluding that indicia of concentrated social disadvantage better predicted crime rates,¹⁶⁸ although some have argued that the Chicago data provides at least partial support for the Broken Windows thesis.¹⁶⁹ A Baltimore study found only an inconsistent relationship between disorder and homicide rates.¹⁷⁰ And, one study found that moving the residents of low-income areas into stable and more affluent communities did not reduce crime rates among

164. See Bernard Harcourt & Jens Ludwig, *Broken Windows: New Evidence from New York City and a Five-City Social Experiment*, 73 U. CHI. L. REV. 271, 297-99 (2006). One can surely question how much this proves; Harcourt and Ludwig picked an example that they surely knew correlated with the New York crime drop of the 1990s. Such a strategy, especially when attacking a peer-reviewed paper in one not subject to peer review, should perhaps raise an eyebrow.

165. See Jeffrey Fagan & Garth Davies, *Policing Guns: Order Maintenance Policing and Crime Rates in New York*, in GUNS, CRIME, AND PUNISHMENT IN AMERICA 191, 198 (Bernard E. Harcourt ed., 2003).

166. See BERNARD E. HARCOURT, *ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING* 59-78 (2001). For similar criticism, see Eck & Maguire, *supra* note 134, at 24.

167. See Yili Xu, Mora L. Fiedler & Karl H. Flaming, *Discovering the Impact of Community Policing: The Broken Windows Thesis, Collective Efficacy, and Citizens' Judgment*, 42 J. RES. CRIME & DELINQ. 147, 154-55 (2005).

168. See Robert J. Sampson & Stephen W. Raudenbush, *Systematic Social Observation of Public Spaces: A New Look at Disorder in Urban Neighborhoods*, 105 AM. J. SOC. 603, 637-39 (1999).

169. See Xu, Fiedler & Flaming, *supra* note 167, at 156-58.

170. See TAYLOR, *supra* note 53, at 185-90.

participants.¹⁷¹ An aggressive quality-of-life policing initiative in New York in the mid-1980s, moreover, failed to reduce violent crime.¹⁷² A committee of distinguished social scientists, in a report co-edited by none other than Skogan, recently reviewed the available evidence and concluded that the efficacy of Broken Windows policing has yet to be demonstrated.¹⁷³ Still, the evidence points to a policing as an important explanation for the crime decline in New York. After all, the crime drop began in 1991, and this correlates well with the beginning of the change in the strength and tactics of the police. Indeed, as we have seen, Corman and Mocan found a relationship between increasing numbers of police officers and declines in violent crime. Moreover, police should have the greatest effect on murders committed in clearly visible locations, and, in the later period of the 1990s, murders in clearly visible locations continued to drop in New York despite the size of the police force stabilizing.¹⁷⁴

3. *The Role of Stop-and-Frisk in the Crime Decline*

As we have seen, the citywide felony arrests studied by Corman and Mocan, on the one hand, and the precinct-level misdemeanor arrests studied by Kelling and Sousa, on the other, are a less than perfect proxy for Broken Windows policing, but they are a much better proxy for something else—the stop-and-frisk.¹⁷⁵ Indeed, the stop-and-frisk was ubiquitous in New York City's approach to policing during the crime-decline period.¹⁷⁶

Unlike most police departments, New York's stop-and-frisk activity can be quantified because officers must complete a form whenever they forcibly stop and frisk or search a suspect or when a suspect who had been forcibly stopped refuses to identify himself.¹⁷⁷ The New York Attorney General's review of the reports covering stops during 1998 and the first three months of 1999 disclosed 174,919 stops by New York City police.¹⁷⁸ The prevalence of

171. See Harcourt & Ludwig, *supra* note 164, at 298-314. This study, in turn, has been criticized. See Maria Cruz Melendez, Note, *Moving to Opportunities and Mending Broken Windows*, 32 J. LEGIS. 238, 251-62 (2006).

172. See Benjamin Bowling, *The Rise and Fall of New York Murder*, 39 BRIT. J. CRIMINOLOGY 531, 547 (1999).

173. See FAIRNESS AND EFFECTIVENESS IN POLICING, *supra* note 122, at 229-30. Doubts about the efficacy of Broken Windows policing as a means of reducing violent crime, however, may not be fatal to the enterprise. I have elsewhere argued that whatever the relationship between disorder and violent crime, the evidence is clear that disorder stimulates the fear of crime, and for that reason policing disorder will reduce the likelihood of neighborhood destabilization. See Lawrence Rosenthal, *Policing and Equal Protection*, 21 YALE L. & POL'Y REV. 53, 92-95 (2003). For a somewhat similar argument endeavoring to rehabilitate the Broken Windows thesis, see Xu, Fiedler & Flaming, *supra* note 167, at 168-73.

174. See KARMEN, *supra* note 141, at 102-04 & graph 3.1.

175. See *id.* at 92-98.

176. See *id.* at 137, 270.

177. See STOP AND FRISK REPORT, *supra* note 158, at 64.

178. *Id.* at App. tbl.1.A.5.

stop-and-frisk has only increased since then, reaching 575,996 in 2009.¹⁷⁹ With stop-and-frisk at such high levels, especially in targeted as “hot spots,” suspects could perceive greatly elevated risk in carrying guns or drugs, or in attempting to purchase the latter, at least in targeted areas. There is some observational evidence to support this supposition; one ethnographic study documented a decline in outdoor drug markets in New York’s Bushwick neighborhood, and observed that it had created a system of middlemen who arrange transactions between purchasers and indoor sellers, and this system, in turn, increased transaction costs because of purchasers’ fears of fraud or deception.¹⁸⁰ Moreover, if gang members and drug sellers cannot confidently carry firearms because of the risk of stop-and-frisk, their ability to defend their turf or themselves will be substantially reduced. In this fashion, high rates of stop-and-frisk may make gang and drug crime more risky and less lucrative by increasing the risk of arrest and the difficulty of establishing stable drug-market monopolies.¹⁸¹

The impact of stop-and frisk rates and gang and drug-related violent crime may well be captured by both the Corman and Mocan and Kelling and Sousa analyses. High precinct-levels of misdemeanor arrests are a rough proxy for precincts in which aggressive stop-and-frisk tactics at violent-crime hot spots are in use. High levels of felony arrests may also reflect more aggressive tactics aimed at gangs and drugs. The inference that stop-and-frisk tactics are an important aspect of New York’s success is strengthened by a more recent study by Jeffrey Fagan, Garth Davies, and Jan Holland that found that intensive patrols near public housing in New York resulted in substantial reductions in violent crime in the areas surrounding public housing projects.¹⁸² Another study of hot spots targeted for special enforcement activity found disproportionate reductions in visible crimes against the person—murder, rape, robbery, assault, and grand larceny.¹⁸³ Intensive patrols, in turn, are another proxy for stop-and-frisks. Moreover, looking beyond New York, an impressive number of studies throughout the nation have found that aggressive policing at hot spots with an emphasis on finding guns reduces levels of violent crime.¹⁸⁴

179. JASPREET GILL & JENNIFER TRONE, CENTER ON RACE, CRIME AND JUSTICE, STOP, QUESTION & FRISK POLICING PRACTICES IN NEW YORK CITY: A PRIMER 19 (John Jay Coll ed., 2010).

180. See Terry Furst, et al., *The Rise of the Street Middleman/Woman in a Declining Drug Market*, 7 ADDICTION RES. 103, 114-24 (1999)).

181. In this connection, it is worth noting that Levitt and Venkatesh found that intergang violence adversely affected gang revenues because drug purchasers are deterred from patronizing violent markets and gang members demand higher wages to compensate them for increased risk. See Levitt & Venkatesh, *supra* note 45, at 775-80. Thus, a strategy that makes it more difficult for gangs to establish stable drug monopolies will adversely affect the economic motivations for gang membership.

182. See Jeffrey Fagan, Garth Davies & Jan Holland, *The Paradox of the Drug Elimination Program in New York City Public Housing*, 13 GEO. J. ON POVERTY L. & POL’Y 415, 418, 442-53 (2006).

183. See Smith & Purtell, *supra* note 157, at 49-50.

184. See FIREARMS AND VIOLENCE, *supra* note 22, at 230-35; Blumstein & Wallman, *supra* note 15, at 136-37; Lawrence W. Sherman, *Reducing Gun Violence: What Works, What Doesn’t, What’s Promising*, in PERSPECTIVES ON CRIME AND JUSTICE, *supra* note 125, at 69, 78-79; Sherman & Eck, *supra* note 134, at 308-10. Studies of directed patrol focusing on high-crime hot spots reach similar conclusions. See FAIRNESS

Indeed, nationwide arrest statistics show that during the crime-decline period, there was a reduction in weapons arrest rates without any evidence that police were decreasing the rate at which they engaged in weapons searches, suggesting a decline in the rate at which potential offenders carried firearms.¹⁸⁵ This suggests that lower crime rates are associated with lower rates at which firearms are carried in public—the kind of response one might expect from an aggressive regime of weapons searches.¹⁸⁶

There is additional evidence from New York itself. Not only is the crime drop well timed to increases in the size of the New York Police Department, as we have seen, but also reductions in violent crime were concentrated to visible crimes committed in public places, suggesting that offenders were responding to the tactics of officers on patrol.¹⁸⁷ Crime reductions were also concentrated on crimes involving handguns, suggesting that patrol tactics directed at concealable firearms were responsible.¹⁸⁸ In addition, ethnographic studies of the crime drop in New York lend support to the stop-and-frisk thesis. In his study of several Brooklyn neighborhoods, Richard Curtis concluded that after police crackdowns began in 1992, gang drug dealing was largely driven indoors and became less attractive to neighborhood residents, producing a decline in violent crime.¹⁸⁹ He concluded: “[T]he reconfiguration of drug markets in the

AND EFFECTIVENESS IN POLICING, *supra* note 134, at 235-40; Anthony A. Braga, *The Effects of Hot Spot Policing on Crime*, 578 ANNALS AM. ACAD. POL. & SOC. SCI. 104, 113-19 (2001); Daniel S. Nagin, *Criminal Deterrence Research at the Outset of the Twenty-First Century*, in CRIME AND JUSTICE: A REVIEW OF RESEARCH 1, 29-33 (Michael Tonry ed., 1998); Lawrence W. Sherman, *The Police*, in CRIME, *supra* note 53, at 327, 328-34. For some of the leading studies, see, e.g., Anthony A. Braga, et al., *Problem-Oriented Policing in Violent Crime Places: A Controlled, Randomized Experiment*, 37 CRIMINOLOGY 541 (1999); Jacqueline Cohen & Jens Ludwig, *Policing Crime Guns*, in EVALUATING GUN POLICY, *supra* note 123, at 217; Ludwig, *supra* note 123, at 701-08; Edward F. McGarrell, *Reducing Firearms Violence Through Directed Patrol*, 1 CRIMINOLOGY & PUB. POL’Y 119, 126-30 (2001); Lawrence W. Sherman & Dennis Rogan, *Effects of Gun Seizures on Gun Violence: Hot Spots Patrol in Kansas City*, 12 JUST. Q. 673, 675-86 (1995). One might think that targeting patrol in this manner would merely move crime to other locations, but displacement effects appear to be limited. This is a function of the same criminological insight that explains the geographic lumpiness of crime even within high-crime neighborhoods. Criminological theory predicts that there will only be a limited number of locations desirable to criminals at which motivated offenders, desirable targets, and a lack of adequate public or private surveillance intersect. See, e.g., BURSIK & GRASMICK, *supra* note 37, at 62-72; MICHAEL R. GOTTFRIEDSON & TRAVIS HIRSCHI, A GENERAL THEORY OF CRIME 22-44 (1990); Lawrence E. Cohen & Marcus Felson, *Social Change and Crime Rate Trends: A Routine Activities Approach*, 44 AM. SOC. REV. 588 (1979); Eck & Weisburd, *supra* note 159, at 7-18. In fact, the evidence is that targeted enforcement practices have limited displacement effects. See, e.g., Eck, *supra* note 159, at 282; Eck & Weisburd, *supra* note 159, at 19-20; Rene B.P. Hesseling, *Displacement: A Review of the Empirical Literature*, in 3 CRIME PREVENTION STUD. 197-230 (Ronald V. Clarke ed., 1994); David Weisburd & Anthony A. Braga, *Hot Spots Policing as a Model for Police Innovation*, in POLICE INNOVATION, *supra* note 160, at 225, 231-36.

185. See BLUMSTEIN & COHEN, *supra* note 40, at 11-12.

186. See *id.* at 5.

187. See ZIMRING, *supra* note 32, at 141-42. In addition, the same pattern observed in homicide was also observed in motor vehicle thefts in New York, demonstrating that the cause of the crime drop was not likely due to factors unique to homicide. See KARMEN, *supra* note 141, at 20-22.

188. See Steven F. Roth, *Decreasing Violent Gun Crimes in New York City: A Result of Vigorous Law Enforcement Efforts, Other Variables, or Both?*, in PROCEEDINGS OF THE HOMICIDE RESEARCH WORKING GROUP MEETINGS, 1997 AND 1998, at 179-83 (1999).

189. See Curtis, *supra* note 139, at 1267-74.

mid-1990s appreciably reduced the level of neighborhood violence. As distribution retired indoors, turf battles were eliminated.”¹⁹⁰ Bruce Johnson, Andrew Golub, and Eloise Dunlap’s study of drug subcultures in New York concluded that aggressive policing in the 1990s, in particular stop-and-frisk tactics that focus on discovering concealed handguns, reduced crime by disrupting open-air drug sales.¹⁹¹ An ethnographic study of the Bushwick neighborhood similarly concluded that aggressive police tactics employed since 1992 pushed drug dealing indoors.¹⁹² As another researcher explained:

The shift indoors reduced the risk of being “ripped off,” including murderously . . . The effects of this shift can be directly related to the reduction in homicide. As one police officer put it: “There are no more drive-by shootings. There’s no one on the corner to drive by and shoot.”¹⁹³

Thus, “the result of persistent stop, frisk and arrests meant that young men thought twice before carrying their guns . . . [t]hat guns were not immediately accessible during routine confrontations was a frequently cited explanation for the reduction in murder in the mid-1990s.”¹⁹⁴

There is, nevertheless, ample reason for caution when interpreting the data.¹⁹⁵ Jeffrey Fagan and Garth Davies examined the stop-and-frisk data obtained by the New York Attorney General and found that the rate of stops in a precinct in 1998 did not predict homicide rates in the first three months of 1999.¹⁹⁶ This data, however, came relatively late in New York’s crime drop, and given the short span of time and the small number of homicides in any given precinct, this finding may not be particularly probative.¹⁹⁷ Moreover, other work by Fagan and Davies—the study of public housing patrols with Jan Holland—supports the stop-and-frisk thesis.¹⁹⁸ Professor Fagan, for his part, has pronounced himself persuaded that policing can reduce crime rates, citing, among others, the Corman and Mocan study.¹⁹⁹ But perhaps the most powerful support for the thesis is the lack of any plausible alternative.

190. *Id.* at 1274. For similar accounts, see KARMEN, *supra* note 141 at 172-73; Travis Wendel & Ric Curtis, *The Heraldry of Heroin: “Dope Stamps” and the Dynamics of Drug Markets in New York City*, 30 J. DRUG ISSUES 225, 243-44 (2000).

191. See Bruce D. Johnson, Andrew Golub & Eloise Dunlap, *The Rise and Decline of Hard Drugs, Drug Markets, and Violence in Inner-City New York*, in THE CRIME DROP IN AMERICA, *supra* note 19, at 164, 185-89.

192. See Furst, et al., *supra* note 180, at 108-09, 126-27.

193. Bowling *supra* note 172, at 547.

194. *Id.* at 546.

195. See, e.g., KARMEN, *supra* note 141, at 257.

196. See Fagan & Davies, *supra* note 165, at 205-06.

197. Franklin Zimring levels this charge at a study questioning the effectiveness of New York’s police management reforms. See ZIMRING, *supra* note 32, at 153-54. Zimring’s work applies with equal, if not greater, force to the Fagan and Davies result.

198. See *supra* note 182 and accompanying text.

199. See Jeffrey Fagan, *Death and Deterrence Redux: Science, Law and Causal Reasoning in Capital Punishment*, 4 OHIO ST. J. CRIM. L. 255, 272-74, 273 n.90 (2007).

Pretty much the only alternative explanation for the New York crime decline to be advanced is the claim of Professors Harcourt and Ludwig who, in response to the Kelling and Sousa study, argued that the New York data could reflect nothing more than a regression to the mean.²⁰⁰ Indeed, criminologists have long observed that crime waves are often followed by a regression.²⁰¹ New York's homicide decline, however, does not exhibit the characteristics of a regression to the mean. By 2000, New York's homicide rate had declined to about one-third of its average during the 1980s.²⁰² This decline was the longest and largest in that city since World War II.²⁰³ As we have seen, the decline continued after 2000, even after the crime rate had reached an unusual low; it was concentrated in the kind of crimes likely to be responsive to stop-and-frisk tactics—visible crime in public places involving handguns—and it roughly doubled the decline observed in other comparable cities.²⁰⁴ A crime decline of such a magnitude and duration does not reflect the kind of ordinary variability seen in a regression to the mean.²⁰⁵ Moreover, the fact that the greatest declines occurred in the precincts with the highest crime rates is consistent with the stop-and-frisk thesis because the most aggressive patrols were conducted in the areas that had been identified as hot spots of crime.²⁰⁶

As with most empirical debates in criminology, the claim that stop-and-frisk has proven its value in fighting violent crime in New York is one that can be advanced only with considerable caution. There are likely a number of reasons that crime declined in New York.²⁰⁷ Moreover, the experience of New York may be unusual in that its unusual population density may magnify the efficacy of its stop-and-frisk tactics.²⁰⁸ For just this reason, however, it may be easier to study the efficacy of stop-and-frisk in New York than elsewhere. Even so, it is worth noting that one of the architects of the New York strategy, former New York Chief of Police William Bratton, brought many of those same tactics to the far less-dense Los Angeles when he became its police chief, and he produced large reductions in violent crime in that city as well.²⁰⁹

In short, *Terry*'s regime of stop-and-frisk may well be critical to the fight against violent crime. For that reason, the law-enforcement benefits of *Terry* seem substantial, and the intrusion on liberty that it authorizes seems relatively limited. Under the pragmatic balancing test utilized in *Terry* itself, the decision

200. See Harcourt & Ludwig, *supra* note 164, at 287-97.

201. See, e.g., Gary LaFree, *Declining Violent Crime Rates in the 1990s: Predicting Crime Booms and Busts*, 23 ANN. REV. SOC. 145, 159-64 (1999).

202. ZIMRING, *supra* note 32, at 138 fig.6.2.

203. *Id.* at 23, 196-97.

204. *Id.* at 141; Roth, *supra* note 188, at 184.

205. See, e.g., KARMEN, *supra* note 141, at 17; ZIMRING, *supra* note 32, at 136-41; Michael D. Maltz, *Which Homicides Decreased? Why?*, 88 J. CRIM. L. & CRIMINOLOGY 1489, 1490-96 (1998).

206. See *supra* text accompanying note 159.

207. See, e.g., KARMEN, *supra* note 141, at 257.

208. See ZIMRING, *supra* note 32, at 156-57.

209. See Editorial, *The Next Chief: A Policing Paradox*, L.A. TIMES, Oct. 19, 2009, § Main, at 16.

may be counted as something of a success.²¹⁰ But, we have yet to consider the originalist and pragmatic cases against *Terry*.

II. ORIGINALISM AND *TERRY*

As we have seen, one route for attacking *Terry* rests on its lack of historical grounding.²¹¹ Indeed, the leading framing-era sources consistently identify the authority of an official or private person acting without a warrant exclusively in terms of a power to arrest offenders, making no mention of any power of investigatory detention or frisk of the type authorized in *Terry*.²¹²

A. *The Originalist Case Against Terry*

When Justice Scalia considered the historical footing for *Terry*, the only historical evidence he thought gave its holding any support was the framing-era nightwalker statutes, although he doubted that they could support a frisk.²¹³ The handful of scholars who have examined the historical record have also identified these statutes as the best support for a doctrine of preventative

210. To be sure, the Attorney General's report expresses some skepticism about the New York Police Department's compliance with the Fourth Amendment, concluding through the use of a sampling procedure that 15.4% of all forms failed to articulate facts sufficient to justify the stop and 23.5% of all forms did not provide sufficient information to make a determination about whether the stop was justified. *See STOP AND FRISK REPORT*, *supra* note 158, at 161-64. The sampling procedure also found that forms that articulated facts amounting to reasonable suspicion resulted in an arrest four times more often. *See id.* at 164. It is difficult to know what to make of this point; it may well be that officers were less thorough in filling out forms when they knew there would be no criminal case arising from the encounter. Reliance on these reports to assess compliance with the Fourth Amendment is perilous because the reports are not made for that purpose but rather as a source of investigative leads. *See* James J. Fyfe, *Stops, Frisks, Searches, and the Constitution*, 3 *CRIMINOLOGY & PUB. POL'Y* 379, 392-94 (2004). In any event, this data does not endeavor to establish that police reports involving arrests based on probable cause were any more likely to fail to articulate sufficient facts to support the arrest than reports involving *Terry* stops. At most, the data may reflect no more than the risk of error inherent in all police activity. The difficulties in gathering evidence on this point are illustrated by a study of another city involving observation of officers on patrol that found 46% of pat-down searches were unconstitutional. *See* Jon B. Gould & Stephen D. Mastofski, *Suspect Searches: Assessing Police Behavior under the U.S. Constitution*, 3 *CRIMINOLOGY & PUB. POL'Y* 315, 333 (2004). Yet, the study also found that "unconstitutional searches were statistically no more likely to generate contraband than constitutional searches." *Id.* at 347. If the presence of reasonable suspicion did not increase the likelihood of finding contraband, however, the problem may lie in the observers' understanding of the reasonable suspicion standard; otherwise, it is difficult to understand how the presence of reasonable suspicion could have no effect on the likelihood that a search will produce contraband. For an additional critical discussion of this study, see Fyfe, *supra* at 384-91. In any event, Part III will address the question whether the risk of error that inheres in *Terry* renders that doctrine unreasonable within the meaning of the Fourth Amendment.

211. *See supra* text accompanying notes 9-12.

212. *See, e.g.*, 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 289-92 (Univ. of Chi. Press 1979) (1769); 2 MATTHEW HALE, A HISTORY OF PLEAS OF THE CROWNS 587-90 (W.A. Stokes & E. Ingersoll eds., 1st Am. ed. 1847); WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 84-97 (1824); *see also* THOMAS K. CLANCY, THE FOURTH AMENDMENT: ITS HISTORY AND INTERPRETATION § 2.2.1 (2008) (reviewing framing-era law); WILLIAM J. CUDDIHY, THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING 602-1791, at 750-53 (2009) (same).

213. *See supra* text accompanying notes 10-12.

detention and search, although they too have doubted the historical case for a stop-and-frisk in the absence of probable cause to arrest.²¹⁴ In fact, the historical evidence is more complex than Justice Scalia and the scholars who have examined this issue have acknowledged.

On the one hand, the nightwalker statutes authorized detention far more intrusive than that contemplated by *Terry* by authorizing full-blown custodial arrests of suspicious individuals rather than brief investigative detention. Blackstone, for example, explained that “watchmen . . . may *virtute officii* arrest all offenders, and particularly nightwalkers, and commit them to custody till the morning.”²¹⁵ Hawkins wrote: “[I]t is holden by some, that any private person may lawfully arrest a suspicious night walker, and detain him till he make it appear that he is a person of good character,” and recognized similar authority in members of the watch.²¹⁶ Hale similarly opined, “[t]he constable may arrest suspicious night walkers.”²¹⁷ Thus, Justice Scalia’s skepticism of the framing-era support for *Terry* is understandable, but likely overstates matters.²¹⁸ In fact, the nightwalker statutes most likely did authorize the type of frisk permitted by *Terry*—and probably a good bit more. These statutes authorized custodial arrests, and framing-era law permitted a search of the person of an arrestee.²¹⁹

Moreover, these statutes seem to authorize detentions lasting at least overnight, custody of a duration exceeding anything permitted by *Terry*.²²⁰

On the other hand, there is little indication that the standard for arrest under the nightwalker statutes was any less stringent than the standard governing any other kind of arrest.²²¹ For example, Hawkins described “suspicion” as the standard required for all arrests and added that:

[W]hoever would justify the arrest of an innocent person by reason of any such suspicion, must not only shew[sic] that he suspected the party himself, but must also set forth the cause which induced him to have such a suspicion, that it may appear to the court to have been a sufficient ground for his proceeding.²²²

214. See Richard M. Leagre, *The Fourth Amendment and the Law of Arrest*, 54 J. CRIM. L., CRIMINOLOGY, & POLICE SCI. 393, 406-11 (1963); Sklansky, *supra* note 13, at 1804-05; Thomas, *supra* note 13, at 1515-16; Sam B. Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315, 317-20, 324 (1942).

215. 4 BLACKSTONE, *supra* note 212, at 289.

216. HAWKINS, *supra* note 212, at 120.

217. 2 HALE, *supra* note 212, at 88.

218. See Sklansky, *supra* note 13, at 1805-06.

219. See, e.g., CLANCY, *supra* note 212, at § 8.1.1; CUDDIHY, *supra* note 212, at 750-53.

220. The longest detention the Supreme Court has ever countenanced under *Terry* was twenty minutes during which officers detained a driver while other officers pursued an apparently overloaded camper with which the detainee had been driving in tandem in order to determine whether the camper contained contraband. See *United States v. Sharpe*, 470 U.S. 675, 683-88 (1985). Conversely, the Court has held that a ninety-minute detention of luggage at an airport pending the arrival of a narcotics-detecting canine was excessive under *Terry*. See *United States v. Place*, 462 U.S. 696, 707-10 (1983).

221. See, e.g., HAWKINS, *supra* note 212, at 120.

222. *Id.* at 77.

In discussing the justification required for all arrests, the notes of Hale's editor similarly cautioned "that suspicion must not be a mere causeless suspicion, but must be founded upon some probable reason."²²³ Accordingly, it seems unlikely that the nightwalker statutes authorized arrest on any lesser standard than found in the general law of arrest.²²⁴ Moreover, there is little evidence that framing-era law permitted any detention or frisk of individuals on the basis of suspicion that stopped short of the justification required to support an arrest.²²⁵ As William Cuddihy concluded in his exhaustive analysis of the historical evidence, "by 1789, body searches were derivatives of the arrest process, and Americans had little recent experience with personal searches apart from that process."²²⁶

Thus, *Terry*'s central innovation—permitting detention and frisk on a predicate that could not support an arrest—has no support in the nightwalker statutes or any other framing-era practice.²²⁷ At the same time, the framing-era standard for arrest was rather imprecise; Hawkins's description of the suspicion required to justify an arrest, for example, does not sound too different from *Terry*'s standard of reasonable suspicion.²²⁸ Thus, *Terry*'s holding on the permissibility of a stop-and-frisk even when an arrest is not warranted has no historical support, but perhaps framing-era arrest authority was greater than that recognized today.

Still, it is easy to make too much of the nightwalker statutes. They were, after all, limited to nightwalking. These statutes authorized the night watch to prevent breaches of the peace; but because of their temporal limitation to the hours at which the threat was thought greatest, they stopped well short of conferring a general power of investigative detention of the type granted by *Terry*. Perhaps even more important, there is reason to doubt that framing-era officers would have used the somewhat-elusive standard of suspicion under the nightwalker statutes anywhere near as aggressively as *Terry* permits. Framing-era officers acting without a warrant faced personal liability in tort if they made an arrest under circumstances that a jury might later deem inadequate.²²⁹ For

223. 2 HALE, *supra* note 212, at 88.

224. See Leagre, *supra* note 214, at 408-11 (providing a more detailed discussion of this point).

225. See Warner, *supra* note 214, at 324.

226. CUDDIHY, *supra* note 212, at 752.

227. See Sklansky, *supra* note 13, at 1804-05; Thomas, *supra* note 13, at 1495-96.

228. Compare HAWKINS, *supra* note 212, at 120 (describing the procedure of detainment until suspicion is abated), with *Terry v. Ohio*, 392 U.S. 1, 30 (1968) (justifying searches based on reasonableness).

229. See, e.g., AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* 11-17, 20-21 (1997); CUDDIHY, *supra* note 212, at 593-96, 760-61; Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 621-22, 665-66 (1999). If a search produced incriminating evidence, the evidence sufficed as a defense to tort liability, see AMAR, *supra*, at 6-7, although there is some debate about whether this defense was the case for a trespass to a house. Compare Davies, *supra* at 647-49 (denying the existence of immunity), with Fabio Arcila, Jr., *The Death of Suspicion*, 51 WM. & MARY L. REV. 1275, 1316-24 (2010) (finding evidence to support immunity). In any event, for a stop-and-frisk on something like a *Terry* standard, the likelihood that an immunity defense would be available would have been doubtful given the risk that an officer would have been taking that the search would not produce incriminating evidence. The *Terry* standard "falls considerably short of satisfying a preponderance of the

misdemeanor offenses, an arrest was considered justifiable only if the offense occurred in the presence of the person making the arrest and the arrestee was in fact guilty, meaning that the acquittal of the arrestee exposed the individual making the arrest to liability for trespass.²³⁰ Even for felonies, an arrest was considered justified only if a felony had in fact been committed and there was “probable cause of suspicion” to believe that the arrestee had committed the offense.²³¹ Thus, an individual who made an arrest under the nightwalker statutes faced a serious threat of personal liability.²³² Under the contemporary qualified immunity doctrine, in contrast, officers face no personal liability even if they violate Fourth Amendment standards, as long as their judgment under the circumstances is considered reasonable.²³³

In the face of this conflicting evidence and imprecise historical analogies, the historical evidence regarding *Terry* yields no clear conclusion. Perhaps the nightwalker statutes conferred even greater authority than *Terry*, but their practical import may have been limited, and they offer no support for *Terry*’s regime of stop-and-frisk absent a legal basis to make an arrest.²³⁴

evidence standard.” *United States v. Arvizu*, 534 U.S. 266, 274 (2002) (citing *U.S. v. Sokolav*, 490 U.S. 1, 7 (1989)). The *Terry* standard further “accepts the risk that officers may stop innocent people.” *Illinois v. Wardlow*, 528 U.S. 119, 126 (2000). Indeed, we will see that, in practice, success rates for *Terry* searches are well below 50%. Thus, framing-era officers would have ample reason to hesitate before courting personal liability for a search conducted on something like a *Terry* standard.

230. See Thomas Y. Davies, *The Fictional Character of Law-and-Order Originalism: A Case Study of the Distortions and Evasions of Framing-Era Arrest Doctrine* in *Atwater v. Lago Vista*, 37 WAKE FOREST L. REV. 239, 323-24 (2002).

231. See Davies, *supra* note 229, at 631-33.

232. See *id.* at 625.

233. See, e.g., *Saucier v. Katz*, 533 U.S. 194, 203-07 (2001); *Anderson v. Creighton*, 483 U.S. 635, 643-44 (1987). Indeed, one could argue that the emergence of contemporary immunity doctrines unknown during the framing-era calls for more stringent regulation of police conduct under the Fourth Amendment in order to compensate for the loss of the inhibitory effect of framing-era liability rules. Cf. *California v. Acevedo*, 500 U.S. 565, 583 (1991) (Scalia, J., concurring) (“[I]t 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[]), may make a warrant indispensable to reasonableness where it once was not.”).

234. With respect to the framing-era conception of probable cause, matters become even more confusing. There is some indication that in the framing era, judges were not required to make an independent assessment of the showing of probable cause made in an application for a warrant but instead concerned themselves with the particularity requirement to ensure that warrants did not confer general authority on those executing them. See Fabio Arcila, Jr., *In the Trenches: Searches and the Misunderstood Common-Law History of Suspicion and Probable Cause*, 10 U. PA. J. CONST. L. 1, 17-45 (2007). But see Davies, *supra* note 229, at 654 n.297; David E. Steinberg, *Probable Cause, Reasonableness, and the Importance of Fourth Amendment History: A Response to Professor Arcila*, 10 U. PA. J. CONST. L. 1211 (2008). For present purposes, the resolution of this dispute is unimportant; no one contends that, in the framing era, officers lacking warrants had a roving authority to engage in detention and search of individuals; such authority would be inconsistent with the particularity requirement that was essential to the validity of framing-era warrants. See Arcila, *supra*, at 9-14. Moreover, as we have seen, at least when it comes to warrantless arrests, framing-era sources evinced considerable concern that an arrest be properly supported by an adequate basis for suspicion. Indeed, it is unlikely that warrantless search or seizure was undertaken promiscuously; as we have seen, those undertaking warrantless arrests faced tort liability if a jury concluded that a search or seizure was inadequately justified.

As he questioned the framing-era support for *Terry*, Justice Scalia wondered whether stop-and-frisk “was considered permissible by 1868, when the Fourteenth Amendment (the basis for applying the Fourth Amendment to the States) was adopted.”²³⁵ There is, however, little evidence that much evolution in this area of the law had occurred since the framing of the Fourth Amendment.

Joel Prentiss Bishop’s treatise, for example, cited Hawkins’s discussion of the authority of private persons to arrest and detain under nightwalker statutes and added that “watchmen and beadles have authority at the common-law to arrest and detain in prison, for examination, persons walking the streets at night, whom there is reasonable ground to suspect of felony, although there is no proof of a felony having been committed.”²³⁶ This appears to be the same standard of reasonable cause or grounds to believe that a suspect had committed an offense that Bishop explained was necessary to justify any arrest.²³⁷ Indeed, nineteenth century police manuals indicate that suspicion was considered a basis for arrest, not a mere investigative detention and frisk on a standard short of that governing arrest.²³⁸ Thus, Fourteenth Amendment framing-era law also contains little indication of stop-and-frisk authority on a standard less than required to justify a full-scale arrest.²³⁹

There is, however, some reason to believe that if Fourteenth Amendment framing-era understandings are consulted, the support that the nightwalker statutes offer for *Terry* becomes even more problematic. The nightwalker statutes seem little different than the vagrancy statutes that became popular in

235. *Minnesota v. Dickerson*, 508 U.S. 366, 382 (1993) (Scalia, J., concurring).

236. 1 JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF CRIMINAL PROCEDURE §§ 169, 182, at 98-99, 106-07 (Boston, Little, Brown, & Co., 2d ed. 1872).

237. *See id.* §§ 181-82, at 105-07. For a discussion of the evolving nineteenth century standards governing arrest that approached the contemporary conception of probable cause, see Davies, *supra* note 229, at 634-42.

238. *See* DAVID R. JOHNSON, POLICING THE URBAN UNDERWORLD: THE IMPACT OF CRIME ON THE DEVELOPMENT OF THE AMERICAN POLICE, 1800-1887, at 131-33 (1979). Arrests on suspicion seemed to represent a small but not insignificant proportion of total arrests:

[I]n Boston in 1856 the largest number of arrests (44 percent) were for public intoxication, 18 percent were for disorderly conduct, and 4 percent were made on the legally tenuous grounds of “suspicion.” Nearly thirty years later in the same city, 59 percent of arrests involved public intoxication, and 5 percent were for disorderly conduct and suspicion. Similarly, in New York in 1891, almost 30 percent of arrestees were charged with drunkenness, 18 percent were arrested for disorderly conduct, and 5 percent were taken into custody on suspicion.

HARLAN HAHN & JUDSON L. JEFFRIES, URBAN AMERICA AND ITS POLICE FROM THE POSTCOLONIAL ERA THROUGH THE TURBULENT 1960S, at 4 (2003).

239. Although there is a paucity of case law on point, a few decisions suggest that a regime of stop-and-frisk in the absence of a basis to arrest was considered unlawful. *See, e.g.*, *Shields v. State*, 16 So. 85, 86-87 (Ala. 1894) (stating that a sheriff operating a jail “is without legal authority, by force, to search or examine [visitors], or to compel them to submit their persons to search or examination, even though he may suspect them of crime or of criminal purposes”); *Evans v. State*, 32 S.E. 659, 659 (Ga. 1899) (reasoning that the police officer’s forcible search and disarmament of the suspect—after the officer had been told that the suspect had been firing a weapon—was unlawful because “neither the officer who testified nor the officer who assisted in the arrest had any warrant for the accused, nor was any arrest made until after the accused was forced to give up his pistol”).

the Black Codes that followed the Civil War, which, although racially neutral on their face, were applied discriminatorily in an effort to control the movements of the newly-freed slaves by authorizing the arrest of persons that the authorities regarded as suspicious.²⁴⁰ One of the concerns underlying the enactment of the Civil Rights Act of 1866 was to eliminate the vagrancy laws that had emerged since the end of the Civil War.²⁴¹ Additionally, a frequently expressed understanding of the Fourteenth Amendment in the Congress that crafted it was that the Amendment constitutionalized the Civil Rights Act.²⁴² To be sure, the question whether the original meaning of the Fourteenth Amendment included a condemnation of nightwalker statutes and their kin is not free from doubt; the Civil Rights Act did not straightforwardly outlaw such statutes, but instead merely guaranteed all races:

[T]he same right . . . to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.²⁴³

Even so, the Supreme Court eventually invalidated modern versions of night-walking statutes under the Fourteenth Amendment on the ground that they

240. See *City of Chicago v. Morales*, 527 U.S. 41, 53-54 n.20 (1999) (plurality opinion); ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 200-01, 208-09 (Henry Steele Commager & Richard B. Morris, eds., Perennial Classics ed. 1992); LEON F. LITWACK, BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY 347-48, 350, 401-05 (1979); DANIEL A. NOVAK, THE WHEEL OF SERVITUDE: BLACK FORCED LABOR AFTER SLAVERY 2-8, 15-16, 19 (1978); THEODORE BRANTNER WILSON, THE BLACK CODES OF THE SOUTH 68, 75-76, 98-99, 103, 107-08, 117-18 (1965); William Cohen, *Negro Involuntary Servitude in the South, 1865-1940: A Preliminary Analysis*, 42 J. S. HIST. 31, 33-34, 47-49 (1976).

241. See CONG. GLOBE, 39th Cong., 1st Sess. 1151 (1866) (statement of Rep. Thayer); *id.* at 1123 (statement of Rep. Cook); CONG. GLOBE, 42d Cong., 1st Sess. 575 (1871) (statement of Sen. Trumbull).

242. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 2462 (1866) (statement of Rep. Garfield); *id.* at 2465 (statement of Rep. Thayer); *id.* at 2501 (statement of Rep. Raymond); *id.* at 2549 (statement of Rep. Stevens); *id.* at 2462 (statement of Rep. Garfield); *id.* at 2467 (statement of Rep. Boyer); *id.* at 2468 (statement of Rep. Kelley); *id.* at 2498 (statement of Rep. Broomall); *id.* at 2502 (statement of Rep. Raymond); *id.* at 2509 (statement of Rep. Spalding); *id.* at 2511 (statement of Rep. Eliot); *id.* at 2534 (statement of Rep. Eckley); *id.* at 2538 (statement of Rep. Rogers); *id.* at 2539 (statement of Rep. Farnsworth); *id.* at 2883 (statement of Rep. Latham); *id.* at 2961 (statement of Sen. Poland); *id.* at 3031 (statement of Sen. Henderson); *id.* at 3069 (statement of Rep. Van Aernam). This understanding was frequently expressed during the ratification debates over the Fourteenth Amendment as well. See, e.g., JAMES E. BOND, NO EASY WALK TO FREEDOM: RECONSTRUCTION AND THE RATIFICATION OF THE FOURTEENTH AMENDMENT 10, 19-24, 45, 56-58, 80-81, 86-90, 103-07, 111, 123-24, 127-28, 148-50, 173-77, 180-82, 199, 215-17, 220-23, 234-38, 241-42, 252-55 (1997); MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 147 (1986); James E. Bond, *Original Understanding of the Fourteenth Amendment in Illinois, Ohio, and Pennsylvania*, 18 AKRON L. REV. 435, 445-54 (1985).

243. Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27.

unreasonably facilitated arbitrary and discriminatory enforcement.²⁴⁴ Thus, to the extent that Reconstruction-Era understandings suggest that nightwalker statutes impermissibly facilitated racial discrimination, they cast doubt upon the historical support for *Terry*. The broad authority granted by the nightwalker statutes that could so readily lend itself to arbitrary and discriminatory enforcement could well be thought inconsistent with the original understanding of the Fourteenth Amendment.

Aside from the nightwalker statutes, there is not much of a historical case to be made for *Terry*. To be sure, Akhil Amar has endeavored to justify *Terry* by arguing that the framing era utilized a general test of reasonableness for all searches and seizures not authorized by a warrant that did not necessarily require probable cause to arrest.²⁴⁵ But, as Thomas Davies has noted, there is no framing-era source that endorses a general test of reasonableness for warrantless searches and seizures.²⁴⁶ The only historical evidence that Professor Amar identifies as supporting warrantless searches and seizures on less than the standard for arrest are two framing-era statutes in which Congress authorized suspicionless searches of ships and liquor storehouses.²⁴⁷ The probative value of this evidence for *Terry*'s regime of stop-and-frisk is doubtful; as Professor Davies has argued, these statutory precedents may well be attributable to the framing era's indulgent attitude toward revenue-related searches of commercial premises.²⁴⁸ Others have made similar points; Tracey Maclin, for example, has noted that searches of vessels had always been governed by the special standards of admiralty law, and the liquor-search statute provided only a highly limited authorization for premises likely to

244. See *Kolender v. Lawson*, 461 U.S. 352, 361-62 (1983); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 156 (1972).

245. See Akhil Reed Amar, *Terry and Fourth Amendment First Principles*, 72 ST. JOHN'S L. REV. 1097, 1106-26 (1998).

246. See Davies, *supra* note 229, at 591-600. Professor Amar made his case by highlighting a reference to reasonableness in a seminal framing-era English case, but, as Professor Davies has observed, the statement says no more than that a search must be reasonable in duration and adds that if the search was unsupported by "probable cause of suspicion," a search's limited duration would not establish its lawfulness. See *id.* at 593-95 (discussing *Leach v. Money*, 3 Burr. 1742, 1765, 19 Howell St. Tr. 1001, 1026, 97 Eng. Rep. 1075, 1087 (K.B. 1765)). That is pretty thin evidence for a general standard of reasonableness that would support a regime of stop-and-frisk on less than probable cause to arrest. Telford Taylor has also advocated a general test of reasonableness, but he adduced no historical evidence in support of this approach other than the rule permitting a search of an arrestee's person as an incident of arrest. See TELFORD TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 27-30, 43 (1960).

247. See AMAR, *supra* note 229, at 17-18; Amar, *supra* note 245, at 1104-05; Akhil Reed Amar, *The Fourth Amendment, Boston, and the Writs of Assistance*, 30 SUFFOLK U. L. REV. 53, 56-59 (1996); accord Arcila, *supra* note 229, at 1298-99, 1305-06.

248. See Davies, *supra* note 229, at 604-08, 711-14. To similar effect, see Thomas, *supra* note 13, at 1477-78. Professor Arcila, in contrast, has argued that unconstrained maritime searches were controversial in the framing era. See Arcila, *supra* note 229, at 1299-303. The fact that these searches were controversial, however, does not mean that they were considered as threatening as searches of persons or homes. This point seems obvious, given Congress's failure to authorize searches of persons or homes absent probable cause or a warrant unless, as Professor Arcila notes, an individual operated a distillery in his home. See *id.* at 1305-06.

contain taxable alcohol.²⁴⁹ Whatever weight is afforded to the statutes highlighted by Professor Amar, however, there is no framing-era precedent for the warrantless detention or search of a person on less than the standard that would justify arrest.²⁵⁰

B. Fourth Amendment Originalism and the Problem of Changed Circumstances

Although the historical support for *Terry* is eminently debatable, perhaps none is required. After all, the text of the Fourth Amendment does not compel adherence to framing-era practices; unlike the Seventh Amendment, which provides that “[i]n [s]uits at common law . . . the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law,” the Fourth Amendment prohibits “unreasonable searches and seizures.”²⁵¹

249. See Tracey Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 B.U. L. REV. 925, 950-54 (1997). To similar effect, see CUDDIHY, *supra* note 212, at 743-46; Morgan Cloud, *Searching Through History; Searching for History*, 63 U. CHI. L. REV. 1707, 1739-43 (1996).

250. Although providing no support for *Terry* in particular, Gerard Bradley has argued that, because the concerns of the framing era centered on the use of general warrants, the original understanding of the Fourth Amendment was that it had no application to warrantless search and seizure. See Gerard V. Bradley, *The Constitutional Theory of the Fourth Amendment*, 38 DEPAUL L. REV. 817, 833-55 (1989). David Steinberg has advanced the related argument that the Fourth Amendment’s original meaning was limited to restrictions on physical intrusions on the home unauthorized by specific warrants because the concerns expressed in the framing era involved search and seizure of the home. See David E. Steinberg, *The Original Understanding of Unreasonable Searches and Seizures*, 56 FLA. L. REV. 1051, 1061-73 (2004). Others are more impressed by the historical evidence suggesting a framing-era concern with warrantless search and seizure. See, e.g., CUDDIHY, *supra* note 212, at 773-82; Maclin, *supra* note 249, at 939-59. Of course, an unconstrained power to engage in warrantless search and seizure of individuals would render the Fourth Amendment rather meaningless as a protection against governmental overreaching, a point made as early as Justice Story’s influential treatise, which condemned warrantless arrests as a circumvention of the Fourth Amendment. See III JOSEPH W. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1895, at 749-50 n. 1 (1833). Even if Justice Story somehow misapprehended the original understanding, his view likely informed the original understanding of the Fourteenth Amendment; the same point can be found in Thomas Cooley’s revision of Story’s treatise in the wake of the Fourteenth Amendment’s ratification, suggesting that Justice Story’s view had become part of the general understanding of the Fourth Amendment by the time of the Fourteenth Amendment’s ratification. See II JOSEPH W. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1902, at 622-23 n.2 (Thomas M. Cooley ed., 1873). More generally, as Professor Davies has observed of efforts to predicate the original understanding on the particular concerns of the framing era, the framing-era focus on general warrants authorizing searches of residences must be understood against the background of a legal regime that evinced hostility to the exercise of discretionary authority to law enforcement officials not armed with warrants and granted those officials only meager authority to engage in warrantless searches and seizures. See Davies, *supra* note 229, at 573 n.56, 576-83, 619-68. Thus, if there is a paucity of framing-era concern about warrantless searches and seizures outside the home, this may well be a function of the reality that framing-era law granted officers acting without warrants so little authority that the risk of abuse by officers on some form of patrol was not thought to be of concern, or that very little of this kind of abuse had occurred in recent memory, rather than a reflection of the framing era’s lack of concern with abuse of power by government officials not armed with warrants.

251. U.S. CONST. amends. IV, VII.

In *District of Columbia v. Heller*,²⁵² as it confronted the Second Amendment's right "to keep and bear [a]rms,"²⁵³ the Court wrote:

In interpreting this text, we are guided by the principle that "[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning." Normal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation.²⁵⁴

Thus, constitutional adjudication should be based on an "examination of a variety of legal and other sources to determine *the public understanding* of a legal text"²⁵⁵ This approach, however, produces little clarity about the proper interpretation of the Fourth Amendment's prohibition on unreasonable search and seizure.

The drafting history of the Fourth Amendment sheds little light on the original meaning of this phrase. The Fourth Amendment began as a single clause forbidding unreasonable search and seizure "by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized."²⁵⁶ The text was changed during debate in the House to create a freestanding clause prohibiting unreasonable searches and seizures, but no explanation for the alteration can be found in the available historical materials.²⁵⁷ Moving beyond legislative history to other indicia of original public meaning is no more helpful; the phrase "unreasonable search and seizure" was neither a widely used concept with a popular meaning nor a term of art associated with particular

252. 554 U.S. 570 (2008).

253. U.S. CONST. amend. II ("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.").

254. *Heller*, 554 U.S. at 576-77 (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931) (brackets in original)).

255. *Id.* at 605 (emphasis in original). Justice Scalia, the author of the opinion in *Heller*, is an avowed advocate of utilizing the original public meaning of a text in constitutional adjudication. See Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3, 38-41 (Amy Gutmann ed., 1997).

256. *THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS* 223 (Neil H. Cogan ed., 1997).

257. For the most complete discussion of the available evidence on this point, see Davies, *supra* note 229, at 716-22. Professor Davies concluded that the alteration was intended only to phrase the prohibition on general warrants in a more imperative fashion because of the paucity of evidence that anyone in the House intended to make a substantive change to the original proposal. See *id.* at 722-24. That view may well be correct as a matter of the Framers' intent, although given the sparse historical record, no conclusion can be stated with great confidence. But under the original-public-meaning methodology that the Supreme Court has endorsed, the inferences that Professor Davies draws from the evidence to be found in the legislative history is of little significance in determining how the public would have understood the proposal—at least absent evidence that the public was aware of a congressional intent to preserve the substance of the original proposal in a two-clause format. In fact, there is virtually no surviving evidence that sheds any light on the understanding of the Fourth Amendment in the ratifying states. See CUDDIHY, *supra* note 212, at 712-23.

common-law concepts in the framing era.²⁵⁸ Professor Davies has adduced considerable evidence that the term “unreasonable,” at least in a legal context, was understood in the framing era to mean illegal or unconstitutional, which suggests that there is at least some support in the historical record to equate reasonableness in the constitutional sense with practices that did not run afoul of the framing-era law of torts.²⁵⁹ Professor Davies goes on to argue that the Fourth Amendment was understood in the framing era to prohibit only general warrants and their like, because warrantless search and seizure was a relative rarity in the framing era that was heavily circumscribed by the law of torts.²⁶⁰ Even so, Professor Davies cautions that the framing-era focus on the general warrant must be placed in the context of the framing-era regime that had sharply circumscribed the power to engage in warrantless search and seizure.²⁶¹

Regardless of how one might resolve the debates over the original meaning of the Fourth Amendment, framing-era public understanding of the meaning of the Fourth Amendment for policing is nearly an oxymoron. The Fourth Amendment was adopted as a restriction on the power of the federal government.²⁶² Keeping the peace, however, was a local responsibility that the public most likely would have understood to have been entirely unaffected by the Fourth Amendment.²⁶³ For this reason, Fourteenth Amendment framing-era public understanding may be more relevant since it was the Fourteenth Amendment that produced constitutional restraints on state and local search and

258. See Sklansky, *supra* note 13, at 1776-1807 (expressing a more elaborate argument along these lines).

259. See Davies, *supra* note 229, at 684-93. David Sklansky, in contrast, has argued that the term had less precision in the framing era, meaning “what it means today: contrary to sound judgment, inappropriate, or excessive.” Sklansky, *supra* note 13, at 1777-81.

260. See Davies, *supra* note 229, at 619-724. Beyond this, Professor Davies has also argued that in the framing era, warrantless arrests were governed by the Due Process Clause and not the Fourth Amendment because due process was understood to refer to the process of arrest, initiating, and conducting criminal prosecutions. See Thomas Y. Davies, *Correcting Search-and-Seizure History: Now-Forgotten Common-Law Warrantless Arrest Standards and the Original Understanding of “Due Process of Law”*, 77 MISS. L.J. 1, 39-87 (2007); Davies, *supra* note 231, at 391-418. I have previously expressed some skepticism about this view as failing to explain all the pertinent evidence and treating other provisions in the Bill of Rights addressing criminal procedure as redundant. See Lawrence Rosenthal, *Does Due Process Have an Original Meaning? On Originalism, Due Process, Procedural Innovation . . . and Parking Tickets*, 60 OKLA. L. REV. 1, 34 n.135 (2007). For present purposes, however, the resolution of this debate matters little. If Professor Davies is correct, then the proper place to debate the propriety of *Terry* is as a matter of due process, but the question of *Terry*'s propriety remains, given its debatable support in framing-era practice.

261. See Davies, *supra* note 229, at 573 n.56, 576-83, 740-42.

262. See *Luther v. Borden*, 48 U.S. (7 How.) 1, 66-67 (1849). The general proposition that provisions of the United States Constitution are treated as limitations on only federal power unless they expressly indicate that they limit the power of the States was established in *Barron v. Mayor of Baltimore*. See *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243, 247-50 (1833). For helpful accounts of the concerns that produced the Fourth Amendment, none of which involved an effort to restrain the power of state or local governments, see, for example, CUDDIHY, *supra* note 212, at 698-772; JACOB W. LANDYNSKI, *SEARCH AND SEIZURE AND THE SUPREME COURT: A STUDY IN CONSTITUTIONAL INTERPRETATION* 37-42 (1966); NELSON B. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* 83-105 (1937); Davies, *supra* note 229, at 694-723.

263. See LASSON, *supra* note 262, at 90-96.

seizure powers.²⁶⁴ Moreover, as we have seen, by the time of the Fourteenth Amendment's ratification, there was greater concern about unconstrained search and seizure through vehicles such as vagrancy laws, going beyond the eighteenth century focus on general warrants.²⁶⁵

But putting all this aside, even if the Fourth or Fourteenth Amendment framing-era understanding was that the existing regime linking search and seizure to the standard for arrest was "reasonable" in the constitutional sense, nothing in the constitutional text forbids a reassessment of reasonableness in light of changing conditions—certainly we have encountered no historical evidence of such a framing-era understanding in either the eighteenth or nineteenth centuries. To put it another way, even if we could survey a cross section of the framing-era public, or the hypothetical "reasonable framing-era person," it is far from clear that they would have understood the Fourth Amendment to forbid any reconsideration of the authority of public officials on patrol to take prophylactic action to keep the peace and confront impending crime, if the framing-era regime of law enforcement proved ineffective to meet the changing needs of modernizing society. One can only speculate about how the original meaning of the Fourth Amendment would have accommodated changed circumstances; the available historical evidence permits no firm conclusion. At a minimum, the framing-era precedents permitting warrantless—indeed even suspicionless—searches of vessels and warehouses suggest that the Fourth Amendment was not understood to pose an absolute bar to search and seizure undertaken for purely investigative purposes in the absence of a basis to make an arrest; the framing-era understanding seems to have been more pragmatic than that.²⁶⁶

264. See, e.g., *Mapp v. Ohio*, 367 U.S. 643 (1961).

265. See *supra* notes 240-43 and accompanying text. For a discussion of the concerns regarding unconstrained search and seizure in the southern states following the Civil War that animated the framing of the Fourteenth Amendment, see ANDREW E. TASLITZ, *RECONSTRUCTING THE FOURTH AMENDMENT: A HISTORY OF SEARCH AND SEIZURE, 1789-1868*, at 248-57 (2006).

266. Professor Davies has argued that the Fourth Amendment was not thought to be applicable to matters falling within admiralty jurisdiction, noting that the amendment did not mention vessels but instead regulated searches of "houses, papers, and effects." Davies, *supra* note 229, at 607-08. This account suggests that the inapplicability of the Fourth Amendment to searches of vessels was not based on pragmatic considerations; although, Professor Maclin has observed that other framing-era precedents required traditional warrants for searches of vessels and commercial premises and that the historical record on this point is in conflict. See Maclin, *supra* note 249, at 950-54. In any event, Professor Davies's argument about the textual inapplicability of the Fourth Amendment to vessels does not account for the framing-era willingness to permit warrantless searches of warehouses containing "effects" that presumably fell within the scope of Fourth Amendment protection. On that point, Professor Davies writes:

Although Americans did express anger over customs officers using general writs to search warehouses, the record does not indicate that those complaints ever became part of the legal grievance over general warrants The most likely explanation for the repeated emphasis on house searches, and the virtual silence regarding searches of commercial premises, is that the Framers understood that legislative authority for official inspection of commercial premises did not violate any common-law principle comparable to the castle doctrine applicable to houses [T]he Framers were apparently comfortable with a regime in which the colonies and then the states closely regulated commercial interests.

To be sure, it is rather a stretch to go from suspicionless searches of vessels and warehouses as a means of enforcing revenue laws to the far more general power of stop-and-frisk endorsed in *Terry*, but these framing-era precedents suggest that the framing-era understanding of reasonableness made some effort to accommodate the pragmatic realities of the day. Of course, these precedents provide little guidance on the question of whether the conception of reasonableness might change along with the exigencies facing the nation, but they hardly foreclose the idea of an evolving law of search and seizure.

When the Court considered the constitutionality of segregation in *Brown v. Board of Education*,²⁶⁷ it concluded that in light of greatly altered circumstances, the historical evidence concerning the framing-era understanding of the Fourteenth Amendment was “inconclusive” and for that reason took a nonoriginalist approach to the problem of segregation.²⁶⁸ As we will see, when it comes to the role of the police in society, circumstances have also changed dramatically since the framing era, rendering originalist methods of interpretation equally suspect.

C. *The Historicist Critique of Fourth Amendment Originalism*

In England, until roughly the time of the American Revolution, the only thing resembling a modern police officer was a constable, an official charged with executing warrants but who also had authority to appoint beadles responsible for clearing the streets of beggars and vagrants by day and keeping the community safe at night.²⁶⁹ This system emerged in the colonies and remained in place in the framing era, with the investigative process largely confined to the execution of warrants, and the remaining law enforcement duties of constables, sheriffs, and their employees consisted of responding to breaches of the peace.²⁷⁰ For example, in his framing-era treatise, St. George Tucker described the duties of constables as limited to keeping the peace, and the duties of sheriffs as limited to apprehending those who had breached the peace, hearing minor civil cases, and executing process.²⁷¹

Davies, *supra* note 229, at 608. Accordingly, assuming that Professor Davies is correct that the framing-era understanding was that vessels were excluded from the protection of the Fourth Amendment, even he seems to concede that more pragmatic considerations underlay the framing-era willingness to tolerate warrantless searches of commercial premises on less than probable cause given the reduced privacy interests and greater regulatory interests at stake.

267. 347 U.S. 483 (1954).

268. *Id.* at 489.

269. See ELAINE A. REYNOLDS, *BEFORE THE BOBBIES: THE NIGHT WATCH AND POLICE REFORM IN METROPOLITAN LONDON, 1720-1830*, at 7-44 (1998).

270. See, e.g., LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 28-29, 68 (1993); Davies, *supra* note 260, at 419-32.

271. II ST. GEORGE TUCKER, *BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND OF THE COMMONWEALTH OF VIRGINIA* 343-45, 355-56 (Lawbook Exchange 1996) (1803).

As we have seen, framing-era law enforcement officials had to be wary of aggressive policing; a search or seizure that a jury might eventually conclude was unjustified led to personal liability in tort.²⁷² Thus, the proactive and prophylactic approach to policing envisioned by *Terry* was rare, as one study of law enforcement in Boston explained:

The formal agencies of control, the justices of the peace, sheriffs, constables, and watchmen, were all derived from the English, pre-urban past. Their effectiveness in Massachusetts depended upon the same conditions, which made the town meeting workable. Through the eighteenth century[,] the use of legal force was ordinarily a direct response to the demands of private citizens for help. The victim of robbery or assault called a watchman, if available, and afterward applied to a justice for a warrant and a constable to make or aid in the arrest. The business of detection was largely a private matter, with initiative encouraged through a system of rewards and fines paid to informers. Neither state nor town made any provision for the identification or pursuit of the unknown offender, except through the coroner's inquest.²⁷³

Unsurprisingly, this approach to law enforcement proved largely ineffective as the nation grew.²⁷⁴ In the mid-nineteenth century, large cities began establishing police forces in response to growing urban lawlessness and instability.²⁷⁵ The Fourteenth Amendment-era understanding of the constitutional limitations on policing did not halt the development of modern police forces or even the emergence of a regime something like *Terry*; as we have seen, nineteenth century policing permitted arrest on the basis of "suspicion"—a regime even harsher than the brief detention that *Terry* permits. Thus, if Fourteenth Amendment framing-era public understanding is relevant, it seems that the Constitution permitted evolution of policing powers beyond the restrictive standards of the late eighteenth century. Even so, by the time of the Fourteenth Amendment, policing in America was still in its infancy: "If we can believe the census figures, there were, all told, in 1880, 1,752 officers and 11,948 patrolmen in cities and towns with inhabitants of 5,000 or more."²⁷⁶ Throughout the nineteenth century, the ratio of police to population remained high, and officers often discharged their duties in a perfunctory, corrupt, or

272. See *supra* text at notes 229-32.

273. ROGER LANE, *POLICING THE CITY: BOSTON 1822-1885*, at 6-7 (1967). For a similar description of framing-era policing in New York City, see JAMES F. RICHARDSON, *THE NEW YORK POLICE: COLONIAL TIMES TO 1901*, at 3-22 (1970).

274. See, e.g., FRIEDMAN, *supra* note 270, at 27-28, 68; Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 830-32 (1997).

275. See, e.g., FRIEDMAN, *supra* note 270, at 68-71; JOHNSON, *supra* note 238, at 12-40; THOMAS A. REPETTO, *THE BLUE PARADE* 2-23 (1978); JAMES F. RICHARDSON, *URBAN POLICE IN THE UNITED STATES* 6-15, 19-32 (1974); SAMUEL WALKER, *POPULAR JUSTICE: A HISTORY OF AMERICAN CRIMINAL JUSTICE* 49-51 (1st ed. 1980). The same process took place in London, eventually leading to the replacement of the night watch with a police force in 1829. See REYNOLDS, *supra* note 269, at 58-147.

276. FRIEDMAN, *supra* note 270, at 149.

brutal fashion.²⁷⁷ It was not until the Progressive Era of the late nineteenth century that a wave of reform produced something resembling a professional police force.²⁷⁸

One of the most potent charges against originalism is that it “depends on using history without historicism, the use of evidence from the past without paying attention to historical context.”²⁷⁹ Originalists are not unconcerned with this problem; even as he questioned the historical basis for *Terry*, Justice Scalia left open the possibility that since the framing era, “concealed weapons capable of harming the interrogator quickly and beyond arm’s reach have become common—which might alter the judgment of what is ‘reasonable’ under the original standard.”²⁸⁰

The relevance of changed circumstances is well entrenched in Fourth Amendment jurisprudence. For example, in *Tennessee v. Garner*,²⁸¹ the Court invalidated a Tennessee statute that codified the framing-era rule that deadly force could be used to stop a fleeing felon on the ground that relevant circumstances and understandings had changed, stating that “[b]ecause of sweeping change in the legal and technological context, reliance on the common-law rule in this case would be a mistaken literalism that ignores the purposes of a historical inquiry.”²⁸² The framing-era rule, the Court observed, was a consequence of the fact that during the framing “virtually all felonies were punishable by death,” as well as “the relative dangerousness of felons,” but since then, most felonies became noncapital and many nondangerous offenses have become classified as felonies.²⁸³ According to the Court:

These changes have undermined the concept, which was questionable to begin with, that use of deadly force against a fleeing felon is merely a speedier execution of someone who has already forfeited his life. They have

277. See, e.g., ROBERT FOGELSON, *BIG-CITY POLICE* 22-35 (1977); SAMUEL A. WALKER, *A CRITICAL HISTORY OF POLICE REFORM: THE EMERGENCE OF PROFESSIONALISM* 15-18, 20-21 (1977).

278. See, e.g., FOGELSON, *supra* note 277, at 41-53; WALKER, *supra* note 277, at 56-68.

279. Stephen M. Griffin, *Rebooting Originalism*, 2008 U. ILL. L. REV. 1185, 1188 (2008).

280. *Minnesota v. Dickerson*, 508 U.S. 366, 382 (1993) (Scalia, J., concurring). Among the current generation of originalists, there is near consensus that framing-era practice or intentions should not be regarded as interpretively binding when there is reason to believe that there have been relevant changes in circumstances or other understandings since the framing era. See, e.g., Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 486-99 (2007); Mark D. Greenberg & Harry Litman, *The Meaning of Original Meaning*, 86 GEO. L.J. 569, 591-617 (1998); Aileen Kavanaugh, *Original Intention, Enacted Text, and Constitutional Interpretation*, 47 AM. J. JURIS. 255, 279-83 (2002); Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 410-43 (1995); Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin’s “Moral Reading” of the Constitution*, 65 FORDHAM L. REV. 1269, 1284-87 (1997); Michael Stokes Paulsen, *How to Interpret the Constitution (and How Not to)*, 115 YALE L.J. 2037, 2059-62 (2006); Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 NW. U.L. REV. 923, 934-35 (2009).

281. 471 U.S. 1 (1985).

282. *Id.* at 13.

283. *Id.* at 13-14.

also made the assumption that a “felon” is more dangerous than a misdemeanor untenable.²⁸⁴

Moreover, arrests were inherently dangerous affairs in the framing-era “when weapons were rudimentary. Deadly force could be inflicted almost solely in a hand-to-hand struggle during which, necessarily, the safety of the arresting officer was at risk. Handguns were not carried by police officers until the latter half of the last century.”²⁸⁵ Accordingly, “though the common-law pedigree of Tennessee’s rule is pure on its face, changes in the legal and technological context mean the rule is distorted almost beyond recognition when literally applied.”²⁸⁶ Thus, the Court concluded that the framing-era judgment about the reasonableness of using deadly force against a fleeing felon was based on a framing-era context no longer relevant.²⁸⁷

Much the same point can be made about framing-era rules about the authority of officers acting without warrants. As we have seen, in the framing era, it was thought that acceptable levels of security could be provided without anything like a modern police force.²⁸⁸ That judgment, however, was rejected long ago.²⁸⁹ In particular, as we have seen in today’s inner city, much more than the prevalence of concealable firearms has given rise to threats to urban stability unknown in the framing era. The crime spike of the late 1980s and the early 1990s was driven by crack—the kind of victimless crime that framing-era reactive policing would have had no hope of combating. The policing tactics that seem to hold the most promise involve proactive efforts to increase the risks posed by those who carry guns or drugs in public but who commit overt breaches of the peace only when no officer is nearby, witnessed only by a thoroughly intimidated citizenry that must risk life and limb to give aid to an investigation. It is surely an odd understanding of a text that prohibits only “unreasonable search and seizure” to place a constitutional prohibition on the tactics that offer the greatest hope of stopping an epidemic of inner-city violence.

In her response to Professor Amar’s endorsement of Fourth Amendment originalism, Carol Steiker objected to reliance on framing-era practice as the measure of Fourth Amendment reasonableness on the ground that the framers did not foresee the emergence of large, professional police forces that posed a

284. *Id.* at 14.

285. *Id.* at 14-15.

286. *Id.* at 15.

287. *See id.* Even the dissenters were reluctant to embrace framing-era practice without regard to changed circumstances; although, they afforded it greater weight: “Although the Court has recognized that the requirements of the Fourth Amendment must respond to the reality of social and technological change, fidelity to the notion of *constitutional*—as opposed to purely judicial—limits on governmental action requires us to impose a heavy burden on those who claim that practices accepted when the Fourth Amendment was adopted are now constitutionally impermissible.” *Id.* at 26 (O’Connor, J., dissenting).

288. *See supra* text accompanying notes 269-73.

289. *See supra* text accompanying notes 274-78.

far greater threat to liberty than the framing-era constables and watchmen.²⁹⁰ Yet, the changed circumstances that required the development of professional police forces could also be thought to justify a greater measure of official power to maintain order and security than was thought necessary in the framing era. After all, there was a reason that professional police forces emerged; as Professor Steiker acknowledges: “[T]he colonial institutions of the constabulary and the watch were extremely ineffectual in combatting any serious threats to public security.”²⁹¹ If we can agree that it is constitutionally reasonable for the authorities to develop a professional police force to respond to a threat to public security unknown in the framing era, then it is surely hard to understand why it is any less reasonable for the police to utilize innovative tactics when traditional approaches fail to afford adequate security.

Thus, even assuming that framing-era practice represented a judgment of what was thought to be a reasonable regime of search and seizure in the constitutional sense, those judgments were made in the context of an approach to law enforcement that would quickly become outmoded, especially in the central cities. Indeed, in the mid-nineteenth century, as major cities created police departments, the pace of urbanization was just beginning to pick up steam; between 1850 and 1910, the proportion of the population residing in cities over 100,000 went from 6% to 41%, and the population in towns of 2,500 or more went from 15% to 46%.²⁹² Framing-era legal understandings, in short, developed in a largely rural setting in which a reactive approach to policing existed, one that largely depended on the victim’s willingness to initiate an investigation of a completed crime.²⁹³ As we have seen, by the middle of the nineteenth century, it had become plain that these arrangements were ill suited to supplying security in an increasingly urbanized context. And yet, even the Fourteenth Amendment framing era was one in which the urbanization of the United States had barely begun.²⁹⁴

Whether examined from the standpoint of the Fourth or the Fourteenth Amendment, framing-era judgments about the scope of official authority were made in a context of a world that was rapidly disappearing. As the country urbanized, it became increasingly apparent that the framing-era regime could not offer the public adequate security. Even so, if the Fourth Amendment’s text required continued use of framing-era arrangements, absent constitutional amendment, in a manner akin to the Seventh Amendment, then the emergence of changed circumstances that rendered those arrangements obsolete might have been of no constitutional significance; but, as we have seen, the Fourth Amendment’s text does not demand such inflexibility; it requires no more than a “reasonable” regime of search and seizure.

290. See Steiker, *supra* note 274, at 830-38.

291. *Id.* at 831-32.

292. HERBERT S. KLEIN, A POPULATION HISTORY OF THE UNITED STATES 142 (2004).

293. See Davies, *supra* note 229, at 741-50.

294. For a similar discussion, albeit without reference to *Terry*, see Arcila, *supra* note 229, at 1326-35.

Of course, the Fourth Amendment does not permit the police to do anything to secure public order—it requires an effort to balance liberty and governmental interests and reach a reasonable accommodation. That process of balancing, however, is precisely what the Court employed in *Terry*, as we have seen.²⁹⁵ If the Court struck the balance incorrectly, it is not on the basis of any historical evidence of framing-era practice. Instead, the attack on *Terry* must be made on the basis of contemporary considerations. If *Terry* is wrong, the case against it must be made on *Terry*'s own terms—the Court has sacrificed too much liberty for the sake of security.

III. THE PRUDENTIAL CASE AGAINST *TERRY*

It is far from obvious that *Terry* misapprehended the constitutional balance between liberty and order. In a world where framing-era reactive policing cannot provide effective security, it surely seems reasonable for the police to undertake some form of proactive investigation on the basis of reasonable suspicion as long as it is sufficiently brief and non-intrusive so as not to unduly impair liberty interests. It seems equally reasonable to permit police officers to conduct such investigations in a manner consistent with their own safety by permitting a frisk of suspects when there is reasonable suspicion that they may be armed or otherwise dangerous. Indeed, a regime that called for police to protect high-crime neighborhoods while preventing them from frisking those that they reasonably suspect to be dangerous gang members or drug dealers would no doubt effectively stymie effective policing no less than the framing-era regime of holding officers personally liable in tort whenever a jury might conclude after the fact that a search or seizure was unwarranted.²⁹⁶

To be sure, *Terry* tolerates what one might regard as a high risk of error when it comes to stop-and-frisk tactics. The *Terry* standard “falls considerably short of satisfying a preponderance of the evidence standard.”²⁹⁷ It also “accepts the risk that officers may stop innocent people.”²⁹⁸ For example, the New York Attorney General’s data established that for stops in which reports were mandated, only 9.6% resulted in an arrest on the suspected charge, with 5.7% resulting in an arrest on another charge.²⁹⁹ Thus, the clearest vehicle for attacking *Terry* is the threat it poses to the liberty of the innocent by reducing the threshold for a search well below probable cause. Still, a stop-and-frisk is a rather brief and limited intrusion on liberty, and given the virtues of permitting the police to investigate potential crime in the making, the error rate does not

295. See *supra* text accompanying notes 3-6.

296. Indeed, in the context of liability for damages for a Fourth Amendment violation, the Court has recognized the doctrine of qualified immunity to protect officers from liability for what may, in retrospect, prove to be a mistake about the propriety of a search or seizure, albeit a reasonable one. See *Saucier v. Katz*, 533 U.S. 194, 203-07 (2001); *Anderson v. Creighton*, 483 U.S. 635, 638-40, 643-44 (1987).

297. *United States v. Arvizu*, 534 U.S. 266, 274 (2002).

298. *Illinois v. Wardlow*, 528 U.S. 119, 126 (2000).

299. STOP AND FRISK REPORT, *supra* note 158, at App. tbl.I.B.3.

seem particularly troubling. Moreover, it is far from clear that a stop-and-frisk should be regarded as an “error” merely because it does not produce an arrest. A stop-and-frisk that produces no evidence of criminality might nevertheless deter potential offenders from going through with a planned crime that might otherwise be committed as soon as uniformed officers leave the scene. If *Terry* is central to reducing violent crime, as Part I above endeavors to suggest, then the case for tolerating a risk of error is even more powerful—at least as long as the intrusion is brief and involves a relatively noninvasive search.³⁰⁰ Consider, for example, Scott Sundby’s attack on *Terry*; he argues that a regime that balances the intrusiveness of a search against the law enforcement interests that it serves undermines the trust between government and citizen that is central to republican government.³⁰¹ Left unconsidered in this account is the effect on the trust between citizen and government of a regime in which the government proves incapable of curbing rampant urban violence. Even Professor Sundby seems to acknowledge that it is difficult to oppose *Terry* when the debate is framed in these terms.³⁰²

Indeed, the nonoriginalist case against *Terry* by and large focuses not on the risk of error but rather on the claim that the authority that *Terry* grants police facilitates discrimination by officers too willing to believe that persons of color are up to no good.³⁰³ This charge, for example, has been frequently leveled at stop-and-frisk tactics in New York.³⁰⁴

A. *The Ambiguous Evidence of Discrimination in Stop-and-Frisk*

Even though the rate at which evidence of a crime is discovered during stops is generally comparable for minorities and non-minorities, abundant evidence shows that police stop minorities at rates much higher than non-

300. See generally Stephen A. Saltzburg, *Terry v. Ohio: A Practically Perfect Doctrine*, 72 ST. JOHN’S L. REV. 911, 952-70 (1998) (advancing an argument along these lines). For an even more aggressive argument that the interests underlying *Terry* are sufficiently important that courts should permit officers to act on the basis of unarticulated hunches when there is demonstrable evidence of efficacy, see Craig S. Lerner, *Reasonable Suspicion and Mere Hunches*, 59 VAND. L. REV. 407, 454-70 (2006). I have elsewhere argued that *Terry* ought to be understood to permit searches on less than individualized suspicion if supported by adequate empirical evidence of efficacy. See Lawrence Rosenthal, *The Crime Drop and the Fourth Amendment: Toward an Empirical Jurisprudence of Search and Seizure*, 29 N.Y.U. REV. L. & SOC. CHANGE 641, 670-80 (2005).

301. See Scott E. Sundby, “Everyman’s” *Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?*, 94 COLUM. L. REV. 1751, 1785 (1994).

302. See Scott E. Sundby, *An Ode to Probable Cause: A Brief Response to Professors Amar and Slobogin*, 72 ST. JOHN’S L. REV. 1133, 1133-35 (1998).

303. See *supra* text accompanying note 7.

304. See, e.g., Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 FORDHAM URB. L.J. 457, 496-503 (2000); David A. Harris, *When Success Breeds Attack: The Coming Backlash Against Racial Profiling Studies*, 6 MICH. J. RACE & L. 237, 256-57 (2001); David Rudovsky, *Law Enforcement by Stereotypes and Serendipity: Racial Profiling and Stops and Searches Without Cause*, 3 U. PA. J. CONST. L. 296, 345-46 (2001); Jerome H. Skolnick & Abigail Caplovitz, *Guns, Drugs, and Profiling: Ways to Target Guns and Minimize Racial Profiling*, 43 ARIZ. L. REV. 413, 425-30 (2001).

minorities.³⁰⁵ In New York, for example, during the period studied by the attorney general, African Americans and Hispanics were stopped at substantially higher rates than Whites, even when compared to the arrest rates for these groups.³⁰⁶ Comparable “hit” rates for minorities and non-minorities during stops suggest that there is no justification for the elevated rates at which minorities are stopped and searched.³⁰⁷ But many complexities underlie this data—if minorities offend at higher rates than non-minorities, then one might expect them to be subject to *Terry* tactics at higher rates.

For example, if a *Terry* stop is properly based indicia of suspicion reflecting a 20% probability that a suspect is unlawfully carrying a gun or drugs, and the underlying offending rate is 2.5% for non-minorities and 5% for minorities, a nondiscriminatory regime of stop-and-frisk could nevertheless produce a 12.5% non-minority search rate compared to a 25% minority search rate. Economists argue that elevated search rates for minorities are not troubling as long as minority and non-minority hit rates are comparable because elevated minority search rates may reflect no more than an efficient response to differential rates of offending—with the more heavily targeted group responding to elevated search rates by reducing its offending rate in response to police tactics, while the less targeted group increases its offending rate until equilibrium is reached.³⁰⁸

On this account, differential search rates simply reflect an efficient law enforcement response to differential rates of offending by race.³⁰⁹ Indeed, reason exists to believe that minorities offend at higher rates. For example, as we have seen in Part I.A. above, minorities are both the victims and perpetrators of homicide at vastly disproportionate rates, especially in large cities.³¹⁰ There is also reason to believe that minorities are disproportionately represented in criminal street gangs, which, as we have seen, are responsible for a large share of urban violence. The United States Department of Justice’s 1998 *National Youth Gang Survey* estimated that nationwide gang membership is 46% Hispanic and 34% African American.³¹¹ These percentages were even

305. See, e.g., DAVID A. HARRIS, PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK 78-84 (2002).

306. See Andrew Gelman, Jeffrey Fagan & Alex Kiss, *An Analysis of the New York City Police Department’s “Stop and Frisk” Policy in the Context of Claims of Racial Bias*, 102 J. AM. STAT. ASS’N 813, 818-20 (2007).

307. See *id.* at 813-14.

308. See, e.g., Vani K. Borooah, *Racial Bias in Police Stops and Searches: An Economic Analysis*, 17 EUR. J. POL. ECON. 17, 32-33 (2001); Jeff Dominitz & John Knowles, *Crime Minimization and Racial Bias: What Can We Learn from Police Search Data?*, 116 ECON. J. F368, F368-F371 (November 2006); John Knowles, Nicola Persico & Petra Todd, *Racial Bias in Motor Vehicle Searches: Theory and Evidence*, 109 J. POL. ECON. 203, 205 (2001).

309. See Gelman, Fagan & Kiss, *supra* note 306, at 813-15.

310. See *supra* text accompanying notes 21-31.

311. OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, U.S. DEPARTMENT OF JUSTICE, 1998 NATIONAL YOUTH GANG SURVEY: SUMMARY 20 (Nov. 2000), available at <http://www.ncjrs.gov/pdffiles/1/ojjdp/183109.pdf>. Although the *National Youth Gang Survey* relies on police reporting, there is widespread

higher in large cities.³¹² The most recent *Survey* indicates that the minority composition of gangs has remained consistently high, with the last figures indicating that 49% of gang members are Hispanic or Latino and 35% are African American.³¹³ These statistics should be unsurprising in light of the ample sociological evidence that disadvantaged minority youth who believe that legitimate paths to upward mobility are unavailable to them will be more likely to turn to gangs as a means of enhancing their status and achieving a form of upward mobility.³¹⁴ Indeed, as we have seen, inner-city minority communities are disproportionately likely to experience gangs and gang-related crime.³¹⁵

Thus, a stop-and-frisk strategy aimed at urban street gangs will result in higher rates of minority stops given the elevated levels of minority participation in urban street gangs. Similarly, some types of crime may be more visible to the police and hence more likely to be the subject of stop-and-frisk tactics. There is evidence, for example, that the disproportionate rates at which minorities are incarcerated for drug offenses reflect the fact that the open-air drug markets most easily targeted by the police are disproportionately found in inner-city minority communities.³¹⁶ Moreover, because there are no reliable estimates for the underlying rates of drug crime—especially trafficking offenses most likely to stimulate aggressive enforcement efforts—it is difficult to use arrest rates or other measures to determine whether minorities are being stopped disproportionately to their underlying rate of offending.³¹⁷

It follows that stop rates alone do not necessarily reflect official discrimination; they may reflect no more than an effort to target the kind of criminal activity most likely to stimulate urban violence, which is relatively visible on the streetscape, and—for that reason—is amenable to stop-and-frisk tactics.³¹⁸ If minorities are disproportionately involved in the type of gang and drug distribution activities that stimulate violent crime, they would therefore be targeted by a stop-and-frisk strategy aimed at reducing violent crime, and elevated minority search rates would provide little indication of official discrimination. As it happens, a RAND Corporation study of 2006 New York

agreement that law enforcement statistics on gang crime are reliable. See FOX, LEVIN & QUINET, *supra* note 20, at 90.

312. OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, U.S. DEPARTMENT OF JUSTICE, *supra* note 311, at 21.

313. OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, U.S. DEPARTMENT OF JUSTICE, NATIONAL YOUTH GANG SURVEY ANALYSIS, *available at* <http://www.nationalgangcenter.gov/Survey-Analysis/Demographics#anchorregm> (last visited Dec. 23, 2010).

314. See Lawrence Rosenthal, *Gang Loitering and Race*, 91 J. CRIM. L. & CRIMINOLOGY 99, 115-30 (2000) (reviewing the evidence on this point found in the sociological literature).

315. See *supra* text accompanying notes 24-39, 80-83.

316. See MICHAEL TONRY, MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT IN AMERICA 105-16 (1995); R. Richard Banks, *Beyond Profiling: Race, Policing, and the Drug War*, 56 STAN. L. REV. 571, 583-84 (2006); William J. Stuntz, *Race, Class and Drugs*, 98 COLUM. L. REV. 1795, 1819-24 (1998).

317. See, e.g., Banks, *supra* note 316, at 580-81 (criticizing use of survey data on rates of drug use by race as a basis for inferring discrimination in drug-law enforcement).

318. See *id.* at 583-92.

City stop-and-frisk data concluded that, after adjusting for arrest rates during the preceding year and data on the race of offenders derived from suspect descriptions, there was no evidence of discrimination in the stop rates in New York.³¹⁹ While it is possible that 2005 arrest rates were themselves tainted by discrimination, using witness suspect descriptions as a benchmark indicated that African Americans were actually under-stopped.³²⁰ In any event, given that that New York stop-and-frisk tactics are driven by statistical data identifying hot spots of violent crime that require focused policing and which may well involve unusually high levels of minority offenders, it is far from clear that the differential stop rates that these tactics produce reflect anything that can be fairly characterized as official discrimination.

This point can be made in doctrinal terms. Although the Supreme Court has held that the objective test for evaluating police conduct under the Fourth Amendment leaves no room for a claim that an otherwise proper search or seizure can be invalidated if it was a pretext for discrimination, the Court has added that “the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment.”³²¹ The Equal Protection Clause, in turn, is violated when “the decisionmaker . . . selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.”³²² It follows that a stop-and-frisk strategy targeting hot spots of gang and drug activity, selected because it offers hope of driving down violent crime associated with competition for control of turf, involves no legally cognizable discrimination even if it produces racially disparate search rates.

To be sure, a racial skew in hit rates—the rate at which a *Terry* stop ripens into an arrest—might provide a better gauge of potential discrimination.³²³ In New York, the hit rate data paints an equivocal picture.³²⁴ During the period studied by the New York Attorney General, one in 7.9 Whites who were stopped were later arrested, compared to one in 8.8 Hispanics and one in 9.5 African Americans, and the study also concluded that minorities were stopped disproportionately to the available proxies for their underlying rate of offending (although the authors acknowledge that underlying offending rates are difficult to calculate, especially for weapons and drug offenses).³²⁵ This data suggests a

319. See GREG RIDGEWAY, RAND CORP., TECHNICAL REPORT: ANALYSIS OF RACIAL DISPARITIES OF NEW YORK’S STOP, QUESTION, AND FRISK PRACTICES 13-29 (2007).

320. *Id.* at 19.

321. *Whren v. United States*, 517 U.S. 806, 811-13 (1996).

322. *Wayte v. United States*, 470 U.S. 598, 610 (1985) (ellipsis in original) (quoting *Personnel Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)).

323. See Gelman, Fagan & Kiss, *supra* note 306, at 821. An alternative is to establish a disparity between the minority search rates of White officers and those of African-American or Latino officers, as reflected in one study of Florida Highway Patrol stops. See Billy R. Close & Patrick L. Mason, *Searching for Efficient Enforcement: Officer Characteristics and Racially Biased Policing*, 3 REV. OF L. & ECON. 263, 315 (2007). There is no similar study of New York.

324. See Gelman, Fagan & Kiss, *supra* note 306, at 821.

325. *Id.* at 821-22.

modest racial skew. The RAND study of stop-and-frisk during 2006 found a somewhat smaller racial skew; arrest rates arising from stops were 4.8% for Whites, 5.4% for African Americans, and 5.1% for Hispanics.³²⁶ The most recent data available, for 2008, produced an arrest rate of 6.07% for African Americans and Hispanics and 5.50% for Whites.³²⁷ From the standpoint of hit rates, the New York data offers, at best, quite modest evidence of discrimination.³²⁸

Yet, as with stop rates, there are perils in relying on hit rates to reach conclusions about discrimination. On the one hand, lower minority hit rates might not reflect discrimination if, as seems likely, minorities are disproportionately found in hot spots targeted for aggressive stop-and-frisk, and outside of those hot spots, police utilize less aggressive tactics that generally call for greater indicia of suspicion to justify a stop-and-frisk. On the other

326. RIDGEWAY, *supra* note 319, at 37 tbl.5.2.

327. GILL & TRONE, *supra* note 179, at 17 fig.13a.

328. *See id.* Perhaps the strongest inference of discrimination relates to weapons searches, in which there was a more marked racial variation in hit rates during the period studied by the New York Attorney General than for any other category of stops:

Crime Type	Stop-Arrest Ratio
<i>White</i>	
Violent	5.94
Property	7.61
Drugs	5.22
Weapons	15.89
<i>Black</i>	
Violent	7.03
Property	7.04
Drugs	6.94
Weapons	20.08
<i>Hispanic</i>	
Violent	7.20
Property	8.47
Drugs	6.14
Weapons	16.74

Fagan & Davies, *supra* note 165, at 202 tbl.9.1. The lower hit rate for weapons stops in itself should not be particularly troubling. *Terry* assesses the reasonableness of a stop-and-frisk by balancing the individual's liberty interests against the law enforcement interests underlying a search and considers officer safety to be an especially weighty interest. *See Terry v. Ohio*, 392 U.S. 1, 20-27 (1968). For that reason, it is doubtful that the Fourth Amendment should be understood to require an especially high probability before an officer is permitted to perform a brief pat-down of a suspect that he suspects is armed. *See id.* at 36. A rule requiring a relatively high probability would most likely cause officers who indulge even a modicum of regard for their own safety to refrain from ever approaching a suspect at a gang or drug hot spot, granting effective immunity to a large volume of gang and drug activity. The lower hit rate for African-American searches, in contrast, might be suggestive of some discrimination in this category of stops, where officers might be especially concerned about discrimination and, for that reason, could be more likely to indulge in stereotypical assumptions about black criminality. The most recent data available, in any event, tells a different story. The data indicates that "for every 1,000 Black individuals frisked in 2008, 3.5 guns were found; the equivalent return for [w]hites was 1.7 guns, and for Hispanics, 1.6 guns. Stops were somewhat more efficient in recovering other types of weapons, especially among [w]hites. For every 1,000 [w]hite individuals frisked in 2008, officers recovered 36.6 knives or other non-firearms. The equivalent return for Hispanics and Blacks was 23.7 and 20.8, respectively." GILL & TRONE, *supra* note 179, at 18.

hand, equilibrium in hit rates might mask discrimination. Professor Harcourt has argued that a racist officer might decide to search a large proportion of the African Americans he encounters, but only a much smaller proportion of Whites; yet, differential rates of offending might produce an equilibrium in hit rates that masks discrimination.³²⁹ Beyond that, he has argued that, even as hit rates remain at equilibrium, differential stop rates might create a “ratchet effect” that produces rates of arrest and prosecution for minorities out of proportion to their underlying representation in the pool of offenders if minorities have relatively fewer legitimate opportunities, and therefore, are unlikely to reduce their rate of offending even as their search rate increases.³³⁰ Professor Harcourt believes this situation likely exists in current drug enforcement efforts, which, he believes may actually increase White offending rates if Whites perceive that they run insubstantial risks of search.³³¹

And, of course, disproportionate minority search rates produce other costs as well, including the criminogenic effects of incarceration that reduce the future prospects for legitimate employment of those who are convicted and their dependents and which disrupt the stability of the communities from which they are removed, stigmatizing minorities by associating them with criminality and creating a perception of unfairness in law enforcement that undermines its legitimacy, especially in the view of the minority community, in ways that might themselves provoke greater lawlessness.³³² Albert Alschuler, for example, has argued that disproportionate minority search rates are properly understood as a governmentally endorsed message that race and criminality go together.³³³ Randall Kennedy has characterized disproportionate stops of minorities as a type of racial tax on minorities.³³⁴ Many others have expressed similar views.³³⁵

329. See BERNARD E. HARCOURT, *AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE* 136-39 (2007).

330. See *id.* at 145-67.

331. See *id.* at 195-214. For useful discussions of the pitfalls of reliance on hit rates and similar outcome tests as evidence of discrimination, see, for example, Ian Ayres, *Outcome Tests of Racial Disparities in Police Practices*, 4 *JUST. RES. & POL'Y* 131, 131 (2002); David Bjerck, *Racial Profiling, Statistical Discrimination, and the Effect of a Colorblind Policy on the Crime Rate*, 9 *J. PUB. ECON. THEORY* 521, 529-35 (2007). In this connection, it is worth noting that even critics of New York City policing are reluctant to place too much weight on the evidence of a racial skew in hit rates. See Gelman, Fagan & Kiss, *supra* note 306, at 815, 820-21.

332. See HARCOURT, *supra* note 329, at 160-70.

333. See Albert W. Alschuler, *Racial Profiling and the Constitution*, 2002 *U. CHI. LEGAL F.* 163, 207-23 (2002).

334. See RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 159-61 (1997).

335. See, e.g., DAVID COLE, *NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM* 16-62 (1998); HARRIS, *supra* note 305, at 237-63; I. Bennett Capers, *Policing, Place, and Race*, 44 *HARV. C.R.-C.L. L. REV.* 43 (2009); Donna Coker, *Forward, Addressing the Real World of Racial Injustice in the Criminal Justice System*, 93 *J. CRIM. L. & CRIMINOLOGY* 827, 878 (2003); Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 *U. MIAMI L. REV.* 425, 427-32 (1997); Diana Roberto Donahoe, “*Could Have, “Would Have”*: *What the Supreme Court Should Have Decided in Whren v. United States*, 34 *AM. CRIM. L. REV.* 1193, 1204-05 (1997); Richard S. Frase, *What Were They Thinking? Fourth Amendment Unreasonableness in Atwater v. City of Lago Vista*, 71 *FORDHAM L. REV.* 329, 415 (2002); Samuel R. Gross

Although the New York data offers, at best, modest reason to suspect that a ratchet effect or any other form of official discrimination is afoot, one cannot deny the possibility that New York's tactics produce many of the costs identified by the critics. It is, however, a curious account that stresses the costs of stop-and-frisk tactics without consideration of their benefits.

B. *The Evidence of Discrimination in Context*

Even if New York police officers utilize racially skewed tactics for policing, there is another group in New York that indulges in a racial skew—the violent criminals of New York. As we have seen, minority violent victimization rates, in New York as in other big cities, are dramatically higher than White victimization rates.³³⁶ As it happens, during the period studied by the attorney general, while stop-and-frisk hit rates for minorities were modestly elevated, the racial skew for rates of firearm assault and homicide among African Americans in New York was far greater: “[M]ore than twice the rate for Hispanics and nearly ten times the rate for Whites.”³³⁷ It is anomalous at best to criticize on grounds of racial unfairness police tactics that have reduced the homicide rate by two-thirds in a city in which almost 80% of homicide victims were minorities.³³⁸

It is surely odd that critics would have the police abandon tactics that have produced the best record in the nation for driving down rates of minority victimization—saving thousands of minority lives in the process. In light of the case to be made that these tactics have helped to abate the profound threat that faced the minority community at the peak of the crime spike, one has to wonder whether the use of these tactics reflects some sort of racial tax, or instead simply a decision to devote disproportionate resources to policing those areas in

& Debra Livingston, *Racial Profiling Under Attack*, 102 COLUM. L. REV. 1413, 1437-38 (2002); David A. Harris, *Car Wars: The Fourth Amendment's Death on the Highways*, 66 GEO. WASH. L. REV. 556, 560-61 (1998); Lenese C. Herbert & Bete Noire, *How Race-Based Policing Threatens National Security*, 9 MICH. J. RACE & L. 149, 194-209 (2003); Erika L. Johnson, “A Menace to Society”: *The Use of Criminal Profiles and its Effects on Black Males*, 38 HOW. L.J. 629 (1995); Dorothy E. Roberts, *Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775, 775 (1999); Kathryn K. Russell, “*Driving While Black*”: *Corollary Phenomena and Collateral Consequences*, 40 B.C. L. REV. 673, 717 (1999); David Alan Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699, 1815-18 (2005); Andrew E. Taslitz, *Respect and the Fourth Amendment*, 94 J. CRIM. L. & CRIMINOLOGY 15, 15, 100-02 (2003); Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 983-1012 (1999); Tom R. Tyler & Cheryl J. Wakslak, *Profiling and Police Legitimacy: Procedural Justice, Attributions of Motive, and Acceptance of Police Authority*, 42 CRIMINOLOGY 253, 253 (2004); Floyd D. Weatherspoon, *Racial Profiling of African-American Males: Stopped, Searched, and Stripped of Constitutional Protection*, 38 J. MARSHALL L. REV. 439 (2004). For an argument that New York's tactics in particular have imposed undue costs of this character, see K. Babe Howell, *Broken Lives from Broken Windows: The Hidden Costs of Aggressive Order-Maintenance Policing*, 33 N.Y.U. REV. L. & SOC. CHANGE 271, 300-15 (2009).

336. See Fagan & Davies, *supra* note 165, at 202-03.

337. *Id.* at 203.

338. See *supra* text accompanying notes 139-45.

which minority lives are at greatest risk. As we have seen, there is a strong case to be made that New York's tactics disrupted the dynamic that drove the violent crime spike; by making it riskier to carry guns and drugs in public, aggressive stop-and-frisk tactics drove gang-related drug trafficking off the streets, reducing the threat of violent confrontation that accompanies the inner-city drug business. The benefits of aggressive stop-and-frisk tactics, in short, are not confined to the hit rates that it generates.³³⁹

What about the criminogenic effects of police tactics that are said to erode minority confidence in the criminal justice system? The data from New York should put these concerns to rest. If New York's tactics imperiled the legitimacy of the criminal justice system to the point that it undermined the willingness of its minority residents to cooperate with the authorities or even to obey the law, we would expect to see some indication of that effect in crime rates.³⁴⁰ Yet, New York, while engaging in aggressive stop-and-frisk tactics, has dramatically outperformed other cities.³⁴¹

It is easy to understand why legal scholars are especially concerned about the dignity interests of minorities who believe themselves to have been subjected to unfair law enforcement tactics, as well as the possibility that these tactics compromise the legitimacy of the criminal justice system. Dignity and legitimacy are, after all, staples of scholarly contemplation. Legal scholars, however, generally can afford to live in communities where they and their families do not experience a daily fear of violent crime. The priorities of those who live in high-crime, inner-city neighborhoods may well be different. In my experience, the residents of high-crime, inner-city neighborhoods are far more concerned with driving down rates of violent crime than with debates over racial profiling. Indeed, in these communities, perceptions of legitimacy of the criminal justice system may be more closely tied to the ability of that system to keep these communities safe than any concerns about procedural justice. After all, few things are more likely to undermine the perception of fairness than the awareness of the residents of high-crime, disproportionately minority, inner-city communities—while the police manage to keep wealthy White communities

339. One recent study found that hit rates in New York have declined over time as the volume of stop-and-frisk has increased and speculated that this may reflect an overuse of the stop-and-frisk tactic. See Jeffrey Fagan, et al., *Street Stops and Broken Windows Revisited: The Demography and Logic of Proactive Policing in a Safe and Changing City*, in RACE, ETHNICITY, AND POLICING: NEW AND ESSENTIAL READINGS 309, 337-39 (Stephen K. Rice & Michael D. White eds., 2010) [hereinafter RACE, ETHNICITY, AND POLICING]. Yet, it is of course hard to identify the optimal search rate; had the police backed off stop-and-frisk tactics, perhaps the murder rate in New York would have risen. In this light, one might understand why New York did not elect to gamble with the lives of its residents. And, from the standpoint of racial fairness, it is worth noting that the lives placed most at risk by reducing the resources devoted to hot spot policing in New York are those of its minority residents.

340. For speculation to this effect based on panel interviews with residents of New York, see Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in their Communities?*, 6 OHIO ST. J. CRIM. L. 231, 262-65 (2008). For speculation along the same lines based on the Attorney General's data, see Fagan & Davies, *supra* note 165, at 201-06.

341. See *supra* text accompanying notes 141-43.

safe, they live in the midst of pervasive threats to their own safety and that of their loved ones. Available data bears this out; studies consistently find that once indicia of perceived crime rates and neighborhood stability are taken into account, the statistical relationship between race and satisfaction with the local police largely, if not entirely, disappears.³⁴² In terms of the priorities of the African American community, polls show that African Americans express greater fear of crime and greater opposition to legalization of drugs than Whites.³⁴³ One national survey found that 80% of African Americans and Hispanics favored more police officers patrolling city streets in vehicles, as opposed to 74% of Whites; 80% of African Americans and 69% of Hispanics favored more officers on foot patrol, as opposed to 63% of Whites; and 88% of African Americans and 85% of Hispanics favored more police surveillance of high-crime areas, as opposed to 82% of Whites.³⁴⁴

To be sure, there is ample evidence of improper racial profiling based on hit rate data elsewhere in law enforcement—highway traffic stop data provides particularly vivid evidence on this point.³⁴⁵ Highway traffic stops, however, are not likely to be responsive to crime-pattern data in discrete neighborhoods—the essence of the New York strategy, as previously discussed.³⁴⁶ The New York data suggests, as well, that discrimination is most likely to take place not at hot spots, but in relatively low-crime areas where minorities may be stopped merely because they appear to an officer to be “out of place.”³⁴⁷ This may explain at least part of the racial skew in New York’s hit rates. A stop-and-frisk strategy aimed at hot spots of gang and drug activity, in contrast, is far more likely to

342. See, e.g., CHERYL MAXSON, KAREN HENNIGAN & DAVID SLOAN, U.S. DEP’T OF JUSTICE, FACTORS THAT INFLUENCE PUBLIC OPINION OF THE POLICE 7-9 (June 2003); RONALD WEITZER & STEVEN A. TUCH, RACE AND POLICING IN AMERICA: CONFLICT AND REFORM 41-45 tbl.2.2 (2006); Liquin Cao, James Frank & Francis T. Cullen, *Race, Community Context and Confidence in the Police*, 15 AM. J. POLICE 3, 13-14 (1996); Paul Jesilow, J’ona Meyer & Nazi Namazzi, *Public Attitudes Toward the Police*, 14 AM. J. POLICE 67, 83, 85-86 (1995); Michael D. Reisig & Roger B. Parks, *Experience, Quality of Life, and Neighborhood Context: A Hierarchical Analysis of Satisfaction with Police*, 17 JUST. Q. 607, 623-25 (2000); Robert J. Sampson & Dawn Jeglum Bartusch, *Legal Cynicism and (Subcultural?) Tolerance of Deviance: The Neighborhood Context of Racial Differences*, 32 LAW & SOC’Y REV. 777, 798-800 (2000); Joseph A. Schafer, Beth M. Huebner & Timothy S. Bynum, *Citizen Perceptions of Police Services: Race, Neighborhood Context, and Community Policing*, 6 POLICE Q. 440, 455-63 (2003); Ronald Weitzer, *Race and Policing in Different Ecological Contexts*, in RACE, ETHNICITY, AND POLICING, *supra* note 339, at 118, 120-21; *but cf.* John MacDonald, et al., *Race, Neighborhood Context and Perceptions of Injustice by the Police in Cincinnati*, 44 URBAN STUD. 2567, 2571, 2578-81 (2007) (finding a statistically significant relation between race and perception of unjust police practices in Cincinnati while acknowledging that this city has an unusual recent history of racial tension involving the police).

343. See, e.g., SOURCEBOOK, *supra* note 108, at 130-31 tbl.2.38, 132 tbls.2.39 & 2.40, 134-35 tbl.2.42, 158-59 tbl.2.68.

344. WEITZER & TUCH, *supra* note 342, at 14, n.4.

345. See, e.g., Samuel R. Gross & Katherine Y. Barnes, *Road Work: Racial Profiling and Drug Interdiction on the Highway*, 101 MICH. L. REV. 651 (2002).

346. See STOP AND FRISK REPORT, *supra* note 158, at 88-117; *also* HARRIS, *supra* note 305, at 79-81. Data derived from traffic stops, in addition, is unlikely to tell us much about *Terry*, because vehicular stops are often based on probable cause to believe that a vehicle has violated a traffic law, rather than reasonable suspicion. See, e.g., *Whren v. United States*, 517 U.S. 806, 809-10 (1996).

347. See Gelman, Fagan & Kiss, *supra* note 306, at 822.

produce a large racial skew in stop rates without reflecting racial discrimination.

This final point may indeed explain much of the opposition to racial profiling. As we have seen, the benefits of aggressive stop-and-frisk tactics—even if they involve some racial skew—are concentrated in high-crime, inner-city communities. The costs of racial profiling, in contrast, are often experienced outside those communities—especially by middle and upper class persons of color who are stopped because they appear “out of place.”³⁴⁸ Since the most politically and socially influential members of the minority community are likely to be able to afford to live in areas where the costs of aggressive policing likely exceed their benefits, their opposition to such tactics is natural. The same is likely true of most academics. But for those who cannot afford to leave inner-city communities, likely the only choice they face is aggressive policing or the Hobbesian world of drug dealers and gangs. In that world, *Terry v. Ohio* may not look so bad.

IV. CONCLUSION

A criminal justice system that fails to keep disadvantaged persons of color safe, even as relatively wealthy Whites live in security, can offer neither fairness nor legitimacy. *Terry* offered the police hope of a prophylactic approach to policing, in which the authorities need not wait until a crime is committed to undertake measures to keep a community safe.

The Fourth Amendment virtually compels the kind of balancing employed by *Terry*. Its command, after all, is merely one of reasonableness. The counsel of reason often suggests that extraordinary threats require extraordinary measures. The residents of high-crime, inner-city communities face threats to their safety that most of us would find unimaginable. Perhaps that is why so many rebel against the kind of stop-and-frisk regime undertaken in New York. The threat of violent crime that New York and other cities have faced, however, should be enough to expand one’s imagination.

348. See, e.g., HARRIS, *supra* note 305, at 91-94.