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"We Own the Night"
Amadou Diallo's Deadly Encounter with New York City's Street Crimes Unit

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Amadou Diallo died in a hail of police bullets in February 1999. The police thought Diallo was a serial rapist who was drawing a pistol against them, but Diallo was an innocent man who was unarmed. The incident has sparked a heated debate over the crime-fighting policies of Mayor Rudolph Giuliani and the New York City Police Department.

To understand what has been happening in New York City in recent years, one must examine the relationship between a police officer's authority to search suspects and the legal doctrine of false imprisonment. The legal shield of false imprisonment has been sharply curtailed in recent years by Supreme Court rulings that have expanded the circumstances under which police officers can "stop and frisk" persons.

In 1994 Mayor Giuliani and Police Commissioner William Bratton ordered their elite Street Crimes Unit to start confiscating illegal weapons from pedestrians. The plainclothes outfit embarked upon an aggressive campaign of stopping and frisking city residents, often illegally. Wealthy and middle-class residents were not affected by the crackdown because the police chose to exercise their search powers in the poorer neighborhoods where the crime rates were higher. Minorities bore the brunt of the crackdown, and their cries of police harassment were largely written off.

The killing of Amadou Diallo was neither an act of racist violence nor some fluke accident. It was the worst-case scenario of a dangerous and reckless style of policing. Policymakers should dispense with confrontational stop-and-frisk tactics before more innocent people are injured or killed.

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Introduction

On February 4, 1999, New York City police officers shot and killed an innocent man. The victim was Amadou Diallo, a 22-year-old West African immigrant. Diallo was unarmed and had no criminal record. The four police officers involved in the shooting were members of the Street Crimes Unit, an aggressive outfit that tries to confiscate illegal firearms from city residents.[1]

An investigation of the shooting began immediately. The officers were subsequently indicted on charges of second degree murder, depraved indifference to human life, and reckless endangerment. One year later, after a four-week trial, all four officers were acquitted on all counts.[2]

The Diallo case has been one of the most closely watched cases involving police killings in many years. One reason for this is that the shooting has sparked a larger debate about the crime-fighting policies of Mayor Rudolph Giuliani and the New York City Police Department. Because crime rates have fallen dramatically during the Giuliani administration, many people contend that the city's crime-fighting strategies are clearly a success—and that Diallo's death was just a tragic accident.[3] Others maintain that the city's low crime rate has been achieved by trampling the civil liberties of minorities—and that Diallo is the latest victim of a brutal and capricious police agency.[4]

This paper critically examines one particular aspect of New York City's crime-fighting strategy, namely, the aggressive "stop-and-frisk" tactics of the Street Crimes Unit. The paper will conclude that the killing of Amadou Diallo was neither a premeditated racist crime nor some fluke accident. It was, rather, the worst-case scenario of a reckless, confrontational style of policing.

First Principles: The Right to Be Left Alone

In America the law has traditionally sought to shield the liberty of the individual from the unbridled power of the police. But when crime rates rise, pressure typically builds to expand the power of government at the expense of liberty. In order to understand what has been happening in New York City (and in many other metropolitan areas) in recent years, it will be useful to examine a legal safeguard that is so longstanding that it predates the Bill of Rights—the doctrine of false imprisonment.

The terms "false imprisonment" and "false arrest" are synonymous. Both terms refer to the "unlawful detention of the person of another, for any length of time, whereby he is deprived of his personal liberty."[5] Although the term "false imprisonment" conjures up the image of someone being confined in a jail cell for an improper reason, the scope of the doctrine is far broader. False imprisonment includes any unlawful exercise of force by which "a person is compelled to remain where he does not wish to remain or to go where he does not wish to go."[6]

The false imprisonment cause of action reflects our society's expectations regarding interpersonal conduct. The doctrine's central admonition is that people ought to be able to move about without interference. Anyone who tries to confine another without legal justification can be sued for false imprisonment.

Here are some other tenets of the doctrine of false imprisonment:

- Police officers are not immune from suit. When a police officer goes beyond the scope of his authority, he may be liable civilly.[7]
- Jailing is not necessary; a victim can prevail by showing that he was unlawfully detained on a public sidewalk.[8]
- Physical force does not have to be shown—as long as the victim reasonably believed that he was being restrained against his will.[9]
- The confinement does not have to be for any appreciable length of time. The wrong is committed with even a brief restraint of a person's freedom.[10]
- A suit can be maintained without any

> proof of actual damages. The doctrine is so protective of individual liberty that the mere fact that there has been a false imprisonment at all is enough to establish a cause of action for at least nominal damages.[11]

A legal treatise explains that it is the "dignitary interest in feeling free to choose one's own location" that is given legal protection.[12]

Unfortunately, the legal shield of false imprisonment has been sharply curtailed in recent years by Supreme Court rulings that have expanded the circumstances under which state agents can forcibly detain and search persons. The effects of that development, however, are still not apparent to American society as a whole. Because the police have not chosen to exercise their search powers in wealthy or middle-class neighborhoods, most Americans are not yet aware of their vulnerability. But the police have been exercising their power to stop and frisk against inner-city residents, particularly young black and Hispanic males—and that narrow segment of the population is painfully aware of its vulnerability. Sadly, minority cries about police harassment have been written off by mainstream America as without merit or exaggerated—at least until the recent killing of Amadou Diallo.

The Power to Stop and Frisk

The key difference between a free society and a totalitarian regime is the power of police agents. In a free society the police are governed by law, whereas in a totalitarian regime the police *are* the law. In America the government's power to search persons is governed by the Fourth Amendment to the U.S. Constitution:

> 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.

The common law and the Fourth Amendment established a paradigm that generally required arrests to be made with a warrant. The early Americans detested the idea that their liberty might depend on the discretion of any "petty officer."[13] Thus, the warrant procedure provided a greater degree of protection—since any arrest warrant application would have to be submitted under oath before an impartial magistrate. And the information in the application would have to establish "probable cause" to believe that a crime had been committed by the person named on the warrant. By placing the power to search under both the executive branch and the judicial branch, the Framers of the Constitution thought they could reduce abuses.[14]

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One component of the original paradigm that is often overlooked, however, was the ever-looming threat of a false imprisonment lawsuit. Because colonial jurors were notoriously jealous of their liberty and hostile to officialdom, the stakes were considerable for individual officers.[15] Thus, the early constables thought twice before trying to effect a warrantless arrest or even temporarily depriving any citizen of his personal liberty. Since officers who sought and obtained warrants were generally immune from civil liability for false imprisonment, warrantless arrests were the exception, not the rule.[16]

A lengthy examination of Fourth Amendment jurisprudence is beyond the scope of this paper. Suffice it to say that the scope of a police officer's authority to search and seize persons has greatly expanded over the years.[17] In fact, it has become routine for police officers to make arrests without warrants—even in situations in which there is ample opportunity to obtain them. What is worse is that the Supreme Court has sanctioned police detentions or "stops." A stop is

an involuntary citizen-police encounter—but it is an encounter that has not yet escalated to the point of a full-blown arrest. In other words, the person has not been handcuffed and taken into custody, but neither is he free to walk away.

The leading case on the so-called stop-and-frisk search is *Terry v. Ohio* (1968).[18] In *Terry* the Supreme Court held that a police officer could temporarily deprive individuals of their right to go about their business on the basis of what the Court called "reasonable suspicion," which is a lower legal standard than "probable cause." The Court also held that if a police officer believed the suspect might be armed, he could frisk the individual's clothing in order to neutralize the potential threat.[19]

The Supreme Court seemed to appreciate at least some of the implications of its ruling, admitting that to allow the police to accost people and to pat down their clothing would constitute a "great indignity" that might very well arouse "strong resentment."[20] The Court nonetheless concluded that subjecting men, women, and children to such searches in the absence of a warrant and in the absence of probable cause was not violative of the Fourth Amendment.

Although the *Terry* decision was replete with qualifiers as to what was "reasonable," "appropriate," and "prudent," those terms have meant little to cops on the beat.[21] Indeed, it is no overstatement to say that, as a *practical* matter, the ruling gave the police a green light to falsely arrest citizens.[22]

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Both liberal and conservative jurists have questioned the *Terry* ruling. Justice William O. Douglas bitterly dissented from the ruling, recognizing that it heralded the beginning of a "new regime" under which the police could stop anybody that they did not like and search the person at their discretion.[23] More recently, Justice Antonin Scalia has criticized the soundness of the *Terry* decision. After quoting from a police manual that described how to frisk a person's arms, legs, stomach, and crotch, Justice Scalia exclaimed, "I frankly doubt . . . [that] 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."[24]

"We Own the Night": New York City's Street Crimes Unit

In 1994 the prominent political scientist James Q. Wilson lamented the fact that police chiefs were not yet exploiting the *Terry* precedent in a systematic fashion. In a *New York Times Magazine* article, Wilson wrote:

> The most effective way to reduce illegal gun-carrying is to encourage the police to take guns away from people who carry them without a permit. This means encouraging the police to make street frisks. . . . Innocent people will be stopped. Young black and Hispanic men will probably be stopped more often than older white Anglo males or women of any race. But . . . we must get illegal guns off the street.[25]

Shortly thereafter, New York City's new police commissioner, William Bratton, implemented Wilson's recommendation, making firearms-related arrests the number-one priority of the city's elite Street Crimes Unit.[26] Bratton also expanded the number of officers in the unit from 86 to 100.[27] Slowly but surely, the number of city residents who were stopped and frisked began to escalate.

Patrolling the streets in unmarked cars and dressed in jeans and sweatshirts, the members of the Street Crimes Unit were indistinguishable from the hoodlums they zealously pursued. The culture of the unit was militaristic. The members were known as the "commandos" of the NYPD and they often spoke of "retaking neighborhoods" from the criminal element.[28] In 1996 some of the officers distributed T-shirts emblazoned with the following quotation from Ernest

Hemingway: "Certainly there is no hunting like the hunting of man, and those who have hunted armed men long enough and liked it, never really care for anything else thereafter."[29] The unit adopted the motto, "We Own the Night."[30]

The Street Crimes Unit had already grown to 138 officers by the time Howard Safir replaced Bratton as police commissioner in 1996. Safir was so impressed by the unit's gun seizures and bravado that he tripled the number of officers assigned to the unit to 380 cops.[31] And, like his predecessor, Safir was determined to bring managerial concepts from the business world into police management. Although crime rates had been declining, the "productivity" of the Street Crimes Unit was to be measured by the number of gun seizures—and Safir expected his newly expanded unit to increase "production."

Sometimes they stopped thugs and found guns or drugs. More often than not, they stopped innocent people and found empty pockets. The modus operandi of the unit was to quickly swarm on a person, with pistols drawn, all the while barking commands laced with vulgarities. It could be a harrowing experience for an innocent person who happened to be on the streets late at night. After all, who wants to have pistols pointed at him? Who wants to have his clothes pressed against a dirty sidewalk while a stranger rifles through his pants? And who wants to have to endure the experience several times?[32]

No one—not even the police department—really knows the number of city residents that has been stopped and frisked. The NYPD does have paperwork showing that 33,500 people were stopped in 1997 and 1998, but those numbers probably represent the tip of the proverbial iceberg.[33] Officers interviewed by Attorney General Eliot Spitzer of New York State admitted that, when they frisked people and found nothing, they typically did not write a report on the incident.[34] The officers did, however, make a point of filling out a report when they thought that the person "tossed" was so upset by the incident that a complaint or lawsuit might be filed.[35] A report written under those circumstances might very well contain self-serving statements in an effort to rationalize the stop and the manner in which it was conducted, including any use of force. Thus, the accuracy of such reports seems questionable. It is certainly impossible to determine the legality of the *unreported* stops since the overwhelming majority of the persons frisked were poor and were in no position to hire an attorney to press a claim for false arrest.

Records do show that the number of formal arrests in New York City has skyrocketed in recent years—but a startling percentage of the arrests is thrown out by prosecutors even before a judge scrutinizes the case at the preliminary hearing stage of trial proceedings. For example, in 1998 prosecutors threw out 18,000 arrests—double the number thrown out in 1994.[36] The *New York Times* reports that "the waves of people arrested but never found to have broken the law largely roll beneath the public consciousness."[37]

Many of the cases that do reach the courtroom are thrown out because the police stops were determined to be illegal. The Street Crimes Unit brought 200 felony gun cases in Manhattan in 1997 and 1998. Half of the adjudicated cases were thrown out by the judiciary.[38] Some judges have been unusually sharp in criticizing the police work coming before them. For example, when one officer asserted that he searched the inside of a taxi cab because he feared for his own safety, the trial judge scoffed at his story, noting that the officer chose not to frisk two suspects after he asked them to step out of the vehicle.[39] The judge reluctantly concluded that the officer was "tailoring his testimony" to overcome constitutional objections.[40]

The lack of accountability for police misconduct seems to be an ongoing problem with the NYPD.[41] Police commanders rarely discipline officers for "tailoring" their testimony in court cases.[42] As a result, police tend to shrug off case dismissals and judicial rebukes. When a reporter asked a veteran police supervisor about the dismissal rates of his unit, his response was that a failed prose-

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cution doesn't matter so long as a gun is taken off the streets.[43] With commanders harboring such attitudes, it is plainly obvious that the typical member of the gung-ho Street Crimes Unit has little incentive to pay much attention to the rights and dignity of city residents. One police officer told a reporter that all the complaints about racial profiling were misplaced. "It's pure mathematics: the more people they toss, the more guns they come up with."[44] Another officer, speaking on the condition of anonymity, said: "There are guys who are willing to toss anyone who's walking with his hands in his pockets. . . . We frisk 20, maybe 30 people a day. Are they all by the book? Of course not; it's safer and easier to just toss people."[45] It is no wonder that many young males in New York City, particularly those who are black or Hispanic, have come to feel that they are second-class citizens.[46] Too many police officers treat them as though they had no rights.

Amadou Diallo Meets the Street Crimes Unit

Amadou Diallo immigrated to the United States from Guinea in the mid-1990s. He worked as a street peddler in Manhattan, selling socks, gloves, and videos. By all accounts, Diallo was a peaceful and hardworking person. He was a devout Muslim, who sent part of his earnings to his parents in his native country.[47]

Early in the morning of February 4, 1999, Diallo arrived home from work. He shared an apartment with two other men in the Soundview section of the Bronx. After a brief conversation with one of his roommates about their utility bill, Diallo left the apartment to get something to eat.[48]

At the same time, four members of the Street Crimes Unit were patrolling the neighborhood in an unmarked Ford Taurus. The officers were armed with 9-millimeter semi-automatic service pistols, which hold 16 rounds. At 12:44 a.m., the officers saw Diallo standing in the vestibule of his apartment building. One officer thought Diallo resembled the physical description of a serial rapist, so they decided to confront him.[49]

All four cops got out of their car, drew their pistols, and approached Diallo. The officers were not wearing uniforms; they wore shields on long necklaces. The police claim that they identified themselves and yelled to Diallo to "freeze." Instead of remaining motionless, the police say Diallo took a few steps in the other direction and then made a sudden movement toward his waist. One officer thought he saw Diallo drawing a weapon and yelled "Gun!" to warn his fellow officers. Fearing for their safety, all four officers fired upon Diallo. Forty-one shots were fired; 19 hit Diallo, who was pronounced dead at the scene.

The officers found a wallet and a pager next to Diallo's body, but no handgun. As it turned out, Diallo was not the serial rapist, nor was he armed. The entire incident lasted about two minutes.

Policy Lessons

The death of Amadou Diallo has sparked a heated debate about the crime-fighting policies of Mayor Rudolph Giuliani and the NYPD.[50] In response to the torrent of criticism, Police Commissioner Howard Safir modestly reduced the size of the Street Crimes Unit, brought more minority officers into the outfit, and instituted a civility campaign called "Courtesy, Professionalism, and Respect," which gives officers tips on how to be more polite to city residents.[51] Political activists, such as the Reverend Al Sharpton, have called for additional reforms, including the hiring of more minority officers in the NYPD generally and city residence requirements for cops.[52] Unfortunately, none of the reform proposals on the table addresses the central problem. If the objective is to reduce the likelihood of incidents such as the Diallo killing, the best solution is to end the confrontational stop-and-frisk tactics of the police

department.[53]

As noted earlier, American law places limits on the powers of the police in order to protect the life, liberty, and property of individual citizens. The police, for example, are not allowed to use deadly force to stop fleeing shoplifters. It is important to note that that rule is designed to protect the lives not only of the thieves but of innocent bystanders who might get shot accidentally.[54]

Before scrutinizing the stop-and-frisk tactics of the NYPD, it will be useful to discuss another legal limitation on police work that pertains to the power to search—the "knock-and-announce" rule. The knock-and-announce rule requires police officers to knock on the front door of a home and to state their identity and purpose *before* they make any attempt to force entry.

The rule of announcement (as it is sometimes called) has two primary purposes. First, it gives the homeowner an opportunity to open the door peaceably, thus preventing the destruction of property.[55] Second, it serves the more general need to prevent violence.[56] A forced entry without any warning could prompt people inside a home to use deadly force to repel the entry out of fear for their safety. The officers, in turn, would respond with deadly force. Adherence to the rule can thus forestall violent confrontations.

The law does not demand that the knock-and-announce rule be rigidly followed in each and every case. Everyone recognizes that there will be situations in which the rule would amount to a futile gesture. For example, if the police verify a tip that a dangerous fugitive is hiding out alone in a particular apartment, an unannounced execution of an arrest warrant would be considered lawful and reasonable. Absent good cause, however, the law requires the police to abide by the knock-and-announce rule.

In 1970 Congress passed a statute that gave the police a blank check to conduct no-knock raids, but that statute was repealed before it could be declared unconstitutional by the Supreme Court.[57] The law was repealed after numerous cases arose in which "terrified citizens, imagining that intruders were entering their homes, discovered instead that the 'intruders' were law enforcement officers entering without notice."[58] Congressional lawmakers came to recognize that it was their own *flawed policy* that had resulted in unnecessary injuries and killings.

The confrontational stop-and-frisk style of policing is no less reckless than the no-knock raid. Such stops endanger the police, the person stopped, and bystanders. In the aftermath of the Diallo incident, many writers have emphasized the difficult circumstances under which the police were operating (e.g., Diallo resembled a criminal; he made a sudden movement in an area that was not well lit). We have been reminded that cops must make split-second judgments in situations that are tense, uncertain, and rapidly evolving. Those observations are valid, to be sure, but the most important point is this: NYPD's stop-and-frisk tactics have *exacerbated* the risks inherent in police work, thereby *increasing* the likelihood of accidental death or injury.

Moreover, a fair appraisal of any police tactic must take into account, not only the viewpoint of the police officer in a fast-moving street confrontation, but the viewpoint of the citizen target in that situation. The Street Crimes Unit created a situation that forced Amadou Diallo into a dreadful dilemma. Recall that the pistol-wielding men approaching Diallo were out of uniform. The cops were wearing blue jeans and coats on that chilly winter evening. Diallo had to make a split-second judgment about whether he was being accosted by street thugs or undercover cops—and then act accordingly *on pain of death or serious bodily injury*.[59]

During their criminal trial, the officers said they were genuinely baffled by the fact that Diallo did not immediately comply with their shouted command to freeze.[60] We will never know why Diallo acted as he did that morning. His friends have speculated that he was probably rushing to get an identification card to present to the officers. What is clear, however, is that the testimony of the police officers

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reveals another lapse showing that the deadly encounter was an accident waiting to happen. It apparently never occurred to the officers that some of the city residents they might be confronting could have difficulty hearing or might not understand English.[61] This is astonishing given New York City's diverse ethnic population and the fact that the officers were members of an "elite" unit.

The Diallo incident also contains lessons for policymakers on both sides of the gun control debate. Proponents of gun control should recognize the hydraulic forces that a handgun prohibition can set in motion.[62] The Street Crimes Unit was told to get guns off the street. Members of the unit pursued that mission zealously. Diallo never had a gun and yet he was accosted by a gun control unit and lost his life.

Opponents of gun control should recognize that had Diallo been carrying a handgun for purposes of self-protection (like Bernard Goetz), a firefight could have ensued and the officers (or bystanders) might have sustained injuries or even been killed. Once the first officer fired his weapon in the mistaken belief that Diallo's wallet was a gun, Diallo surely would have been legally justified in drawing his weapon and returning fire in an effort to save his own life. In fact, Diallo probably would have been justified in drawing a handgun even earlier had he not seen any badges or clearly heard the officers identifying themselves.[63] After all, in just a few seconds several menacing men were about to be on top of him.

Police tactics that unnecessarily endanger people are alarmingly reckless and just plain foolish. Absent special circumstances, police departments everywhere should discontinue confrontational stop-and-frisk tactics.[64] Policymakers and judges should recognize that allowing the police to detain and search people without probable cause violates the Fourth Amendment and is akin to permitting no-knock raids on a wholesale basis.[65]

Dispensing with stop-and-frisk tactics does not mean that the police must remain idle and wait for crimes to occur. Members of the Street Crimes Unit, for example, would sometimes set up sting operations in which one officer would act as a decoy and make herself an inviting target for a mugger or a rapist; if she were accosted, the other officers would move in and make an arrest.[66] *That* is the sort of police work that other cities should be emulating. Although it is more time-consuming and less expedient than "tossing" pedestrians, it is effective, constitutional, relatively safe, and far less likely to arouse resentment among the people.

Conclusion

The Supreme Court eviscerated the doctrine of false imprisonment when it gave police officers the power to forcibly detain and search persons without warrants or probable cause. It was only a matter of time before the twin imperatives of gun control and narcotics control led to wholesale searches of men, women, and children. City residents, particularly young black and Hispanic males, have borne the brunt of the police stop-and-frisk tactics.

The killing of Amadou Diallo was neither a premeditated act of racist violence nor some fluke accident. It was, rather, the worst-case scenario of a reckless, confrontational style of policing. As it did in the ill-fated experiment with no-knock raids, experience has shown that stop-and-frisk tactics unnecessarily endanger the police, the suspect, and bystanders. Policymakers in New York and elsewhere should discontinue the freewheeling stop-and-frisk searches and restore the constitutional standard of probable cause without delay.

Notes

1. See Michael Cooper, "Police Fire 41 Shots, and an Unarmed Man Is Dead," *New York Times,* February 5, 1999, p. A1.

2. See Lynne Duke, "Jury Acquits 4 N.Y. Officers," *Washington Post,* February 26, 2000.

3. See George Kelling, "Policing under Fire," *Wall Street Journal*, March 23, 1999; and John O'Sullivan, "Black and Blue," *National Review*, April 19, 1999.

4. See Bob Herbert, "At the Heart of the Diallo Case," *New York Times*, February 28, 2000; Robyn Blumner, "Letting the Police Search without Suspicion Erodes Freedoms," *St. Petersburg Times*, March 5, 2000; and Nat Hentoff, "The Big Apple's Rotten Policing," *Washington Post*, September 4, 1999, p. A29.

5. Henry Campbell Black, *Black's Law Dictionary* (St. Paul: West, 1968), p. 890.

6. *McKendree v. Christy*, 172 N.E.2d 380, 381–82 (1961).

7. See *Mason v. Wrightson*, 109 A.2d 128 (1954).

8. See *Norton v. Mathers*, 271 N.W. 321, 324–25 (1937).

9. See W. Page Keeton, ed., *Prosser and Keeton on the Law of Torts*, 5th ed. (St. Paul: West, 1984), p. 49.

10. Ibid., p. 48.

11. Ibid., p. 47.

12. See *Restatement of the Law: Torts* (St. Paul: American Law Institute, 1965), vol. 1, p. 53.

13. On the eve of the American Revolution, James Otis railed against the British "writs of assistance," calling them devices that "placed the liberty of every man in the hands of every petty officer." Quoted in John Wesley Hall Jr., *Search and Seizure* (New York: Clark, Boardman, Callaghan, 1991), vol. 1, p. 8 n. 35.

14. For background, see Timothy Lynch, "In Defense of the Exclusionary Rule," Cato Institute Policy Analysis no. 319, October 1, 1998.

15. During the Maryland ratification debates, the Anti-Federalist, Maryland Farmer, wrote, "[N]o remedy has yet been found equal to the task of deterring and curbing the insolence of office, but a jury—it has become the invariable maxim of English juries, to give ruinous damages whenever an officer had deviated from the rigid letter of the law." Quoted in Akhil Reed Amar, "Fourth Amendment First Principles," *Harvard Law Review* 107 (1994): 777.

16. Sir William Blackstone wrote that "a lawful warrant will in all events indemnify the officer, who executes the same ministerially." Quoted in ibid., p. 779. On the law of warrantless searches, see *Draper v. United States*, 358 U.S. 307, 315–16 (1959) (Douglas, J., dissenting).

17. For background, see Matthew Lippman, "Stop and Frisk: The Triumph of Law Enforcement over Private Rights," *Criminal Law Bulletin* 24 (1988): 24. Before the 1960s, some states had vagrancy and loitering laws, which were broad enough to give the police "probable cause" to arrest virtually any poor person that they were interested in stopping. Thus, it was not until the latter half of the 1960s, when the Supreme Court began to invalidate such statutes on void-for-vagueness grounds, that uniform rules began to emerge as police-citizen encounters started receiving scrutiny under Fourth Amendment principles. See William J. Stuntz, "*Terry*'s Impossibility," *St. John's Law Review* 72 (1998): 1213; Caleb Foote, "Tort Remedies for Police Violations of Individual Rights," *Minnesota Law Review* 39 (1955): 493; William O. Douglas, "Vagrancy and Arrest on Suspicion," *Yale Law Journal* 70 (1960): 1; and Charles A. Reich, "Police Questioning of Law Abiding Citizens," *Yale Law Journal* 75 (1966): 1161.

18. *Terry v. Ohio*, 392 U.S. 1 (1968).

19. Ibid. at 27.

20. Ibid. at 17.

21. "Unquestionably, the police under Mayor Rudolph Giuliani have been using their stop-and-frisk power more aggressively than the Supreme Court opinion establishing the power contemplated." Heather MacDonald, "Diallo Truth, Diallo Falsehood," *City Journal* (Summer 1999): 12.

22. On paper, the Supreme Court says that no one, including young black males, may be detained "even momentarily without reasonable, objective grounds for doing so." *Florida v. Royer*, 460 U.S. 491, 498 (1983). On the streets, however, the police have de facto discretion to stop and frisk any person they choose. See David Kocieniewski, "Success of Elite Police Unit Exacts a Toll on the Streets," *New York Times*, February 15, 1999, p. A1.

23. *Terry* at 39 (Douglas, J., dissenting).

24. *Minnesota v. Dickerson*, 508 U.S. 366, 381 (1993) (Scalia, J., concurring).

25. James Q. Wilson, "Just Take Away Their Guns," *New York Times Magazine*, March 20, 1994, p. 46.

26. See *Police Strategy No. 1: Getting Guns Off the Streets of New York* (New York: New York City

Police Department, 1994), p. 16. In a TV interview, Bratton echoed Wilson, saying, "One of the things we don't use effectively enough in New York is the constitutional [power] given police officers going back to *Terry v. Ohio*." Quoted in Holman W. Jenkins Jr., "What Happened When New York Got Businesslike about Crime," *Wall Street Journal,* April 28, 1999, p. A19. Other cities adopted the same stratagem. See Fox Butterfield, "Cities Finding a New Policy Limits Guns," *New York Times,* November 20, 1994, p. 22.

27. *Police Strategy No. 1.*

28. See Kocieniewski, "Success of Elite Police Unit Exacts a Toll on the Streets."

29. Ibid.

30. Ibid.

31. Ibid.

32. Some city residents—such as Arnold Cruz, who works as a bike messenger—complain that they have lost count of how many times they have been frisked. Cruz told a reporter: "If you live in the Bronx, police think they can just frisk you. . . . They just make up an excuse like there are gun shots or you fit some description." Quoted in Larry Celona and Jesse Angelo, "3,000 'Stop-and-Frisks' Net Only 6 Guns," *New York Post,* May 9, 1999, p. 3.

33. See Kevin Flynn, "Elite Unit's Wearing of Uniforms Is Reviewed As Gun Seizures Drop," *New York Times,* July 31, 1999, p. A1.

34. See Richard Perez-Pena, "Police May Have Understated Street Searches, Spitzer Says," *New York Times,* March 23, 1999, p. B5.

35. Ibid.

36. See Ford Fessenden and David Rohde, "Dismissed before Reaching Court, Flawed Arrests Rise in New York," *New York Times,* August 23, 1999, p. A1.

37. Ibid.

38. See John Marzulli and William K. Rashbaum, "Super Cops Blow Half Gun Cases," *Daily News,* March 21, 1999, p. 6.

39. Ibid.

40. Ibid.

41. See David Kocieniewski, "System of Policing Is Attacked from Without and Within," *New York Times,* December 19, 1997, p. A36.

42. Ibid.

43. See Marzulli and Rashbaum.

44. Quoted in Tom Hays, "New York Cases Help Make 'Racial Profiling' a National Issue," Associated Press, September 6, 1999.

45. Quoted in Kocieniewski, "Success of Elite Police Units Exacts a Toll on the Streets."

46. See Jodi Wilgoren and Ginger Thompson, "After Shooting, an Eroding Trust in the Police," *New York Times,* February 19, 1999, p. A1. See also Michael Janofsky, "Police Chiefs Say Criticism Is Founded, and Vow to Regain the Public Trust," *New York Times,* April 10, 1999, p. A12.

47. See Cooper, p. A1.

48. Ibid.

49. Ibid.

50. See Howard Chua-Eoan, "Black and Blue," *Time,* March 6, 2000, p. 24; and Kit R. Roane, "Are Police Going Too Far?" *U.S. News & World Report,* February 7, 2000, p. 25.

51. See Howard Safir, "For Most, Brutality Isn't the Issue," *New York Times,* April 19, 1999.

52. Sharpton would also like to see the officers who were involved in the Diallo shooting retried on federal charges. That would be a mistake. The Constitution's prohibition of multiple prosecutions ought to be respected. See Timothy Lynch, "The Ominous Powers of Federal Law Enforcement," *Cato Handbook for Congress: 106th Congress* (Washington: Cato Institute, 1999), p. 175.

53. Despite some political overtones, the U.S. Civil Rights Commission and New York attorney general Eliot Spitzer both deserve credit for investigating NYPD search practices. Unfortunately, those officials have accepted the *Terry* ruling as a baseline and have only sought to determine the extent to which the NYPD has deviated from *Terry.* The investigations do not leave room for more fundamental reform. The approach is not unlike saying that because the Supreme Court has found the death penalty to be constitutional, no state can abolish it.

54. See *Tennessee v. Garner,* 471 U.S. 1 (1985).

55. See Hall, p. 648.

56. Ibid.

57. See *Richards v. Wisconsin,* 549 N.W.2d 218, 231 n. 12 (1996) (Abrahamson, J., concurring).

58. Ibid.

59. For minorities, the Diallo case was no aberration. Indeed, it is telling that while white parents residing in middle-class neighborhoods rarely set aside time to give their teenagers tips on how to survive an encounter with the police department, in America's cities, caring minority parents are forced to do just that. See Dan Barry, "What to Do If You're Stopped by the Police," *New York Times*, February 27, 2000.

60. See Lynne Duke, "Defense Cites Officers' Fear of Diallo," *Washington Post*, February 23, 2000, p. A3.

61. It is true, of course, that such disabilities would contribute to the confusion of any fast-moving police encounter. That is why the police should refrain from forcing such situations. It is one thing for an officer to be summoned to a home on a domestic violence call and to have to deal with a volatile situation with a family that is not fluent in English. It is another thing entirely for plainclothes officers to actively confront and "toss" people haphazardly in the streets.

62. David Kopel has noted the strain that gun control laws place on the Constitution: "One cannot comply with the Fourth Amendment—which requires that searches be based upon probable cause—and also effectively enforce a gun prohibition." David B. Kopel, "Trust the People: The Case against Gun Control," Cato Institute Policy Analysis no. 109, July 11, 1988, p. 10.

63. See *New York v. Cherry*, 121 N.E.2d 238 (1954).

64. Unfortunately, some police chiefs have learned little from the Diallo incident. See Fox Butterfield, "Police Chiefs Shift Strategy, Mounting a War on Weapons," *New York Times*, September 7, 1999, p. A1.

65. See *Richards v. Wisconsin*, 520 U.S. 385 (1997); and *Wilson v. Arkansas*, 514 U.S. 927 (1995).

66. See Kocieniewski, "Success of Elite Police Unit Exacts a Toll on the Streets."

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