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DOMESTIC DRUG INTERDICTION OPERATIONS: FINDING THE BALANCE

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"In this 'anything goes' war on drugs, random knocks on the doors of our citizens' homes seeking consent to search for drugs cannot be far away. This is not America."

—Judge Sporkin, United States v. Lewis, 728 F. Supp. 784, 788-79 (D.D.C. 1990), *rev'd*, 921 F.2d 1294 (D.C.Cir. 1990).

I. INTRODUCTION

The last decade has seen a proliferation of drug-related crimes in this country so great as to prompt the President to adopt a war theme regarding the nation's strategy.[1] In response to the growing drug crisis, law enforcement agencies nationwide have made fundamental changes in their policing tactics. Whereas in the past police officers patrolled neighborhoods and made individual determinations that certain persons should be investigated,[2] today law en-

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[1] In an address to the nation, President Bush has stated: "To win the war against addictive drugs . . . will take a national strategy, one that reaches into every school, every workplace, involving every family. . . . Our outrage against drugs unites us, brings us together behind this one plan of action, an assault on every front." President George Bush, Address to the Nation on the National Drug Control Strategy (Sept. 5, 1989), *in* 25 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 1304, 1305, 1307-8 (1989).

[2] An abundance of literature addresses the limits of the authority of the police in patrolling neighborhoods. *See* Edwin J. Butterfoss, *Bright Line Seizures: The Need for Clarity in Determining When Fourth Amendment Activity Begins*, 79 J. CRIM. L. & CRIMINOLOGY 437 (1988); Thomas K. Clancy, *The Supreme Court's Search For A Definition of a Seizure: What is a "Seizure" of a Person Within the Meaning of the Fourth Amendment?*, 27 AM. CRIM. L. REV. 619 (1990); George E. Dix, *Nonarrest Investigatory Detentions In Search And Seizure Law*, DUKE L.J. 849 (1985); Terence C. Gill, *Regulating the Police in Investigatory Stops: A Practical Alter-*

forcement officers at all levels of government participate in wide-scale drug interdiction operations in which they investigate large numbers of people in transit. The police have, in effect, adopted a regulatory model of policing, much like that used to regulate certain industries. The police treat the drug trade as an industry and the people in transit via airplanes, buses, trains or cars as the possible employees.

A closer look at the most common regulatory-style operations used for domestic drug interdiction reveals a number of serious drawbacks. The most fundamental flaw of the operations is their reliance on an inquisitorial style of investigation which entails police questioning of individuals and the search of individuals based on their voluntary consent. A second flaw stems from the dragnet approach utilized in conducting these inquisitorial investigations. Since the vast majority of individuals investigated are law-abiding citizens, not criminals, a large number of innocent people must be investigated in order to find a few drug traffickers. Thus, the operations have proven to have little utility in fighting the drug war. Moreover, operations that effectively place every person investigated under suspicion until they convince the police of their innocence tend to alienate the public, thereby impeding attempts to enlist public support of the police effort. This is particularly true in the case of working-class persons and racial minorities, who are often the targets of these operations.

The Supreme Court has given virtually free reign to the police in conducting drug interdiction operations by upholding the constitutionality of every new method it has reviewed.[3] In order to do so,

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native to Bright Line Rules, 59 S. CAL. L. REV. 183 (1985); Scott J. Glick, Note, *Reexaming Fourth Amendment Seizures: A New Starting Point*, 9 HOFSTRA L. REV. 211 (1980); Wayne R. La Fave, *Constitutional Rules For Police: A Matter of Style*, 41 SYRACUSE L. REV. 849 (1990); Wayne R. La Fave, *"Seizures" Typology: Classifying Detentions of the Person To Resolve Warrant, Grounds, and Search Issues*, 17 J. OF L. REF. 417 (1984); Wayne R. LaFave, *"Street Encounters" and the Constitution: Terry, Sibron, Peters, and Beyond*, 67 MICH. L. REV. 39 (1968); Tracy Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 CORNELL L. REV. 1258 (1990); Peter Preiser, *Confrontations Initiated By the Police on Less than Probable Cause*, 45 ALBANY L. REV. 57 (1980); Rachel A. Van Cleave, *Michigan v. Chesternut and Investigative Pursuits: Is There No End to the War Between the Constitution and Common Sense?*, 40 HASTINGS L. J. 203 (1988); Christine M. Wiseman, *The "Reasonableness" of the Investigative Detention: An "Ad Hoc" Constitutional Test*, 67 MARQ. L. REV. 641 (1984).

[3] The Supreme Court itself has on many occasions suggested new assertive investigative techniques. *See, e.g.*, Delaware v. Prouse, 440 U.S. 648, 663 (1979) (suggesting that states might implement roadblock-type stops for questioning of all oncoming traffic); Davis v. Mississippi, 394 U.S. 721, 728 (1969) (suggesting that warrants based on reasonable suspicion might be used to briefly detain people for fingerprinting); Hayes v. Florida, 470 U.S. 811, 816 (1985) (suggesting that brief detention for on-site fingerprinting based on reasonable suspicion would pass constitutional muster); Florida v.

the Court has adapted the jurisprudence applicable to administrative search cases to the drug industry. While the Court's newest cases upholding drug interdiction operations can most obviously be faulted for doing violence to Fourth Amendment jurisprudence, an equally important net effect of the cases is to remove the Supreme Court from its former role in maintaining the proper balance of interests between the vigorous enforcement of criminal laws and the protection of individual civil liberties.

With the absence of effective Supreme Court oversight, the task of ensuring a balance between police authority and individual autonomy falls to state courts interpreting state law, and to both federal and state legislatures and community boards in charge of overseeing the police. Fortunately, the choice is not between maintaining the present menu of interdiction operations and returning to the hit-or-miss approach of reactive police patrols. Alternatives to the dragnet, inquisitorial approach include an increased reliance on drug-sniffing dogs and the use of comprehensive community-oriented programs that encourage community volunteer efforts in partnership with the police. These methods have proven more effective and offer other important benefits not provided by the present methods.

This Article passes a critical eye over some of the domestic drug interdiction operations being popularized by police forces across the country and explores the various legal and policy issues they raise. It argues that state and local authorities should replace these procedures with other, less intrusive forms of investigation. In Part I, the Article explores the transformation of policing from its previous reactive model to the more sophisticated regulatory model. This section assesses a number of systematic investigative methods and examines the Supreme Court's reliance on administrative search jurisprudence to uphold each of them. Part II of the Article examines a number of alternatives to the present methods of drug interdiction and addresses various criteria that should guide policy makers in implementing police procedures so as to bring about a proper balance between the interests of law enforcement and individual civil liberties.

Royer, 460 U.S. 491, 505 (1983) (suggesting use of drug sniffing dogs to inspect luggage in airports).

II. THE DEVELOPMENT OF A REGULATORY MODEL OF POLICING

A. DRUGS, CRIME AND FEDERAL GOVERNMENT INFLUENCE IN THE TRANSFORMATION OF POLICE WORK

The seriousness of the drug problem in this country can hardly be overstated. Americans have shown "unprecedented concern over epidemic levels of drug use and frightening amounts of drug-related crime"[4] in recent years. The true costs to society of the prevalence of illegal narcotics are difficult to quantify, but they are by all accounts extremely high.[5]

In response to the drug crisis facing state and local law enforcement agencies across the nation, the federal government has stepped in to provide abundant resources and training. In fact, the growth of the overall federal budget for drug control programs is daunting. Since 1981, federal spending has increased 700%, from $1.7 billion in 1981 to a requested $11.7 billion for 1992.[6] Seventy percent of this budget is appropriated to "supply reduction" activities such as purchasing patrol cars or aircraft, building prisons, and drug interdiction operations.[7] The Drug Enforcement Administration (hereinafter "DEA"), the frontline federal agency in the government's interdiction effort, had an operating budget of nearly $700 million in 1991.[8] In addition, federal agencies, including the Federal Bureau of Investigation, the U.S. Customs Service, the U.S. Coast Guard, and many others each receive a budget for drug control programs.[9]

State and local law enforcement agencies benefit from the wealth of federal resources as well. In 1990, the federal government provided $2.3 billion dollars to state and local governments for drug control measures.[10] In addition, the DEA participates in state and local drug interdiction efforts primarily through "DEA State

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4 GEORGE BUSH, NATIONAL DRUG CONTROL STRATEGY 1 (1991). In 1991, almost half of the Federal prison inmates and three-fourths of the state inmates admit to using drugs. *Id.* at 55.

5 *See, e.g.*, Sally J. Suddock, *Substance Abuse Cost: $249 Billion*, 11 ALASKA J. OF COM. 1 (1987) (reporting results of federal study of societal costs of drug and alcohol abuse and mental illness, which is thought often to result from substance abuse); Editorial, *Rehabilitation: Way to Conguer Crack, L.A. Times*, May 20, 1990 at M6 (an estimated 860,000 Americans regularly use cocaine, and 2.2 million Americans are addicted to cocaine).

6 BUSH, *supra* note 4, at 133-34.

7 *Id.* at 134.

8 *Id.* at 140.

9 *Id.*

10 Office of National Drug Control Policy White Paper, FEDERAL DRUG GRANTS TO STATES 1 (1991).

and Local Task Forces."[11] Although such cooperative task forces came into being as early as 1973, the DEA did not provide substantial federal funds as an incentive to encourage participation until the 1980's.[12] The DEA assumes the costs of investigative overtime for non-federal personnel, an expense which can amount to hundreds of thousands of dollars annually.[13] The DEA also provides "investigative expenses, such as payments to informants and 'buy money' to purchase contraband, as well as undercover vehicles and surveillance equipment."[14] In addition, the state and local participants share in the assets, such as vehicles, seized under the federal asset forfeiture program.[15] Moreover, state and local agents not involved in task forces can enlist DEA cooperation in the investigation of a particular case on an informal, ad hoc basis, and can also share in any assets forfeited as a result of the case.[16] This type of informal cooperative effort has become an increasingly popular activity.[17]

As a result of direct federal participation as well as federal funding and training of state and local officers, street level drug interdiction efforts have become remarkably sophisticated. Today the police devote a much greater percentage of their time to wide-scale, proactive investigative procedures aimed at drug interdiction.[18]

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11 JAN CHAIKEN et al, MULTIJURISDICTIONAL DRUG LAW ENFORCEMENT STRATEGIES: REDUCING SUPPLY AND DEMAND 44-45 (National Institute of Justice ed., 1990); Richard Bocklet, *DEA-State and Local Task Forces: A Body For Law Enforcement, in* LAW & ORDER MAGAZINE 272 (Jan. 1991).

12 Chaiken et al, *supra* note 11, at 44-45.

13 *Id.* at 45.

14 *Id.*

15 *Id.*; Bocklet, *supra* note 11, at 272.

16 Chaiken et al, *supra* note 11, at 48.

17 *Id.* at 45.

18 The use of some proactive police tactics, such as the use of undercover officers, came into existence with the creation of the first police departments in the mid-nineteenth century. BARTON INGRAHAM & THOMAS P. MAURIELLO, POLICE INVESTIGATION HANDBOOK at § 16.02 at 16-4 (1990); JEROME H. SKOLNICK, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY 139-63 (2d ed. 1975). Nonetheless, the mainstay of policing activity — the police patrol — can best be described as primarily reactive in nature. For most of this century, police patrol work generally has entailed responding to citizen telephone calls registering complaints of many types. ALBERT J. REISS JR., THE POLICE AND THE PUBLIC 63-64 (1971); Gary W. Cordner, *The Police On Patrol, in* POLICE AND POLICING: CONTEMPORARY ISSUES 60 (Dennis Jay Kenney ed., 1989). *See generally The Functions of the Police in Modern Society, in* EGON BITTNER, ASPECTS OF POLICE WORK 89 (1990). Despite the changes in the form of transportation utilized by patrol officers, the fundamental nature of the police patrol has remained the same throughout most of the century. *See, e.g.*, GEORGE L. KELLING, FOOT PATROL (National Institute of Justice ed., 1988). While police patrols may be considered "preventive" or "proactive" in the sense that they are believed to deter crime, most policing activity is in actuality purely passive and reactive. *See contra* George L. Kelling, Anthony Michael Pate, Duane Dieckman & Charles E. Brown, *The Kansas City Preventive Patrol Experiment in* Cordner, *supra*, at 45, 47.

These police-initiated investigative procedures are aimed at large groups of people as to whom the police generally have no suspicion of wrongdoing. Rather than simply reacting to reports of crime, the police now take the initiative actively to seek out possible crimes by approaching, questioning, and searching the general public in a methodical fashion.

Police investigative procedures utilizing this inquisitorial approach share several key characteristics: The police are trained to approach an individual and engage him or her in an interview. The interview generally entails a series of questions regarding the person's identity and itinerary. During the interview, the police also request to see the person's identification and transportation tickets. Finally, the police request the person's consent to a search of the person and his or her belongings. The ultimate objective of these inquisitorial encounters is the search. The basic assumption underlying each of these operations is that guilty people will voluntarily admit their illegal activities to the police and will of their own free will hand over incriminating evidence. A number of new techniques have been developed which utilize this inquisitorial approach to investigate persons traveling via commercial airplanes, buses and trains, as well as those traveling via automobiles both on highways and in urban areas.[19]

Because even local police officers now receive high quality training by the DEA, street level drug interdiction programs have resulted in surprisingly few complaints of individual police officer misconduct, such as unjustified, armed threats or arbitrary harassment. On the contrary, the officers conducting these new investigative techniques proceed in a fairly standardized manner consistent with the legal limits of their authority. The new tactics, however, raise serious concerns, because the procedures themselves are flawed. Inquisitorial investigative procedures require the police to take affirmative steps to confront individuals in situations in which they often have absolutely no basis to suspect criminal activity. Moreover, while the operations may proceed in a fairly standardized manner, they nonetheless afford individual officers sufficient discretion to exercise their personal biases or prejudices in selecting persons to investigate.

An additional objection to the new methods of policing is that,

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[19] *See, e.g.*, United States v. Mendenhall, 446 U.S. 544 (1980) (airports); Florida v. Bostick, 111 S.Ct. 2382 (1991) (buses); Alvarez v. State, 515 So.2d 286 (Fla. Dist. Ct. App. 1987) (trains); Galberth v. United States, 590 A.2d 990 (D.C. 1991) (automobile drivers in residential areas); State v. Sims, 808 P.2d 141 (Utah App. 1991) (automobile driver along major highway).

while previous police-citizen encounters generally occurred "on the street," proactive investigative activity has brought the police into new environments, such as airport terminals, train stations, and the interiors of passenger trains and commercial buses. Indeed, even the private homes of innocent people may soon be subject to wide-scale, police-initiated investigative activities. The likelihood of this eventuality is illustrated by several experimental projects already underway around the country.[20]

As a result of the proliferation of the new policing methods, police have made increasing use of proactive stops based on little or no suspicion. This disturbing trend paints a picture of a country that employs groundless authoritarian confrontations as a regular law enforcement technique. The increasing reliance upon these operations will lead to a state of affairs wherein countless individuals will be intimidated into relinquishing their freedom to travel about, and will lose the dignity and self-respect which can exist only when the privacy of their bodies and personal belongings is respected.

B. SUPREME COURT ADAPTATION OF ADMINISTRATIVE SEARCH JURISPRUDENCE TO THE REGULATORY MODEL OF POLICING

The Supreme Court, seemingly oblivious to the legitimate interests of innocent travelers, has enthusiastically ratified the regulatory model of policing. As the Court has confronted an increasing number of dragnet, inquisatorial, investigative procedures, it has adapted the rationales of the administrative inspection cases to the new regulatory model of policing for general law enforcement. The principles applied in administrative search cases, however, have been derived from considerations not present in criminal law en-

[20] In implementing a police reform project called "community policing," which in part involves getting police officers out of patrol cars and into the neighborhoods, Detroit and Houston implemented a program of "house visits" whereby the police went door-to-door to ask about security problems, offer services, solicit suggestions about police activity and sometimes collect information about residents. The officers reportedly received a warm reception. JEROME H. SKOLNICK & DAVID H. BAYLEY, COMMUNITY POLICING: ISSUES AND PRATICES AROUND THE WORLD 9 (National Institute of Justice ed., 1988). However, in a similar program conducted in New York City, the police were criticized for using community policing as a means of gathering intelligence about a neighborhood. *Id.* at 85. *See also* LAWRENCE SHERMAN, NEIGHBORHOOD SAFETY 3 (National Institute of Justice ed., 1988) (fear-reduction experiment in Houston sought to increase communication with residents by having police "knock on doors and chat with pedestrians"); *cf.* Wyman v. James, 400 U.S. 309 (1971) (welfare recipient must submit to warrantless home inspections); Camara v. Municipal Court of San Francisco, 387 U.S. 523 (1967) (occupants of public housing must submit to inspections for fire code violations). Unwarranted invasions of persons' homes is contrary to the primary purpose of the Fourth Amendment. *See* NELSON B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE CONSTITUTION 55-78 (1937).

forcement cases. Thus, the decisions upholding regulatory-style police operations fit awkwardly into the line of administrative search cases.

In a series of cases derived from the administrative search case of *Camara v. Municipal Court*,[21] the Supreme Court has upheld virtually every case involving systematic police questioning of people as to whom they have no individualized suspicion of wrongdoing. Ironically, the *Camara* case emerged during the Warren Court's "revolution" in constitutional criminal procedure, a revolution which raised the standards for acceptable police conduct to unprecedented levels[22] and made these standards applicable to both federal and state law enforcement agencies.[23]

Even as it was raising the standards, however, the Court confronted situations governed by the Fourth Amendment that justified giving the police and other government officials a measure of latitude in their dealings with the public. These situations could not adequately be regulated by restricting government involvement only to cases in which government agents had obtained a judicial warrant based on probable cause. Thus, in cases involving government regulation of public housing, welfare programs, or industries in which there existed a heightened governmental interest in regulation, the Court felt obliged to lower the standard of suspicion required for a search or seizure below the usual quantum of probable cause.

In *Camara*, the Court first articulated the theoretical underpinnings for this lower threshhold and upheld safety inspections of public housing pursuant to warrants issued upon less than probable cause. In so doing, the Court centered its inquiry on the "reasonableness" of the search by balancing "the need to search against the invasion which the search entails."[24] However, the Court carefully

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21 387 U.S. 523 (1967).

22 *See, e.g.*, Katz v. United States, 389 U.S. 347 (1967) (warrantless electronic recording of telephone conversation made from public telephone violates Fourth Amendment); Miranda v. Arizona, 384 U.S. 436 (1966) (police may not undertake custodial interrogation of suspect without informing suspect of applicable constitutional rights); United States v. Wade, 388 U.S. 218 (1967) (police may not subject arrestee to eyewitness identification lineup without affording right to presence of counsel); Chimel v. California, 395 U.S. 752 (1969) (limiting search incident to arrest to arrestee's person and area within immediate control); Wong Sun v. United States, 371 U.S. 471 (1963) (government may not introduce at trial evidence derived from prior illegality).

23 By adopting a doctrine called "selective incorporation," the Warren Court made the federal constitutional provisions governing criminal procedure equally applicable to the states as to the federal courts. *See* WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 2.5 at 49-60 (1985).

24 *Camara*, 387 U.S. at 536-37.

limited the reach of this analysis by emphasizing that *Camara* did not involve the highly personal invasion of privacy present in searches utilized in criminal law enforcement.[25]

Nonetheless, the *Camara* balancing test was soon applied to legitimize the authority of the police to approach pedestrians on the street for questioning as well. Thus, within a year of its decision in *Camara*, the Court had applied the rationale for allowing administrative searches in *Camara* to a case which broadened the authority of the police to accost people in public for general law enforcement reasons. In *Terry v. Ohio*,[26] the Court applied the *Camara* balancing test to determine the reasonableness of a police officer's conduct in stopping and frisking a citizen that the officer reasonably believed was armed and dangerous.[27]

During the twenty-three years since *Camara* and *Terry*, the two areas of law — that governing non-criminal regulatory investiga-

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25 In applying this balancing test, the Court considered a number of factors including the extent to which the search might constitute an "invasion of . . . privacy." *Id.* at 537. The Court was satisfied that the privacy interests of the residents were adequately protected since the inspections at issue were not "personal in nature" or "aimed at the discovery of evidence of crime." *Id.* Additionally, the Court required that fair and objective procedures be followed in the selection of those residences to be searched. *Id.* at 538. Thus, two important factors in the *Camara* inspections that supported its constitutionality were that the non-criminal purpose of the investigations rendered the invasion of privacy minimal and that the selection of persons for investigation would be done in an objective and fair manner. *Id.* at 537-538. The *Camara* rationale was soon extended to administrative inspections of businesses [See v. City of Seattle, 387 U.S. 541 (1967)], inspections of homes by welfare workers [Wyman v. James, 400 U.S. 309 (1971)], inspections at fire scenes [Michigan v. Tyler, 436 U.S. 499 (1978)], and border searches [United States v. Martinez-Fuerte, 428 U.S. 543 (1976)].

26 392 U.S. 1 (1968). Before *Terry*, it was clear that in order to "arrest" someone, that is, to take someone into police custody for an extended period of time, the government was required to establish that "probable cause" existed. Under the traditional definition, "probable cause" existed where "the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information [were] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense ha[d] been or [was] being committed" and that the suspect was the person who committed or was committing the offense. Brinegar v. United States, 338 U.S. 160, 175-76 (1949). More recently, the Court in Illinois v. Gates, 462 U.S. 213, 238 (1983), stated that probable cause to search exists if there is a "fair probability that contraband or evidence of a crime will be found in a particular place."

27 The police officer in this case observed three men apparently "casing" a store for a possible robbery. They walked back and forth in front of it many times and stopped to confer with each other. Because the officer believed the men were planning to rob the store, he had reason to believe they might be armed and dangerous. The case called upon the Court to determine the appropriate course of action for an officer to take in similar circumstances. Here, the officer had approached the suspects, asked them some questions to which they gave mumbled responses, and then grabbed and "frisked" them for weapons. *Terry*, 392 U.S. at 5-7. In finding the stop and frisk procedure to be reasonable, Chief Justice Warren acknowledged the danger to police officers from "American criminals [who] have a long tradition of armed violence." *Id.* at 23.

tions and that governing criminal law enforcement — have developed simultaneously and symbioticly. The Court has proceeded in a consistent fashion to decide cases in the administrative search context and then almost immediately apply them without any limitations in the criminal law enforcement area. In hindsight, it can be said that *Camara* opened the floodgate to numerous types of investigative stops and searches on less than probable cause.[28] Increasingly, the administrative search rationales have served to justify dragnet, inquisitorial drug interdiction operations.[29]

The following sections examine three types of systematic, inquisitorial operations used to detect drug traffickers, and demonstrate the Supreme Court's willingness to turn to administrative search jurisprudence to justify increasingly greater intrusions of citizens' privacy in order to stem the flow of illegal narcotics.

1. Drug Courier Profile Operations

The first form of systematic investigation was the use by the DEA of "drug courier profiles" to identify drug traffickers in airports.[30] This technique has received much attention since it was developed in the mid-1970's.[31] Today, both federal and state law enforcement agencies have modified the profiles for use in special

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[28] *See, e.g.*, Cathy Cox et al., Comment, *An Emerging New Standard For Warrantless Searches and Seizures Based on Terry v. Ohio*, 35 MERCER L. REV. 647 (1984); Daniel M. Harris, *The Supreme Court's Search and Seizure Decisions of the 1982 Term: The Emergence of a New Theory of the Fourth Amendment*, 36 BAYLOR L. REV. 41, 43-45 (1984); Arnold H. Loewy, *Protecting Citizens From Cops And Crooks: An Assessment Of The Supreme Court's Interpretation Of The Fourth Amendment During The 1982 Term*, 62 N.C.L. REV. 329 (1984); Ronald F. Wright, *The Civil and Criminal Methodologies of the Fourth Amendment*, 93 YALE L.J. 1127 (1984).

[29] *See, e.g.*, New York v. Burger, 482 U.S. 106 (1987) (upholding warrantless inspection of junk yard as "necessary to further regulatory scheme" which aimed at detecting automobile theft).

[30] *See, e.g.*, United States v. Whitehead, 849 F.2d 849 (4th Cir. 1988), *cert. denied*, 488 U.S. 983 (1988).

[31] *See, e.g.*, Charles L. Becton, *The Drug Courier Profile: "All Seems Infected That Th' Infected Spy, As All Looks Yellow To The Jaundic'd Eye*, 65 N.C.L. REV. 417 (1987); Morgan Cloud, *Search and Seizure By The Numbers: The Drug Courier Profile And Judicial Review Of Investigative Formulas*, 65 B.U.L. REV. 843 (1985); Alexandra Coulter, Project, *Drug Couriers and the Fourth Amendment: Vanishing Privacy Rights for Commercial Passengers*, 43 VAND. L. REV. 1311 (1990); Emily J. Dark et al., Note, *Search and Seizure — Airport Drug Seizures: How the Federal Courts Strike The Fourth Amendment Balance*, 58 NOTRE DAME L. REV. 668 (1983); Mitchell M. Gaswirth, Comment, *Reformulating Seizures — Airport Stops and the Fourth Amendment*, 69 CALIF. L. REV. 1486 (1981); Peter S. Greenberg, *Drug Courier Profiles, Mendenhall and Reid: Analyzing Police Intrusions on Less Than Probable Cause*, 19 AM. CRIM. L. REV. 49 (1981); Kathleen Mahoney, Comment, *Drug Trafficking at Airports — The Judicial Response*, 36 U. MIAMI L. REV. 91 (1981); Rebecca A. Stack, Note, *Airport Drug Searches: Giving Content to the Concept of Free and Voluntary Consent*, 77 VA. L. REV. 149 (1991).

surveillance operations in train stations,[32] in bus stations,[33] and on highways.[34]

The use of drug courier profiles allows the police systematically to investigate passengers, travelling through transportation terminals, who have been selected on the basis of certain characteristics found to fit a profile. In this way, drug courier profile operations shift police practices away from investigations based on individualized suspicion or individual citizen complaints and toward an administrative-style of operation that targets anyone who happens to satisfy a checklist.

The Supreme Court has described the "profiles" as "an informally compiled abstract of characteristics thought typical of persons carrying illicit drugs."[35] These "profiles" have purportedly been used as a substitute for or as an aid to traditional police surveillance for suspicious behavior.[36] The obvious logic behind the creation of profiles is that they allow the aggregation of the experience of many

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[32] United States v. Tartaglia, 864 F.2d 837 (D.C. Cir. 1989); United States v. Carrasquillo, 670 F. Supp. 49 (D.D.C. 1987), *aff'd*, 877 F.2d 73 (D.C. Cir. 1989); United States v. Whitehead, 849 F.2d 849 (4th Cir. 1988), *cert. denied*, 488 U.S. 983 (1988); United States v. Silk, 695 F. Supp. 30 (D.D.C. 1988); United States v. Savage, 889 F.2d 1113 (D.C. Cir. 1989); United States v. Battista, 876 F.2d 201 (D.C. Cir. 1989); United States v. Brady, 842 F.2d 1313 (D.C. Cir. 1988); United States v. Baskin, 886 F.2d 383 (D.C. Cir. 1989), *cert. denied*, 111 S. Ct. 113 (1990); United States v. Colyer, 878 F.2d 469 (D.C. Cir. 1989); United States v. Trayer, 898 F.2d 805 (D.C. Cir. 1990), *cert. denied*, 111 S. Ct. 113 (1990); United States v. Tavolacci, 704 F. Supp. 246 (D.D.C. 1988), *aff'd*, 895 F.2d 1423 (D.C. Cir. 1990).

[33] United States v. Winston, 711 F. Supp. 639 (D.D.C. 1989), *rev'd*, 892 F.2d 112 (D.C. Cir. 1989). More often, officers simply will focus their attention on bus travelers as they walk through the terminal or sit in a bus. The officers may decide that a person looks "suspicious," although there ordinarily is not reasonable suspicion of wrongdoing. Based on their hunches, they may follow the passenger into the bus or outside the terminal. *See* United States v. Morris, 738 F. Supp. 20 (D.D.C. 1990); United States v. Alston, 742 F. Supp. 13 (D.D.C. 1990); United States v. Madison, 774 F. Supp. 13 (D.D.C. 1990), *rev'd*, 936 F.2d. 90 (2d Cir. 1991); United States v. Ashley, 761 F. Supp. 3 (D.D.C. 1991).

[34] *See, e.g.*, United States v. Sharpe, 470 U.S. 675 (1985); *see generally*, Mark G. Ledwin, Comment, *The Use of the Drug Courier Profile In Traffic Stops: Valid Police Practice or Fourth Amendment Violation?*, 15 OHIO N.U.L. REV. 593 (1988); Diana Patton, Note, *Miles of White Lines: The Use of The Drug Courier Profile By State Law Enforcement Agencies On The Highway As Reasonable Suspicion To Detain Motorists*, 30 ARIZ. L. REV. 949 (1988).

In addition, "profiles" are also used by the Immigration and Naturalization Service and the Border Patrol to detect illegal aliens, see United States v. Brignoni-Ponce, 422 U.S. 873 (1975); and the police have also developed a drug smuggling vessel profile, a stolen car profile, a stolen truck profile, an alimentary-canal smuggler profile, a battering parent profile and even a poacher profile. Becton, *supra* note 31, at 424-25.

[35] United States v. Mendenhall, 446 U.S. 544, 547 n.1 (1980).

[36] In airports, DEA agents will surveil passengers who travel from "source cities" such as Miami or Los Angeles, cities which are considered the sources of drug distribution to other cities. The agents often cite profile factors such as exiting the plane first or last, "scanning" the terminal upon deplaning, walking very fast or very slowly, checking

narcotics agents from which can be distilled a set of characteristics most often possessed by drug couriers.[37] The use of this composite set of characteristics is presumably thought to be superior to individual officers' reliance on their personal observations, beliefs and judgments. The DEA, despite its continued defense of drug courier profiles, has never made the profile characteristics public.[38] Nevertheless, the numerous lower court cases in which agents have listed profile characteristics have made them well-known. Significantly, although courts speak of drug courier profiles as though there were one well-established profile, there is clearly no single, national drug courier profile. Profiles vary according to region, mode of the courier's transportation (*i.e.*, plane, automobile, etc.), and law enforcement agency.

Drug courier profile operations have impressed some members of the Court, particularly Justice Powell, who has described the DEA operation as "a highly specialized law enforcement operation designed to combat the serious societal threat posed by narcotics distribution."[39] Justice Powell has also emphasized both the importance and the difficulty of discovering drug smugglers traveling on commercial airlines. He has written, for example:

> The public has a compelling interest in detecting those who would traffic in deadly drugs for personal profit. Few problems affecting the health and welfare of our population, particularly our young, cause greater concern than the escalating use of controlled substances. Much of the drug traffic is highly organized and conducted by sophisticated criminal syndicates. The profits are enormous. And many drugs, including heroin, may be easily concealed. As a result, the obstacles to detection of illegal conduct may be unmatched in any other area of law enforcement.[40]

The DEA's airport surveillance operation involving the use of drug courier profiles first received Supreme Court approval in *United States v. Mendenhall*[41] and *Florida v. Royer*.[42] The two salient issues before the Court were: (1) the permissibility of a police officer's approaching citizens in public to make inquiries, and the

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in no luggage, making quick turn-around trips, buying a one way ticket, paying in cash, switching airlines, and many others. *See, e.g.*, Becton, *supra* note 31, at 430-438.

37 *See id.* at 426.

38 INGRAHAM & MAURIELLO, *supra* note 18, at § 14.02 (2).

39 *Mendenhall*, 446 U.S. at 562 (Powell, J., concurring in part and concurring in the judgment). In his concurring opinion in *Florida v. Royer*, Justice Powell again expressed his confidence in the expertise of the DEA, stating, "the Drug Enforcement Administration has assigned highly skilled agents to the major airports . . . ." 460 U.S. 491, 508 n.2 (1983) (Powell, J., concurring in part and concurring in the judgment).

40 *Mendenhall*, 446 U.S. at 561-2 (1980).

41 446 U.S. 544 (1980) (opinion of Stewart, J.).

42 460 U.S. 491 (1983).

point at which such an encounter is transformed into a Fourth Amendment "seizure,"[43] and (2) the standard for judging whether a person has voluntarily given consent to a search.

a. Distinguishing Mere Inquiries From Seizures

In *Mendenhall*, the members of the Court readily agreed that police officers have a right, like any other citizen, to pose questions to individuals, and that such questioning would not transform the encounter into a "seizure" requiring at least reasonable suspicion of wrongdoing.[44] Writing for a plurality in *Florida v. Royer*, Justice White articulated the "right-to-inquire" rule,[45] acknowledging that:

> law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in criminal prosecution his voluntary answers to such ques-

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[43] It is important to understand the distinction drawn by the Court between the right to inquire and the parameters of a *Terry* stop for investigation on reasonable suspicion. The right to inquire rule allows a police officer to approach a person and pose questions, but the person remains, as a legal matter, free to walk away without responding. In Wainwright v. City of New Orleans, 392 U.S. 598 (1968), Justice Fortas argued that the right to inquire included the right to arrest if the person did not cooperate by answering the inquiries. This position has been resoundingly rejected in later Supreme Court cases. *See also infra* notes 44-56 and accompanying text; Maclin, *supra* note 2, at 1267-68.

In contrast, the police may *detain* a person for a brief period in order to pose questions during a *Terry* stop. During a *Terry* stop, a person is free not to respond to the inquiries, but may not walk away. Thus, it is one's freedom to walk away that is infringed during a *Terry* stop. Terry v. Ohio, 392 U.S. 1 (1967).

[44] In his concurring opinion in *Terry*, Justice White emphasized that a police officer is always free to ask questions of citizens on the street, but "absent special circumstances, [such as those in *Terry*], the person approached may not be detained or frisked but may refuse to cooperate and go on his way." 392 U.S. at 34-35; *see also, id.* at 32-33 (Harlan, J., concurring) (police officer has "the liberty (again, possessed by every citizen) to address questions to other persons, for ordinarily the person addressed has an equal right to ignore his interrogator and walk away").

The Fifth Amendment implications of police questioning during drug interdiction operations have gone unexplored by the courts. Whether the protections against self-incrimination provided in Miranda v. Arizona, 348 U.S. 436 (1966), apply ultimately turns on whether the Fourth Amendment has been violated. *Miranda* warnings must issue before the police question a person who is in "custody," in other words, whenever a person has been "seized." Berkemer v. McCarty, 468 U.S. 420 (1984). Thus, courts have focused on the Fourth Amendment "seizure" issue and have not reached the Fifth Amendment issues involved when police ask questions which may call for self-incriminating responses. *See generally*, Allan D. Hallock, Note, *Stop-and-Identify Statutes After Kolender v. Lawson*: Exploring the Fourth and Fifth Amendment Issues, 69 IOWA L. REV. 1057, 1075-79 (1984).

[45] For a helpful discussion of the origins of the right-to-inquire rule, *see* Maclin, *supra* note 2, at 1266-70; *see also* Charles A. Reich, *Police Questioning Of Law Abiding Citizens*, 75 YALE L.J. 1161 (1966).

> tions. Nor would the fact that an officer identifies himself as a police officer, without more, convert an encounter into a seizure requiring some level of objective justification. However, a person need not answer any question put to him; may decline to listen to questions at all and may go on his way. He may not be detained even momentarily without reasonable, objective grounds for doing so, and his refusal to listen or answer does not, without more, furnish those grounds.[46]

The plurality in *Royer* thus more explicitly reaffirmed the authority of the police to engage in inquisitorial investigative operations of individuals as to whom they may have no suspicion of wrongdoing. The police have the right to approach anyone at any time and pose questions of virtually any sort entirely free of any Fourth Amendment constraint. This has been referred to as a "classic consensual encounter."[47]

A more difficult issue for the Court, and one as to which no clear consensus emerged from the cases, is the question of what police conduct constitutes a "show of authority" such that the individual being investigated is effectively "seized" for Fourth Amendment purposes.[48] In *Mendenhall*, Justice Stewart set out what would become the prevailing definition of a seizure.[49]

In *Mendenhall*, the Court assessed a drug courier profile investigation in which a woman was stopped and asked for identification and airline tickets and subsequently asked to go to a police room for a body search.[50] Justice Stewart's analysis of the airport encounter began with a reaffirmation of the right to inquire rule which authorizes police officers to approach citizens for the simple purpose of making a few inquiries. Rejecting the proposition that mere inquiries constitute a seizure, the Court cited *Terry* in finding that "a person is 'seized' only when, by means of physical force or a show of authority, his freedom of movement is restrained."[51] Accordingly, a seizure by means of a "show of authority" has occurred "only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."[52]

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46 *Royer*, 460 U.S. 491, 497-98.

47 Immigration and Naturalization Serv. v. Delgado, 466 U.S. 210, 221 (1984).

48 *See infra* note 91 and following text for a discussion of the Supreme Court's most recent decision interpreting the *Mendenhall* "show of authority" test for seizures.

49 Although the section in which Justice White defined a seizure was joined only by Justice Rehnquist, lower courts nonetheless treated this section as the Court's position. *See, e.g.*, Dark et al, *supra* note 31, at 673-79 (1983) and the cases cited therein. The Court's most recent decision in California v. Hodari D., 111 S. Ct. 1547 (1991), should change the way courts interpret the seizure question. *See infra* note 91.

50 United States v. Mendenhall, 446 U.S. 544, 547-548 (1980).

51 *Id.* at 553.

52 *Id.* at 554.

From its very inception, commentators have found little to protest with regard to the test itself, and much to protest with regard to the Court's application of that test.[53] Despite the fact that two white male officers, acting without reasonable suspicion, had employed an inquisitorial approach to investigating a young, black female who had little education, the *Mendenhall* Court treated the case as if an ordinary citizen had approached her to ask her the time.[54] With *Mendenhall*, the Court began a pattern of finding inherently coercive situations insufficient to restrict the reasonable person's freedom to walk away.[55] This application of the "show of authority" test for

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53 *See* Maclin, *supra* note 2, at 1297-1308; Clancy, *supra* note 2, at 628; Van Cleave, *supra* note 2, at 214-19; *see also* Florida v. Bostick, 111 S. Ct. 2382, 2389-95 (1991) (Marshall, J., dissenting).

54 Applying the "show of authority" test to the facts in the case, Justices Stewart and Rehnquist determined that no seizure had occurred. Since the test involves an assessment of the totality of the circumstances, it is difficult in this case and in those that followed to determine precisely what conduct on the part of a police officer converts an encounter from a consensual one to a seizure. Of course, the test, being an objective assessment of the perceptions of the "reasonable person," does not take into account the subjective intent of the officers, nor the subjective perceptions of the citizen approached. Thus, the "surrounding circumstances" taken into account include only those relating to an objective assessment of the police officers' actions and demeanor. Accordingly, in finding that no seizure occurred, Justice Stewart lists the officers' actions, such as the fact that they wore no uniforms, displayed no weapons, etc., in explaining why the encounter was purely consensual. *Mendenhall*, 446 U.S. at 555. 446 U.S. at 555. Moreover, he provided a number of examples of circumstances that might indicate a seizure: "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *Id.* at 554. The *Mendenhall* opinion dismisses the possibility that there should be any requirement to notify citizens of their right to decline to cooperate. *Id.* at 555. For a discussion of a warnings requirement, *see infra* notes 63-64 and accompanying text.

55 Nonetheless, the Court has attempted to place some limits on the authority of the police to "seize" people based only on the officers' observations that a passenger fits a generic checklist, but the line between mere inquiries and "seizures" has not been clearly drawn. In general, the Court has shown a preference for individualized suspicion over suspicion arising solely from the use of profiles without any particular information about the individual. For example, airline employees often alert narcotics agents that particular travelers have behaved suspiciously, such as, by purchasing a one-way ticket and paying in cash, giving a phone number that is not a working number, etc. When officers stop travelers on the basis of previously known facts about the traveler beyond those gathered merely from visual observations, they have a stronger basis for suspecting criminal activity than if they relied on visual observations alone.

In Reid v. Georgia, 448 U.S. 438 (1980) the Court found that the conduct of the officers in chasing and forcibly detaining suspects who had run away constituted a seizure requiring at least reasonable suspicion. *Id.* The Court held that the DEA officers' observations of the suspects as they walked through the terminal, which were said to fit the drug courier profile, constituted at most "an inchoate and unparticularized suspicion or 'hunch'." *Id.* at 441.

In contrast, in United States v. Sokolow, 490 U.S. 1 (1989), the DEA officers had particularized suspicious information about certain passengers which they had received from the ticket agent who had sold them their tickets. *Id.* The Court found that the

Fourth Amendment seizures has been the most potent method employed by the Court to expand the authority of the police to take affirmative steps to initiate investigative encounters without any suspicion of wrongdoing. When police actions are held not to constitute a search or seizure, there are no constitutional restraints on those actions. The police are thus authorized to engage in investigative activity whenever they want, for as long as they want, and with little or no justification, without running afoul of any constitutional limitation.[56]

Thus, the Court's cases establish that the police may single people out for criminal investigation based on their appearing to fit a mechanical (if elusive) checklist, so long as the police merely make inquiries. The police may not, however, move people from the place where they were stopped and take them to a police room unless they agree to go there voluntarily. Otherwise, such movement will escalate the encounter into the equivalent of a full-custody arrest requiring probable cause.

b. Voluntary Consent Determinations

The next step in the execution of drug courier profile investigations involves the request for consent to search a passenger's person or luggage.[57] This method relies on grants of consent, since the police would not otherwise have the authority to search without ob-

officers had reasonable suspicion to stop the passengers based on this individualized information. *Id.* at 8-9.

56 Of course, police conduct is always subject to due process restraints. Thus, if, for example, a particular person were routinely singled out for police questioning on a daily basis for a lengthy period of time premised on no individualized suspicion, a court might find that such police behavior "offends a sense of justice," rendering the activity violative of due process. *See* Rochin v. California, 342 U.S. 165 (1952).

Still other police conduct may escalate the encounter into the equivalent of a full-custody arrest requiring probable cause. Although the Supreme Court again has provided little bright-line guidance for determining exactly what conduct escalates an encounter into an arrest, it appears highly significant, if not determinative, that a suspect is *moved* to another location without his consent.

In *Royer*, for example, the Court found the police conduct effectively placed Royer under arrest. Florida v. Royer, 460 U.S. 491 (1983). The facts of the case are remarkably similar to those in *Mendenhall*. Unlike *Mendenhall*, however, the officers asked Royer to accompany them to a small room *while retaining his identification and ticket*, making it impossible for him to walk away and resume his itinerary. *Id.* These actions by the officer escalated the encounter to an arrest requiring probable cause. *Id.* Since the information the officers had about Royer was found to constitute only reasonable suspicion, the detention was held to be unlawful. *Id.* at 501-503. *See also* Dunaway v. New York, 442 U.S. 200, 207 (1979) (suspect taken from a friend's home to police station without being asked if he would agree to go).

57 *See generally*, Stack, *supra* note 31.

taining a search warrant.[58]

The situation in *Mendenhall*[59] presented two separate questions of voluntariness. The first was whether the defendant voluntarily had accompanied the officers to the police room. The second issue was whether the defendant voluntarily had agreed to a strip search of her person. As to both questions, the Court applied the totality of circumstances test developed in *Schneckloth v. Bustamonte*[60] to determine whether the defendant's consent had been given voluntarily or was "the product of duress or coercion, express or implied."[61]

Accordingly, the Court examined the characteristics of the particular defendant, determining that, with regard to both questions of voluntariness, no reason existed to justify the assumption that she could not give voluntary consent or that she was vulnerable to requests from the particular officers. As with the seizure question, the Court apparently gave no weight to the fact that this particular defendant was a young black woman with little education.[62]

A second set of factors considered by the Court relate to the conduct of the officers during the encounter. The Court approved the conduct of the officers in asking the suspect to accompany them to the police room, since the Court found that they had asked, not instructed her to go, and that they used neither threats nor a show of force. As for the body search, the officer had expressly told the suspect several times of her right to refuse to consent to the search. The Court made it clear that, notwithstanding the *Schneckloth* Court's refusal to require police to inform citizens of their right to refuse to give consent to a search,[63] the Court would nonetheless

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58 It is a fundamental premise of Fourth Amendment jurisprudence that a citizen may not be required to suffer searches of the person or of property unless the police act pursuant to a warrant issued upon probable cause that contraband or evidence of a crime will be found. *See, e.g.*, Katz v. United States, 389 U.S. 347, 357 (1967). Thus, in the absence of probable cause, officers can proceed only if the situation meets one of the exceptions to the warrant requirement. *Id.* The easiest and most applicable exception is the search conducted with the consent of the owner.

The Supreme Court's rationale for permitting consent searches is that an individual may waive even the most precious and fundamental constitutional rights, so long as the decision to do so is freely, voluntarily and intelligently made. No person should be required, for instance, to proceed at trial with the representation of an attorney if the individual has made a voluntary and intelligent choice to represent herself. Similarly, if a person chooses to assist the police in the investigation of a crime and permits them to enter her home to search for someone, the police should be allowed to enter the home, even if they do not have probable cause or a warrant. *See* Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

59 446 U.S. 544 (1980).

60 412 U.S. 218 (1973).

61 *Mendenhall*, 446 U.S. at 557.

62 *Id.* at 558.

63 In refusing to require warnings, the Court noted the practical difficulty for the

give the provision of such warnings great weight.[64]

Thus, the *Mendenhall* Court applied a subjective test to determine the voluntariness of a person's consent to a search, a test that takes into account the particular characteristics of the person investigated. Nonetheless, in applying that test, the Court has given little weight to possibly coercive factors such as race, gender, age, education and the like, and has accorded nearly dispositive weight to the provision by an officer of warnings regarding the right to refuse to give consent.

2. *Bus Sweeps*

This session, the Supreme Court, in *Florida v. Bostick*,[65] approved another type of drug interdiction operation called "bus sweeps" or "working the buses." This practice reportedly also is used to "sweep" trains,[66] and one case even reports a regular plane sweeping operation in Detroit Metropolitan Airport.[67] In what has become a growing feature of our nation's drug control effort, state Drug Interdiction Units now routinely board commercial buses during layovers and approach individual passengers to request identification, tickets, and consent to search their luggage and sometimes their bodies. Thus far, three states and the District of Columbia have adopted bus sweeps as a regular police activity.[68]

The agents ordinarily target buses leaving a "source city"

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prosecution if they were burdened with proving a criminal defendant's state of mind in giving consent. The obvious alternative — to require the police to advise citizens of their right to refuse consent — was flatly rejected as "thoroughly impractical." *Schneckloth*, 412 U.S. at 231. And, the Court found that the questioning of people not in custody was "immeasurably far removed from the 'custodial interrogation' where, in *Miranda v. Arizona*, . . . we found that the Constitution required certain now familiar warnings." *Id.* at 232. Unfortunately, the opinion does not explain why a requirement that police officers advise people of the right to refuse consent is so impractical, nor does it elaborate on how the difference between custodial interrogation and non-custodial interrogation bears on the question of a warnings requirement.

64 The *Mendenhall* Court found that the fact that the police convey this information "substantially lessen[s] the probability that their conduct could reasonably have appeared to . . . be coercive." *Mendenhall*, 446 U.S. at 559.

65 111 S.Ct. 2382 (1991).

66 *See, e.g.*, Alvarez v. State, 515 So. 2d 286 (Fla. Dist. Ct. App. 1987).

67 *See, e.g.*, United States v. Grant, 920 F.2d 376, 378 (6th Cir. 1991) ("Border Patrol agents regularly check early morning flights arriving at Detroit Metropolitan Airport from the Southwest for drug traffickers and illegal aliens").

68 *See, e.g.*, United States v. Lewis, 728 F. Supp. 784 (D.C. 1990), *rev'd*, 921 F.2d 1294 (D.C. Cir. 1990) (Washington D.C.); United States v. Flowers, 912 F.2d 707 (4th Cir. 1990) (North Carolina), *cert denied*, 111 S. Ct. 2895 (1991); United States v. Fields, 909 F.2d 470 (11th Cir. 1990) (Florida); Guess v. State, 197 Ga. App. 40, 397 S.E.2d 453 (Ga. Ct. App. 1990) (Georgia).

bound for other parts of the country,[69] although in some cases they target buses that have taken on passengers in other cities.[70] In all cases thus far, the officers have not worn uniforms, although in many cases officers wear jackets with "police" printed on either the back or front.[71] In no case has an officer displayed a weapon or even placed one in view of the passengers.[72]

The typical method used in sweeping buses involves the officers' boarding the bus and questioning everyone, requesting consent to search from some.[73] The agents usually proceed to the back of the bus and work their way forward.[74] The agents identify themselves and sometimes explain that they are seeking the public's cooperation in their drug interdiction efforts.[75] In some cases, officers request a passenger's consent to answer some questions,[76] but in most cases, they simply proceed to pose questions.[77] The officers ask the passenger's name and itinerary, and then request to see identification and bus tickets. Officers then often request consent to

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69 United States v. Felder, 732 F. Supp. 204, 205 (D.D.C. 1990); *Flowers*, 912 F.2d at 708; *Fields*, 909 F.2d at 471.

70 United States v. Rembert, 694 F. Supp. 163, 168 (W.D.N.C. 1988).

71 *See, e.g.*, *Lewis*, 728 F. Supp. at 785 (plainclothes); United States v. Rembert, 694 F.Supp. 163, 168 (W.D.N.C. 1988) (police jackets worn); *Flowers*, 912 F.2d at 708 (same); *Fields*, 909 F.2d at 471 (same); State v. Avery, 531 So.2d 182, 183 (Fla. App. 4 Dist. 1988) (windbreakers which identified police department); Nazario v. State, 535 So.2d 295, 297 (Fla. app. 4 Dist. 1988) ("raid jackets" worn).

72 Oddly, *Bostick* is the only reported case in which passengers were made aware that one of the officers carried a gun. The officer in question held a pouch that clearly contained a handgun. 111 S.Ct. at 2384. The Court dismissed the possibly intimidating effect of the gun pouch, stating that none of the passengers had been "threatened" with a weapon. *Id.* at 2385.

73 In some cases, agents will request the driver's permission to interview the passengers. *See, e.g.*, *Flowers*, 912 F.2d at 708; *Rembert*, 694 F. Supp. at 168; *Fields*, 909 F.2d at 471. In State v. Johnson, 390 S.E.2d 707, 709 (N.C. App. 1990), the police officer testified that the Greyhound Corporation had given the police permission to board buses and to search unaccompanied bags.

74 *See, e.g.*, United States v. Hammock, 860 F.2d 390, 391 (11th Cir. 1988); *Rembert*, 694 F. Supp. at 169; *Flowers*, 912 F.2d at 709; *Fields*, 909 F.2d at 471; *Avery*, 531 So.2d at 183; State v. Turner, 380 S.E.2d 619 (N.C.App. 1989).

75 United States v. Cothran, 729 F.Supp. 153, 154 (D.D.C. 1990), *rev'd*, 921 F.2d 1294 (D.C. Cir. 1990); *Fields*, 909 F.2d at 471. These introductions are usually made to each individual passenger, but sometimes officers use the bus intercom. *See, e.g.*, United States v. Felder, 732 F. Supp. 204, 205 (D.D.C. 1990).

76 *See, e.g.*, *Cothran*, 729 F. Supp. at 154; United States v. Lewis, 728 F. Supp. 784, 785 (D.D.C. 1990), *rev'd*, 921 F.2d 1294, 1296 (D.C. Cir. 1990); *Flowers*, 912 F.2d at 709 (4th Cir. 1990).

77 A number of jurisdictions have trained their officers to stand slightly behind the passengers they are interviewing so as not to block their path should they decide to exit. *See, e.g.*, *Flowers*, 912 F.2d at 709; *Hammock*, 860 F. 2d at 392; *Fields*, 909 F.2d at 471; *but see* United States v. Chandler, 744 F. Supp. 333, 335 (D.D.C. 1990).

search the passenger's person or belongings.[78] In some cases, officers advise a person that consent to search may be refused.[79]

Alternatively, officers may sweep a bus by asking passengers to identify their luggage on the overhead racks or beneath the seats. If a particular piece of luggage goes unclaimed, the officers will inquire of the person sitting closest to it, and then of all the passengers, to determine its owner. If no one claims possession of it and if all the passengers are on board, the officers will then proceed to search the "abandoned" luggage.[80] They often discover evidence that one of the nearby passengers owns the piece of luggage and, presumably, whatever contraband may be found inside.

In some other cases, officers board a bus and randomly select a few passengers to interview and from whom to request identification and bus tickets.[81] In one reported case, the officers admittedly boarded the bus and then selected suspicious people or people who were "unduly nervous," obviously based only on their appearance and demeanor, and investigated only those people.[82] These interviews invariably culminate in a request to search either the person or the passenger's belongings. In these cases, too, passengers often disclaim ownership of their baggage.[83]

In *Bostick*,[84] the first bus sweep case to reach the Supreme Court, the six-person majority upheld the procedure, relying heavily on the reasoning in the administrative search case of *INS v. Delgado*.[85] In *Delgado*, the Court had authorized "factory surveys" conducted by the Immigration and Naturalization Service (INS) to detect undocumented Mexican workers. The *Delgado* decision

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78 *Cothran*, 729 F. Supp. at 154.

79 *See* United States v. Hammock, 860 F.2d 390, 392 (11th Cir. 1988); *Fields*, 909 F.2d at 471. Even when officers are provided with written consent forms for passengers to sign before a consent search is conducted, the reported cases reveal that they often fail to use them because they find them too time consuming. State v. Avery, 531 So.2d 182, 183-184 (Fla. App. 4 Dist. 1988); State v. Schwartzbach, 513 So.2d 756, 757 (Fla. App. 4 Dist. 1987). One case reports that officers in that county often fill out written consent forms after a search has been conducted and if there has been an arrest for contraband found during the search. Avery, 531 So.2d at 184.

80 *See, e.g.*, *Hammock*, 860 F.2d at 392; *Flowers*, 912 F.2d 707; *Fields*, 733 F. Supp. at 6. In some cases officers will have luggage sniffed by a drug-detecting dog for a positive reaction before physically searching. *See, e.g.*, Cothran, 729 F. Supp. at 155.

81 *See, e.g.*, United States v. Lewis, 728 F. Supp. 784, 785 (D.D.C. 1990); United States v. Felder, 732 F. Supp. 204, 206 (D.D.C. 1990); Chandler, 744 F. Supp. at 334; Nazario v. State, 535 So.2d 295, 297 (Fla. App. 4 Dist. 1988); State v. Christie, 385 S.E.2d 181, 182 (N. C. App. 1989); State v. Menefield, 575 So.2d 296 (Fla. App. 4 Dist. 1991).

82 State v. Carrol, 510 So.2d 1133, 1144 (Fla. App. 4 Dist. 1987).

83 *Flowers*, 912 F.2d at 709.

84 111 S.Ct. 2382 (1991).

85 466 U.S. 210 (1984).

shifted the focus of the "free to leave" aspect of the seizure determination.[86] In rejecting the claim that the INS agents had seized the entire workforce by restricting their freedom of movement, the Court held that the seizure determination did not simply turn on whether a reasonable person would have felt free to leave, but whether the feeling of restraint is attributable to conduct of the government agents. In this case, the loss of freedom of movement was attributed to the employees' decision to be employed, and thus, the government agents had not seized the workers.[87]

The shift in reasoning in *Delgado* was crucial to the *Bostick* decision. The *Bostick* Court, in an unprecedented application of regulatory theory to a criminal case, applied the *Delgado* "free to leave" standard to seizures of ordinary citizens travelling by commercial bus, despite the absence of any police suspicion that any particular passenger was engaged in criminal activity. The *Delgado* decision might have been justified in light of the fact that the primary purpose of the investigation was not to uncover crimes, but only to discover deportable aliens. In contrast, the primary purpose of bus sweeps is to detect drug traffickers, who presumably would face vigorous prosecution and punishment.

Despite the differences in non-criminal regulatory activities and criminal investigation, the Court applied the *Delgado* standard to bus sweeps without limitations. The traveler's freedom of movement was found to have been restricted by the nature of the bus which he voluntarily chose to board. Thus, if a reasonable person would not have felt free to leave, the restraint should be attributed to the trav-

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86 Initially, the *Delgado* decision relied on the drug courier profile case of Florida v. Royer, 460 U.S. 491 (1983), in finding that questioning regarding identity and requests for identification would be "unlikely to result in a Fourth Amendment violation." 466 U.S. at 216. Thus, the *Delgado* majority read *Royer* as in effect creating a presumption of lawfulness for encounters involving inquiries about identity and requests for identification. On the contrary, Justice White's statement in *Royer* merely allowed for the *possibility* that a police officer may make inquiries of a person without having the encounter become a seizure so long as the questioning did not amount to a "show of authority." *See supra* notes 45-47 and accompanying text.

87 This new requirement that the restraint must be the product of the government agents' conduct made it easier for the Court to reject the claim that the Hispanic factory workers in *Delgado* had been seized, in spite of the fact that the atmosphere in the factory could hardly have been more intimidating. The "factory surveys" involved the positioning of several agents near the exits of the factories, while other agents questioned nearly all of the employees, which took one to two hours. 466 U.S. at 212, 214. The agents displayed badges, carried walkie-talkies, and were armed. *Id.* In addition, the surveys were conducted by surprise by a large number of officers. *Id.* at 230 (Brennan, J., dissenting). As agents discovered persons whom they suspected of being illegal aliens, they handcuffed them and lead them away. *Id.*

eler's own actions and not to those of the police.[88]

Justice O'Connor explained that the "free to leave" language in *Mendenhall* applies to pedestrians on the street who were already in transit when stopped by the police, but it is not meant to apply in every case. The essence of this test is that a person should feel free "to ignore the police presence and go about his business."[89] For a passenger on a bus this means simply refusing to speak to the agents and remaining in her seat.[90]

The *Bostick* Court's application of the *Mendenhall* "show of authority" test vividly demonstrates the Court's propensity to find that police conduct does not constitute a seizure under circumstances in which it is simply legal nonsense to say that any reasonable person would feel free to walk away or otherwise to terminate the encounter. As with most other decisions applying the *Mendenhall* test, the application of the test to the particular facts of this case does not jibe with common sense. One does not feel free to disregard the police and go about one's business when police officers are standing overhead and asking questions like "Are you carrying drugs?" an affirmative answer to which would constitute grounds for arrest.[91]

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88 The Court relied on language in *Delgado* in which it had reasoned that "when people are at work their freedom to move about has been meaningfully restricted, not by the actions of law enforcement officials, but by the workers' voluntary obligations to their employers." 466 U.S. at 218.

89 Florida v. Bostick, 111 S. Ct. 2382, 2387 (1991).

90 *See id.* at 2387 ("Bostick's movements were 'confined' in a sense, but this was the natural result of his decision to take the bus; it says nothing about whether or not the police conduct at issue was coercive").

91 *See infra* discussion at Section II. B.

The Court's most recent case addressing the *Mendenhall* "show of authority" test, California v. Hodari D., 111 S.Ct. 1547 (1991), further exemplifies the Court's reluctance to find that police conduct short of an actual, physical seizure constitutes a Fourth Amendment seizure. The case involved the question of whether a police chase of a person who flees upon seeing the police is a show of authority sufficient to constitute a seizure. The issue for the Court was whether the defendant had been seized prior to his discarding a rock of crack cocaine. If he had been seized, the police would have been required to have acted upon at least reasonable suspicion.

The Court had previously considered the question in Michigan v. Chesternut, 486 U.S. 567 (1988), which involved remarkably similar factual circumstances. Rejecting the defendant's contention that a chase "necessarily communicates that detention is intended and imminent," the Court in *Chesternut* concluded that "the police conduct involved here would not have communicated to the reasonable person an attempt to capture or otherwise intrude upon respondent's freedom of movement." *Id.* at 574-75. The Court did admit that "the very presence of a police car driving parallel to a running pedestrian could be somewhat intimidating," *id.* at 575, but nonetheless declined to find the Fourth Amendment applicable.

Although the Court found the chase was not a seizure in this case, the decision did not exclude all police chases from Fourth Amendment scrutiny. Justice Blackmun suggested several factors that might result in a seizure: the activation of a siren or flashers, a command to halt, the display of weapons, and operating the car in an aggressive man-

In most investigative stop cases, a finding that an *encounter* was "consensual" — that the questioning did not constitute a "seizure" — should not end the inquiry. As in *Mendenhall*, courts should ordinarily proceed separately to examine the voluntariness of the grant of consent. In *Bostick*, however, the majority concluded from the fact that the encounter was consensual that the consent to search was freely given, essentially reasoning that if an encounter is consensual, then a finding of voluntary consent to search follows automatically.[92] The *Bostick* Court began its analysis of the seizure issue by highlighting "[t]wo facts particularly worth noting," the first being that the police had advised Bostick of his right to refuse to give consent to a search.[93] While this fact may have some bearing on the seizure analysis, it appears instead that the Court confused the seizure and the voluntariness determinations.

Although the consensual nature of the encounter (*i.e.*, whether an encounter constitutes a seizure) may generally have some bearing on the subsequent voluntariness of the consent to search, the two issues deserve separate treatment. This is especially true since the two issues are judged by wholly different criteria. The seizure question turns on whether a "reasonable person" would feel free to leave or to terminate the encounter, whereas the consent to search

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ner to block a person's course or otherwise control the direction or speed of his movements. *Id.* at 575. Thus, after *Chesternut*, the Court left open the possibility that a person might be "seized" even as he was being chased and before he was actually caught.

In the face of facts virtually identical to those in *Chesternut*, the *Hodari D.* Court ignored the four-year old case. Whereas the *Chesternut* majority had left open the possibility that a sufficient show of authority might cause a chase to be considered a seizure, in *Hodari D.* Justice Scalia instead writes:

> The word "seizure" readily bears the meaning of a laying on of hands or application of physical force to restrain movement, even when it is ultimately unsuccessful. . . . It does not remotely apply, however, to the prospect of a policeman yelling "Stop in the name of the law!" at a fleeing form that continues to flee. That is no seizure.

111 S. Ct. at 1550. The majority thus establishes two distinct categories of seizures: (1) when a person is detained by use of physical force, and (2) when a person is detained by means of submission to a show of authority. *Id.* at 1551.

The implications of the *Hodari D.* decision are frightening. One state court recently relied on *Hodari D.* to find that an officer who had drawn his weapon and simultaneously ordered a suspect to raise his hands had not effected a Fourth Amendment seizure. State v. Shahid, 813 S.W.2d 38 (Mo.App. 1991). In any case, *California v. Hodari D.* establishes that the present Court will not find that a Fourth Amendment seizure has occurred unless a person is physically detained.

92 Other courts have adopted this reasoning as well. *See, e.g.*, State v. Christie, 385 S.E.2d 181 (N.C. App. 1989); Nazario v. State, 535 So. 2d 295 (Fla. App. 4 Dist. 1988); State v. Carroll, 510 So. 2d 1133 (Fla. App. 4 Dist. 1987).

93 111 S.Ct. at 2385 (1991). In United States v. Watson, 423 U.S. 411 (1976), the Supreme Court held that a person in custody could give a valid consent to search. Thus, so long as the seizure is not illegal, *ie.*, so long as the police have the requisite level of suspicion to arrest an individual, a valid consent may be obtained.

issue depends on the subjective state of mind of the individual in light of the totality of the circumstances. Thus, one can easily imagine a situation in which the objectively assessed reasonable person might have felt free to terminate the encounter, but the actual person investigated might have had peculiar vulnerabilities to police requests such that the consent given might not be considered voluntary.[94]

In sum, the Court has approved the police practice of investigating possible drug activity by means of bus sweeps. As *Bostick* makes clear, the location of the questioning on a cramped commercial bus from which a person may not feel free to leave does not necessitate a finding that the encounter constitutes a seizure. Finally, so long as these encounters are determined to be consensual, the voluntariness of the consent to search will not be closely scrutinized.

3. Roadblocks for Drug Investigations

A third notable police-initiated investigative activity is the use of the police roadblock to detect drug traffickers. Most police roadblocks proceed in similar fashion. In most cases, the police provide some form of advance notice of the roadblock.[95] Generally, higher-ranking officials, not the officers in the field, choose the roadblock sites, and these choices are made according to a written policy.[96] Most roadblocks are placed along major highways, but recently police in Washington D.C. have located them in residential neighbor-

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94 *See infra* discussion at Section II. B.

95 Some roadblocks are advertised in local newspapers or on television. *See, e.g.*, State v. Park, 810 P.2d 456 (Utah App. 1991); State v. Sims, 808 P.2d 141 (Utah App. 1991); State v. Kitchen, 808 P.2d 1127 (Utah App. 1991). The police may give two to four weeks notice, although they may only advertise the date and not the place of the roadblock. *See* State v. Henderson, 756 P.2d 1057 (Idaho 1988). Other police departments rely on community meetings and news conferences to give the public advanced notice of a planned roadblock. *See* Galberth v. United States, 590 A.2d 990 (D.C. App. 1991). In most cases, providing advance warning of a roadblock in local media is ineffective because most roadblocks are conducted on major interstate highways traveled by people from outside the local area. *See* State v. Sims, 808 P.2d 141 (Utah App. 1991) (notice published in Juab County, but roadblock placed along major north-south route).

96 United States v. McFayden, 865 F.2d 1306, 1308 (D.C. Cir. 1989) (District Commander chose location based on community complaints); Galberth v. United States, 590 A.2d 990, 993 (D.C. App. 1991) (Lieutenant chose sites because of high drug activity involving heavy vehicular traffic); State v. Barcia, 549 A.2d 491, 493 (N.J. Super. L. 1988), *aff'd*, 562 A.2d 246 (N.J. Super. A.D. 1989) (site selected by prosecutor following State Police guidelines); Cardwell v. State, 482 So. 2d 512, 513 (Fla. App. 1 Dist. 1986) (supervisory personnel and legal staffs of two state agencies, local state attorney, Department of Transportation and other representatives of law enforcement participated in development of roadblock plan).

hoods.[97] They are usually conducted for a number of hours, but less than a full day.[98] A substantial number of officers ordinarily man a roadblock, and they often represent an array of federal, state, or local agencies.[99] Some police roadblocks entail stopping *all* vehicles, but since roadblocks can cause traffic congestion, many involve the stopping of cars in a sequence, such as every fifth car or every twentieth car.[100]

Once a driver is pulled over, the police officers ask to see the driver's license and vehicle registration.[101] Roadblock stops provide an opportunity for officers to peer into a vehicle at a time when the driver has not anticipated official inspection. Thus, in many driver's license checkpoints, officers can detect alcohol or drug violations simply by being alert to them.[102] Driver's license and vehicle registration checks also permit the police to consult computer databases to check for outstanding arrest warrants or to determine whether

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97 Washington D.C.'s "Operation Cleansweep" included the use of residential roadblocks for deterring drug-related traffic problems. *See* Galberth v. United States, 590 A.2d 990 (D.D.C. 1991); United States v. McFayden, 865 F.2d 1306 (D.C. Cir. 1989); United States v. Manner, 887 F.2d 317 (D.C. Cir. 1989); *see also* State v. Landfald, 571 So.2d 11 (Fla. App. 2 Dist. 1990) (drug dog sniffs at roadblock in residential neighborhood); *cf.* State v. Henderson, 756 P.2d 1057 (Idaho 1988) (sobriety checkpoint in urban area); Nelson v. Lane County, 743 P.2d 692 (Or. 1987) (same).

98 *See, e.g.*, Garrett v. Goodwin, 569 F. Supp. 106, 110 (E.D. Ark. 1982) (twenty-three-hour roadblock); Meeks v. State, 692 S.W.2d 504, 506 (Tex. Cr. App. 1985) (twelve-hour roadblock); *Nelson*, 743 P.2d at 693 (Or. 1987) (two-hour and fifteen minute roadblock).

99 *McFayden*, 865 F.2d at 1309 (eight to ten uniformed officers); Garrett v. Goodwin, 569 F. Supp. 106, 110 (E.D. Ark. 1982) (Arkansas State Police obtained assistance from eight federal and state agencies); State v. Bolton, 801 P.2d 98, 101 (N.M. App. 1990) (roadblock conducted by State Police and Border Patrol); *Meeks*, 692 S.W.2d at 506 (officers from numerous agencies); State v. Kitchen, 808 P.2d 1127, 1128 (Utah App. 1991) (35 officers).

Roadblock sites are marked, usually by some variety of signs, orange cones, flares or lighted police cars. *See McFayden*, 865 F.2d at 1309 (ten to twenty flares along center of road); *Henderson*, 756 P.2d 1057 (cones and merge signs); State v. Sanchez, 800 S.W.2d 292, 293 (Tex. App.-Corpus Christi 1990) (same); *Barcia*, 562 A.2d 246 (cones, flares, signs, and lighted police vehicles).

100 United States v. Corral, 823 F.2d 1389, 1390 (10th Cir. 1987) (stopped all cars); *Henderson*, 756 P.2d at 1058 (Idaho 1988) (stopped all cars until traffic backed up, then stopped cars in sequence); *Sanchez*, 800 S.W.2d at 293 (Tex. App.-Corpus Christi 1990) (stopped all northbound vehicles).

101 In some cases, the police distribute pamphlets. *See, e.g.*, *Henderson*, 756 P.2d at 1058 (pamphlets explaining roadblock); *Barcia*, 562 A.2d 246 (brochures on drunk driving).

102 *Corral*, 823 F.2d at 1390 (officer detected smell of marijuana in car); United States v. Millar, 543 F.2d 1280, 1281 (10th Cir. 1976) (same); *Meeks*, 692 S.W.2d at 507 (same); *Kitchen*, 808 P.2d at 1128 (same); Untied States v. Lopez, 777 F.2d 543, 546 (10th Cir. 1985) (officer detected smell of ether); *Bolton*, 801 P.2d at 102 (officer noticed false gas tank in which drugs were found).

the vehicle has been reported stolen.[103] In at least one case, the officer stopping motorists not only requested drivers' licenses and registrations, but also asked all drivers if they were carrying drugs, alcohol or weapons.[104] As with bus sweeps, however, the investigative technique of choice is the voluntary consent search.[105] Prior to conducting a consent search, motorists are often asked to sign a "consent search form."[106]

While prohibiting random stops of individual automobiles without suspicion,[107] the Supreme Court has upheld roadblocks in which all cars are stopped in a systematic fashion.[108] Earlier lower court cases upheld roadblocks for driver's license checks, since no alternative system for this regulatory purpose is apparent.[109] In contrast, the use of roadblocks for general criminal law enforcement previously was considered unconstitutional. However, even as far back as 1974, some police departments used driver's license checkpoints as a subterfuge for drug searches or sobriety checks.[110] In

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103 United States v. Diaz-Albertini, 772 F.2d 654 (10th Cir. 1985); Galberth v. United States, 590 A.2d 990 (D.C. App. 1991); State v. Bolton, 801 P.2d 98 (N.M. App. 1990).

104 State v. Sims, 808 P.2d 141, 143 (Utah App. 1991).

105 *Corral*, 823 F.2d 1389; Diaz-Albertini, 772 F.2d 654; *Meeks*, 692 S.W.2d 504; Cardwell v. State, 482 So.2d 512 (Fla. App. 1 Dist. 1986); *Sanchez*, 800 S.W.2d 292; Bolton, 801 P.2d 98; *Sims*, 808 P.2d 141; State v. Park, 810 P.2d 456 (Utah App. 1991); State v. Kitchen, 808 P.2d 1127 (Utah App. 1991).

106 *Diaz-Albertini*, 772 F.2d 654; *Cardwell*, 482 So.2d 512; *Sanchez*, 800 S.W.2d 292.

107 In the past, police-initiated, suspicionless stops of automobile drivers have been met with disfavor by courts. In contrast to the right-to-inquire rule that permits officers to approach any pedestrian at any time in order to pose questions, when individuals are within the confines of their automobiles, the police may not approach them to pose questions without some level of objectively reasonable suspicion. The reason for distinguishing between pedestrians and automobile drivers is obvious: automobile stops usually require the police to use sirens and lights to bring the driver to a stop, whereas to accost a pedestrian simply requires an officer to say, "excuse me, sir." Because the former procedure involves a "possibly unsettling show of authority," random automobile stops without suspicion of wrongdoing are prohibited. Delaware v. Prouse, 440 U.S. 648 (1979).

108 In *Delaware v. Prouse* — the same case in which the Court struck down the use of random automobile stops for driver's license checks — the Court also suggested that states could develop means less intrusive than random stops, such as roadblock stops. 440 U.S. 648, 663 (1979); *see also* Texas v. Brown, 460 U.S. 730 (1983) (upholding seizure of balloon containing drugs found in "plain view" inside an automobile at a driver's license checkpoint).

109 *See* Theresa Ludwig Kruk, *Validity of Routine Roadblocks by State or Local Police for Purpose of Discovery of Vehicular or Driving Violations*, 37 A.L.R.4TH 10, 17-29 (1983).

110 In Swift v. State, 206 S.E.2d 51 (Ga. App. 1974), *rev'd*, 207 S.E.2d 459 (Ga. 1974), the police stated that their purpose was to conduct a driver's license and registration checkpoint. The evidence, however, overwhelmingly showed that the roadblock was designed to conduct drug searches. First, the timing and placement of the roadblock coincided with that of a rock festival. *Id.* at 52. Second, the personnel manning the roadblock occupied positions that would not be appropriate at a drivers' license checkpoint, including the drug abuse squad, drug dogs, officers whose duties included trans-

some cases, the police used driver's license roadblocks as a pretext for walking drug-sniffing dogs around stopped vehicles.[111] Rather than confront the propriety of roadblocks for drug investigations, courts have generally accepted police testimony that the primary purpose of the roadblock in question was to enforce license requirements.[112] Increasingly, however, the police have begun frankly to state that their purpose is either to detect traffic violations related to the drug trade, to confiscate illegal drugs or to curb other criminal law violations.[113]

In any case, the prohibition of the use of roadblocks for general criminal law enforcement, such as the interdiction of drugs, has been eroded. The Supreme Court recently adapted the logic of administrative search checkpoints used to detect illegal aliens at the border to roadblocks for criminal law enforcement. In light of this recent development, it appears likely that the Court will similarly uphold roadblocks for drug investigations.

The Court first upheld the use of roadblocks in a case in which

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porting prisoners, and a magistrate. *Id.* at 52-53. Third, the Highway Patrol officers who do enforce traffic violations "weren't there much" and issued only a few traffic tickets. *Id.* at 53. The trial court nonetheless upheld the roadblock as a driver's license checkpoint, and the Supreme Court of Georgia upheld the trial court's determination, reversing the appellate court's determination that the "drivers' license checkpoint" was a subterfuge for a roadblock for drug searches.

After a case from the 1990 term, Michigan Department of State Police v. Sitz, 110 S.Ct. 2481 (1990), which upheld the use of sobriety checkpoints, the police may conduct such checkpoints without the need to disguise their actions. *See infra* notes 116-27 and accompanying text.

111 United States v. Morales, 714 F. Supp. 1146 (D.N.M. 1989), *rev'd sub nom*, United States v. Morales-Zamora, 914 F.2d 200 (10th Cir. 1990).

112 As a number of courts have noted, "the law does not require the police to ignore evidence of other crimes in conducting legitimate roadblocks." United States v. McFayden, 865 F.2d 1306, 1312 (D.C. Cir. 1989), *citing*, United States v. Lopez, 777 F.2d 543, 547 (10th Cir. 1985). So long as the police say that their primary purpose was to check driver's licenses, the Tenth Circuit has upheld the regular use of drug-sniffing dogs at "drivers' license roadblocks." *Morales-Zamora*, 914 F.2d 200. The Florida state courts have gone even further, upholding roadblocks conducted for the sole purpose of allowing drug dogs to sniff for illegal narcotics. The Florida courts have, however, limited the placement of these roadblocks to interstate highways, and have not allowed them in residential areas. State v. Lanfald, 571 So.2d 10 (Fla. App. 2 Dist. 1990).

113 Galberth v. United States, 590 A.2d 900, 990, 991-992 (D.C.App. 1991) ("Operation Cleansweep" designed to combat traffic problems arising from drug activity); *McFayden*, 865 F.2d at 1308 (same); United States v. Manner, 887 F.2d 317, 319 (D.C. Cir. 1989) (same); Garrett v. Goodwin, 569 F. Supp. 106, 113 (E.D. Ark. 1982) ("saturation enforcement" to curb criminal and traffic violations); Meeks v. State, 692 S.W.2d 504, 506 (Tex. Cr. App. 1985) (roadblock to "enforce all the laws"); Cardwell v. State, 482 So. 2d 512, 513 (Fla. App. 1 Dist. 1986) (roadblock for drug dog sniffs); State v. Landfald, 571 So.2d 10, 11 (Fl. App. 2 Dist. 1990) (drug roadblock in residential area); State v. Sims, 808 P.2d 141, 142 (Utah App. 1991) (roadblock for license checks and drug or alcohol violations); State v. Park, 810 P. 2d 456 (Utah App. 1991) (same).

the primary purpose was regulatory, and not the enforcement of criminal laws. In *United States v. Martinez-Fuerte*,[114] the majority permitted fixed roadblocks for INS searches for illegal aliens near the Mexican border. In upholding the roadblock procedure, the Court strongly emphasized the national policy interests in controlling illegal immigration and applied a *Camara*-type balancing test weighing this public interest against the Fourth Amendment interest of the individual.[115]

In the Court's 1990 decision, *Michigan Department of State Police v. Sitz*,[116] this rationale was extended to permit roadblocks for detecting intoxicated drivers. The *Sitz* majority found support for its position in *Martinez-Fuerte*,[117] holding that sobriety checkpoints were "for constitutional purposes indistinguishable from the checkpoint stops" upheld in *Martinez-Fuerte*.[118] Accordingly, the Court applied the *Camara* balancing test, thereby removing all vestiges of the barrier against the use of roadblocks for criminal law enforcement.[119]

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114 428 U.S. 543 (1976).

115 *Id.* at 551-55.

116 110 S.Ct. 2481 (1990). *Sitz* involved a civil suit filed by licensed motorists of the state of Michigan. For a thorough discussion of the *Sitz* decision, see Nadine Strossen, *Michigan Department of State Police v. Sitz:* A Roadblock to Meaningful Judicial Enforcement of Constitutional Rights, 42 HASTINGS L.J. 285 (1991).

117 428 U.S. 543 (1976).

118 *Sitz*, 110 S.Ct. at 2487. In addition to its failure to consider the obvious difference between sobriety checkpoints, which serve criminal law enforcement interests, and illegal alien roadblocks, which serve the regulatory function of detecting deportable aliens, the Court also neglected a number of other differences between the two procedures. The first obvious difference is that the illegal alien checkpoints were *permanent* and *fixed*. Residents in the area thus would become familiar with the stopping procedure and could allot extra time in their schedules. The sobriety checkpoints, on the other hand, are temporary and are "usually operated at night at an unannounced location." 110 S.Ct. at 2490 (Stevens, J., dissenting). Second, the fixed checkpoint near the border gave motorists notice that they would be stopped, thus reducing the "subjective intrusion" from the possibility of fear or surprise. 428 U.S. at 557-559. In contrast, the sobriety checkpoints, being conducted at night in various, unannounced places, "depend for their effectiveness on the element of surprise." 110 S.Ct. at 2492 (Stevens, J., dissenting). Such surprise tactics would cause fear and surprise, or at least annoyance, not only in intoxicated drivers, as the majority argued, but in most motorists. 110 S.Ct. at 2486. Contrary to the conclusion of the Court in *Sitz*, the level of intrusion upon the privacy interests of motorists caused by sobriety checkpoints clearly exceeds that involved in illegal alien checkpoints.

119 *Sitz* resembles many of the other Rehnquist Court Fourth Amendment decisions: it involves a seemingly utilitarian *Camara* balancing analysis that weighs the "public" interest in law enforcement against the "individual's" interest in privacy and liberty. But *Sitz* is not like the other cases. The Court here upheld Fourth Amendment seizures for ordinary criminal law enforcement purposes based on *no individualized suspicion*. The Court assessed whether the seizure was "reasonable" in the abstract, as if objective factors of individual suspiciousness were not relevant. In fact, the vast majority of the drivers stopped were sober, and reasonable suspicion could not have been established as to any particular motorist stopped.

Previously, the Court had upheld only suspicionless searches and seizures in limited cases where the government could show some "special governmental needs, beyond the normal need for law enforcement."[120] In advocating the "need" for sobriety checkpoints, the government could show no need beyond the normal need for law enforcement. The Court simply emphasized the severity of the drunk driving problem in this country.[121]

Of course, one can readily appreciate the nexus between discouragement of the crime of drunk driving and the stopping of automobiles during sobriety checkpoints: drunk driving is a crime involving the use of a vehicle. Arguably, roadblocks should not be extended to investigations of crimes not intimately associated with the driving of vehicles. Nowhere in the Court's opinion in *Sitz*, however, does the majority articulate this limitation. Instead, the opinion stresses only the "magnitude of the drunk driving problem."[122] Even assuming that roadblocks were limited to the enforcement of driving-related crimes, roadblocks for drug searches might be allowed if the police allege, as was the case in Washington D.C., that much drug-related activity occurs in automobiles.[123]

Moreover, the Court upheld DWI checkpoints despite the fact that they were not shown to be any more effective than traditional patrols for drunk drivers.[124] The sobriety checkpoint had resulted in a drunk driving arrest rate of 1.5%. An expert witness had also testified that, on average, sobriety checkpoints yielded a one percent arrest rate. Nonetheless, the Court declined to scrutinize the effectiveness of this program by comparing this arrest rate to that resulting from normal police patrols[125] or by inquiring about less intrusive means of deterring drunk driving.[126] Instead, the Court showed extreme deference to the judgment of the law enforcement establishment, finding the 1.5% arrest rate sufficient to advance the

120 National Treasury Employees Union v. Von Raab, 109 S.Ct. 1384, 1390 (1989); *see also*, New Jersey v. T.L.O., 469 U.S. 325 (1985) (searches of students permissible on less than probable cause because of "substantial need" to maintain order in schools); Strossen, *supra* note 116, at 300-302.

121 *Sitz*, 110 S. Ct. at 2485-86.

122 *Id.* at 2485.

123 *See supra* note 97.

124 Strossen, *supra* note 116, at 318-325.

125 *See, e.g.*, Delaware v. Prouse, 440 U.S. 648, 659 (1979) (No empirical data suggests that random automobile stops for driver's license checks is a "sufficiently productive mechanism to justify the intrusion").

126 *See, e.g.*, Florida v. Royer, 460 U.S. 491, 505-506 (1983) (Court suggested that police might have investigated Royer's bags in a "more expeditious way," suggesting the use of drug sniffing dogs).

state interest in preventing drunk driving and to outweigh the "slight" intrusion upon motorists' Fourth Amendment interests.

The *Sitz* decision foreshadows a rapid proliferation of police roadblocks for general law enforcement purposes and particularly for drug interdiction. With the Supreme Court's approval of sobriety checkpoints, the police can be expected to push the rationale of *Sitz* to permit drug roadblocks in "drug-prone" neighborhoods and on highways.[127]

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In short, the Supreme Court has moved in tandem with law enforcement in developing a regulatory model of policing to facilitate domestic drug interdiction. With the use of drug courier profiles, the police may justify criminal investigations of people who happen to fit a generic checklist, but as to whom the police have no individualized suspicion. With bus sweeps and roadblocks, the police advanced the regulatory model to the mass criminal law investigations of travelers based on no suspicion whatsoever. Thus, what started as a small group of modest exceptions to the probable cause requirement, intended to provide flexibility for government agents in conducting administrative searches for public safety reasons, has burgeoned into a full-bodied case law permitting the police to engage in administrative-style criminal law operations in which they may question individuals and request identification and consent to search. Supreme Court approval and abundant federal training and funding means that the federal government has ushered in a new era of policing, one in which the police increasingly subject people to questioning and searches without cause. Unless state courts interpreting state law, the federal or state legislatures or the community review boards intervene, the police will continue to engage in intrusive drug interdiction operations without any adequate check on their authority.

III. Evaluating the Regulatory Model of Policing

A. The Need for Grassroots Intervention

In a surprising turn of events, numerous state courts have responded to the Supreme Court's retreat from the effective governance of police practices by interpreting state laws to preserve many of the early Supreme Court rulings. Many state supreme courts have interpreted provisions of their state constitutions that are simi-

127 The North Dakota Supreme Court recently upheld a highway roadblock set up to detect drug traffickers, finding the reasoning in *Sitz* equally applicable to roadblocks for drug investigations. *See* State v. Everson, 474 N.W.2d 695 (N.D. 1991).

lar, and sometimes identical, to the federal constitutional provisions, more expansively than has the Supreme Court.[128]

Such a trend bodes well for the vigorous protection of various civil liberties in state prosecutions. Even if state courts were to prohibit or to attempt to regulate the drug interdiction operations discussed in this Article, however, their rulings would have only a limited effect, since part of the federal/state cooperative efforts include the provision of greater access to federal courts and prosecuting attorneys for drug crimes.[129] Even in those federal courts found in states that might prohibit drug interdiction activities such as these, the admissibility of evidence would be governed by the Supreme Court's Fourth Amendment jurisprudence.[130] Presumably, state and local agents would be free to engage in these activities provided the cases were brought in federal court.

Nevertheless, if state courts strongly reject particular activities on the basis of their state constitutions, state agents might feel pressure to discontinue those activities, even if prosecution in federal court remained an option. The influence of state disapproval might also encourage change in federal policy. Alternatively, state and local policy makers could prohibit certain drug interdiction operations through legislation. Again, the effect of a grassroots legislative effort might be to prompt changes in the direction of law enforcement activities at all levels. Finally, community review boards that may play a role in the decision-making processes of police forces could also help to bring about changes in regular practices.

B. GUIDELINES FOR BALANCED, EFFECTIVE OPERATIONS

Distinguishing preferred drug interdiction operations from those that should be abolished involves the weighing of the costs and benefits involved in each type of operation. A number of factors, such as the expense of the operations, should be taken into account.[131] In particular, because the freedom to travel about in

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128 William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Kenneth J. Melilli, *Exclusion of Evidence in Federal Prosecutions on the Basis of State Law*, 22 GA. L. REV. 667, 674-675 (1988).

129 *See* BUSH, *supra* note 4, at 33 (discussing additional funding for federal judiciary for drug related case load and noting that state and local agencies bring cases to federal courts for prosecution).

130 *See generally* Melilli, *supra* note 128 (arguing that present rules do not require federal courts to exclude evidence obtained in violation of state law).

131 Unfortunately, little information is publicly available on any of the operations currently practiced. In any case, in light of the federal resources available for drug interdiction operations, the monetary costs of operations may not be the most pressing concern. Assuming every operation involves a substantial investment of resources, a number of other factors merit careful consideration.

public without unjustified official interference is one of our most cherished liberties,[132] the extent to which the police operations may intrude officiously into the private lives of innocent people who have done nothing to draw suspicion onto themselves should be considered of overriding importance.

Moreover, intrusive practices are all the more offensive when they are arbitrarily directed at certain groups, such as working class people or racial minorities, as the current operations appear to be.[133] Given that certain practices may have drawbacks that make them less attractive, it should also be asked whether the practices are sufficiently successful that the interest in snaring drug traffickers outweighs the interests of innocent people. Of course, many Americans might willingly sacrifice some of their privacy and freedom of movement if such sacrifices would significantly further law enforcement interests.[134] They may not even protest operations that actually capture few traffickers, since most people probably take for granted that the police would not engage in an operation unless it was highly successful. But it is incumbent on policy makers to weigh carefully the advantages and disadvantages of the various techniques, notwithstanding the possibility of general public acquiescence in ineffective, intrusive methods.

1. Protecting the Interests of Innocent Persons

A primary goal in designing optimal drug interdiction operations should be to reduce the extent to which the police intrude into the lives of innocent people. Police operations that affect innocent people in an improper manner impose unnecessary personal costs — loss of privacy, liberty, dignity and security — on a group of people not responsible for the drug crisis. Operations which so affect innocent people may result in the alienation from the law enforcement establishment of some people who might otherwise have provided useful service to the cause of drug interdiction. Rather, police operations should endeavor to enlist the voluntary assistance of in-

132 *See, e.g.*, Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) ("The makers of our Constitution . . . conferred as against the Government, the right to be let alone — the most comprehensive of rights and the right most valued by civilized men.").

133 *See infra* Section II.B.a.

134 *Cf.* Michigan Department of State Police v. Sitz, 110 S.Ct. 2481, 2490 (1990) (Brennan, J., dissenting) ("I would hazard a guess that [a] majority of our society would willingly suffer the minimal intrusion of a sobriety checkpoint in order to prevent drunk driving."). Rather than burdening innocent people with intrusive investigations, however, methods that encourage voluntary cooperation with the police in detecting drug dealers should be encouraged. *See infra* Section II.C.

nocent people, and should urge them to work in partnership with the police. Such programs offer a source of empowerment for innocent people who want to help rid their streets of drug dealers. Thus, the best drug interdiction operations would include law-abiding residents as an integral part of the intelligence-gathering and decision-making process. In order to accomplish this goal, the police must adopt sorting techniques that allow them to distinguish drug traffickers from innocent people without placing unnecessary burdens on the latter.

a. The Inquisitorial Approach

The current practices described above rely heavily on an inquisitorial approach which involves police questioning and voluntary consent searches to distinguish the innocent from the guilty. This sorting technique operates from the assumption that every person is guilty until she can dispel the officer's suspicion. Most innocent people experience great anxiety and fear when approached by a police officer for questioning about possible drug trafficking. The most courteous behavior and the friendliest tone of voice will not completely alleviate the stress of the situation.

When an officer solicits a person's cooperation in identifying herself, producing identification and a destination ticket, and disclosing her itinerary, that person must divulge a great deal of personal information. Furthermore, when a police officer requests to search one's person or personal effects, this ordinarily entails having that officer physically touching a person's body or opening baggage and rummaging through one's private possessions. Out of a combination of intimidation, fear of bringing suspicion upon oneself, and a sense of willingness to cooperate with the police, people will acquiesce to virtually any request to search, no matter how offensive.[135]

The success of the inquisitorial approach as a sorting technique for detecting drug traffickers depends on the ability of the police to obtain voluntary consent to search. This crucial aspect of the inquisitorial approach has proven to be an elaborate charade. The police know well that even if people are told they may refuse consent, they will usually give consent anyway — even if they are carrying illegal narcotics.[136] Police officers apparently rely on this fact, for

135 In one reported case, the police received consent to search a man's body, despite the lack of any articulable suspicion that he was involved in criminal activity, and then proceeded to search his genital area. State v. Menefield, 575 So.2d 296 (Fla. App. 4 Dist. 1991).

136 Testimony shows that the majority of the people approached will agree to talk to

otherwise the current drug interdiction techniques would make little sense.[137] What is evident from the cases is that, with warnings or without, most people feel compelled to give consent to search when asked to do so by a police officer, even when giving consent means certain arrest.

Many people must surely sense that, even if they attempted to exercise their rights to refuse consent, the police would somehow — perhaps unlawfully — insist on searching their possessions. In some cases, this intuition proves correct. In *United States v. Nurse*,[138] for instance, a police officer spotted a woman who had arrived in Washington D.C. on a train. The officer followed her outside and requested to see identification. She produced a commercial identification card that he suspected to be false. The officer then requested both consent to search her bag and permission to have a dog sniff the bag, but she refused both requests. The officer next informed her that he intended to keep the bag for a dog sniff. When she attempted to enter a taxi while still holding the bag, he then decided to detain her.

The officer here did not have probable cause to seize the bag when he told her he planned to seize it, but the D.C. Circuit found that the officer's observations of the defendant — including her attempt to leave after he told her he was detaining the bag — gave rise to reasonable suspicion.[139] By stating that he would detain the bag for a drug dog to sniff, the officer either planned to commit an illegal act, or he was bluffing so that she would give consent. It is this type of unlawful reaction to the legitimate exercise of one's constitutional right to be free from unreasonable searches and seizures that citizens must surely fear.

The use of the inquisitorial approach during roadblock stops

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the police. Of the eighty-five passengers accosted by one officer during a bus sweeping operation, only three or four had refused to speak to him. *Id.*; *see also* United States v. Cothran, 921 F.2d 1294 (D.C. Cir. 1990) (one out of five passengers refuses to cooperate).

137 Thus, the prediction in *Schneckloth* that if warnings were given many consent searches would not occur has proven wrong. Schneckloth v. Bustamonte, 412 U.S. 218, 227-31 (1973). On the other hand, Justice Marshall's suggestion in his dissent in *Bostick* that warnings would transform a highly intimidating encounter into a truly consensual one falls short of its mark as well. Florida v. Bostick, 111 S.Ct. 2382, 2394-95 (1991).

In one case, an officer testified than any person who refused to speak to them during a train sweep would be reported to the authorities at the next stop for further questioning. United States v. Felder, 732 F. Supp. 204, 205 (D.D.C. 1990). This determination to conduct interviews may have been unconsciously conveyed to the passengers so as to rule out a voluntary decision to cooperate.

138 916 F.2d 20 (D.C. Cir. 1990).

139 *Id.* at 23-24.

raises concerns about invasions of privacy even greater than that involved in the stopping of pedestrians or bus passengers. An automobile stop provides an officer with the opportunity to search a much greater area than that involved in a pedestrian stop, due to the obvious fact that an automobile is simply a very large container of sorts in which individuals often transport and store numerous personal possessions. Moreover, the Court has broadly defined "vehicles" to include even motor homes which may contain nearly *all* of a person's belongings.[140]

Once a person is stopped, the officers have the opportunity to look into the passenger compartment of the vehicle, to ask the driver for identification, and to put questions to the driver and other passengers. The officers may also require that everyone get out of the car.[141] In addition, they may request consent to search the car.[142] A Supreme Court case from the 1991 term greatly simplifies and expands the authority of the police in conducting automobile searches. In *Florida v. Jimeno*,[143] the Court held that, if a motorist gives an officer consent to search "a car" for narcotics, it is "objectively reasonable for the police to conclude that the general consent to search respondent's car included consent to search containers within the car which might bear drugs."[144] Thus, so long as the police notify a motorist of their intent to search specifically for narcotics, a consent to search the car suffices to permit searches of any and all containers found within, since narcotics can be stored in the smallest of packages. Of course, if the police state that they are searching for something necessarily larger, rifles for example, then it would be unreasonable for them to open a small, light-weight pa-

140 California v. Carney, 471 U.S. 386 (1985).

141 Pennsylvania v. Mimms, 434 U.S. 106 (1977) (per curiam).

142 Jimeno v. Florida, 111 S.Ct. 1801 (1991).

143 *Id.* In a second case of the 1991 term, California v. Acevedo, 111 S.Ct. 1982 (1991), the Supreme Court did away with the distinction between containers found during a general search of a vehicle and containers found in a vehicle after a limited search for the particular container. Previously, if the police had probable cause to believe a *container* held contraband, they could seize and store it until they had obtained a search warrant. United States v. Chadwick, 433 U.S. 1 (1977); Arkansas v. Sanders, 442 U.S. 753 (1979). This was so even if the police happened to locate the container in an automobile. On the other hand, if the police had probable cause to search an *automobile* for contraband, the "automobile exception" to the warrant requirement permitted a search of all closed containers found in the vehicle which might bear the object of the search. United States v. Ross, 456 U.S. 798 (1982). In *Acevedo*, the Court held that the police can search a closed container found within a vehicle in either situation. Thus, even if the police do not have probable cause to conduct a general search of the *entire* car, but have probable cause only as to the container, they can nonetheless seize and search the container.

144 111 S. Ct. at 1802.

per bag without an additional grant of consent.[145]

In short, the predicament of the innocent traveler investigated by the inquisitorial approach is particularly compelling. As Judge Sporkin stated in *United States v. Lewis*:

> It must be realized that it is the law-abiding citizen who readily accedes to the policeman's "search" request to demonstrate that he has nothing to hide. Although the law-abiding citizen can be instructed to just say "No" to a police officer's patently offensive request, he should not be placed in the posture of having to deny those who are there to protect him. Nor should the citizen be placed in a catch-22 position in which some might argue that a negative response in itself creates the necessary articulable suspicion to permit a more in depth inquiry by the police.[146]

Whatever one may think about the privacy rights of a drug trafficker, surely no one would argue that innocent people should be subjected to intimidating interrogations or compelled to reveal their private possessions for inspection or to have their bodies searched.[147] These individuals are the silent thousands who are never seen by the courts of our country, because they have done nothing illegal and because it is not a practical option to file civil rights lawsuits against the police.

b. Dragnet Operations

Operations designed to sift through large groups of people found in public places so as to sort out the innocent from the guilty

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145 Presumably, if a person refuses to give consent to search, the officers will be prevented from conducting the search. However, in Gustafson v. Florida, 414 U.S. 260 (1973), the Supreme Court upheld a custodial arrest of an individual for failure to produce a drivers' license where it was apparent to a casual observer that the arrest was a pretext intended to permit further investigation of a suspicious person. In *Gustafson*, the officer saw defendant driving in the early morning hours in an erratic manner such that the car weaved across the center line and back to the right side "three or four times." 414 U.S. at 261-62. The officer also noticed that the defendant's car had New York license plates (the arrest took place in Florida) and that the defendant seemed to have altered his route upon seeing the patrol car. *Id.* The custodial arrest of a motorist provides the opportunity for questioning, Miranda v. Arizona, 384 U.S. 436, 486 (1966), a thorough search of the person "incident to arrest," United States v. Robinson, 414 U.S. 218 (1973), and a thorough search of the vehicle during an "inventory search." South Dakota v. Opperman, 428 U.S. 364 (1976). In sum, the law clearly weighs in favor of allowing police officers to search vehicles whenever their suspicions are aroused.

146 728 F. Supp. 784, 790 (D.D.C. 1990), *rev'd*, 921 F.2d 1294 (D.C. Cir. 1990).

147 In State v. Menefield, 575 So.2d 296 (Fl. App. 4 Dist. 1991), the police selected a man at random as he sat on a bus and asked to search his person. He apparently allowed the search. The court described the search as follows:

> The officer patted down his stomach, legs, and arms. He then proceeded to search his genital area, touching his private parts in the process. The officer felt an object and reached in and removed it from the appellant's pants.

Id.

by use of the inquisitorial approach make it possible for the police intrusively to investigate vast numbers of innocent people. During a bus sweep, for example, officers have only to board a bus and choose who among the tens of passengers they want to interrogate and search. A single officer can reportedly search over three thousand bags in a nine month period.[148] Thus, given the informal pressures that result in uniform grants of consent to search, literally thousands of travelers will endure this police practice.

In addition to the loss of privacy rights, dragnet operations place a second burden on innocent travelling people. Operations that require every person to be individually questioned and searched necessarily will delay the progress of travel for those investigated. Even if the police do their best not to cause unreasonable delay for travelers, some inconvenience is inevitable, and the delay may be extreme in some cases. For example, in *State v. Barcia*,[149] the police stopped one of every twenty cars exiting the Washington Bridge in New Jersey from Manhattan. Because of the roadblock, traffic became so congested that over one million cars came to a complete stop, some for as long as four hours.[150]

2. *Impact on Working Class and Racial Minorities*

In addition to their effects on innocent people in general, the current interdiction operations appear to have the effect of targetting working class people and racial minorities. In a democratic society, even the appearance of racial or class discrimination by the police should not be tolerated. This is not to say that special efforts should not be made to eradicate drug crimes in neighborhoods that happen to be comprised of poor people or racial minorities. Rather, in all contexts, police operations should be conducted so as to minimize the impression that intrusive techniques are utilized only in situations in which the disproportionate number of the innocent people affected will be working class or racial minorities.

There are two types of flaws in the systematic procedures now used to interdict drugs that allow for the targetting of working class people and racial minorities. First, some procedures afford individual officers unguided discretion to single out people who "look like" drug traffickers. Thus, officers have the discretion to exercise their personal prejudices in determining whether an individual should be investigated. Often, officers in this position focus on racial minori-

148 Florida v. Kerwick, 512 So. 2d 347, 349 (Fla. App. 1987).
149 562 A.2d 246 (N.J. Super. A.D. 1989).
150 *Id.* at 249.

ties or people who do not appear well-dressed. Evidence shows this to be the case with many drug courier profile operations in which officers stop individuals based on no information other than the officers' visual observations of the person. Many drug courier cases indicate that Blacks and Hispanics may be targetted by undercover agents simply because of the color of their skin. In some cases, officers have admitted that race played an important part in their decision to stop a particular traveler.[151] One Memphis police officer testified that seventy-five percent of the people that the drug task force follows in airports are Black.[152] Another drug courier case revealed that the officer had stopped an airplane passenger because "his appearance was 'disheveled' and not in conformance with that of the other passengers on the flight, most of whom appeared to be businessmen."[153] Unquestionably, many innocent travelers — particularly racial minorities — are being caught in the DEA's indiscriminately wide net.[154]

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151 *See, e.g.*, Ramirez v. Webb, 599 F. Supp. 1278, 1284 (W.D. Mich. 1984, *aff'd*, 787 F. 2d 592 (6th Cir. 1986), ("*Hispanic* appearance . . . is not a valid reason to stop anyone") (emphasis in original); United States v. Taylor, 917 F.2d 1402 (6th Cir. 1990), *vacated*, 925 F.2d 990 (6th Cir. 1991) (police officers' stop of only black person to deplane because he was not wearing nice clothing like other passengers was racially-based and insufficient to justify stop); United States v. Bradley, 923 F.2d 362 (5th Cir. 1991) (female black woman stopped for questioning; nothing suspicious except that she had flown from Los Angeles, a "source city"); *cf.*, United States v. Lopez, 328 F. Supp. 1077 (E.D.N.Y. 1971) (anti-hijacking profile included improper ethnic element). The use of race as a factor contributing to the suspiciousness of a person is not a new phenomenon. *See generally Developments in the Law: Race and the Criminal Process*, 101 HARV. L. REV. 1472, 1494-1520 (1988). The evidence that racial minorities are singled out for criminal investigation is overwhelming and unimpeachable. *See* Sheri Lynn Johnson, *Race and the Decision To Detain A Suspect*, 93 YALE L.J. 214 (1983). The practice is not one that the Supreme Court has strictly forbidden. For example, in cases involving searches for illegal aliens near the Mexican border, the Supreme Court has permitted officers to set up checkpoints in order briefly to examine all highway travelers. In addition, persons may be selectively diverted for brief questioning solely on the basis of "apparent Mexican ancestry," presumably meaning people who have dark skin or who dress in a typically Mexican fashion or have Mexican-style haircuts. *See* United States v. Martinez-Fuerte, 428 U.S. 543, 563 (1976); *but see* State v. Maldonado, 793 P.2d 1138 (Ariz. App. 1990) ("profile" for illegal aliens cannot rely on appearance of Mexican ancestry alone).

152 *Taylor*, 917 F.2d at 1409; *see also* State v. Graziano, 653 P.2d 683 (Ariz. 1982) (unwritten highway "profile" for stolen vehicle violations includes being young, Mexican male).

153 United States v. Pulvano, 629 F.2d 1151, 1152 (5th Cir. 1980); *see also* Becton, *supra* note 31 at 420.

154 These facts are difficult to establish. Figures are generally not compiled with regard to the numbers of people investigated who are determined to be innocent. *Cf.* WAYNE R. LAFAVE, ARREST: THE DECISION TO TAKE A SUPECT INTO CUSTODY, at 75, 153-57 (Police decisions not to enforce law rarely become known to public). Even less forthcoming are figures indicating what percentage of those stopped are minorities. On occasion, however, an innocent person who is detained for investigation will make her

A second flaw that has resulted in the targetting of racial minorities or working class people during some interdiction operations stems from discriminatory characteristics of the procedures themselves. The profile used by agents to make highway stops, for instance, appears to include being an Hispanic male as a characteristic of a drug courier,[155] and the original airport drug courier profile used in Detroit focused on Black females.[156] Justice Marshall's dissenting opinion in *Bostick* noted his disapproval at the admitted use of race by some officers conducting bus sweeps in deciding which passengers to approach.[157] Reliance on profile characteristics based on race may bring about a self-fulfilling prophecy.[158] If the police look only for Black and Hispanic drug traffickers, they will find only those drug traffickers who happen to be Black or Hispanic.[159]

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displeasure at the intrusion known by taking legal action against the authorities. *See, e.g.*, Buffkins v. City of Omaha, 922 F.2d 465 (8th Cir. 1990).

In *Buffkins*, the police did not stop Ms. Buffkins on the basis of a drug courier profile. Instead, they were acting on a tip from a previously reliable informant who said that a black person or persons would be arriving on a particular flight with drugs. The police stopped Ms. Buffkins, the only black person on the flight, took her to a private room, and requested consent to search her possessions. The reliability and sufficiency of the information given was found to support a brief detention of Ms. Buffkins since she was the only black person aboard.

Although this case does not advance the argument that profiles have targeted minorities, it does support the proposition that innocent people who are singled out by the police for investigation feel personally violated. In this case, Ms. Buffkins was requested to go with the officers to a security room with her luggage. The officers then picked up her suitcases and escorted her to an office located on the other side of the terminal. On the way to the office, Ms. Buffkins complained that the officers' conduct was "racist and unconstitutional." During the investigation, she became increasingly loud. She refused to give consent to search her suitcases, citing her Fourth Amendment rights. When the officers said they would have to confiscate her luggage and inventory it, her sister agreed to open it and inspect it in the officers' presence. Ms. Buffkins was not carrying any drugs or contraband.

155 *See* Ledwin, *supra* note 34, at 594 and cases cited therein.

156 An early Supreme Court case on drug courier profiles, United States v. Mendenhall, 446 U.S. 544 (1980), involved a black female stopped during this operation.

157 Florida v. Bostick, 111 S. Ct. 2382, 2390 n.1 (Marshall, J., dissenting), *citing*, United States v. Williams, No. 1:89CR0135 (ND Ohio, June 13, 1989), p. 3.

158 *See* Johnson, *supra* note 151, at 240.

159 In a few rare cases lower courts have reversed convictions where it was found that the police relied primarily or exclusively on race in deciding to target a person for investigation. United States v. Taylor, 917 F.2d 1402 (6th Cir. 1990), *vacated*, 925 F.2d 990 (6th Cir. 1991); United States v. Laymon, 730 F.Supp. 332 (D. Colo. 1990); United States v. Nembhard, 676 F.2d 193 (6th Cir. 1982); *cf.* United States v. Ramos, 753 F.Supp. 75 (W.D.N.Y. 1990). More often than not, even when officers admit taking race into account, judicial relief is unlikely. Courts have rejected claims that detentions were racially motivated, finding that race was not the *only* factor taken into account and to the extent that it was taken into account, it was permissible. United States v. Ramirez-Ocampo, Slip. Op. No. 85-414-W (D. Mass. Feb. 11, 1986); Goode v. State, 398 A.2d 801, 806 (Md. App. 1979) (automobile stop "may not be simply because of the motorist's national origin, race, or sex").

Additionally, the very decision to undertake the twenty-four hour, dragnet "sweeping" of commercial buses creates at least the impression that the police are focusing their intrusive investigatory procedures on working class people. People who travel by buses generally do so because they can afford neither the quicker alternative of air travel nor the more luxurious alternative of driving a privately-owned automobile. To engage in the inquisitorial investigation of all bus passengers while they are seated in the cramped quarters of the bus disregards the interests of chiefly working class people.

3. Maximizing Effectiveness

If the costs involved in conducting an operation are high, the benefits of that operation should be correspondingly high. Benefits should be measured by the number of arrests for drug violations, the amount of drugs confiscated, and the effect on crime rates (if the operation is focused in a particular neighborhood). With regard to drug courier profiles used in airports or on highways, the measure of benefits is ambiguous. As for bus sweeps and drug roadblocks, these operations appear to have virtually no utility in producing arrests or quantities of drugs.

The success of drug courier profile operations in airports is the subject of disagreement. In *Mendenhall*, for example, Justice Powell stated that, during the first eighteen months of the program in Detroit, the DEA found drugs in seventy-seven of ninety-six encounters in which they searched 141 persons, arresting 122 of them.[160] However, as Justice White pointed out in a dissenting opinion, these numbers include cases where the DEA had information *in addition to* the mere visual observation of the passenger, such as information received from airline employees or independent police investigation.[161] The success rate for searches where law enforcement agents rely on profiles alone is virtually certain to be much lower.

Accurately assessing the effectiveness of investigations based only on the visual observations of officers applying drug courier profiles presents some difficulty, in that the DEA apparently does not keep accurate records of the numbers of people stopped who were not carrying drugs, nor do they distinguish between stops

160 *Mendenhall*, 446 U.S. 544, 562 (Powell, J., concurring in part and concurring in the judgment).

161 *Id.* at 573-74 n.11 (White, J., dissenting).

based only on visual observations and those in which they have additional information prior to the stop.

With regard to bus sweeps, a measure of their effectiveness can be gleaned from the testimony of police officers as recorded in a few lower court cases in the states where they are practiced. For example, in *United States v. Flowers*,[162] the Fourth Circuit noted that in a sweep of 100 buses, seven arrests were made.[163] Even if only one person on each bus had been questioned and searched, the rate of success would only amount to seven percent. More realistically, if five to ten persons were questioned and searched, the success rate would range between 1.4% and 0.7%.

With regard to the success of roadblocks, an accurate measure of their success is more difficult to glean from reported cases, especially since the location and methods used vary from roadblock to roadblock. One case reports that, in Washington D.C.'s "Operation Cleansweep," law enforcement agents conducted seventy-seven roadblocks, with an average duration of three hours,[164] and stopped twenty to forty cars per hour.[165] These seventy-seven roadblocks resulted in 243 arrests, only ten of which involved narcotics, and only one of those for a felony offense. Most of the arrests involved traffic offenses. Based on this information, a conservative calculation of the number of people passing through the seventy-seven roadblocks is 4,620.[166] Thus, the rate of arrest for narcotics offenses was 0.216 percent. Another reported "Operation Cleansweep" roadblock netted *no* drug arrests of the 226 cars stopped in a two-hour period, in an area said to be plagued with drug-related traffic.[167]

The police may defend the low success rates of the current practices by noting that roadblocks may *deter* many people from engaging in drug trafficking, but no empirical data has been compiled to prove the level of deterrent effect. In any case, such an argument should be rigorously scrutinized to ensure that the deterrent benefit

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162 912 F.2d 707 (4th Cir. 1990).

163 *Id.* at 710. *See also* United States v. Rembert, 694 F. Supp. 163 (W.D.N.C. 1988) (only three to four narcotics arrests made in forty to fifty bus sweeps).

164 The three-hour figure is derived from the time periods reported in United States v. McFayden, 865 F.2d 1306 (D.C. Cir. 1989) (six hours), Galberth v. United States, 590 A.2d 990, 992, 994 (D.C. App. 1991) (two hours, and 1 1/2 hours).

165 *McFayden*, 865 F.2d 1306.

166 That number is derived as follows: twenty vehicles (one person per vehicle) per hour for three hours multiplied by seventy-seven. The actual figure may be more than twice that number since many cars may have been occupied by more than one person.

167 *Galberth*, 590 A.2d 990.

outweighs the costs borne most often by working class people and racial minorities.

C. ALTERNATIVE SORTING TECHNIQUES

Other less intrusive and more effective means by which to distinguish the guilty from the innocent are available to the police and should be encouraged. In particular, the use of narcotics detection dogs could replace the inquisitorial investigative method in airport, bus and train terminals and during highway roadblocks. To detect drug dealers in residential neighborhoods, the innovative use of comprehensive community-oriented programs again offers many advantages not available with residential roadblocks that rely on the inquisitorial approach. Each of these alternatives provides both greater benefits due primarily from the superior accuracy of their investigative abilities, as well as lower costs in terms of the intrusions on innocent people. Some innovative operations also make possible the recruitment of community support and assistance in the on-going effort to deter drug activity.

1. Narcotics Detection Dogs

In drug interdiction operations in airport, bus, and train terminals, the "canine sniff" by a narcotics detection dog is a preferrable method for distinguishing drug traffickers from innocent people. Officers could subject travelers' possessions, such as checked-in luggage or carry-on bags, to a "canine sniff" during the same security clearance process now in place without significant additional delay or inconvenience. This investigative technique could replace police questioning and searches pursuant to voluntary consent.

It is well-established that dogs may be trained to use their olfactory senses to detect a number of illegal narcotics.[168] A positive "alert" to a checked-in suitcase by a drug-detecting dog would lead to the detention of the passenger who later arrived to claim the piece of luggage. An alert to luggage which a passenger is attempting to carry on board the vehicle would result in the passenger being asked to step aside until further investigation had been

168 The most common use of the dog's olfactory senses is for hunting, but increasingly law enforcement have employed dogs to detect concealed explosives, drugs, toxic wastes and certain other types of contraband. *See* LAWRENCE J. MYERS, DYSOSMIA OF THE DOG IN CLINICAL VETERINARY MEDICINE (on file with author). Dogs are generally trained and certified to detect particular narcotic substances. *See, e.g.*, United States v. Sullivan, 625 F.2d 9 (4th Cir. 1980) (narcotics detection dog certified for discovery of marijuana, heroin and cocaine, but not for PCP).

completed.[169] By use of canine sniffs, officers can more effectively sort out the possibly guilty passengers and subject only them to subsequent questioning and manual searches. The ability to investigate large numbers of containers in this way means that drug traffickers will be significantly impeded from transporting large quanitities of narcotics via commercial airplanes, buses, or trains.[170]

Canine sniffs would also allow the police to conduct quick, thorough investigations of automobile drivers during roadblocks[171] without requiring the time-consuming task of manual inspection of all the many places in an automobile where drugs might be hidden.[172] Like their use in transportation terminals, the use of narcot-

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169 A positive alert from a trained narcotics detection dog would give rise to at least reasonable suspicion to believe the luggage contains narcotics. Thus, the agents could detain a person briefly for questioning and seek consent to search. Since current methods employ canine sniffs only when officers have other suspicious information about a passenger, it has not been determined whether a canine sniff alone could provide probable cause to arrest the owner and to seize the luggage until a search warrant is obtained.

In any case, a preferrable approach is to give the owner the opportunity to consent to a search. This method minimizes the possibility that an erroneous alert — a false positive alert — will lead to the erroneous arrest of an innocent traveler. The traveler would be given the option to have the police manually search the luggage and thus be cleared of suspicion on the spot and allowed to continue the trip.

Of course, this approach may raise many of the same concerns as the inquisitorial approach when an innocent person is stopped because of a false positive alert. Innocent people should not have the burden to remove suspicion from themselves and may feel pressured to give consent to search. However, these cases would be many fewer since canine sniffs are a more accurate sorting technique than drug courier profile operations, bus sweeps or roadblocks, which fact alone makes this approach preferrable.

170 *See, e.g.*, United States v. Place, 462 U.S. 696 (1983) (luggage contained 1,125 grams of cocaine); United States v. Sullivan, 625 F.2d 9 (4th Cir. 1980) (luggage contained 258 ounces of fluid PCP).

171 One federal district court found that an officer must have reasonable suspicion that a crime is being committed in order to conduct a canine sniff around the perimeter of the automobile during a drivers' license checkpoint stop. United States v. Morales, 714 F. Supp. 1146 (D.N.M. 1989). The court noted that since the sniff of an automobile's exterior necessarily includes a sniff of the passenger and her belongings contained in the automobile, the canine sniff implicates privacy interests greater than those involved in the sniff of luggage. Such concerns are particularly true if the motorist is driving a motorcycle. *Id.* at 1148. However, the Tenth Circuit reversed, rejecting the proposition that the bodily integrity of the driver had been implicated by the automobile sniff. United States v. Morales-Zamora, 914 F.2d 200 (10th Cir. 1990). The Tenth Circuit found the case indistinguishable from *Place*. *Id.* at 203.

As a practical matter, since police questioning and requests for consent to search during a lawful automobile stop without a showing of individualized suspicion are constitutionally permissible and more intrusive, suspicionless canine sniffs should also be permissible, so long as the police follow proper procedures with respect to the sniffing of the passengers themselves.

172 In United States v. Taylor, 934 F.2d 218 (9th Cir. 1991), the agent estimated that the canine sniff of defendant's car during a roadblock took approximately sixty seconds. The officer in State v. Bolton, 801 P.2d 98 (N.M.App. 1990), for example, visually de-

ics detection dogs at roadblocks would also prevent the transportation of large quanitites of narcotics via automotive vehicles.[173] However, the use of roadblocks for such purposes should be limited to interstate highways or major thoroughfares. Roadblocks on interstate highways may inconvenience motorists, but they do not involve a conspicuous invasion by the police into one's "backyard," an activity that must surely alarm law-abiding residents. Roadblocks should also be designed to minimize the delay caused to innocent motorists.[174]

The use of canine sniffs thus offers many appealing advantages not found in the inquisitorial approach, since it is a much less intrusive technique for sorting the guilty travelers from the innocent. As the Supreme Court said in *United States v. Place*:

> A "canine sniff" by a well-trained narcotics detection dog . . . does not require opening the luggage. It does not expose non-contraband items that otherwise would remain hidden from public view, as does for example, an officer's rummaging the contents of the luggage. Thus, the manner in which information is obtained through this investigative technique is much less intrusive than a typical search. Moreover, the sniff discloses only the presence or absence of narcotics, a contraband item. Thus, despite the fact that the sniff tells the authorities something about the contents of the luggage, the information obtained is limited. This limited disclosure also insures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods.[175]

Because the canine sniff is so unlike other investigative tools, the Supreme Court in *Place* found it to be *sui generis*. The Court found canine sniffs of luggage to be so unintrusive as not to violate a passenger's reasonable expectatation of privacy, thus not constituting a "search" for Fourth Amendment purposes.[176] So long as the

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tected a false gas tank. The detection of such hiding places by visual observation will likely take more time than would the passing of a narcotics detection dog by the gas tank.

173 *See, e.g.*, United States v. Solis, 536 F.2d 880 (9th Cir. 1976) (approximately one ton of marijuana found in bed of defendant's trailer).

174 For example, officers might stop every fifth car or every twentieth car, depending on the flow of traffic, in order to minimize the possibility of creating massive traffic logjams. This procedure would not ensure that *no* drugs would pass along that highway, but would nonetheless enable the police to search a sufficient number of vehicles and have a deterrent effect on drug transport along that stretch of highway. This procedure is no different from that already followed in most roadblocks. *See infra* note 100 and accompanying text.

175 462 U.S. 696, 707 (1983).

176 *Place* raised the issue of the length of time that the police could detain one's luggage in order to subject it to a canine sniff. Presumably, drug-detecting dogs would be readily available during organized drug interdiction operations so as not to raise the

sniffs occur in a public place,[177] or the police are legitimately in custody of the container,[178] or the container is in the possession of a third party common carrier,[179] canine sniffs may be conducted without the need to show any quantum of suspicion.

The practice of using of drug-detecting dogs to sniff the bodies of passengers themselves calls for more careful consideration than does the practice of using them to sniff of luggage. The most thorough consideration of this issue is found in a Fifth Circuit case challenging the use of drug-detecting dogs in public schools.[180] The court found the manner in which the children were sniffed — "sniffing around each child, putting his nose *on* the child and scratching and manifesting other signs of excitement in the case of an alert" — was intrusive.[181] If invasiveness were the only objection to canine sniffs of people, such concerns could be dispelled by simply keeping the dogs a distance of at least a few feet from the subject of the sniff. Canine sniffs of passengers, however, raise additional concerns.

First, if the procedure for sniffing of passengers allows the dog handler to select individuals for investigation, such as by means of a drug courier profile, the replacement of the inquisitorial approach with canine sniffs would not eliminate the danger of individual officers' selecting people for investigation based on their race or apparent socio-economic status. Consequently, procedures for canine sniffs of passengers should either require all passengers to be inves-

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question of delay. *See, e.g.*, United States v. Beale, 736 F.2d 1289 (9th Cir. 1984) (canine sniff of checked-in luggage does not interfere with owner's possessory interest where not significantly delayed).

177 *Place*, 462 U.S. 696 (1983) (canine sniff of luggage in public airport not a search); United States v. Canis, 1991 U.S. App. Lexis 4384 (Nos. 90-10014, 90-10018, 9th Cir. 3/13/91) (canine sniff of plane parked in public airport not a search). Until recently, some courts had refused to allow the use of narcotics detection dogs to sniff the outside of very private areas, such as the outside of one's home. *See, e.g.*, United States v. Thomas, 757 F.2d 1359 (2nd Cir. 1985) (dog sniff outside defendant's apartment constituted a Fourth Amendment search requiring a search warrant). However, the Supreme Court's decision in United States v. Jacobsen, 466 U.S. 109 (1984), held that so long as the police conduct "reveal[s] nothing about noncontraband items," it is not a search. Thus, courts have taken the position that canine sniffs outside private areas, since they "reveal nothing about noncontraband items," are not a search. *See, e.g.*, United States v. Colyer, 878 F.2d 469 (D.C.Cir. 1989).

178 *See, e.g.*, United States v. 1988 BMW 750 IL, 716 F. Supp. 171 (E.D.Pa. 1989) (canine sniff during inventory search of automobile permissible even if sniff does not advance any interests justifying inventory); United States v. Rodriguez-Morales, 929 F.2d 780 (1st Cir. 1991) (same).

179 *See, e.g.*, United States v. Germosen-Garcia, 712 F. Supp. 862 (D.C.Kan. 1989) (canine sniff of checked-in luggage in airport that does not cause a significant delay not a search or seizure).

180 Horton v. Goose Creek Ind. School Dist., 690 F.2d 470 (5th Cir. 1982).

181 *Id.* at 479.

tigated — just as every passenger must pass through a metal detector — or provide other safeguards against arbitrary selection. For example, a requirement that drug courier profile stops be based on substantial information beyond mere visual observations would minimize the risk of arbitrary selection. In many drug courier profile cases, officers had obtained information from airline employees about a passenger that justified their stopping that individual, such as, for instance, information that a passenger had purchased a one-way ticket with cash or had given a non-working telephone number or a false address. Officers acting pursuant to this type of information would be justified in singling out that passenger for a canine sniff, or even for questioning and a voluntary consent search.

A second concern, expressed by the Fifth Circuit in *Horton*, involves the type of dogs chosen. The dogs utilized in canine sniffs are usually Doberman Pinschers and German Shepherds, breeds often sold to police forces in order to enable them "to maintain an image of strength and ferocity."[182] In fact, clinical studies have shown that breeds such as the German Shepherd are of only average ability as drug-detectors.[183] Other, smaller dogs such as beagles or terriers exhibit very effective detection abilities. Because the use of drug-detecting dogs to sniff people can involve fear and anxiety over being confronted at close proximity by a large, ferocious-appearing dog, and in light of the superior sensory abilities of some smaller breeds, police forces should be required to use only smaller, non-threatening breeds for sniffs of passengers.

In general, besides the highly discreet nature of this investigative method, canine sniffs appear to be sufficiently accurate. As current research indicates, accuracy depends largely on the traits of individual dogs (although some breeds as a group may be better suited for detection tasks than others) and on the quality of their training.[184] To date, law enforcement training efforts have appeared to produce reliable narcotics detection dogs.[185] Nonethe-

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182 *Id.* at 482; *see also* Jeffrey T. Even, *The Fourth Amendment And Drug-Detecting Dogs*, 48 MONT. L. REV. 101, 115-116 (1987).

183 Telephone interview with Dr. Lawrence J. Myers of the Auburn University Institute for Biological Detection Systems, Sept. 10, 1991. Dr. Myers has not studied a large enough sample of Doberman Pinschers to arrive at any scientific conclusions. Dr. Myers is apparently the first researcher to conduct controlled studies of canine detection systems. He is presently engaged in a major research effort to determine the weaknesses of these systems. Letter from Lawrence Myers, Sept. 1991 (on file with author).

184 *See* MYERS *supra* note 168 and accompanying text.

185 The government is required to state the dog's qualifications in its affidavit for a search warrant. In light of the fact that there have been few complaints of "false positives," courts have not closely scrutinized the reliability of individual narcotics detection dogs. One federal court has held that a search warrant affidavit that states that the dog

less, should a canine sniff produce a "false positive," indicating the presence of drugs when none are present, the innocent traveler would have the opportunity to permit a manual search and be quickly cleared of suspicion. Such is not a desirable outcome, but since canine sniffs are more accurate than drug courier profiles or dragnet operations as a means of sorting the guilty from the innocent, this result is still preferrable.

Conversely, if a canine sniff produces a "false negative," not detecting the presence of drugs when they are in fact present, it will mean that a drug trafficker will pass undetected. Such an outcome is inevitable in some cases. No system — short of a thorough manual search of all luggage and every passenger's body — is perfect. Even so, the use of canine sniffs offers so many advantages in terms of protecting the interests of innocent people, removing the burdens on racial minorities and working class people present in the current methods, and achieving more effective results not available with the current methods, that the balance weighs in favor of its adoption.

2. *Community-Oriented Operations*

In lieu of such tactics as drug investigation roadblocks in residential areas, some police forces around the country have developed and succcessfully implemented community-oriented operations that take aim at the perceived sources as well as the symptoms of the drug problem. As the drug crisis of the 1980's surged forward, police departments in the cities of San Diego, Dallas, New York, Portland, Houston, Tulsa, Tampa, and others realized that traditional policing approaches were failing to curb the decline of some neighborhoods. The crisis called for innovative strategies that re-defined the role of the officer on the beat.

The operations share the same overall goal: to facilitate long-term reductions in the levels of drug-related crime and violence by providing a wide range of community services and improvements. The operations endeavor to further this goal by doing two important things: (1) identifying and arresting drug dealers, and

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has been "trained" to detect narcotics is sufficient proof of reliability for a magistrate to reasonably infer that the dog has attained a high degree of proficiency in narcotics detection. United States v. Meyer, 536 F.2d 963 (1st Cir. 1976).

In order to respond to a challenge concerning the reliability of a particular dog's detection abilities, the government must disclose the dog's actual training records and information about the dog's experience. In United States v. Dicesare, 765 F.2d 890 (9th Cir. 1985), the court upheld the lower court's decision to prohibit the disclosure of several chapters of the U.S. Customs Service narcotics canine training manual on the grounds that federal law protect from disclosure any information that would compromise investigative techniques.

(2) soliciting assistance from a wide variety of sources for the long-term improvement of the neighborhood's quality of life. Wisely, operation designers recognized that, in order to work, the programs must be tailored to the unique needs of each community. Thus, the details of the operations vary somewhat from city to city, but the overall designs remain for the most part the same.

The first task in establishing a community-oriented operation is to identify a particular neighborhood or large public housing complex as the target area.[186] Because community-oriented operations require the allocation of substantial city and community resources, it is imperative that the scope of the operation be limited. Accordingly, police departments select certain discrete areas of special need. Target areas are selected based on current levels of drug use and street distribution, crime rates, and calls for police service,[187] although in many cases the problem areas are conspicuous in their notoriety.[188] The residents are usually of low socio-economic status, and the communities are usually characterized by high rates of unemployment and higher than average levels of high school dropouts.[189]

Second, the operations take a variety of approaches to ridding the neighborhoods or housing areas of drug dealers. Dallas's "Operation CLEAN" relies on the traditional form of vice operation — the undercover operation — by infiltrating the area for five to fourteen days with undercover detectives who obtain information for numerous search and arrest warrants. The next stage involves the *en masse* execution of the warrants by as many as 100 uniformed police officers, who enter the neighborhood knowing exactly the identities of the drug dealers and where they may be found.

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186 Atlanta, Tampa, Philadelphia, and Tulsa targeted large public housing complexes, while other cities like Dallas, San Diego, and New York targetted a larger number of city blocks. *See* Deborah Lamm Weisel, *Playing The Home Field: A Problem-Oriented Approach To Drug Control*, 1990 AM. J. OF POLICE 75, 78 (1990); Richard W. Hatler, *Operation CLEAN: Reclaiming City Neighborhoods*, 23 FBI L. ENFORCEMENT BULL. 22, 23 (1990); Patrick J. Carroll, *Operation Pressure Point: An Urban Drug Enforcement Strategy*, 58 FBI L. ENFORCEMENT BULL. 1, 2 (1989).

187 Hatler, *supra* note 186 at 23; Weisel, *supra* note 186 at 78.

188 Rod Englert, *Safety Action Team*, 59 FBI L. ENFORCEMENT BULL. 2 (1990) (Portland housing project notorious for gang-sponsored violence, drug dealings, and drive-by shootings); Carroll, *supra* note 186 at 1 (Manhattan's Lower East Side had been called "drug supermarket of the metropolitan area").

189 In Portland, for example, the residents of the targetted housing project lived at or close to the poverty level, with incomes ranging from $2,500 to $12,000. Many had no high school diploma and were functionally illiterate. The residents had severely limited employment potential, since they lacked job skills, positive role models, child care facilities, or transportation. Other residents had unattended or chronic health problems. *See* Englert, *supra* note 188, at 3.

Manhattan's "Operation Pressure Point," on the other hand, sought to maintain a highly visible presence by saturating the area with 240 additional officers, mostly on foot, who deterred conspicuous drug sales.[190]

Besides effectuating arrests, the police have used other methods to push dealers out of an area. In Tulsa, drug dealers were driven from a housing complex by means of an eviction program.[191] In Tampa, the dealers were found not to reside in the targetted complex, and so the operation focused on the strict enforcement of trespassing laws.[192]

Once the neighborhood has been cleared of drug dealers, the third phase of most community-oriented operations involves the initiation of comprehensive solutions to the area's long-term problems. Most operations coordinate the efforts of several municipal agencies or private entities, in addition to the police, which enter to clean, check and repair streets and buildings.[193] For example, in Dallas and Manhattan, the fire department checked for fire code violations and ordered the closing of unoccupied buildings with safety violations. The streets and sanitation department was responsible for cleaning up the area, removing discarded furniture used by drug dealers, clearing alleys, and towing away abandoned cars. The housing and neighborhood services department was enlisted strictly to enforce applicable city codes.[194]

In Tampa and San Diego, officers discovered that better lighting in the common areas of apartment buildings reduced residents' fears and detered drug dealing at night. The officers worked with the building owner in San Diego and with the electric company in Tampa to upgrade the lighting conditions.[195]

Operations also use outside agencies for a number of other purposes. In Manhattan, one day a week all arrests made by the

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190 Lynn Zimmer, *Proactive Policing Against Street-Level Drug Trafficking*, 1990 AM. J. OF POLICE 43, 51-52 (1990). In addition, mounted police cleared parks and the canine unit swept through abandoned buildings clearing out drug activity. The Organized Crime Control Bureau also conducted undercover "buy and bust" operations. *Id.*

One issue of concern is the fact that the foot patrols in Operation Pressure Point, as instructed, "swept through the streets, mostly on foot, dispersing the crowds, . . . conducting searches and making arrests." *Id.* A significant component of the police activity — the aggressive sweeping out of drug dealers — thus created the possibility that innocent neighborhood residents who may have looked like drug dealers to the officers would be harassed.

191 Weisel, *supra* note 186, at 84.

192 *Id.* at 87.

193 *See generally id.* at 77.

194 Hatler, *supra* note 186 at 23; Zimmer, *supra* note 190, at 55.

195 Weisel, *supra* note 186, at 81, 89.

New York City Narcotics Division during Operation Pressure Point were prosecuted by the U.S. Attorney's Office under federal drug statutes.[196] In San Diego, the police coordinated the assistance of the local Housing Commission and the U.S. Department of Housing and Urban Development, as well as the private owner of an apartment building, in order to facilitate the eviction of a drug dealer from a specific "drug hot spot."[197]

The operations are also comprehensive in the sense that the police actively seek support from private organizations and the community. The Tampa police sought community input in the design of the operation by conducting a survey of residents of the targetted housing complex to determine their needs.[198] In Manhattan, the police created a hotline for citizens' drug complaints, and assigned a "Community Affairs Officer" to recruit Auxiliary Police and to organize Block Watchers Programs and tenant associations. The department also established school programs to educate students about the drug problem and a "recover hotline" to give addicts an outlet for self-help.[199] The Portland operation enlisted police officers to train residents in crime prevention techniques and to transport truants to school. The officers also established programs less directly related to crime control, such as athletic programs, trips for children to the zoo and other places, job placement programs, and transportation for the elderly.[200]

Every neighborhood in which these types of long-term, comprehensive strategies for crime control were implemented showed marked improvement on many fronts. For example, the Dallas program resulted in the arrests of 289 people, issuance of 200 traffic citations and seizure of 630 packets of crack cocaine and seventy-six packets of marijuana in one neighborhood.[201] During the six weeks of the program, citizen calls for police service decreased by forty percent and the crime rate fell by seventy-one percent.[202] Many other changes could be seen in the neighborhood as well. The area had been cleared of 1,000 cubic yards of debris, and new buildings were being constructed to replace dilapidated structures. Addition-

196 Carroll, *supra* note 186, at 4.

197 Weisel, *supra* note 186, at 81-82.

198 The officers learned that the residents believed that the majority of drug dealers in their complex were not residents. This information enabled them to devise a strategy specifically to deal with outsiders trespassing in the complex. Weisel, *supra* note 186, at 88.

199 Carroll, *supra* note 186, at 5-7.

200 Englert, *supra* note 188, at 3-4.

201 Hatler, *supra* note 186, at 25.

202 *Id.* at 25.

ally, residents were beginning to become involved in regaining control of their neighborhood by forming a Crime Watch Program.

Operation Pressure Point was responsible for almost 14,000 drug-related arrests in seventeen months of activity in Manhattan, resulting in a substantial decrease in volume of drug traffic.[203] Gradually, residents "reclaimed" the streets and parks, and the increasingly middle class areas continued to be "gentrified."[204]

In Portland, the community began to take pride in their housing complex and to volunteer their assistance to the police. The police saw a noticable reduction in the fear of crime. As the changes in the housing complex began to receive favorable news coverage, private groups responded with an outpouring of support and donations. Church groups called to volunteer their services, and area businesses contributed everything from fishing trips and tickets to cultural and sporting events to snacks for the children, microwaves, and computers.[205] Such police activities not only fostered good will among the community, but also expanded the police role to encompass preventive activities in addition to law enforcement.

In sum, police operations can both effectively remove drug dealers from neighborhoods and simultaneously transform the areas in a more permanent and meaningful way. Like any ambitious police operation, community-oriented operations require the allocation of substantial resources, but over time, they may actually be more cost-effective than alternatives like increasing foot patrols or roadblocks for drug investigations. Community-oriented operations serve as evidence that, in many cities across the country, police departments have the vision and faith in the good people they serve to seek holistic and constructive solutions to the drug crisis. The success of the operations confirms the belief that, even in the neighborhoods with the worst drug problems, law-abiding residents and area organizations and businesses desperately want to see improvement and will work with the police if given the opportunity. Empowering communities to enter into partnership with the police and the city to find real and lasting solutions may be the only viable way to turn these areas around. Thus, for many reasons, comprehensive programs that endeavor to improve the quality of life for the law-abiding residents of drug-infested neighborhoods should be encouraged over dragnet, inquisitorial operations that attempt to sift

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203 Zimmer, *supra* note 190, at 52, 55.

204 *Id.* at 63.

205 Englert, *supra* note 188, at 4-5.

through all the residents of the neighborhood in a non-constructive way in order to find the guilty ones.

IV. CONCLUSION

A common undercurrent throughout recent case law on present methods of domestic drug interdiction is that innocent citizens have an obligation to support the police and cooperate fully with their investigations. Many courts speak in terms of the "small price" involved in these investigations, as compared to the huge benefits from drug interdiction. Such attitudes reflect the mentality of a country at war: everyone must do their part to win. But, although our leaders speak of a "war on drugs," America is not involved in a military war against a foreign enemy. This "war" is an internal battle against a strong criminal element. Because it is a domestic battle, the line between the enemy and innocent "civilians" is not easily drawn. Unless we intend to surrender all civil rights and declare a military state, the traditional protections of citizens from arbitrary and unwarranted intrusions by the government should be maintained. That these protections be vigilantly enforced is especially important since the burdens of this "war" are not equally borne by all. As discussed above, many new types of drug interdiction operations adversely affect the interests of innocent people, particularly racial minorities and the working class. Thus, for the most part, the obligation to pay the price for drug interdiction rests most heavily upon innocent working class citizens and racial minorities.

History has taught us that, even during times of real military war, the fervor for self-protection can lead us to commit violations of human rights on certain groups of American citizens associated with the enemy. In 1944, Justice Black wrote:

> [H]ardships are part of war, and war is an aggregation of hardships. All citizens alike, both in and out of uniform, feel the impact of war in greater or lesser measure. Citizenship has its responsibilities as well as its privileges, and in time of war the burden is always heavier.

With that, he then proceeded, in writing the majority opinion of the Supreme Court, to uphold as constitutional the wholesale exclusion of Japanese-Americans from their homes and their internment in concentration camps during World War II.[206]

Today, the tactics of police agencies around the country, while certainly not comparable to the internment of the Japanese-Americans, certainly threaten the rights of liberty and privacy of many innocent people. The Supreme Court's Fourth Amendment

[206] Korematsu v. United States, 323 U.S. 214, 219 (1944).

jurisprudence provides only the most minimal protection from intrusive police actions. Meanwhile, the federal budget for drug interdiction, which also provides essential resources to state and local agencies, continues to grow at an astounding rate. Thus, unless state courts or legislatures or the general public take some action, we can only expect intrusive drug interdiction operations to blossom nationwide. The present state of affairs calls for a careful examination of the policy options available in fighting the war on drugs. Highly productive and unintrusive techniques exist and should be supported, while dragnet, suspicionless investigations that inevitably affect more innocent people than drug traffickers should be eliminated.