

## FLAMED UP<sup>1</sup> AND PATTED DOWN: GANG INSIGNIA, *TERRY STOPS*, AND SPEECH INTEGRAL TO CRIMINAL CONDUCT

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<sup>1</sup> “A gang term used by gangs that rep with red (chiefly Bloods and Northsiders) which means wearing alot of or entirely red clothing to represent the gang.” *Flamed Up Definition*, URBAN DICTIONARY, <http://www.urbandictionary.com/define.php?term=flamed%20up&defid=2760953> (last visited Apr. 2, 2013).

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## INTRODUCTION

According to a recent FBI report, “gangs are expanding, evolving and posing an increasing threat to U.S. communities nationwide.”<sup>2</sup> Gang membership is on the rise all across the country, not just in major cities.<sup>3</sup> It is becoming more difficult for law enforcement to combat these often-sophisticated criminal enterprises with limited resources. Conservative estimates

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<sup>2</sup> National Gang Intelligence Center, *2011 National Gang Threat Assessment—Emerging Trends*, FBI, <http://www.fbi.gov/stats-services/publications/2011-national-gang-threat-assessment> [hereinafter Nat’l Gang Threat Assessment 2011].

<sup>3</sup> This is a forty percent increase from 2009. *Id.*

attribute forty-eight percent of all violent crime to gang members.<sup>4</sup> Law enforcement officers therefore face an uphill battle to make the streets safer for the rest of the population.

Although law enforcement officers undoubtedly need to combat this growing epidemic of violent crime, there are certain constitutional protections guaranteed to all citizens, regardless of whether or not they participate in gang activity. Such protections include the freedom of speech as guaranteed by the First Amendment,<sup>5</sup> as well as the freedom from unreasonable searches and seizures guaranteed by the Fourth Amendment.<sup>6</sup> This Comment will explore the tension that exists between these two interests when the First Amendment is implicated in Fourth Amendment investigatory stops of gang members.

The Fourth Amendment requires that law enforcement officers have reasonable suspicion that the individual is involved in criminal conduct before a seizure occurs.<sup>7</sup> While this requirement is necessary to prevent law enforcement from engaging in unnecessary harassment of innocent individuals, it also creates a burden that an officer must meet before he or she can stop an individual suspected of crime. Because of limited time and resources, officers cannot efficiently stop all individuals they suspect of being involved in criminal activity. Often the lack of specific and articulable facts will prevent an investigation from ever occurring because the level of suspicion is not high enough. Gang identifiers are relevant to establishing reasonable suspicion that criminal activity may be afoot because gangs are so fundamentally organized around criminal activity.<sup>8</sup>

The use of gang indicia, such as the member's clothing or tattoos, as a factor in an investigatory stop does raise First Amendment concerns. However, this type of speech is entitled to

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<sup>4</sup> *Id.*

<sup>5</sup> "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I.

<sup>6</sup> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. CONST. amend. IV.

<sup>7</sup> *See infra* Part I.A.

<sup>8</sup> The term "gang" is defined as "[a] group of persons who go about together or act in concert, esp. for antisocial or *criminal* purposes." BLACK'S LAW DICTIONARY 748 (9th ed. 2009) (emphasis added).

less constitutional protection than speech that would normally receive strict scrutiny.<sup>9</sup> Gang indicators are a type of incriminating speech that can be used against a member in court; therefore, such indicators should also be used against the member on the street. Furthermore, there is a nexus that exists between the speech and the criminal activity, which suggests that gang indicators might fall within the unprotected category of “speech integral to criminal conduct.”<sup>10</sup>

Law enforcement officers may then use these indicators as factors to help establish reasonable suspicion without the fear of the defendant raising a First Amendment violation or having evidence suppressed. The practical effect of using gang indicators for stops would ultimately cause gangs to be less conspicuous in flaunting gang indicia because they would be more fearful of being stopped by law enforcement. Because of the nexus between this indicia and criminal activity, this would deal a blow to the criminal enterprise and generally weaken the gang by obscuring their sense of identity.

## I. BACKGROUND

### A. *Fourth Amendment Investigatory Stops*

#### i. *Terry v. Ohio*

*Terry v. Ohio*<sup>11</sup> challenged the constitutionality of police detention of individuals on the street absent an arrest or warrant.<sup>12</sup> In *Terry*, Cleveland Police Detective Martin McFadden observed two individuals unusually pacing about in front of a store.<sup>13</sup> It was the middle of the afternoon, and the individuals passed the store almost a dozen times, conferring with one another after each time, and then conferred together with a third

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<sup>9</sup> See *infra* Part V (examining why this type of speech should not receive constitutional protection).

<sup>10</sup> See *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949) (“It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute.”). See also *infra* Part V.B.

<sup>11</sup> 392 U.S. 1 (1968).

<sup>12</sup> *Id.* at 4.

<sup>13</sup> *Id.* at 6.

party.<sup>14</sup> McFadden “suspected the two men of ‘casing a job, a stick-up,’ and [ . . . ] he considered it his duty as a police officer to investigate further.”<sup>15</sup> McFadden then approached the men, identified himself as a police officer, and asked for their names.<sup>16</sup> After one of the men mumbled a response, McFadden grabbed him, spun him around to face the other two, and patted the outside of his clothing. The pat down revealed a gun, and a subsequent pat down of the other suspect also produced a gun.<sup>17</sup>

The trial court rejected the motion to suppress the guns, finding that McFadden had reasonable cause to believe that the defendants were involved in some criminal activity, and some interrogation was necessary.<sup>18</sup> The frisk that followed was also permissible because McFadden had reasonable cause to believe the men might be armed and dangerous.<sup>19</sup> In deciding that McFadden was justified in stopping the suspects, the Supreme Court held that such investigatory stops did not violate the Fourth Amendment when an officer “observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot.”<sup>20</sup>

#### ii. *Illinois v. Wardlow*

In *Illinois v. Wardlow*,<sup>21</sup> the Court again examined the reasonable suspicion requirement and held that an individual’s unprovoked flight in a high crime area supported reasonable suspicion that the defendant was involved in criminal activity and justified a stop.<sup>22</sup> Additionally, the Court noted that

[a]n individual’s presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime. . . . Our cases have also recognized that

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<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 6-7.

<sup>17</sup> *Id.* at 7.

<sup>18</sup> *Id.* at 8.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 30.

<sup>21</sup> 528 U.S. 119 (2000).

<sup>22</sup> *Id.* at 124-25.

nervous, evasive behavior is a pertinent factor in determining reasonable suspicion. Headlong flight—wherever it occurs—is the consummate act of evasion: It is not necessarily indicative of wrongdoing, but it is certainly suggestive of such.<sup>23</sup>

*Wardlow* rejected the idea of creating a bright-line rule and instead stated, “[T]he determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior.”<sup>24</sup>

### B. First Amendment

#### i. Symbolic Speech

Like pure speech, symbolic speech also receives constitutional protection under the First Amendment.<sup>25</sup> In *Spence v. Washington*,<sup>26</sup> the Supreme Court addressed whether “speech” as expressed in the First Amendment “include[d] not only written or spoken language but also expressive *conduct*.”<sup>27</sup> In its analysis, the Court established a two-part test for determining whether non-verbal speech qualified as communication protected by the First Amendment.<sup>28</sup> There must be first, “[a]n intent to convey a particularized message,” and second, a great likelihood that such a message would be understood by those who view it.<sup>29</sup> If these two elements are met, the action falls under First Amendment protection for symbolic speech.

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<sup>23</sup> *Id.* at 124 (internal citations omitted).

<sup>24</sup> *Id.* at 125.

<sup>25</sup> See *Virginia v. Black*, 538 U.S. 343, 358 (2003) (“The First Amendment affords protection to symbolic or expressive conduct as well as to actual speech.”).

<sup>26</sup> 418 U.S. 405 (1974). In *Spence*, the defendant was convicted of improper display of an American flag when he fashioned a peace symbol on the flag. *Id.* at 405-06.

<sup>27</sup> Ann Kordas, *Losing My Religion: Controlling Gang Violence Through Limitations on Freedom of Expression*, 80 B.U. L. REV. 1451, 1459 (2000).

<sup>28</sup> *Spence*, 418 U.S. at 410-11.

<sup>29</sup> *Id.*

## ii. Content-Based Restrictions

Content-based restrictions are presumptively invalid<sup>30</sup> but have survived in very limited contexts.<sup>31</sup> *United States v. Alvarez*<sup>32</sup> reinforced the general principle that content-based restrictions can very rarely survive a First Amendment challenge.<sup>33</sup> Content-based restrictions receive the “most exacting scrutiny,”<sup>34</sup> and when the government seeks to regulate protected speech, the restriction must be the “least restrictive means among available, effective alternatives.”<sup>35</sup> When speech is restricted, the burden is on the government to prove “a direct causal link between the restriction imposed and the injury to be prevented.”<sup>36</sup>

Although content-based restrictions must normally survive strict scrutiny, the Court has carved out some exceptions to this standard, including: obscenity,<sup>37</sup> defamation,<sup>38</sup> fraud,<sup>39</sup>

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<sup>30</sup> See *Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984) (“Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment.”).

<sup>31</sup> See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (finding restrictions permissible where the speech is “of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”).

<sup>32</sup> 132 S. Ct. 2537 (2012). In *Alvarez*, the Court invalidated The Stolen Valor Act, which made “it a crime ‘falsely’ to ‘represen[t]’ oneself ‘to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States.’” *Id.* at 2552.

<sup>33</sup> *Id.* at 2543. Since false statements do not fall within the categories previously exempted from First Amendment protection, the Court refused to extend the exemption to cover false statements. *Id.* at 2547. “The Government has not demonstrated that false statements generally should constitute a new category of unprotected speech on this basis.” *Id.*

<sup>34</sup> See *Turner Broad. Sys. Inc. v. FCC*, 512 U.S. 622, 642 (1994).

<sup>35</sup> *Alvarez*, 132 S. Ct. at 2551 (quoting *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 666 (2004)).

<sup>36</sup> *Id.* at 2549.

<sup>37</sup> See *Roth v. United States*, 354 U.S. 476, 492 (1957) (holding that the state statute prohibiting obscene materials did “not offend constitutional safeguards against convictions based upon protected material . . .”).

<sup>38</sup> See *Beauharnais v. Illinois*, 343 U.S. 250 (1952) (holding that state statute forbidding publication of any lithograph exposing any race to contempt or productive of breach of peace or riot).

<sup>39</sup> See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (“[T]here is no constitutional value in false statements of fact.”).

incitement,<sup>40</sup> and speech integral to criminal conduct.<sup>41</sup> The limits placed on these exceptions “[have] never been thought to raise any Constitutional problem.”<sup>42</sup> These categories of speech may be suppressed without meeting any level of scrutiny.<sup>43</sup>

### iii. “Incriminating Speech”

In *Wisconsin v. Mitchell*,<sup>44</sup> the Court had to determine whether the First Amendment protected a defendant’s speech when it was used in conjunction with a hate crime. The Court held:

The First Amendment, moreover, does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent. Evidence of a defendant’s previous declarations or statements is commonly admitted in criminal trials subject to evidentiary rules dealing with relevancy, reliability, and the like.<sup>45</sup>

The Court upheld the sentencing enhancement statute in the interest of protecting against individual and societal harm.<sup>46</sup> Because this sort of crime was likely to “provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest,”<sup>47</sup> the Wisconsin statute protected the community from escalating violence and chaos.

Additionally, “the Constitution does not erect a *per se* barrier to the admission of evidence concerning one’s beliefs and associations at sentencing simply because those beliefs and

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<sup>40</sup> See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (“[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”).

<sup>41</sup> *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949).

<sup>42</sup> *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

<sup>43</sup> See *United States v. Alvarez*, 638 F.3d 666, 681 (9th Cir. 2011) (“Without more, restrictions upon false statements, as with other areas of unprotected speech, are simply not subject to strict scrutiny review.”).

<sup>44</sup> 508 U.S. 476 (1993).

<sup>45</sup> *Id.* at 489.

<sup>46</sup> *Id.* at 487-88.

<sup>47</sup> *Id.* at 488.

associations are protected by the First Amendment.”<sup>48</sup> As long as this type of evidence is reliable, relevant, and the probative value outweighs its prejudicial effect, it is normally admissible.<sup>49</sup> In *Haupt v. United States*,<sup>50</sup> the Court held that incriminating speech, even political in nature, is admissible to prove motive and the commission of a crime.<sup>51</sup>

Similarly, incriminating statements are admissible as long as they are voluntary.<sup>52</sup> When an individual makes an incriminating statement that complies with the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment, he has made the statement freely and voluntarily and it may be used against him.<sup>53</sup> “Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence.”<sup>54</sup> A statement that is voluntary and not coerced from the defendant constitutes a waiver of the rights and privileges that he was previously entitled to under the Constitution.<sup>55</sup>

#### iv. Speech Integral to Criminal Conduct

The category of “speech integral to criminal conduct” was first recognized in *Giboney v. Empire Storage & Ice Co.*<sup>56</sup> In *Giboney*, an injunction was upheld against union members who formed a picket line in order to compel Empire to stop selling ice to non-union peddlers, as well as to intimidate its members not to cross over the picket line.<sup>57</sup> The category of “speech integral to

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<sup>48</sup> Dawson v. Delaware, 503 U.S. 159, 165 (1992).

<sup>49</sup> FED. R. EVID. 403.

<sup>50</sup> 330 U.S. 631 (1947).

<sup>51</sup> *Id.* at 642.

<sup>52</sup> Haynes v. Washington, 373 U.S. 503, 513 (1963).

<sup>53</sup> Miranda v. Arizona, 384 U.S. 436, 478-79 (1966).

<sup>54</sup> *Id.* at 478.

<sup>55</sup> See Maryland v. Shatzer, 130 S. Ct. 1213, 1219 (2010) (“To establish a valid waiver, the State must show that the waiver was knowing, intelligent, and voluntary.”).

<sup>56</sup> 336 U.S. 490, 498 (1949) (“It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute.”).

<sup>57</sup> *Id.*

criminal conduct” developed out of the broader category of low-value speech which receives no First Amendment protection.<sup>58</sup>

Although the parameters of this category of speech remain undefined, after *New York v. Ferber*,<sup>59</sup> speech integral to criminal conduct now includes child pornography.<sup>60</sup> In *Ferber*, a bookstore owner was convicted under a statute that prohibited a person from “knowingly promoting sexual performances by children under the age of 16 by distributing material which depicts such performances.”<sup>61</sup> The Court found the restriction on speech to be constitutional because the speech was “intrinsically related to the sexual abuse of children.”<sup>62</sup> Not only were the materials produced “a permanent record of the children’s participation and the harm to the child [was] exacerbated by their circulation,” but the production and advertising of such materials were essential to keep the distribution network alive.<sup>63</sup> Society has a high interest in protecting the physiological, emotional, and mental health of its youth, and while the Court’s decision would not effectively end the exploitation of children, it would make it more difficult for the industry to thrive. The Court therefore decided that having law enforcement interject was the most expeditious and practical method for trying to cause the industry to dry up.<sup>64</sup>

## II. PUBLIC INTEREST IN COMBATING GANGS

Gang violence has always been a problem in major cities like Chicago, Los Angeles, and New York, but recently, the threat has moved to smaller towns across the country as well. California’s recent anti-gang legislation embodies the public sentiment on the issue: “It is the right of every person . . . to be secure and protected from fear, intimidation, and physical harm caused by

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<sup>58</sup> See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (finding content-based restrictions constitutional where the speech is “no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality”).

<sup>59</sup> 458 U.S. 747 (1982).

<sup>60</sup> *Id.* at 761-62.

<sup>61</sup> *Id.* at 749.

<sup>62</sup> *Id.* at 759.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 760.

the activities of violent groups and individuals.”<sup>65</sup> Studies have shown that gangs are becoming increasingly mobile—moving out of inner cities and into suburbs and residential communities that have not previously had problems with gangs.<sup>66</sup> Gangs pose a threat to a community’s way of life, a danger to its citizens, and a strain on law enforcement resources.

### A. Gangs and Violent Crime

Many gangs have abandoned their traditional role as distribution networks for illegal drugs and have resorted to all manners of criminal activity, including violent crime to intimidate, retaliate, and initiate.<sup>67</sup> Gangs are responsible for forty-eight percent of violent crime in most jurisdictions, and up to ninety percent in others.<sup>68</sup> Although violent crime in general experienced a decline in recent years since its height in the early 1990s, it is on the rise once again.<sup>69</sup> Some citizens have attributed the recent increase in homicides and gang activity in Chicago to a reduction in the city’s police force.<sup>70</sup> Budgets and other concerns may justify the reduction in police spending, but public safety should not become a casualty when the budgets are cut. Reducing police forces only increases the need for police to have every tool available at their disposal, including the ability to conduct an investigatory stop of a suspected gang member. Police officers have other duties in addition to combating gang activity, and it is important that their time and energy be used as efficiently as possible. Proper training and research on gang identification will help police in surveillance and investigations of gang activity and lead to a more effective police force in combating gangs.

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<sup>65</sup> CAL. PENAL CODE § 186.21 (West 1999).

<sup>66</sup> Carol Marin, *Chicago Street Gangs Increasing Presence in Suburbs*, NBCCHICAGO.COM (July 14, 2010, 7:30 PM), <http://www.nbcchicago.com/news/local/violence-project-marin-rolling-meadows-98387104.html>.

<sup>67</sup> Nat’l Gang Threat Assessment 2011, *supra* note 2, at 10.

<sup>68</sup> *Id.* at 15.

<sup>69</sup> Terry Frieden, *U.S. Violent Crime Up For First Time in Years*, CNN.COM (Oct. 17, 2012, 10:01 AM), <http://www.cnn.com/2012/10/17/us/violent-crime/index.html>.

<sup>70</sup> *See, e.g.*, Abby Rogers, *How Chicago Became The Deadliest City In America*, BUS. INSIDER (Nov. 23, 2012, 11:00 AM), <http://www.businessinsider.com/how-chicago-became-the-deadliest-city-in-america-2012-11>.

### *B. Gang Problem = Drug Problem*

Although gangs are now involved in more diverse illegal activities, gangs and drugs still cannot be separated. It is a symbiotic relationship where each depends on the other to survive.<sup>71</sup> Illegal drug trafficking finances many gang activities, and drugs likewise depend on gangs as their channels of distribution. To eradicate gangs is to largely eradicate drugs, and vice versa. Americans are the largest consumer of illegal drugs, and taking out the channels of distribution would largely improve the health of our nation.<sup>72</sup>

Over the past hundred years, Americans have been committed to the never-ending “War on Drugs,” and have devoted hundreds of billions of dollars ending the manufacturing, distribution, and use of illegal drugs.<sup>73</sup> Why would we put forward so much time, money, and resources to combat what many think is no big deal? Because “[d]rug use endangers the health and safety of every American, depletes financial and human resources, and deadens the spirit of many of our communities.”<sup>74</sup> With gangs being responsible for nearly all drug-trafficking in the United States, taking members off the street usually means taking drugs off the street as well.

Successfully identifying gang members who are involved in the selling and use of drugs is vital to keeping the streets clean and safe. A brief investigatory stop of a suspected gang member using certain gang indicators would combat not only local gang activities, but the national drug problem as well.

### *C. The Socio-Economic Impact of Gang Activity*

Although a community’s most pressing gang concern is violent crime, there are a number of other social and economical problems that gangs are often responsible for, such as instilling

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<sup>71</sup> Matthew O’Deane, *Gangs & Drugs: The Connection and What Law Enforcement Can Do*, LAW OFFICER (Nov. 5, 2010), <http://www.lawofficer.com/article/gangs-drugs>.

<sup>72</sup> *Id.*

<sup>73</sup> See Claire Suddath, *Brief History: The War on Drugs*, TIME (Mar. 25, 2009), <http://www.time.com/time/world/article/0,8599,1887488,00.html>.

<sup>74</sup> Office of Nat’l Drug Control Policy, *Nat’l Drug Control Strategy 2010*, at iii, (2010), available at [http://www.whitehouse.gov/sites/default/files/ondcp/policy-and-research/ndcs2010\\_0.pdf](http://www.whitehouse.gov/sites/default/files/ondcp/policy-and-research/ndcs2010_0.pdf).

fear in the community, intimidation, vandalism, graffiti, and drug sales. A gang's presence in a particular area can also cause local residents to avoid certain streets or stop patronizing local businesses to avoid any confrontation with gang members.<sup>75</sup> A small business owner who has his business in an area with a gang presence can testify to the problem gangs present to his business. In addition to making customers afraid to visit an area, gang members routinely demand that small business owners pay certain "taxes," and the failure to do so can result in assault, vandalism, theft, or other violence against the business and its owner.<sup>76</sup>

Another area where gangs can disrupt the operation of a society is through the judicial process—or lack thereof. Witness intimidation and harassment, as well as other more violent acts, make prosecuting gang members extremely difficult.<sup>77</sup> Without successful prosecutions, the gang violence only continues.

Since gang violence is most prevalent in low-income neighborhoods, residents often have limited ability to do anything about it.<sup>78</sup> They are essentially left with the choice either to put up with the gang, or move out of the neighborhood. The choice to remain and take a stand against gangs can put one's life in

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<sup>75</sup> National Crime Prevention Council, *Impact of Gang Violence on Businesses and Communities*, PREVENTION WORKS (Apr. 11, 2012), [http://ncpc.typepad.com/prevention\\_works\\_blog/2012/04/impact-of-gang-violence-on-businesses-and-communities.html](http://ncpc.typepad.com/prevention_works_blog/2012/04/impact-of-gang-violence-on-businesses-and-communities.html).

<sup>76</sup> Ari B. Bloomekatz, *Sad Price of Gang 'Rent'*, L.A. TIMES (Oct. 07, 2007), <http://articles.latimes.com/2007/oct/07/local/me-rent7> ("taxes" are a form of extortion gangs charge in exchange for not vandalizing a business or threatening its customers).

<sup>77</sup> See John Anderson, *Gang-Related Witness Intimidation*, NAT'L GANG CTR. BULLETIN, Feb. 2007, at 1, available at <http://www.nationalgangcenter.gov/Content/Documents/Gang-Related-Witness-Intimidation.pdf> ("[G]ang members so frequently engage in witness intimidation that it is considered part of normal gang behavioral dynamics.").

<sup>78</sup> See Maria Hanratty et al., *The Impact of the Los Angeles Moving to Opportunity Program on Residential Mobility, Neighborhood Characteristics, and Early Child and Parent Outcomes* 14 (Ctr. for Research on Child Wellbeing, Working Paper No. 98-18, 1998), available at <http://crew.princeton.edu/workingpapers/wp98-18-Hanratty.pdf> (explaining that participation in the new Moving Opportunity Program was largely driven by the desire to escape gang-infested neighborhoods. Absent state or federal intervention, members of the community have extremely limited residential mobility.).

jeopardy, and entire housing authorities have been taken over when the residents were forced out.<sup>79</sup>

Gang members are also a large economic burden on society, with the cost of incarcerating gang members often exceeding annual expenses at top private universities.<sup>80</sup> Americans are also responsible for paying medical expenses related to violent crime,<sup>81</sup> the majority of which is attributable to gangs.<sup>82</sup> Gang members are also more likely to drop out of school, become pregnant during adolescence, or have unstable employment; all of which only further the economic burden imposed by gangs on society.<sup>83</sup>

The problems created by gangs extend further than just putting the culpable parties behind bars. Entire neighborhoods must be rehabilitated and our youth must be taught that gangs are not the answer. However, the first step to reclaiming our cities and streets begins with taking gangs out of them. Any tool that helps police to do so is contributing to a safer and more peaceful society, because it is indeed the right of every person to be secure and protected from fear, intimidation, and physical harm caused by the activities of gangs.<sup>84</sup>

### III. GANG INDICATORS CAN HELP TO ESTABLISH REASONABLE SUSPICION NECESSARY TO CONDUCTING AN INVESTIGATORY STOP

In *Terry v. Ohio*, the Court held that “in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.”<sup>85</sup> Recent decisions have indicated a willingness to accept gang

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<sup>79</sup> See *Standing Up Against Crime: Los Angeles Needs More People Like Viviana Guerra*, L.A. TIMES (Aug. 05, 1993), [http://articles.latimes.com/1993-08-05/local/me-20397\\_1\\_apartment-vacancies](http://articles.latimes.com/1993-08-05/local/me-20397_1_apartment-vacancies).

<sup>80</sup> National Crime Prevention Council, *supra* note 75.

<sup>81</sup> Robert J. Shapiro & Kevin A. Hassett, *The Econ. Benefits of Reducing Violent Crime: A Case Study of 8 Am. Cities*, CTR. FOR AM. PROGRESS (2012), [http://www.americanprogress.org/wp-content/uploads/issues/2012/06/pdf/violent\\_crime.pdf](http://www.americanprogress.org/wp-content/uploads/issues/2012/06/pdf/violent_crime.pdf).

<sup>82</sup> See *supra* note 69 and accompanying text.

<sup>83</sup> TERENCE P. THORNBERRY, ET. AL., GANGS AND DELINQUENCY IN DEVELOPMENTAL PERSPECTIVE 169-70 (2003).

<sup>84</sup> CAL. PENAL CODE § 186.21 (West 1999).

<sup>85</sup> *Terry v. Ohio*, 392 U.S. 1, 21 (1968).

indicators as “specific and articulable facts” relevant to establishing reasonable suspicion. The following cases demonstrate how lower courts have handled the issue.

A. *United States v. Marcelino*—*The “Hunch”*

In *United States v. Marcelino*,<sup>86</sup> special agents from the Immigrations and Customs Enforcement (ICE) stopped and detained Fidel Eusebio Marcelino.<sup>87</sup> Marcelino was subsequently indicted for being an illegal alien in possession of an automatic handgun.<sup>88</sup> In addition to the defendant’s presence in a high crime area, the agents cited the reason for the investigatory stop was that “the defendant was wearing loose baggy clothing including a silver and black hooded sweatshirt, which could have been possible gang attire.”<sup>89</sup> The officer recalled:

I observed the defendant in an area that, to me, was a known gang area, he was wearing attire that, although not specifically indicative of gang activity, did—I guess I just had a hunch. His attire—it could have been termed gang clothing. . . . [A]lso, you know the colors were pretty significant, black and silver. Again, those aren’t necessarily indicative of any particular gang but, you know, some gangs may claim those colors.<sup>90</sup>

The court ultimately determined that the agents’ inability to connect the individual to a particular gang did not support the claim of reasonable suspicion,<sup>91</sup> stating,

[T]he Government did not present any evidence to show that black and silver loose baggy clothing are tied to or represent membership in a particular gang. Other courts that have relied upon gang affiliation to justify a *Terry* stop, including those cited by the Government, had more evidence to support the defendant’s ties to a specific gang and other factors

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<sup>86</sup> 736 F. Supp. 2d 1343 (N.D. Ga. 2010).

<sup>87</sup> *Id.* at 1345.

<sup>88</sup> *Id.* at 1347.

<sup>89</sup> *Id.* at 1346.

<sup>90</sup> *Id.* at 1350 (emphasis omitted).

<sup>91</sup> *Id.*

present to support a determination of reasonable suspicion, than this case.<sup>92</sup>

Although the evidence was suppressed because this particular stop was not justified, the court insinuated that an officer's suspicion that certain clothing colors may be affiliated with gang membership is relevant to reasonable suspicion.<sup>93</sup> Had the officer been able to connect Marcelino's clothing to a gang, the particularized suspicion requirement would likely have been met. The failure of the officer to articulate these facts resulted in nothing more than a "hunch" and was therefore insufficient to a finding of reasonable suspicion.<sup>94</sup>

#### B. *United States v. Vasquez-Ortiz—More Than a "Hunch"*

In *United States v. Vasquez-Ortiz*,<sup>95</sup> officers were patrolling an area known to be a hangout for gangs and identified an individual who was dressed in attire that indicated gang membership, as well as a tattoo that indicated the same.<sup>96</sup> Based on these factors alone, the court determined that the officers had reasonable suspicion to conduct an investigatory stop of Vasquez-Ortiz.<sup>97</sup>

The Eleventh Circuit Court distinguished *Marcelino* from *Vasquez-Ortiz* because in *Vaquez-Ortiz* "officers observed suspect sitting atop a staircase in a public location, known to be a hangout for gangs with illegal alien membership, and dressed *in specific*

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<sup>92</sup> *Id.* at 1349.

<sup>93</sup> *Id.* at 1350. See also *United States v. Santio*, 351 F. App'x 324, 328–29 (10th Cir. 2009) (suspect observed in a high crime area at 3:30 a.m., acted nervously, wore all blue clothing and a long white belt indicative of local gang affiliation); *United States v. DeJear*, 552 F.3d 1196, 1200-01 (10th Cir. 2009) (suspect appeared nervous and attempted to conceal something in the car seat and people standing outside nearby house in a high crime area wore colors affiliated with local gangs); *United States v. Am*, 564 F.3d 25, 30 (1st Cir. 2009) (officers were aware of suspect's "known gang affiliation, past criminal conduct, proclivity to carry a firearm," and stopped suspect in a location of known gang violence); *United States v. Feliciano*, 45 F.3d 1070, 1074 (7th Cir. 1995) (officer recognized suspect as a gang member who had just been released from prison; gang affiliation and prior criminal acts are permissible components of articulable suspicion analysis).

<sup>94</sup> *Marcelino*, 736 F. Supp. 2d at 1350.

<sup>95</sup> 344 F. App'x 551 (11th Cir. 2009).

<sup>96</sup> *Id.* at 554.

<sup>97</sup> *Id.* at 554-55.

*attire and having a visible tattoo indicating gang membership.*<sup>98</sup> In *Marcelino*, the officer only had a faint suspicion of the defendant's possible gang affiliation, which was not based on any specific and articulable facts.<sup>99</sup> Instead "[r]easonable suspicion requires 'more than a hunch'; it requires that the totality of the circumstances create, at least, 'some minimal level of objective justification' for the belief that the person engaged in unlawful conduct."<sup>100</sup>

Essentially, the officer must have some degree of knowledge of an individual's possible gang affiliation, or point to some objective facts that indicate such, before it can be relevant to a finding of reasonable suspicion. The "more than a hunch" is not a new standard that contradicts *Terry v. Ohio*, but is rather a rephrasing of the specific and articulable facts requirement for the basis of reasonable suspicion. As long as reasonable suspicion is based on specific and articulable facts, or more than a hunch, then the proper foundation has been laid for an investigatory stop.

### *C. Objective Justification: How to get to "Specific and Articulable"*

Officers must base their suspicion on objective facts, and absent specific and articulable facts, there can be no finding of reasonable suspicion. The specific and articulable facts requirement for an investigatory stop is a built-in safeguard against the arbitrary and abusive enforcement of law. Additionally, the reasonable suspicion standard protects against abuse by considering the quantity and quality of the information possessed by the officers. As the U.S. Supreme Court stated in *Alabama v. White*,<sup>101</sup>

Reasonable suspicion, like probable cause, is dependent upon both the content of information possessed by police and its degree of reliability. Both factors—quantity and quality—are considered in the "totality of the circumstances—the whole

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<sup>98</sup> *Marcelino*, 736 F. Supp. 2d at 1350 (quoting *Vasquez-Ortiz*, 344 F. App'x at 554) (emphasis added).

<sup>99</sup> *Id.*

<sup>100</sup> *Vasquez-Ortiz*, 344 F. App'x at 553.

<sup>101</sup> 496 U.S. 325 (1990).

picture,” . . . that must be taken into account when evaluating whether there is reasonable suspicion.<sup>102</sup>

Therefore, courts should prohibit the use when it is not grounded in objective facts such as empirical research, personal knowledge, or third-party information.

### i. Empirical Research

Police can and should rely on empirical research that has evaluated gang statistics, methods, and patterns. Many organizations, both local and national, are involved in studying gangs so that communities can better identify gang problems and police can better combat gang activity in the field.<sup>103</sup> Involved in the research are statistics that detail how to identify certain members of gangs in certain cities based on their particular clothing.<sup>104</sup> This type of credible research should allow police to determine that that an individual may be involved in gang activity.

### ii. Personal Knowledge

One of the best ways an officer can accurately identify gang members is the officer has personal knowledge of a gang’s indicators through prior experience with the gang or as part of a criminal record. Due to the cyclic nature of criminal activity, officers often deal with the same individuals on a regular basis. In developing this relationship with the criminals, police can gain insight into the activities of the gang and learn such information

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<sup>102</sup> *Id.* at 330.

<sup>103</sup> *See e.g.*, ARIZONA STATE UNIV. SCHOOL OF CRIMINOLOGY AND CRIMINAL JUSTICE, <http://gangresearch.asu.edu/> (last visited Apr. 2, 2013); *About the Nat’l Gang Ctr.*, NAT’L GANG CTR., <http://www.nationalgangcenter.gov/> (last visited Apr. 2, 2013); *Welcome to the NGCRC*, NAT’L GANG CRIME RES. CTR., <http://www.ngcrc.com/> (last visited Apr. 2, 2013); *Gang Resistance Education And Training Program (G.R.E.A.T.)*, INST. FOR INTERGOVERNMENTAL RES., [https://www.iir.com/WhatWeDo/Gang\\_Initiatives/Great/](https://www.iir.com/WhatWeDo/Gang_Initiatives/Great/) (last visited Apr. 2, 2013); COUNCIL FOR UNITY, <http://www.councilforunity.org/alphaIndex.php> (last visited Mar. 6, 2013); *Project Safe Neighborhoods*, BUREAU OF JUSTICE ASSISTANCE, U.S. DEPT. OF JUSTICE, [https://www.bja.gov/programdetails.aspx?program\\_id=74](https://www.bja.gov/programdetails.aspx?program_id=74) (last visited Apr. 2, 2013); *Gangs: Awareness, Prevention, Intervention*, FOCUS ADOLESCENT SERVS., <http://www.focusas.com/Gangs.html> (last visited Apr. 2, 2013).

<sup>104</sup> *See supra* note 103.

as the colors and tattoos used by such gangs. Police regularly keep evidence of gang membership on file and gang identification is taught to new police officers.<sup>105</sup> If an officer is relying on personal knowledge of gang indicators revealed to him by members of such gang, this would also provide the necessary basis identifying potential gang members while on patrol.

### iii. Third-Party Information

Similarly, individuals not directly involved in the gang can provide very accurate and highly useful information about gang members and their activities. Some of the likely informants might be rival gang members, friends and loved ones of gang members, or victims of gang crime. Similar to the way officers use tips on a daily basis,<sup>106</sup> this information about gangs and how to identify its members can be corroborated through observation, and should be used to contribute to the reasonable suspicion requirement of the Fourth Amendment.<sup>107</sup>

## IV. CLASSIFYING GANG INDICATORS UNDER THE FIRST AMENDMENT

### A. Gang Indicators as Symbolic Speech

Clothing issues that have been found to be within the Free Speech Clause of the First Amendment and warranting of its protection include the wearing of armbands<sup>108</sup> and the wearing of

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<sup>105</sup> See Matthew O' Deane & William Patrick Murphy, *Identifying and Documenting Gang Members*, POLICE MAG. (Sept. 23, 2010), <http://www.policemag.com/channel/gangs/articles/2010/09/identifying-and-documenting-gang-members.aspx> (describing the procedures police use when filling out field interview cards to document or update gang information).

<sup>106</sup> *Report A Crime*, L.A.P.D., [http://www.lapdonline.org/report\\_a\\_crime](http://www.lapdonline.org/report_a_crime) (last visited Apr. 16, 2013) ("Crime prevention cannot be achieved by the police alone. Together professional law enforcement officers must work hand-in-hand with the public to fight crime and neighborhood disorder throughout our communities. As such, we depend heavily on your assistance in reporting crimes to the police.").

<sup>107</sup> See *supra* Part III.B.

<sup>108</sup> See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505 (1969) ("[T]he wearing of an armband for the purpose of expressing certain views is the type of symbolic act that is within the Free Speech Clause of the First Amendment.").

army uniforms.<sup>109</sup> The Court in *Spence v. Washington*<sup>110</sup> established the test for symbolic speech that now would determine whether gang clothing warrants symbolic speech protection. The *Spence* test requires there must be (1) an “intent to convey a particularized message,” and (2) a great likelihood that such message would be understood by those who view it.<sup>111</sup>

It would be difficult to argue that gang clothing does not meet both prongs of this test. The reason gang clothing is often easily identifiable is that the gang chooses specific colors or symbols that, when organized in a certain way or worn in a particular manner, make it easy to identify with a particular gang. The purpose for wearing the clothing can be for a number of reasons, but the commonly accepted reason is for gang members to be able to identify fellow gang members, warn other gangs to keep out of an area, or show off certain accomplishments within a gang.<sup>112</sup> There may be additional motivations behind choosing certain clothing or symbols, but the intent is principally to convey the particularized message “I am in this gang.” The second prong of the *Spence* test is also met, because there is a great likelihood that the message would be understood by those who view it. In areas where gangs have a heavy presence, almost everyone in the community, including law enforcement, are able to understand that an individual is wearing certain articles of clothing in order to say, “I am in this gang.”<sup>113</sup>

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<sup>109</sup> See *Schacht v. United States*, 398 U.S. 58 (1970). In *Schacht*, the defendant was convicted of violating a statute prohibiting unauthorized wearing of an army uniform. *Id.* at 59. In reversing his conviction, the Court held that everyone “enjoys a constitutional right to freedom of speech, including the right openly to criticize the Government during a dramatic performance.” *Id.* at 63. Consequently, *Schacht*’s Constitutional right to freedom of speech had been violated. *Id.*

<sup>110</sup> 418 U.S. 405 (1974).

<sup>111</sup> *Id.* at 410-11.

<sup>112</sup> See, e.g., *Martinez v. State*, 323 S.W.3d 493, 506 (Tex. Crim. App. 2010) (“A street gang is identified first and foremost through its hand signs and attire; it puts the public, and most of all, rival gangs, on notice of its existence and presence. Rivalries exist between street gangs, and the use of gang hand signs and clothing, the identifier, contributes to the onset of violence between rival gangs. Additionally, gang hand signs and clothing are used to promote a criminal street gang’s overall objective of engaging in gang activity.”).

<sup>113</sup> Context is important and there are additional issues that must be taken into consideration depending on the location. While black and white may be a gang’s principle color of identification, a gang member’s presence at an Oakland Raiders game

*B. Conducting Investigatory Stops Based on Gang Indicators  
may be a Content-Based Restriction*

If the stop of a gang member can be classified as content-based restriction on speech, then strict scrutiny applies and such actions are presumptively invalid.<sup>114</sup> In *Martinez v. State*,<sup>115</sup> a Texas court had to decide whether provision sixteen of a temporary injunction<sup>116</sup> that prohibited gang members from identifying themselves with a particular gang was “a content-neutral or a content-based time, place, and manner restriction.”<sup>117</sup> Since “the content of the gang hand signs and clothing provided the basis for the restrictions in provision sixteen and the purpose was to ban the message conveyed by such signs and clothing,” the restriction was content-based.<sup>118</sup> The test has been explained by stating,

The Supreme Court has drawn a distinction between regulations that are content-based and those that are content-neutral. A content-based regulation is one in which the goal of the regulation is the suppression of the message itself, while a content-neutral regulation is one in which the impact on expression is only incidental to the regulation of conduct and the regulation is motivated by an important governmental interest. A higher standard of review is applied when the government regulation is content-based; such regulations are subject to strict scrutiny and are presumptively

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while wearing these colors (which are also the colors of the Oakland Raiders) can surely not meet the second prong of the test because the message that would be understood in that case might be, “I am a Raiders fan.”

<sup>114</sup> See *supra* Part I.B.ii.

<sup>115</sup> 323 S.W.3d 493.

<sup>116</sup> *Id.* at 496-97. (“[T]he Eighty-Ninth District Court of Wichita County entered a temporary injunction enjoining specific members of the Varrio Carnales (VC) street-gang, including Martinez, from . . . [u]sing or making words, phrases, physical gestures, or symbols, commonly known as gang hand signs or engaging in other forms of communication which the Defendant knows, describes, refers, or identifies members of the combination, or wearing clothes that particularly identify membership within the combination.”).

<sup>117</sup> *Id.* at 504.

<sup>118</sup> *Id.* at 505. Had the provision banned all hand signs and clothing and not only gang hand signs and clothing, the provision would have been content neutral. *Id.*

unconstitutional. Content-neutral regulations, on the other hand, are subject to a much lower standard of review.<sup>119</sup>

Since a content-based restriction aimed at suppressing protected speech would be unconstitutional under the First Amendment, this issue would be moot if the speech was unprotected<sup>120</sup> or there was no content-based restriction. This Comment does not advocate for legislation to enjoin gangs from displaying gang signs or symbols or from wearing gang clothing. Rather, this Comment argues that the speech is unprotected because of the nexus with criminal conduct and may be used in the field, not that the stop and frisk is either a content-based or content-neutral restriction.

Under a § 1983 action<sup>121</sup> an individual would likewise not have any success. For a § 1983 action to succeed, a plaintiff

[m]ust show that (1) they were engaged in constitutionally protected activity, (2) the defendants' actions caused them to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity, and (3) the defendants' adverse actions were substantially motivated against the plaintiffs' exercise of constitutionally protected conduct.<sup>122</sup>

The claim fails if the activity—in this case, speech—is protected, and since this Comment argues that gang indicia are unprotected for the purposes of *Terry* stops, a § 1983 action should prove unsuccessful. Even in the event that such speech is protected, the defendant may prevail on a § 1983 suit. *Hartman v. Moore*<sup>123</sup> requires plaintiffs in a § 1983 action to prove lack of probable

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<sup>119</sup> Christopher M. LaVigne, *Bloods, Crips, and Christians: Fighting Gangs or Fighting the First Amendment?*, 51 BAYLOR L. REV. 389, 393 (1999).

<sup>120</sup> See *infra* Part V.B.

<sup>121</sup> 42 U.S.C. § 1983 (2006) (“Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .”).

<sup>122</sup> *Keenan v. Tejada*, 290 F.3d 252, 258 (5th Cir. 2002).

<sup>123</sup> 547 U.S. 250 (2006).

cause when claiming malicious prosecution.<sup>124</sup> Although controversial, this application has been extended to claims of retaliatory arrests as well, holding that the plaintiff must prove lack of probable cause for the arrest.<sup>125</sup> Although not challenged yet, it would seem that the same logic might be applied in situations where the action is somewhere short of arrest, such as a *Terry* stop and frisk. Using the *Hartman* standard and its treatment for arrests, in order for a plaintiff to succeed on a claim of malicious stop and frisk, the plaintiff must prove that the police did not have the necessary suspicion to take such action. This standard for a *Terry* stop is reasonable suspicion, which is less than probable cause and often a difficult burden for a plaintiff to prove.

*C. Analogy to Racial Profiling under the Equal Protection Clause of the Fourteenth Amendment*

The analysis of investigatory stops under the Equal Protection clause of the Fourteenth Amendment is comparable to the argument presented in this Comment that there are two constitutional liberties being challenged and each is worthy of addressing.

Race is generally permissible to be used as one factor for establishing reasonable suspicion under the Fourth Amendment;<sup>126</sup> however, it is well established that the use of race alone does not provide the necessary suspicion to stop and detain an individual.<sup>127</sup> In *United States v. Brignoni-Ponce*, the Court considered whether or not race could be used in investigatory stops for the purpose of combating illegal immigration.<sup>128</sup> There, border patrol agents were observing northbound traffic when they

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<sup>124</sup> *Id.* at 258.

<sup>125</sup> *See* Beck v. City of Upland, 527 F.3d 853, 864 (9th Cir. 2008).

<sup>126</sup> *See infra* note 128 and accompanying text. *See also* David A. Harris, *Using Race or Ethnicity as a Factor in Assessing the Reasonableness of Fourth Amendment Activity: Description, Yes; Prediction, No*, 73 MISS. L.J. 423, 430-31 (2003) (“*Brignoni-Ponce* appears to restrict the use of ethnic appearance as a factor in deciding whether reasonable suspicion exists, it actually does so only in the most narrow sense: in situations where ethnic appearance is the only factor involved. And it leaves the door open to using ethnic appearance when it is among several factors.”).

<sup>127</sup> *See infra* notes 128-31.

<sup>128</sup> *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975).

spotted a suspicious vehicle.<sup>129</sup> The officers later stated that their “only reason for [stopping the vehicle] was that its three occupants appeared to be of Mexican descent.”<sup>130</sup> The Court concluded that this single factor did not “furnish[] reasonable grounds to believe that the three occupants were aliens.”<sup>131</sup> If public interest in illegal immigration is not enough to use race as the sole factor for investigatory stops, it is difficult to imagine any situation where race could be the only factor for a *Terry* stop.

The Court, in *Brignoni-Ponce*, also noted that the identification of an individual as Mexican in an area near the border did not automatically translate to the individual being in the country illegally.<sup>132</sup>

Large numbers of native-born and naturalized citizens have the physical characteristics identified with Mexican ancestry, and even in the border area a relatively small proportion of them are aliens. The likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor, but standing alone it does not justify stopping all Mexican-Americans to ask if they are aliens.<sup>133</sup>

Therefore, individuals who are in a gang for reasons such as protection, fellowship, or other non-criminal purposes could make a similar argument that their gang membership is not indicative of criminal activity and a stop based on that factor alone is insufficient.

When race is used as a factor in governmental decision-making, strict scrutiny is triggered.<sup>134</sup> Forty years after *Korematsu*, the heightened scrutiny for racial classifications was reinforced in *Adarand Constructors, Inc. v. Peña*.<sup>135</sup> The Court emphasized that not all racial classifications were unconstitutional, but “such classifications are constitutional only

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<sup>129</sup> *Id.* at 874.

<sup>130</sup> *Id.* at 875.

<sup>131</sup> *Id.* at 886.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 886-87.

<sup>134</sup> See *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

<sup>135</sup> 515 U.S. 200 (1995).

if they are narrowly tailored measures that further compelling governmental interests.”<sup>136</sup>

A First Amendment challenge can similarly trigger strict scrutiny. Not all speech restrictions are subject to strict scrutiny; however, “[w]here a government restricts the speech of a private person, the state action may be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest.”<sup>137</sup> Although in slightly different words, this First Amendment compelling interest test is the same that was used in *Adarand Constructors* for strict scrutiny.

#### *D. The First Amendment Demands Independent Analysis*

When both Fourth Amendment liberties and Equal Protection rights are violated, certainly both matter and are worthy of individual analysis by the courts. A legitimate encounter with police may be valid under the Fourth Amendment, but run afoul of the Equal Protection clause if the individual was targeted based on his or her ethnicity. “The Equal Protection Clause of the Fourteenth Amendment provides citizens a degree of protection independent of the Fourth Amendment protection against unreasonable searches and seizures. This protection becomes relevant even before a seizure occurs.”<sup>138</sup> The reverse is also possible—an investigatory stop may be invalid while still complying with the Equal Protection Clause of the Fourteenth Amendment. There are also situations in which both liberties are violated, and situations in which both liberties are properly protected.<sup>139</sup>

Courts have not treated simultaneous First and Fourth Amendment challenges with the same care. Courts have found conduct permissible under the Fourth Amendment while not even considering the First Amendment challenges raised. The First Amendment claims should not be so easily dismissed because they

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<sup>136</sup> *Id.* at 227.

<sup>137</sup> *Consol. Edison Co. of New York v. Pub. Serv. Comm’n of New York*, 447 U.S. 530, 540 (1980).

<sup>138</sup> *United States v. Avery*, 137 F.3d 343, 352 (6th Cir. 1997).

<sup>139</sup> *See, e.g., United States v. Vandyck Aleman*, 201 F. App’x 215, 217 (5th Cir. 2006).

are among the most sacred rights guaranteed by the Constitution and the very rights that were the motivation for forming these United States.

V. THE USE OF GANG INDICATORS WHEN CONDUCTING  
INVESTIGATORY STOPS IS PERMISSIBLE BECAUSE IT DOES NOT  
VIOLATE THE FIRST AMENDMENT

*A. The Use of Gang Indicators in Criminal Proceedings*

Prosecutors are allowed to use evidence of a criminal's gang membership during criminal proceedings.<sup>140</sup> Gang indicators, such as the individual's clothing or tattoos, have been admitted in both criminal trials<sup>141</sup> and during sentencing.<sup>142</sup> If speech may be used against the accused in a court of law to prove motive or the commission of a crime, then speech should likewise be available to officers in the field for investigative purposes. The use of speech in the field to investigate potential criminal activity is consistent with the idea that speech may be used in court to convict or sentence a defendant as long as the procedural requirements are met.

So, in the courtroom, a prosecutor may be allowed to introduce evidence that a defendant is a member of the "Bloods" gang as part of his case to prove why he or she shot and killed a member of the "Crips" gang. After a conviction, the same evidence may be used at sentencing to show that the individual was extremely dangerous and a menace to the community. Without a personal admission from the defendant, this evidence is based on the same gang indicators and testimony that officers may use to identify a member of the "Bloods" while in the field. It is only logical that field officers be allowed to use this evidence to possibly

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<sup>140</sup> See *infra* notes 141-42 and accompanying text.

<sup>141</sup> See *State v. Jones*, 286 P.3d 562, 567 (Kan. 2012) ("[G]enerally, evidence of gang affiliation or involvement with gang activity is admissible if relevant and, specifically, that such evidence may be relevant for several reasons.").

<sup>142</sup> See *Dawson v. Delaware*, 503 U.S. 159, 165 (1992) ("[T]he Constitution does not erect a *per se* barrier to admission of evidence concerning one's beliefs and associations at sentencing simply because his beliefs and associations are protected by the First Amendment.").

prevent crime from happening rather than to enhance punishment for a crime already committed. If the First Amendment is fully complied with, police should be able to use gang indicators in the field when conducting investigatory stops.

A discussion of a broader issue that transcends gang indicators is necessary to tie together a couple arguments. Absent a violation, a defendant's speech—such as incriminating statements—are per se admissible.<sup>143</sup> There is no detailed justification for why the use of such speech elements during criminal proceedings is allowed. Essentially logic dictates that in order for the judicial process to work, there have to be spoken and written words. But perhaps the already existing, yet underdeveloped category of “speech integral to criminal conduct” provides the necessary justification of why such speech is permitted to be used against a defendant. Speech that recounts a crime or indicates criminal activity is not protected by the First Amendment when it is given under the appropriate conditions.<sup>144</sup> This so closely resembles “speech integral to criminal conduct” because without the speech, it may not be possible to identify, charge, or prosecute such conduct. Therefore, it may be said that the use of such statements is justified because they fall into this category of “speech integral to criminal conduct.” Even not accepting this as justification for already established law, classifying gang indicators as “speech integral to criminal conduct” can be an independent justification for the more narrow issue in this comment that gang indicators are not protected and may be used when conducting investigatory stops.

### *B. Classifying Gang Indicators as “Speech Integral to Criminal Conduct”*

Classifying gang indicators as “speech integral to criminal conduct” would extinguish any First Amendment issues because such speech is unprotected. *Ferber* provides an example of when speech falls into this category,<sup>145</sup> and after examining the nexus

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<sup>143</sup> See *Miranda v. Arizona*, 384 U.S. 436, 478 (1966) (“Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence.”).

<sup>144</sup> See *supra* note 139 and accompanying text.

<sup>145</sup> See *supra* notes 59-64 and accompanying text.

between gang indicators and gang criminal activity, it is only appropriate that gang indicators also be denied First Amendment protection.

In *Ferber*, the nexus between the production of child pornography and child abuse allowed the Court to decide that the speech was so integral to criminal activity it warranted no First Amendment protection.<sup>146</sup> Similarly, gang indicators are so integral to furthering the criminal acts of the gang that it should also not receive any protection.

### i. Drug Trafficking

The main source of income for almost all gangs is drug trafficking.<sup>147</sup> Therefore, gangs depend on their members to acquire, distribute, and sell drugs for the group to function. Many gangs have established a system to make it easier for gangs to sell their drugs in neighborhoods and on street corners. Like meeting to buy tickets outside a baseball game, drug dealers will wear conspicuous clothing and let the buyer know what they will be wearing so they can be easily identified and make a quick purchase.<sup>148</sup> If it were more difficult to find the source of the drugs, many consumers may never initiate the contact and ultimately decide not to purchase drugs.

Similar to child pornography, drug-dealing is also “a low-profile, clandestine industry, [and] the need to market the resulting products requires a visible apparatus of distribution.”<sup>149</sup> Using gang indicators to help identify drug dealers is not going to effectively end the drug-trafficking industry in the same way that shutting down distribution channels for child pornography will not end the exploitation of children. However, it would help to disrupt the distribution channels and hopefully weaken the illegal drug market.

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<sup>146</sup> See *supra* notes 62-64 and accompanying text.

<sup>147</sup> National Gang Intelligence Center, *2009 National Gang Threat Assessment*, FBI, <http://www.fbi.gov/stats-services/publications/national-gang-threat-assessment-2009-pdf>.

<sup>148</sup> See Jo Tuckman, *Fashion Maketh the Drug Dealer*, SYDNEY MORNING HERALD (May 28, 2011), <http://www.smh.com.au/world/fashion-maketh-the-drug-dealer-20110527-1f890.html> (describing the use of Polo brand clothing among Mexican based drug traffickers).

<sup>149</sup> *New York v. Ferber*, 458 U.S. 747, 760 (1982).

## ii. Reputation

Gang signs and symbols also foster criminal behavior through the initiation process as prospects seek to attain membership and earn a reputation. A reputation is one of the most important, if not the most important, things to a gang member.<sup>150</sup> In order to establish this respect and get this reputation, individuals must first prove to the gang that they are worthy of membership, and then once a member, continuously add to their reputation by performing many criminal, and often violent, acts.<sup>151</sup> For initiation, prospects often have to severely beat—or even kill—an innocent bystander or be beaten by current members.<sup>152</sup> The willingness to perform such acts illustrates the value prospects place on earning the respect of current gang members and receiving the privilege to wear the gang's colors.

## iii. Intimidation

One of the other acts favored by gang members that has a direct correlation to the gang's colors and symbols is intimidation.<sup>153</sup> While these acts could be performed without any reference to the gang, they would lose their effectiveness without it. Intimidation doesn't work well when a person does not know who to be afraid of. However, in communities where gangs are a problem, gangs intimidate business owners, families, witnesses, and rival gangs.<sup>154</sup> Both explicit and implicit forms of intimidation

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<sup>150</sup> See Steve Nawojczyk, *Street Gang Dynamics*, THE NAWOJCZYK GROUP (1997), <http://www.gangwar.com/dynamics.htm> (last visited Apr. 2, 2013) (explaining the "Three R's" of gang culture: reputation, respect, and retaliation).

<sup>151</sup> Robert Walker, *Background on Gang Initiations*, GANGS OR US, <http://www.gangsorus.com/initiations.html> (last visited Apr. 2, 2013).

<sup>152</sup> *Id.* See also SCOTT H. DECKER & BARRIK VAN WINKLE, *LIFE IN THE GANG: FAMILY, FRIENDS, AND VIOLENCE* 69-72 (1996).

<sup>153</sup> See John Anderson, *Gang-Related Witness Intimidation*, NAT'L GANG CTR. BULLETIN, Feb. 2007, at 3, available at <http://www.nationalgangcenter.gov/Content/Documents/Gang-Related-Witness-Intimidation.pdf> (discussing the methods used in implicit threats, property damage, and courtroom intimidation).

<sup>154</sup> See John Anderson, *Gang-Related Witness Intimidation*, NAT'L GANG CTR. BULLETIN, Feb. 2007, at 1, available at <http://www.nationalgangcenter.gov/Content/Documents/Gang-Related-Witness-Intimidation.pdf>.

may be used.<sup>155</sup> Witnesses often experience this form of intimidation where a gang member may stalk the witness and circle the witness's house to make the witness fearful to testify.<sup>156</sup> The gang member will make sure the gang's message is received through his conspicuous gang clothing, while either stalking the witness's home or sitting in the courtroom.<sup>157</sup>

#### iv. Responsibility for Criminal Acts

In crimes such as drive-by shootings, the shooting gang may or may not be intending to actually kill someone.<sup>158</sup> While this is often the purpose, it is sometimes just a more extreme show of force in order to intimidate someone—usually a rival gang member or defector.<sup>159</sup> Regardless of the purpose, the shooting gang does not shy from responsibility and wants to make clear who the responsible party is usually by shouting gang phrases, or by displaying as much of their colors and symbols as possible as a show of pride and force.<sup>160</sup>

#### v. Graffiti

The gang's colors and symbols also play a large role in their graffiti and "tagging."<sup>161</sup> Members will spray-paint buildings, trains, or other structures for fun, intimidation, vandalism, or to

<sup>155</sup> *Id.* at 2.

<sup>156</sup> This is a mild form of intimidation. For more horrifying accounts of gang intimidation, see Sheryl Stolberg, *Some Crime Witnesses Pay High Price for Civic Duty: Violence: Agreeing to Testify Can Bring Threats, Even Death. L.A. Gangs Are Notorious for Intimidation Tactics*, L.A. TIMES (Aug. 30, 1992), [http://articles.latimes.com/1992-08-30/news/mn-8554\\_1\\_witness-intimidation](http://articles.latimes.com/1992-08-30/news/mn-8554_1_witness-intimidation).

<sup>157</sup> See John Anderson, *supra* note 153, at 2.

<sup>158</sup> See WILLIAM B. SANDERS, GANGBANGS AND DRIVE-BYS: GROUNDED CULTURE AND JUVENILE GANG VIOLENCE 84 (1994) (describing situations of nonperson drive-by targets).

<sup>159</sup> See RONALD M. HOLMES, ET. AL., INTRODUCTION TO GANGS IN AMERICA 21 (2012) ("[T]he primary intention of gang members performing drive-by shootings is to promote fear and to intimidate rivals (the targets); actually causing harm or killing is a secondary motive for such activities.").

<sup>160</sup> See *One wounded in drive-by shooting*, BELOIT DAILY NEWS, (Jan. 28, 2013, 4:00 PM), [http://www.beloitdailynews.com/news/one-wounded-in-drive-by-shooting/article\\_b1623560-696d-11e2-87ed-001a4bcf887a.html](http://www.beloitdailynews.com/news/one-wounded-in-drive-by-shooting/article_b1623560-696d-11e2-87ed-001a4bcf887a.html).

<sup>161</sup> *Why Gang Graffiti Is Dangerous*, L.A.P.D., [http://www.lapdonline.org/get\\_informed/content\\_basic\\_view/23471](http://www.lapdonline.org/get_informed/content_basic_view/23471) (last visited Apr. 2, 2013).

mark their territory.<sup>162</sup> Without the gang colors and symbols, it would likely just be bad artwork by kids being kids. But this is not usually the motive.<sup>163</sup> The nature of the artwork serves to show rival gangs to keep out, members of the community to be on guard, and intimidate business owners.<sup>164</sup>

#### vi. Trophy Clothing

Perhaps the activity that has the most direct correlation between gang clothing and criminal conduct is when clothing is used as trophies by gang members in order to proudly display the member's "achievements."<sup>165</sup> For example, in some areas, when the member wears red shoestrings with black boots, it represents that the individual has beaten someone to a bloody pulp.<sup>166</sup> When police know that this particular clothing represents such, they should not be prohibited from using this as a factor that contributes to reasonable suspicion simply because the individual has a First Amendment right to wear what he chooses.

The examples of gang indicia being used to further a criminal enterprise are not exhaustive. Gangs are continuously evolving and adapting much like a corporation would to increase its market share or profitability.<sup>167</sup> Trained law enforcement officers become aware of these activities, and with the ability to conduct investigatory stops without fear of First Amendment impediments, can be able to better control gang criminal activity.

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<sup>162</sup> HERBERT C. COVEY, *STREET GANGS THROUGHOUT THE WORLD* 56 (2d ed. 2010).

<sup>163</sup> *Why Gang Graffiti Is Dangerous*, *supra* note 161; See also Ted Mink, *Graffiti: What it Means, What to Do*, JEFFERSON CNTY COL. SHERIFF'S OFF. (July 2012), [https://www.co.jefferson.co.us/sheriff/sheriff\\_T62\\_R156.htm](https://www.co.jefferson.co.us/sheriff/sheriff_T62_R156.htm) (last visited Apr. 2, 2013) ("Gangs use graffiti to mark territory and as a way to communicate both internally and externally. Gang graffiti is usually simple, as its authors are more interested in marking territory and communicating short messages than they are in artistic expression.").

<sup>164</sup> *Why Gang Graffiti Is Dangerous*, *supra* note 161.

<sup>165</sup> CHARLES FALCO & KERRIE DROBAN, *VAGOS, MONGOLS, AND OUTLAWS: MY INFILTRATION OF AMERICA'S DEADLIEST BIKER GANGS* 6-7 (2013).

<sup>166</sup> See *People v. Easley*, No. 10F0238, 2012 WL 3715239, at \*1 (Cal. Ct. App. Aug. 29, 2012).

<sup>167</sup> See Susan Chandler, *Gangs Built on Corporate Mentality*, CHI. TRIB. (June 13, 2004), [http://articles.chicagotribune.com/2004-06-13/business/0406130224\\_1\\_gangster-disciples-gang-members-black-disciples](http://articles.chicagotribune.com/2004-06-13/business/0406130224_1_gangster-disciples-gang-members-black-disciples).

## VI. APPLICATION

*A. Groups that Engage in Hate Speech vs. Gangs that Engage in “Speech Integral to Criminal Conduct”*

Imagine a neo-Nazi is walking along the sidewalk in a high-crime area. The neo-Nazi hates Jews and African-Americans and believes Whites to be the superior race. The t-shirt on his back displays a large swastika on a field of red and he has various unreadable tattoos. Now imagine instead this individual is a member of the Aryan Brotherhood. The Aryan Brotherhood is also a group that hates Jews and African Americans, and believes that Whites are the superior race.<sup>168</sup> On this man’s t-shirt is a swastika on top of a four-leaf clover,<sup>169</sup> and on each of his forearms are the words “Aryan” and “Brotherhood.” Are both of these men entitled to the same protections under the First Amendment? The answer should be no. The neo-Nazi is simply a member of a group who practices political hate speech,<sup>170</sup> while the member of the Aryan Brotherhood is part of a gang that primarily engages in activities typical of organized crime entities, such as “extortion, weapons, protection, and murder-for-hire schemes outside and inside the prison walls.”<sup>171</sup>

Therefore, applying the argument made in this Comment, the neo-Nazi’s speech is protected under the First Amendment while the member of the Brotherhood’s speech is not protected and can be used as a factor for an investigatory stop.

The two individuals may be indistinguishable to most, and if that were the case, police would not be able to use indicia of the Brotherhood for a stop if it were not particularized enough. However, gang members do not like to go unnoticed and they almost always have key indicators that allow their membership with the Aryan Brotherhood to be known. Key indicators of neo-

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<sup>168</sup> See Matthew Duersten, *Who’ll Stop the Reign?*, LA WEEKLY (Feb. 3, 2005), <http://www.laweekly.com/2005-02-03/news/who-ll-stop-the-reign/>.

<sup>169</sup> *Id.*

<sup>170</sup> Frederick J. Simonelli, Essay, *The Neo-Nazi Movement*, SOUTHERN POVERTY LAW CTR., <http://www.splcenter.org/get-informed/intelligence-files/ideology/neo-nazi/the-neo-nazi-movement> (last visited Apr. 2, 2013).

<sup>171</sup> *Aryan Brotherhood*, INST. FOR THE STUDY OF VIOLENT GROUPS, [http://vkb.isvg.org/Wiki/Groups/Aryan\\_Brotherhood](http://vkb.isvg.org/Wiki/Groups/Aryan_Brotherhood) (last visited Apr. 2, 2013).

Nazism are swastikas, black boots, SS bolts, at other symbols that idealize Adolf Hitler.<sup>172</sup> The Aryan Brotherhood uses as a symbol some combination of the letters “AB,” a swastika, a clover, and often the number “666,” as well as other Celtic iconography.<sup>173</sup> Law enforcement officers know where the Brotherhood is a problem, know these facts, and are able to discern a member of the Brotherhood from a regular neo-Nazi.

The Aryan Brotherhood is more dangerous to society as a whole because of their involvement in organized criminal activity, whereas neo-Nazis are more involved in political and hate speech, which is entitled to protection under the First Amendment.<sup>174</sup> Although the actions of both groups are reprehensible, only one is a contributor to criminal activity. By allowing police to use gang indicators in investigatory stops, the rights of law-abiding citizens—even neo-Nazis—are protected while still allowing police to actively combat the continuing gang problem.

#### CONCLUSION

Gang indicators can help law enforcement in the field to establish reasonable suspicion for an investigatory stop because with gangs, crime is usually afoot. As long as police can base the gang indicators on specific and articulable facts that an individual may be a gang member, this particularized suspicion is relevant to an investigatory stop. Because the speech is the type of speech that is admissible in criminal proceedings, such as trials and sentencing, it should also be allowed in the field as well since it can only help prevent crime. Independent of this justification,

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<sup>172</sup> See *Hate on Display: About the Symbols: Neo-Nazi Symbols*, ANTI-DEFAMATION LEAGUE, [http://archive.adl.org/hate\\_symbols/neo\\_nazi\\_symbols.asp](http://archive.adl.org/hate_symbols/neo_nazi_symbols.asp) (last visited Apr. 16, 2013).

<sup>173</sup> Matthew Duersten, *supra* note 168.

<sup>174</sup> *Compare Aryan Brotherhood*, INST. FOR THE STUDY OF VIOLENT GROUPS, [http://vkb.isvg.org/Wiki/Groups/Aryan\\_Brotherhood](http://vkb.isvg.org/Wiki/Groups/Aryan_Brotherhood) (last visited Apr. 2, 2013) (“The Aryan Brotherhood was first created as a prison gang in San Quentin State Prison in California to protect its mostly white members from the larger black and Mexican gangs present in the prison system.”) *with Neo-Nazism*, FROSTS’ MEDITATIONS, <http://www.martinfrost.ws/htmlfiles/neonazism1.html> (last visited Apr. 16, 2013) (“The term Neo-Nazism is used to refer to any social or political movement seeking to revive National Socialism or a form of Fascism, and which postdates the Second World War. Often, especially internationally, those who are part of such movements do not use the term to describe themselves.”)

gang indicia may be classified as “speech integral to criminal conduct” and also be denied First Amendment protection.

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