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CRIMINAL LAW COMMENTS AND CASE NOTES

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STOP AND FRISK: AN HISTORICAL ANSWER TO A MODERN PROBLEM

LOREN G. STERN

Although stop and frisk legislation has only recently become a subject of national concern and debate, the police power to detain and question is as old as the common law of England. Detention and questioning were well known to, and strongly enforced under, the English common law. Early case holdings and statutes empowered the night-watch of each town to detain "suspicious night-walkers" until the morning at which time the watchman would either release the suspect or arrest him if grounds for arrest were discovered.¹ Even private individuals were authorized to detain suspicious night-walkers until they gave a proper account of themselves.² In 1839 the English Parliament extended the common law power to detain by authorizing police to search any vessel, carriage, and persons who could be *reasonably suspected* of possessing stolen goods.³

A number of state courts of the United States have followed the English common law and, in the absence of statutory provisions, have upheld the power of police officers to stop, question, and frisk suspects under reasonable circumstances. These courts have found that the police have a duty to stop and to question under circumstances "which

reasonably require investigation and to frisk as incident to inquiry."⁴ This power to detain is based upon a standard which is less than probable cause—a standard of reasonable suspicion, much like the one prescribed by the English Parliament. The reasonableness of any detention and investigation is determined as a question of constitutional fact under the circumstances of each individual case.⁵

⁴ See *People v. Martin*, 46 Cal. 2d 106, 293 P. 2d 52 (1956); *People v. Ambrose*, 155 Cal. App. 2d 513, 318 P. 2d 181 (1957); *People v. Rivera*, 14 N.Y. 2d 441, 201 N.E. 2d 32 (1964); *People v. Salerno*, 38 Misc. 2d 467, 235 N.Y.S. 2d 879 (Sup. Ct. 1962); *State v. Chronister*, 353 P. 2d 493 (Okla. Crim. App. 1960); *Hargus v. State*, 58 Okla. Crim. 301, 54 P. 2d 211 (1935); *United States v. Bonanno*, 180 F. Supp. 71 (S.D.N.Y. 1960); *State v. Hatfield*, 112 W. Va. 424, 164 S.E. 518 (1932); *State v. Zupan*, 155 Wash. 80, 283 Pac. 671 (1929); *State v. Cantrell*, 310 S.W. 2d 866, (Mo. Sup. Ct. 1958); *People v. Henneman*, 367 Ill. 151, 10 N.E. 2d 649 (1937); *People v. Exum*, 382 Ill. 204, 47 N.E. 2d 56 (1943); *State v. Kilday*, 155 A.2d 336 (R.I. 1959); *State v. Gluczynski*, 32 Del. 120, 120 Atl. 88 (1922); *City of Portland v. Goodwin*, 187 Ore. 409, 427, 210 P. 2d 577, 585 (1949); *Giske v. Sanders*, 9 Cal. App. 13, 98 Pac. 43 (1908).

⁵ See, e.g., *United States v. Vita*, 294 F. 2d 524 (2nd Cir. 1961), *cert. denied*, 369 U.S. 823 (1962). Fifteen months after a bank robbery which Vita committed F.B.I. agents asked him to come to F.B.I. headquarters. Vita agreed and was not taken to headquarters against his will. He was told that he was not under arrest, was free to go at anytime, and that anything he said could be used against him. Vita consented to fingerprinting, a lie detector test, and to participating in two line-ups. After six hours he confessed to the robbery. Vita claimed that his confession was

¹ HALE, PLEAS OF THE CROWN 88,97 (Wilson ed. 1800);
² HAWKINS, PLEAS OF THE CROWN 164, 173 (7th ed. 1795).

² 2 HAWKINS, PLEAS OF THE CROWN 129 (8th ed. 1824).

³ Williams, *Police Detention and Arrest Privileges—England*. 51 I. CRIM. L. & P.S. 413, 418 (1960).

Although only five state legislatures have felt the necessity to pass stop and frisk legislation, many state legislatures have otherwise given the police authority to detain suspicious persons by enacting vagrancy statutes authorizing the arrest of any person suspiciously loitering.⁶ These vagrancy statutes are not as broad as stop and frisk statutes, yet these statutes can often encompass the situation where a detention would be called for.

In the last few years, law enforcement agencies have consistently sought the enactment of stop and frisk legislation, partially, at least, in response to the decision of the Supreme Court of the United States in *Mapp v. Ohio*.⁷ Before the *Mapp* decision, one-half of the state courts, including New York, allowed incriminating evidence to be admitted at trial even though it was seized incident to an unlawful arrest. But the New York decisions left some doubt whether an officer could detain a suspect for questioning if he did not

made during an unnecessary delay before being brought in front of a commissioner.

The court held that a reasonable detention is not necessarily a short one.

It is at such a time [during questioning when the suspect responds with explanations or denials] that law enforcement agents must work with all possible speed to verify that [the suspect] says and run down leads which develop in the process. This takes time. The question of when 5A is violated is decided on the facts of each case. The policy of reasonableness indicates that arrest should not include all detention. If there is justification for delay then the delay is not unnecessary. The detention is not an arrest nor unnecessary if the continuing process of essential investigation is being carried out expeditiously, the suspect has been advised of his constitutional rights, and there is no reason to believe that the procedures being followed are used merely as an excuse for delay during which a confession can be extracted.

⁶ CAL. PEN. CODE § 647. Every person who roams about from place to place without any lawful business; or Every person who wanders about the streets at late or unusual hours of the night without any visible or lawful business; or Every person who loiters, prowls or wanders upon the private property of another, in the nighttime, without any visible or lawful business with the owner or occupant thereof; or who while loitering, prowling or wandering upon the private property of another, in the nighttime, peeks in the door or window of any building or structure located thereon and which is inhabited by human beings, without visible or lawful business with the owner or occupant thereof: is a vagrant and is punishable by fine of not exceeding \$500 or by imprisonment not exceeding 6 months or by both such fine and imprisonment.

See Foote, *Vagrancy-Type Law and Its Administration*, 104 U. PA. L. REV. 603 (1956); Note, *Use of Vagrancy-Type Laws for the Arrest and Detention of Suspicious Persons*, 59 YALE L.J. 1351 (1950).

⁷ 367 U.S. 643 (1961).

have an arrest warrant and there were no grounds for arrest.⁸ Thus a police officer was never quite sure whether a detention was constitutionally valid. Police officials felt that the mandatory exclusionary rule of *Mapp*, when considered with antiquated arrest statutes and the diverse state court holdings on the power to detain, improperly restricted effective police action. The police demanded that the legislature pass a stop and frisk statute which would permit a policeman to detain and frisk a suspect on the grounds of reasonable suspicion, thereby eliminating the necessity of grounds for arrest.⁹ These officials believed that the New York legislature had precedent for enacting a stop and frisk statute. Other states on the Eastern Seaboard had enacted stop and frisk statutes even before the *Mapp* decision. The legislatures of these states, knowing that police may often wish to investigate without having to bring the suspect to the station house for booking and arraignment, passed legislation providing a category of permissible restraint other than arrest and thus allowed police a greater flexibility in their investigations and in the performance of their duties.¹⁰

⁸ Cases holding that police cannot detain suspects where grounds for arrest do not exist; *People v. Tinston*, 6 Misc. 2d 485, 163 N.Y.S. 2d 554 (Magis. Ct. 1957); *Arnold v. State*, 255 App. Div. 422, 425, 8 N.Y.S. 2d 28, 30 (3d Dept. 1938), *rev'd on other grounds*, 280 N.Y. 326, 20 N.E. 2d 774 (1939). *Contra*; *People v. Entrialgo*, 19 App. Div. 2d 509, 245 N.Y.S. 2d 850 (2d Dept. 1963), *aff'd mem.*, 14 N.Y. 2d 733, 199 N.E. 2d 384, 250 N.Y.S. 2d 293 (1964).

⁹ Memorandum of the New York State Combined Council of Law Enforcement Officials to the New York State Legislature In Relation to Temporary Questioning and Search for Weapons, 38 ST. JOHNS L. REV. 392, 400 (1964).

¹⁰ Text, Interstate Commission on Crime, *Interstate Crime Control* 86-89 (1942).

Section 2: Questioning and Detaining Suspects.

- (1) A peace officer may stop any person who he has reasonable grounds to suspect is committing, has committed or is about to commit a crime, and may demand of him his name, address, business abroad and whither he is going.
- (2) Any person so questioned who fails to identify himself or explain his actions to the satisfaction of the officer may be detained and further questioned and investigated.
- (3) The total period of detention provided for by this section shall not exceed two hours. The detention is not an arrest and shall not be recorded as an arrest in any official record. At the end of the detention the person so detained shall be released or be arrested and charged with a crime.

Section 3: Searching for Weapons. Persons Who Have Not Been Arrested.

A peace officer may search for a dangerous weapon any person whom he has stopped or detained to

Thus in 1964, urged by the police officials and encouraged by its neighbors' legislative actions, New York enacted a stop and frisk statute derived from, similar to, but more limited than the Uniform Arrest Act.¹¹ In the state of New York an officer may stop and question any person "abroad in a public place" whom the officer "reasonably suspects has committed, is committing, or is about to commit a felony or serious misdemeanor." If the officer "reasonably suspects" that he is in danger, he may search for dangerous weapons on the suspect's person. If he finds a weapon or "any other thing, the possession of which may constitute a crime," the officer can keep it until the end of the questioning "at which time he shall return it if lawfully possessed or arrest such person."¹²

Stop and frisk statutes present the judiciary with a problem which has confronted them before—the problem of balancing. In determining the constitutionality of the stop and frisk statutes, the courts must balance the right of a citizen to move freely about without any undue restraint or interference by law enforcement agencies, and his right to liberty and privacy, against society's need to maintain order by the prevention of crime and the ability to bring criminals to justice quickly and efficiently.¹³ There are no Supreme Court decisions dealing with the constitutionality of stop and frisk statutes,¹⁴ but the holdings of federal courts on other constitutional issues closely related to those presented by the stop

and frisk statutes may be good indicators of whether the Supreme Court will hold these statutes constitutional.

The Fourth Amendment does not prohibit all searches and seizures; it prohibits only those which are unreasonable. The Supreme Court has consistently held that in order for an arrest to be reasonable, it must be based upon probable cause.¹⁵ The Court has defined probable cause as existing when "the facts and circumstances within [the arresting officer's] knowledge and of which [he] has reasonably trustworthy information [are] sufficient to warrant a man of reasonable caution in the belief that [an offense has been or is being committed]."¹⁶ The Court must "deal with probabilities . . . they are the factual and practical considerations of everyday life on which prudent men . . . act."¹⁷

It is true that both an arrest and a stop are "seizures" within the meaning of the constitution, but that is where the similarity ends and the differences begin. Not every restriction of absolute freedom of movement is an illegal police action demanding suppression of evidence.¹⁸ Also, not every detention is an arrest.¹⁹ An arrest—a formal apprehension—which leads to arraignment, booking, and public trial is usually, though not necessarily, the gravest form of seizure.²⁰ The stop authorized by stop and frisk statutes, contrasted with an arrest, "is relatively short, less conspicuous and less humiliating to the person stopped, and offers much less chance of police coercion."²¹ There are no charges made against the suspect and, usually, no record made of the stop.

The distinction between an arrest and a detention has been recognized by English jurists and legislatures for hundreds of years. The English common law made a clear distinction between an arrest and a detention. By statute and case holdings, the night-watch could detain a suspicious night-walker "and if no suspicion be found, he

question as provided in Section 2, whenever he has reasonable ground to believe that he is in danger if the person possesses a dangerous weapon. If the officer finds a weapon, he may take and keep it until the completion of the questioning, when he shall either return it or arrest the person. The arrest may be for the illegal possession of the weapon.

¹¹The New York statute is more limited than the Uniform Arrest Act since the New York statute is limited only to felonies and serious misdemeanors while the Uniform Arrest Act encompasses any crime.

¹²N.Y. CODE CRIM. PRO. § 180-a(2).

¹³Carroll v. United States, 267 U.S. 132 (1924). The right of liberty, privacy and the right to move freely about without undue interference is a natural right of all United States citizens. These rights are guaranteed to all citizens under Amendment IX of the Constitution and under the "due process" clause of the XIV Amendment. CORWIN, UNDERSTANDING THE CONSTITUTION, 104, 117, 118 (1949).

¹⁴The issue will be decided in the 1967-68 Term. See *Peters v. New York*, 18 N.Y. 2d 238, 219 N.E. 2d 595, *prob. juris. noted*, 386 U.S. 980 (1967); *Sibron v. New York*, 18 N.Y. 2d 603, 219 N.E. 2d 196 (1966), *prob. juris. noted*, 386 U.S. 954 (1967); *Terry v. Ohio*, 5 Ohio App. 2d 122, 214 N.E. 2d 114 (1966), *cert. granted*, 387 U.S. 929 (1967).

¹⁵Carroll v. United States, *supra* n. 13; *Brinegar v. United States*, 338 U.S. 160 (1949); *United States v. Rabinowitz*, 339 U.S. 56 (1950); *Ker v. California*, 374 U.S. 23 (1963).

¹⁶Carroll v. United States, *supra* n. 13.

¹⁷Brinegar v. United States, *supra* n. 15.

¹⁸United States v. Bonanno, *supra* n. 4.

¹⁹United States v. Vita, *supra* n. 5.

²⁰Although all arrests are not absolutely graver than a detention, those arrests which go to the station house or to court are graver than any detention.

²¹LaFave, *Detention for Investigation by the Police: An Analysis of Current Practices*, 1962 WASH. U. L.Q. 331, 356-60.

shall go quit."²² The basis for detention was not a "mere causeless suspicion" or hunch; the basis was a "just ground for suspicion."²³ This *just ground for suspicion* was not the equivalent of probable cause. If, during the detention, grounds for arrest (probable cause) were found, the night-watch was to arrest the suspect.²⁴ Thus, it is apparent that the English common law permitted detention without an arraignment on grounds less than probable cause while requiring probable cause for an arrest.

Even where stop and frisk legislation has not been enacted, one-fifth of the state courts have consistently distinguished between detention and an arrest. These state courts have held that police officers have a right to stop and question suspects—to take investigatory action—without this action constituting an arrest.²⁵ These courts hold that a detention is not an arrest if the detention is for a reasonable length of time. In determining what is a reasonable length of time, the courts look to the circumstances of each case.

The most recent example of this rationale is *State v. Dilley*,²⁶ decided by the Supreme Court

of New Jersey in July, 1967. A veteran member of the New Brunswick Police Department was patrolling a low income, high crime rate section of the city at 3 a.m. The officer had worked in this area for over fifteen years and was familiar with the people there. He noticed the defendant and another man, both strangers to him, walking and constantly turning their heads to look behind them. These men went to a municipal parking lot and were standing between two autos when they noticed the officer observing them. The two men turned and left the parking lot. The officer stopped them, got out of the patrol car and asked them what they were doing in the lot. The reply was "Nothing". The officer told the two men that they were under arrest and gave defendant Dilley a "quick frisk" by patting him on the outside of his jacket. He felt a pistol which he immediately removed and discovered it to be a loaded .38 caliber revolver. The other man was also found to be armed.

Both men were convicted of carrying a concealed weapon, but only Dilley appealed his conviction. The trial court had denied Dilley's motion to suppress the revolver as illegally seized because (1) there was a valid arrest and an incidental taking of the gun and, in the alternative, (2) there was a lawful right to question Dilley and incidentally frisk him for the officer's protection.

²² 2 HAWKINS, PLEAS OF THE CROWN, *supra* n. 2.
²³ *Lawrence v. Hedger*, 3 Taunt. 14, 128 Eng. Rep. 6 (1810). In this case the suspect was passing through the streets at 11:00 at night with a bundle in his possession. He was stopped by the night-watchman and taken to the watch-house where he was questioned as to what was in the bundle and who had given it to him. His reply was that he did not know what was in the bundle, but that he was carrying it to his sister's house. The suspect referred the watchman to an address where the watchman could inquire for proof of his veracity. No inquiry was made and the suspect was held in jail until morning when he was released. This detention was valid, the court holding that "watchmen . . . have authority at common law to arrest and detain in prison for examination, persons walking in the streets at night, whom there is reasonable ground to suspect of felony, although there is no proof of a felony having been committed." *Queen v. Tooley*, 2 LD Raym 1296, 92 Eng. Rep. 349 (KB 1709). Here a statute was passed authorizing constables to arrest all disorderly persons (street-walkers). A constable arrested a woman whom he suspected of being a street-walker. His suspicion was due to the fact that once before he had arrested her for being a street walker. The court held that constables may seize suspicious persons, but it must be a "just ground of suspicion." It is not a constable's suspecting that will justify his taking up of a person, but it must be just grounds of suspicion . . . the will of the constable cannot rule—the liberty of the suspect cannot depend upon the will of the constable." Here the constable did not have a reasonable ground for suspicion. The woman had done nothing to arouse any suspicion. The constable's only basis for suspecting the woman of being a street-walker was his past experience with her and this was not a sufficient basis for suspicion.

The Supreme Court of New Jersey affirmed Dilley's conviction holding that the arrest and incidental taking of the weapon were lawful. "However, we need not pursue this issue for we are satisfied that the trial court's alternative ground for denial of the motion represented a sound approach to the important constitutional and enforcement problems presented and should be reaffirmed here." The court then declared that police officers' duties include "vital preventive roles;" that they must have the right to stop persons on the street for summary inquiry where the circumstances are so suspicious as to call for inquiry. The court declared that the temporary detention which is incidental to summary inquiry is not a formal arrest requiring probable cause and that the legality of the inquiry cannot depend on what label the street detention is given, "but rather on whether it was reasonable in the light of the circumstances. . . . In determining reasonableness, weight must of course be given to all of the pertinent factors including the basis

²⁴ 2 HAWKINS, PLEAS OF THE CROWN, *supra* n. 1.

²⁵ See cases cited in n. 4, *supra*.

²⁶ —N.J.—(1967).

of the suspicion on the part of the police and the nature and extent of the restraint on the individual. Where, as here, the circumstances disclosed highly suspicious activities at three in the morning on the city streets and in the city parking lot, the inquiry was not only reasonably called for, but was actually dictated by elemental police responsibilities.²⁷

The court went on to hold that the frisk was obviously a greater intrusion on privacy than the detention. "But here again the formal labeling of the action should not be controlling and the test should be its reasonableness in the totality of the circumstances." Therefore, the right to frisk necessarily exists when the circumstances point to the need of such action for the officer's protection. In this case the officer was alone, confronted by two men in the early morning hours, didn't know what these men were carrying, and felt that there was a good possibility that he could have been killed by one of them. Thus, his frisk was for self-protection.

The distinctions between an arrest and a detention are clearly pointed out and emphasized by the stop and frisk statutes. The Uniform Arrest Act provides for a new category of detention in the course of an investigation which is not an arrest.²⁷ The detention is just a "street stop" which may occur at any place and at any time in order for a short, superficial investigation of the suspect. The New York statute authorizes a "stopping for temporary questioning" only and not an arrest.²⁸ The courts of those states having stop and frisk statutes have consistently upheld the validity of the legislatures' distinction between an arrest and a detention.²⁹

In defining probable cause the Supreme Court has balanced the individual's interests against

those of society. The Court has held that an arrest, the highest degree of seizure, requires probable cause in order to be reasonable under the mandate of the Fourth Amendment.³⁰ A court determines if there was probable cause for the arrest by looking at the circumstances of each case and deciding whether the officer's belief was reasonable under the particular circumstances. Probable cause is the officer's reasonable *belief*—the *probability* under the circumstances. The basis for detention under the stop and frisk statutes is reasonable *suspicion*—the *possibility* under the circumstances. By definition suspicion is just one step removed from belief.³¹

At this point we must note that the Court has never held that an arrest or seizure occurs at the first instant of restraint upon the suspect.³² Other federal courts have recognized a distinction between arrest and detention.³³ Since a detention is a much lesser degree of seizure than an arrest, a detention should require a lesser degree of justification than does an arrest.³⁴ Suspicion is this lesser degree. If the courts find that an officer's suspicion was reasonable under the circumstances, then this standard for detention certainly seems to meet the Fourth Amendment requirement of reasonableness. The Supreme Court has declared that it is "not unmindful" of the needs of society for efficient law enforcement.³⁵ If so, it must permit the Fourth Amendment standard of reasonableness to reflect the difference between a detention for a brief investigation and a formal arrest.

³⁰ *Carroll v. United States*, *supra* n. 13; *United States v. Rabinowitz*, 339 U.S. 56 (1950); *Brinegar v. United States*, *supra* n. 15; *Ker v. California*, *supra* n. 15.

³¹ *Leagre*, 54 J. CRIM. L., C. AND P.S. 393, 412 (1963); *Kuh*, 56 J. CRIM. L., C. AND P.S. 32 (1965); *Kavanagh v. Stenhouse*, *supra* n. 29.

³² *Schoenfeld*, 17 SYR. L. REV. 627, 639 (1966).

³³ *United States v. Vita*, *supra* n. 5; *United States v. Bonanno*, *supra* n. 4.

³⁴ Support for this author's opinion that a variable probable cause is the test which must be used in determining the reasonableness of any restraint on a suspect can be found in *SCHAEFER, THE SUSPECT AND SOCIETY* 25 (1967). "It seems to me more relevant to ask whether there is probable cause for restraining the suspect than to ask whether there is probable cause for believing in the suspect's guilt. The Fourth Amendment does not, I submit, preclude us from weighing the extent of the detention against the strength of the evidence that justifies it." Justice Schaefer goes on to say, "[t]he argument based on reasonableness is a strong one." Justice Schaefer would like the test of reasonableness of a police officer's conduct to be stated in terms of "what the reaction would be if he had not done what he is charged with having done wrongfully. If you would fire the officer for not doing what he did, then what he did was reasonable." *Id.* p. 41.

³⁵ *Elkins v. United States*, 364 U.S. 206, 222 (1960).

²⁷ Uniform Arrest Act § 2(3).

²⁸ N.Y. CODE CRIM. PRO. § 180-a(1): A police officer may stop any person abroad in a public place whom he reasonably suspects is committing, has committed or is about to commit a felony or any of the crimes specified in section five hundred fifty-two of this chapter (serious misdemeanors), and may demand his name, address and explanation of his actions.

²⁹ *Kavanagh v. Stenhouse*, 174 A. 2d 560 (R.I. 1960); *DeSalvatore v. State*, 52 Del. 550, 163 A. 2d 244 (1960); *Cannon v. State*, 53 Del. 284, 168 A. 2d 108 (1961); *Commonwealth v. Lehan*, 196 N.E. 2d 840 (1964) (dictum). *People v. Mercado*, 262 S. 2d 641 (1965); *People v. Koposesky*, 269 S. 2d 486 (1966); *People v. Rodriguz* 262 S. 2d 863 (1965). Other states have passed statutes which are similar to the Uniform Arrest Act and which distinguish between an arrest and a detention—*CAL. PEN. CODE* 833 (1957); *WIS. STAT.* 954.03 (1961); *MO. REV. STAT.* 84.090, 84.440 (1959).

Although the Supreme Court has not yet had the opportunity to use the balancing of interests approach in the area of temporary detention, it has been employed in other cases dealing with the Fourth Amendment.

The case of *Frank v. Maryland*,³⁶ and the cases of *Camara v. Municipal Court*³⁷ and *See v. City of Seattle*,³⁸ which overruled *Frank*, (to the extent that although a warrant is required for administrative searches of homes and businesses not open to the public, the degree of probable cause necessary for such a search warrant to issue is less than ordinarily required in warrant cases), are important precedents in the area of temporary detention for two reasons.

[These cases] illustrate the willingness of the Court to recognize that the traditional protection of the Fourth Amendment may be flexibly interpreted when faced with a high degree of public interest, and [they] show that the Court considers itself capable of weighing various factors and balancing interests in order to conclude whether a governmental invasion of privacy was or was not reasonable. The only distinction between this and the right of temporary detention is the element of criminal procedure; a greater risk is involved when the restraint is a preliminary step in the process which may ultimately lead to trial and conviction. Admittedly the danger to the security of the individual is greater under such circumstances. Yet it is not contended that this increased risk is to be treated as irrelevant; its consideration is necessarily inherent in the nature of the balancing test involved. Experience in other areas of the law shows that the element of risk can be weighed along with the value of the interests protected and the social need for the conduct pursued.³⁹

³⁶ 359 U.S. 360 (1959).

³⁷ 87 S. Ct. 1727 (1967).

³⁸ 87 S. Ct. 1737 (1967).

³⁹ Leagre, *supra* n. 31 at 414. *Frank v. Maryland*, 359 U.S. 360 (1959). A Baltimore City health inspector was investigating the exterior and surrounding area of Frank's home for the source of a rat infestation. The inspector discovered evidence of such an infestation in the rear of Frank's home. The inspector did not have a warrant to search, but he requested Frank to allow him to inspect Frank's home. Frank refused this request and was arrested the next day for violating § 120 Art. 12 of the Baltimore City Code. Frank was convicted and appealed to the Supreme Court alleging that his arrest and conviction for resisting inspection without a warrant violated the Fourth Amendment. The Court affirmed the conviction holding that "[i]n light of the long history of this kind of inspection and of modern needs, we cannot

When the Court has the opportunity to apply the balancing of interests approach to the stop and frisk statutes, it appears that it has ample precedent for deciding that a detention under the stop and frisk statutes does not violate the prohibition of unreasonableness of the Fourth Amendment and it should not interpret the statutes as so doing.

Deciding that detention on less than probable cause for arrest may be reasonable, however, answers only half the problem. There remains the question of the validity of the incidental search or "frisk". The courts which have upheld the validity of the search of a suspect incident to a stop have done so on the basis that a search for dangerous weapons is really only a "frisk."

The argument for upholding the frisk as constitutional usually is stated as follows. Just as a detention is different than an arrest, so, too, is the frisk which is incidental to a detention different than a search. The frisk is of a limited scope; "just a mere patting of the outer clothing" while a search is a thorough investigation of the suspect's person.⁴⁰ The right to frisk does not automatically follow after every lawful detention. The officer is only authorized to frisk a suspect when the officer reasonably suspects that the suspect possesses a weapon which may be used to harm him. The frisk is a precaution which contributes considerably to the basic safety of the officer. The state courts which have decided cases dealing with the stop and frisk statutes have held that a frisk, as a safety precaution, is constitutional.⁴¹ Even in the absence of stop and frisk statutes, state courts have upheld the right of an officer to frisk a detained suspect as a safety precaution.⁴²

say that the carefully circumscribed demand which Maryland here makes on appellant's freedom has deprived him of due process of law."

⁴⁰ *People v. Rivera*, *supra* n. 4.

⁴¹ Under the circumstances presented in each case the courts held that a frisk was not so unreasonable as to be constitutionally forbidden. *People v. Rodriguz*, *supra* n. 4; *People v. Cassese*, 263 S. 2d 737 (1965); *Commonwealth v. Lehan*, *supra* n. 29; *People v. Pugach*, 15 N.Y. 2d 65 (1965). In these cases it appears that the courts realize the necessity for the detaining officer to protect himself by a frisk of the suspect. If the circumstances reflect that the officer may have reasonably suspected the suspect of carrying a dangerous weapon, then the officer's act of frisking was reasonable and did not fall under the Fourth Amendment prohibition of unreasonable searches and seizures.

⁴² See note 4; *Ellis v. United States*, 264 F. 2d 372 (D.C. Cir.), *cert. denied*, 359 U.S. 998 (1959); *Commonwealth v. Reynolds*, 4 Pa. D. & C. 262 (Quarter Session 1923); *People v. Mickelson*, 59 Cal 2d 448, 380 P. 2d 658 (1963) (*dictum*); *People v. Simon*, 45 Cal. 2d 645,

And even some opponents of the stop and frisk statutes admit that a frisk is necessary and constitutionally permissible when used as a safety measure.⁴³

The right to frisk, when used as a safety measure, after a lawful detention therefore parallels the right to search after a lawful arrest. Just as a detention requires a lesser degree of justification than an arrest, so, too, does a frisk require a lesser degree of justification than a full blown search. Because a frisk does not interfere with, restrict, or inconvenience a person to nearly as great a degree as does a search, a lesser grounds for justifying a frisk may still meet the Fourth Amendment standard of reasonableness.

The argument that *only* a lesser form of search, i.e., a "frisk", may reasonably accompany a lesser

form of arrest, i.e., a detention, concedes too much, however, and unnecessarily so. For the danger that a suspect may be carrying a weapon and may use it to escape from the police officer is exactly the same whether an officer arrests a suspect or merely stops him. Since the danger is equally as great in either situation, and since a search is reasonable if it is incident to an arrest, a search for dangerous weapons should be reasonable as an incident to the detention.

Although the statutes are labeled stop and frisk, they authorize a search for dangerous weapons. The majority of courts which have dealt with these statutes have interpreted this search to mean a frisk.⁴⁴ There seems to be no basis for this interpretation and no need to label a search a frisk. The detaining officer has a right to protect himself from injury by the suspect. If the officer reasonably suspects that the suspect has a dangerous weapon and may possibly use it on the officer, the officer's only protection is a search to uncover this weapon before it is used. This search must be as extensive as necessary in order to find the weapon and to assure the officer that he is in no danger. Therefore, a search which is incident to a valid stop and which is made as a safety precaution is reasonable under the circumstances and does not violate the Fourth Amendment prohibition of unreasonable searches and seizures.

Since the courts have consistently labeled the search conducted by officers before the stop and frisk statutes were enacted, and the search authorized by these statutes, as a frisk, it seems likely that both state and federal courts will be exceedingly hesitant to free themselves of the shackles of this precedent.⁴⁵ The courts seem to be looking for some method to allow a search based on something less than probable cause. The courts do this by labeling the search a frisk instead of breaking away from the precedents which make all reasonable searches those which are based on probable cause. The Fourth Amendment speaks only of unreasonable searches and seizures. There is no reason why a search cannot be based on something less than probable cause and still be a reasonable one.⁴⁶ The courts have

⁴⁴ See note 41.

⁴⁵ See notes 41 and 42.

⁴⁶ SCHAEFER, *supra* n. 34, at p. 42. Justice Schaefer is of the opinion that a search for dangerous weapons which may be used against the detaining officer is a reasonable search and meets the requirement of the Fourth Amendment. See n. 34.

290 P. 2d 531 (1955) (*dictum*). But see, *White v. United States*, 271 F. 2d 829 (D.C. Cir. 1959).

In *Ellis v. United States*, the arresting officers were specially assigned to look for the perpetrator of a number of day-time housebreakings in a certain area of Northeast Washington D.C. They had the housebreakers description. The officers saw a man that fit the description roaming about the area checking homes to see if anyone was home. The officers stopped the suspect and asked him twice to take his hand out of his pocket which he refused to do. The pocket had a bulge in it which could have been caused by a gun. The officers frisked him and found items (not a gun) which were used as evidence against the suspect.

In *People v. Rivera*, three New York detectives in plain clothes and an unmarked car were patrolling an area with a high incidence of crime at 1:30 in the morning. The detectives observed two men walk up to the front of a bar and grill, stop, and look inside for about five minutes. The two men then began to walk away, stopped, came back and looked in the window again. Upon noticing the detectives car, the men began to walk away quickly. They were stopped and frisked. The frisk uncovered a loaded .22 caliber revolver. The New York Court of Appeals held that despite the absence of probable cause for believing a crime is being committed or has been committed, neither state nor federal law prohibits police from stopping and frisking a suspicious person. The court spoke of a bullet being the answer to the officer's questions. "The frisk is a reasonable and constitutionally permissible precaution to minimize that danger." *Supra* p. 446, 201 N.E. 2d at 35.

In *People v. Salerno*, the arresting officers noticed the suspect walking down the street at 3:15 in the morning carrying a gun case. When asked what he was doing, the suspect answered that he was going duck hunting. The officers replied that there was no duck season in July. The suspect then said that he was going to hunt chipmunks. The officers asked to see the gun. It was a fully loaded shot gun. The officers told the suspect that he would have to come down to the station and gave the suspect a quick frisk before he entered the car. The frisk uncovered a hard object the size of a pistol. A more formal search revealed a pistol and two hunting knives. The Supreme Court of New York upheld the frisk as reasonable under the circumstances.

⁴³ Schoenfeld, *supra* n. 32; 78 HARV. L. REV. 473 (1964).

not as yet adopted this viewpoint, and hold that a search must be based on probable cause in order to be constitutionally valid.

There is no reason, however, why an officer's suspicion cannot be elevated to belief when the suspect offers unsatisfactory explanations to the officer's questions.⁴⁷ Nor is there any reason why a frisk based upon a reasonable suspicion—and engaged in by the officer as a safety precaution—cannot, under some circumstances, become a constitutionally valid search for evidence when the officer's reasonable suspicion is raised to probable cause on the discovery of a weapon. The weapon discovered during the frisk can be admitted as evidence against the suspect since the frisk, as a safety measure, was certainly not unreasonable under the circumstances. And after discovery of a weapon a further, more thorough search for evidence may be permissible because the officer's suspicion that the suspect was carrying a dangerous weapon has been elevated to belief by his discovery. Therefore, the later fruits of the search are also admissible as evidence against the suspect because these fruits were discovered by a search based upon probable cause.

To illustrate, suppose an upper middle class neighborhood whose residents are all white which has been the scene of many late night robberies in the last few weeks. The victims of the robberies have described the robber as either a Mexican or Puerto Rican male, whose height is about five feet seven inches and whose weight is about one hundred and thirty-five pounds. All the robberies have been committed with the use of a pistol. An officer notices a Puerto Rican male who fits the robber's description and who seems to be just roaming around the area at one o'clock in the morning. The officer stops him and asks him what he is doing in this neighborhood at this late hour. The suspect's explanations are clearly unsatisfactory and the officer, suspecting that this person may be responsible for the many robberies in this area, and suspecting that this person may be carrying a gun with which to commit a robbery, and fearing that he might use this gun in order to escape arrest, proceeds to frisk the sus-

pect. Upon frisking the suspect, the officer feels a hard object about the size of a pistol in the suspect's coat pocket. The officer looks into the pocket and discovers a pistol.

At this moment the officer's suspicion may be confirmed; he may now reasonably believe that this man is the cause of the many robberies in the neighborhood. Based on this belief, the officer conducts a thorough search and discovers a few watches and billfolds. The officer then arrests the suspect for robbery. If the true owners of the watches and billfolds are found and, in fact, the suspect is identified as the robber, the suspect will be tried. The billfolds and watches which the officer discovered on the suspect can be admitted as evidence at the trial court. The original detention gave adequate grounds for a frisk for safety purposes which, in turn, confirmed the officer's suspicion and elevated it to a belief which meets the probable cause standard of reasonableness.

The Fifth Amendment provides that "no person shall be deprived of life, liberty, or property without due process of law." Due process means that there must be an ascertainable standard by which the law is made clear to any reasonable man, relieving him of the burden of guessing what the law is.⁴⁸ It has been argued that the stop and frisk statutes violate the Fifth Amendment because of the vagueness of the term "temporary questioning", the indefiniteness of the length of time this "temporary questioning" can last, the indefiniteness of the amount of force that an officer can use to stop and question a suspect, and the vagueness of the standard "reasonable suspicion".⁴⁹

"Temporary questioning" is just that; a brief stop which will last no longer than it takes, for example, for the suspect to give his name, his address, and an explanation of his actions under the New York statute. Under the Uniform Arrest Act the stop is also a brief one, taking no longer than it takes the suspect to explain his actions and the Act goes on to state that if the cursory investigation does not dismiss the officer's suspicion, then a more thorough investigation is authorized which may under no circumstances last for more than two hours. Thus it appears

⁴⁷ If the suspect refuses to answer, his refusal will not contribute to any notion of probable cause. *California Police Training Bulletin* #3 states that a suspect's refusal to answer shall not contribute to probable cause. Neither detention statutes nor states without detention statutes which allow temporary stopping and frisking provide any penalties for a suspect's refusal to answer questions.

⁴⁸ CORWIN, UNDERSTANDING THE CONSTITUTION (1949).

⁴⁹ The terms 'temporary questioning' and 'reasonable suspicion' are used in the New York stop and frisk statute 'Reasonable grounds to suspect' is the term used in the Uniform Arrest Act.

that the term "temporary questioning" is not vague and that the length of time it can last is clearly established by the statutes.

The stop and frisk statutes do not give an officer the right to use force in order to stop and question a suspect. The statutes say absolutely nothing about the amount of force permissible, but this fact does not violate the Fifth Amendment. When an officer asks a person to stop, most, if not all, law-abiding citizens will do so out of respect for the authority of the officer, if not the law. When an officer asks a criminal to stop, most criminals will stop. A criminal will stop even though he has committed a crime, or is about to commit a crime, because he feels that he can answer questions adequately enough to dispel the officer's suspicion. A criminal may often stop when asked to do so because of the fear that his flight may lend credence to the suspicion that he was about to or has committed a crime. The criminal will often stop because of fear for his life; fear that if he doesn't stop and begins to run, a bullet may be used to stop him. Thus it seems that most good citizens and many criminals will stop when an officer asks them to stop. If upon the order to stop a suspect begins to run away, the officer may have reasonable grounds to suspect that the suspect has committed some crime.⁵⁰ At this point the officer, as a law enforcer, has a duty to apprehend the suspect for questioning using whatever force is necessary to accomplish this apprehension. It is probable that an officer will not have to use any force in stopping most people because they will stop when asked to stop while in the few cases where force is necessary it will be warranted.

Just as the framers of our Constitution failed to define probable cause, so, too, have the framers of the stop and frisk statutes failed to define reasonable suspicion. The framers of the Constitution left it to the courts to interpret the meaning of probable cause. The framers of the stop and frisk statutes have also left it to the courts to define reasonable suspicion. Just as probable cause is defined on the basis of all the facts of each case, so must the courts define reasonable suspicion on the basis of all the facts and circumstances of each case. In each case the reason-

ableness of the suspicion will depend upon the special situation in which the suspect and the officer find themselves. This is a workable standard. It is used by the courts in determining probable cause and must be used in determining reasonable suspicion. As Professor Leagre so aptly states, "the Court is capable of eliciting fundamental standards through a process of judicial inclusion and exclusion . . . a certain amount of vagueness is rather of the essence of a Constitutional principle."⁵¹

Nor do the stop and frisk statutes violate the prohibition against self-incrimination embodied in the Fifth Amendment. These statutes do not compel a suspect to answer. A suspect cannot be detained until he answers, the longest permissible detention under any statute being two hours.⁵² And no statute provides any penalty for a suspect's refusal to answer the officer's question. In *Miranda v. State of Arizona*, the Court held that "[g]eneral on the scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding. It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement. In such situations the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present."⁵³ The stop and frisk which takes place at the point of the stop and restricts the suspect's freedom only to the amount of time it takes the suspect to give his name, his address, and an explanation of his actions falls under the category of general questioning in the fact-finding process.

Closely related to the prohibition against self-incrimination is the Sixth Amendment mandate that "the accused shall have a right to counsel in all criminal prosecutions." The right to counsel has been extended through the years to the point where a person's constitutional right to counsel is mandatory when a custodial interrogation is conducted.⁵⁴ "By custodial we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."⁵⁵ In *Miranda*, the Court distinguished

⁵¹ Leagre, *supra* n. 31, at 420.

⁵² Uniform Arrest Act 2(3); *see* n. 10.

⁵³ *Miranda v. Arizona*, 86 S. Ct. 1602, 1629 (1966).

⁵⁴ *Miranda v. Arizona*, *supra* n. 52.

⁵⁵ *Miranda v. Arizona*, *supra* n. 52, at 1612. The Court also held that "[t]he principles announced today deal with the protection which must be given to the

⁵⁰ *Richardson v. State*, 113 Ga. App. 163, 147 S.E. 2d 653 (1966); *Robinson v. State*, 93 Ga. 77, 18 S.E. 1018 (1893); suspect's flight gives probable cause for arrest. *But cf. Wong Sun et al. v. United States* 371 U.S. 471 (1963); under certain circumstances a suspect's flight is equivocal.

between a custodial and a non-custodial interrogation, the latter being permissible without any warning to the suspect of his right to counsel and without any constitutional right to counsel attaching at the time of the interrogation. When the interrogation authorized by the stop and frisk statutes is conducted at the point of the stop, the suspect has neither been taken into custody nor deprived of his freedom in any significant way. When questioning at the point of the stop, the officer is usually not attempting to elicit a confession from the suspect. The officer's purpose is to investigate a suspicious situation and is therefore a general inquiry only. Thus the stop and the questioning which takes place at the point of the stop clearly falls outside the category which the Court would consider "custodial." Once again quoting the Court regarding general questioning, "[i]n such situations the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present."⁵⁶

The stop and interrogation authorized by the New York stop and frisk law does not fall into the category of custodial interrogations and therefore is constitutional.

The Uniform Arrest Act should also meet the test of the *Miranda* decision if subsection (3) of Section 2 authorizing a detention of up to two hours is removed.⁵⁷ A two hour detention will most assuredly be considered a significant deprivation of the suspect's freedom. Also a two hour detention will usually take place at the station house and would therefore come within the specific holding of the Court.⁵⁸

CONCLUSION

The stop and frisk statutes are a necessary element of crime prevention. The ability to stop and frisk a person on grounds of reasonable suspicion will aid the police in apprehending those committing crimes and will aid in preventing many crimes from being committed. The officer no longer has to wait until a crime has been committed in order to stop and question a suspect.

Under the statutes, if it appears that a crime may be attempted, the officer has the authority to stop and question the suspect. If the officer

privilege against self-incrimination when the individual is first subjected to police interrogation while in custody at the station . . ." p. 1629.

⁵⁶ *Miranda v. Arizona*, *supra* n. 52, at 1629.

⁵⁷ *See* n. 10.

⁵⁸ *See* n. 53.

finds a weapon or if the suspect's answers are inadequate, further police action is justified and a crime may be prevented; while under the same circumstances, but without a stop and frisk statute, a crime might have been committed because of the officer's inability to stop and question the suspect.

Even if the suspect is, in reality, a criminal intent upon committing a crime, but his explanations dismiss the officer's suspicion, it is highly doubtful that even the coolest of criminals would attempt a crime soon after the stop. During the stop the officer obtains the name and address of the suspect. If a crime is committed subsequent to this stop and the perpetrator of the crime fits the description of the person stopped, the officer knows just where he can find a suspect who may have committed the crime. Therefore, many crimes may be prevented from ever occurring and many crimes which do occur can be solved quickly and efficiently because of the stop and frisk statutes.⁵⁹

Even if the Supreme Court ultimately strikes down the frisk incident to the stop as unconstitutional because it is not based on probable cause, "[t]he realities of life will demand that an officer will in fact always frisk a suspect if he fears for his life, regardless of the Constitution."⁶⁰ This is not a malicious defiance of the Constitution or the Court. The officer will frisk only because he has no other alternative. The officer is given the power to stop all suspicious persons, many of whom are dangerous and carry dangerous weapons. The officer will necessarily frisk in order to protect himself during the period of the stop. Without this power the officer subjects himself to a high degree of risk of injury by a suspect who is carrying a weapon and who is not afraid to use it against a police officer. In order to encourage our police officers to do their job properly, the power to frisk has to follow the power to stop.⁶¹

Even if evidence obtained from the frisk is

⁵⁹ Based on an interview with Detective Thomas McCann of the Chicago Police Dept. Detective McCann is presently in the license division of the force, but was formerly in the sex offenses division of the force.

⁶⁰ Schoenfeld, *supra* n. 32, at 633.

⁶¹ Justice Schaefer suggests that a search should be allowed incidental to a stop when the officer believes he is in danger, but anything found during the search be excluded from evidence. This solution allows "[t]he search . . . to perform its authorized function of protecting the officer, but it could not serve the more questionable function of securing evidence against the suspect."