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THE LAW AND PRACTICE OF FIELD INTERROGATION

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The article, which is the result of intensive field research into stop and frisk practices in both Chicago, Illinois, and Corpus Christi, Texas, is an abridged version of the master's thesis written by Mr. Pilcher during his tenure as a Police Legal Advisor fellow.

A workable, qualitative definition of the term "field interrogation" is almost impossible to devise. We will have to be content, then, with a descriptive definition. For the purposes of this article, a field interrogation is any situation in which a police officer asks questions, pertaining to a crime or a suspected crime, of a citizen prior to the time when the citizen is taken, by force or consent, to a police station for further processing. The terms "field stop" and "field contact" are to be considered as synonymous with the term "field interrogation".

It would seem, at first glance, that the term "field interrogation" should be susceptible of a fairly accurate definition. But first glances can be deceptive. There are several revealing and important reasons why any definition of the term "field interrogation" must be, at least in some degree, arbitrary.

The necessity to be arbitrary in the definition of the term "field interrogation" arises primarily because there are so few clear-cut cases where the practice of field interrogation has been examined, analyzed, or defined.[1] At the root of this definitional problem is the wide disparity between the criminal law, as developed by appellate courts, and police practice. To the police officer, an arrest and a field interrogation are entirely distinct concepts.[2] Each has its own purpose, and the techniques used in the streets are quite different. Generally, from the policeman's standpoint, he "arrests" a person when he takes this person to the police station to be charged with a specific crime. On the other hand, he is engaged in the practice of "field interrogation" when he "checks out" a person to determine who he is, what he has been doing, and attempts to obtain an explanation of his actions. Our appellate courts apparently have not made this distinction until very recently. Instead, the courts, when they have faced the real issues at all, have talked in terms of "arrest".

Once the term "arrest" is used by an appellate court it is immediately handicapped. In the first place, the traditional concept of arrest is encrusted with the barnacles of an ancient time which has long since passed. Our present concept of arrest was fairly accurately described by Matthew Hale before 1676.[3] In feudal England, law enforcement, or at least the bringing of an accused person before a magistrate, was the responsibility of the people in the community and the citizens were organized in groups of hundreds in order to apprehend the perpetrator of a crime. In theory, when a crime was perpetrated and the person suspected of committing the crime was attempting to evade capture, the general populace was supposed to evoke a "hue and cry" to pursue the criminal in much the same manner that the posse operates in a western movie.

Such a system of apprehending criminals apparently worked satisfactorily in a static, rural society where each person in the community was intimately acquainted with every other person. The system described above eventually evolved into the Justice of the Peace system wherein the Justice of the Peace was not only a magistrate but also had the responsibility of preserving the peace within his jurisdiction and was the chief law enforcement officer. But the Justice of the Peace system proved inadequate in the face of urbanization and a marked increase in criminal activity.[4]

[1] 31 BRKLYN. L. REV. 175 (1964).
[2] BRISTOW, FIELD INTERROGATION 5–6 (2d ed. 1964).
[3] *Detention, Arrest and Salt Lake City Police Practice*, 9 UTAH L. REV. 593 (1965).
[4] *Id.*

As cities began to develop, a system of night watchmen was evolved. The actual authority of the night watchman is somewhat vague, but apparently his only function was to take into custody persons who were suspicious or who were committing a crime and hold such persons until dawn, when they could be handed over to the regular law enforcement apparatus.[5] At the same time there developed in England a system of rewards and pardons to encourage citizens to apprehend criminals and bring them before a judicial officer for the criminal process to commence. The first organized police force in the Anglo-American heritage was not established until 1829 when the London metropolitan police force was created by act of Parliament over vigorous opposition. Thus, as one writer states:

> ... the law of arrest was developed in the context of a citizen enforcement system where arrests were often motivated by greed for "blood money", private vendetta, or hope of pardon for the arresting person's own crime.[6]
>
> The development of arrest law was probably also influenced by the post arrest predicament of the arrested person in early England. Persons charged with serious offenses were rarely admitted to bail and conditions in the jails of the time were horrible. Jails were run as a private business and fees were charged for the most elementary "privileges". Those persons arrested who did not have the means to purchase better accommodations were huddled together, often in irons, in dark, filthy, rooms and in close proximity to depravity and disease. Under such conditions, an arrest could be, and often was, equivalent to a death sentence.[7]

The concept of the individual citizen as a law enforcer is not merely of interest to medieval scholars; it is very much alive in some parts of the United States today. For example, the State of Texas completely revised its Code of Criminal Procedure in 1965, and this "modern" code provided the individual citizen with exactly the same authority to make arrests without warrant as the authority granted to the peace officer, with one exception.[8]

It is part of our judicial heritage that courts do not determine abstract questions of law. Therefore, field interrogation situations which are decided by courts usually are cast in the context of a situation where the field interrogation has in fact played a part in an arrest, a subsequent charge, and a trial. Furthermore, the discussion of field interrogation practices then arises under a motion to suppress, an objection to the introduction of evidence, or a discussion of the existence or nonexistence of probable cause to make the arrest.[9] Unfortunately, at least at the trial court level, the prosecutor is usually faced with meeting the defense attorney on these grounds and attempting to convince the court that: (a) probable cause for an arrest did exist, or (b) the evidence in issue was obtained prior to the time that an arrest occurred. The crucial questions in field interrogation suffer from being presented in this light.

In the first place, in most field contacts, probable cause, in a classic sense, does not exist. The traditional elements of probable cause are (1) that the peace officer knows a specific crime has been committed and (2) that the peace officer has probable cause to believe that a specific individual has committed the specific crime.[10] If these elements are present, then the officer would more than likely simply arrest the individual, charge him, and there would be no field interrogation problem. As a result, the line is usually drawn on the rather artful definition of what is an arrest; the defense attorney naturally insists that the arrest occurred at the very instant the person was stopped and the prosecution insists with equal vigor that the arrest occurred at some nonspecific time after the individual was approached by the peace officer. With very few exceptions the courts tend to fall into this definitional trap. Therefore, we have numerous courts which hold that the slightest interference with a person's freedom of movement

[5] Kuh, *Reflections On New York's "Stop and Frisk" Law And Its Claimed Unconstitutionality*, 56 J. CRIM. L., C. & P.S. 32 (1964).

[6] UTAH L. REV., *supra* n. 3, at 595.

[7] *Id.*

[8] TEX. ANN. CODE OF CRIM. PROC. Ch. 14(1965). This exception provided that peace officers could only make arrests for felonies which did not occur in their presence if (a) the peace officer were informed by a credible person that an individual committed a felony, (b) that the person so accused was attempting to escape, and (c) that there is no time to procure a warrant. *See* Art. 14.04.

[9] LaFave, *Detention For Investigation By The Police: An Analysis Of Current Practice*, 1962 WASH. U. L. Q. 360.

[10] 6 C.J.S. *Arrest*, §6G(2) 587.

is an "arrest",[11] and a large number of other decisions which define an arrest as "the taking into custody a person so that he may answer for a crime." [12] Thus, the critical issues involved in the practice of field interrogation are obscured by the semantic battle over the definition of "arrest".

Neither of these definitions reaches the essential issues which are involved in the field interrogation. Each of these definitions tends to beg the question, and a court's decision automatically follows from its choice of definition. To say that a peace officer must have probable cause to make an arrest at the very first instant where a citizen's full freedom of locomotion is impeded in any way can lead to some fantastic results. For example: let us assume that an officer is informed that a person has just been killed in a particular room in a particular building. The officer rushes in and finds it full of people. Most people would be willing to concede, at this point, that the officer has probable cause to believe that a crime has been committed; however, he has absolutely no idea that any specific person in this room has committed the crime. It would follow then that the officer must stand there totally helpless while the people in the room with the dead body silently file out, leaving eventually no one left but one confused and frustrated police officer and one dead body.

On the other hand, the definition of arrest as the taking of a person into custody to answer for a crime can lead to some equally fantastic results. This latter definition, if applied logically, would authorize an officer to take people into custody and theoretically detain them for an unknown length of time. There would be no arrest unless the officer's purpose in taking the individual was to charge him with a crime. The odious "dragnet" fits very comfortably in this latter definition.[13] In addition, this latter definition of arrest makes the determination of whether or not an arrest has occurred resolve around the subjective intent of a police officer. It is submitted that the officer's subjective intent is not a particularly desirable point at which to determine such a crucial question of an arrest, even when it is mitigated by the general rule that the officer's intent can be determined from extraneous evidence and is not dependent solely upon his word as to what was his intent.

It is the author's suggestion that the very critical question involving individual liberties and protection of society against crime are not served by leaning on artificial and obscure definitions.

Another reason for the lack of legislative and judicial attention to the question of field interrogation is the simple fact that such attention was irrelevant in the many jurisdictions which did not have an exclusionary rule, and where a person who was unlawfully detained or arrested had no remedy other than a theoretical cause of action against the arresting officer for false arrest or false imprisonment. However, recent decisions by the Supreme Court of the United States, especially in the cases of *Mapp v. Ohio*,[14] *Miranda v. Arizona*,[15] and *Wong Sun v. United States*[16] have made the initial contact between the police officer and the citizen not only relevant, but in many situations critical.

Prior to any further discussions relating to field interrogation it is necessary that we examine the Constitution of the United States with relation to the right of an individual to be free from arrest. After all, if the Constitution requires that no individual can be detained in any manner unless the officer has classic probable cause to make an arrest without a warrant, then any future discussion of balancing of public interest with individual rights is irrelevant. The Fourth Amendment to the United States Constitution reads as follows:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

It seems clear that the framers of this particular amendment did not have in mind arrest and searches as we think of them today. Historically, the framers of the Constitution placed the Fourth Amendment in the Bill of Rights to prohibit general warrants and writs of assistance.[17] The writs of assistance were widely used and abused in the thirteen colonies. They were writs which

[11] Barrett, *Police Practices And The Law—From Arrest To Release Or Charge*, 50 CAL. L. REV. 32 (1962).
[12] Perkins, *The Law Of Arrest*, 25 IOWA L. REV. 201 (1940).
[13] 100 U. PA. L. REV. 1186 (1952).
[14] 367 U.S. 643 (1961).
[15] 384 U.S. 436 (1966).
[16] 371 U. S. 471 (1963).
[17] Leagre, *The Fourth Amendment And The Law Of Arrest*, 54 J. CRIM. L., C.& P.S. 393, 396-397 (1963).

authorized the officers to search anywhere at anytime for contraband. Furthermore, these writs were for an indefinite period of time, usually for the life of the sovereign who was then reigning.[18] At one point in the drafting of the Fourth Amendment it only contained the latter portion, which spoke specifically of warrants. The insertion of the first part of the amendment against "unreasonable searches and seizures" probably was not intended to impose additional standards, but to serve merely as a preface to the prohibition of general warrants.[19] However, there seems little doubt that the Supreme Court has, and probably correctly so, given life and meaning to the first portion of the Fourth Amendment by interpreting the amendment to carry an overriding requirement of "reasonableness" to the entire field.[20]

In the process of imposing this penumbra of reasonableness to searches and seizures the Court has also emasculated the rather simplistic argument that the Constitution prohibits only unreasonable searches and seizures; that a reasonable search is constitutional. This type of argument is invalid, or more accurately a simple truism, because it overlooks the fact that "unreasonable" as applied to searches and seizures is a word of art and has, over the decades, obtained a specific legal meaning over and above the meaning as applied in general usage.

It should be noted at this point that the Fourth Amendment does not use the word "arrest" at all. Instead it uses the word "seizure" which is, in effect, much broader than the word "arrest". Few people would argue that no person could ever be "seized" in the sense of being detained unless "probable cause" existed. We have many examples of this outside of the criminal field. A quarantine to protect the community from contagious disease,[21] the picking up of a lost child on the streets, the detention of a person who is entering the United States from a foreign country or the restraint of a person who is attempting to commit suicide are all examples of detentions which are "reasonable" but which do not involve an arrest.[22]

One may well wonder how the whole concept of "probable cause" arose to apply to situations where an officer stops a person on the street for the purpose of investigating a crime. Apparently, the rationale runs something like this: (1) the Fourth Amendment states that no warrant shall issue but upon probable cause particularly describing the person to be seized; (2) this applies to warrants of arrest as well as search warrants; and (3) obviously the standard required to arrest a person without a warrant must be at least as high as the standard required to arrest a person with a warrant. Thus we have reached the rather ironic situation in which a constitutional provision which was originally designed to prohibit governmental authorities from ransacking houses and personal effects anytime they wanted to has now been interpreted, by some persons at least, to also prohibit police officers from stopping an individual who, at 2:00 in the morning, breaks and runs at the first sight of a patrol car.

Arrest Versus Detention

At this point we will deepen our inquiry and ask some of the more fundamental questions which arise when a police officer stops a citizen on the street. Basically, the issues boil down to the following questions: Is there any significant difference between a detention and an arrest? If there are valid distinctions, are there sufficient policy reasons to recognize and authorize the police to draw their own distinctions between detention and arrest?

First, let us ask ourselves just what happens to a person who is placed under "arrest", regardless of exactly how the word is defined or exactly when the arrest occurs. Let us assume that a person is walking down a street in a city and a peace officer, with more than adequate probable cause, approaches and places him under arrest. The individual is very probably searched on the spot, and then taken to a police station where he is booked on some charge. He may be interrogated at this point if he waives his right to counsel, as required by *Miranda v. Arizona*, and even if he is not interrogated, he is placed in jail unless he makes bond. He is given the opportunity to have a preliminary hearing to determine whether or not there is "probable cause" to hold him pending indictment or other procedure to bring him to trial. If such probable cause exists, he either remains in jail, or out on bond, until he is tried by a judge or a jury. At this point he is found guilty or innocent of the crime as charged and he is either released or retaken into custody. Let us further assume that this particular individual is not guilty of the crime

[18] *Id.* at 397.
[19] *Id.* at 397–398.
[20] *Id.* at 399.
[21] Waite, *The Law Of Arrest*, 24 Tex. L. Rev. 279 (1946).
[22] Leagre, *supra* n. 17, at 406–407.

with which he is charged and he is released after a not guilty finding by the trier of fact.

On the other hand, let us take a situation where a person is "detained". In this circumstance he is stopped on the street, usually asked to identify himself and give some explanation of what he has been doing and his movements in the neighborhood. He may even be required to stand by while the officer investigating or detaining him checks with the police station to see if he is wanted. There might possibly even be a further detention while witnesses to a crime attempt to identify him. If the individual is under suspicion of committing a major crime and he has an alibi he might even be taken to the police station and held there until his alibi can be checked. Under many circumstances he will probably be searched to a greater or lesser extent. We will assume once again that the individual is innocent of the crime, if any, of which he is suspected and that he is released from his detention.

It cannot be too strongly emphasized at this point that we are not discussing the detention of a person that a police officer picks up at random. In all cases relating to field interrogation or detention we are assuming that the police officer has certain facts which draw his attention to the individual being detained or interrogated in the field, but these facts fall short of classic probable cause to make an arrest. The author knows of no responsible authority who advocates authorizing police officers to pick a citizen at random off the street, detain him, interrogate him or confine him in any way unless there were some circumstances which set this particular individual apart from the general public.

In order to make this latter point especially clear, perhaps it would be best to outline the type of situation which the author is speaking about when he uses the word detention. A good example occurred while the author was serving as Police Legal Advisor to the Police Department of the City of Corpus Christi, Texas and was one in which he specifically suggested that the officers detain a person without making an arrest. The circumstances of the detention were as follows: At 1:00 A. M., an individual knocked on the door of a citizen and asked if this particular citizen could spare a bandage. The person who knocked on the door was bleeding rather profusely from a cut of unknown origin on his hand. The homeowner, who was a city official, called the police and reported the incident while his wife obtained a bandage for the injured person. When a patrol car approached the house, two persons, not counting the injured party, were sitting out in front in an automobile. As soon as the patrol car came into view, the two individuals, both young males, drove off at a high rate of speed. They got approximately three-fourths of a block when they were stopped by another patrol car coming from the other direction. The type of clothing worn by these three young men and the type of car they were driving rather clearly indicated that they did not live in the neighborhood in which they were found. When questioned separately, the individuals gave at least two names to the police officers and came up with three conflicting stories as to what they were doing at this particular place and at this particular time of night. None of the persons would give any information as to how the injured individual cut his hand. All three of the persons were held on the street for approximately 30 minutes while the police officers checked with headquarters to determine whether or not any crime, such as burglary, had occurred that night to the knowledge of the police department in which a person suffered a cut on the hand. While this check was being conducted, another patrol car examined two nearby schools which were the source of frequent cases of burglary or vandalism. Neither the check by the patrol car nor the check through headquarters indicated that these particular people had been involved in any specific crime. The young men were permitted to leave after they had identified themselves finally to the satisfaction of the patrolmen and after the injured party had been given first aid. It should be noted that all three of these individuals were distinctly held against their will, although no force was necessary, and it should be further noted that the officers at the scene had no "probable cause" to make an arrest for a specific crime.

This type of detention apparently meets the approval of a rather significant majority of commentators. A relatively recent article states:

> "The stop, contrasted with an arrest, is relatively short, less conspicuous, and less humiliating to the person stopped and offers much less chance for police coercion. Moreover the attempts to apply a single standard of probable cause to all interferences is likely to lead to a standard either so diluted that the individual is not adequately protected or so

strict that much apparently reasonable police investigation is unlawful.[23]

Professor Wayne R. La Fave has asked a number of extremely pertinent questions relating to field interrogations. He asks whether it makes any difference that the field interrogation typically results in a much shorter period of detention than an actual arrest. Does it make any difference that the suspect will not have an arrest record, or that the suspect will not consider himself under arrest? He also inquires whether or not the person subjected to field interrogation has suffered as much damage to his reputation as an actual arrest. He apparently concludes that there is a good deal of difference between a detention and an arrest and he observes, "A conversation with a policeman on the street corner is not likely to be mistaken by the public as an arrest as is the actual taking of the suspect to the station for further questioning.[24]

Another writer has observed that "The London Police, who have been proclaimed as models for American police agencies, have been stopping several hundred thousand people a year and asking to see the contents of bags they are carrying or inquiring as to the possession of other property which might have been stolen." [25]

Still another author goes to the extreme of postulating the proposition that a policeman's authority to conduct a field interrogation is in reality an exercise of the detained individual's affirmative right to be given an opportunity to be heard before he is arrested.[26] Presumably this "right" is based on some sort of free speech rationale rather than on the more familiar right to remain silent as contained in the Fifth Amendment.[27]

Even among the writers who belittle the distinction between arrest and detention there is usually a concession that there is a difference in (a) the limitation on the length of a detention, (b) the lack of an arrest record, and (c) the fact that the detained person can truthfully answer "no" if asked if he has ever been arrested. This latter element is becoming more and more important in our society today when individuals must fill out all types of forms, many of which ask questions relating to the person's "police record". However, the suggestion that there is a valid distinction between an arrest and a detention in fact, if not in law, does not mean to imply that an interrogation, no matter how short, by a police officer on the street is totally innocuous. When a person is stopped on the street and asked questions by a police officer there is undoubtedly a good deal of pressure on this individual to respond to the police officer's questions. After all, what are a person's alternatives when he is faced with the situation where he is the subject of a field interrogation? In practice, he has only five alternatives: (1) He can confess to a crime, (2) he can offer his identification and give plausible reasons for being present and give an explanation of his recent movements, (3) he can attempt to flee, (4) he can tell a lie, or (5) he can refuse to answer any questions at all. To a thoughtful person a confession or flight are obviously out of the question. This conduct will only tend to confirm the police officer's original suspicion, whatever that may have been, which caused the officer to single the person out in the first place. This, in effect, leaves a person only three alternatives: cooperate, refuse to answer any question, or lie.

Regardless of the legal effect of a refusal to answer, the practical effect of such a refusal will be to confirm an officer's suspicion. A lie is dangerous because it can be used as a factor in probable cause to make an arrest if it is detected and will, at least, heighten the officer's suspicion. Thus, as a practical matter, a person detained has no satisfactory alternative but to identify himself and attempt to convince the police officer that he is an upstanding citizen with nothing to fear from the law.

By way of summary then, what are the distinctions between a detention and an arrest? First, the detention or custody is limited. It is true that in some rare instances field interrogation or field detention will go beyond the few minutes which it normally takes. However, even at it most extreme, a field detention is likely not to take anywhere near the time that a formal arrest will consume. We must bear in mind that a traditional arrest usually carries with it a processing period during which the individual under arrest is fingerprinted, has his picture taken and is usually interrogated unless

[23] Recent Statute, 78 HARV. L. REV. 473, 474–75 (1964).

[24] LaFave, *supra* n. 9, at 364.

[25] Ronayne, *The Right To Investigate And New York's "Stop And Frisk Law"*, 33 FORDHAM L. REV. 211, 214 (1964).

[26] Perkins, *supra* n. 12, at 261.

[27] For additional authorities which generally support some type of field detention, see 37 MICH. L. REV. 311 (1938); *The Law Of Arrest: Constitutionality Of Detention And Frisk Acts*, 59 NW. U.L. REV. 641 (1964); 28 VA. L. REV. 315 (1942); 14 SYRACUSE L. REV. 505.

he refuses to answer any questions. Of course, almost every state requires that the individual be released on bond or taken "immediately" before a magistrate. But the bond procedure can consume 30 to 45 minutes, counting the time that the person under arrest gets in touch with a bondsman and has all of the papers signed.

Secondly, a person who is subjected to a field detention and a field interrogation does not have on his record, which will be with him for the rest of his life, the fact that he has been charged with a crime. In most states a person who is arrested, no matter how capriciously, is still saddled with that vague and indefinable thing which scares employers away—a "police record". The individual has this albatross hanging around his neck regardless of the outcome of his trial—even though he may be totally exonerated and even collect damages from the peace officer who illegally arrested him. It is true that some police departments maintain informal or "nonofficial" records of field interrogations which they feel will be significant in the future. But this is an entirely different process than the maintenance of an official arrest record.

Thirdly, since a detained person has virtually no idea that he has in fact been "arrested", in spite of some courts' definitions, he can truthfully answer "no" to the inevitable question, "Have you ever been arrested or convicted of any crime other than a traffic offense?"

Finally, we must consider the detained person's reputation. It is almost inconceivable that a person who has been the subject of a field interrogation does any significant damage to his reputation when his friends and neighbors see him talking to a police officer on the street corner. Any damage to reputation under such circumstances is certainly far less than the damage which might occur if these same friends and neighbors saw the individual being taken off, handcuffed, in the back seat of a police car. This difference in damage to reputation is particularly important if the crime under investigation is one involving extreme emotional reactions from the neighborhood, such as child-molesting, homosexual activity, or the like.

The fact that the actual distinction between an arrest and a detention is a real distinction is a far cry from saying that the distinction is significant enough to treat the arrest differently from the field interrogation in terms of public policy. One of the most vigorous foes of field interrogation and detention is Professor Caleb Foote.[28] Although he laces his works with a great deal of emotionalism, he nevertheless makes some points which can hardly be ignored. He challenges, to begin with, the necessity for any type of general detention statute or practice which is separate from the traditional law of arrest. And, as might be suspected, he insists that arrest is "an actual restraint of the person to be arrested",[29] which occurs at the moment an individual is no longer a free agent to do as he pleases.

Professor Foote insists that we do not have enough information to determine the necessity of field interrogation. He states: "factual assumptions made about police arrest practices today necessarily rest upon political philosophy or armchair speculation seasoned with scattered and unreliable statistics, isolated studies, personal experiences or undocumented police claims." He is, of course, correct that criminal law, especially as it involves the work of the police officer on the street, has suffered and is still suffering from a gross lack of concrete, reliable data. But the social sciences cannot remain static because our methods of information-gathering do not fit in the admirable and convincing matrix which the physical sciences have managed to develop.

Professor Foote argues that the need for field interrogation and detention would disappear if we have more and better trained police officers. He states:

> The chief disadvantages of these alternatives are that they cost money and require the exercise of political and administrative statesmanship whereas enacting new arrest laws offers the illusion of doing something about crime without financial or political complications and has a natural appeal to political expediency. I suspect that in police work, as elsewhere, one generally gets no more than he pays for, and that legislation of police power is a wholly inadequate substitute for responsible police fiscal and personnel policy.
>
> The importance of seeking alternatives within the present legal framework is emphasized when one examines the impact of police arrest practices upon our constitutional respect for privacy. The right to be let alone—to be

[28] See Foote, *The Fourth Amendment: Obstacle Or Necessity In The Law Of Arrest?*, in POLICE POWER AND INDIVIDUAL FREEDOM (Sowle ed. 1962).

[29] *Id.* at 30.

able to sit in one's own house or drive one's own car or walk the streets without unwarranted police intrusion—is surely one of the most important factors to be weighed in achieving a balance between individual liberty and public necessity. Ironically, it is this factor about which we know the least. Although we are often inadequate, we collect at least some data on the number of crimes reported, the number of crimes cleared by arrest and the mortality between charge and conviction. We also have figures purporting to state the number of persons arrested but usually this only reflects cases where the police have booked, fingerprinted and charged the suspect. We cannot even guess at the true arrest rate because we have no data on the number of people whose liberty is restrained but who after investigation are released without charge. Under these circumstances to try to make an intelligent evaluation of how the right of privacy fares under present conditions and how proposed changes in the law would affect it is very much like trying to compute batting averages when one knows only the number of hits for each player but has no data on the number of times at bat.[30]

Professor Foote sidesteps the problems of the hypothetical emergency situation, such as the right of the police to temporarily detain a person found near a fresh corpse, by stating: "Whatever the law may be in such situations, the reasonableness of the police action is conditioned by an immediate crisis and would have no general application.[31] Then he refers to Mr. Justice Jackson's dissenting opinion in the case of *Brinegar v. United States*,[32] where the Justice appears to approve of a situation in which police officers might throw a roadblock around a neighborhood and search every outgoing car when this is "the only way to save a threatened life and detect a vicious crime", whereas he would disapprove of "a roadblock and universal search to salvage a few bottles of bourbon and catch a bootlegger." The fact that Professor Foote himself draws a distinction between emergency situations and everyday police problems seems to be flatly contradictory to his position that the Constitution permits only one single standard of probable cause. Once it is admitted that a police officer may take certain steps in an "emergency" situation, but that the officer may not take the same steps in a "non-emergency" situation, it is obvious that the authority of the police officer to arrest or detain a person depends on the type, degree, or even existence of an emergency. Therefore, the whole scope of the inquiry ceases to be whether or not the officer has the authority to detain a person, but rather the essential question is—under what type of "emergency" circumstances may an officer detain a person?

One engaged in library research in the field of police detention is struck by the fact that there is almost no dialogue between the persons who want to strictly limit the policeman's authority to detain a person and those advocates of broadening the officer's authority to make a detention. There are numerous articles, of course, but they are in effect monologues which are, this author suspects, largely directed at people who have already become convinced. In other words, the scholarly debators are simply not speaking the same language at all.[33]

Those authors who tend to advocate broadening a policeman's authority to detain a person usually stress the "practicalities" of on-the-spot police work. They can point to numerous situations where reasonableness and common sense would dictate that a police officer make a detention, but where the circumstances are such that the officer would normally be beyond his authority in making such a detention. These advocates usually fail to come to grips with the legal and constitutional issues which are involved in any exercise of authority by a police officer in the field other than to say, perhaps, "well, the Constitution of the United States only prohibits unreasonable searches and seizures and thereby permits searches and seizures which are reasonable".

On the other hand, those individuals who advocate strictly limiting a police officer's power tend to avoid concrete discussions of hypothetical, or even real, situations where a police officer could be expected to act "reasonably" and use good common sense. These advocates prefer instead to discuss the legalistic issues involved and to become enmeshed in esoteric discussions of "arrest" and "probable cause".

What is too often overlooked is that no constitutional right, privilege or guarantee is absolute. The

[30] *Id.* at 33.
[31] *Id.* at 35.
[32] 338 U.S. 160 (1949).

[33] *Compare* 12 OKLA. L. REV. 154 (1959) *with* 12 OKLA. L. REV. 160 (1959).

whole idea of law, as a decisional process, is an attempt to apply certain principles to everyday life to the extent that they are meaningful and pliable. The task of building Utopias is left to the philosopher. The task of the working lawyer is to develop certain principles and practices which will guarantee the maximum of public order and crime prevention and at the same time permit the maximum of constitutional freedoms to the individual citizen.

Specific Issues

So far, the problem of field detention and interrogation have been discussed in somewhat general terms. It would be useful, now, to examine some of the more narrow and specific issues which will arise in a field interrogation or detention situation.

Use of Force

One of the issues which courts and legislatures have been particularly reluctant to face is the question of what force, if any, a police officer should be authorized to use in a detention less than an arrest. Neither the Uniform Arrest Act nor the "Stop and Frisk" law of New York mention the question of force. Very few courts have been faced with this question, since experience seems to show that only an infinitesimal group of people attempt to resist a mere street stop. Furthermore, it is this author's very firm suspicion, based on two years' on-the-street work and observation with police departments, that in those rare instances where the police must use force in what would ordinarily be a field detention situation, the officer has a tendency to take the position that he approached the resisting individual initially for the purpose of making an arrest, usually for some vagrancy type offense.

However, the fact that the use of force in a field detention situation is seldom clearly placed in issue during the course of trial does not mean that the question of force is not an important one to which we should address our attention. About the only legislative enactments, in the criminal law area, which specifically deal with force are the merchant detention statutes designed to combat shoplifting. In addition, the provision of the American Law Institute's Code of Pre-Arraignment Procedure, which has not been enacted by any state, also clearly faces the issue of force in a field interrogation or detention context. Both the ALI code and the typical merchant detention statute state that the person who is detaining or stopping an individual may use all reasonable force short of deadly force.

It is quite understandable why legislatures and courts are loathe to face the issue of force. A field detention, virtually by definition, is the stopping of a person when there is no probable cause to believe the person who is the subject of the stop has committed a crime. It seems rather extreme, therefore, to authorize a police officer to forcefully wrestle with an individual and perhaps handcuff him for the purpose of asking that individual his name and address and what he has been doing.

Some writers evade the issue of force by stating that all the police officer is doing is walking up and asking a person a question in much the same way a private individual would do. Therefore, the implication is that the police officer is doing no more than any other individual could do, thus the question of force, if not irrelevant, tends to fade away. In other words, if *A*, a private citizen, stops *B* on street and asks of him directions to the bus station, it is quite possible that *B* would simply continue on his way without answering at all. *A* would probably classify *B* as an extremely rude person; however, we simply do not consider the question of how much force *A* may be permitted to use against *B* in order to obtain an answer to his question because force, in such a context, is simply unthinkable. Therefore, to equate a police officer with the private citizen in a field detention situation is to lose touch with reality.

The author has observed more than 400 field stops in two different states and he has never seen a situation where force has been necessary. It is almost inconceivable that the type of questions which were asked during these field stops, and some of the questions were rather searching, would have been tolerated by the detained person unless they were being asked by a police officer. The only conclusion which can be drawn from these observations is that the presence of a police officer, no matter how pleasant his demeanor, implies the potential use of force—force at least to effectuate the stop if not to compel the answers.

Another method of evading the question of force in a detention situation is to take the position that any force used was, in fact, for some purpose other than detaining an individual. An excellent example of this technique is found in the case of *High v. State*.[34] In this case the police officers were informed by a passing motorist that a disturbance was taking

[34] 217 S.W. 2d 774 (Tenn. 1949).

place at a certain location. The officers rushed to the location and saw a car driving away with one person in it. They stopped the car and found that the driver was intoxicated. There was apparently no evidence, such as erratic driving, to indicate that the driver was intoxicated prior to the time he was stopped by the officers. The Supreme Court of Tennessee upheld the conviction for driving while intoxicated. It held that the stopping of the automobile was not a technical arrest and that the officers simply stopped the car for the purpose of quelling the disturbance of which they had been informed and found that the driver was intoxicated. The court rather unimaginatively overlooked the fact that there was no disturbance to quell at the time the officers stopped the car and, as a matter of fact, no disturbance ever took place in the presence of the officers other, perhaps, than the disturbance which may have occurred during the course of taking the driver into custody for the offense of driving while intoxicated.

The only case to face the issue of force squarely is *Cannon v. State*.[35] In this case the defendant followed a woman to her house and accused her of speeding while she had been driving an automobile. The defendant was obviously drunk. Two officers arrived and took the defendant, against his will, to the police station for an intoxication test. He apparently failed the test and was charged with driving while intoxicated. It was the theory of the state that he was not placed under arrest until after he had failed his test for intoxication and that the intervening detention was authorized by Delaware's version of the Uniform Arrest Act. The defendant contended that the detention statute did not authorize the use of force and contemplated only voluntary detention. The Delaware Supreme Court, without much discussion, rejected such a contention out of hand. The court held that such a construction of Delaware's detention statute would make the statute meaningless.

It is obvious that the Delaware Supreme Court in the *Cannon* case articulated the proper rule of law. It is admittedly offensive to contemplate force being used against a private citizen when the private citizen is not being placed under arrest based on probable cause. The necessity of force will occur in extremely rare instances in the field detention context. But even so we should face the fact that a field detention authorization must carry with it the right of the officer to use force in making a detention. If such authorization is not present then we have not given the officer the tool which he needs to gain the maximum benefit from a field detention and interrogation authority. Indeed, a detention statute without the right to use force may lead to a situation where the general public, which has relatively little to fear with or from a field detention statute, will be subjected to being stopped and questioned, but the small corps of criminals at whom the detention statute is primarily aimed, will have no reason to fear it since they know they will not be required to pay any attention to the officer when he approaches them. This would lead to the further result that the general public would be limited in their freedom and there would be no corresponding gain to society as a whole.

[35] 168 A. 2d 108 (Del. 1961).

Privilege Against Self-Incrimination

Another issue involved in a field detention and interrogation is the question of the detainee's right not to answer the questions on the basis that the answers might incriminate him. There seems to be absolutely no question that a person who is subjected to a field interrogation cannot be required to answer questions of an incriminatory nature. Any other interpretation of a statutory or common law right of field detention would be squarely contrary to the Fifth Amendment's protection against self-incrimination. However, there does seem to be some question as to the effect of a person's refusal to answer the police officer's question. This question is usually framed in the context of whether or not the refusal to answer questions can be taken into consideration as one of the factors or elements in determining probable cause to make an arrest for a specific offense.

It has been held that flight from an officer to avoid answering questions can be a factor in determining probable cause.[36] By the same token, contradictory stories given in rapid succession, and obvious lies can also be taken into consideration in determining probable cause.[37] Chief Justice Traynor of the California Supreme Court stated, as dictum, in the case of *People v. Simon*[38] that "there is, of course, nothing unreasonable in an officer's questioning persons outdoors at night [citing authorities] and it is possible that in some circumstances even a refusal to answer would, in

[36] *See* Scurlock, *Arrest In Missouri*, 29 U. Kan. City L. Rev. 117, 125 (1961).

[37] State v. Hedman, 130 N.W. 2d 628 (Minn. 1964).

[38] 290 P. 2d 531 (Cal. 1955).

the light of other evidence, justify an arrest". There are, of course, other authorities that do not agree; they state that an exercise of a person's privilege against self-incrimination cannot be used as a factor in determining probable cause.

The only provision of the ALI's Model Code of Pre-Arraignment Procedure which was specifically rejected was the provision which would permit a failure to comply with an obligation imposed by the code to be used in determining probable cause for an arrest. It was the intention of the drafters, as shown by the commentary accompanying the draft, to permit the refusal to answer authorized questions by police officers to be used as a factor in determining probable cause.

States which have adopted the Uniform Arrest Act provide that any person, questioned by an officer, who fails to identify himself or explain his actions to the satisfaction of the officer may be detained further for a period of detention not to exceed two hours. The statutory wording seems to indicate quite clearly that a refusal to answer the officer's questions, even on the basis of a privilege of self-incrimination, could result in the individual being taken to the police station and held there until he does answer the officer's questions or until two hours expire. However, research does not reveal any case with that specific holding. In fact, no cases from the states which have adopted the Uniform Arrest Act have been found which even discuss the effect of a failure to answer the officer's questions.

There is authority for the proposition, of course, that while the Constitution does not require a person to incriminate himself, the Constitution does not state that the exercise of the privilege cannot be used for any other purpose.[39] Recent decisions of the Supreme Court seem to indicate that the purposes for which an invocation of the privilege against self-incrimination are used have been severely limited, although the court has not overruled the above stated principle in its entirety.[40] Nevertheless, the court has been especially alert and sensitive to any situation in which the use of the privilege against self-incrimination could be interpreted as an admission of guilt.[41] It would seem, therefore, that the use of the privilege against self-incrimination in a context where a detained person refuses to answer any of the officer's questions would fall in the "admission of guilt" category and be held to be constitutionally protected; in other words, a refusal to answer questions during field interrogation cannot be used as a factor in determining subsequent probable cause to make an arrest.

Thus far we have been discussing a situation in which a detained person refuses to answer any of the police officer's questions, except perhaps for name and address. A different conclusion might be reached if a detained person answered most of the officer's questions but refused to answer certain questions relating to a specific subject. Under such circumstances, if the officer considered refusal to answer a portion of his questions in his determination of probable cause to make an arrest, his determination might be upheld. True, he would be implying that the detainee was admitting guilt by his refusal to answer certain questions and would therefore be subject to the previously outlined constitutional objections. On the other hand, such conduct on the part of the detained individual might come closer to the "contradictory or evasive answer" category which has been recognized as a factor in probable cause.

The field research did not disclose a single instance where a detained person absolutely refused to answer any of the police officer's questions. On those rather rare instances when answers were refused, the subject matter usually did not involve probability of a crime, but rather third persons whom the detainee preferred not to name. Most instances of refusal occurred when the officer asked the detainee where he had been and he replied that he had been to see his girlfriend. When the officer would inquire as to her name and address, presumably for the purpose of verification, the detained individual would refuse to answer, perhaps out of chivalry or perhaps out of wisdom.

It is the author's opinion that an officer who has so little probable cause to make an arrest that the refusal of a person to answer his questions will swing the decision one way or the other, in all likelihood has a pretty weak arrest to begin with. A reviewing court would probably find "insufficient probable cause" without a detailed and careful examination of the constitutional issues involved. It is also the author's conclusion, based upon field research, that a person who answers questions with extreme reluctance almost invariably attracts the

[39] *See* Konigsberg v. State Bar of California, 353 U.S. 232 (1957); Orloff v. Willoughby, 345 U.S. 83 (1953) and Kimm v. Rosenberg, 363 U.S. 405 (1960).

[40] Garrity v. New Jersey, 385 U.S. 493 (1967); Spevack v. Klein, 385 U.S. 511 (1967).

[41] Slochower v. Board .350 U.S. 551 (1956).

full attention of the questioning officer to the extent that the officer starts attempting to find probable cause to make an arrest. Even when probable cause is not found, the person who answered the questions evasively or with extreme reluctance can almost certainly be assured that he will be under some type of surveillance. The time and duration of this surveillance will, of course, depend on numerous circumstances. Therefore, even if a refusal to answer the officer's questions does not constitute probable cause for an immediate arrest, such refusal to answer is seldom to the detainee's advantage.

Length of Detention

The length of a field detention is an issue of particularly vital importance. Various statutory enactments permit a detention for any period of time ranging from twenty minutes, in the case of the ALI Code of Pre-Arraignment Procedure, to two hours in the case of the Uniform Arrest Act. Other statutes, such as New York's "Stop and Frisk Act", and the common law right to field detention, do not contain any specific time period for the detention. Presumably cases falling in the latter category could result in a detention for a "reasonable" period of time.

In discussing the length of detention, the conflicting balance of values is rather obvious. On one hand, it is quite obvious that a field detention is especially capable of police abuse. In addition, those persons who advocate a field detention of some type stress the fact that the invasion of a person's right to free mobility is so slight as to justify the use of field detention as a law enforcement tool. On the other hand, if the length of detention is made so short as to dilute the effectiveness of such a detention as a law enforcement aid, then very little has been gained by authorizing such detention.

One argument against having any specific period of detention named at all is that any time limit set by a statutory enactment will be considered by the officer as the usual length of time which he can detain a person and, therefore, there will be a tendency for officers to detain persons for the maximum period of time even when the use of this maximum period of time is not necessary. This conduct on the part of the police officer would, in the author's opinion, be especially true in those cases where the officer, by virtue of his experience and "street wisdom", feels intuitively that the individual he is detaining has committed some crime, but the officer just can't quite "pin anything on him". On the other hand, the phrase "for a reasonable period of time" can be interpreted many ways under certain circumstances. This might result in a field detention statute being used as an excuse for a general investigative custody for a number of hours. Such a use would, of course, be contrary to the general purpose of field interrogation statutes which are primarily designed to authorize the police officer to obtain the name, address and explanation of actions from the individual who has been stopped. Naturally there will be some cases where the officer, using reasonableness and common sense, will desire to detain a person for a more protracted length of time pending a further investigation. However, the field research done by the author, coupled with his field experience, indicate that the need for an extended detention is an extremely rare event. This field research and subsequent experience, which will be described in some detail hereafter, indicate that the vast majority of field detentions consume less than six minutes. Indeed, the only field detention observed by the author which exceeded thirty minutes occurred in the City of Chicago when the police department's highly touted computer broke down and, as a result, an individual was detained for almost an hour until the clerical staff at headquarters could determine whether or not the detained person was wanted for an offense. He was.

Any detention statute should have a maximum length of detention expressed therein and that length of detention should be approximately thirty minutes. Such a period of time would be sufficient to cover the overwhelming majority of situations in which a field detention would be desirable. In addition, the existence of a thirty-minute time limit would clearly indicate to the officer that the statute is designed to permit only the most minor of detentions and is not to be used as an excuse to take a person into custody while an investigation is in process. A thirty-minute time period would also tend to cancel out those situations where the individual police officer, for one reason or another, decided to hold a detained person for the full time alloted by the statute. Even where this abuse does occur, a detention for a half-hour is a relatively minor invasion of a person's general right to free locomotion.

Exclusionary Rule

The vexing question always arises regarding what remedy would be available if a person has been detained beyond the thirty-minute maximum time period advocated in this article. For example, though no exclusionary rule governing violations of the ALI twenty minute limitation has yet been drafted, conceivably the drafters could take the position that *all* evidence obtained during the stop —that taken before the expiration of twenty minutes as well as that taken thereafter—should be excluded because the stop, considered as a whole, was illegal. This would be, to say the least, a most unfortunate and, indeed, unfair rule. We would then have a situation where the search of a person, which almost always occurs very early in the stop, would result in the discovery of legally admissible evidence, but if the detained person gave a prolonged explanation regarding his conduct or his possession of the contraband, then this evidence, which was originally valid and admissible, would, at the 21st minute of detention, suddenly become inadmissible. Such a "now you see it, now you don't" rule of exclusion is unnecessary, impractical, and logically inconsistent. An exclusionary rule which covered only those items discovered as a result of a search *after* the maximum period of detention had elapsed might be acceptable, but evidence obtained as the result of the search during the permissible time period should be admissible, regardless of subsequent circumstances. If the officer exceeds the period of detention, such violations of the statute can more effectively be dealt with by use of other disciplinary techniques which will be subsequently discussed.

Scope of Questions

Another issue involved in a field interrogation situation relates to the types of questions which may be asked a detained person. This issue has been created primarily as a result of the Supreme Court's decisions in the *Escobedo*[42] and *Miranda* cases.

The *Miranda* case will be discussed at some length hereafter to determine if it applies to a field interrogation situation at all. However, assuming that the *Miranda* case could apply to a field interrogation, the issue remains as to whether or not *Miranda* would apply to every field interrogation.

It seems valid to classify field interrogation into three broad categories. The first is where a police officer has some reason to believe that the detained party has committed a crime. Perhaps the belief is not of such a nature as to constitute probable cause, but at least the officer has, prior to the stop, a very specific situation or set of circumstances about which he desires to question the detained person. In the second, it is believed that the person to be detained has done something, or his presence is so out of character with the neighborhood, that the officer desires a *general explanation* regarding the individual's *movements*. Finally, we have the circumstance wherein a detained person may be a *witness* to a crime or have information relating to a specific crime which the peace officer feels would be valuable. Of course, these three general categories of detentions are very broad and each category is capable of being broken down into an almost infinite variety of sub-categories.

There seems to be little doubt that no *Miranda* warning would be required in the third class of field interrogation involving a witness. This is the type of interrogation in which there is no thought, at least initially, that the detained person has committed a crime or is guilty of any other unlawful conduct. Indeed, the *Miranda* case itself excludes this type of questioning from the requirement of a warning.[43] The second category of field interrogation would, at first glance, also seem to be outside the scope of the *Miranda* decision. After all, there is no probable cause for an arrest and, there is in fact no "custody" or arrest as those terms have been used and interpreted by a majority of the cases. Furthermore, the officer is usually not concentrating his questions upon a specific crime or circumstance but rather is asking the individual for nothing more than his name, address and explanation of his presence and actions.

We must remember, however, that the field stop, if properly used, is not a "random sampling" of persons in the community. Under court decisions which validate the common law field interrogation and the stop and frisk statutes, an officer is authorized to make a stop only when an individual's conduct raises a certain degree of suspicion in the officer's mind that the person stopped has committed, is committing, or is about to commit a crime. Therefore, a person subjected to a field stop is being investigated as a suspect for a crime even though the exact nature of the crime may be un-

[42] 378 U.S. 478 (1964).

[43] 384 U.S. 436 at 477–78.

known to the officer at the time of the stop. True, the detained individual is not the "focus of suspicion" that he would be if the officer had extraneous evidence to the fact that the detained person had committed a specific crime, but this does not remove the fact that the detained person is suspected of doing something illegal. Nevertheless, the author believes that the *Escobedo* and *Miranda* cases would not apply to this second category of field detention. *Escobedo* and the four cases decided in *Miranda* all involved circumstances where individuals were very clearly under arrest and had been in fact taken to places of detention. The interrogators in those cases employed techniques which were designed to obtain confessions from the individual involved to be used in evidence against him in a specific case which was under investigation. The field interrogation, on the other hand, is not designed so much to obtain a confession of a specific crime as it is to determine or obtain information relating to the detained person's conduct. As long as the interrogation officer confines himself to such questions as "what are you doing out here at this time of the morning?", there is little likelihood that he would be required to give the *Miranda* warning at this first approach to the individual to be detained.

The first category of field stop, that of questioning a person with relation to his guilt concerning a specific crime or series of crimes, is an entirely different matter. Here we have a situation where the "focus of suspicion" is relatively firm and it would appear that if *Miranda* applies to questioning away from the stationhouse at all, it would apply in this type of circumstance. Hence, the officer would be required to give the *Miranda* warning if he wanted to use the individual's statements as evidence against the individual in a criminal case. In addition, we can predict with a relatively high degree of accuracy that the Supreme Court is going to be rather sensitive to investigative techniques which can be reasonably construed as designed to evade the *Miranda* decision. Approaching a person whom a police officer believes has committed a specific crime and interrogating him with relation to that specific crime on a street corner under the disguise of a field stop might very easily be interpreted as such an evasion.

In summation, no warnings are necessary under the *Miranda* decision to persons who have been subjected to a field stop except in those cases where the interrogation relates to a specific crime which an officer has probable cause to believe, or at least suspects, that the detained person has committed.

Records of the Stop

Another issue involved in field stops is whether the police ought to record the detention. This issue probably has an emotional content which far exceeds its true importance. The New York "Stop and Frisk" Act, as well as the Uniform Arrest Act, are quite specific in stating that field detentions should not be recorded as arrests in any official police record. On the other hand, the ALI Model Code of Pre-Arraignment Procedure requires each field stop to be recorded and sets forth in some detail the information to be kept. The importance of record keeping insofar as the general public is concerned is perhaps exemplified by a public controversy which broke out in the City of Chicago in the winter of 1965–66. That police department's policy is to conduct field stops even though Illinois has no enabling legislation and the Illinois courts have not clearly sustained a peace officer's common law authority to make field detentions. In spite of the fundamental issues which surround field interrogations, the opponents of such a departmental policy opposed most vigorously the Chicago police department's practice of making notations of field stops and then retaining them for a thirty-day period. If newspaper support is any indication of general public approval, it would appear that the people of Chicago approve the practice of field stops even in spite of their alleged "illegality"[44]; nevertheless, even the newspapers which generally supported the policy of a field interrogation expressed discomfort over the record-keeping practice.[45]

Those states which prohibit the keeping of records of field stops do so, presumably, in an attempt to make the consequences of such a stop as innocuous as possible. In fact, as indicated earlier, the lack of a detained person's "police record" as the result of the stop is one of the primary points which distinguishes a field interrogation from an arrest. A good deal of public sentiment can be aroused by charging that police departments are compiling dossiers on individuals to be used for some vague, future and unknown (but presumably sinister) purpose.

Police officials, on the other hand, support the idea of keeping records which are to be main-

[44] Chicago Sun-Times, January 19, 1966, at 31.
[45] *Id.*

tained for a limited period of time on a number of grounds. First, such records provide leads if it should be later determined that a crime was committed in a certain neighborhood. The theory is that the investigating officers would check the field stop records to find out which suspiciously acting persons were in the general area of the crime at the time it was committed. Police officers, especially administrators and supervisors, can also use the field interrogation records as a method of supervision and internal control of the patrolmen under their command. In short, they can have some indication of which patrolmen are aggressively checking their beats and which ones are dragging their feet.

Most importantly, records of field stops are invaluable to police supervisors when a citizen complains that he was rudely approached or otherwise mistreated during the course of a field interrogation. In a large metropolitan police department it would be next to impossible to determine which officers were involved in the complaint unless there was a record of the incident.[46] We can only presume that this latter use of records is what the drafters of the ALI Code had in mind when they required that rather extensive records be maintained. This presumption is reinforced when we notice that there is, among other information to be recorded, information of witnesses present during the field stops and whether or not the detained person objected to the stop. It is also worthy of note that the ALI drafters went to rather elaborate precautions to limit potential abuse of the field stop, yet did not see fit to require that the records kept of the field stop be destroyed after a limited period of time. Under the ALI provisions these records could be maintained indefinitely. The only conclusion which can be drawn from this circumstance is that the ALI drafters did not consider maintenance of records to be a significant source of unwarranted exercise of police powers.

It is the author's opinion that field stops should not be recorded as arrests and should not be considered as "a police record". By "police record" we mean that an authorized person in a police position who was checking on a specific individual would not be routinely informed of any field stops. Beyond this limitation, the keeping or nonkeeping of records is largely a false issue. It would appear that if the lack of records would make a policy of field interrogation more palatable to a particular community, records should not be kept, not for a law enforcement or legal reason, but from the standpoint of public acceptance and police department public relations.

[46] *The Law Of Arrest: Constitutionality Of Detention And Frisk Acts*, 59 NW. U.L. REV. 641, 654 (1964).

THE SEARCH

Of the various issues which may arise in the course of a field interrogation, probably the most critical and controversial issue is that of a search of the detained person. This is a vital issue because a person arrested after a field stop is frequently arrested for the possession of contraband which is discovered as a result of a search. In addition, it is one of the most difficult issues to grapple with. The overwhelming majority of authorities seem to approve of the idea of permitting police officers to make field stops and conduct inquiries. However, there is a much more substantial difference in opinion when the inquiry includes a search.

One line of reasoning holds fast to the idea that absolutely no search of a person is constitutionally permissible unless that search is conducted under the authority of a search warrant or as an incident to a lawful arrest.[47] It naturally follows, according to this rationale, that if a field stop is not an arrest, then there can be no search of a person until such time as an arrest has occurred. The dissent in the case of the *People v. Rivera*[48] took this position. Justice Fuld predicated his dissent on the basis that a search without consent and without a warrant is constitutional only if it is an incident to a lawful arrest. He brushed aside any suggestions that a frisk is distinguished from a search by pointing out that neither the Fourth Amendment nor the law of torts distinguishes between a cursory search and an elaborate one. He then stated: "This is nothing but exercise in semantics; a search by any other name is still a search".[49] It is, perhaps, interesting to note that the judge dissented only on the question of the right of an officer to search as an incident to a field stop. The highest court in New York was unanimous in agreeing that officers had a common-law authority to stop and question an individual.

Another writer also doubts that a search of any nature is permissible. He appears to base this

[47] *See* Collings, *Toward Workable Rules of Search and Seizure—An Amicus Curiae Brief*, 50 CAL. L. REV. 421 (1962).

[48] 201 N.E. 2d 32, 35 (N.Y. 1964) (dissenting opinion).

[49] 201 N.E. 2d at 35.

conclusion on the fact that arrests without warrants are well known and have been traditionally used whereas searches without warrants have been more strictly proscribed. He states that a very important distinction exists between arrests and searches, and adds: "Whereas the basic postulate is that a search without warrant is *per se* unreasonable and is to be tolerated only in certain circumstances . . . arrest without warrant is hardly treated as exceptional".[50] And a recently published, comprehensive analysis of street stops also expresses doubt that gradations of search are constitutionally permissible.[51]

In general, a majority of the authorities approving a street stop at all would authorize a cursory search, "a frisk", for the self-protection of the police officer. While such a modified search does not fit neatly into a traditional view of search and seizure law, it does conform more closely to the realities of the street. As one author states, "Hale, Hawkins and Blackstone never saw a 4 inch automatic pistol, but to officers who have, it does not seem unreasonable to search a person being questioned who may be armed".[52] A 1964 article points out that 26% of the police officers killed in the four previous years were making an arrest or transporting prisoners. Another 18 were killed investigating reports of suspicious persons, and 63 were killed interrupting robberies or burglaries, even though the officer did not know, in all cases, that he was in fact interrupting a crime in progress.[53]

There appears to be virtually no suggestion from any responsible source that a police officer be authorized to make a general evidentiary search incident to a field interrogation. The Uniform Arrest Act, New York's "Stop and Frisk Act", and the ALI Proposed Code of Pre-Arraignment Procedure all strictly tie the authority of an officer to make a search of any kind incident to a field stop to the officer's need for protection. This same limitation is also contained in the case law of those states, notably California, which recognize a police officer's right to stop and question an individual as a part of that state's common law. Thus far, the author has not been able to find any state which recognizes a statutory or common-law right to stop and question persons, but prohibits the police officer from conducting any type of search of him.

There is a distinct tendency, however, for the courts to scrutinize a search with considerably more care than they review the probable cause to investigate a stopped person's activity. An excellent example of this is the case of *People v. Rodriguez*.[54] In this case a motion to suppress evidence of policy slips was granted. The policy slips were uncovered while a police officer was frisking an individual for weapons. The court reasoned that a cursory search, or patting down of the outside clothing to determine whether or not a person was carrying a weapon would not have revealed policy slips, hence the court held that this type of search must, by the very nature of the evidence uncovered, have been beyond the frisk which was contemplated under the New York statute and was an unlawful search.

Another such case is *People v. Simon*.[55] In this case a police officer saw the defendant and another person walking in a warehouse district late at night. The officer stopped and searched the defendant and, in the course of said search, found a quantity of marijuana. Defendant was charged with illegal possession of that drug. The California Supreme Court set the information aside and released the defendant. Chief Justice Traynor pointed out that under California law a search may be before or after an arrest but probable cause must exist prior to the search or it is invalid. In this case, the officer simply stopped the defendant and thoroughly searched him before he asked defendant to identify himself or explain his conduct. The Court pointed out that there is nothing unreasonable in an officer's questioning of a person who is outdoors late at night. However, in this case the type of search indicated that the officer was engaged in a general search for evidence without probable cause, which is, of course, unlawful. A later California case, also written by Chief Justice Traynor, does clearly recognize the right of an officer to request a suspect to "submit to a superficial search for concealed weapons".[56]

In summation, the majority of the authorities which have faced the issue of the search seem to take the position that even though the constitutional language relating to searches has no exceptions, courts, in the light of experience, have en-

[50] Scurlock, *supra* n. 36, at 118.
[51] Recent Statute, 78 HARV. L. REV. 473, 476–477 (1964). See also Johnson v. United States, 333 U.S. 10 (1948) and Trupiano v. United States, 334 U.S. 699 (1948).
[52] Comment, 39 CAL. L. REV. 96, 109 (1951).
[53] Ronayne, *supra* n. 25, at 237.
[54] 262 N.Y.S. 2d 859 (Cty. Ct. 1965).
[55] 290 P. 2d 531 (Cal. 1955).
[56] People v. Mickelson, 380 P. 2d 658 (Cal. 1963).

grafted certain exceptions such as a search incident to an arrest or a search by consent.[57] These authorities tend to engage in a balancing of social values and reach the conclusion that, "... as long as the frisk is strictly limited, this invasion seems outweighed by the necessity to protect the questioning policeman".[58]

This general rationale is also well summarized in the commentary to the stop and frisk provision of the ALI Model Code of Pre-Arraignment Procedure:

> ... an officer, if he reasonably believes his safety so requires, may search a person stopped pursuant to this section. He may search only to the extent necessary to discover any dangerous weapon which may on that occasion be used against him. The search envisioned here should not usually be more intensive than "an external feeling of the clothing" that is, the traditional "frisk". The subsection also authorizes a search of the immediate surroundings of the person for the same purpose and under the same limitations. By immediate surroundings, the draft intends to designate any place (for example, a lady's handbag) where a weapon may be concealed, and which during the interview remains in easy reach of the person.
>
> The Reporters included this authority to search with some reluctance. Many people would find being subjected even to the limited search authorized by this subsection offensive and humiliating. Nevertheless, the important purpose which this section as a whole is intended to serve would be frustrated if no search were authorized. Police officers will not, and should not, be asked to risk an encounter with a person who may be armed unless they can protect themselves by "frisking" the person at the outset. Where the authority to stop has been recognized, the search for dangerous weapons has also generally been recognized as a necessary concomitant to it.
>
> The draft seeks to minimize as far as possible the recourse to such searches by limiting their scope to the specific need which is their justification. The very extensive search which may accompany an arrest is clearly not within the terms of this provision.[59]

[57] Leagre, *supra* n. 17, at 339.

[58] Recent Statute, 78 HARV. L. REV. 473, 476–77 (1964).

[59] MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE, *Tentative Draft No. 1* (March 1, 1966), 101.

Thus far, we have discussed a number of authorities which take the position (a) that no search at all is permissible under any circumstances which constitute less than probable cause to make an arrest, and (b) that some type of limited search, for the protection of the officer involved, is permissible. A third alternative has been suggested. It would authorize police officers to conduct a limited search for deadly weapons and would go further by not permitting into evidence any item recovered by the search except weapons. Presumably the reasoning behind such a suggestion is that the authority of a police officer to frisk an individual for deadly weapons would not be abused by being used as an excuse to conduct a general search of the detained person for other types of contraband. In other words, it would remove any motive for the officer to conduct a thorough search for items other than weapons since the other items could not be used in obtaining a conviction.

At first blush such a proposal sounds rather attractive. It would allow the officer to protect himself and greatly reduce the temptation to abuse the authority to frisk. However, such a proposal, like most simplistic solutions to extremely complex problems, can lead to some illogical situations. In general, if this proposal were followed we may encounter a situation of a police officer making a perfectly proper frisk and uncovering what could very well be evidence of a major crime, but immunity would be accorded the stopped person because the seized evidence was not an instrumentality dangerous to the officer. Indeed, we could easily reach the point where a police officer would not stop persons whom the officer suspects are guilty of possesing narcotics, burglary tools, stolen property or other contraband out of fear that he might accidently find some of this contraband on the person during the frisk and thereby taint its validity. This possibility is not merely a product of the author's imagination. In fact, one case now pending before the Supreme Court involving New York's "Stop and Frisk Act" is just such an example.

The question naturally arises: If there is so little judicial or scholarly opposition to the authority of a police officer to stop an individual and ask an explanation of his movements, why do we then find a rather significant opposition to the right of a law enforcement officer to conduct a frisk as an incident to the street stop? It is this author's opinion that some of the concern relating

to a frisk is based on the very real potential for abuse in a field situation.

To begin with, most openminded students of the problems related to field interrogation can easily see the distinction between a field stop and arrest. There is a relatively clear distinction between a four or five minute conversation with a policeman on a street corner, as in the case of a field stop, and, on the other hand, an arrest in which the individual is taken to a police station, charged with a crime, fingerprinted, "mugged", and in general caught up in the entire criminal law process. However, the distinction between a frisk and a more thorough search is an even finer distinction than that between a field stop and an arrest. It is quite easy to define a frisk as the patting down of the outer clothing for the purpose of determining by touch the existence of a concealed weapon. However, in actual field practice, a police officer will frequently face situations in which a simple "frisk", to be effective for self-protection, may turn into a reasonably thorough search—even assuming the good faith of the police officer. For example, cold weather, when people are wearing numerous garments and heavy clothing, creates something of a problem. Even the educated fingers of a veteran police officer have difficulty in checking for knives and small weapons beneath extremely bulky clothing. Requiring an individual to unbutton his topcoat and perhaps a jacket underneath the topcoat, then checking the various layers of clothing for a reasonably available weapon can have all the appearances of a rather thorough search. Such a search is certainly necessary to protect the officer in some instances, but it also goes considerably beyond the mere patting down of the outer clothing as discussed by the courts. Hatbands, boot tops, and collar linings are favorite places for concealment of certain types of sharp bladed weapons, yet it is extremely difficult to check these parts of a person's clothing by simply running a hand over them, and this is especially true if the weapon is made of flexible material such as leather or plastic, or a safety razor.

The most common confiscated weapon which the author has seen in two years' field experience with police departments is a small Spanish or Italian automatic pistol, which sells for $8–$15 and which fits in an adult male's hand without being seen. Such weapons, while lacking in accuracy and precision, are extremely effective at point-blank range. Yet this is the type of weapon which an officer is supposed to protect himself against by patting down the outer clothing.

In addition to the sophistication and increasing availability of commercial weapons, the officer in the street must contend with an occasional ingenious homemade weapon. The author has seen a homemade "zip gun" capable of firing a single .22 or .25 caliber bullet which was designed and constructed to be concealed in a common cigarette lighter. From outward appearances, this weapon would have a very low threshold of reliability and accuracy but it did work when tested. Therefore, in the hands of a certain type of person, the very act of casually lighting a cigarette could spell death or serious injury to a police officer.

Another troublesome problem in defining the limits of a frisk is the question of items being carried by the detained individual. There is a very real threat to officers making street stops under certain circumstances when the detained individual is carrying open boxes, grocery sacks or even handbags. This is an especially relevant problem in view of the fact that the carrying of some such items very late at night and in certain portions of a city would be the very type of circumstance which would attract a police officer's attention to the individual in the first place.

The purpose of the preceding discussion is not to develop any definite line between a frisk and a search. Rather, the purpose is to demonstrate that a peace officer, in order to protect himself, is going to have to engage in some type of search which will exceed the casual patting down of the outer clothing. In balancing the degree of intrusion of the freedom of personal movement over and against the effectiveness of a law enforcement technique, we must not delude ourselves into believing that the degree of intrusion, insofar as the frisk is concerned, can be effectively limited to a fleeting three or four second patting down of outer clothing.

There is still an additional reason why the frisk of the person causes more concern than the original stopping of the individual. The statutory and common-law authority of a police officer to stop an individual on the street is based on "reasonable suspicion" that the individual stopped has commited, is about to commit, or is going to commit a crime. While it is conceded that the term "reasonable suspicion" has not been the subject of extensive case law, nevertheless a reading of the few cases which have interpreted and analyzed this

and similar terms indicates that the appellate courts have some general concept of what these terms mean and the circumstances to which they apply. In general these terms mean that a person must be engaged in some type of conduct or be in some circumstances which remove him from the general class of ordinary citizens in the same area at the same time and, further, that these circumstances must suggest to a reasonably prudent officer that the individual is engaged, or is about to engage, in some illegal act. While such a criterion is necessarily vague, it would appear that it is no more vague or incapable of review than the classic concept of "probable cause to arrest".

It should be noticed, however, that the statutory authority for an officer to make a frisk as an incident to a street stop is dependent on the officer's "reasonable belief that he is in danger". Yet research has not revealed a single case in which the officer's "belief that he is in danger" was ever subjected to appellate review. This presumably means that the authority of an officer to frisk an individual, which can be a much more serious intrusion of the individual's liberty than the original stop, is going to be based on the criterion of whether or not the officer has a right to stop the individual. It is understandable that a judge would be somewhat hesitant to review the officer's judgment as to whether or not he was in danger. After all, it is the police officer's life which is at stake and a judge would be naturally hesitant to review this highly personal decision. But if the authority of an officer to make a frisk is to be constitutionally upheld and properly applied and opposition to the frisk abated somewhat, the courts are going to have to grapple with the question of standards which justify a frisk.

The concept of "reasonable belief of danger" is going to have to be determined and developed by case law in conformance with our common law tradition. But it appears that the very first question which must be decided prior to the development of case law is whether or not the courts are going to require objective criteria or take into account generally surrounding circumstances which do not necessarily apply to a specific individual being stopped. In other words, does an officer have to testify to certain movements or conduct on the part of the specific individual stopped in order to justify a belief in danger, or will the court take into consideration the general character of the neighborhood, the time of day, the availability of assistance to the officer, the general type of crime which the detained person is suspected of committing and other circumstances of a like nature? The author believes that general circumstances such as those mentioned must be taken into account in determining "reasonable belief of danger". Any attempt to require some suspicious movement—such as the reaching for a glove compartment or a hip pocket on the part of the individual detained—would not comport with the reality of the streets.

At this point, we should realistically face the fact that we are actually not talking about the protection of citizens from the intrusion of a frisk but are discussing admissibility of evidence. There is not the slightest doubt that an officer who believes that he may be in danger, based on any conceivable criteria, is going to conduct a frisk. If the officer feels his life is at stake he will protect himself first and the question of admissibility of evidence will have extremely low priority. However, the judicial development of some case law, at least to the extent of crystalizing the concept of "reasonable belief of danger", will reassure those individuals who may have reservations about granting a police officer the authority to conduct a frisk. At least it will indicate that the criteria to conduct the frisk will be subject to judicial review and not left to the whim of each individual police officer.

There is one final reason why some persons might have reservations about authorizing a frisk as opposed to authorizing a field stop. This involves the question of the detained person's reputation or embarrassment. It is relatively easy for a well-trained police officer to conduct a short field stop involving a short period of questioning of an individual and make such a practice inconspicuous to the other persons in the vicinity. However, a frisk is more difficult to conceal from other citizens, especially when it also includes checking of shopping bags or the more heavy-handed frisk necessary for heavy or bulky clothing. Associated with the question of reputation is the attitude of the person who has been stopped. The field research for this article, as well as the author's experience in the field, has been that individuals who are merely questioned almost never raise objections to being stopped, especially if the interrogating officer's demeanor is one of politeness and efficiency. Almost every objection of any degree observed has been in a situation where the detained person was subjected to a frisk. Indeed, this author's personal experiences while residing in the City of Chicago

bear out the field observation. He was subjected to a field stop by Chicago police officers on two occasions. During both incidents it was quite understandable that his conduct, when viewed by a police officer from a distance of a block or so away, could be considered suspicious. Under both circumstances, a short explanation of that conduct satisfied the officers that the seemingly suspicious conduct was, in fact, reasonable and innocuous. The author departed from both field stops with a generally favorable impression of the officers concerned, especially their politeness and alertness. However, if the field stop had resulted in a frisk of either the person or an automobile, the author strongly suspects his own feelings would have been less favorable and some degree of resentment would have been present.

A corollary to the question of reputation is the fact that a frisk is much more subject to abuse by police officers than a field stop. Assuming that a police officer desires to harass a particular individual and this harassment took the form of stopping the individual at every conceivable opportunity, it would no doubt be annoying and somewhat damaging to the individual's standing and reputation in his community. However, if the harassment took the form of a thorough frisk, it could become extremely oppressive, especially if the officer managed to conduct the frisk in open view and in relatively crowded public places. This type of harassment by conducting frequent personal searches is not a figment of some civil libertarian's overactive imagination. It exists today, in varying degrees, to the extent that a slang expression has been developed to cover the situation. Harassment by frequent personal stops and searches is known in one big city as "jacking-up" an individual. This practice of "jacking-up" a citizen is usually accomplished by means of unlawful detentions and searches. Any statutory or common-law scheme to add new tools to the arsenal of law enforcement officers must be especially constructed to assure that it does not, at the same time, legalize a presently existing abuse.

Miranda and the Field Interrogation

One of the more pressing constitutional problems involved in the area of field interrogation is the question of what effect, if any, the recent decision of the Supreme Court in *Miranda* has on field stops. There is an assumption, which is probably valid, that the requirement that a person be warned of his right to silence, that any statement he makes may be used against him, that he is entitled to an attorney either of his own selection or appointed for him if he cannot afford one, would hamper the use of the field stop as a technique to uncover crime. Certainly, an exercise of the full *Miranda* ritual would have a tendency to alarm a citizen whose suspicious conduct resulted from completely and innocuous motives. It is the judgment of the author that *Miranda* does not apply to the typical field interrogation. However, this case has such importance and potentially far-reaching effect on the process of criminal investigation that it will be discussed separately and in some detail, apart from other constitutional issues.

To begin with, all four of the cases which were decided by the Supreme Court in the *Miranda* opinion involved persons who had been arrested and taken to the police station and interrogated for the purpose of obtaining a confession.[60] In each of the cases, a confession was obtained after lengthy detention and interrogation at the station house. Before examining the language of the court, it is of interest to note that Mr. Chief Justice Warren, who wrote the majority opinion, does not use the word "arrest" in the opinion. He therefore avoids the semantic and definitional difficulty which has been the stumbling block of many other courts and which was discussed at the very outset of this article. Instead of using the word "arrest" the majority almost always uses the word "custody". Therefore, for our purposes, it behooves us to examine some of the language of the majority opinion to determine whether or not an interference with a person's freedom to move about the streets for the purpose of inquiring of the individual his name, address, and explanation of actions is the type of "custody" to which *Miranda* is addressed.

In the very first paragraph of the majority's opinion, we find the statement "... we deal with the admissibility of statements obtained from an individual who is subjected to custodial police interrogation ..." [61] The Court then points out that in each of the cases before it law enforcement officials took the defendant into custody and interrogated him at the police station. By way of introduction to the rationale of the majority's opinion, Mr. Chief Justice Warren stated:

> Our holding will be spelled out with some specificity in the pages which follow but briefly

[60] 384 U.S. at 440.
[61] 384 U.S. at 439.

> stated it is this: the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. *By custodial interrogation, 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.*[62]

It is submitted that the word "custody" means that an individual has been taken physically from the street or other place and confined. This interpretation of the word "custody" is reinforced by additional quotations which will follow. But the Court also indicated that the *Miranda* rule would have to be followed in any other situation which deprived a person of his freedom of action "in any significant way." At this point in the opinion it is not clear what the Court means by being deprived of freedom of action in any significant way. This statement implies that *Miranda* is applicable to situations in which the suspect is not actually confined in a police station or jail, but, by the same token, it also implies that there can be a deprivation of freedom of action in an insignificant way, to which *Miranda* would not apply. As the opinion progresses we find the following:

> The Constitutional issue we decide in each of these cases is the admissibility of statements obtained from a defendant questioned while in custody and deprived of his freedom of action. In each, the defendant was questioned by police officers, detectives, by a prosecuting attorney *in a room in which he was cut off from the outside world.*[63]

The Court then observed that all four cases were similar in that "They all thus share salient features—*incommunicado interrogation of individuals in a police dominated atmosphere,* resulting in self-incriminating statements without full warnings of constitutional rights".[64] The Court added that "An understanding of the nature and setting of this in-custody interrogation is essential to our decisions today".[65]

At this point the Court goes into a discussion of reports of physical abuse of prisoners in order to obtain confessions, primarily the Wickersham report of 1931 and three Law Review articles dated 1930, 1932 and 1936. The Court then points out that "Interrogations still take place in privacy", and that "Privacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on in the interrogation room." [66] The Court next discusses at some length two well known and widely used manuals of police interrogation wherein the authors discuss psychological techniques of gaining the confidence of the suspect and obtaining a confession thereby. The Court then states: "Even without employing brutality, the 'third degree' or the specific stratagems described above, the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of the individuals." [67] The majority also observed: "It is obvious that such an *interrogation environment* is created for no purpose other than to subject the individual to the will of his examiner. This atmosphere carries its own badge of intimidation. To be sure, this is not physical intimidation, but it is equally destructive to human dignity. *The current practice of incommunicado interrogation* is at odds with one or our nation's most cherished principles—that the individual may not be impelled to incriminate himself." [68] The Court at a later point states: "We have concluded that without proper safeguards the process of in-custody interrogation of persons suspected or accused of a crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." [69]

As the opinion progresses, its application to field interrogation based on reasonable suspicion becomes less certain. We find a statement to the effect that, "the principles announced today deal with the protection which must be given to the privilege against self-incrimination when the individual is first subjected to police interrogation while in custody at the station or otherwise deprived of his freedom of *action in any way*".[70] The preceding quotation very clearly supports the

[62] 384 U.S. at 444 (emphasis added.)
[63] 384 U.S. at 445 (emphasis added.)
[64] *Id.* (emphasis added.)
[65] *Id.*
[66] 384 U.S. at 448.
[67] 384 U.S. at 455–56.
[68] 384 U.S. at 457–58.
[69] 384 U.S. at 467.
[70] The quotation in the text came from an advance sheet, 16 L.Ed.2d 725, No. 7 July 6, 1966. However, the official report inserts the work "significant" between the words "any" and "way", 384 U.S. at 477.

earlier implication that the word "custody" means confinement at a police station but instead of talking in terms of deprivation of freedom of action in any *significant* way which the court discussed early in the opinion, we now find the opinion turning to the deprivation of freedom of action in *any* way. Of course, if this preceding statement is interpreted to be the holding of the court in *Miranda*, certainly the field stop is a deprivation of freedom of action "in any way". If this apparent contradiction in the opinion were not enough, in the very next paragraph we find the court saying that "investigation [of a crime] may include inquiry of persons not under restraint". And then the court said:

> General 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.[71]

The preceding quotation could easily be interpreted as applying to witnesses only and not to a person who is suspected of committing a crime. However, such an interpretation is weakened because the Court attaches a footnote at the end of the foregoing quotation. This footnote cites with approval the police practice of visiting "... the house or place of business of a *suspect* and there questioning him, probably in the presence of a relative or friend." [72]

It is submitted that this latter quotation rather effectively destroys the idea that the general non-custodial investigation of crime referred to in the *Miranda* quotation applies only to witnesses. Based on the preceding quotations, it is the author's conclusion that *Miranda* was striking at what the Court considered the inherently coercive circumstances and atmosphere of a place of confinement and does not apply to general inquiries made in public places and in public view which do not have the attributes of a jail or station house. *Miranda*, therefore, does not apply to the typical field interrogation.

There are situations, of course, which could develop in the field which would bring about an atmosphere and circumstances similar to a station house questioning and in which *Miranda* would apply. For example, a person is stopped and a general field interrogation, or the evidence obtained as a result of a frisk, indicates that the detained person has been guilty of a major crime. If he is placed in a police car and interrogated at significant length by police officers with relation to the individual's guilt of the crime, the circumstances would not be significantly different from the inherently coercive in-custody interrogation which was generally condemned by *Miranda*. Then too, a police station is not the only place where a person can be taken into physical custody and "cut off from the rest of the world". If a police officer stops an individual in a store on suspicion of shoplifting, and takes him to some isolated room in the back of the store and proceeds to interrogate him for the purpose of obtaining a confession, there can be relatively little doubt that *Miranda* would apply. Examples such as the two which have just been mentioned would be exceedingly rare, however, and to apply *Miranda* would have little effect on the general practice of field interrogation. In summation, the entire thrust of the rationale of *Miranda v. Arizona* is such that it does not apply to field interrogations so long as the stop is for a relatively short period of time, is conducted in public, or in a non-police dominated atmosphere, and the questioning, at least initially, is confined to the general conduct of the individual and is not an interrogation relating to the individual's involvement in a specific crime for the purpose of obtaining a confession.

Field Research

In order to obtain factual data for this article, the author made arrangements with the Chicago Police Department to ride with various units of that department's Patrol Division in November and December of 1965, and in April and May of 1966.

Method

The information set forth hereafter in this article resulted from observation in Task Force Areas 6, 1, and 4 and in Patrol Districts 11, 2, 20, and 16. The author would report to the relevant area or district headquarters at 6:00 P. M. after a supervisory officer had been notified that an observer would be present. The author would

[71] 384 U.S. at 477–78.
[72] 384 U.S. at 478, n. 46.

then be assigned to one unit for the night's observation. The officers involved were given an explanation of the purpose of the observer's presence and were requested to conduct themselves as though they were on a routine patrol mission. (The possible effect on the police officers' conduct due to the presence of the observer is discussed hereafter.) The author would accompany the officers during the entire eight-hour shift, making notes on certain stops which were made. The data contained herein includes only those contacts in the field which were not primarily concerned with the apprehending of a particular person for the commission of a specific criminal act. The type of police activity under investigation in this report is the stopping of individuals who were allegedly engaged in "suspicious" activity and operates under the various labels such as "field challenge", "field interrogation", "stop and frisk", and "stop and quiz".

Explanation of data

The phrase "total persons contacted" represents the number of persons the officer spoke to in an official capacity. For example, if an automobile with three occupants was stopped and only the driver was asked to identify himself, one person was counted as "contacted". If all occupants were questioned or asked to identify themselves, three persons were counted as "contacted".

The phrase "vehicles stopped" is self-explanatory; it also includes a few instances (less than ten) when persons were questioned after being observed in a parked car.

The phrase "frisk of a person or car" means, in relation to a person, the running of the officer's hands over the outside of a person's clothing as a check for concealed weapons. If during the course of a frisk the officer felt an object which, in his opinion, could have been a weapon, the incident is counted as a frisk, even though the officer went into the person's clothing after feeling the object. The frisk of a car is defined as a superficial shining of a flashlight inside the automobile to observe items which would be in plain view; it also includes the shining of lights under the seats and other potential hiding places which are accessible without rearranging any items in the car.

The phrase "search of a person or car" is defined, in relation to an individual, as the examining of the inside of a person's pockets or minutely examining a piece of clothing; for example, taking a person's hat off and turning the sweatband inside out. Basically, any physical investigation which extended beyond the feeling of a subject's outer clothing is counted as a search. The looking inside of packages or sacks is not counted as a search unless the officer shifted the contents of the parcel around or lifted some items of the parcel in order to examine all of the contents of the package. Any such rearranging of the contents of a parcel is counted as a search. A search of an automobile is defined as any conduct which goes beyond a superficial checking of the interior of an automobile. The opening of glove compartments, trunks, or boxes inside a car are examples of searches. Any time the officer felt it necessary to rearrange any of the contents of an automobile it was counted as a search.

The phrase "approval" represents the number of persons who affirmatively congratulated the officers for being alert or expressed their appreciation of the officer's presence.

The phrase "Protest 1" represents the number of persons who did not verbally protest at being stopped, but who displayed objective signs of annoyance or inconvenience.

The phrase "Protest 2" represents the number of persons who were visibly upset at being questioned and expressed such disapproval verbally.

Using the definitions contained above, the data obtained is as follows:

Total persons contacted, 297;
Vehicles stopped, 129;
Persons arrested, 11;[73]
Frisk of person or cars, 187;
Search of person or car, 142;
Approval, 4;
Protest 1, 8; and
Protest 2, 7;[74]

Validity of data

The most difficult problem in this type of field survey is the interpersonal relationship between the police officer and the observer. As stated earlier, each unit was requested to carry out its function as though the observer was not present.

[73] Persons arrested: rape, 1; unlawful carrying of weapon, 5; attempted auto theft, 2; gambling, 1; theft, 1 and driving while license revoked, 1.

[74] This figure includes one protest, in an overwhelmingly Negro area, which was primarily directed to the fact that a white person (the author) was in the area; the two officers accompanying the author were both Negroes.

The author is under no delusion that the request was complied with entirely. However, even though the observer is an "outsider" there are some techniques which can be used to minimize the possible distortive effect of the observer's presence: (A) The author always rode the entire shift with a single unit. After a few hours in the close confines of a patrol car, the officers would begin to become more accustomed to the observer's presence and this would, in turn, tend to make the observations more valid. (B) The normal practice would be to ride with a different unit each night until the observer found a team which seemed to be comfortable with him and the observer with them; then the observer would ride with that unit for the balance of the time he was in the particular area or district. (C) The observer attempted to show by his actions that he knew how to conduct himself in a field contact situation; the author's previous experience with another police department in another state tended to relieve the officers' natural apprehension that the observer might do something foolish in a potentially delicate situation. (D) In all of the author's relationships with the officers, he operated on the theory that establishing a good rapport was his job, thus taking the burden off the officer to keep the observer "entertained".

Although we must assume that the presence of a non-policeman had an effect on the conduct of the officers, it does not automatically follow that the officers' altered conduct will always reflect favorably on the police department or the field contact practice. For example, one night the author accompanied two officers who were so polite to the public that they actually gave the appearance of being obsequious. It is interesting to note that almost half of the "Protest 2" incidents occurred in that one tour of duty. Of course, it is possible that this was just a coincidence or a "bad night". On the other hand, it is psychologically valid to state that a grovelling police officer will get a large share of complaints because he does not command the respect of the people with whom he is dealing. In addition, the number of "searches" was considerably higher than the author anticipated. Perhaps this resulted from the officers' attempt to impress the observer with the very thorough job which they were doing.

There is another reason for believing that the observer's presence did not seriously distort the collected data. With the single exception pointed out above, the officers with whom the observer rode conducted themselves in fundamentally the same manner. If the presence of an observer was radically altering police conduct, it follows that more than three dozen policemen would have to react to an observer's presence in a uniform manner and would have to keep up the "act" for more than 300 hours. The author finds such a suggestion somewhat difficult to accept.

General observations

The average length of time a citizen was detained by a field stop was between two and three minutes. One person was detained about 20 minutes until the victim of an armed robbery arrived and made a negative identification. One driver was detained for more than 45 minutes while a name check was being made. This delay occurred on a Friday night while there was a computer malfunction; the person was arrested when it was reported that his driver's license had been revoked. Other than these two instances a detention did not last over five or six minutes and, of course, the overwhelming majority were much less than that.

The author was impressed at the length to which most officers went in order to keep from drawing attention to the fact that a person was being questioned. The officers would stand quite close to the detained individual in order to speak in low tones. Very few of the frisks or searches of a person were conducted in the traditional "hands-on-the-wall" manner. The normal technique used, even for a search, was for an officer to stand directly in front of the detained individual and conduct his frisk from this position. The only movement which the detained person was required to make was to hold his arms out from his sides a few inches in order that the officer could feel under the armpits and the chest pockets. This technique of frisking is not in accordance with good police practice and is, in fact, dangerous to the officer since it places him in a vulnerable position in the event that the frisked person decides to attack the officer.[75] Nevertheless, this kind of frisking technique was almost invariably used since it can be done in a very inconspicuous manner by an experienced officer.

The normal technique of a frisk or search of the person is to require the individual to place

[75] VALLOW, POLICE ARREST AND SEARCH, 45-55 (1962).

his hands on a vehicle or wall and to extend his feet out from the object which is supporting his hands. The only times this frisk was observed during the course of the author's observation was in certain situations where more than two persons were being frisked or where the detained person gave some distinctly objective sign that he had a weapon. Examples of this latter category occurred when an individual would reach under the seat of his car or would put his hand in his pocket when the officers identified themselves as policemen and would be hesitant in removing his hand when ordered to do so.

A number of the officers explained to the observer that the attempts to make the stop as inconspicuous as possible were done to keep from drawing a crowd which could potentially create a problem for the officer on the street. While such a motive may not be based on the highest principles of civil liberties, it does minimize the embarrassment factor.

The fact that a field stop, especially accompanied by a frisk or search is humiliating to some degree, is recognized by a general policy followed by the officers in the field in Chicago. Males are almost never subjected to field stops when accompanied by females. The theory behind such a policy is that a man, either alone or accompanied by other men, will not normally object to being stopped and frisked. However, the same man, in the same circumstances, accompanied by a wife or girl friend, will feel that his masculine role as a protector is challenged by such a field stop and thus he may offer objection or resistance. This writer observed three instances of field stops involving females, but in only one instance was a female involved to the extent that she was listed under a category of "total persons contacted".

Most of the persons contacted were involved in some type of "suspicious activity" which was discernible to the observer. Of course, the term "suspicious activity" is, to a large extent, a subjective evaluation. And, we must remember, that the observer was not a trained police officer nor familiar with the neighborhoods in which he rode. Of the 297 persons contacted, 243 of them were engaged in some type of conduct which the author would classify as "suspicious". Most of the suspicious activity involved attempts, in varying degrees, to evade police officers as soon as the individuals recognized a police car, or involved persons who might be fairly classed as loitering or lurking in back alleys, dark doorways or similar locations late at night.

The author did notice that the number of field stops is a factor in the supervisory control of patrolmen in the Task Force. This is quite readily understandable, especially for a unit such as the Task Force which is given a considerable independence and which does not answer routine calls. This is not meant to imply that a "quota" system exists, in the strict sense of the word. Nevertheless, in each Task Force area headquarters a monthly list is posted in a prominent place on the bulletin board which indicates, among other things, the number of field stops which each Task Force officer has made. In addition, there does appear to be pressure on the patrolmen to "show some activity". In areas of a high crime rate and dense population, this system, insofar as the observer could determine, causes little problems. However, in some relatively quiet districts this real or imagined pressure could lead to a number of field contacts in which there is no suspicion of any kind. This author also observed, that in the relatively quiet residential areas, an officer would patrol for five or six hours without making any field stops and then, as his tour of duty came to a close, would stop two or three people within the course of an hour whose only suspicious activity appeared to be their presence in the neighborhood. Such conduct can only be classified as an abuse of the field stop technique. It is strongly suggested that any police department using the field stop practice should make it scrupulously clear to the officers involved that stops should be made only in reasonably suspicious circumstances and that there is not going to be the slightest hint of a "quota" system by which the officers' efficiency or competence is to be judged.

The data set forth is not intended to be a definitive study, based on scientific methods, of the field interrogation practice of the Chicago Police Department. Rather, the data is descriptive and to some degree subjective even though a conscious effort was made to obtain a balanced view of the field interrogation method by selecting districts and areas of varying crime rates and ethnic groups. The statistics contained above indicate that 3.6% of the persons stopped were eventually arrested, all as a result of information or physical evidence obtained by virtue of the detention. Statistics from the Task Force rate of arrests of "field challenges" indicate that out of

more than 250,000 field contacts the arrest rate was approximately 3.2%. This close relationship between the author's sample data and the total statistics indicate that his experience and observation offer a statistically valid insight into one police department's experience and practice—especially if we use the figures contained herein as a general guide and do not attempt to use them as highly precise tools.

The collection of this data naturally gives rise to the question of whether or not the advantages of a systematic field interrogation program outweigh its disadvantages. In the final analysis, such a question is based on a person's concept of values rather than on some mathematical formula. Nevertheless, we can make some generalizations.

The value of a field interrogation program exceeds the 3.6% of the arrests made because it keeps persons with a criminal inclination on the defensive. Any police department that follows a practice of centering its attention only on responses to crimes already committed places itself in a position, not of preventing crime, but of reacting to criminal activity. Such a practice gives the criminal the initiative in that he is almost totally free to determine the time, place, and circumstance under which he will commit a crime.[76] But a well planned and a well conceived program of field interrogation leaves the criminal without all of the options. An aggressive and controlled program of patrol to determine who is on the streets, what the explanation for their presence is (assuming the individual is engaged in some unusual activity), will throw an indeterminable variable into any preconceived plan to commit a crime. In addition, such a practice of field interrogation is designed to give the general public, including the vast majority of law-abiding citizens, the feeling of police "presence". This will in turn, hopefully, help to instill in the general public a confidence in the alertness and efficiency of the police department.

As indicated previously, there was very little abuse observed in the course of the original stop. The data indicates that, on the average, the patrol units which were under observation stopped about one person an hour. Considering the general nature of criminal activity in the city of Chicago, this number of stops per hour is not excessive.

The foregoing data and observations indicate, however, that the field interrogation practice does have some disadvantages. The data indicates that approximately 5% of the individuals contacted show visible signs of anger or resentment at the intrusion. It can be assumed that an unknown number of additional people were more successful in hiding their feelings about their detention. Nevertheless, it is the author's impression, based on observing the demeanor and manner of speech of persons detained during the course of the field survey, that an overwhelming majority of the individuals stopped cooperated willingly with the police officer, if not out of a sense of civic duty at least with the attitude that this temporary delay be ended as quickly as possible. The observer also noted that all but one of the protests occurred in predominantly Negro districts of Chicago. It is likely, therefore, that field interrogation practice, in all probability, adds to the general deterioration in the relationship between policemen and minority groups.

Already noted, the extent of the search in many instances was surprising. Over one-third of the field detentions resulted in searches which far exceeded even that which proponents of "stop and frisk" advocate. Certainly the searches, except in two or three instances, went far beyond the type of search which would be necessary to protect a police officer. Slightly more than one-half of these extensive searches were made in high crime rate, Negro areas which had been the scene of large scale rioting the year before (1964). Most of the officers in these districts were quite candid in explaining that they were aware the search was unlawful and that no conviction could be supported on the basis of evidence obtained by the search. However, they further explained that the purpose of these extensive searches was to confiscate firearms in the event of future riots and that a conviction for unlawful carrying of a firearm was largely irrelevant. Such conduct also widens the gap between police officers and the Negro minority, especially in the vicinity of Chicago's Eleventh District. On the other hand, the officers' prediction of future riots in the summer of 1966 did prove accurate and the author feels certain that the same officers who had to face the rioters felt quite justified in previously removing a number of firearms from the area of the riots.

In general, the "field challenge" practice of Chicago's police department has advantages which outweigh the disadvantages. It is submitted, however, that the number of extensive searches

[76] *See* BRISTOW, *supra* n. 2.

is not only unlawful, but unnecessary, and that such a practice of extensive searching be discontinued or at least not be permitted to hide under the cloak of legitimate field interrogation practice. If the Chicago police department decides to conduct clearly unlawful general searches in areas of potential rioting, then the department should, as a matter of policy, do so openly and explicitly. In this way the courts and the municipal officials responsible for such a policy can clearly and cleanly be judged by the responsible citizenry. To conduct general searches under the guise of field interrogation does not make the searches any more lawful, and such a practice endangers, through abuse, the legitimate use of the tool of field interrogation.

It is interesting to note that out of the approximately 300 persons subjected to a field stop, not one single individual indicated in any way that he would not answer the police officer's question. The author heard a number of highly unskillful lies, but observed no one who chose to resort to silence.

Conclusion

It appears that the primary opposition to authorizing temporary police detentions is the fact that such authority is capable of abuse by police officers. This fear has some validity and cannot be brushed aside easily. But an effective law enforcement tool should not be completely negated because it is subject to potential abuse.

In dealing with the problem of abuse of authority, it is suggested that attention be directed toward the potential abuse rather than the authority itself. Thus far the technique of the courts in handling abuse of police authority has been through the exclusionary rule which prohibits the introduction of illegally seized evidence—a technique that, in the main, has been ineffective. It is ineffective because it does not actually prevent the abuse itself but only strikes at a consequence of the abuse. For instance, if police officers kick in the door of a person's home in the middle of the night and ransack it without probable cause, and if, in fact, the officers find no incriminating evidence, there can be no doubt that a very gross abuse of police authority has occurred—and yet there is no evidence to exclude. By the same token, even if some contraband is found, when the prosecuting attorney learns of the method by which the evidence was obtained, there is little likelihood that a charge will be placed against the home owner for possession of contraband. Once again the courts' exclusionary technique becomes a futility.

Traditional civil suits against police officers are largely ineffective because of the difficulty of satisfying a judgment in a substantial amount against a relatively impecunious policeman.

As regards remedial action by disciplinary measures directed at the offending officer, this seems quite unrealistic to contemplate when consideration is given to the fact that the officer in our hypothetical case actually obtained highly incriminating evidence even though his conduct was illegal. This places the police administrator in the awkward position, as far as the general public and his subordinates are concerned, of disciplining a policeman who caught a criminal. In addition, a competent defense attorney would almost certainly get a good deal of mileage at the trial of the case against the possessor of the contraband out of the fact that the evidence against him was obtained in a manner so grossly abusive as to result in a policeman's discharge or suspension.

The author's recommendation is that the governmental agency by whom the offending officer is employed should be made civilly liable for abuses in field detention *arising out of malice, bad faith, or gross negligence.* It is suggested that a field detention statute carry with it this creation of civil liability against the agency employing the police officer.

In order to make civil liability meaningful, it is further suggested that a certain sum of money be assumed as damages in case of such abuse—perhaps a sum in the neighborhood of $500.00, plus reasonable attorney's fees. A provision should also be included which would permit the plaintiff to collect a higher amount upon proof of actual damage. This concept of a minimum is necessary, however, because in the ordinary situation an individual subjected to police misconduct either has not suffered any actual damage or else the damages which he has suffered are so speculative as to be extremely difficult to prove. This recommendation is made with the full knowledge that, initially, at least, this statutory liability would result in a rash of ill-founded and even fraudulent lawsuits.

The author is confident that a governmental agency, faced with the prospect of a budget-wrecking series of lawsuits, would very quickly and very vigorously establish and enforce criteria

and standards for field interrogations, and would also resort to a wide range of administrative sanctions to insure that the criteria are followed. If this result occurred, the courts would be impelled to accept the principle that civil rights and liberties can be adequately protected by police administration without court interference.

It must be emphasized that the civil liability suggested herein is only for abuses which are the result of malice, bad faith, or gross negligence. The fact that a police officer simply made an error in judgment, would not be the basis for liability. In other words, it is contemplated that no action would lie if unwarranted motives were absent, as when the officer had legitimate "reasonable suspicion" as a basis for the original stop.

Field detention interrogation is both a constitutional and a necessary tool in the fight against crime. It must, however, be used with discretion, and for the legitimate purposes for which it was intended. The police officer in the street must take seriously the admonition of the great French statesman, Talleyrand, when he said, "above all, not too much zeal".