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STOP AND FRISK

(A Case Study in Judicial Control of the Police)*

HERMAN SCHWARTZ

Professor Schwartz, who received his LL.B. from Harvard Law School, served as law clerk to Judge J. Edward Lumbard of the United States Court of Appeals from 1956 to 1957. After four years in private practice, he served as assistant counsel to the United States Senate Sub-committee on Antitrust and Monopoly, and in 1963 joined the faculty of the State University of New York at Buffalo School of Law where he is Professor of Law.

Professor Schwartz's article is the first published work to closely examine the operation of New York's stop and frisk statute and the rationale of the New York cases interpreting it. Though appreciative of some of the arguments made in support of both the wisdom and constitutionality of field interrogation, Professor Schwartz concludes, although reluctantly, that except for extraordinary or emergency circumstances, field interrogation, especially when accompanied by a frisk or search, is unconstitutional, unwise, and an unnecessary irritant to already inflamed police-minority group tensions.

For the last few years, state courts and legislatures have been steadily trying to legitimate police power and practices endangered by the Supreme Court's decisions. One of the most significant of these efforts is New York's 1964 "Stop and Frisk" law, which authorizes temporary detention and search on less than probable cause.¹ The power to stop and frisk under both common law and statute has been invoked in some twelve reported New

York cases as of September 15, 1967,² and in the October 1967 term, the Supreme Court of the United States will consider two of the cases decided under the statute and two from other states.³

Few current problems are more difficult or more important. Violent disorders have torn apart our cities in each of the last four summers, steadily increasing in number and destructiveness, and there is reason to think stop and frisk practices have contributed to this. At the same time, concern over crime in the streets has substantially heightened as the figures for reported crimes continue to rise sharply; many in law enforcement and elsewhere believe that the power to stop and frisk is necessary to keep the crime rate from getting worse. Thus, each group sees stop and frisk as crucial, but for sharply opposed reasons.

To summarize the positions in somewhat more detail, the proponents claim that the power to

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¹ N.Y. CODE CRIM. PROC. § 180-a; *People v. Rivera*, 14 N.Y.2d 441 (1964). The power was made available almost simultaneously by statute and by judicial decision, the statute becoming effective July 1, 1964 and *Rivera* being decided on July 10, 1964. In addition to New York, other state courts have granted the police such powers. *E.g.*, *State v. Dilley*, 1 BNA Cr. L.R. 2190 (7/19/67) (N.J. 1967); *Commonwealth v. Hicks*, 209 Pa. Super. 1, 223 A.2d 873 (Super. Ct. Pa. 1966); *State v. Terry*, 5 Ohio App. 2d 122, 214 N.E. 2d 114 (1966), *cert. granted*, 87 Sup. Ct. 2050 (1967); *Commonwealth v. Lehan*, 196 N.E.2d 840 (Mass. 1964); *People v. Martin*, 293 P.2d 52 (Cal. 1956). In addition, several states have adopted the Uniform Arrest Act. Recently, Massachusetts adopted a provision virtually equivalent to the search provision of the New York Law, Acts of 1967, C. 368, 1 BNA Cr. L.R. 2301 (8/23/67). For the extent of such practices, see Galvin & Radelet, *A National Survey of Police and Community Relations*, prepared for the President's Commission on Law Enforcement and Administration of Justice 328-31 (Mich. St. 1967). The President's Commission is hereafter cited as "President's Commission."

² Of the twelve, two involved events prior to July 1, 1964, the date § 180-a became effective, and were decided on the basis of common-law powers. *People v. Rivera*, 14 N.Y.2d 441 (1964); *People v. Pugach*, 15 N.Y.2d 65 (1965). There have also been a few federal cases applying the New York statute. *United States v. Lewis*, 362 F.2d 759 (2d Cir. 1966); *United States v. Thomas*, 250 F. Supp. 771 (S.D.N.Y. 1966).

³ *People v. Peters*, 18 N.Y.2d 238 (1966), *prob. juris. noted*, 87 Sup. Ct. 1291 (1967); *People v. Sibron*, 18 N.Y.2d 603 (1966), *prob. juris. noted*, 87 Sup. Ct. 1042 (1967); see also *Wainwright v. New Orleans*, 248 La. 1097, 184 So.2d 23 (1966), *cert. granted*, 87 Sup. Ct. 700 (1967); *State v. Terry*, 5 Ohio App.2d 122, 214 N.E.2d 114 (1966), *cert. granted*, 87 Sup. Ct. 2050 (1967).

forcibly stop and to search for self-protection, a power long and widely exercised by police, is necessary to prevent crime in a period of frighteningly rising crime rates and civil disorders; further, that the invasion of personal liberty entailed by such a detention and search is relatively minor, is constitutional because reasonable, and can be controlled by the courts and by effective police administration. Opponents, on the other hand, dispute the need, the mildness of the affront, and the susceptibility to judicial control of such practices; they point to the evidence that such police tactics produce minority group resentment and hostility. Additionally, they deplore the abandonment of probable cause, the traditional constitutional standard necessary to deprive a person of his liberty, in favor of reasonable suspicion, which they find too vague.⁴ If the opponents are right, then to legitimate this power is to sanction a serious invasion of individual rights, to set a precedent for circumventing the probable cause requirement which may be repeated many times, and to grant judicial approval to conduct which contributes significantly to civil strife. If they are wrong, and they prevail, there may be a serious interference with crime prevention resulting in higher crime rates, fear, increased police and community resentment and reflected pressure on individual liberties in other areas. And if each is partly right and partly wrong, then we may be faced with another example of the classic problem of compromising liberty and security, in an especially volatile setting.

Until now, we have had relatively few decisions and little practical knowledge in this area. Recently, some studies and a substantial number of decisions in New York have appeared, and in an effort to shed some light on these issues, this article will consider these cases and studies. First, the New York courts' experience with stop and frisk will be considered, together with certain recent empirical data, to show what practices are actually taking place. It will be seen that there has been an almost total judicial abdication (at least in New York) of whatever modest supervision the courts might have exercised over an intrusion that is quite far reaching. Thereafter, an evaluation will be made of how this power assists law enforcement and community security. It will be concluded that

exercise of this power may actually *reduce* police effectiveness, but that in some situations, there may be no choice but to allow such authority. The over-all, rather hesitant, conclusion is that given the breadth of the power, the inability of courts and others to control it, the social consequences of its widespread use, and the possibility that less intrusive alternatives are available and effective, the heavy burden imposed on those who would depart from traditional constitutional doctrine has not been carried, except with respect to a few exceptional circumstances.

Ordinarily, forcible detention would be discussed first, and then the power to search. But because the search is the more intrusive, and often more important for law enforcement—indeed, it is frequently the reason for the initial stop, as will appear—judicial treatment of the searches that have reached the New York courts will be considered first, together with some more general background information. The facts in these cases will be explored in much detail in order to indicate exactly when the New York police are now authorized to forcibly stop and search.

STOP AND FRISK IN THE NEW YORK CASES AND IN PRACTICE

The Power to Search

The New York "stop and frisk" statute provides as follows:

§ 180-a. Temporary questioning of persons in public places; search for weapons.

1. A police officer may stop any person abroad in a public place whom he reasonably suspects is committing, has committed or is about to commit a felony or any of the crimes specified in section five hundred fifty-two of this chapter, and may demand of him his name, address and an explanation of his actions.

2. When a police officer has stopped a person for questioning pursuant to this section and reasonably suspects that he is in danger of life or limb, he may search such person for a dangerous weapon. If the police officer finds such a weapon or any other thing the possession of which may constitute a crime, he may take and keep it until the completion of the questioning, at which time he shall either return it, if lawfully possessed, or arrest such person.

Although enacted in order to fill what was widely

⁴Compare Kuh, *Reflections on New York's "Stop-and-Frisk" Law and Its Claimed Unconstitutionality*, 56 J. CRIM. L., C. & P. S. 32, 38 (1965) with Souris, *Stop and Frisk or Arrest and Search—The Use and Misuse of Euphemisms*, 57 J. CRIM. L., C. & P. S. 251 (1966).

thought to be a gap in police powers, a few days after it became effective the New York Court of Appeals held in *People v. Rivera*⁵ that even before the statute, policeman had such authority.

The facts of *Rivera* were these: At 1:30 A.M., May 25, 1962, three detectives were driving in an unmarked car on the lower East Side in New York, "a tenement neighborhood".⁶ They "observed" two Puerto Rican men who "walked up in front, outside a bar and grill, stopped, looked in the window, continued to walk a few steps, came back and looked in the window again".⁷ This conduct continued for about five minutes. The record shows that the street was not deserted but that "a small newsstand" was open. When the two men saw the officers, they started to walk away. One of the detectives got out of the car, calling "Hold it. This is the police". The officer "patted" the outside of defendant Rivera's clothing, felt something hard, went into Rivera's pocket, and found a gun. At the hearing the detective explained that he had frisked for "my own protection. And because of the numerous number of stick-ups in our precinct at this time". On cross-examination, he admitted that although he was apprehensive it was *not* for fear of being attacked—"At that time we didn't know what we had". Rivera himself told the detective, when asked, that he was carrying the gun for his own protection. The detective also said that since this was a Puerto Rican neighborhood, it was "not unusual . . . to see a Puerto Rican in this neighborhood at this time of night".⁸

On the basis of pre-statute common law, the court upheld the search on the ground that when the officer felt the hard object, "inferred by him correctly to be a gun, he had probable cause to arrest defendant and to proceed at once further to invade his clothing and take the gun".⁹

Upon these facts, a case for some danger can be made, although it is hard to believe that these three armed policeman were in any substantial peril, and the police witness admitted as much. The court, however, made no such particularistic attempt, but held, in effect, that under the New York common law every stop can be followed by a "frisk" saying:

If we recognize the authority of the police to stop a person and inquire concerning unusual street events [which authority was found necessary for crime prevention in the first part of the opinion] we are required to recognize the hazards involved in this kind of duty. *The answer to the question propounded may be a bullet; in any case the exposure to danger could be very great.* We think the frisk is a reasonable and constitutionally permissible precaution to minimize that danger.¹⁰

Since "the answer . . . may [always] be a bullet" it is difficult to conceive of a case when the police would not be justified in frisking for self-protection. Judge Van Voorhis, who concurred in *Rivera*, later described that decision as allowing a frisk "at the officer's whim".¹¹

The court sought to minimize the impact of its ruling by distinguishing a "frisk" from a "search", saying that, "as it is generally understood in police usage", the frisk is much less intrusive than a search, being only "a contact or patting of the outer clothing of a person to detect by the sense of touch, if a concealed weapon is being carried". Being less intensive than a "full-blown search" it requires less to justify it. And the court added, reassuringly: "The sense of exterior touch here involved is not very far different from the sense of sight or hearing upon which police customarily act. . . . [It is] a minor inconvenience and petty indignity."¹²

From the suspect's viewpoint, it would take exceptionally dull nerve endings to agree that touching someone "is not very far different" from seeing or hearing someone. The court's comment is particularly incredible if one considers what a "frisk" really is as it is "generally understood in police usage". In *People v. Hoffman*,¹³ an officer frisked two men before taking them down to the police station to check out their story, saying:

I asked both the defendant and his passenger to put their hands on the roof of the police car and I started from their necks and worked across their shoulders and under their arms (indicating) all the way down their sides and

⁵ 14 N.Y.2d 441, 252 N.Y.S.2d 458 (1964). There had been warning signs of the *Rivera* result in *People v. Entralgo*, 14 N.Y.2d 733, 250 N.Y.S.2d 293 (1964).

⁶ Record on Appeal to New York Court of Appeals in *People v. Rivera* 27.

⁷ 14 N.Y.2d at 444, 252 N.Y.S.2d at 460.

⁸ Record, *supra* n. 6 at 32-33.

⁹ 14 N.Y.2d at 447, 252 N.Y.S.2d at 463.

¹⁰ 14 N.Y.2d at 446, at 462-63 (*Emphasis added*).

¹¹ *People v. Sibron*, 18 N.Y.2d at 606; ("frisking a suspect can be done in practice (though not in theory) at the officer's whim.") See also *id.* at 605 ("The power to frisk is practically unlimited.")

¹² 14 N.Y.2d at 447, 252 N.Y.S.2d at 463, 464.

¹³ 24 A.D.2d at 497, 261 N.Y.S.2d 651 (2d Dept. 1965).

down each leg to determine whether they could possibly have a weapon on them or not.¹⁴

This kind of "frisk" could involve less of an intrusion than a so-called "full-blown search", but it is "very far different from the sense of sight or hearing", and can be extremely offensive to the victim.

In granting the police the authority to search for self-protection whenever a stop is made, the court was simply accommodating itself to standard police practice. Thus, the President's Crime Commission Task Force on the Police reported searches in "81.6 percent of stops reported" in New York.¹⁵ And this is not surprising. At least one reason is that the patrolman is advised to "assume every person he encounters may be armed",¹⁶ for the officer cannot predict reliably when a suspect will attack him, and the consequences of a mistake can be fatal. "Thus, the exceptional case, an assault on an interrogating officer dictates what self-protection measures will be used in the routine case."¹⁷

¹⁴ Record on Appeal to Appellate Division in *People v. Hoffman* 56. This pat was made at a time when the officer was found by the court to have had probable cause but it is clear that the officer saw this not as a search but only as a frisk, since he admitted he had not arrested them and was taking them in only for investigation. *Id.* at 58-59, 53-55. An expressly intended search incident to arrest was later made at the police station and turned up forged credit cards in a pocket. Private conversations with police also indicate that the procedure employed in *Hoffman* is "customary usage." The frisk can be particularly intrusive where there is reason to suspect the presence of small knives, as there often is. "Thus, a frisk designed to turn up such a small knife would be similar to a search." TIFFANY, MCINTYRE & ROTENBERG, *DETECTION OF CRIME* 47 (1967). (This is an American Bar Foundation study, and is hereafter cited as "DETECTION.") See generally, *id.* at 45-48, ch. 3. Where a large group of suspects is involved, a wall search, with guns, may be involved. *Id.* at 48, n. 8. But see Kuh, *supra* n. 4 at 37 (claiming a substantial distinction between a search and a frisk).

¹⁵ *Task Force on the Police, THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE* 185 (1967) (hereafter cited as "Police Task Force"). A 1966 field study of high-crime areas in Boston, Chicago and Washington, D. C., concluded that only 20% of police-suspect encounters and 33% of the field interrogations involved a search. Reiss and Black, *Interrogation and the Criminal Process* (Mimeo 10-11) (pub. forthcoming in *Annals of the American Academy of Political and Social Science* Nov. 1967.)

¹⁶ BRISTOW, *FIELD INTERROGATION* 25 (2d ed. 1964) (hereafter cited as "BRISTOW"). See also the Chicago Police Manual, quoted at DETECTION 45. Conversations with Buffalo police confirm the universality of this attitude which is based on the theory "It only takes one mistake."

¹⁷ DETECTION 45. Jerome Skolnick provides an insightful discussion of some of the other theoretical and practical implications of the fact that the officer sees everyone he encounters as a potential assailant.

Rivera is troublesome more for some of its language and implications than for its holding on the specific facts before the court. *People v. Pugach*,¹⁸ however, is quite a different matter. It has been widely condemned, even by those who approve *Rivera*,¹⁹ for on the facts and language of the *Pugach* opinion, police may be able to make a search virtually as broad as that incident to a valid arrest even where a "frisk" is unnecessary to eliminate whatever danger may exist, where there is actually very little danger, and perhaps even where they have not exercised their power to forcibly stop.

Burton N. Pugach, a lawyer and a disappointed suitor, was convicted in 1962 of having thrown acid in his ex-girl friend's face on June 15, 1959.²⁰ He had previously been convicted in 1960 of illegally possessing a concealed gun. According to the court's opinion in the concealed gun case, which raised the stop and frisk issue, police

had been investigating defendant in connection with "another matter" which had occurred June 15, 1959. By prearrangement, on the morning of October 30, 1959, three city police officers went by squad car to an office building in which the defendant was known to have an office, and parked at the curb. At about 10:30 A.M. they observed the defendant Pugach, carrying a brief case, enter the office building. Two of the officers followed him into the building, accosted him by the elevator and spoke to him about the "other matter", following which he was asked to accompany them and, with an officer on either side, he was escorted to the parked squad car. There they were joined by a third officer. One officer entered the rear seat of the squad car followed by the defendant and another officer. The third officer entered the front seat at the right of the driver. While all were so seated, the officers seated on either side of defendant in the rear seat proceeded, in police parlance, to "frisk" the defendant. The latter was then wearing a blue coat with a belt which the officers asked him to untie. As he did so, the

SKOLNICK, *JUSTICE WITHOUT TRIAL* 44-70 (1966) (hereafter cited as "SKOLNICK").

¹⁸ 15 N.Y.2d 65, 67-68; 255 N.Y.S.2d 833, 834-38 (1965).

¹⁹ See e.g., A.L.I., *A MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE*, Tent. Drft. No. 1, *Commentary* 103 (hereafter cited as ALI code); Note, 65 COLUM. L. REV. 848, 859 (1965).

²⁰ 21 A.D.2d 854, *aff'd*, 16 N.Y.2d 504 (1965).

defendant put the brief case which he had been holding on his lap with the handle and opening toward his body on the car floor between his feet. The officers completed the "frisk" without incident, after which defendant retied the belt to his coat, reached down, picked up the brief case and placed it on his lap as before with the opening near his body. One of the officers seated at his side then reached over, took the brief case and, as he testified, "put it on the floor in front of me between my legs". He unzipped the fastening, looked in, saw a gun and exclaimed: "Look what I found", at the same time showing the brief case to his fellow officers. The gun it contained was then removed, the chamber broken and five live shells fell out.

The court went on to say that:

... the record is silent as to why the defendant had been under surveillance or what was said in the conversation between the defendant and the officers just before he was asked to enter the squad car. The defendant now says that, absent a record showing as to the "other matter", no probable cause existed for an arrest, absent which the search of his brief case was illegal and the fruits thereof unavailable as evidence against him.

Relying on *Rivera*, the court found that the search of the zippered briefcase was a "frisk", justified "upon grounds of safety". Disclosure of the "other matter" was unnecessary, because the defendant had been under investigation and was "being taken to a police station for further questioning. . . . Under all the circumstances the inclusion of the brief case in the 'frisk' was not so unreasonable as to be constitutionally illegal".²¹

Judge Fuld dissented, stressing the absence of probable cause "on the basis of the record before us", the lack of any real danger to the officers, and the obvious protective alternative of "simply placing . . . [the brief case] on the front seat of the car, out of the reach of the defendant".²²

The decision is clearly insupportable for the very reasons given by Judge Fuld. It is hard to imagine that the three policemen were in any real danger from Pugach, as he sat between two officers in the back seat, with another in front. Pugach was a lawyer who was acquainted and familiar with

police officers, and obviously aware of the futility and danger of any attempt to overcome three armed policemen. There may have been a remote suspicion of danger, but hardly "reasonable" suspicion. Moreover, how can a search of a zippered brief case ever be justified as a "frisk" of the *person* for safety?²³ Stop and frisk Guidelines issued by the New York State Combined Council of Law Enforcement Officials, which drafted and promoted the "stop and frisk" provision, suggested that in the application of that statute a suspect's brief case should not be searched but put outside his reach,²⁴ and this would seem applicable to all stops, whether authorized by statute or by common law.

Finally, on the facts of the case, there is no indication that Pugach was not going to the station voluntarily, for the record contains no evidence that he was in fact being "taken down" against his will.²⁵ If so, then the decision may validate an extensive search of those who are invited and voluntarily come down to the station house.

In sum, *Pugach* seems to authorize a "frisk" which is as broad as a search incident to arrest, even where there is no forcible detention at all.

Such a far-reaching decision requires more than the brief treatment it received, unless there is something more here than meets the eye—and there obviously is, as the mysterious references to the "other matter" intimate. The fact is that when Pugach was "accosted" at his elevator and spoken to, he was being formally *arrested* for the maiming of his girl friend, and apparently with probable cause. The brief case was searched incident to that arrest, and when the gun was found,²⁶ it was decided, apparently for strategic reasons, to try him first for illegal possession of a weapon (under Penal

²³ Compare *Commonwealth v. Lehan*, 196 N.E.2d 840 (Mass. 1964) (police would not be allowed to search packages carried by the suspect) and *United States v. Margeson*, 259 F. Supp. 256, 267 (E.D. Pa. 1966).

²⁴ "If the suspect is carrying an object such as a handbag, suitcase, sack, etc. which may conceal a weapon, the officer should not open that item, but should see that it is placed out of reach of the suspect so that its presence will not represent any immediate danger to the officer." Memorandum from the New York State Combined Council of Law Enforcement Officials Re: The "Stop-and-Frisk" and "Knock Knock" Laws ¶ I.D.6 (July 1, 1964) (hereafter cited as "Stop-and-Frisk, Guidelines"), reprinted in *HALL & KAMISAR, CASES AND MATERIALS ON MODERN CRIMINAL PROCEDURE* 199, 202 (1966).

²⁵ We are told only that he was "asked to accompany the officers." 15 N.Y.2d at 67; 233 N.Y.S.2d at 834.

²⁶ The defendant raised the possibility that police knew it was there. See Respondent's Brief in Opposition to Petitioner's Jurisdictional Statement and Replying to Questions 2 and 3, pp. 5-6.

²¹ 15 N.Y.2d at 67-68, 69; 255 N.Y.S.2d at 836.

²² 15 N.Y.2d. at 71; 255 N.Y.S.2d at 836-37.

Law § 1897). In order to avoid prejudicing the weapon possession trial, however, the officer testifying to the circumstances of the arrest and search at that trial carefully avoided referring to the reason for "accosting" Pugach. Under pre-*Mapp* law in 1960, when the case was tried, the prosecution obviously thought that it did not have to present any separate legal basis for the search of the brief case, and the circumstances are very ambiguous as to whether an objection was even made. The appeal to the Court of Appeals came up post-*Mapp*, however, and Pugach there argued that the search was illegal and, contrary to the People's reply, that he had adequately raised the point at trial. In the People's brief, the "other matter" was fully disclosed as follows:

It so happened that trial counsel for the defendant was the same attorney who represented the defense in *People v. Loria*, 10 N.Y.2d 368. In the *Loria* case, which had been tried six months before *Mapp v. Ohio*, 367 U.S. 643, was decided, an appropriate objection on constitutional grounds had been made.

The reason this attorney did not likewise object in the case at bar is because he was aware that the gun had been found on Pugach immediately after he had been taken into custody for the crime of maiming, arising out of the acid-blinding of one, Linda Riss, committed on June 15, 1959. Upon the completion of their investigation the police arrested Pugach and his confederates, at the same time but at different places, on October 30, 1959. Defendant has since been convicted of the maiming and the judgment has been unanimously affirmed by the Appellate Division

....

[Defense] Counsel asked [officer] O'Connor whether his presence in the building where Pugach had his office was "accidental" (S. M. p. 44). To avoid telling the jury that he and his fellow officers were there to arrest Pugach for the acid-blinding of Linda Riss, which would have constituted prejudicial error, O'Connor's answer was, "We were there to question the defendant, Pugach, relative to another matter" (S. M. p. 44).

Had defendant suggested at the trial that the question was asked to establish alleged illegality of the search and seizure of the gun and, if the Court had permitted such an

inquiry to be made, there would have been no restriction upon Detective O'Connor revealing that the search had been made after Pugach had been arrested for the other crime. This opportunity was not given to the People because defendant never even thought of litigating the alleged illegality of the search, at the trial in 1960.²⁷

Despite the foregoing statement, both the majority and dissent in the Court of Appeals decision thought that the Prosecution had conceded that no probable cause had been shown in the gun case and so stated in early versions of their respective opinions. The District Attorney, however, immediately denied making such a concession and reference thereto was deleted from the final versions of the opinions.²⁸ Unsatisfied with this, the District Attorney moved to reargue, declaring:

The vital part of the opinion about which the People complain is that which finds that the search of defendant's briefcase could not have been incidental to a lawful arrest because no probable cause existed for the arrest; that the search of the briefcase was an incident of a frisk of defendant who had been taken into custody for further questioning.

Respondent respectfully submits that if those facts were true, the People would not have sought to justify the search upon the theory of the ruling made by this Court on that basis.

The record is not "silent as to why the defendant had been under surveillance or what was said in the conversation between defendant and the officers just before he was asked to enter the squad car". *The truth, as the record shows, is that defendant was not under surveillance. The police were simply waiting for him and when they saw him, they immediately placed defendant under arrest.*

²⁷ Respondent's Brief in the Court of Appeals, *People v. Pugach* 7-8.

²⁸ Judge Fuld's unrevised opinion read: "It is conceded that the search of the briefcase may not be justified as incident to a lawful arrest, for there was no probable cause for such action and the People frankly acknowledge that the defendant had not been arrested." This and apparently similar statements in the slip sheet majority opinion were eliminated. See Respondent's Brief in Opposition to Petitioner's Jurisdictional Statement, Answering Questions 2 and 3 in Appellant's Jurisdictional Statement.

*On a search, incidental to this arrest, the gun was discovered.*²⁹

Nevertheless, no further revisions were made.

Several explanations are available for the court's refusal to revise its opinion more extensively: one is simply inertia; another is that the court deliberately intended to hand down a very far-reaching opinion. A third is that there was simply not enough evidence of probable cause *on this record* to support an incidental search. The conviction would therefore have had to be overturned if the search were insupportable on the "frisk" grounds, and the court was unwilling to accept such a result where the search was clearly justified on facts *dehors* the record.

Of the three explanations, the last seems the most likely, though it is of course only a guess. If that guess is sound, however, the case may be another example of judicial reluctance to let a guilty man escape conviction, despite the clear thrust of the law. *Pugach* may have seemed particularly appropriate for such a bending of principle because it involved pre-*Mapp* activities, with a possibly difficult factual question as to whether defendant had preserved the point.³⁰ Moreover, if the defendant had openly challenged the search initially, the prosecution would have been free to indicate the real basis therefore, and the ambiguity of defendant's challenge may therefore have prejudiced the prosecution. On several counts, therefore, it seems likely that the case is *sui generis*.

Unfortunately, it has not been so interpreted. The above history does not seem to have been disclosed elsewhere, and the case has been cited³¹ and relied upon as authorizing a very wide search incident to a stop, a search virtually equivalent to that incident to an arrest. Thus, in a recent lower court decision, two men were stopped on what the court found was reasonable suspicion of theft of a portable television set and portable phonograph. These items had been placed on a sidewalk when the police arrived, together with a tin box on top of the phonograph. The officer questioned the defendant as to the phonograph and television and then asked what was in the tin

box. Defendant answered "personal papers" and the officer "asked defendant Reason to open the box" which he did, disclosing narcotics. At this point, the defendant was placed under arrest. The court upheld this search on the authority of *Pugach*, saying

the fact that the contraband was found concealed in a tin box carried by one of the defendants rather than a briefcase, afforded no ground for saying that this "frisk" was in reality a constitutionally protected search.

I see no purpose anymore in splitting hairs over the distinction between a frisk and a search unless one applies the term "frisk" to a search for weapons only. *Pugach* has taken care of that! How does one pat a tin box (such as was here described) for weapons and, for that matter, a briefcase?

Assuming a weapon in a tin box such as was here described, or in a briefcase—who can say whether such a weapon is not as readily accessible as it might be, were it lodged in a pocket of a suspect's clothing!³²

In one respect, there was more danger here than in *Pugach*, for the box was not sealed. But the Combined Council Guidelines alternative of putting the box out of the defendant's reach was equally available. Moreover, the danger issue is patently meretricious for here the officer was so clearly unconcerned about his safety that he had the defendant himself open the "dangerous" box!³³ At this point, there seems little difference between a search incidental to an arrest and a

²⁹ *People v. Reason*, 52 Misc. 2d at 436, 276 N.Y.S.2d at 207-08 (emphasis added).

³⁰ An equally permissive attitude appears in dictum in another New York case, *People v. Cassese*, 47 Misc. 2d 1031 (Crim. Ct. N.Y. 1965). There, the court found that defendants, who were suspected of having fired a shot, had been properly arrested upon probable cause and frisked, after being ordered from their car. After the frisk, the car was searched and a loaded pistol found. The search was initially upheld on the authority of *United States v. Carroll*, 267 U.S. 132 (1928), but the court went on to say,

"Even without arresting the defendants at that hour in the morning on a public street, the police had the right to momentarily detain, question and 'frisk' them. [citing *Rivera*, *Peters*, and § 180-a.] Such 'frisk,' under the facts in this case, could lawfully extend to the automobile. (*People v. Pugach*, 14 N.Y.2d 65.)" 47 Misc.2d at 1033-34.

Although there may be a qualifier in "under the facts of this case," it does seem as if the court is sanctioning a search of a car when there is merely suspicion of its occupants. Thus, if the police have nothing more than

²⁹ Respondent's Notice of Motion and Brief for Reargument in *People v. Pugach*, 4 (emphasis added).

³⁰ Cf. *People v. Friola*, 11 N.Y.2d 157 (1961).

³¹ See, e.g., ALI code 103; *People v. Reason*, 52 Misc. 2d 425, 276 N.Y.S.2d 196 (Sup. Ct. N.Y. 1966); Note, 50 CORNELL L. Q. 529, 536 (1965); Note, 39 N.Y.U.L. REV. 1093 (1964); Note, 78 HARV. L. REV. 473, 476 (1964).

"frisk" incidental to a "stop" as the court in the latter case recognized.³⁴

The New York Court of Appeals' most recent stop and frisk opinion in *People v. Taggart*³⁵ virtually obliterates the distinction between a search and a frisk, and quite explicitly. There, police received an anonymous telephone tip that a "male, white youth on the corner of 135th and Jamaica Avenue", described further as being 18, and having "blue eyes, blond hair", and wearing "white chino-type pants", had a "loaded .32 caliber revolver in his left hand jacket pocket". The police went to the spot, saw defendant among a group of children, "put him against the wall and took the revolver out of his left-hand jacket pocket".

The prosecution's primary contention was that the arrest and search were based on probable cause. Although the Court of Appeals rejected this argument, it upheld the search on the basis of the stop and frisk provision. Judge Breitel, speaking for 6 members of the court, first found that there was reasonable suspicion to stop under the first paragraph of the provision. As to the distinction between a "frisk" and a "search", he said:

A difficulty is that both the *Peters* and *Rivera* cases held that the "permissible search" following the "stop" allowed under common law and section 180-a should be limited to a "frisk"—"a patting of the exterior of one's

suspicion, and if the suspects are found in a car and frisked, apparently any weapons—or perhaps something else?—found in the car may be used against them.

Another lower court decision in New York may also have relied on *Pugach* to sanction a search that was far more than a touch of the exterior. In *People v. Norris*, 46 Misc.2d 44, 258 N.Y.S.2d 967 (Sup. Ct. Kings 1965), an officer saw a suspect wearing a glove on his left hand. The suspect "put his right hand under the glove or up the left-hand sleeve." According to the officer's affidavit, he searched the glove and found two brown envelopes which were found to contain 26 marijuana cigarettes. Although the facts are not too clear, it is hard to see how a "frisk" for self-protection could justify opening these envelopes. Compare *People v. Vasquez*, 43 Misc.2d 1058 (Dist. Suff. 1966), discussed at n.43 below, and *People v. Rodriguez*, 47 Misc.2d 551, 556 (Nass. Cty. 1965). It is possible, of course, that upon taking hold of the envelopes, the officer gained probable cause to open them on the ground that he had good reason to believe such envelopes are used to hold narcotics, see *People v. Battle*, 12 N.Y.2d 866 (1962). The case was not, however, decided on that ground, but in reliance on *Pugach* and § 180-a, subd. 2. See 46 Misc. 2d at 45; 258 N.Y.S.2d at 969.

³⁴ 52 Misc. 2d at 436; 276 N.Y.S.2d at 208.

³⁵ 20 N.Y.2d 335 (1967).

clothing"... In fact, the *Rivera* case distinguished a "frisk" from a "full blown search" and held that as the former was a lesser invasion of privacy, it "may be justified as an incident to inquiry upon grounds of elemental safety and precaution which might not initially sustain a search..."

In the case at bar, it is clear that Delaney did not frisk defendant. As the detective had been told that the pistol was in defendant's left-hand jacket pocket, he chose to make an immediate search of that area rather than engaging in the routine frisk. Under the circumstances this may well have been the correct procedure, or at least a reasonable alternative procedure, but it probably exceeded the limitations of the *Peters* and *Rivera* opinions.

The fact remains, however, that in all but one of the Court's decisions on this point, the arresting officers engaged in "searches" rather than "frisks" in order to obtain inculpatory evidence. . . . Even in *People v. Peters* (*supra*), where the officer initially frisked the defendant and felt something hard, this Court held that the officer did not have "probable cause" to make the arrest until he had actually reached into the defendant's pocket, withdrew, and identified the burglars' tools. In the *Rivera* case, on the other hand, the Court found that the officer had probable basis to search the defendant's pocket once the frisk had revealed the likely presence of a weapon.

In short, there is ample authority to uphold the legality of the search in this case.

Even assuming that under normal circumstances the "search" allowed by section 180-a should be limited to a "frisk", the action of the detective in this case was proper, because of the additional circumstances. Delaney had a reasonably based suspicion not only that defendant was carrying a pistol but also that the weapon was located in his left-hand jacket pocket. It would seem unreasonable to require an officer in that situation to engage in a preparatory and undoubtedly dangerous frisk—particularly in view of the fact that defendant was standing in the middle of a group of children at the time of the search.³⁶

The reason for limiting the search to a frisk, however, is to reduce the invasion of privacy

³⁶ *Id.* at 342-43.

when there is no probable cause, and not because of a lack of reasonable suspicion as to where the weapon is. In every case in which a frisk is legally permitted under the "stop and frisk" provision there must be reasonable suspicion that a weapon is somewhere on the suspect's person and, as Judge Breitel recognized, the frisk is permitted in order to verify this suspicion only because the court considered it merely "a minor inconvenience".³⁷ Judge Breitel's opinion apparently rejects this rationale. Moreover, his review of the prior New York cases as involving searches rather than mere frisks and his reliance on them for authority, indicate that even where there is no such reasonable suspicion of the weapon's specific location, a full-blown search has been and will be allowed. His apparently approving citation of the ALI Code provision under which "the 'search' need not be confined to a 'frisk'" reinforces this conclusion.³⁸

The consequences of this are obvious, and were noted by Judge Fuld in his dissent:

The Fourth Amendment, guaranteeing "protection of privacy" . . . means nothing if anyone may be searched at any time simply on the strength of an anonymous phone call—made, perhaps, out of mischief or spite—denouncing him to the police as being unlawfully armed. A proper way to respond to such a communication would be to stop and question the suspect, . . . rather than to act, as if probable cause had already been established. . . .³⁹

The two cases now before the Supreme Court of the United States, *People v. Peters* and *People v. Sibron*, were decided under the authority of both *Rivera* and the statutory provision, and they completely emasculate the "reasonable suspicion of danger" requirement of that statute. In *Peters*, an off-duty police officer named Lasky, with his service revolver drawn, ran after two suspiciously acting men whom he saw on the sixth (top) floor of the officer's apartment building. He caught up with Peters on the stairway, grabbed him by the shirt

collar, and questioned him.⁴⁰ After obtaining a reply, he frisked Peters by "tapp[ing] his groin pockets and under his arms . . . looking for a weapon". The frisking revealed "something hard", which did not "seem like a gun", but "could have been" a knife.⁴¹ Lasky put his hand in the defendant's right pants pocket and brought out an opaque plastic envelope, which was not sealed but through which he could not see.⁴² The officer did not know what the envelope contained and opening it he found burglar's tools, for the possession of which Peters was thereafter convicted.

It seems clear from the above facts that the officer really had no good reason to think the hard object was a weapon, except on the ground that any object might be. And this may well be a reasonable position. Knives obviously can be small and dangerous, although it is difficult to believe Lasky felt himself in very much danger even from a knife, when he had his gun in his hand. But if there is to be a right to invade a suspect's clothing whenever anything hard is felt, then it must be realized that the frisk will often be more than an external "pat" or "feel", onerous as even that may be, for many people carry hard objects like pens, keycases, wallets and the like which "could" or "may" be a weapon. After *Peters*, there will be few occasions when an officer will not feel justified in going into a suspect's pockets if he feels something hard which "could have been" and "may have" felt like a knife.

Further, there seems very little justification for opening the opaque envelope for safety's sake—as little as for opening Pugach's brief case or Reason's tin box. Here again, the package could have been

⁴⁰ Record on Appeal to Court of Appeals, *People v. Peters*, 16.

⁴¹ The officer described the episode as follows at the preliminary hearing:

Q. Did your frisking reveal a weapon? A. I felt something hard.

* * *

Q. The Court: You felt something hard in his pocket. Did it seem like a gun? A. No.

Q. Did it seem to be the envelope that was recovered? A. I didn't know what it contained.

Q. Did it seem like some other weapon? A. It could have been.

Q. Did it feel like a knife? A. It may have.

Q. Did it feel like a knife? A. It could have been.

* * *

Q. Were you able to feel the length of this object, this hard object which you say was in the defendant's pocket? A. No.

Q. Were you able to feel as to its width? A. No. *Id.* at 26-27.

⁴² *Id.* at 21, 23.

³⁷ *People v. Rivera*, 14 N.Y.2d at 464, 252 N.Y.S.2d at 463.

³⁸ ALI Code § 2.02 5; 20 N.Y.2d at 343 n.2. Such approval is hardly surprising since Judge Breitel was one of the most vigorous proponents of this provision at the ALI meeting discussions. 43d Annual Proceedings, American Law Institute 120-23, 135-38, 159 (1966) (hereafter cited as "1966 ALI Proceedings.")

³⁹ 20 N.Y.2d at 345.

put out of the suspect's reach until the matter was disposed of.⁴³

Peters is therefore doubly significant with respect to searches: it first allows the police to go into a person's pockets for anything hard which "could" or "may" be a weapon, which includes almost anything, and it then allows them to open whatever is found.⁴⁴

Peters also makes it clear that the right to search under the statutory provisions can be invoked whenever a stop is made, just as with a frisk under *Rivera*. At the opening of the *Rivera* opinion, the court seemed to draw a distinction between the statutory provision, which requires the conjunction of both reasonable suspicion of certain crimes and reasonable suspicion of danger to the officer before a search may be made, and "the case now presented". In view of the latitude given the police by *Rivera* to search anytime they stop, this comparison may have implied that by requiring reasonable suspicion of danger the legislature had given the police less power to search than they had had without the statute, hardly a result contemplated by the legislature or by anyone else. *Peters*, however, scotched this possible interpretation. Though talking the language of reasonable suspicion of danger, the Court said:

The frisk is necessary on grounds of elemental safety. Even when the policeman has the upper hand, the tables are easily turned.⁴⁵

If tables may be "easily turned" even when an officer has his gun out, then surely the search will almost never be held unjustified. Thus, under both the statute and the common law, a policeman may search whenever he stops.

In many ways, *Sibron* is an even more troubling case. According to the police officer's testimony,

⁴³ Compare *People v. Vasquez*, 51 Misc.2d 1058 (Dist. Ct. Suffolk 1966), an analogous situation where the court authorized a search to divest a person arrested for a traffic violation of property, while at the jail house, and held that the Correction Law and regulations authorized such a search. The court further held, however, that such a search would not permit police officers to open two manila envelopes which defendant had on him, and which were found to contain marijuana. *Id.* at 1061-63.

⁴⁴ Although the opinion does note that the envelope was "unsealed", there is little reason to think this fact made a difference since the envelope was closed, especially in light of *Pugach*. Interestingly enough, however, Judge Keating nowhere cited *Pugach* as authority for the officer's conduct.

⁴⁵ 18 N.Y.2d at 245; 273 N.Y.S.2d at 223.

he had had the defendant *Sibron* under surveillance for some eight hours, during which he saw him talking to numerous addicts. At about midnight, the officer called *Sibron* out of a restaurant where the latter had been talking to some known addicts and said, again according to the officer, "You know what I am looking for". *Sibron* mumbled something, reached into his pocket, and "held something in his hand", at which point the officer reached in and grabbed some metal tin foil which contained heroin. The officer described the scene as follows:

The Witness: At the same time I told him to take his hand out of his pocket, at the same time I reached in with him and inside his pocket I saw in his hand and in his pocket he was ready to grab this cellophane—actually, it was metal tin foil wrapper.

Q. Did you see what it was in his hand at the time? A. I asked him what it was.

Q. What did he do with it? A. I grabbed it off him.

Q. Did he attempt to throw it away? A. Yes, sir. He was reaching in his pocket to throw it out.⁴⁶

On "cross-examination" by the prosecution,⁴⁷ the officer testified as follows to a clearly suggestive question:

Q. When he reached into his pocket, you didn't think he was reaching for a weapon? A. I thought he might have been.

Q. But he came up with a piece of tin foil; didn't he? A. Yes.

Q. And that's when you grabbed his hand? A. Well, he had his hand in his pocket. I put my hand in his pocket. At that time I caught him with his hand in his pocket.

Q. Just prior to that, you asked if he had something to give you? A. I said, "You know what I am looking for". He mumbled something and reached into his pocket.⁴⁸

The trial judge, who saw the issue solely as one of probable cause to arrest and so decided it, summarized the situation as follows:

⁴⁶ Record on Appeal to Court of Appeals, *People v. Sibron* 18.

⁴⁷ The officer was called as the court's witness after the prosecutor refused to call him. *Id.* at 12.

⁴⁸ *Id.* at 19.

... here is a police officer, known by the defendant to be a police officer. The police officer advances toward the defendant and says, "You know what I am looking for". The defendant—may it not be so—was overcome or overawed by a show of authority of a police officer who asks him pointblank or says to him pointblank, "I am looking for contraband". The defendant reaches into his pocket and is about to take it out, the facts there are just as consistent with the interpretation he is about to take it out and hand it to the police officer, the police officer intercepted him.⁴⁹

He then found probable cause, clearly incorrectly,⁵⁰ and it was only on appeal that the District Attorney sought to justify the search under *Rivera* and the statutory provision.

On this record, it is clear that not only was there no reason whatsoever to suspect danger, but that no one even considered that possibility, except when the issue was fleetingly introduced by the prosecution, obviously as a precaution. Indeed, if the officer thought that he was in any danger, would he not have made the frisk himself, as was done in *Rivera*? Surely, he would not have ordered the "dangerous" suspect to hand over something which was not in the suspect's hand at the time,⁵¹ thereby requiring him to go into his pockets and obtain access to whatever weapons might be there. A bona fide frisk for safety involves keeping the suspect's hands out of his pockets, not *in* them.⁵² Indeed, the officer himself described his understanding of *Sibron*'s actions as "reaching in his pocket to throw it out".⁵³

Sibron also points up the fact that in many of these cases the officer is not really interested in an interrogation.⁵⁴ In calling *Sibron* out, the

⁴⁹ *Id.* at 21-22.

⁵⁰ The judge relied on the fact that the defendant was an addict even though there was no evidence that the officer knew this. *Id.* at 22.

⁵¹ *Id.* at 16.

⁵² The same analysis of course applies to *Reason*, where the officer had the defendant himself open a closed box, instead of keeping this "dangerous" item away from the defendant by either putting the box aside or by the officer's opening it himself. Compare DETECTION 48.

⁵³ Record on Appeal to Court of Appeals, *People v. Sibron*, 18.

⁵⁴ This may also have been true in *Rivera* and in *Norris* where no questions were asked before the search, although it is possible that in those cases, the officers searched first to protect themselves, assuming *arguendo* that there was a realistic suspicion of danger.

officer asked no questions at all but simply said "You know what I am looking for",⁵⁵ and the search followed immediately when the suspect attempted to comply. This may be quite typical,⁵⁶ for the post-stop "frisk" is generally used for much more than self-protection. It is used (1) to seek evidence; (2) to prevent crime by the confiscation of weapons; and (3) to establish the policeman's authority on the streets.

The policeman's understandable desire to search for evidence without having to comply with the probable cause requirement is well-known. As Jerome Skolnick puts it, police "would like to be able to search first and then arrest on the basis of the incriminating evidence disclosed by the search".⁵⁷ The American Bar Foundation study has documented the numerous pretexts police have adopted for searching,⁵⁸ and the reports contain many such cases.⁵⁹ Traffic and vagrancy arrests, drinking, curfew, and other minor violations, searches prior to arrest where probable cause to arrest is ultimately found⁶⁰—the widespread use of these attests to the policeman's attempt to get around restrictions on his power to search at will.⁶¹

Sibron is a very good example of such a pre-arrest search for evidence and the New York cases as a group provide a revealing list of items seized in a stop and frisk; narcotics (*Sibron*, *Reason*, *Norris*); burglar's tools (*Peters*); and four guns (*Rivera*, *Teams*, *Taggart* and *Cassese*).⁶² In all the gun cases but *Rivera*—and perhaps even there, as noted earlier—the very purpose of the stop and search was to find a gun whose

⁵⁵ 18 N.Y.2d at 603. Compare *People v. Matera*. 45 Misc.2d 864, 258 N.Y.S.2d 2 (1st Dept. 1965) (where officers "directed" defendant to empty his pockets, his compliance was held to be coerced and the subsequent arrest annulled.)

⁵⁶ The American Bar Foundation study concluded that the decision to question was dependent on many factors, but the decision to search was based on only four—"race, sex, time, and location." DETECTION 41.

⁵⁷ SKOLNICK 216.

⁵⁸ DETECTION 122; see generally Ch. 9.

⁵⁹ See e.g. *Taglavore v. U.S.*, 291 F.2d 262 (9th Cir. 1961); *People v. Sapp*. 43 Misc.2d 81 (Erie Cty. 1964); *Lohman and Misner*, I The Police and the Community 37 (1966) (San Diego) (This 2-volume study of San Diego and Philadelphia will hereafter be cited as "San Diego Study" and as "Philadelphia Study" respectively. It was prepared for the President's Commission.)

⁶⁰ Police often misstate the sequence of events in order to sustain the search. DETECTION 128; SKOLNICK 144.

⁶¹ *Id.* at 217.

⁶² Three other cases did not involve a frisk and *Pugach* really involved a search incidental to an arrest, as earlier indicated.

existence the police anticipated, and it was not found as a by-product of a self-protective measure incident to an inquiry, as ostensibly contemplated by the statute. This could hardly be mere accident,⁶³ and in fact, New York was cited by the President's Crime Commission Task Force Report for the proposition that "searches are made in a high proportion of instances not for the purpose of protecting the officer but to obtain drugs or other incriminating evidence".⁶⁴

Another reason for the police desire to search is to confiscate knives and weapons, also one of the major purposes of the aggressive patrol work so widely used for crime prevention in high crime areas. This is good public relations and most police apparently feel that such confiscation helps to prevent crime.⁶⁵ The American Bar Foundation study found that consequently any male on the streets in a high-crime area "is likely to be searched several times . . . a year".⁶⁶ Parolees, "known criminals" and juveniles are often likely to be searched on sight for weapons,⁶⁷ and in one night, an officer can confiscate 30 to 40 knives.

The reference to juveniles raises the third major purpose of the search: the policeman's oft-noted need to maintain authority on the streets against the competing claims of juvenile gangs and others.⁶⁸ A recent study of the Philadelphia police stressed the importance of the "fight for the corner" in order to assert the policeman's authority and establish respect, especially where the young officer is concerned. This "fight" often produces stops, shakedowns, and arrests, particularly of youths, and often without probable

cause.⁶⁹ The "shakedown" is a favored method of maintaining discipline,⁷⁰ and it dovetails nicely with self-protection and confiscation of weapons in an explosive situation.

In light of these other reasons for searching, much of the support for frisk powers for self-protection seems irrelevant and unrealistic, for the pure self-protection frisk actually seems quite rare.

The foregoing review indicates that the "frisk" is not a carefully circumscribed protective device that is sparingly invoked, but a wide-ranging and serious intrusion used for gathering evidence, confiscation of weapons and the maintenance of discipline. Judge Van Voorhis' description of what the Court of Appeals authorized in *Rivera* and *Pugach* is quite accurate: the policeman may search "almost at will",⁷¹ because a search is permitted in New York whenever a stop is made and perhaps even when there is no forcible stop, as on the record facts in *Pugach*. The reference in the statute to "reasonably suspects . . . danger" is not a meaningful limitation on when a search may be made, for it has been read out of the statute, leaving as the only remaining limitation that which is imposed on the power to stop—"reasonable suspicion" of criminality. Analysis of how this standard has been applied in New York and elsewhere shows, however, that this provision also imposes no significant control on the policeman's power to stop and search, and to this we now turn.

The Power to Stop on "Reasonable Suspicion"

Few tests are more vague, uncertain and minimal than the "reasonably suspects . . . crime" prerequisite to a stop under § 180-a. The New York Combined Council Guidelines stress that "reasonable suspicion" is "clearly" more than "mere suspicion", but how can one objectively define and apply this "clear" difference between them? The difference is, in fact, anything but "clear". Thus far, only one New York case out of the twelve reported has found that an officer acted without "reasonable suspicion",⁷²

⁶⁹ Philadelphia Study 132, 142-46, 168-69; San Diego Study 88.

⁷⁰ See e.g., Werthman & Piliavin 62.

⁷¹ People v. Siron, 18 N.Y.2d at 608 (dissent).

⁷² In *People v. Anonymous*, 48 Misc.2d 713, 265 N.Y.S.2d 705 (Ct. Ct. Nas. 1965) an officer saw a boy walking on a Sunday afternoon in July, at 5:00 P.M. in Hicksville, Long Island, carrying a box of books.

⁶³ See Kuh, *supra* n. 4 at 35. ("Concealed non-bulky contraband is not ordinarily legally discoverable to such a search. . . .") Figures supplied to me by the New York Police Department indicate that in 2½ years (July 1964-Dec. 1966), out of 1142 stops and 885 frisks, only 69 weapons—guns, knives and bayonets (!)—were obtained. Letter to author from Ellsworth A. Monahan, Director, Legal Bureau, Police Department, City of New York (Feb. 8, 1967). The figures are, however, highly suspect, for it is almost impossible to believe that there were only 1142 stops in New York in 2½ years when there were over 200,000 reported annually in San Diego. Police Task Force 184. The figures are so defective in other regards that it does not seem worth reproducing them.

⁶⁴ Police Task Force 185.

⁶⁵ For the doubts, see DETECTION 190, 195, 197-98. For public support see San Diego Study 38, 51, 177.

⁶⁶ DETECTION 190.

⁶⁷ *Id.*

⁶⁸ Police Task Force 183; Reiss and Bordua, *Environment and Organization: A Perspective on the Police*, in *THE POLICE* 25, 47-48 (Bordua ed. 1966); Werthman & Piliavin, *Gang Members and the Police*, in *id.* at 56, 92 (hereafter cited as "Werthman and Piliavin").

and some police officers with whom the case was discussed found the facts quite suspicious. The Guidelines give an example of "reasonable suspicion" but this too is of little help, for the facts given are so fulsome as to satisfy the requirements of probable cause.⁷³ Indeed, the police themselves have been said to be unable to make their standards objective,⁷⁴ and the proposed ALI Code does not even try; it allows a forcible stop whenever "circumstances . . . suggest" criminality, without indicating to whom or how strongly.⁷⁵

Nor can an effort at an objective and significant set of limitations even be expected, for if any such restraints were attempted, the only result would be police confusion and irritation, with more complaints about tying the hands of the police.

The officer called the boy over and asked him where he'd gotten the books. The boy said he'd found them outside a school and offered to give them to the officer. The officer, unsatisfied, had the boy accompany the officer to the school. It turned out subsequently that the boy had burglarized the school. The court found that the officer had no basis for his suspicion. *Compare* *People v. Simon*, 290 P.2d 531 (Cal. 1955).

⁷³ The victim of a mugging describes her assailant as six feet tall, wearing a brown leather jacket. Shortly thereafter police see a man hurrying down a dark street, looking furtively around and clutching something under his brown jacket. He is, however, only five feet tall, and the Guidelines assert that the difference in height precludes the existence of probable cause. It is well-established, however, that a mistake does not necessarily preclude probable cause, *see, e.g.*, *United States ex rel. Wilson v. LaVallee*, 367 F.2d 251 (2d Cir. 1966); *United States v. Brown*, 365 F.2d 976 (D.C. Cir. 1976) (mistake of 6" as to height and as to clothing); *United States v. Kuntz*, 265 F. Supp. 543, 547-48 (N.D.N.Y. 1967), and the facts given seem more than enough for probable cause. The example may have been designed to give the impression that stop and frisk would be used primarily in those cases where there would be probable cause but for the absence of one detail. See Note, 78 HARV. L. REV. 473, 475 (1964).

It should be noted, incidentally, that the suspicion must relate to the actual or possible commission of only certain crimes. The cases, however, rarely mention the specific crime, and in some, at least, it seems likely that none was specifically contemplated. *See, e.g.*, *Norris*, *supra*, where officer saw two men walking at 3:00 a.m. in downtown Brooklyn. When the officer approached, one ran away, and the other suddenly put his hand to his sleeve. The court held that the officer had reasonable suspicion about the commission of "one of the crimes above specified," and he was therefore authorized to search "for a dangerous weapon." 46 Misc. 2d at 45. The nature of the crime was never specified. In most of the cases, however, burglary was probably involved. *Compare* DETECTION 31, n. 18 ("courts . . . do not seem to require any certainty with respect to what offense is suspected.")

⁷⁴ DETECTION 39-41, 93.

⁷⁵ The dictionary definition of "suggest" is "to call to mind by association of ideas." Webster's Collegiate Dictionary (7th Ed.) (1965). One needn't have read Joyce to be aware of the limitless possibilities made available by "suggest."

Instead, police judgment will probably be followed in almost all cases, for what else can the judge really do? Suspicion involves so low a degree of belief and so subjective a judgment that it is impossible for him to draw a line between a "mere" suspicion and a "reasonable" suspicion, especially if the officer whose conduct is under review is an experienced patrolman, which the judge almost never is.

Indeed, deference to police expertise is now mandatory in New York both for applying stop and frisk and for probable cause. In *Peters*, Judge Keating declared:

By requiring the reasonable suspicion of a police officer, the statute incorporates the police officer's intuitive knowledge and appraisal of the appearances of criminal activity. His evaluation of the various factors involved insures a protective, as well as definitive, standard.⁷⁶

Thus, we must now look to the policeman's judgment of what is suspicious for our protection against his misjudgment. And in *People v. Valentine*,⁷⁷ the Court of Appeals found probable cause to arrest on events which admittedly appeared innocuous to a layman on the ground that they appeared otherwise to a policeman. Surely, this is a long way from Mr. Justice Jackson's distrust of the policeman's judgment because he is "engaged in the often competitive enterprise of ferreting out crime."⁷⁸

Mr. Justice Jackson's distrust was sound, for police judgment is not likely to be overly discriminating. Recent field studies by Skolnick, the American Bar Foundation, and many others⁷⁹ have catalogued the many innocent events that are suspicious to a policeman. These studies and police training materials like Bristow's *Field Interrogation* point up the underlying principle of these judgments: anything out of the ordinary is suspicious. Because of the element of danger in his work, "the policeman is generally a 'suspicious' person"; "he must be suspicious of strangeness, oddity, indeed any sort of change."

⁷⁶ 18 N.Y.2d at 245.

⁷⁷ 17 N.Y.2d 128 (1966).

⁷⁸ *United States v. Johnson*, 333 U.S. 10, 14 (1948).

⁷⁹ *See, e.g.*, Specter, *Mapp v. Ohio: Pandora's Box for the Prosecutor*, 111 U. PA. L. REV. 4, 18-19 (1962); Note, 9 UTAH L. REV. 593 (1965); Note, 100 U. PA. L. REV. 1182 (1952); as well as generally SKOLNICK; WERTHMAN & PILAVIN; L'FAVE, ARREST (1965); and BRISTOW.

"It is in the nature of the policeman's situation that his conception of order . . . is . . . shaped by persistent suspicion. . . . A young man may suggest the threat of violence to the policeman by his manner of walking or 'strutting' . . ." ⁸⁰ A policeman's magazine quoted by Skolnick listed the following, among many others, as "subjects who should be subjected to field interrogation":

1. Suspicious persons known to the officer from previous arrests, field interrogations, and observations.

* * *

5. Known trouble-makers near large gatherings.
6. Persons who attempt to avoid or evade the officer.
7. Exaggerated unconcern over contact with the officer.
8. Visibly "rattled" when near the policeman. . . .
16. Hitchhikers.
17. Person wearing coat on hot days.

* * *

20. Many others. How about your own personal experiences? ⁸¹

The Combined Council Guidelines contain a similarly broad list of so-called suspicious circumstances. ⁸² "Merely being alone in certain areas 'is one of the factors contributing to his being

⁸⁰ Quoted from SKOLNICK, 65, 44-48. See also WERTHMAN & PILIAVIN 56.

⁸¹ A complete list, which is taken from Adams, *Field Interrogation*, Police (March-April 1965), p. 28, is quoted at SKOLNICK 45 n.5. See also DETECTION 39-40, discussed below.

⁸² Combined Council Guidelines ¶ 1.B.3.b. lists the following:

- i. The demeanor of the suspect.
- ii. The gait and manner of the suspect.
- iii. Any knowledge the officer may have of the suspect's background or character.
- iv. Whether the suspect is carrying anything, and what he is carrying.
- v. The manner in which the suspect is dressed, including bulges in clothing—when considered in light of all of the other factors.
- vi. The time of the day or night the suspect is observed.
- vii. Any overheard conversation of the suspect.
- viii. The particular streets and areas involved.
- ix. Any information received from third persons, whether they are known or unknown.
- x. Whether the suspect is consorting with others whose conduct is "reasonably suspect."
- xi. The suspect's proximity to known criminal conduct.

(This listing is not meant to be all inclusive.)

suspect' " ⁸³ As a result, it has been quite easy for the New York police to meet the standards of "reasonably suspects . . . crime". The New York cases have relied on such factors as the lateness of the hour, the level of neighborhood crime, ⁸⁴ the suspect's attempt to leave the scene upon seeing a policeman, a sudden movement, ⁸⁵ walking back and forth in front of a restaurant at night, ⁸⁶ and talking to known addicts. ⁸⁷ In some of these cases, of course, several of these factors were present, but in others there was very little. ⁸⁸

In addition, there is the factor of race. As Werthman and Piliavin put it:

From the front seat of a moving patrol car, street life in a typical Negro ghetto is perceived as an uninterrupted sequence of suspicious scenes. Every well dressed man or woman standing aimlessly on the street during hours when most people are at work is carefully scrutinized for signs of an illegal source of income; every boy wearing boots, black pants, long hair, and a club jacket is viewed as potentially responsible for some item on the list of muggings, broken windows, and petty thefts that still remain to be cleared; and every hostile glance directed at the passing patrolman is read as a sign of possible guilt. ⁸⁹

Such discriminatory practices are not limited to high-crime urban areas, but, as shown by an unpublished study by a CORE chapter in Oregon, they can exist in so pastoral a setting as Eugene, Oregon. ⁹⁰ One observer comments that it is only recently that police have found that "because a

⁸³ Goldstein, *Administrative Problems In Controlling The Exercise of Police Authority*, 58 J. CRIM. L., C. & P. S. 160, 165 (1967).

⁸⁴ *People v. Rivera*.

⁸⁵ *People v. Norris*, 46 Misc.2d 44, 258 N.Y.S.2d 967, 968 (Sup. Ct. Kings 1965).

⁸⁶ *People v. Rivera*.

⁸⁷ *People v. Sibron*, 18 N.Y.2d at 603.

⁸⁸ *E.g., id.* at 603.

⁸⁹ Werthman & Piliavin 56; Police Task Force, 164, 1964; Edwards, *Order and Civil Liberties: A Complex Role for the Police*, 64 MICH. L. REV. 47, 54 (1965).

⁹⁰ The study found that Negroes are more likely to be stopped more often even after discounting for class and criminal record. It was found that 52% of the Negroes in the sample were stopped and only 3% of the whites. Further, that Negroes averaged 1.1 stops for a 15-month period and whites only .08, a ratio of more than 10:1. See Report of Community Relations Committee, Eugene Chapter, CORE, on Police Harassment in Eugene (mimeo, undated) (the data covers the period Nov. 1963-Feb. 1965).

Negro walks on the streets of an exclusively white neighborhood it is not legal 'reasonable grounds' for assuming he has committed a crime, much less that a crime has been committed".⁹¹ Negro juveniles are particularly prone to suspicion, especially if found in white neighborhoods, or simply lounging around, as so many of them do for lack of employment or other reasons.⁹² Also stopped frequently in some areas are interracial couples, and those who look in the least bit eccentric, "hip", or "beat".⁹³

Equally high on the list of suspicious persons are known criminals and parolees often regarded by the authorities as "police property".⁹⁴ In part, this is because of the way police apparently do much of their detective work: if a crime has been committed, they often go right to those who are known to have been in similar trouble before.⁹⁵

Moreover, by the nature of his work, the policeman must work by stereotypes, by general judgments about people. He has to forego making fine distinctions among them.⁹⁶ Thus, any young male Negro or lower class person in a high-crime neighborhood, or even a middle-class person in a minority neighborhood, is likely to be viewed with suspicion, particularly if his demeanor is hostile or fearful. The police will often act on the basis of furtive glances, nervousness, walking away, and the like,⁹⁷ and they will sometimes test for such responses by staring at a possible suspect.⁹⁸ They will often be upheld by the courts, too, as *Rivera*, *Norris*, and other cases in New York and elsewhere show.

⁹¹ McNamara, *Uncertainties in Police Work: The Relevance of Police Recruits' Backgrounds and Training*, in *THE POLICE* 163,165 (Bordua ed. 1966) (hereafter cited as "McNamara").

⁹² Cf. Werthman & Piliavin 57-59.

⁹³ San Diego Study 106, 65, 67.

⁹⁴ This can include known gamblers and prostitutes. Goldstein, *supra* n.83 at 164. See BRISTOW 123 for justification of this practice. See Kamisar Book Review, 76 HARV. L. REV. 1502, 1509-10 (1963) for "police property" problems in connection with arrests for investigation, which are obviously closely related to stop and frisk. The illegality of such arrests is clear, however. *Miranda v. Arizona*, 384 U.S., 436, 482 (1966); Kamisar, *supra*.

⁹⁵ Werthman & Piliavin 69. With juveniles, this can include those with families that are often in trouble. *Id.* at 73-74.

⁹⁶ Skolnick 67; McNamara 170-71.

⁹⁷ DETECTION 32 ("a person who manifests concern for the presence of the police, who repeatedly glances at the officer, who changes his direction in an apparent attempt to avoid confronting the officer, or who flees at the sight of the officer will commonly be detained and questioned."); *Id.* at 191.

⁹⁸ Werthman & Piliavin 80; DETECTION 191.

Of course, the police are often justified and right.⁹⁹ The people they suspect are often involved in criminal activity. But they are also often wrong, and for reasons related to their operational procedures and roles. For example, it was found that Philadelphia police over-estimated the proportion of arrests involving Negroes in the districts in which the officers were assigned.¹⁰⁰ Partly, this is because the police concentrate on patrolling poor neighborhoods, as a result of which they see more of the crime that occurs there than occurs in middle or upper-class areas.¹⁰¹ Also, police often have very little familiarity with the ghetto area, in which they do not live and which they fear, sometimes referring to it as "the jungle". An assignment to a ghetto area is usually considered undesirable and is sometimes used for disciplinary reasons, the "department's worst" being assigned there.¹⁰² Moreover, in most places, police have become motorized and extremely busy so that they have little personal contact with the residents except at moments of trouble. With rotating shifts, they are often out of the neighborhood before they have a chance to get to know the residents, and "as a result, the same persons will be stopped repeatedly by different officers."¹⁰³ They are thus always fearful, ill at ease, and suspicious, for the white policeman in a Negro neighborhood—and most policemen in such areas are still white¹⁰⁴—knows that there is little love lost between him and the residents.¹⁰⁵ Such suspicions are compounded by the very real and sincere belief of most policemen that most Negroes are somehow involved in crime.¹⁰⁶ And finally, some police departments have set field interrogation quotas.¹⁰⁷

⁹⁹ See letter from Dean Edward L. Barrett to Jerome Skolnick, quoted in SKOLNICK 218-19.

¹⁰⁰ Kephart, *Negro Visibility*, 19 AMER. SOCIO. REV. 464 cited in McNamara 167-68, *Task Force Report on Crime And Its Impact; An Assessment*, The President's Commission 5 (hereafter cited as "Crime Impact Task Force").

¹⁰¹ Werthman & Piliavin 82.

¹⁰² Police Task Force 165-66; San Diego Study 53; Philadelphia Study 162.

¹⁰³ Police Task Force 166; *Id.* at 52, 97, 132, 152, 162, 166; San Diego Study 161.

¹⁰⁴ The problem with Negro policemen can be even worse. San Diego Study 93; Philadelphia Study 116; Police Task Force 167.

¹⁰⁵ Skolnick 49, (both British and American police feel like "occupying soldier[s] in a bitterly hostile country.")

¹⁰⁶ San Diego Study 121; Philadelphia Study 46, 48, 53, 64, 97.

¹⁰⁷ Police Task Force 189.

In light of the above, it is hard to see how any objective controls based on "reasonable suspicion" could ever be developed, especially by a judge removed from the street scene, and Judge Keating's approach in *Peters* abandons any attempt to do so. The only way probable cause itself may be kept meaningful is by insisting on a certain threshold quantum of evidence which even a layman can understand, while making some allowance for police expertise, but when that threshold is reduced to "suspicion", there is room for almost no control.¹⁰⁸

This lack of objective standards and the inevitable "anything goes" result has a further troublesome consequence, the importance of which has been highlighted by the recent riots. Stop and frisk laws give the officer not only the power to command a halt but also the right to use force to enforce that command. Although attempts may be made to prohibit the use of deadly force or even a weapon as the ALI Code provides and as the Combined Council Guidelines suggest, *Peters* allowed the officer to point a gun, and the New York cases at least hint at no limitation. And it is hard to see how it could be otherwise, for how can one enforce a stop against someone who vigorously resists or flees by foot or by car, except by threatening or using substantial if not "deadly" force? Stop and frisk may thus encourage policemen to use force on many more occasions at a time when the dangers inherent in such use are becoming increasingly apparent and destructive.

Moreover, allowing this power may encourage unnecessary and excessive force. It often happens that a policeman brings in an arrestee who has been badly beaten and the officer—sometimes without a mark on him—claims that the beating was necessary to subdue the citizen's wrongful resistance to a lawful arrest. In some cases at least, it seems clear that this claim is false, but the citizen cannot disprove the officer's story and the burden is almost always on the citizen, especially where he is from a minority group and poor. However, if the officer had no right to make an arrest in the first place, his force was unauthorized regardless of whether the citizen did in fact resist, at least in many jurisdictions. Since the officer

knows this, he may refrain from assaulting the person if he has no probable cause. But when the officer is permitted to detain on suspicion, this defense would be unavailable to a citizen, and he would be forced to fall back on comparative credibility, with its usual result. Legitimizing the use of force on suspicion would thus remove one of the restraints on indiscriminate use of force by the police. Whether this restraint is presently of substantial practical significance is impossible to say, but it probably has some impact. And any grant to the police of more power than they now have will inevitably produce more legitimately and illegitimately used force.

It has been suggested, however, that (1) a balancing test can be developed which will allow stops where necessary but still avoid indiscriminate use, and (2) the police should develop guidelines and administrative regulations which will make the standards objective. In an important article, Dean Edward L. Barrett proposed that "the reasonableness of each investigative technique [should be determined] by balancing the seriousness of the suspected crime and the degree of reasonable suspicion possessed by the police against the magnitude of the personal security and property rights of the individual involved".¹⁰⁹ He then proceeded to analyze the *Henry* and *Rios* cases¹¹⁰ with this technique.

The prospect is, of course, attractive, although it has never formally been adopted.¹¹¹ But how is this to be applied in practice? Are all of these subtle considerations to be balanced by the policeman on the spot, in a matter of seconds or minutes, subject to second guessing by the courts? If the policeman's "balancing" turns out to produce evidence of crime, how many courts will be ready to find that he balanced wrongly, that there was not enough suspicion for the crime suspected? The

¹⁰⁹ *Personal Rights, Property Rights and The Fourth Amendment*, 1960 SUP. CT. REV. 46, 63; see also Leagre, *The Fourth Amendment and the Law of Arrest*, 54 J. CRIM. L., C. & P. S. 393, 413-416 (1963).

¹¹⁰ *Rios v. United States*, 364 U.S. 253 (1960); *Henry v. United States*, 361 U.S. 98 (1959).

¹¹¹ Justice Jackson's suggestion that "judicial exceptions to the Fourth Amendment . . . should depend somewhat on the gravity of the offense" is well known. *Brinegar v. United States*, 338 U.S. 160, 183 (1949) (dissent). For recent support for such a test, see Stewart, J. in *Berger v. New York* — U.S. —, 87 Sup. Ct. 1873, 1888 (1967) (concurrency). Cf. *Camara v. Municipal Court*, — U.S. —, 87 Sup. Ct. 1727, 1735-36 (1967), *id.* at 1742 (Clark J., dissenting) (different standard for health searches, with "reasonableness . . . still the ultimate standard." *id.* at 1735-36.)

¹⁰⁸ "If probable cause is no longer to be the test, at least at the initial point of arrest, where is the line to be drawn short of indiscriminate police detentions or hunch?" Foote, *The Fourth Amendment: Obstacle or Necessity in the Law of Arrest*, in *POLICE POWER AND INDIVIDUAL FREEDOM* 29, 34 (Sowle ed. 1962).

Hall and Kamisar casebook raises the prospect of frequent litigation of this issue, often leading to reversals, or a possible reduction in the amount of exclusion to a level below that necessary to maintain deterrence.¹¹² The latter is the more likely prospect, especially in view of the difficult value judgments involved in weighing the "seriousness of the suspected crime"—often burglary or petit larceny—against the "magnitude of the invasion of" an individual's rights.¹¹³

Regardless of what position the courts take, so vague a test as required by the "balancing" approach will inevitably produce friction and resentment, for there are bound to be inconsistent and confusing decisions.¹¹⁴ Police might even prefer a flat denial of such broad powers, for uncertainty can be a greater burden than having to do without, and a "balancing" test ensures permanent ambiguity.

Moreover, if meaningful restrictions are imposed by this approach, the pressures to weaken them will quickly mount.¹¹⁵ Professors Bator and Vorenberg have commented that even a "reasonable suspicion standard" may be too high in certain circumstances.¹¹⁶ A standard so vague and

uncertain as Dean Barrett's can hardly be enforced strictly against strong pressures for lenient application, especially in view of the notorious reluctance of lower court judges to "tie the hands" of the police. The history of the "voluntariness" test for confessions in the state courts is ample testimony of what can happen to an ambiguous standard under such circumstances.^{116a} In short, it seems most unlikely that indiscriminate use of this power will be prevented by such a test.

The other suggestion, strongly pressed by the President's Crime Commission and its Police Task Force, is that the police apply measures of self-discipline and develop guidelines to limit themselves.¹¹⁷ This suggestion is equally futile for several reasons: First, police can hardly be expected to restrict and curtail a long-standing practice like stop and frisk which is based in part on fear for their own safety. Secondly, as earlier noted, the police are themselves unable to make these standards objective. Thirdly, self-regulation is one of the frailest of instruments for social control in any context, not just police work. It is especially feeble in the police context, for relatively little supervision of the patrolman's actions is attempted or is even possible. And finally, how can one expect self-imposed restrictions to have any meaning when the New York courts, at least, have undercut any attempt at self-regulation by sanctioning conduct explicitly interdicted by criteria proposed by law enforcement authorities?¹¹⁸

In actuality, the "reasonable suspicion" standard merely legitimates whatever police do, and thus Judge Keating could say in *Peters*, "courts have had no difficulty in applying this standard." The infrequent case where a policeman's stop is deemed unauthorized will probably be quite difficult to reconcile with the more permissive

¹¹² HALL & KAMISAR, *supra* n.24 at 186.

¹¹³ The difficulties can be seen in some of the California cases. For example, in *People v. Blodgett*, 293 P.2d 57 (1956), two passengers were ordered out of a taxi which they had separately entered while the taxi was waiting outside a hotel at 3:00 A.M. By what objective calculus can one balance the intrusiveness of such police conduct against the suspiciousness of the circumstances? Cf. the dissent of Justice Carter, *id.* at 59-60.

¹¹⁴ Police resentment toward the courts because of the vagueness of probable cause is well known. Such resentment is compounded when different courts arrive at different results on similar facts, especially when one of the courts is a federal habeas corpus court, for this can also produce friction between the state and federal courts.

¹¹⁵ Compare the situation with probable cause, discussed *in* 123-126.

¹¹⁶ "There may be instances when an officer would seem justified in stopping a person to ask a few questions relating to a crime, even though the officer has no basis for suspecting him of that crime." Bator & Vorenberg, *Arrest, Detection, Interrogation and the Right to Counsel: Basic Problems and Possible Legislative Solutions*, 66 COLUM. L. REV. 62, 66 (1966). They seem to have incorporated this thought in the right to forcibly stop witnesses. § 2.02(1). However, a witness may be simply a prospective defendant as to whom there is not even reasonable suspicion, and thus the limitations will be weakened even more. Cf. *People v. Clayton*, 28 A.D.2d 543, —N.Y.S.2d— (2d Dept. N.Y. 1967). See also Edwards, 1966 ALI Proceedings 103 ("There will never be a time when a police officer in any central part of any big city . . . wouldn't have reasonable cause to believe that a felony or misdemeanor has been committed, and . . . couldn't find it in his

heart to believe that any person has knowledge that might . . . aid . . . investigation of that crime.")

^{116a} Way, *The Supreme Court and State Coerced Confessions*, 12 J. PUB. L. 53 (1963).

¹¹⁷ President's Commission Report, 106; Police Task Force 17, 23.

¹¹⁸ The Combined Council "Stop and Frisk" Guidelines advise against opening a briefcase, ¶ I.D.6, but see *Pugach* which sanctioned such conduct; they advise against the use of a "weapon or nightstick in any fashion," ¶ I.B.1, and of stopping someone "in the public portion of private buildings," ¶ I.B.2.b, but see *Peters* which ignored both; they suggest that no questions are to be asked until the officer has identified himself as a police officer, § i.c.1 but see *Peters* and many others; they suggest that the search always be limited to a "frisk", but see *Taggart*.

decisions and will only cause confusion and resentment.

To sum up the New York law, there has been a steady and overt relaxation of standards so that "reasonable suspicion of criminality" can be satisfied by virtually anything and serves primarily to circumvent the requirements of probable cause: "reasonable suspicion of danger" is always present almost by definition; and the "self-protective" search is no longer limited to a frisk. This same kind of loosening can be seen by comparing *Rivera* with *Peters* and *Sibron*, with respect to the standards for reasonable suspicion, and *Rivera* with *Taggart* with respect to the intensity of the search. And there is no reason to think that the New York experience is or will be unique—the inevitable looseness of the standards and the ubiquitous judicial reluctance to strike down police conduct which turns up conclusive evidence of crime ensures that this pattern will be repeated elsewhere as courts get beyond the initial cases raising the validity of such powers, which are often, like *Rivera*, relatively strong for the prosecution.

We are told, however, that "the case for such a provision is a convincing one"—that such authority is not only beneficial but necessary.¹¹⁹ How "convincing" is this case?

THE CASE FOR STOP AND FRISK POWERS

The purported benefits from giving the police the power to stop and frisk can be summarized as these: (1) prevention of crime; (2) avoiding a dilution of probable cause in arrest cases; (3) avoiding the necessity of making an arrest; (4) allowing an opportunity for exculpation; and (5) reducing police lawlessness and frustration.

The special benefits to be achieved from the frisk are: (1) reducing danger to the policeman; and (2) crime prevention by confiscating knives, guns and other weapons.

The Benefits from Stop and Frisk

Of the first five listed, a few can be disposed of quickly. Thus, although the stop as an opportunity for exculpation is emphasized by Judge Keating in *Peters*, in most cases it hardly seems necessary to force a man to stop in order to allow him to exculpate himself. A request for cooperation, and advice that the suspect has such an opportunity, surely seems sufficient. And, of course, where the

officers have probable cause, which is where there is likely to be the greatest need for exculpation, a forcible restraint is permissible. On the other hand, if the suspect is fleeing, a restraint might be necessary to allow exculpation, but flight, particularly if the suspect refuses to obey a request to stop and there are circumstances which really do call for an exculpatory explanation, may well be deemed enough for probable cause, though the matter is not entirely clear and will be returned to again.¹²⁰ In short, the suggestion that we allow one to be forcibly deprived of his liberty so that he can try to regain it is no more persuasive here than in other interrogational situations.¹²¹

A somewhat more plausible argument is that if police can stop on less than probable cause in order to make an investigation, they will not be inclined to make formal arrests so quickly with all the unfortunate consequences of such actions. As a corollary to this argument, the ALI draftsmen contend that stop and frisk powers will relieve the courts of pressure to water down probable cause in order to uphold such arrests when the victims turn out to be implicated in crime.¹²² The second half of this argument presupposes, however, that there is a clear-cut and substantial difference between probable cause and reasonable suspicion, with probable cause having been kept at a definite and high threshold. Unfortunately, experience does not support this assumption. Even after New York police were given stop and frisk powers, the New York courts loosened probable cause to a point where it now seems little more than a relatively high degree of reasonable suspicion. Thus, the Court of Appeals described a recent case in which it found probable cause as follows:

In *White* the court held that there was probable cause for an arrest without a warrant and an incident search with no more in the record "than a showing that a known addict holding money in his hand and talking to the suspected drug peddler quickly put the money

¹²⁰ *People v. Jackson*, 257 N.Y.S.2d 73 (1st Dept. 1965); Broeder, *Wong Sun v. United States: A Study in Faith and Hope*, 42 NEB. L. REV. 483, 493 n.40 (1963); DETECTION 32.

¹²¹ See ALI Code § 5.01 Commentary 170, implicitly rejected in *Miranda v. Arizona*, 384 U.S. at 482; *United States v. Vita*, 294 F. 2d 524 (2d Cir. 1961), cert. denied, 369 U.S. 823 (1962). For Judge Keating's comment, see 18 N.Y. 2d at 244.

¹²² ALI Code 97.

¹¹⁹ ALI Code 95.

away and left the scene when the detective approached." ¹²³

And in *People v. Valentine*, probable cause was found on the following facts:

The arresting officer testified at the trial that, on the afternoon of September 23, 1964, the defendant was standing on a street corner in Brooklyn. During a period of more than 20 minutes, from a vantage point 50 to 60 feet away in a parked automobile, the officer observed six unknown persons approach the defendant. Each of these persons engaged the defendant in a short conversation, and, at the conclusion thereof, each was seen to hand him money in bill form. On three of these occasions the defendant was observed making notations on a slip of paper. Then, at approximately 1:30 P.M., the officer approached the defendant, identified himself as a police officer, and placed him under arrest. The officer testified that prior to the arrest he had not overheard any of the conversations between the defendant and the unknown persons, nor was he able to see the notations made by the defendant on the piece of paper.

And the court concluded:

Here each transaction observed by the officer might have been seemingly innocent, but the repeated pattern amounted to probable cause in the eyes of an arresting officer who was well versed in the behavior of a professional policy operator.

Elsewhere the story is the same.¹²⁴ Thus, allowing officers to stop and frisk will not preserve a high threshold for probable cause, for other forces and

pressures are watering it down.¹²⁵ Moreover, insofar as the existence of stop and frisk does allow probable cause to retain a relatively high threshold, it does so by the simple device of allowing most of what probable cause would allow, without requiring that it be established, as the *Pugach*, *Sibron*, and *Taggart* cases so clearly show. In each of these cases, the action was originally justified as based on probable cause, but when the support therefor was ruled inadequate, the same conduct was upheld under the stop and frisk law.¹²⁶ Thus, probable cause was preserved by being circumvented and made irrelevant.

It is also unlikely that the availability of stop and frisk will reduce the number of arrests, for if the officer is dissatisfied with the answers he gets from the stop, he will often arrest anyway, even if only and wrongly on suspicion, or on a vagrancy or loitering charge.¹²⁷ This may be partly because some people cooperate out of fear that they will be arrested if they do not,¹²⁸ and

¹²⁵ Part of the reason for the watering down in *White* is that if probable cause had not been found in those facts, the defendant would have been entitled to the name of a confidential informant. A court's desire to preserve the confidentiality of informers, a vital aspect of sumptuary crimes enforcement, will exert continuing pressures to weaken probable cause, regardless of stop and frisk. By not requiring disclosure of such informants where there is much evidence of their past utility, *McCray v. Illinois*, *supra*, may relieve the courts of the constitutional pressures.

It may also be noted that the *Valentine* facts contains just a little more than an example of "probable cause to interrogate" only, appearing in *Bristow* 89. In *Valentine*, money was passed, though not in the example, but in the latter the suspect was a known bookmaker.

¹²⁶ See, e.g., *Sibron*, *Taggart* and *People v. Teams*, 20 A.D. 2d 803 (2d Dep't), *aff'd*, 18 N.Y.2d 835 (1966), where the search was upheld under § 180-a, when the Court of Appeals found that there was no probable cause for an arrest. See also *Pugach*, *Hoffman* and *Cassese*, *supra*. This may well have been the real reason for the enactment of § 180-a, after *Mapp v. Ohio*, 367 U.S. 643 (1961). Steinberg, 1966 ALI Proceedings 166.

¹²⁷ Police apparently believe they have a right to arrest if they receive no cooperation. *Id.* at 57. For vagrancy arrests, see Police Task Force 188, *LAFAVE, ARREST* 151, and Amsterdam, *Federal Constitutional Restrictions on the Punishment of Crimes of Status, of General Obnoxiousness, Crimes of Displeasing Police Officers, and the Like*, 3 CRIM. L. BULL. 205, 226-28 (1967). The New York Court of Appeals has recently strick down a vagrancy statute, *CODE CRIM. PROC.* § 887 (1), partly because the use of a vagrancy law for investigating crime violates New York conceptions of due process. *Fenster v. Leary*, 20 N.Y. 2d 309, 315-16 (1967). The statute was soon to be superseded anyway, however by N.Y. REV. PEN. L. § 240. 35.6. (See pp. 459, *infra*.)

¹²⁸ DETECTION 91.

¹²³ *People v. Valentine*, 17 N.Y.2d 128, 269 N.Y.S.2d 111 (1966); *People v. White*, 16 N.Y.2d 270, 266 N.Y.S.2d 100 (1965). How great a weakening of probable cause is entailed by *Valentine* and *White* can be seen by comparing the underlying facts in these cases with decisions like *United States v. Ventresca*, 380 U.S. 102 (1965), where a far more elaborate set of facts was deemed sufficient only because the search was based on a warrant, and *Johnson v. United States*, 333 U.S. 10 (1948) and *Henry v. United States*, 361 U.S. 98 (1959), where more detailed factual foundations than in the New York cases were deemed inadequate for probable cause to arrest. For other watering down, see *People v. Schnitzler*, 18 N.Y. 2d 457 (1966).

¹²⁴ See, e.g., *People v. Prewitt*, 52 Cal.2d 330, 341 P.2d (1959); *State v. Krogness*, — Ore. —, 388 P.2d 120 (1963); *United States v. Kuntz*, 265 F.Supp. 543 (N.D.N.Y. 1967). For a Supreme Court contribution, see *McCray v. Illinois*, 87 S.Ct. 1056 (1967).

the policeman may feel he must maintain this impression. Whatever the reason, the Police Task Force of the President's Crime Commission found that the number of arrests for investigation and suspicion remains deplorably high, despite their clear illegality, and, one may add, despite the widespread use of field interrogation.¹²⁹ Moreover, the recent loosening of probable cause will also make for more arrests, undercutting whatever benefits may result from allowing detention powers.¹³⁰ Thus, this argument seems as weak, experientially, as the others.

The most weighty argument for the forcible stop is its purported use for crime prevention. Thus, it has often been said that many police believe the stop and frisk power is both useful and necessary to cut down on crime,¹³¹ and this has now been accepted by the New York courts in *Rivera* and *Peters*. This crime prevention effect is supposed to operate in several ways: The first was summarized by Bristow as follows:

The frequent stopping and questioning of suspicious persons usually tends to reduce the crime rate in a given district. Word travels quickly by the criminal grapevine that a certain area is being well patrolled. Criminals rarely frequent areas where they are frequently stopped for interrogation, and tend not to choose such districts for criminal activity.¹³²

The second, which looks to the removal and confiscation of weapons from suspicious people, has been touched on earlier and will be discussed further below.

¹²⁹ Task Force 186; see also LAFAYE, ARREST 354-63. The Philadelphia and San Diego studies found a vast number of arrests for harassment and other improper purposes, such as for insolence, for refusal to disperse, in order to assert the police officer's authority, to check out an identification, to establish respect. Philadelphia Study, 142-46, 152. See also Goldstein, *supra* n. 83 at 169. It was also alleged that police will often goad the young person into either an attack or profanity, which will then produce a violent police reaction. Philadelphia Study 165, 126, and nn.140 and 142 *infra*.

¹³⁰ One of the strongest factors discouraging indiscriminate arrests appears to be the officer's reputation with his sergeant. It has been found that officers lose face in their departments if they make too many arrests which are later thrown out. Werthman & Piliavin 92. It may be, however, that this applies primarily to arrests which are intended to stand up.

¹³¹ DETECTION 3; San Diego Study 44, 46, 53, 64, 82, 139; Philadelphia Study 316.

¹³² Bristow 5.

Professor Remington, a not unsympathetic student of field interrogation,¹³³ has recently evaluated these arguments as follows:

It is probable that an aggressive program of preventive patrol does reduce the amount of crime on the street, though it is a significant comment on the police attitude toward policy-making responsibility that there has been no noticeable effort to measure the effectiveness of this technique. It is also apparent that aggressive preventive patrol contributes to the antagonism of minority groups whose members are subjected to it. A basic issue, never dealt with explicitly, is whether, even solely from a law enforcement point of view, the gain in enforcement outweighs the cost in community alienation. . . .¹³⁴

A conclusion that "the gain in enforcement" does not outweigh the cost confirmed by studies which stress the extent of the resentment and alienation arising from these practices.¹³⁵ More recently the Crime Commission Police Task Force found that "in many communities, field interrogations are a major source of friction between the police and minority groups,"¹³⁶ its report refers to this problem over and over again, and study of the recent and earlier riots makes clear that such police practices bear a large share of blame for the disorders.¹³⁷ The problems are aggravated when the stops are accompanied by searches.¹³⁸ This community alienation produces more crime and disrespect for law, and in turn, more police-community antagonism, more fearful and hostile police attitudes, a greater need for aggressive street patrols, and again, still more resentment, more alienation and more crime.

¹³³ See Remington, *The Law Relating to "On the Street" Detention, Questioning and Frisking of Suspected Persons and Police Arrest Privileges in General*, in POLICE POWER AND INDIVIDUAL FREEDOM 11, 15-18 (Sowle ed. 1962).

¹³⁴ DETECTION xix; see also *id.* at 195.

¹³⁵ Werthman & Piliavin 56.

¹³⁶ Police Task Force 103.

¹³⁷ *Id.* at 147, 157, 178, 184. See also San Diego Study 82, 128, 142. See also Edwards, 1966 ALI Proceedings 105-06. How severe the resentment and alienation can be among Negro youth is vividly described in the Werthman study, and continually referred to in the San Diego and Philadelphia studies, though in Philadelphia, few problems were found with field interrogation. See note 148 below; also CONOT, RIVERS OF BLOOD, YEARS OF DARKNESS (1967) *passim*.

¹³⁸ Police Task Force 185-87.

It is also clear that such practices reduce citizen cooperation with police, one of the most important aids to effective law enforcement. This effect may be alone sufficient to outweigh any benefits from field interrogation. Furthermore, it is frequently noted that a major complaint of ghetto residents is that they get too little police protection, despite aggressive patrol tactics. This grievance can be satisfied only if police-citizen cooperation can be developed, but such cooperation seems impossible where stop and frisk practices are common.¹³⁹

Apart from attitudinal factors, recent field studies of stop and frisk in high-crime areas in three cities also raise doubts about the value of such practices for apprehension of suspects. In 248 interrogations (out of 801 encounters) about 86% resulted in no admission at all, with no variation dependent on the seriousness of the charge. Furthermore, "of all [36] admissions in field situations, more were made voluntarily prior to questioning [22] than were made after questioning, [and] admissions after questioning were less productive of arrests than . . . voluntary admissions," (77% to 57%). And perhaps most significantly, all felony admissions "were made when there was other evidence or officer testimony as to occurrence of the event and the implication of the suspect." In none of the 116 felony arrests, was there an admission after questioning—of which there were only 8 anyway—where the admission was the sole or even vital evidence on which the arrest was based. Although the sample is not very large, the study certainly casts doubt on the effectiveness of this device as a basis for arrest as opposed to crime prevention, and is consistent with those studies which have raised doubts about the indispensability of interrogation at the station house.¹⁴⁰

Even members of non-minority groups are often irritated and angered by a policeman's stopping

¹³⁹ For the indispensability of citizen cooperation to effective law enforcement, see Edwards, *supra* n.89 at 60-61; Police Task Force 144. For a demonstration of the boomerang effect of over-zealous law enforcement practices, see Kamisar, *On the Tactics of Police-Prosecution Oriented Critics of the Courts*, 49 CORN. L. Q. 436, 454-58 (1964); Police Task Force 144-45; President's Crime Commission Report 192.

¹⁴⁰ Reiss & Black, *supra* n.15 at 17-20. In a letter to me dated Oct. 9, 1967, Dr. Reiss wrote that the admission was generally superfluous to probable cause for arrest.

For doubts about stationhouse interrogation, see SOBEL, *THE NEW CONFESSION STANDARDS* 136-46 (1966).

and interrogating them. Indeed, the authoritative manual on field interrogation advises that "generally the irate, annoyed, sarcastic or uncooperative attitude might be expected from a subject who is in advanced years or who may be considered an affluent citizen."¹⁴¹ But minority groups, parolees,¹⁴² drug addicts,¹⁴³ eccentrics, those who are either different or already somewhat alienated from our society—and in many cases more prone to criminality—are both more susceptible to being stopped and most vulnerable to adverse consequences. The resentment at the discrimination is obvious and serious.¹⁴⁴

Moreover, in many of these cases, physical abuse will take place if the person—especially a juvenile—shows resentment at being stopped, or resistance to questioning. As Professor Charles Reich has said:

Police are human, and there is a very real possibility that a person who stands on his rights one day may find the same officer "out to get him" another day. Moreover, we have all too much evidence that talking back to a police officer can produce violence and perhaps serious injury to the individual, particularly if he is a Negro or an outcast.¹⁴⁵

And, as indicated earlier, there is some indication that police do not mind this resistance but even encourage it.¹⁴⁶

¹⁴¹ BRISTOW 23: Reich, *Police Questioning of Law-Abiding Citizens*, 75 YALE L. J. 1161 (1966): The most cooperative are often the experienced criminals, Note 9 UTAH L. J. 593, 616 (1965) and such cooperation is itself, according to Bristow, suspicious. BRISTOW 23.

¹⁴² *Id.* at 123; DETECTION 23, 24, 8.

¹⁴³ *Id.* at 26; Note, 100 U. PA. L. REV. 1182 1194 (1952).

¹⁴⁴ Werthman & Piliavin 56; Police Task Force 147. Judge Souris has well described the fear and police attitudes involved in the stop and frisk of a 17-year-old Negro boy. Souris, *supra* n.4 at 251-53.

¹⁴⁵ Reich, *supra* n.141 at 1169.

¹⁴⁶ See Philadelphia Study 165, 126, and see n.148 *infra*.

A student in my criminal law seminar decided to find out for himself exactly how the police would treat a somewhat independent young person walking the streets at night. He therefore made the following experiment:

In order to experience what the citizen is subjected to upon being stopped by the police, two friends and I dressed in old, but respectable clothing, proceeded to the lower East side of —, a predominantly Negro and lower-class white area. Upon arriving there at 12:30 A.M. on an unusually cold winter night, we began to walk around. We had the intention of being subjected to a "stop"

Even where the result of the stop is conviction on a gun charge, as in *Rivera*, is it really so clear that the community is better off? Possession crimes are often extremely inchoate crimes. Yet, in many lower class areas, guns are carried for status or self-protection,¹⁴⁷ and the gun conviction may itself so prejudice the employment and other opportunities of an otherwise law abiding citizen or delinquency-prone juvenile that he may be led

at all times, but we never, in the course of the evening, broke any law or city ordinance.

We were stopped first after only fifteen minutes in the area by a motorcycle policeman. On this occasion the three of us were walking down the street looking in the windows of closed stores in the manner of window shoppers, never remaining long in any one place. The officer, a member of the [Special Service Unit] drove his motor cycle upon the sidewalk and blocked our path and immediately wanted to know what we were doing in this area. As he asked this question he alighted from his motorcycle and approached us with his nightstick in hand. I spoke first saying it was none of his business why we were there and I was not going to tell him anything. He responded with a thrust of the stick into my ribs, saying "Oh, you're one of those wise asses, huh?" He then asked my friends the same question. He grabbed one of my companions, who was bearded, and began to pummel him saying "You're one of those peace guys; well, you're not so smart now". Eventually, we were required to tell him why we were there and furnish proof of identification, on pain of being arrested for assault and vagrancy. After complying with these requests, we were ordered to leave the area with the phrase, "If I see you here again you've had it."

This is merely one out of eight such times we were stopped. Each time we refused to answer questions we were sworn at and physically abused. In the last incident we were standing under a street light and, observing a prowler car coming toward us, we walked slowly into the shadows down a street. On this occasion the officers approached with drawn revolvers and asked us the same questions. After giving somewhat varying explanations we were placed in a prowler car for about a half an hour where my bearded companion was given some physical abuse.

On every occasion, we asked why we were stopped and what we were being charged with. We were never told anything in this regard, but that we had just better answer the questions. Myers, Stop and Frisk 21-22 (unpublished man. 1967).

I have been informed orally that searches also took place in several of these stops though the paper inadvertently omitted reference thereto.

¹⁴⁷ Poor police protection in the ghetto makes self-protection particularly important. Conot, *supra* n.137 at 92, 198-99 ("almost every person keeps a weapon for self protection"); ADD Center Report, *The World of Youthful Drug Use* 29 (Berkeley 1967). See also Schultz, *Why the Negro Carries Weapons*, 53 J. CRIM. L. & P. S. 476 (1962). 70% of a 50 man sample in St. Louis carried weapons for self-protection, and generally a loaded gun.

deeper into criminal habits, particularly if a jail sentence results. Similarly, in some cases, the stop produces frictions and a possible conviction for resistance to arrest which can have the same effect.¹⁴⁸

And there may well be alternatives to the forcible stop. To analyze these, it is important to break down the power that is sought into its components; as the ALI Proposed Model Pre-Arrestment Code does: (1) the power to *request* cooperation; and (2) the power to *detain* that person *forcibly* in order to make and follow through on that request. Theoretically, the combination of these two is all the investigational power that a stop and frisk law provides, for as the proposed ALI Code stressed, there can be no obligation to answer.¹⁴⁹ Is the power of *forcible* detention really necessary to the purpose of the stop, which is to obtain information as to identity and an explanation of the suspicious circumstances? Will not a request for voluntary cooperation generally be as effective? If not, how can the power to detain temporarily and forcibly help produce information as to identity and purpose except by the forcible character of the detention, which raises serious self-incrimination problems? If the person stopped is not willing to talk when requested to do so, is there any reason other than fear why forcible detention will change things? And if the person is willing to give an explanation and identity, will he not often be willing to remain while the information is being checked?

Experience in Salt Lake City supports the possibility of such voluntary cooperation. There it was found that most people will consent to answer questions, especially the professional criminal.¹⁵⁰ Indeed, it has been noted often that

¹⁴⁸ There is reason to think that police may encourage such reactions in order to obtain promotions. McNamara, 189. ("If you want to get out of the 'bag' [uniform] and into the bureau, *shoot somebody*") (Emphasis in original). See also n.129 *supra*, and Conot, *supra* n.137, at 40-41.

¹⁴⁹ See ALI Code § 2.01(2), *id.* at 5, 101. See also Combined Council Guidelines ¶ 1.C.3 ("The officer cannot compel an answer and should not attempt to do so. The suspect's refusal to answer shall not be considered as an element by the officer in determining whether or not there is a basis for an arrest.")

¹⁵⁰ "Where the officer is careful to convey to the interrogated person that he is merely requesting information and that the interrogated person is free to leave at any time, there is of course nothing unlawful about the interrogation. In most cases it apparently does not occur to the questioned person to object because the questioning is done in such a courteous manner that the only reasonable thing is to answer. The only persons observed to object in such

despite general agreement that politeness and citizen cooperation are among the most effective ways of getting information,¹⁵¹ but that police put too low a value on this.¹⁵² Salt Lake City is not a high-crime area and thus its problems may be different from cities like New York or Chicago. On the other hand, the difference may be more in the reported police attitude toward the persons they stopped, then in the comparative levels of crime.

It has been argued, however, and with much force, that such voluntary cooperation cannot be relied on, for as a practical matter it represents compliance with the mailed fist behind the request,¹⁵³ and this may well be true. And when such incidents come to court we are very likely to see some of the same problems of credibility, and evaluation of the suspect's state of mind to determine true voluntariness that we find in the consent to search cases.¹⁵⁴ Moreover, such requirements may not be enforceable, given current police attitudes and the low visibility of the encounter. This brings us to the fifth benefit of allowing stop and frisk—reducing police lawlessness and frustration. For example, the San Diego Police Department specifically forbids restraint of persons questioned, and requires that the citizen be given an explanation when stopped, yet field interrogation and patrol practices are a major cause of minority

circumstances became cooperative when it was explained that they were not being accused of doing anything wrong and that the police were not attempting to impose a curfew. There was no observed instances where a person refused to cooperate. According to those officers interviewed, such refusal is rare, and where it does occur, the officers do not insist unless there is some indication that the person involved is engaged in criminal activity." Note, 9 UTAH L. REV. 593, 615 (1965). See also *id.* at 607-08.

¹⁵¹ Werthman & Piliavin 68, 86; BRISTOW 20, 26.

¹⁵² McNamara 218-19. Girardin, *After the Riots: Force Won't Settle Anything*, SAT. EVE. POST (Sept. 23, 1967) pp. 10, 11.

¹⁵³ See Bator & Vorenberg, *supra* n.116 at 65: to permit voluntary cooperation to become a general justification for the exercise of police authority would simply be self-deception. If in fact a policeman stops a suspect by issuing an order to him or threatening the use of force, the affixing of the label "voluntary" to the suspect's compliance only serves to obscure the importance of making an explicit decision as to what the predicate for such a stop should be and what procedural protections should be afforded to the person stopped.

See also DETECTION 91.

¹⁵⁴ See *e.g.*, Channel v. United States, 285 F.2d 717 (9th Cir. 1960); United States v. Page, 302 F.2d 81, 83 (9th Cir. 1962); DETECTION, ch. 10.

resentment in that city,¹⁵⁵ and explanations are frequently not given.

Yet, this answer may be a bit too pessimistic. For one thing, the credibility problem is just as great where the power to stop and frisk is granted if meaningful limitations are imposed, even if only theoretically.¹⁵⁶ Moreover, for a variety of reasons, many people will cooperate without force or even coercion (apart from that inherent in the badges, uniform, and holstered guns), as the Salt Lake City and other experiences show; indeed the ALI Code itself provides for such procedures and, as the Commentary indicates, "officers should rely to the fullest possible extent on cooperation."¹⁵⁷ "But," it immediately continues, "in the absence of a power . . . [to forcibly stop], the concept of voluntary cooperation is put to much strain." And thereafter follows a series of hard cases:

- (1) Without a coercive stop, how can officers secure the cooperation of someone traveling at 60 miles per hour?
- (2) Can the police be prevented from shouting "stop" at a running man and from enforcing that command?
- (3) Are the police to be denied the right to freeze the situation at the scene of a shooting by ordering that "nobody leave" to prevent a suspect or witness from permanently disappearing?

And earlier, the following somewhat overlapping examples were given:

- (4) A person running at 2:00 A.M. with a heavy package in a business neighborhood;
- (5) A person travelling in an automobile who seems to correspond to the description of a suspect.
- (6) A person walking slowly down a street at night, looking into parked cars.¹⁵⁸

These six situations fall into three categories: automobiles (1 and 5); the pure "suspicious circumstance" case (2, 4, and 6); and emergencies where there is reasonable ground for belief that a crime has been committed (3 and 5).

The emergency situation is an easy case for approving stop and frisk powers, for there a crime

¹⁵⁵ Police Task Force 184, 185.

¹⁵⁶ See Goldstein, *supra* n.83 at 165. In a private conversation, an experienced Legal Aid attorney in New York City commented that 98% of current search and seizure cases turned on credibility issues.

¹⁵⁷ ALI CODE 96.

¹⁵⁸ *Id.* at 96, 95.

has already been committed—or there is good reason to think so—and emergency powers of brief detention are probably unavoidable in order to freeze the situation.¹⁵⁹ Otherwise, the suspect or witnesses may disappear permanently, other lives may be endangered, memories may fade and evidence be destroyed. Also, an attempt to flee the officer's presence in this kind of situation would probably satisfy probable cause requirements for most courts. A carefully drawn statute limited to such situations would probably be acceptable to most opponents of stop and frisk,¹⁶⁰ but this is hardly the typical stop and frisk situation involving on-the-street detention, where there is no knowledge or even probable cause to believe that a crime has occurred.

The more difficult problem is the pure "suspicious circumstance" case where there is merely suspicion of criminality, and often of the vaguest kind. Is it so clear that the right to forcibly stop is necessary here? Surely the man walking down the street and looking into cars can be stopped and interrogated without force. If he refuses to comply—and few in such circumstances will refuse—the police have not really lost very much. They have gotten a look at the suspect, and more importantly, by their mere presence they may have deterred him from perpetrating a crime. Indeed, the factor of mere police presence is likely to be among the most important deterrents to crime. Moreover, if he has not yet committed a crime, they can do very little even if they force him to stop except to either arrest him for loitering if he fails to answer satisfactorily—with all the problems this raises¹⁶¹—or to frisk him for weapons, a patently illegal maneuver unless there is some danger to the officer.

What, however, of the man who is running at night with a heavy package in a business neighborhood? (Ex. 2 and 4). Should police be able to order him to stop? If he refuses, can police force him, to stop? Suppose he talks but suddenly breaks off and flees? And if denied the right to use force in these circumstances, will police obey such restrictions, regardless of the law?

One answer is that the use of force is so serious a matter, especially in the highly explosive atmos-

phere of a high-crime area, that unless police have probable cause to believe a man has committed a crime, they should not be authorized to use it. They probably should not even be authorized to issue orders and commands, for an order carries with it the implicit threat of force. Such a threat should not be made on mere suspicion, especially where there is no evidence that a crime has even been committed.

Moreover, the example may be quite unrealistic. Few men in suspicious circumstances will refuse to stop,¹⁶² though they may occasionally refuse to answer questions. Where the suspect does flee, that can be considered in determining probable cause.¹⁶³ Flight may be especially significant if the police actually have knowledge that a crime has taken place, for then they are likely to have some idea of the item stolen and—perhaps—of the thief, so that the flight plus the package, plus other circumstances, may amount to probable cause.¹⁶⁴

But suppose the police still have no reason to think a crime has been committed except for the flight, and so there is no probable cause.¹⁶⁵ Can they

¹⁶² This may indeed be because there is a feeling that the police can force you to stop, but denying the police stop and frisk power is not really going to substantially reduce their presently great power and authority. Moreover, the criminal is generally quite eager to talk, according to Bristow, and least likely to run away. See e.g., *United States v. Kuntz*, 265 F.Supp. 543, 546 (N.D.N.Y. 1967).

¹⁶³ DETECTION 32–33 n.19; Broeder, *Wong Sun v. United States: A Study in Faith and Hope*, 42 NEB. L. REV. 483, 493–94 (1963). Most courts give flight almost conclusive weight on the probable cause issue. See e.g., *United States v. Heitner*, 149 F.2d 105 (2d Cir. 1945); *State of Louisiana ex rel. Johnson v. Middlebrooks*, 260 F.Supp. 517 (E.D. La. 1966); *United States v. One 1951 Cadillac Coupe*, 139 F.Supp. 475 (E.D.Pa. 1956). Cf. *Henry v. United States*, 361 U.S. 98, 103 (1959). But see *Wong Sun v. United States*, 371 U.S. 471, 483–84 (1963); *Miller v. United States*, 320 F.2d 767 (D.C. Cir. 1963); *Taglavore v. United States*, 291 F.2d 262 (9th Cir. 1961); *United States v. Margeson*, 259 F. Supp. 256, 265–67 (E.D.Pa. 1966). And see Conot, *supra* n. 137 at 295 (flight and "instinctive reaction in the Negro community" at the sight of a policeman.)

¹⁶⁴ It may be noted that in *Henry*, Justice Douglas made much of the fact that the cartons carried by the suspects had no resemblance to those thought to be involved in the known crime, a whiskey robbery. Indeed, in indicating what was absent and might have produced probable cause, Justice Douglas touched on many factors that would often be present where a package is suspected of being contraband: "Its shape and design might at times be adequate. The weight of it and the manner in which it is carried might at times be enough." 361 U.S. at 104.

¹⁶⁵ See e.g., *Wilson v. Porter*, 361 F.2d 412 (9th Cir. 1966); *United States v. Margeson*, 259 F.Supp. 256, 265–67 (E.D. Pa. 1966); *People v. Ellsworth*, 12 Cal.

¹⁵⁹ See 9 UTAH L. REV. 622; indeed, the particular example given in the Combined Council Guidelines involves such an emergency. See also *Bell v. United States*, 290 F.2d 717 (D.C. Cir. 1960).

¹⁶⁰ Foote, *supra* n.108 at 35–36.

¹⁶¹ See text at nn. 182–95 *infra*.

forcibly stop the fugitive? And can they then frisk him for self-protection? Indeed, this case, which may be relatively rare, is the one which raises the true and the hardest stop and frisk problem, for in most other cases, force and a frisk may be quite unnecessary.

Strong arguments can be made on both sides. On the one hand, it would not seem unreasonable to authorize the police to briefly detain a fleeing man to seek cooperation or to ask a few questions. Even without anything else, flight increases the officer's original suspicion. Also, the officer may gain some valuable information for future purposes by simply getting a look at the man, and under *Schmerber v. California*,¹⁶⁶ there seems to be no right to deny police such an opportunity, though *Schmerber* does not, by itself, approve the use of force to obtain such an opportunity.

Moreover, if it is clear that the suspect was aware of the officer's presence and request, flight is a sufficiently objective fact, credibility questions aside, that reliance thereon does not pose the difficulties discussed earlier with making objective the standard of "reasonable suspicion". The case for allowing a forcible stop in these circumstances seems even stronger where the flight is in the middle of a questioning session for although it may still be for good and innocent reasons, such flight justifies an even stronger inference of guilt which is worth further investigation.

Finally, it is difficult to believe that many courts can be persuaded to disallow a policeman's attempt to prevent someone from fleeing before or during an interrogation.

The arguments on the other side, however, seem stronger. Do we gain much from allowing the forcible stop, except for giving the policeman a good look at the suspect? By hypothesis, there is still no probable cause to arrest and so the crime is still not properly cleared. There is never an obligation to answer, so no information as to purpose and identity will necessarily result. Indeed, if the Reiss-Black field interrogation conclusions are valid, stop and frisk will not produce much information even where the suspect does not flee, unless the police already have a good deal of evidence. Furthermore, what of the citizen who does not immediately flee but refuses to answer any questions and starts to walk away? Here, there is not even the need to restrain in order to look at the

man, for that has already taken place. By what right can the police detain him to ask questions which he has no obligation to answer? Seen under this aspect, flight is merely one way of refusing to answer questions, of exercising one's privilege. Furthermore, when a suspect flees, it is hard to believe that any response after recapture will be truly voluntary. Thus, a forcible detention after flight may turn out to be useless for any information that is so obtained may be deemed coerced.

Finally, how much force will be permitted? If someone is fleeing in a car or on foot, it may indeed be "frustrating and humiliating to the officer to grant him an authority to order persons to stop and then ask him to stand by while his order is flouted."¹⁶⁷ It may, however, be fatal or seriously injurious to the suspect to allow the officer to capture him by the use of force. Although the ALI Code draftsmen minimize the danger that "moderate force . . . may escalate into deadly force,"¹⁶⁸ no reasons for this judgment are given and recent history points otherwise, especially where the atmosphere is tense and the action is sudden. And even "moderate" force may cause serious injury, either unintended or otherwise.

On balance, it would seem that if the suspect's flight, together with the other circumstances known to the police about the crime and its perpetrator, do not produce probable cause to believe the suspect is the criminal, there should be no right to forcibly detain him. In such circumstances, the little knowledge legitimately gained from a forcible detention does not outweigh the indignities and dangers inherent in such a charged and low-visibility situation.

The automobile situation (Ex. 2, 5) seems to present certain special difficulties. Although there is probably no inherent analytic difference between the rights and duties of someone in a car and of someone on foot, at least so far as criminal investigation is concerned,¹⁶⁹ it is obviously much harder to seek voluntary cooperation from a motorist. This does not, however, imply that force may be used whenever an officer wishes to see or talk to such a person, absent probable cause. It does mean that certain special methods of interception may be required so that the police may get into a position to make such a request. Thus, waving down, flashing, a pull-over request, and even use of a siren, would

¹⁶⁷ ALI Code Commentary 100.

¹⁶⁸ *Ibid.*

App. 2d 844, 2 Cal. Rptr. 433 (1961); *People v. Martin*, 293 P.2d 52 (1956).

¹⁶⁹ 384 U.S. 757 (1966).

¹⁶⁹ Cf. *United States v. DiRe*, 332 U.S. 581, 586-87 (1948).

seem permissible. Although these all smack of an order rather than a request, it is hard to see what can be done about this unless the police are to be denied all power to request cooperation, a position not advocated here.

What if the car refuses to stop or slow down? In the first place, the police may be better off here than in the pedestrian situation since if the car tries to get away, it may violate the traffic laws and thus justify a formal arrest. Also, many states allow policemen to force a car to stop in order to check the driver's license and registration, and this power has been upheld.¹⁷⁰ Motorists know of this power and most will stop. Finally, refusal to stop plus other circumstances known to police may be enough for probable cause, as in the pedestrian case.

If there is no probable cause, however, and no traffic violation the police should not be permitted to forcibly stop the moving car by blocking it off or other methods. The reasons set forth earlier with respect to the pedestrian would seem to apply with even more force here. The police can probably obtain the license plate number and determine whether the car is stolen in a manner of minutes. Also, the use of force in such a circumstance is even more fraught with danger, since society has few more dangerous instrumentalities than a moving car, particularly if out of control. Shooting at it is obviously perilous to all, but forcing it over or otherwise blocking it also pose serious dangers.¹⁷¹

Another troublesome question relates not so much to the power to enforce a stop but to the power to detain for investigation while the suspect's answers are checked out. A suspect will often respond with some kind of evasive answer, especially (though not necessarily) if he is in fact guilty of some wrongdoing. Should not the police be able to hold him long enough to check out his story? Should not they be allowed to hold him long enough to check out this identification?¹⁷² And, if he is in a car, is it not especially important, given the mobility of cars and the high incidence of car theft, to allow the police to check out his identity?¹⁷³

¹⁷⁰ *United States v. Bhono*, 256 F.Supp. 391 (S.D. N.Y. 1966).

¹⁷¹ When a stationary car arouses police suspicion, which seems fairly common, there is even less need for force either to ask questions or to see the occupants.

¹⁷² *United States v. Lewis*, 362 F.2d 759 (2d Cir. 1966).

¹⁷³ See *Cotton v. United States*, 371 F.2d 385 (9th Cir. 1967) (when police checked identity, during detention, suspect found to have falsely given name of owner of car which he had stolen.)

The problem is that at this point it becomes difficult to distinguish such so-called detention from a "full-blown arrest", for where a person is forcibly deprived of his liberty for any length of time beyond the momentary stop involved in "requesting cooperation," to use the ALI phrase, the values of individual security and freedom of movement underlying the Fourth Amendment are significantly invaded. The proposed ALI Code seeks to limit this intrusion to 20 minutes,¹⁷⁴ and to the place of initial stopping,¹⁷⁵ but apart from the obvious problem in proving that the incriminatory oral or tangible material was obtained within 20 minutes—and in such circumstances, the credibility of neither party would be reliable¹⁷⁶—the pressures to expand this would soon become irresistible. If information starts to come in after 18 minutes, are the police to let the man go? Do not all the reasons for the original stop counsel against such release? Thus, the court in *United States v. Vita*¹⁷⁷ found that 8 hours was not too lengthy, as information and leads were checked out, and the recent decision in *United States v. Thomas*¹⁷⁸ stressed the importance of allowing enough time for investigation. Moreover, the police will be impelled to arrest on less than probable cause after the 20 minutes is up in order to hold on to the suspect while information is coming in or while waiting for it. Police arrest now in order to get and check information, and there is little reason to think this will not continue to happen, despite the ALI claim that there will be fewer illegal arrests if the power to stop is given. And if the information does indicate criminality, there will be the usual pressure on the trial court to approve the arrest. The proposal thus seems highly unworkable.

Even if it were workable, a 20 minute detention is simply too serious an infringement on one's liberty.¹⁷⁹ This is a period when the suspect is

¹⁷⁴ Section 2.02(2).

¹⁷⁵ *Contra*, *People v. Hoffman*, 24 A.D.2d 497, 261 N.Y.S.2d 651 (2d Dept. 1965).

¹⁷⁶ Cf. Kuh, *Some Views on Miranda v. Arizona*, 35 *FORD. L. REV.* 233, 236-37 (1966).

¹⁷⁷ 294 F.2d 524 (2d Cir. 1961) *cert. denied*, 369 U.S. 823 (1962). In the Reiss-Black study half the suspects were detained less than 10 minutes, 25% for 20 or more, 10% for 40 or more, and 5% an hour or more, before the police decided to book or release. *Supra* n.15 at 12.

¹⁷⁸ 250 F.Supp. 771, 794-95 (S.D.N.Y. 1966). For an example of how such limitations can be ignored, see *Hancock v. Wilson*, 363 F.2d 249 (1st Cir. 1966) (eight hours detention where statute allowed four hours).

¹⁷⁹ See the description of one such stop in *Souris*, *supra* n.4 at 251-52.

virtually at the mercy of the police, often with no one else around. Many of the problems of custodial interrogation will crop up here, even with a *Miranda* warning,¹⁸⁰ especially in view of the current attitudes and methods of field interrogation discussed earlier. One can, of course, urge police to act politely at all times, but where there is power, especially over members of the lower classes, young people, narcotic addicts and minority groups, it will not be exercised mildly and politely, at least not for a long time to come. And, as Professor Herman Goldstein has noted, the problem is "often complicated by the isolated conditions under which the two parties come in contact with each other. . . . The absence of witnesses to such contact makes it difficult to reconstruct the relationship, should some aspect of it subsequently be subject to question", a problem which underlay *Miranda*.¹⁸¹

Exposure to a 20-minute stop and frisk is not a trivial experience, and only judicial and partisan Erehonism can think of it in that way.

Reference to custodial interrogation also raises serious self-incrimination problems with respect to the power to forcibly detain. Such problems are particularly acute in New York which, as of September, 1967, adopted the following loitering statute:

A person is guilty of loitering when he:

6. Loiters, remains or wanders in or about a place without apparent reason and under circumstances which justify suspicion that he may be engaged or about to engage in crime, and, upon inquiry by a peace officer, refuses to identify himself or fails to give a reasonably credible account of his conduct and purposes.¹⁸²

By definition, the stop authorized by the statutory provision takes place in "circumstances which justify suspicion" and it allows an officer to demand the suspect's identity and an explanation,

¹⁸⁰ *Miranda v. Arizona*, 384 U.S. 436, 445, 448 (1966).

¹⁸¹ See Goldstein, *supra* n.83 at 165. Another alleged purpose of stop and frisk is to detain a suspect long enough for a complainant to try to identify him. This purpose does not seem legitimate under the New York law at least, which refers solely to interrogation as to identity and purpose. See Galvin & Radelet, *supra* n.1 at 327-28.

¹⁸² N.Y. REV. PEN. L. § 240.35.6 (1967). This is patterned after § 250.6 of the Model Penal Code but lacks most of the latter's attempted protective features. It should be noted that under the New York statute, a refusal to provide *either* identity *or* explanation is enough for conviction.

which probably has to be "a reasonably credible account of his conduct and purposes, within the loitering statute."¹⁸³ This means that the sanction for refusing to talk is a loitering charge, and/or exposure to further interrogation in the jail house.¹⁸⁴ The constitutionality of the loitering statute is highly dubious,¹⁸⁵ but until struck down it puts the defendant in a dilemma: if he refuses to talk, he may be charged with loitering, but if he does respond, he may incriminate himself, for the questions authorized by a stop and frisk law necessarily call for potentially incriminating answers. Indeed, questions solely as to identity can be incriminatory,¹⁸⁶ and the questions authorized by the stop and frisk law and the ALI Model Pre-Arrest Code, for example, go into possible past and future criminality.

In view of this, what of the *Miranda* warning? Is the stop always so "significant" a deprivation of liberty that the four-fold warning must be given?¹⁸⁷ The proposed ALI Code provides that a

¹⁸³ In *Peters*, the frisk and continued detention were justified on the ground that the account of conduct and purposes was not reasonably credible. 18 N.Y.2d at 242.

¹⁸⁴ See, e.g., Note, 9 UTAH L. REV. at 621. This may be the sanction in most jurisdictions, even where there is no loitering statute, for some police believe silence justifies arrest. DETECTION 57; Werthman & Piliavin 87.

¹⁸⁵ See Amsterdam, *supra* n.127 at 228; cf. Mansfield, *The Albertson Case: Conflict Between the Privilege Against Self-Incrimination and the Government's Need for Information*, 1966 SUP. CT. REV. 103; *City of Cleveland v. Forrest*, 223 N.E.2d 661 (Cleve. Ohio Mun. Ct. 1967) (penalizing failure to give a "responsible and satisfactory explanation infringes on Fifth Amendment and arrest for violation of such a statute violates Fourth Amendment.) See also *United States v. Margeson*, 259 F.Supp. 256, 267-69 (E.D. Pa. 1966) (New Jersey statute requiring a "good account" unconstitutionally vague); *District of Columbia v. Hicks*, Cr. N. D.C. 34194-66 (D.C. Ct. Gen. Sess. May 4, 1967) (statute punishing "not giving a good account of himself" by one wandering the streets late at night); but see *People v. Weger*, No. 13090 (Ct. of App., 2d Dist. Cal. June 5, 1967) (upheld statute punishing a loiterer "who refuses to identify himself and to account for his presence . . . if the surrounding circumstances . . . indicate to a reasonable man that the public safety demands such identification").

¹⁸⁶ See Mansfield, *supra* n.185 at 122.

¹⁸⁷ See *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). Comparison of the final version of the *Miranda* opinion with that released on the day of decision discloses what could be an important change in this context. In the initial version, which appears in the slip opinion, U.S. Law Week and the Supreme Court Reporter advance sheets the court defined "custodial interrogation" in one place as involving a "deprivation] of . . . liberty in any significant way." Sup. Ct. Adv. Sheet, Vol. 86, No. 17, pp. 1602, 1612; Slip Opinion, p. 6; 34 U.S. L. Week 4521, 4523 (6-14-66). At other

warning as to the lack of obligation to answer be given only when there is "sustained questioning" of someone who "may have committed a crime."¹⁸⁸ This means that no warning need be given to some one who is suspected of being "about to commit a felony or misdemeanor," a possible subject of an ALI Code-approved stop, and the target of most forcible stops, insofar as this practice is designed for crime prevention. Though there are difficult theoretical problems involved in the applicability of the privilege to future criminality¹⁸⁹ there can still be a great many instances where the person involved in such questioning may be subject to prosecution for attempt or some other inchoate crime.¹⁹⁰ Moreover, if the police practice is indeed to rely heavily on a prior record in charging with crime, a parolee or ex-convict is particularly liable to incriminate himself for possibly unsolved neighborhood crimes simply by identifying himself. Surely, the warning is at least as important to this person.

Moreover, the officer will rarely know that he is about to "engage in sustained questioning" when he starts the interrogation, the point at which the warning is most important. In most cases the length of questioning will depend on the answers he gets. The officer usually knows very little about what is happening, and there is a good chance of ready exculpation, or at least that is one of the reasons given in the proposed ALI Code for allowing this power. Requiring a preliminary judgment as to whether "sustained questioning" will be engaged in is thus highly unrealistic.

points where custodial interrogation is referred to, "significant" is omitted. See Slip Opinion at 7, 29, 40; Sup. Ct. Adv. Sheet, Vol. 86, No. 17 at 1612, 1624, 1630; 34 U.S. L. W. at 4523, 4530, 4533. In the final version however, as appearing in 384 U.S., the word "significant" has been inserted in all of these. See *id.* at 445, 467, 478, 86 Sup. Ct. 1612, 1624, 1630. The insertion of the word "significant" throughout may affect the decision of whether *Miranda* should not be applied to the stop and frisk. Certainly those who claim that it is a mild and innocuous detention, see discussion of the *Rivera* opinion *supra*, would deem it not "significant." See Schwartz, *Retroactivity, Reliability and Due Process: A Reply to Professor Mishkin*, 33 U. CHI. L. REV. 719, 758 n.203 (1966).

¹⁸⁸ ALI Code § 201(2). The directly pertinent section is 2.02(3) which requires the warning to be given to persons forcibly detained under § 2.02(2), but only "subject to the limitations of § 2.01." This would apparently now require the *Miranda* warning, which was laid down after this section of the ALI Code was proposed.

¹⁸⁹ See Mansfield, *supra* n.185 at 151-58.

¹⁹⁰ Section 5.01 of the Model Penal Code extends attempt quite far back in order to apply penal sanctions to dangerous persons.

On the other hand, one careful observer has concluded that field interrogation would become ineffective if a warning had to be given.¹⁹¹ If so, and there are reasons to doubt this in view of experiences in some areas,¹⁹² we may be at a constitutional impasse: if a warning is required, the technique is ineffective if constitutional, and unconstitutional if kept effective.

So far, one lower New York court has held that the *Miranda* warning must be given in the stop and frisk situation, and it is hard to see how the answer could be otherwise, especially where the suspect resists detention, though the Counsel to the New York State Police has advised that the warning need not be given.¹⁹³ If this holding is sustained by the Court of Appeals, a loitering conviction based on an inadequate or false explanation or identity, or a refusal to answer would be doubly unconstitutional for the warning would be false and deceptive. The officer cannot truthfully say "you need not answer," for if the suspect relies on this advice, his silence will have contributed to a loitering charge.¹⁹⁴

The Frisk

Denial of a general power to forcibly stop on suspicion does not entirely settle the question of when a policeman may frisk, for if the police are granted the power to request cooperation, to wave down cars, and to freeze emergencies, there will often be the same threat to the policeman's safety as if the stop were fully permitted.

Where a policeman's life is in danger, it is hard to oppose measures designed to provide some added safety.¹⁹⁵ But especially here, the dangers of abuse are so high, as the New York cases show, that the claim must be subjected to greater scrutiny.¹⁹⁶ The first thing to be noted is the somewhat unexpected fact that most police deaths apparently

¹⁹¹ DETECTION 67.

¹⁹² Reiss & Black, *supra* n.15 at 28 n.6; 9 UTAH L. REV. at 615; cf. the experience with *Miranda* reported in Harris, *Miranda v. Arizona: Is it Being Applied?* CRIM L. BULL. 135, 139 (1967).

¹⁹³ People v. Reason, 52 Misc.2d 425, 430 (1966). Compare with McKane, *Comments on Miranda v. Arizona*, in THE LAW ENFORCEMENT EXECUTIVE 7-8 (N.Y. 1966) (Advice by Counsel, N.Y. State Police); see also United States v. Kuntz, 265 F.Supp. at 547.

¹⁹⁴ Raley v. Ohio, 360 U.S. 423 (1959); U.S. ex rel. Caserino v. Denno, 259 F.Supp. 784 (S.D.N.Y. 1966).

¹⁹⁵ See Ronayne, *The Right to Investigate and New York's "Stop and Frisk" Law*, 33 FORD. L. REV. 211, 237 (1964); Note, 100 U. PA. L. REV. 1182, 1204 (1952).

¹⁹⁶ The problem of an unnecessarily intrusive search is particularly acute where the search is for a small knife.

result from accidents, and particularly from trying to handle family squabbles although only the police are subjected systematically to violent assaults.¹⁹⁷ But even with such violent assaults, it appears that police work may be less dangerous than many other outdoors occupations. The Police Task Force quoted a study showing that the average rate of total police fatalities while on duty for the period 1950-60 (including accidents) was 33 fatalities per 100,000 officers, which was less than the 1955 rate of deaths on duty from mining (94), agriculture (55), construction (76), and transportation (44).¹⁹⁸ These figures may be somewhat out-of-date in view of the crime rate increase and a possible general increase in lawlessness. But even if the figure is substantially higher, it is still not too much higher than other outdoor occupations and it led the author of this study "to suggest that the general belief that law-enforcement activity is one of extreme peril is not confirmed by an analysis of the facts."¹⁹⁹

Moreover, one of the few other studies of police shootings also shows some rather remarkable results: out of 110 cases, 43% involved vehicles, often during and after the stop, and 51% involved shootings in buildings.²⁰⁰ No significant number were on the street, and in many of the vehicle cases, the shooting appeared totally unpredictable. If the frisk were to have an effect in these latter situations, everyone would have to be searched.

On the other hand, this may not take into account the numerous assaults to which police are subjected. We have relatively little information here and the little we do have is inconclusive. The Lohman-Misner study of the Philadelphia police disclosed the following incidents in 1965:

Aggravated Assault and Battery on
Police Officer

By gun.....	9
By knife or cutting instrument...	9
By other dangerous weapon.....	23
By hands, fists, etc.....	129
Sub-Total.....	170

¹⁹⁷ Robin, *Justifiable Homicide by Police Officers*, 54 J. CRIM. L., C. & P. S. 225, 230 n.16 (1954); President's Commission Report 92; SKOLNICK 47.

¹⁹⁸ Police Task Force 189; quoting Robin, *supra* n.197 at 228-29.

¹⁹⁹ *Id.* at 231 See also, Conot, *supra* n.137, at 122.

²⁰⁰ Bristow, *Police Officer Shootings*, 54 J. CRIM. L., C. & P. S. 93 (1963). Of the 51%, 71% involved cases where the police knew or should have known the suspect was armed.

Assault and Battery on Police

Officer

Simple assault and battery.....	1,160
Resisting arrest.....	1,300
Interfering with an officer.....	111
Sub-Total.....	2,571
TOTAL.....	2,741 ²⁰¹

These figures show only 41 assaults with a dangerous weapon, the kind of assault which the stop and frisk power is supposed to prevent, in a city of 2 million, with 5725 policemen,²⁰² and hundreds of thousands of difficult citizen-police encounters. However, it is possible and indeed likely that the Philadelphia police did stop and frisk, and perhaps had they not done so, the serious assaults would have been higher. Yet, these searches were apparently made so innocuously that field interrogation practices were not found to be a major source of tension in Philadelphia although this finding does not seem entirely supported by the study.²⁰³ On balance, however, it is difficult to draw very firm conclusions from these statistics and very few other reliable figures seem to be available.

This, of course, is not to say that measures to reduce injuries and fatalities should not be taken. One of the most important of these, however, is to reduce police-citizen frictions and the very power sought—the power to stop forcibly—has been found to increase such frictions. Moreover, the power to frisk, separate and apart from the power to stop, aggravates such frictions and dangers. In a sense, then, it may be that the power to stop and frisk, especially as applied, actually increases rather than reduces danger.²⁰⁴

Moreover, it is hard to ignore the fact that here, at least, any power at all will be abused. The courts have made it quite clear that in the name of police safety, they will always allow a frisk of extensive proportions, and it is difficult to see how this can be avoided. A corollary hard reality is that police will use this power not really to protect themselves but to seize and confiscate weapons and other contraband. Insofar as the former is

²⁰¹ Philadelphia Study 55.

²⁰² *Id.* at 29.

²⁰³ Compare *id.* at 173 with *id.* at 121-27, 154 showing much resentment.

²⁰⁴ Compare the analogous situation in England, where police have been *denied* guns, in order to increase their safety. The situation in England may, however, be changing.

concerned, it is arguable that this too serves a crime prevention purpose. Some aspects of this have already been discussed, but one additional point may be made: there is very little evidence that confiscation of weapons really does reduce crime. As the American Bar Foundation study commented, it is doubtful that such weapons are irreplaceable, particularly knives, and it is therefore impossible to know the effect of confiscation.²⁰⁵

But how may we deny a policeman the right to frisk for self-protection? Moreover, if such a frisk is made, and it discloses contraband—either a gun or something else—should that fact be ignored? Perhaps the suggestion of several commentators that the fruits may not be usable in evidence might be of some help,²⁰⁶ but as is often pointed out, the purpose of much of the frisking really has little to do with prosecution, and much to do with harassment and pure confiscation. And surely one cannot return property illegally possessed to the person illegally possessing it.

Nevertheless, the potentiality for abuse and indiscriminate use is so great that the frisk should generally not be allowed and other alternatives should be sought.²⁰⁷ Some of these alternatives were set out in the American Bar Foundation study: one is to request the suspect to keep his hands in sight or in a certain position. Another, which already seems common, is for police to travel in pairs or more. Bristow lists several other precautions relating, *inter alia*, to the officer's position vis-a-vis the suspect, none of which involve a frisk.²⁰⁸ Still another is to request the suspect to leave his car. Whether these are as effective as a frisk is hard to tell for we have very little knowledge of how useful the frisk is and how effective these alternatives might be. They do seem less intrusive and, given the real circumstances of most frisks, would probably not reduce the officer's safety.

There still remains the man known to be dangerous. Where the evidence is strong that there is such danger, a frisk should probably be permitted, but it is difficult to imagine too many such

circumstances where the officers would not also have probable cause. Even in such circumstances, alternatives might be preferable if there were no probable cause, such as approaching with a drawn gun, while making it clear that the detention is to be extremely brief and only to ask a few questions.

The use of such alternatives will, of course, not totally eliminate the search for harassment and confiscation purposes, but it will deprive it of the color of legality and this is at least one step toward eliminating such practices. Whether such elimination can succeed is a different question, but at least the law will not have allowed itself to be used as an excuse and a pretext for such conduct.²⁰⁹

CONCLUSION

It seems clear that much is lost by legitimating the stop and frisk in the normal street situation, and perhaps unnecessarily. Therefore, stop and frisk should thus rarely be allowed.

Yet, some doubts remain. For one thing, there remains a serious problem of police compliance with such a decision, which most will find new, chafing, and unreasonable. Police honestly believe that their primary job is crime prevention, that aggressive stop and frisk is useful to this, and that the community and their superiors do in fact expect it of them.²¹⁰ And few can deny all of these with complete assurance. The first and third seem quite true and the impact of aggressive police patrol on crime prevention may be substantial. We simply do not know. Moreover, the explosive nature of the usual police-person encounter in high-crime or other minority areas, the policeman's need to assert his authority, and his belief that the frisk is necessary to his safety support his desire to frisk, and these too are real considerations. As Skolnick and others have con-

²⁰⁹ It is for somewhat related reasons that a position taken by the Ohio Court of Appeals in *State v. Terry*, 5 Ohio App.2d, 122, 214 N.E.2d 114 (1966), *cert. granted*, 87 Sup. Ct. 2050 (1967), is troubling. That court refused to apply the exclusionary rule, in part on the ground that police would continue to frisk anyway. 214 N.E.2d at 121. But this ignores one of the other aspects of the exclusionary rule which is to ensure that the state, and particularly the court, does not rely on violations of law in order to enforce the law. See Schwartz, *supra* n.187 at 250-52. Thus, regardless of deterrent efficacy, evidence obtained by an illegal frisk should be excluded.

²¹⁰ Indeed, there are indications that some superiors except certain field interrogation quotas to be met. Police Task Force 189; San Diego Study 134, 162.

²⁰⁵ DETECTION 195, 204.

²⁰⁶ See the suggestion of Judge Van Voorhis, in *People v. Sibron*, 18 N.Y.2d 604, 606-08; Schoenfeld, *The "Stop and Frisk" Law is Unconstitutional*, 16 SYRACUSE L. REV. 627, 640 (1966); Note, 39 N.Y.U.L. REV. 1093, 1098 (1964).

²⁰⁷ See Fuld, J., dissenting in *Rivera*, 14 N.Y.2d at 448, 252 N.Y.S.2d at 464, 468.

²⁰⁸ BRISTOW 25-26.

cluded, a policeman will not obey the law very strictly if it does not comport with what he considers reasonable law enforcement objectives, especially since much of what he does in this area is of low visibility. In such circumstances, and others, will any citizen cooperation that is obtained really be "voluntary"?

Furthermore, can courts really do much to discourage or control the stop and frisk, even if this practice is found to be unconstitutional? As noted, the judiciary can only control what goes on in the courts, and little of this conduct is aimed toward that forum. Moreover, unless police are convinced that both their superiors and the community are against such practices, the low visibility of such incidents ensures that little judicial or other control can be exercised.²¹¹ Instead, we may have more police resentment and hostility, which may only aggravate matters.

Nevertheless, the burden on those who would create new constitutional doctrine to justify a deep infringement of personal security is a heavy one. A very strong case must be made that the infringement is necessary and that it can be controlled. Such conditions are particularly important when we consider abandoning probable cause, which reflects a fundamental judgment about when a man may be deprived of his liberty, one of the most serious invasions of a free man's rights. Neither of these two conditions are met with the case for stop and frisk. Despite its possible and perhaps substantial benefits, we simply do not know that the power to stop does more over-all good than harm, and that alternatives are inadequate. And we do know that, for many reasons, almost no extra-judicial control is likely or even feasible: meaningful police self-regulation is a vain hope, nor can the legislatures be counted on to impose controls, for there is no great community support for restricting such powers.

The camel's nose argument is particularly appropriate in this context for once we abandon an insistence on probable cause, an insistence that a person not be deprived of his liberty to the extent produced by a forcible stop and search except upon evidence which would lead a prudent man to believe

that the suspect has committed a crime, we truly open the door to other possible exceptions. For example, the New York Combined Council of Law Enforcement Officials, which sponsored and pushed through New York's stop and frisk law, has had introduced into the New York State Legislature a "stop and frisk on wheels" bill, to allow the search of a car and all of its occupants on reasonable suspicion that narcotics can be found in the car.²¹² The proposal seems patently unconstitutional under *Carroll v. United States*²¹³ and *United States v. DiRe*,²¹⁴ but the bill still passed one house of the legislature,²¹⁵ and a similar argument from precedent was unpersuasive in New York when the stop and frisk bill and *Rivera* became law. The same contention is being made for this proposal as for stop and frisk powers over pedestrians: it is necessary for dealing with the crime problem in the modern urban community, with additional arguments about the problems posed for narcotic law enforcement by the automobile.²¹⁶

Furthermore, one of the greatest problems facing law enforcement today is the lack of citizen cooperation. Such cooperation is especially necessary in our explosive slums and high-crime areas, but the widespread use of stop and frisk contributes substantially to preventing such cooperation. A substantial reduction in the stop and frisk practices might join with other factors to increase citizen cooperation, thereby much improving law enforcement.

There is also a further consideration. Regardless of whether the courts can substantially reduce stop and frisk abuses, the court's role goes beyond controlling police conduct: it also has an obligation to maintain the constitutional and legal purity of the judicial process, so that regardless of deterrent impact, the processes of justice must not be tainted by official misconduct. The hypocrisy of using injustice to enforce justice is a luxury that our society cannot continue to afford.

The courts may also have a greater impact on the extent of these practices than is generally assumed. For one thing, if the Court legitimates stop and frisk, it will inevitably encourage it.²¹⁷ There is no

²¹² S. 831, A. Int. 3163, 1967 Sess., N.Y. State Legis.

²¹³ 267 U.S. 132 (1928).

²¹⁴ 332 U.S. 581 (1948).

²¹⁵ The bill died in the other house, but this may have been in part because the session was a very short one.

²¹⁶ See Legislative Memo accompanying bill cited at n.212.

²¹⁷ Some Philadelphia police have opposed legitimation of the frisk on the ground that the police will

²¹¹ The student involved in the incidents described at n.146 *supra*, reported that he was stopped 8 times in one evening, but no reports were made. The Police Task Force estimated that San Diego police made over 400,000 stops in one year, but reported only 200,000. Police Task Force 184. See also Goldstein, *supra* n.83 at 165.

middle ground between condemnation and endorsement, for the theoretically possible middle—limited and controlled stop and frisk—is a practical impossibility. Moreover, approval of New York's virtually total abdication of judicial control over this practice will encourage other states to emulate New York's example,²¹⁸ for today, support for so-

called crime prevention pressures are very strong indeed.

The Supreme Court has been our great teacher of governmental morality. If it makes clear exactly what stop and frisk involves, how little is really gained and how much is definitely lost, a process may be set in motion which will educate the community as to what a decent society should want and pay for. If the Court does not prohibit these practices, it will be a sign to the bitterly alienated minorities and slum residents, the main victims of stop and frisk, that still another of our society's institutions of orderly change cannot be relied upon when the crisis is at its worst. The fact that this particular institution has led in the use of peaceful means to eliminate injustice will only make the lesson more effective.

appropriate remedy for a violation of the announcement requirement. Compare text at n. 123, *supra*.

abuse the law and engage in far more frisks than they do even now. Note, 100 U. PA. L. REV. 1182, 1204, 1213 (1952).

²¹⁸ In *People v. Gallmon*, 19 N.Y.2d 389, 227 N.E.2d 284 (1967), the New York Court of Appeals eroded *Mapp* even further by creating a power to enter premises for non-arrest "investigatory" purposes without the need to comply with the announcement requirements, and impliedly, without probable cause. As in the analogous on-the-street "frisk", the fruits of such conduct were held fully utilizable in a criminal proceeding. Here again, the court's factual premises and legal theory had not been urged by either party, for it was agreed by all that the officer entered to make an arrest, the main issues on appeal being whether a passkey entry was "breaking", and whether the exclusionary rule was an