THE LIMITS OF STOP AND FRISK— QUESTIONS UNANSWERED BY TERRY

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The legal authority of police to detain and search persons suspected of criminal activity dates from early English common law[1] when constables were allowed to hold suspicious persons overnight and police were permitted to search vessels, carriages, and persons suspected of possessing stolen goods. In this country, in an effort to prevent abuses, such authority was severely restricted by enactment of the fourth amendment which provides that persons shall be free from unreasonable searches and seizures and that no warrant shall issue except upon probable cause. As the law of search and seizure evolved, however, the necessity of a warrant was dispensed with in certain instances,[2] provided there was probable cause.[3]

Probable cause exists when the facts and circumstances within the arresting officer's knowledge are sufficient to cause a man of reasonable caution to believe that an offense has been or is being committed.[4] Hence, there must be a more than common rumor, mere suspicion, or even strong reason to suspect.[5] The requirement is founded upon the belief that it provides the best compromise between effective law enforcement and the individual's right to privacy and security. "Requiring more would unduly hamper law enforcement. To allow less, would be to leave law-abiding citizens at the mercy of the officers' whim or caprice."[6]

Query, in light of fourth amendment requirements, would a search and seizure conducted with less than probable cause be a *priori* unreasonable and therefore unconstitutional? The Supreme Court has held that an unreasonable search and seizure is unlawful and that evidence obtained therefrom is inadmissible in both federal[7] and state[8] courts. However, the Court has never established a "fixed formula"

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[1] Lawrence v. Hedger, 3 Taunt 14, 128 Eng. Rep. 6 (C.P. 1810); METROPOLITAN POLICE ACT OF 1839, 2 & 3 Vict. ch. 47 & 66; 2 M. HALE, PLEAS OF THE CROWN 89, 96-97 (Amer. ed. 1847); 2 W. HAWKINS, PLEAS OF THE CROWN 122, 129 (6th ed. 1777).

[2] Warden v. Hayden, 387 U.S. 294 (1967) (police in hot pursuit of a felon); Stoner v. California, 376 U.S. 483 (1964) (defendant consents); Henry v. United States, 361 U.S. 98 (1959) (incident to a lawful arrest); Husty v. United States, 282 U.S. 694 (1931) (the object searched is a vehicle which could be easily removed); State v. Quinn, 111 S.C. 174, 97 S.E. 62 (1918) (contraband can be seized without a search).

[3] *See, e.g.*, Carroll v. United States, 267 U.S. 132 (1925).

[4] Brinegar v. United States, 338 U.S. 160, 175-76 (1949).

[5] *Id.* at 175; Henry v. United States, 361 U.S. 98, 101 (1959).

[6] Brinegar v. United States, 338 U.S. 160, 176 (1949).

[7] Weeks v. United States, 232 U.S. 383 (1914).

[8] Mapp v. Ohio, 367 U.S. 643 (1961).

defining just what constitutes a reasonable search or seizure and has never determined whether probable cause is an absolute prerequisite of a reasonable search.[9] By 1960, federal courts[10] were suggesting that officers could, with less than probable cause, temporarily detain a suspect to perform routine interrogations, while several state courts[11] had held that probable cause was not essential to every detention. Recently, other states have enacted statutes authorizing stop and frisk on reasonable suspicion.[12] These courts and legislatures have balanced the social utility of an admittedly valuable police tool against the extent to which individual privacy is invaded, and have concluded that a limited detention and frisk serves an essential function in the area of law enforcement.[13] On the other hand, some writers have suggested that allowing any type of search and seizure with less than probable cause is both unwise and unconstitutional.[14]

In the recent New York case of *People v. Rivera*[15] a detective observed two men who appeared to be "casing" a bar and grill located in a high crime rate area. The officer approached the men, and upon conducting a frisk, he discovered a weapon. The New York Court of Appeals held the weapon to be admissible evidence. Although the court refused to give the subsequently enacted New York Stop and Frisk Law retroactive application,[16] it did hold that the police practice

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[9] *See* Ker v. California, 374 U.S. 23, 31-32 (1963).

[10] United States v. Vita, 294 F.2d 524, 530 (2d Cir. 1961), *cert denied*, 369 U.S. 823 (1962); United States v. Bonanno, 180 F. Supp. 71, 78 (S.D.N.Y. 1960).

[11] People v. Hennenman, 367 Ill. 151, 10 N.E.2d 649 (1937); Commonwealth v. Lehan, 347 Mass. 197, 196 N.E.2d 840 (1964).

[12] UNIFORM ARREST ACT §§ 2-3 (1965), allows a police officer to detain a person for two hours if he "fails to identify himself or explain his actions to the satisfaction of the officer," and further authorizes the officer to search such persons for dangerous weapons when the officer has "reasonable grounds to believe that he is in danger." *See also* DEL. CODE ANN. tit. 11, §§ 1902, 1903 (1953) (UNIFORM ARREST ACT adopted in its entirety); MASS. GEN. LAWS ANN. ch. 41, § 98 (Supp. 1967). (UNIFORM ARREST ACT adopted for night time activity); N.H. REV. STAT. ANN. § 594:2,3 (1955); N.Y. CODE CRIM. PROC. § 180-a (McKinney Supp. 1966); R.I. GEN. LAWS ANN. §§ 12-7-1 to -2 (1956) (UNIFORM ARREST ACT adopted in its entirety).

The few cases which have arisen under the Act have upheld its constitutionality. De Salvatore v. State, 52 Del. 550, 163 A.2d 244 (1960); Commonwealth v. Lehan, 347 Mass. 197, 196 N.E.2d 840 (1964); Kavanaugh v. Stenhouse, 93 R.I. 252, 174 A.2d 560 (1961).

[13] The reader can easily think of a variety of situations where police action is essential although no probable cause exists. For examples see 3 CRIM. L. BULL. 597, 600-601 (1967). For an example of the balancing process see Camara v. Municipal Court, 387 U.S. 523, 534, 536-537 (1967).

[14] *See* Justice Fuld's dissenting opinions in People v. Rivera, 14 N.Y.2d 441, 201 N.E.2d 32, 252, N.Y.S.2d 458 (1964), *cert. denied*, 379 U.S. 978 (1965), and in People v. Pugach, 15 N.Y.2d 65, 204 N.E.2d 176, 255 N.Y.S.2d 833 (1964), *cert. denied*, 380 U.S. 936 (1965); Brief, *The Constitutional Arguments Against "Stop and Frisk,"* 3 CRIM. L. BULL. 441 (1967); Schoenfeld, *The 'Stop and Frisk' Law is Unconstitutional*, 17 SYRACUSE L. REV. 627 (1966).

[15] 14 N.Y.2d 441, 201 N.E.2d 32, 252 N.Y.S.2d 458 (1964), *cert. denied*, 379 U.S. 978 (1965).

[16] N.Y. CODE CRIM. PROC. § 180-a (McKinney Supp. 1966), was inapplicable since, although the case was decided subsequent to the effective date of the New York law, the events of *Rivera* occurred some two years prior to that date.

of stopping suspicious persons and inquiring about their activity was authorized under common law, and that for his own protection, the officer could frisk the suspect for weapons. *Rivera* set the stage for three Supreme Court decisions handed down this past term — *Terry v. Ohio*[17] and the companion cases of *Sibron v. New York* and *Peters v. New York*.[18]

TERRY, SIBRON AND PETERS

In *Terry*, a case involving facts strikingly similar to *Rivera*, a police officer observed the defendants acting in a manner which indicated that they contemplated criminal activity.[19] The officer approached the men, identified himself and asked their names. When the men "mumbled something" in response to his inquiries, the officer grabbed Terry and "patted-down" his outer clothing. The frisk revealed that Terry had concealed a weapon in his coat pocket. The weapon was confiscated and the defendant was subsequently charged with and convicted of possessing a concealed weapon. The defendant appealed the denial of his motion to suppress the evidence on grounds that it was illegally seized. The Supreme Court granted certiorari and affirmed the conviction in a very limited holding.

> [W]here a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous; where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries; and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him. Such a search is a reasonable search under the Fourth Amendment, and any weapons seized may properly be introduced in evidence against the person from whom they were taken.[20]

In both *Sibron* and *Peters*, the Court declined to decide the "facial constitutionality" of the New York Stop and Frisk Law. Instead, the Court looked to the specific facts of each case to determine the reasonableness of the police action in light of the fourth amendment.

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[17] 88 S. Ct. 1868 (1968).
[18] 88 S. Ct. 1889 (1968).
[19] While patrolling a downtown area in Cleveland at 2:30 p.m., the officer saw defendants standing on a corner. The men began to take turns walking up the street, pausing to look in a store window and then returning to the other partner. They did this approximately six times apiece. At one point a third person joined the two and then left again. The two original suspects left the scene a few minutes later and rejoined the third party a few blocks away, at which point the officer intercepted them. 88 S. Ct. at 1871, 1872.
[20] 88 S. Ct. at 1884-1885.

In *Peters*, an off-duty police officer observed two men outside his apartment; he believed they were attempting a burglary. As the officer attempted to stop them, the two men ran. He pursued and caught Peters, and, while frisking him for weapons, he felt what might have been a weapon. The officer confiscated the object and discovered that it was a packet of burglar tools.[21]

Peters was charged and convicted of possessing burglary tools under circumstances evincing an intent to employ them in the commission of a crime. The lower courts sustained the conviction on the ground that "reasonable suspicion" under the New York Stop and Frisk law justified the detention and the frisk. The Supreme Court, however, held that "for purposes of the Fourth Amendment, the search was properly incident to a lawful arrest"[22] since the officer, prior to the search, had *probable cause* to believe that the defendant was attempting a burglary. Moreover, the Court found that the search was reasonable under the fourth amendment since only a limited frisk was conducted and the officer did not reach into the defendant's pocket until he had reason to believe a weapon might be concealed therein.

In *Sibron*, a police officer had observed the defendant in the company of known narcotics addicts for several hours, but had neither seen nor heard anything which would indicate that the defendant was involved in criminal activity. Notwithstanding, the officer approached the defendant and remarked, "You know what I am after," whereupon Sibron reached into his pocket. According to the testimony accepted by the Court, the officer simultaneously reached into the defendant's pocket and withdrew a packet of narcotics. Sibron was charged with and convicted of illegally possessing narcotics, but the Supreme Court reversed, holding the narcotics to be inadmissible evidence because of the unreasonable intrusion.

> The inference that persons who talk to narcotics addicts are engaged in the criminal traffic of narcotics is simply not the sort of reasonable inference required to support an intrusion by the police upon an individual's security.[23]

The Court recognized that, had the officer been in fear of his life, a search and seizure may have been justified under *Terry*, but the Court ruled that the suspect's contact with narcotics addicts did not give rise to reasonable fear of life or limb. Even had such fear existed, the Court went on, the scope of the search was excessive as there was no general "pat-down"; rather, the officer reached directly into Sibron's pocket without reasonable suspicion that a weapon was concealed therein.

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[21] For detailed facts see 88 S. Ct. at 1895.
[22] 88 S. Ct. at 1904.
[23] 88 S. Ct. at 1902.

Some students of criminal procedure may consider these three cases to be a reversal of the recent Supreme Court trend sharply limiting the permissive range of law enforcement procedure.[24] However, it may be argued that the results in these cases were foreseeable in light of (1) recent state legislative enactments and judicial decisions sanctioning stop and frisk practices; (2) certain congressional opposition[25] to recent decisions of the Supreme Court which "protect" criminals; (3) the substantial increase in crime and violence; and (4) the unavoidable necessity in many instances of using stop and frisk as a police tool. The full impact of the decisions, however, is unclear since the Court limited its holdings to the very narrow fact situations posed in each individual case. Consequently, the Court left unanswered some vital questions such as: Is a stop or detention with less than probable cause permitted? If so, under what circumstances will such a stop be allowed? If a stop is sanctioned, how is it to be distinguished from an arrest? What constitutes a reasonable stop or frisk? Is contraband or other evidence found while frisking for weapons admissible? Is a detention prior to or during a frisk a custodial situation requiring *Miranda* warnings?

THE STOP

Is a Detention Founded Upon Less Than Probable Cause Judicially Sanctioned?

It is crucial to recognize at the outset that none of the instant cases expressly authorized a stop with less than probable cause. In *Terry* the Court held that where an officer is investigating suspicious conduct and believes the suspect to be dangerously armed, the officer may frisk him; in *Sibron,* the Court found that there was not sufficient reasonable inference that criminal activity was afoot to justify the stop; and in *Peters,* the Court ruled that the officer had *probable cause to arrest* the suspect prior to the search, despite the fact that the New York Court of Appeals based its conviction on a stop justified by reasonable suspicion. Moreover, the Court in *Sibron* and *Peters* expressly refused to consider the right to stop on reasonable suspicion granted by the New York statute. Thus, it appears that the Court intentionally avoided the issue of whether police can detain suspects on less than probable cause. This extremely important question was squarely presented in *Wainwright v. New Orleans*[26] when the Court asked to consider

> [W]hether police, seeing a pedestrain who fits the description of a person suspected of murder, may accost the pedestrian

[24] *E.g.,* United States v. Wade, 388 U.S. 218 (1967); Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964); Malloy v. Hogan, 378 U.S. 1 (1964); Mapp v. Ohio, 367 U.S. 643 (1961).

[25] The CRIME CONTROL ACT, Pub. L. No. 90-351 (1968), attempts to limit some Court decisions such as *Miranda.*

[26] 248 La. 1097, 184 So. 2d 23 (1966), *cert. denied,* 88 S. Ct. 2243 (1967).

> and stop him; and when and to what extent is the accosted person justified in refusing to cooperate with the efforts of the police to establish that he is or is not the person whom they seek.[27]

The Court initially granted certiorari,[28] but later dismissed the writ as improvidently granted, thereby effectively avoiding the issue.

Certainly, in the not too distant future, the Court will be called upon to determine unequivocally whether a police officer can stop or detain a suspect on less than probable cause. There are several indications that, when confronted with the issue, the Court will allow such a detention. The most obvious indicant is Justice Harlan's concurring opinion in *Terry* wherein he attempts to point out that the majority opinion did in fact sanction a stop or detention founded upon reasonable suspicion.[29] Furthermore, to the extent that a frisk necessarily entails restraint, the Court approved a detention. The detention, however, was predicated upon the same requisites as was the frisk, *i.e.*, reasonable suspicion that criminal activity was afoot *and* a reasonable belief that the suspect was armed or dangerous. It is possible that when the Court is eventually confronted with a stop situation in which no frisk is involved, it may dispense with the requirement that the officer reasonably believe that the suspect is armed. A policeman's primary function is to prevent and investigate criminal activity; his right to frisk for weapons in order to protect himself is only incidental to the proper performance of this function. It would seem that the officer's right to stop a suspicious individual in order to investigate his conduct would be at least as essential as the frisk even though he has no reason to suspect that the individual is armed at the initial stages of the encounter.

In speculating as to what will be the Court's attitude toward a stop with less than probable cause, it should also be noted that the Court stated that an officer, with less than probable cause, "may in appropriate circumstances and in an appropriate manner *approach a person*"[30] to investigate possible criminal behavior. The Court's use of the word "approach" does not necessarily mean a stop or detention; however, any other interpretation seems meaningless since surely an individual can "approach" any person on the public streets at any time without invading the legal rights of the person approached. If the restrictions the Court placed upon an "approach" were applied to a detention or stop they would make more sense and would more nearly coincide with Justice Harlan's interpretation of the majority opinion. Finally, the Court in *Terry* found the limited search (frisk) to be reasonable under the circumstances even though the officers did not have probable cause

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[27] 88 S. Ct. at 2244 (Fortas, J. concurring).
[28] 385 U.S. 1001 (1967).
[29] See 88 S. Ct. at 1886 (Harlan, J. concurring).
[30] 88 S. Ct. at 1880 (emphasis added).

because the invasion was less severe than in a full-blown search. This reasoning is equally applicable to a stop or detention since such a restraint is far less harsh than in an arrest.[31]

Stop v. Arrest.

Assuming that the Court will uphold a stop based upon reasonable suspicion, it may be necessary to distinguish between a stop and an arrest. Although such a distinction is not essential for fourth amendment requirements, it may be important because, depending upon the particular state law involved, a stop may be equated with an arrest. In *Terry* the Court attempted to minimize the distinction between the two,[32] but the difference cannot be ignored. The American Law Institute[33] and a majority of the states[34] have defined arrest as the apprehension of a person in order that he may be forthcoming to answer for an alleged crime. There are, however, a minority of states which hold that an arrest is a mere detention or any interference with one's freedom of movement.[35] The latter view may be more realistic considering that a detention by police is rarely voluntary due to the suspect's ignorance of his rights or his fear of or respect for the officer. Indeed, the officer may not allow the suspect to leave at will during questioning.[36] Therefore, it would appear that a defense counsel in a minority jurisdiction could avoid the entire issue of whether a stop and frisk was reasonable by showing that the defendant was detained, thereby constituting an arrest which would require probable cause.[37] This would be a valid

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[31] When arrested, a person is booked, photographed, fingerprinted, held over for an arraignment and preliminary hearing. Moreover, a permanent record of the arrest is made which will follow him through life even if he is aquitted of the charge. A detained person is subject to none of this.

[32] 88 S. Ct. at 1878.

[33] ALI CODE OF CRIMINAL PROCEDURE § 18 (1931).

[34] Cornish v. State, 215 Md. 64, 137 A.2d 170 (1957); Commonwealth v. Lehan, 347 Mass. 197, 196 N.E.2d 840 (1964). *See, e.g.*, United States v. Vita, 294 F.2d 524 (2d Cir. 1961), *cert. denied*, 369 U.S. 823 (1962); Patterson v. United States, 192 F.2d 631 (5th Cir. 1951), *cert. denied*, 343 U.S. 951 (1952). *See generally* Leagre, *The Fourth Amendment and the Law of Arrest*, 54 J. CRIM. L.C. & P.S. 393 (1963); Comment, *Probable Cause Held Not Requisite for Stop and Frisk*, 39 N.Y.U. L. REV. 1093, 1096 (1964); RESTATEMENT (SECOND) OF TORTS § 112 (1965).

[35] United States v. Festa, 192 F. Supp. 160 (D. Mass. 1960); State v. Harris, 265 Minn. 260, 121 N.W.2d 327 (1963); State v. Sullivan, 65 Wash. 2d 47, 395 P.2d 745 (1964).

[36] Where force is used to detain a suspect it would be difficult not to consider the act an arrest. *See* People v. Lopez, 253 Cal. App. 431, 61 Cal. Rptr. 605 (1967); Wainwright v. New Orleans, 248 La. 1097, 184 So. 2d 23 (1966), *cert. denied*, 88 S. Ct. 2243 (1967). In the regulations issued by the New York State Combined Council of Law Enforcement Officials, the council states: "If a suspect refuses to stop, the officer may use reasonable force, but only by use of his body, arms and legs. He may not make use of a weapon or nightstick in any fashion." NEW YORK COUNCIL OF LAW ENFORCEMENT REGULATIONS FOR ENFORCEMENT OF NEW YORK LAWS 368 (1964). In the future the Supreme Court may allow stops on reasonable suspicion, but may prohibit the use of force to so detain. The Court may in fact distinguish a stop from a detention on the basis that a detention implies force and a stop does not. In this article the terms have been used synonomously as such a distinction would seem to be too academic.

[37] In Henry v. United States, 361 U.S. 98, 103 (1959), the Court held that the

argument in cases involving arrests by federal as well as state officers since, in the absence of an applicable federal statute, the lawfulness of an arrest is determined by reference to state law, insofar as it does not violate the proscriptions of the fourth amendment.[38]

The Reasonableness Requirement.

Assuming that the Court will ultimately approve a stop with less than probable cause and that such detention is determined to be something less than an arrest, it must be determined whether the particular detention is reasonable under the fourth amendment. The reasonableness requirement involves a process of balancing the individual's right to privacy and security with society's interest in protecting itself from criminals.[39] The Court, however, has never established a talismanic test to determine when a search or seizure is or is not reasonable. Indeed, guidelines as to reasonable conduct were conspicuously lacking in *Terry*.[40] Consequently, courts will have to turn to precedent established in their own and other jurisdictions in order to determine what constitutes a reasonable stop.

In *Terry* the Court emphasized that a combination of facts may lead to reasonable suspicion of criminal activity whereas one particular fact alone would not.[41] The vicinity in which the suspect is found is a prime consideration,[42] especially when the suspect fits the description

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mere stopping of an automobile by officers was an arrest, and, consequently, mere suspicion was not enough to make the stop lawful. In United States v. Mitchell, 179 F. Supp. 636 (D.D.C. 1959), the court said that the detaining of a suspect who was hailing a taxi was not an arrest, but that the officers request for the suspect to accompany him to a police call box a short distance away, did constitute an arrest. This was in spite of the fact that the officer had explicitly told the defendant that he was not under arrest. The case was dismissed for lack of probable cause.

[38] Ker v. California, 374 U.S. 23, 34 (1963); United States v. Di Re, 332 U.S. 581, 589 (1948). Although outside the scope of this article, a further issue raised is whether the higher standards set by the states governing the time arrest occurs, the application of *Miranda* warnings, etc. apply to cases which are removed to the federal courts.

[39] Terry v. Ohio, 88 S. Ct. 1868, 1879 (1968); Camara v. Municipal Court, 387 U.S. 523, 534, 536-537 (1967). This process of balancing of interests is similar to that used in other areas of the law. The first amendment, for instance, guarantees freedom of speech, but it does not give a person the right to intentionally defame another, to utter obscenities publicly, or to falsely shout fire in a crowded theater.

[40] What, for instance, are "specific and articulable facts which taken together with rational inferences from those facts reasonably warrant [an] intrusion"? 88 S. Ct. at 1880. However, Justice Harlan, in his concurring opinion, does make some attempt to define reasonable conduct.

[41] 88 S. Ct. at 1880.

[42] In People v. Martin, 46 Cal. 2d 106, 293 P.2d 52 (1956), the court said (although there were other facts justifying reasonable suspicion) the mere fact that two men were parked in a lovers lane at night was sufficient to justify investigation. Such dicta would probably be violative of the *Terry* doctrine that a combination of facts is usually necessary to create reasonable suspicion. The New York Stop and Frisk Law also prohibits an officer from stopping just any person who happens to be in the area.

of a burglar in the area[43] or when the vicinity has a high crime rate.[44] The nature of the area — whether it is industrial, commercial, or residential — has also been considered.[45]

A stronger case for detention exists when the police can link a suspect with a known crime.[46] An informer's tip,[47] even when anonymous,[48] may create reasonable suspicion of criminal activity. Yet, many such tips may be unreliable and therefore insufficient. An officer's knowledge of the suspect's prior criminal activity has been held sufficient to justify a stop;[49] under what seems to be the better view, a stop should not be permitted on that basis alone.[50] Courts have also held that after dark, otherwise normal conduct may create reasonable suspicion.[51] In addition, it would seem that the necessity of immediate action should certainly be considered in the reasonableness of any stop.[52]

Not only the circumstances justifying the stop, but also the duration and the amount of force used, if any, should be reasonable. If the period of detention is excessive, it may constitute an arrest. Police should be allowed to detain only long enough to ask the suspect for his name, address, and a brief explanation of his activity. In cases where the courts have upheld stops lasting two[53] or even nine[54] hours, the detention would seem to be unreasonable. Moreover, it is arguable that the Supreme Court may never permit the police to stop on less

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[43] Commonwealth v. Hicks, 209 Pa. Super. 1, 223 A.2d 873 (1966).

[44] *See, e.g.*, People v. Rogers, 241 Cal. App. 2d 384, 50 Cal. Rptr. 559 (1966); People v. Stewart, 189 Cal. App. 2d 176, 10 Cal. Rptr. 879 (1961); State v. Freeland, 255 Iowa 1334, 125 N.W.2d 825 (1964) (the officer was aware of house breakings in the area); State v. Lowry, 95 N.J. Super. 307, 230 A.2d 907 (1967).

[45] People v. Beverly, 200 Cal. App. 2d 119, 122, 19 Cal. Rptr. 67, 69 (1962) (officers saw suspect coming out of a nonresidential area at a time of evening when activity usually had ceased); People v. Cassone, 20 A.D.2d 118, 245 N.Y.S.2d 843 (App. Div. 1963), *aff'd*, 14 N.Y.2d 798, 251 N.Y.S.2d 33, *cert. denied*, 379 U.S. 892 (1964) (early on a holiday morning in a commercial area, several persons were seen loading what appeared to be a heavy object into a car; it was a safe).

[46] United States v. McKendrick, 266 F. Supp. 718 (S.D.N.Y. 1967); Wilson v. State, 186 So. 2d 208 (Miss. 1966); Commonwealth v. Hicks, 209 Pa. Super. 1, 7, 231 A.2d 317, 322 (1966).

[47] State v. Freeland, 255 Iowa 1334, 125 N.W.2d 825 (1964).

[48] Busby v. United States, 296 F.2d 328 (9th Cir. 1961), *cert. denied*, 369 U.S. 876 (1962); State v. Zupan, 155 Wash. 80, 283 P. 671 (1929) (annonymous tip and suspicious conduct).

[49] People v. Perez, 243 Cal. App. 2d 528, 52 Cal. Rptr. 514 (1966) (the officer knew suspect was a parolee); People v. Currier, 232 Cal. App. 2d 102, 42 Cal. Rptr. 562 (1965); People v. Brooks, 234 Cal. App. 2d 662, 44 Cal. Rptr. 661 (1965) (the officer suspected the individual to be a narcotics offender).

[50] Kelly v. United States, 298 F.2d 310 (D.C. Cir. 1961); N.Y. CODE CRIM. PROC. § 180-a A(1) (McKinney Supp. 1966).

[51] United States v. Thomas, 250 F. Supp. 771, 785 (S.D.N.Y. 1966); Gross v. State, 390 P.2d 220 (Alas.), *cert. denied*, 379 U.S. 859 (1964) (suspect drove away from side of building at night with his lights off). However, it would seem that a person walking down the street at 7:00 p.m. would not create sufficient suspicion to justify a stop despite a slight bulge in his coat. People v. Jones, 176 Cal. App. 2d 265, 1 Cal. Rptr. 210 (1959).

[52] Sibron v. New York, 88 S. Ct. 1889, 1907 (1968) (Harlan, J. concurring).

[53] Kavanagh v. Stenhouse, 93 R.I. 252, 174 A.2d 560 (1961).

[54] United States v. Vita, 294 F.2d 524 (2d Cir. 1961), *cert. denied*, 369 U.S. 823 (1962).

than probable cause if force is necessary to consummate the stop. This is suggested in *Sibron* where the Court indicated that it was uncertain as to whether some of the activities sanctioned by the New York Stop and Frisk Law (one section of the law provides that an officer may use bodily force to detain) are within the spirit of the fourth amendment.[55] Yet the Court recently declined to review that very question when it was presented in *Wainwright v. New Orleans.*[56]

Sanctioning a stop based on less than probable cause may adversely affect the rights of defendants to object to the admissibility of incriminating statements made as a product of the detention.[57] Under the exclusionary rule announced in *Wong Sun v. United States,*[58] verbal evidence resulting from an unlawful arrest must be excluded as the fruit of police illegality. Thus, if a stop is permitted with less than probable cause, it would appear that a court could, in cases involving a lawful stop, admit into evidence statements which would have been inadmissible under the *Wong Sun* rule.

THE FRISK

Reasonableness

If an "approach" or a stop is determined to be illegal, a subsequent frisk would be *a priori* illegal, and any evidence obtained thereby would be inadmissible.[59] However, where the events preceding the officer's immediate contact with the suspect are constitutionally sanctioned and the officer "has reason to believe that he is dealing with an armed and dangerous individual,"[60] the officer may conduct a limited frisk for weapons.

Under what circumstances does an officer have reason to believe he is dealing with an armed and dangerous individual? In *People v. Rivera*[61] the court said, "the answer to the question propounded by a policeman may be a bullet; in *any* case the exposure to danger could be very great." (emphasis added). This statement, if taken literally, sanctions a frisk whenever a suspect is detained.[62] *Terry* cannot be so broadly construed. Granted, when an individual is suspected of a violent crime such as burglary[63] or murder,[64] the officer would have reason to believe the suspect may be armed. It seems clear, however,

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[55] 88 S. Ct. at 1901 n.20.
[56] 248 La. 1097, 184 So. 2d 23 (1966), *cert. denied,* 88 S. Ct. 2243 (1967).
[57] This assumes *Miranda* does not apply. The effect of *Miranda* will be treated in depth *infra.*
[58] 371 U.S. 471 (1963).
[59] Harlan, J. concurring in *Terry,* 88 S. Ct. at 1886, adheres to this concept.
[60] Terry v. Ohio, 88 S. Ct. 1868, 1883 (1968).
[61] 14 N.Y.2d 441, 446, 261 N.E.2d 32, 35, 252 N.Y.S.2d 458, 463 (1964), *cert. denied,* 379 U.S. 978 (1965).
[62] Sibron v. New York, 88 S. Ct. 1889, 1903 (1968).
[63] Terry v. Ohio, 88 S. Ct. 1868 (1968); People v. Jones, 176 Cal. App. 2d 265, 1 Cal. Rptr. 210 (1959).
[64] People v. Schader, 62 Cal. 2d 716, 401 P.2d 665, 44 Cal. Rptr. 193 (1965).

that some crimes would not give rise to fear for life or limb. For example it is questionable whether suspicion of possession of narcotics creates a "substantial likelihood" that the suspect is armed.[65] Nor is it likely that a prostitute or a "bookie" would be carrying a weapon. Suspecting a minor of possessing alcoholic beverages would not justify a frisk for weapons;[66] nor should suspicion of vagrancy warrant such a search.

In a recent decision, the Court of Appeals for the District of Columbia held that a *full-blown search* could be instituted upon an *arrest* for vagrancy.[67] This case raises a serious question in light of *Terry* — do the reasonableness limitations placed upon a frisk incident to a lawful "approach" apply equally to a search incident to a lawful arrest? The scope of a search incident to a lawful arrest has been the subject of much controversy. In *Terry* the Court emphasized that any search reasonable at its inception may violate the fourth amendment by virtue of its intensity and scope, and that the scope of the search must be strictly tied to and justified by the circumstances which rendered its initiation permissible.[68] In another recent opinion,[69] the Supreme Court indicated that a general search of an automobile incident to an arrest for a traffic offense might be unconstitutional. Certainly an arrest for such minor offenses as vagrancy or traffic violations cannot be used as a pretext for an extensive search of the person or his automobile;[70] furthermore, even where the arrest is made in good faith, but the only crime which the police have probable cause to suspect is vagrancy or a traffic violation, a full-blown search would be unreasonable and therefore violative of the fourth amendment. On the other hand, if the arresting officer subsequently becomes aware of evidence without a search, it would seem unreasonable to deny the officer the right to seize such evidence even though it is not related to the original cause for the arrest.

A further restriction on the frisk is that it must be reasonably related to the circumstances which justified the interference in the first instance.[71] Since the purpose of a frisk is to locate and seize dangerous weapons, it must be limited to running one's hands over the suspect's outer clothing.[72] The officer can then confiscate any weapons he finds.

An interesting problem may arise if, based upon independent information, an officer reasonably believes that a suspect is carrying a

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[65] Sibron v. New York, 88 S. Ct. 1889, 1907 (1968).
[66] People v. Simon, 45 Cal. 2d 645, 290 P.2d 531 (1955).
[67] Worthy v. United States, 3 CRIM. L. REPORTER 2448 (Aug. 28, 1968).
[68] 88 S. Ct. at 1878.
[69] Dyke v. Taylor Implement Mfg. Co., 88 S. Ct. 1472 (1968).
[70] *See* United States v. Lefkowitz, 285 U.S. 452 (1932); Brinegar v. State, 97 Okla. Crim. 299, 262 P.2d 464, 479 (1953); State v. Michaels, 60 Wash. 2d 638, 374 P.2d 989 (1962).
[71] 88 S. Ct. at 1878, *citing* Warden v. Hayden, 387 U.S. 294, 310 (1967) (Fortas, J., concurring).
[72] 88 S. Ct. at 1884; People v. Simon, 45 Cal. 2d 645, 290 P.2d 531, 534 (1955).

weapon and is reasonably certain as to the exact location of the weapon on the suspect's person. In such a case is the officer required to go through the mechanics of a "pat-down" before he can seize the weapon? In *People v. Toggart*,[73] a pre-*Terry* decision, the New York Court of Appeals answered in the negative. In that case an officer was anonymously informed that a youth who had a gun concealed in his coat pocket was standing on a street corner among a group of children. The officer, upon arriving at the scene, observed an individual who matched the informant's description, approached the suspect, and immediately reached into the suspect's coat pocket and withdrew the gun. In *Sibron* the Court suggested that many aspects of the New York statute under which *Taggart* was decided may not meet fourth amendment standards.[74] Consequently, the Court may reject a *Taggart*-type search should it decide a similar case in the future. It would seem, however, that if information, regardless of its source, is as reliable as a frisk in ascertaining whether an individual is dangerously armed and the exact position of the concealed weapon, a seizure of the weapon would be no less reasonable than if a general pat-down had been conducted.

The New York Stop and Frisk Law provides that any bag, brief case, or article of a like nature should not be searched, since the officer's safety can be secured simply by placing the article out of the suspect's reach.[75] California has established this principle in case law.[76] Such a position provides for the *most* reasonable alternative to secure an officer's safety and, consequently, appears to be in accord with the fourth amendment.

Admissibility of Evidence

Under *Terry*, if an officer is searching for weapons, it is clear that, assuming the frisk itself is reasonable, any weapons uncovered are admissible in evidence against the suspect. It is equally clear under *Sibron* that if an officer is not searching for weapons, any evidence discovered by means of a frisk is inadmissible. The issue left unresolved by these cases is the admissibility of other evidence discovered while frisking for weapons. The facts in *Peters* presented the Court with an opportunity to rule on this question, but it declined to do so by finding that the officer had probable cause to arrest prior to the search. It is logical that if the stop and the frisk were reasonable by *Terry* standards, any evidence discovered while the officer in good faith searches for what might reasonably appear to be a weapon should be admissible.

[73] 20 N.Y.2d 335, 299 N.E.2d 581, 283 N.Y.S.2d 1 (1967).
[74] 88 S. Ct. at 1901 n.20.
[75] N.Y. CODE CRIM. PROC. § 180-a (McKinney Supp. 1966).
[76] People v. Mickelson, 59 Cal. 2d 448, 452, 380 P.2d 658, 660, 30 Cal. Rptr. 18 (1963).

There are, however, some strong competing policy arguments. One such argument is that unscrupulous police officers can testify that they were frisking for weapons and just happened to discover the contraband when, in fact, the quest for contraband was the initial intent of the officer. Such testimony may be accepted on its face for lack of unimpeachable countervailing testimony. Until the Court is inclined to render a decision clarifying the matter, the only alternative is to turn to those state courts which have ruled on the question. Some courts have held that once an officer who is frisking a suspect feels what he reasonably believes to be a weapon, he has probable cause to make an arrest.[77] Under this line of reasoning, the officer could then arrest the suspect and contraband discovered during a search incident to that arrest would be admissible. It has also been held that if a suspect actively conceals something during a frisk for weapons, the officer may seize the concealed item, and it is admissible evidence even though it is not a weapon.[78] The rule in California seems to be that if contraband is discovered anytime during the general purview of the frisk, the officer need not ignore it, and the evidence is admissible.[79] On the other hand, a California court has held that a police officer cannot empty the pockets of a suspect merely because he feels an object which he reasonably believes to be a weapon.[80]

Application of Stop and Frisk to Vehicles

With the exception of customs and immigration searches,[81] probable cause has traditionally been required to stop and search an automobile.[82] However, in United States v. Bonanno,[83] the District Court for the Southern District of New York held that where police had set up a roadblock at the estate of a person who had been under police investigation and individuals leaving the estate who were unknown to the officers were detained and taken to a police substation for questioning, the action was neither unreasonable nor unlawful. In its decision the court stated that there is "no difference in principle between the detention of an individual

[77] People v. Rivera, 14 N.Y.2d 441, 201 N.E.2d 32, 252 N.Y.S.2d 458 (1964), *cert. denied*, 379 U.S. 978 (1965). *See* People v. Machel, 234 Cal. App. 2d 37, 44 Cal. Rptr. 126 (1965).

[78] People v. Lewis, 187 Cal. App. 2d 373, 9 Cal. Rptr. 659 (1960).

[79] People v. Martin, 46 Cal. 2d 106, 293 P.2d 52 (1956); People v. Blodgett, 46 Cal. 2d 115, 293 P.2d 57 (1956).

[80] People v. Martines, 228 Cal. App. 2d 245, 39 Cal. Rptr. 526 (1964).

[81] Witt v. United States, 287 F.2d 389 (9th Cir.), *cert. denied*, 366 U.S. 950 (1961); Murgia v. United States, 285 F.2d 14 (9th Cir. 1960), *cert. denied*, 366 U.S. 977 (1961); *see* Comment, *Border Searches — A Prostitution of the Fourth Amendment*, p. 457 infra.

[82] Carrol v. United States, 267 U.S. 132 (1925) (officers stopped and searched auto with probable cause to believe that suspects were illegally transporting liquor); Brinegar v. United States, 338 U.S. 160 (1949) (facts similar to *Carrol*).

[83] 180 F. Supp. 71 (S.D.N.Y. 1960).

on the street and the stoppage of a car, so long as there is no violence or highhandedness involved."[84]

Some recent cases have applied this doctrine, and a stop has been upheld where suspicious activity is involved,[85] or where the defendant and his car match the description in a burglary report.[86] However, driving slowly in pre-dawn hours should not justify a stop.[87]

More difficulty is encountered in determining the permissive scope of a vehicular search incident to a stop for a traffic violation.[88] Recently, the Arizona Supreme Court held that a search was justified during a stop for a traffic violation where the driver responded to police questions with evasive answers and evinced a nervous demeanor throughout the encounter.[89] When an individual is stopped for a traffic violation, the stop would usually seem to constitute an arrest rather than a detention. This again poses a problem (discussed *supra* page 429) as to whether the restrictions in regard to a frisk also apply to a search following a lawful arrest. The better reasoned decisions agree that a lawful arrest for a traffic violation does not in and of itself automatically render constitutional a contemporaneous search and seizure.[90] However, where the stop has been made in good faith and the evidence is in plain sight[91] or has been openly abandoned,[92] the courts have upheld the seizures. In these latter cases the courts face serious "dropsey" problems — that is, it is all too easy for a policeman to testify that the suspect abandoned the criminal evidence or that it was laying in plain sight when, in actuality, the evidence was confiscated in flagrant violation of fourth amendment rights. At the trial it is the policeman's word against the defendant's.

If, after the stop, the officer reasonably believes that the occupants of the vehicle may be armed and dangerous,[93] there would be adequate grounds to frisk them.[94] Whether the officer could search the car for

[84] *Id.* at 79. In its opinion the court established the following requisites for detaining automobiles on less than probable cause: (1) belief by the officer that a crime has been committed, (2) based on reasonable grounds, and (3) an absolute necessity for immediate investigatory activity.

[85] *See, e.g.*, People v. Beverly, 200 Cal App. 2d 119, 19 Cal. Rptr. 67 (1962).

[86] People v. King, 175 Cal. App. 2d 386, 346 P.2d 235 (1959).

[87] *But see* Wilson v. Porter, 361 F.2d 412 (9th Cir. 1966).

[88] United States v. Bhono, 256 F. Supp. 391 (S.D.N.Y. 1966).

[89] State v. Quintana, 92 Ariz. 267, 376 P.2d 130 (1962).

[90] Dyke v. Taylor Implement Mfg. Co., 88 S. Ct. 1472 (1968) (dictum); State v. Taylor, 2 Ariz. App. 314, 408 P.2d 418 (1965); Brinegar v. State, 97 Okla. Crim. 299, 262 P.2d 464 (1953). *But cf.* Harverstick v. State, 196 Ind. 145, 147 N.E. 625 (1925); Tolliver v. State, 133 Miss. 789, 98 So. 343 (1923).

[91] Wilson v. Porter, 361 F.2d 412 (9th Cir. 1966); People v. Linden, 185 Cal. App. 2d 752, 8 Cal. Rptr. 640 (1960); People v. Murphy, 173 Cal. App. 2d 367, 343 P.2d 273 (1959).

[92] People v. Spicer, 163 Cal. App. 2d 678, 329 P.2d 917 (1958); People v. Battle, 12 N.Y.2d 866, 187 N.E.2d 793, 237 N.Y.S.2d 341 (1962).

[93] For instance, where the suspects are known criminals, acting suspiciously, or attempting to escape.

[94] Brinear v. State, 97 Okla. Crim. 299, 262 P.2d 464, 480 (1953) (the defendant was arrested at night after passing one truck in a no passing zone and crowding another off the road).

weapons, however, is questionable. Although an automobile cannot be removed from the suspect's presence as easily as a briefcase, the officer would have no reason to believe he was in any danger once he had frisked the suspect outside the car. Presumably once he was released, the suspect, upon reentering the vehicle, would have no reason to attack the officer. Thus, under *Terry* standards, the situation would have to be very compelling to justify a search of the automobile for weapons.

MIRANDA LIMITATIONS ON STOP AND FRISK

The Court in *Terry* did not consider whether the long arm of *Miranda*[95] would reach out to affect the temporary detention involved in a stop and frisk situation.[96] In *Miranda* the Court held that a defendant must be advised of his constitutional rights before any information obtained from "custodial interrogation" can be admitted in evidence against him.[97] The Court defined "custodial interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise *deprived of his freedom of action in any significant way.*"[98] (emphasis added). The purpose of the *Miranda* warnings is to protect persons from incriminating themselves in the compelling atmosphere inherent in the process of in-custody interrogation.[99] However, the Court went on to state that "general-on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact finding process is not affected by our holding."[100]

It would seem that any responsive remark by the suspect during or subsequent to a *frisk* would, absent *Miranda* warnings, be inadmissible since the atmosphere would indeed be a compelling one. Likewise, if a stop is construed to be an arrest, the *Miranda* warnings certainly will be required.[101] Beyond this, however, *Miranda's* role is conjectural.[102] It would seem that a stop under certain circumstances would be every bit as "compulsive" as a police station interrogation. At least it can be argued that a detained person will feel prohibited from leaving the

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[95] Miranda v. Arizona, 384 U.S. 436 (1966).

[96] The effect of the CRIME CONTROL ACT, PUB. L. No. 90-351 (1968), upon *Miranda* has not been considered in this article since it only applies to federal officers and its constitutionality remains uncertain.

[97] 384 U.S. at 444.

[98] *Id.*

[99] *Id.* at 467.

[100] *Id.* at 477.

[101] See the discussion on the distinction between an arrest and a detention *supra* at 425.

[102] In Sibron v. New York, 88 S. Ct. 1889, 1901 n.20 (1968), the Court, in examining the New York Stop and Frisk Law, stated that they could not tell

> [W]hether the officer's power to 'demand' of a person an 'explanation of his actions' contemplates either an obligation on the part of the citizen to answer or some additional power on the part of the officer in the event of a refusal to answer, or even whether the interrogation following the 'stop' is 'custodial.'

presence of the officer. From reading *Miranda* one could infer that the warnings are not necessary in general fact finding situations whereas they are in *Terry*-type detentions where the initial objective of the officer will often be to link the suspect with criminal activity. The distinction between fact-finding and accusatorial detentions is often a narrow one and is complicated by the fact that an encounter may begin as one and evolve into the other. Chief Justice Warren observed in *Terry*:

> Street encounters between citizens and police officers are incredibly rich in diversity. They range from wholly friendly exchanges of pleasantries or mutually useful information to hostile confrontations of armed men involving arrests, or injuries, or loss of life. Moreover, hostile confrontations are not all of a piece. Some of them begin in a friendly enough manner, only to take a different turn upon the injection of some unexpected element into the conversation. Encounters are initiated by the police for a wide variety of purposes, some of which are wholly unrelated to a desire to prosecute for crime.[103]

In *People v. Reason*[104] the Supreme Court of New York County held that *Miranda* warnings applied to temporarily detained suspects as well as to persons accused of a crime. The defendants in that case admitted, after some questioning, that they had stolen certain articles which were found in their possession. The court concluded that these articles were unlawfully seized since they were fruits of a confession which was inadmissible under *Miranda*. Several federal [105] and state[106] courts, however, have held contra. The Arizona Supreme Court[107] has resolved the issue in a novel manner.

> We believe that the point where the warning must be given is when the two [reasonable ground to believe a crime has been committed and reasonable ground to believe the defendant has committed it] generally coincide, for from that point forward the police can be expected to pursue the case against the defendant with vigor. The police must have focused generally upon the crime so that they would have cause for arrest without a warrant. . . . The time for caution is when the arrest could be made. Everything prior to that time may reasonably be considered 'the general-on-the-scene questioning' which is permissible under *Miranda*.[108]

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[103] 88 S. Ct. at 1875.

[104] 52 Misc. 2d 425, 276 N.Y.S.2d 196 (Sup. Ct. 1966).

[105] Sciberras v. United States, 380 F.2d 732 (10th Cir. 1967) (warnings not necessary where only defendant's name was asked); Williams v. United States, 381 F.2d 20 (9th Cir. 1967) (no warnings necessary where defendants stopped their car of their own will and officers made only a routine border check); Arnold v. United States, 382 F.2d 4 (9th Cir. 1967) (warnings not necessary where defendant was asked what he was doing in a bank which was just burglarized).

[106] *See generally* Annot., 10 A.L.R.3d 1054 § 4 (Supp).

[107] State v. Telliz, 6 Ariz. App. 251, 431 P.2d 691 (1967).

[108] *Id.* at 696. *See* State v. Noriega, 6 Ariz. App. 428, 433 P.2d 281 (1968).

The court appears to be looking only to objective probable cause to determine when *Miranda* warnings are required rather than looking to the compelling atmosphere and the defendant's state of mind.

The question of *Miranda's* application to stop and frisk situations should hinge upon the point at which the citizen-police encounter takes on a "compelling atmosphere." Although recent decisions are otherwise, it would seem that such an atmosphere would develop early in the confrontation, since the basis for the stop is suspicion of criminal activity. This, by its nature, puts the suspect on the defensive at the very inception of the detention. On the other hand, it may be argued that requiring *Miranda* warnings may seriously hamper police investigation of suspicious activity since the suspect, after being given *Miranda* warnings; will be less likely to respond in such a way as to either dispel the officer's suspicion or justify further investigation.

Since it is not clear whether *Miranda* applies to stop and frisk situations, courts will have to develop their own rules governing safeguards for such encounters. The extent to which stop and frisk is limited by *Miranda* will depend, at least in part, upon the amount of freedom the courts wish to confer upon police activity at any particular time. At present the trend is against requiring *Miranda* warnings in such situations.

CONCLUSION

Stop and frisk practices have no doubt, at times led to abuse of minority groups in urban ghettos.[109] Indeed, it is contended by many that reasonable suspicion is too subjective a standard and that minority groups will be unable to protect themselves from overly suspicious officers, since such groups have little knowledge of their constitutional rights or lack financial resources to retain counsel in civil or criminal suits. In addition, community relations may be adversely affected by excessive encounters of this nature. It has been suggested[110] that abuses may be curbed by limiting the admissibility of evidence since "limitation upon the fruit to be gathered tends to limit the quest itself."[111] This solution

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[109] You know, I'm walking down the street, minding my own business, going someplace, you know, and they stop me and I say, 'What you want with me?' and they say, 'Come here!' and they want to talk to me, and I don't want to talk to them, you know. They just want to get to know you and all of that stuff, and I don't want to know them at all, you know. Los Angeles Times, July 20, 1967, at B. col. 1.
See Comment, *Stop and Frisk: Dilemma for the Courts,* 41 S. CAL. L. REV. 161, 162 (1967). N.Y. Times, Feb. 19, 1964, at 41, col. 1.

[110] See the dissent of Judge Van Voorhis in People v. Sibron, 18 N.Y.2d 603, 219 N.E.2d 196, 272 N.Y.S.2d 374 (1966). *See also* Schoenfeld, *The 'Stop and Frisk' Law Is Unconstitutional,* 17 SYRACUSE L. REV. 627, 640 (1966); Comment, *Probable Cause Held Not Requisite for Stop and Frisk,* 39 N.Y.U. L. REV. 1093, 1098 (1964).

[111] United States v. Poller, 43 F.2d 94 (2d Cir. 1930).

appears valid in view of the fact that the sole purpose of the frisk is to protect the officers or bystanders.

However, these fears and suggestions are not entirely warranted. Where abuses occur, the courts, by *Terry* standards, are required to hold that the evidence is inadmissible since the search and seizure is unreasonable. For instance, police would not be justified in detaining or harrassing Negroes who venture into all white districts[112] or other minority group members who have long hair or wear eccentric clothing.[113] There is no need to extend limitations upon admissibility of evidence to all cases of stop and frisk, both reasonable and unreasonable; where harrassment or confiscation of contraband, rather than an ultimate conviction, is the object of the stop or frisk, the inadmissibility of evidence will not prevent abuses.[114] The officer who is harrassing minority groups will continue to do so. To refuse to admit evidence obtained during a reasonable stop and frisk would be to conclude, in effect, that the search and seizure is legal but the evidence thereby obtained is illegal. Such is not the logic of the law.

There is reason to believe that *Terry* is another *Escobedo*.[115] There the Court handed down a purposely vague decision to test the wind — in certain places the language was sweeping, and in others it was narrow in a deliberate attempt to gain from the experience of the lower courts and to listen to public reaction. In *Terry*, a general principle has been laid forth with insufficient guidelines to precisely apply the standard. The Court's intention may have been to allow each lower court to establish its own guidelines within the spirit of the fourth amendment; however, *Terry* may be followed by a clarifying decision (just as *Escobedo* was followed by *Miranda*) establishing more definitive guidelines governing permissive police activities.

The courts, however, are not precluded from adopting workable rules governing arrests and searches and seizures so long as they are consistent with fourth amendment principles.[116] Even more effective, however, would be legislative guidelines and workable police policies. Despite the Supreme Court's less than enthusiastic reaction in *Sibron* to the New York Stop and Frisk Law,[117] it is an excellent attempt to establish reasonable and effective guidelines for stop and frisk procedures. Moreover, several farsighted police departments have developed comprehensive rules and regulations governing the conduct of field interrogation. For instance, training materials for the Oakland Police

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[112] TASK FORCE REPORT: THE POLICE 185 (1967).
[113] *Id.*
[114] See Chief Justice Warren's pertinent observations on this point in Terry v. Ohio, 88 S. Ct. 1868, 1876 (1968).
[115] 378 U.S. 478 (1964).
[116] Sibron v. New York, 88 S. Ct. 1889, 1902 (1968); People v. Rivera, 14 N.Y.2d 441, 448, 261 N.E.2d 32, 36, 252 N.Y.S.2d 458, 464 (1964), *cert. denied*, 379 U.S. 978 (1965); Ker v. California, 374 U.S. 23, 34 (1963).
[117] N.Y. CODE CRIM. PROC. § 180-a (McKinney Supp. 1966).

Department carefully describe the types of individuals who may be stopped;[118] the San Diego Police Department specifically forbids officers from forcefully restraining persons being questioned;[119] and the Tampa Police Department defines conditions under which a person may be searched.[120]

It is clear that the right of police to stop and frisk is essential to effective law enforcement. Such practices will conform with fourth amendment standards if the police are guided by the rule of reasonableness. Reasonableness, however, is a concept dramatically elusive of practical application; consequently, the Court in *Terry* has provided itself with several methods of severely restricting stop and frisk practices should they be used to oppress constitutionally guaranteed securities. Like the parents of young teenagers attempting to cope with newly discovered responsibilities, the Court may withdraw privileges granted in *Terry* should the police abuse them and the lower courts fail to appropriately chastize such abuse. The formulation of extensive guidelines by the police departments themselves and their enforcement by strict intradepartmental reprimands would be the most effective method of curtailing abuses. The ultimate survival of stop and frisk rests within the discretion of the police departments; extreme vigilance and prudence in the application of this discretion is fervently admonished.

[118] Oakland Police Dept., Departmental Training Bulletin, March 7, 1966.
[119] San Diego Police Dept., Field Interrogation, July 1965 at 41, 44.
[120] Tampa Police Dept., Training Bulletin, Vol. XII, no. 6, Dec. 10, 1962.