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"Street Encounters" and the Constitution: *Terry, Sibron, Peters, and Beyond*

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“STREET ENCOUNTERS” AND THE CONSTITUTION: *TERRY, SIBRON,* *PETERS, AND BEYOND*

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"STREET ENCOUNTERS" AND THE CONSTITUTION: *TERRY*, *SIBRON*, *PETERS*, AND BEYOND†

Wayne R. LaFave*

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.¹

I. STOP AND FRISK COMES OF AGE

IT has been only eight years since a leading criminal law scholar noted with dismay that the issue of "whether the police have the right to stop and question a suspect, without his consent, in the absence of grounds for an arrest" had been "largely ignored by commentators and dealt with ambiguously by most courts."² How times have changed! In the past few years, the police practice commonly and euphemistically referred to as "stop and frisk"³ has been a most popular topic in the law reviews,⁴ and has been dealt with by a

† Portions of this article are based upon a paper presented at Ann Arbor, Michigan, for the Institute of Continuing Legal Education program on "Criminal Law and the Constitution: The Expanding Revolution," on July 19, 1968.

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1. *Terry v. Ohio*, 392 U.S. 1, 13 (1968) (Chief Justice Warren).

2. Remington, *The Law Relating to "On the Street" Detention, Questioning and Frisking of Suspected Persons and Police Arrest Privileges in General*, 51 J. CRIM. L.C. & P.S. 386, 390 (1960).

3. The terms "stop" and "frisk" are used in this Article as convenient ways of referring to distinct police practices, and their use is not intended to suggest that the words themselves aid in resolving the difficult constitutional issues concerning these practices. See text accompanying note 66 *infra*.

4. See Abrams, *Constitutional Limitations on Detention for Investigation*, 52 IOWA L. REV. 1093 (1967); Bator & Vorenberg, *Arrest, Detention, Interrogation and the Right to Counsel: Basic Problems and Possible Legislative Solutions*, 66 COLUM. L. REV. 62 (1966); Kuh, *In-Field Interrogation: Stop, Question, Detention and Frisk*, 3 CRIM. L. BULL. 597 (1967); Kuh, *Reflections on New York's "Stop-and-Frisk" Law and Its Claimed Unconstitutionality*, 56 J. CRIM. L.C. & P.S. 32 (1965); LaFave, *Improving Police Performance Through the Exclusionary Rule—Part I: Current Police and Local Court Practices*, 30 MO. L. REV. 391, 427-55 (1965); LaFave, *Detention for Investigation by the Police: An Analysis of Current Practices*, 1962 WASH. U. L.Q. 331; Leagre, *The Fourth Amendment and the Law of Arrest*, 54 J. CRIM. L.C. & P.S. 393, 406-16 (1963); Oberman & Finkel, *Constitutional Arguments Against "Stop and Frisk"*, 3 CRIM. L. BULL. 441 (1967); Pilcher, *The Law and Practice of Field Interrogation*, 58

number of courts in a more forthright manner.⁵ This development reached its zenith last term when the Supreme Court for the first

J. CRIM. L.C. & P.S. 465 (1967); Reich, *Police Questioning of Law Abiding Citizens*, 75 YALE L.J. 1161 (1966); Reiss & Black, *Interrogation and the Criminal Process*, 374 ANNALS 47 (1967); Ronayne, *The Right To Investigate and New York's "Stop and Frisk" Law*, 33 FORDHAM L. REV. 211 (1964); Schoenfeld, *The "Stop and Frisk" Law Is Unconstitutional*, 17 SYRACUSE L. REV. 627 (1966); Schwartz, *Stop and Frisk (A Case Study in Judicial Control of the Police)*, 58 J. CRIM. L.C. & P.S. 433 (1967); Siegel, *The New York "Frisk" and "Knock-Not" Statutes: Are They Constitutional?*, 30 BROOKLYN L. REV. 274 (1964); Souris, *Stop and Frisk or Arrest and Search—The Use and Misuse of Euphemisms*, 57 J. CRIM. L.C. & P.S. 251 (1966); Stern, *Stop and Frisk: An Historical Answer to a Modern Problem*, 58 J. CRIM. L.C. & P.S. 532 (1967); Tiffany, *Field Interrogation: Administrative, Judicial and Legislative Approaches*, 43 DENVER L.J. 389 (1966); Younger, *Stop and Frisk: "Say It Like It Is"*, 58 J. CRIM. L.C. & P.S. 293 (1967); Wolbrette, *Detention for Questioning In Louisiana*, 39 TUL. L. REV. 69 (1964).

See also the student commentary appearing in *Recent Decision, Search and Seizure—Police Officer May Stop, Question and Frisk a Person on Reasonable Suspicion—Section 180-a of New York Code of Criminal Procedure Is Constitutional*, 31 ALBANY L. REV. 177 (1967); *Recent Decision, Right of Police Officer To Stop and Frisk a Suspect Held Constitutional—Evidence Obtained Thereby Is Admissible*, 33 BROOKLYN L. REV. 138 (1966); *Recent Decision, Common Law "Frisk"—Right Extended*, 31 BROOKLYN L. REV. 397 (1964); *Recent Decision, Frisk Distinguished From a Constitutional Search*, 31 BROOKLYN L. REV. 174 (1964); *Recent Case, Inclusion of Briefcase in "Frisk" Does Not Create a Constitutionally Protected Search*, 14 BUFFALO L. REV. 545 (1965); *Comment, Police Power To Stop, Frisk, and Question Suspicious Persons*, 65 COLUM. L. REV. 848 (1965); *Note, Stop and Frisk: A Perspective*, 53 CORNELL L.Q. 899 (1968); *Note, Stopping and Frisking a Suspect Without Grounds for Arrest: People v. Rivera*, 50 CORNELL L.Q. 529 (1965); *Case Note, New York "Stop and Frisk" Law—Seizure of Burglar's Tools and Narcotics Without Probable Cause for Arrest or Search Held Valid*, 35 FORDHAM L. REV. 355 (1966); *Recent Statute, New York Authorizes Police To "Stop-and-Frisk" on Reasonable Suspicion*, 78 HARV. L. REV. 473 (1964); *Note, Stop and Frisk in California*, 18 HASTINGS L.J. 623 (1967); *Decision, Right of Police To "Stop and Frisk"*, 10 N.Y.L.F. 410 (1964); *Note, Stop and Frisk: Police Protection or Police State*, 21 N.Y.U. INTRA. L. REV. 180 (1966); *Comment, Probable Cause Held Not Requisite for Stop and Frisk*, 39 N.Y.U. L. REV. 1093 (1964); *Comment, The Law of Arrest: Constitutionality of Detention and Frisk Acts*, 59 NW. U. L. REV. 641 (1964); *Note, Police Officers Have the Right To Stop and Question Individuals in the Absence of Probable Cause and, as an Incident to the Stopping, May Frisk or Search the Suspect as a Precautionary Measure*, 4 HOUSTON L. REV. 589 (1966); *Note, Stop and Frisk: Dilemma for the Courts*, 41 S. CAL. L. REV. 161 (1967); *Recent Decision, New York's "Stop and Frisk" Law Held Not Violative of the Fourth Amendment Despite Lack of "Probable Cause" Requirement*, 41 ST. JOHN'S L. REV. 610 (1967); *Legislation, The "No-Knock" and "Stop and Frisk" Provisions of the New York Code of Criminal Procedure*, 38 ST. JOHN'S L. REV. 392 (1964); *Recent Decision, Briefcase Within Limits of Permissible Personal Frisk*, 16 SYRACUSE L. REV. 685 (1965); *Note, Selective Detention and the Exclusionary Rule*, 34 U. CHI. L. REV. 158 (1966); *Comment, Constitutional Limitations on Pre-Arrest Investigations*, 15 UCLA L. REV. 1031 (1968); *Recent Decision, The Power To Stop and Frisk*, 1965 U. ILL. L.F. 119; *Note, "Stop and Frisk" and Its Application in the Law of Pennsylvania*, 28 U. PITT. L. REV. 488 (1967); *Note, Detention, Arrest, and Salt Lake City Police Practices*, 9 UTAH L. REV. 593 (1965); *Recent Decision, Unreasonable Searches and Seizures—Stop-and-Frisk Statutes*, 18 W. RES. L. REV. 1031 (1967); *Note, Stop and Frisk—Reasonable Suspicion: An Exception to Probable Cause*, 13 WAYNE L. REV. 449 (1967).

The subject has also received attention in several recent books; see, e.g., W. LAFAYE, *ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY* 344-47 (1965); W. SCHAEFER, *THE SUSPECT AND SOCIETY* 23-26, 40-43 (1967); L. TIFFANY, D. MCINTYRE, & D. ROTENBERG, *DETECTION OF CRIME* 5-94 (1967) [hereinafter *DETECTION OF CRIME*].

5. E.g., *People v. Mickelson*, 59 Cal. 2d 448, 380 P.2d 658, 30 Cal. Rptr. 18 (1963);

time directly confronted⁶ this issue in *Terry v. Ohio*,⁷ *Sibron v. New York*,⁸ and *Peters v. New York*.⁹

The practice of stop and frisk, of course, is by no means new. It is a time-honored police procedure for officers to stop suspicious persons for questioning and, occasionally, to search these persons for dangerous weapons. This is a distinct law enforcement technique which has characteristics quite different from other police practices such as arrest or search incident to arrest, and has long been viewed by the police in this way.¹⁰ It is curious, but perhaps understandable, that it has taken so long for the law and lawyers to respond to a practice which quite obviously presents "serious questions concerning the role of the Fourth Amendment in the confrontation on the street between the citizen and the policeman investigating suspicious circumstances."¹¹

In part, this long-standing disregard may be attributable to the fact that stop and frisk is what some commentators would call a "low-visibility" police procedure.¹² Although it has long been a matter of routine in every major police department in the country,

Commonwealth v. Lehan, 347 Mass. 197, 196 N.E.2d 840 (1964); *State v. Dilley*, 49 N.J. 460, 231 A.2d 353 (1967); *People v. Rivera*, 14 N.Y.2d 441, 201 N.E.2d 32, 252 N.Y.S.2d 458 (1964); *State v. Terry*, 5 Ohio App. 2d 122, 214 N.E.2d 114 (1966); *Commonwealth v. Hicks*, 209 Pa. Super. 1, 223 A.2d 873 (1966).

6. The Court avoided this issue on two prior occasions. In *Henry v. United States*, 361 U.S. 98 (1959), where F.B.I. agents stopped a vehicle in which suspects under surveillance were riding, the Government conceded that the legality of the stopping depended upon whether there were then grounds for arrest. The majority accepted this concession although the Chief Justice and Justice Clark took the position that there were adequate grounds for stopping the vehicle for investigation even if grounds for arrest were lacking. In *Rios v. United States*, 364 U.S. 253 (1960), police found the defendant in possession of narcotics after approaching the taxicab in which he was riding while it was stopped at a red light. The Court returned the case to the trial court for a determination of when the arrest was made, without passing on the Government's contention that the question was whether there were reasonable grounds for inquiry.

7. 392 U.S. 1 (1968).

8. 392 U.S. 40 (1968).

9. 392 U.S. 40 (1968). The Court disposed of *Peters* and *Sibron* together, although it did not attempt to deal with the two cases as a unit except with regard to its refusal to consider the question of prima facie constitutionality of the New York statute. Reference will be made herein to the *Peters* and *Sibron* cases as if they were decided in separate opinions, for the two cases have little in common and required separate analysis by all members of the Court.

10. See, e.g., 2 Los Angeles Police Dept., Daily Training Bull. 126 (1950). See also NATIONAL CENTER ON POLICE AND COMMUNITY RELATIONS, FIELD SURVEYS V: A REPORT OF A RESEARCH STUDY SUBMITTED TO THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE 327-36 (1967).

11. *Terry v. Ohio*, 392 U.S. 1, 4 (1968).

12. It was so characterized by the Court in *Sibron* (392 U.S. at 52), and has been frequently referred to in this way by the commentators, e.g., Schwartz, *Stop and Frisk (A Case Study in Judicial Control of the Police)*, 58 J. CRIM. L.C. & P.S. 433, 463 (1967).

until recently the police appeared contented with the fact that their authority to employ the stop-and-frisk tactic was undefined. Few courts or legislatures had said that the police could stop and frisk; but neither had they said that the practice was improper, and the resulting uncertainty did not strike the police as disadvantageous: Why go looking for trouble? But when the Supreme Court imposed a fourth amendment exclusionary rule on the states in 1961,¹³ and then imposed a fifth amendment exclusionary rule to bar admissions obtained without certain warnings in 1966,¹⁴ it became increasingly apparent that the police would not much longer benefit from the law's silence on street encounters. Notwithstanding the common use of such delightful euphemisms as "stop," "frisk," and "field interrogation," it was clear that sooner or later courts would have to determine whether these practices could be squared with the Constitution.

The fact that this assessment took place later and not sooner does not mean that these police practices were a dark secret. Perhaps stop and frisk was a low-visibility procedure in one sense, but striking illustrations of the practice did reach trial and appellate courts with some frequency. Indeed, they arose in almost every context except that which would require a direct answer to the question of whether stop and frisk was constitutional. This is because what the police viewed as a distinct procedure simply did not fit comfortably within any extant legal pigeonhole.¹⁵ As a result, instances of what in fact

13. *Mapp v. Ohio*, 367 U.S. 643.

14. *Miranda v. Arizona*, 384 U.S. 436.

15. It is true, however, that the Uniform Arrest Act had been in existence since 1942, and contained the following provisions governing street encounters:

Section 2. Questioning and Detaining Suspects.

(1) A peace officer may stop any person abroad who he has reasonable ground to suspect is committing, has committed or is about to commit a crime, and may demand of him his name, address, business abroad and whither he is going.

(2) Any person so questioned who fails to identify himself or explain his actions to the satisfaction of the officer may be detained and further questioned and investigated.

(3) The total period of detention provided for by this section shall not exceed two hours. The detention is not an arrest and shall not be recorded as an arrest in any official record. At the end of the detention the person so detained shall be released or be arrested and charged with a crime.

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

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

INTERSTATE COMM. ON CRIME, INTERSTATE CRIME CONTROL 86-89 (1942); Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315, 343-47 (1942). The Act had drifted into obscurity by the beginning of this decade, however, and was in force in only three states in slightly modified form. See DEL. CODE ANN. tit. 11, §§ 1901-12 (1953); N.H. REV. STAT. ANN. §§ 594:1-25 (1955); R.I. GEN. LAWS ANN. §§ 12-7-1 through 13 (1956).

were stops and frisks were usually disposed of by a rather mechanical process of determining whether an "arrest" had taken place.¹⁶ In other cases, the matter was dealt with solely in terms of substantive law because the suspect was prosecuted for "being suspicious" under a vagrancy statute or similar provision.¹⁷

In 1964, the state of New York adopted a statute entitled "Temporary questioning of persons in public places; search for weapons,"¹⁸ which immediately was dubbed the "stop and frisk" law. While this statute contributed little toward resolution of the difficult constitutional issues involved—it was all but ignored by the Supreme Court in *Sibron* and *Peters*¹⁹—it did serve to focus the attention of the legal world upon this particular police practice. A flurry of articles criticizing and defending the statute appeared;²⁰ in short order the New York courts were confronted with cases in which the practices authorized by the statute were challenged.²¹ Two years later, the American Law Institute published the first tentative draft of *A Model Code of Pre-Arrest Procedure*, dealing in part with the stopping of suspects for investigation,²²

16. *E.g.*, *People v. Esposito*, 118 Misc. 867, 194 N.Y.S. 326 (Ct. Spec. Sess. 1922).

17. *See Foote, Vagrancy-Type Law and Its Administration*, 104 U. PA. L. REV. 603 (1956).

18. N.Y. CODE CRIM. PROC. § 180a (McKinney Supp. 1967), which provides in part:

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.

19. The majority dismissed the statute by saying:

We decline . . . to be drawn into what we view as the abstract and unproductive exercise of laying the extraordinarily elastic categories of § 180-a next to the categories of the Fourth Amendment in an effort to determine whether the two are in some sense compatible. . . . The operative categories of § 180-a are not the categories of the Fourth Amendment, and they are susceptible of a wide variety of interpretations.

392 U.S. at 59-60. *See also* 392 U.S. at 60 n.20.

20. *See* note 4 *supra*. The New York statute also received considerable attention in the public media. *See DETECTION OF CRIME* 7 n.3.

21. The statute took effect on July 1, 1964, and, in a sense, was upheld on July 10 in *People v. Rivera*, 14 N.Y.2d 441, 201 N.E.2d 32, 252 N.Y.S.2d 458 (1964). Although *Rivera* concerned a 1962 incident and did not involve the statute, the court recognized a common-law power essentially the same as that granted by the statute. For a discussion of the subsequent New York decisions, *see Schwartz, supra* note 12.

22. MODEL CODE OF PRE-ARREST PROCEDURE § 2.02 (Tent. Draft No. 1, 1966):

(1) *Stopping of Persons Having Knowledge of Crime.* A law enforcement officer lawfully present in any place may, if he has reasonable cause to believe that a felony or misdemeanor has been committed and that any person has knowledge which may be of material aid to the investigation thereof, order such person to remain in or near such place in the officer's presence for a period of not more than twenty minutes.

which also stimulated the debate.²³

Another significant development was the fact that in recent years we began to learn more about this particular aspect of police work and its impact. Empirical studies on the subject were published, the most noteworthy of which appeared as part of the American Bar Foundation's (ABF) *Survey of the Administration of Criminal Jus-*

(2) *Stopping of Persons in Suspicious Circumstances.* A law enforcement officer lawfully present in any place may, if a person is observed in circumstances which suggest that he has committed or is about to commit a felony or misdemeanor, and such action is reasonably necessary to enable the officer to determine the lawfulness of that person's conduct, order that person to remain in or near such place in the officer's presence for a period of not more than twenty minutes.

(3) *Action to Be Taken During Period of Stop.* A law enforcement officer may require a person to remain in his presence pursuant to subsection (1) or (2) of this section only insofar as such action is reasonably necessary to

- (a) obtain the identification of such person;
- (b) verify by readily available information an identification of such person;
- (c) request cooperation pursuant to and subject to the limitations of Section 2.01; or
- (d) verify by readily available information any account of his presence or conduct or other information given by such person.

(4) *Use of Force.* In order to exercise the authority conferred in subsections (1) and (2) of this section, a law enforcement officer may use such force, other than deadly force, as is reasonably necessary to stop any person or vehicle or to cause any person to remain in the officer's presence.

(5) *Search for Dangerous Weapons.* A law enforcement officer who has stopped or ordered any person to remain in his presence pursuant to this section may, if he reasonably believes that his safety so requires, search such person and his immediate surroundings, but only to the extent necessary to discover any dangerous weapons which may on that occasion be used against the officer.

(6) *Action to Be Taken After Period of Stop.* Unless an officer acting hereunder arrests a person during the time he is authorized by subsections (1) and (2) of this section to require such person to remain in his presence, he shall, at the end of such time, inform such person that he is free to go.

(7) *Records Relating to Persons Stopped.* A law enforcement officer, who has ordered any person to remain in his presence pursuant to this section, shall with reasonable promptness thereafter prepare and sign a report setting forth the name and address of such person; the place, time and purpose of the stop; the names of additional officers and other persons present; whether the person stopped objected thereto; whether force was used and, if so, the degree and circumstances thereof; and whether the person stopped was searched and, if so, a description of all items seized and their disposition.

(8) *Limitations to Prevent Abuse.* The authority to stop persons granted in subsections (1) and (2) of this section may not be used solely to aid in the investigation or prevention of the following crimes:

- (a) any misdemeanor the maximum penalty for which does not include a sentence of imprisonment of more than thirty days;
- (b) loitering;
- (c) vagrancy;
- (d) . . . [Note: There should be added to this list those felonies and misdemeanors, in connection with which the stop authority is unnecessary, or creates an undue risk of abuse or harassment, such as ordinances requiring permits for public parades or gatherings.]

As a general matter, the members of the ALI were not opposed to allowing the police to frisk for weapons in order to protect themselves. However, some members were afraid that the police would abuse this power and conduct a general search for narcotics and other contraband. *E.g.*, 43 ALI PROCEEDINGS 114-17 (1966).

23. Compare W. SCHAEFER, *THE SUSPECT AND SOCIETY* 23-26, 40-43 (1967), with *Souris, Stop and Frisk or Arrest and Search—The Use and Misuse of Euphemisms*, 57 J. CRIM. L.C. & P.S. 251 (1966).

tice.²⁴ Stop and frisk was also investigated by the President's Commission on Law Enforcement and Administration of Justice, which recommended that state legislatures enact statutory provisions prescribing the authority of law enforcement officers to stop persons for brief questioning.²⁵ The National Advisory Commission on Civil Disorders agreed that guidelines for "field interrogation" and its incidents were needed, and that it was imperative for police and others to distinguish legitimate investigative procedures from somewhat similar actions of dubious legality and efficacy (often called "aggressive preventive patrol").²⁶

It was against this backdrop that the United States Supreme Court, on June 10, 1968, decided the *Terry*, *Sibron*, and *Peters* cases,²⁷ the Court's first word—but certainly not its last—on the subject of stop and frisk. The several opinions in these cases cover a total of seventy-six pages in the official reports, and a close reading of them might well lead one to wish that the Court had written less and said more. Given the oft-stated need for guidelines, one is struck with the fact that very few specific guidelines can be distilled from these cases. However, this point should not be pushed too far; this was the Court's first foray into this particular thicket, and it is thus understandable that it made a conscious effort to leave sufficient room for later movement in almost any direction.²⁸ One could hardly expect the Court to pass upon the full range of constitutional issues which lurk in the area of stop and frisk, if for no other reason

24. DETECTION OF CRIME 5-94. Other helpful studies, based at least in part upon empirical data, include: POLICE AND THE COMMUNITY, FIELD SURVEYS IV: A REPORT OF A RESEARCH STUDY SUBMITTED TO THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE (1966); NATIONAL CENTER ON POLICE AND COMMUNITY RELATIONS, FIELD SURVEYS V: A REPORT OF A RESEARCH STUDY SUBMITTED TO THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE (1967); Pilcher, *The Law and Practice of Field Investigation*, 58 J. CRIM. L.C. & P.S. 465 (1967); Reiss & Black, *Interrogation and the Criminal Process*, 374 ANNALS 47 (1967); Note, *Detention, Arrest, and Salt Lake City Police Practices*, 9 UTAH L. REV. 593 (1965).

25. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 95 (1967).

26. REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 159-61, 164-65 (Bantam ed. 1968).

27. A fourth case before the Court also involved a stopping for investigation, but the writ of certiorari was dismissed as improvidently granted. *Wainwright v. New Orleans*, 392 U.S. 598 (1968). However, the concurring and dissenting opinions contain some interesting discussion. 392 U.S. at 598, 600, 610.

28. This is what Karl Llewellyn called "the essence of good appellate judging." First, he said, "a court ought always to be slow in *uncharted* territory, and, in such territory, ought to be narrow, again and again, in any ground for decision." Second, "*once there is a clearish light*, a court should make effort to state an ever broader line for guidance." Finally, it is important that "each line is promptly and overtly checked up and checked on and at need rephrased on each subsequent occasion of new illumination" K. LLEWELLYN, *THE COMMON LAW TRADITION, DECIDING APPEALS* 389 (1960) (emphasis in original).

than the fact that many of these issues—such as those concerning the fifth amendment limits on questioning during street encounters—were not before the Court. This was no occasion, then, for a *Miranda*-style decision, but rather a time for a few tentative steps. But if one compares the Court's previous tentative steps with their progeny—*Betts v. Brady*²⁹ with *Gideon v. Wainwright*,³⁰ or *Brown v. Mississippi*³¹ with *Miranda v. Arizona*,³² for example—it seems clear that more precise and far-reaching constitutional limitations can be expected.³³

In light of the surfeit of law review commentary on the subject of stop and frisk, a word about what follows is in order. This Article is not intended to be a restatement or summary of the recent debate on stop and frisk. *Terry* and its companions have put some of the issues to rest and pushed others to the forefront, and with the resulting change in the battle lines the time is ripe for a reassessment. The concern here is with the approach taken by the Supreme Court in *Terry*, *Sibron*, and *Peters*, and the emphasis is upon what the Court has and has not done, and upon what is likely to happen in future cases.

II. THE RECENT CASES

A. *Terry v. Ohio*

One afternoon, a Cleveland police officer became suspicious of two men standing on a street corner in the downtown area. One of the suspects walked up the street, peered into a store, walked on, started back, looked into the same store, and then joined and conferred with his companion. The other suspect repeated this ritual, and between them the two men went through this performance about a dozen times. They also talked with a third man, and then followed him up the street about ten minutes after his departure. The officer, thinking that the suspects were "casing" a stickup and might be armed, followed and confronted the three men as they were again conversing. He identified himself and asked the suspects for their names. The men only mumbled something, and the officer spun Terry around and patted his breast pocket. The policeman felt a pistol, which he removed. A frisk of Terry's companion also un-

29. 316 U.S. 455 (1942).

30. 372 U.S. 335 (1963).

31. 297 U.S. 278 (1936).

32. 384 U.S. 436 (1966).

33. For a discussion of the movement toward increasingly generalized statements in Supreme Court decisions concerning criminal procedure, see Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929 (1965); Packer, *The Courts, the Police, and the Rest of Us*, 57 J. CRIM. L.C. & P.S. 238 (1966).

covered a pistol; a frisk of the third man did not disclose that he was armed, and he was not searched further. Terry was charged with the crime of carrying a concealed weapon, and he moved to suppress the weapon as evidence. The motion was denied by the trial judge, who upheld the officer's actions on a stop-and-frisk theory. The Ohio court of appeals affirmed,³⁴ and the state supreme court dismissed Terry's appeal.³⁵

The United States Supreme Court affirmed in an opinion by the Chief Justice, stating the issue in the narrowest possible terms: "whether it is always unreasonable for a policeman to seize a person and subject him to a limited search for weapons unless there is probable cause for an arrest."³⁶ Stops and frisks, said the Court, are governed by the fourth amendment, but the officer's actions had been reasonable. Justice Black concurred in one sentence;³⁷ Justice Harlan concurred but thought that more attention should be given to the right to stop as the real basis for the right to frisk,³⁸ and the concurrence of Justice White added a few words on the right to ask questions during a stop.³⁹ Only Justice Douglas dissented. He took the position that probable cause is required by the fourth amendment but was not present on the given facts.⁴⁰

B. *Sibron v. New York*

A Brooklyn officer, while patrolling his beat in uniform, observed Sibron in an area from four p.m. until midnight. Sibron conversed with six or eight known narcotics addicts during this time, and later entered a restaurant and talked with three more known addicts. The officer then approached Sibron, told him to come outside, and said, "You know what I am after." Sibron mumbled something and reached into his pocket; the officer simultaneously reached into the pocket and pulled out several glassine envelopes of heroin. The officer's sworn complaint alleged that Sibron had thrown the envelopes away, but his testimony on the defendant's motion to suppress the evidence was to the contrary. The trial court ruled that the officer had had probable cause for arrest, but clearly erred in basing this determination upon Sibron's in-court admission that

34. *State v. Terry*, 5 Ohio App. 2d 122, 214 N.E.2d 114 (1966).

35. *See Terry v. Ohio*, 392 U.S. 1, 8 (1968).

36. 392 U.S. at 15.

37. 392 U.S. at 31.

38. 392 U.S. at 31.

39. 392 U.S. at 34.

40. 392 U.S. at 35.

he had been talking to the addicts about narcotics.⁴¹ Sibron was convicted on his plea of guilty for the unlawful possession of heroin, the appellate division affirmed without opinion,⁴² and the New York Court of Appeals affirmed on the basis of the New York stop-and-frisk law but wrote no opinion.⁴³ It is hard to imagine a less appealing set of circumstances upon which to justify a stop and frisk before the United States Supreme Court, and the prosecutor understandably confessed error.

The Chief Justice declined the confession of error and refused to find that the case was now moot because Sibron had completed his six-month sentence. He also declined to pass upon whether the New York statute was or was not constitutional on its face, as argued by the parties on both sides of this and the *Peters* case. The search in this case was found to be unlawful because the officer was seeking narcotics rather than acting from fear for his own safety, and because, in any event, the officer had not followed the necessary procedures for a frisk for weapons. Justice White joined this part of the opinion in his concurrence;⁴⁴ Justice Fortas said he would accept the confession of error;⁴⁵ Justice Harlan preferred to dispose of the case on the basis that there were not grounds for a stop;⁴⁶ and Justice Douglas also concurred, stressing the right of privacy for sick people.⁴⁷ Justice Black dissented, claiming that the officer had grounds to frisk and also grounds to arrest.⁴⁸

C. *Peters v. New York*

A New York City officer, home one afternoon in his sixth-floor apartment, heard a noise outside his door⁴⁹ and went to the peep-

41. See *Sibron v. New York*, 392 U.S. 40, 47 (1968).

42. See 392 U.S. at 47.

43. *People v. Sibron*, 18 N.Y.2d 603, 219 N.E.2d 196, 272 N.Y.S.2d 374 (1966).

44. 392 U.S. at 69.

45. 392 U.S. at 70.

46. 392 U.S. at 70.

47. 392 U.S. at 68.

48. Although Justice Black said that the seizure was not unreasonable for "both these reasons" (392 U.S. at 79), he later made the curious observation that "there was sufficient evidence here on which to base findings that *after recovery of the heroin*, in particular, an officer could reasonably believe there was probable cause to charge Sibron with violating New York's narcotics laws." 392 U.S. at 82 (emphasis added). What bearing that has on the admissibility of the heroin is far from clear.

49. Actually, the statement of the facts says that the officer "heard a noise at his door" (392 U.S. at 48), which the Chief Justice assumed "led him to believe that someone sought to force entry." 392 U.S. at 66. Justice Harlan responded that the officer had not testified as to such a belief and no state court had concluded that he had held such a belief. 392 U.S. at 75. This is the critical fact in the case. On the basis of one interpretation of what a noise "at" the door is, the Chief Justice concluded that the officer had reasonable grounds to believe the suspects had attempted a burglary; on

hole to see what was happening. He observed two strangers⁵⁰ tiptoeing out of the alcove toward the stairway. He then called the police, put on civilian clothes, grabbed his service revolver, and looked out again. The two men were now headed toward the stairway. Believing that the suspects were in the building to commit a burglary, the officer entered the hallway and slammed the door behind him, at which point the two men quickly started down the stairs. The officer gave chase and collared Peters, who claimed to be in the building visiting his girl friend, but refused to identify her because she was a married woman. The officer patted him down and felt what might have been a knife in his pocket. He then removed the object, which was an opaque plastic envelope containing burglar's tools. After Peters was charged with possession of burglary tools with intent to employ them in commission of a crime, the trial court upheld the officer's actions on the basis of the New York stop-and-frisk statute.⁵¹ Peters was convicted, and the appellate division⁵² and Court of Appeals⁵³ affirmed.

For the Chief Justice, this case was easy; there was no need to worry about the right to stop and frisk, since the officer had made an arrest on probable cause and thus could search the suspect in order to find weapons and prevent the destruction of evidence.⁵⁴ The opinions of Justices Fortas⁵⁵ and Black⁵⁶ agreed as to this defendant; Justice Douglas concurred because this fact situation presented what to him is the only constitutionally permissible kind of stop and frisk—that in which there is probable cause for belief that the suspect is *about to* commit a crime;⁵⁷ Justices White and Harlan objected that the officer's actions should instead be upheld on the ground that a lawful stop and frisk (rather than an arrest and search) had occurred.⁵⁸

the basis of a quite different interpretation, Justice Harlan said there were grounds to suspect only that the men were in the building for the purpose of committing a burglary.

50. The officer testified that he had lived in the 120-unit building for twelve years and did not recognize either of the men as tenants. 392 U.S. at 48.

51. *People v. Peters*, 44 Misc. 2d 470, 254 N.Y.S.2d 10 (1964).

52. *People v. Peters*, 24 App. Div. 2d 989, 265 N.Y.S.2d 612 (1965).

53. *People v. Peters*, 18 N.Y.2d 238, 219 N.E.2d 595, 273 N.Y.S.2d 217 (1966).

54. See note 49 *supra* for the interpretation of the facts needed to reach such a conclusion.

55. 392 U.S. at 70.

56. 392 U.S. at 79.

57. 392 U.S. at 68.

58. 392 U.S. at 69, 70.

III. STOP AND FRISK AND FOURTH AMENDMENT THEORY

Before looking in more detail at precisely what the Court has or has not done in these opinions, it is important to consider a more fundamental question: To what extent does existing fourth amendment theory support the proposition that what is commonly referred to as a stop and frisk is constitutionally permissible in circumstances where it would be a violation of the amendment to make an arrest and search? Or, to put it another way, is Justice Douglas correct in saying that the *Terry* decision amounts to a rewriting of the fourth amendment?⁵⁹ To answer these questions, it is necessary to consider whether stops and frisks fall within the fourth amendment, and, if they do, to determine what requirements of the amendment are applicable.

A. *In or out of the Fourth Amendment*

In the *Terry* case, the Chief Justice criticizes "the distinctions of classical 'stop-and-frisk' theory" on the ground that they serve to divert attention from the basic question of whether the officer's conduct was reasonable.⁶⁰ The distinctions to which he referred, of course, are between a stopping on the street and a to-the-station arrest, and also between a frisk for weapons and the more extensive search that is commonly made incident to an arrest. Abjuring such labels, the Chief Justice concludes that they do not mark the boundaries of the fourth amendment; restraining a person on the street is certainly a "seizure," and an exploration of the outer surfaces of his clothing is beyond question a "search." The Court therefore rejects "the notions that the fourth amendment does not come into play at all as a limitation upon police conduct if the officers stop short of something called a 'technical arrest' or a 'full-blown search.'"⁶¹

It is hard to see how anyone could quarrel with that conclusion. Indeed, it is somewhat surprising that the Court labors so hard to reach it, except for the fact that it assumed that "classical 'stop-and-frisk' theory" somehow supports a contrary position. This is not the case. Notwithstanding an occasional unfortunate choice of words in a few decisions,⁶² it has never been seriously contended that merely

59. 392 U.S. at 38-39.

60. 392 U.S. at 19.

61. 392 U.S. at 19.

62. The Court refers (392 U.S. at 16 n.12) to the Ohio court of appeals' statement that "we must be careful to distinguish that the 'frisk' authorized herein includes only a 'frisk' for a dangerous weapon. It by no means authorizes a search for contraband,

characterizing certain police activity as a "stop" or a "frisk" removes that conduct from the limitations of the fourth amendment. Rather, the traditional argument has been that the words "stop" and "frisk" are convenient ways of describing certain limited intrusions⁶³ which, because of their scope, should be permitted in circumstances which would not justify the more serious intrusions of a to-the-station arrest accompanied by a search for weapons *and* evidence.⁶⁴ The Supreme Court does not reject that argument, but embraces it.⁶⁵

This is not to suggest, however, that the Court's failure to attach importance to the "stop" and "frisk" labels is not of major significance. As one commentator has correctly observed, a most important feature of these cases "is that the Supreme Court of the United States has dissipated the notion that the search and seizure provisions of the Fourth Amendment are subject to verbal manipulation."⁶⁶ It is the reasonableness of the officer's conduct, not what the state chooses to call it, which is in issue. If courts adhere to this principle, then "the importance of another verbalism—the term 'arrest'—which for a long time has tended to dominate legal thinking in this area,"⁶⁷ may wane.⁶⁸

evidentiary material, or anything else in the absence of reasonable grounds to arrest. Such a search is controlled by the Fourth Amendment and probable cause is essential." Although the Ohio court might have stated the point more clearly, this language essentially seems to be an attempt to distinguish two kinds of searches which are quite different in terms of their degree of imposition, rather than a "suggestion . . . that such police conduct is outside the purview of the Fourth Amendment." 392 U.S. at 16.

63. Indeed, there may be some merit in the continued use of these labels as a convenient way to single out what the police consider to be unique and distinct enforcement techniques. The police, if they are to have a clear understanding of their authority (which is necessary if the exclusionary rule is to have any deterrent effect), must be instructed in terms of how much evidence is needed for certain actions, and not merely told that they must somehow "balance" all the factors. *See* text accompanying notes 87-96 *infra*.

64. This argument is discussed in greater detail in the text accompanying notes 74-76 *infra*. For other statements of the "classical 'stop-and-frisk' theory," *see* sources cited in note 74 *infra*.

65. 392 U.S. at 18 n.15:

In our view the sounder course is to recognize that the Fourth Amendment governs all intrusions by agents of the public upon personal security, and to make the scope of the particular intrusion, in light of all the exigencies of the case, a central element in the analysis of reasonableness.

66. Remarks of Justice Walter V. Schaefer of the Supreme Court of Illinois, Institute of Continuing Legal Education program on "Criminal Law and the Constitution: The Expanding Revolution," July 19, 1968.

67. *Id.*

68. It has often been assumed that whether an officer has made an "arrest" is critical in passing upon the validity of a search without warrant. If an arrest has been made, the tendency of courts is to uphold the subsequent search without serious consideration of whether it can otherwise be justified. *See* LaFave, *Search and Seizure: "The Course of True Law . . . Has Not . . . Run Smooth,"* 1966 U. ILL. L.F. 255, 277-98. On the other hand, if the officer has not first gone through the formalities of an arrest, it is common for courts to assume that it is improper to search. *Id.* at 302-03. *Cf. In re Boykin*, 39

B. *Is Probable Cause Required?*

If these more limited intrusions arising out of street encounters—whatever they may be called—are governed by the fourth amendment, then it is appropriate to look to the language of that amendment to determine precisely what constitutional requirements must be met:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.⁶⁹

This language, which students of constitutional history tell us was in part a result of an oversight in the redrafting process,⁷⁰ has been a source of confusion since its adoption.⁷¹ The basic difficulty concerns the proper relationship between the reasonableness clause and the warrant clause. Can a search or seizure with a warrant on probable cause still be unreasonable? Or, perhaps more important, can a search or seizure without a warrant be reasonable even in the absence of probable cause?

It is this latter question that divides the Chief Justice and Justice Douglas in *Terry*. Says the Chief Justice:

If this case involved police conduct subject to the Warrant Clause of the Fourth Amendment, we would have to ascertain whether "probable cause" existed to justify the search and seizure which took place. However, that is not the case. . . . Instead, the conduct involved in this case must be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures.⁷²

This approach seems to assume that a lesser quantum of evidence may suffice when an officer is acting without a warrant *because* he is so acting and thus has escaped the reach of the probable cause half of the amendment.

To this analysis, Justice Douglas replies: "We hold today that

Ill. 2d 617, 237 N.E.2d 460 (1968) (reasonable for officer to search high school student for gun on information from assistant principal that he had anonymous tip that student had a gun, without regard to whether there was probable cause to make an arrest).

69. U.S. CONST. amend. IV.

70. Abrams, *Constitutional Limitations on Detention for Investigation*, 52 IOWA L. REV. 1093, 1101 (1967); Leagre, *The Fourth Amendment and the Law of Arrest*, 54 J. CRIM. L.C. & P.S. 393, 397-98 (1963); Comment, *Search and Seizure in the Supreme Court: Shadows on the Fourth Amendment*, 28 U. CHI. L. REV. 664, 679 (1961).

71. For a critical examination of many of these problems, see Comment, *supra* note 70, at 678-92.

72. 392 U.S. at 20.

the police have greater authority to make a 'seizure' and conduct a 'search' than a judge has to authorize such action. We have said precisely the opposite over and over again."⁷³ I would award this round to Justice Douglas, as it is unmistakably clear that the Court has repeatedly held that police may not act upon less evidence merely by avoiding the magistrate. Thus, it may be said that the officer's actions in *Terry* should be upheld only if they would have been equally permissible had there been a magistrate at his elbow who supplied a warrant. Of course, the nature of stop and frisk is such that a magistrate is unlikely to be involved, but this hardly justifies a departure from the long-standing premise that the absence of a warrant does not of itself confer greater authority upon the police.

It is at this point, however, that I part company with Justice Douglas, for he then seems to assume that this constitutional requirement of probable cause is an inflexible standard which demands precisely the same amount of evidence no matter what kind of police action is involved. This, of course, amounts to a rejection of what I have come to believe is the best-reasoned analysis in support of stop and frisk.⁷⁴ In brief, this analysis proceeds as follows: the requirement of probable cause is a compromise for accommodating the opposing interests of the public in crime prevention and detection, and of individuals in privacy and security.⁷⁵ The same compromise is not called for in all situations, and thus this balancing process should take account of precisely what lies in the balance in a given case. Because one variable is the degree of imposition on the individual, it may be postulated that less evidence is needed to meet the probable cause test when the consequences for the individual are less serious. Thus, it may be said that a brief on-the-street seizure does not require as much evidence of probable cause as one which involves taking the individual to the station, since the former is relatively short, less conspicuous, less humiliating to the person, and offers less chance for police coercion than the latter. Similarly, it could be concluded that patting down for weapons, although it is a search, is a lesser imposition than a complete search of the person

73. 392 U.S. at 36.

74. For other statements of this or very similar analysis, see Leagre, *supra* note 70, at 411-16; Pilcher, *The Law and Practice of Field Interrogation*, 58 J. CRIM. L.C. & P.S. 465, 468-71 (1967); Stern, *Stop and Frisk: An Historical Answer to a Modern Problem*, 58 J. CRIM. L.C. & P.S. 532, 536-37 (1967); Younger, *Stop and Frisk: "Say It Like It Is"*, 58 J. CRIM. L.C. & P.S. 293, 298 (1967); Recent Statute, *New York Authorizes Police To "Stop and Frisk" on Reasonable Suspicion*, 78 HARV. L. REV. 473 (1964); Note, *Stop and Frisk: Dilemma for the Courts*, 41 S. CAL. L. REV. 161 (1967); Note, *Selective Detention and the Exclusionary Rule*, 34 U. CHI. L. REV. 158, 162-66 (1966).

75. See *Brinegar v. United States*, 338 U.S. 160, 176 (1949).

and his "immediate presence"—and consider how broadly those words have been construed⁷⁶—for weapons and for the fruits, instrumentalities, or evidence of crime.

But does this analysis square with pre-*Terry* theories of the fourth amendment? I think so, although I would have been more hesitant with my answer about a year ago. Then, notwithstanding the urgings of some writers,⁷⁷ the Court had not expressly recognized a variable probable cause test, although some Justices seemed to support such a position. There is, for example, the oft-quoted dissent of Justice Jackson in *Brinegar v. United States* to the effect that he would strive to uphold a roadblock if it was thrown up to terminate a kidnapping but not if it was used "to salvage a few bottles of bourbon and catch a bootlegger."⁷⁸

Then in 1967 came the *Camara*⁷⁹ and *See*⁸⁰ decisions, concerning health and safety inspections of residential and business premises. The Court held that the inspector, if turned away, must obtain a warrant; but this was of minor importance compared to what the Court had to say about what evidence was needed to secure the warrant. Although the warrant clause was clearly in issue, the Court called for a "balancing [of] the need to search against the invasion which the search entails."⁸¹ The Court then adopted a lower standard of probable cause for inspection warrants, in part because these inspections "involve a relatively limited invasion of the urban citizen's privacy."⁸² Thus, a new fourth amendment calculus was

76. See LaFave, *supra* note 68, at 285-87. Although the Supreme Court has said that "the rule allowing contemporaneous searches is justified . . . by the need to prevent the destruction of evidence of the crime" [*Preston v. United States*, 376 U.S. 364, 367 (1964)], the Court has not so limited the scope of search incident to arrest in prior cases. See, e.g., *United States v. Rabinowitz*, 339 U.S. 56 (1950) (search of defendant's desk, safe, and filing cabinet after he was in custody of officers); *Harris v. United States*, 331 U.S. 145 (1947) (search of defendant's four-room apartment after he was arrested and handcuffed).

77. Barrett, *Personal Rights, Property Rights and the Fourth Amendment*, 1960 SUP. CT. REV. 46, 63; Leagre, *supra* note 70, at 413-16; Comment, *supra* note 70, at 704-06.

78. 338 U.S. 160, 183 (1949).

79. *Camara v. Municipal Court*, 387 U.S. 523 (1967).

80. *See v. City of Seattle*, 387 U.S. 541 (1967).

81. *Camara v. Municipal Court*, 387 U.S. 523, 537 (1967).

82. *Camara v. Municipal Court*, 387 U.S. 523, 537 (1967). This was one of three "persuasive factors" listed by the Court. The other two, a long history of acceptance of such programs and the theory that the public interest demands that all dangerous conditions be prevented, are less than convincing. See LaFave, *Administrative Searches and the Fourth Amendment: The Camara and See Cases*, 1967 SUP. CT. REV. 1, 13-17.

It would seem to follow that a higher standard of probable cause than ordinarily required would be called for when the intrusion is particularly severe. Thus, Justice Stewart, concurring in *Berger v. New York*, 388 U.S. 41, 68-69 (1967), said:

The standard of reasonableness embodied in the Fourth Amendment demands that the showing of justification match the degree of intrusion. By its very nature

brought into being—one which was immediately recognized as pointing the way toward the Court's acceptance of the rationale supporting stop and frisk.⁸³ The balancing test of *Camara* was quoted and relied upon in *Terry v. Ohio*.⁸⁴

For one who subscribes to the stop-and-frisk analysis summarized above, the most significant part of *Terry* is the Court's response to the petitioner's contention that if there was not sufficient evidence for arrest then there was not sufficient evidence for any other form of intrusion. The majority rejects this argument, saying: "It assumes that the interests sought to be vindicated and the invasions of personal security may be equated in the two cases, and thereby ignores a vital aspect of the analysis of the reasonableness of particular types of conduct under the Fourth Amendment."⁸⁵ Although it would make no difference in terms of results,⁸⁶ it is unfortunate that the Court did not say that this is so even though probable cause is required, instead of saying that the argument fails because probable cause is irrelevant. Then the dissent of Justice Douglas could not have been written the way it is, and he would have had to confront directly the issue of how the variable probable-cause test should be applied to the police conduct in question. That, of course, is an issue which not all men would resolve in the same way, but it seems much more sensible to acknowledge that this is the issue than to accept the unjustified assumption that stopping and frisking must be unconstitutional because these practices are indistinguishable from arrest and search incident to arrest.

C. *The Utility of the Balancing Test*

Several commentators have raised the question of whether the balancing test is not too subtle and sophisticated a device to be workable in day-to-day practice.⁸⁷ This certainly would be a valid

electronic eavesdropping for a 60-day period, even of a specified office, involves a broad invasion of a constitutionally protected area. Only the most precise and rigorous standard of probable cause should justify an intrusion of this sort.

83. LaFave, *supra* note 82, at 13 n.39.

84. 392 U.S. at 21, 27.

85. 392 U.S. at 27.

86. If the balancing technique is used, it would seem to make no difference in terms of outcome whether the balancing is done merely to determine what is reasonable or to determine what level of probable cause is required.

87. See, e.g., Schwartz, *Stop and Frisk (A Case Study in Judicial Control of the Police)*, 58 J. CRIM. L.C. & P.S. 433, 448 (1967):

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?

objection if balancing were used to the extent that there was no single test of probable cause for arrest or for stopping, and instead the police and the courts were expected to make slide-rule computations based upon all the facts and circumstances of each individual case. While this might well be a stimulating exercise in the rarefied atmosphere of an appellate court or a law school classroom, it is clearly asking too much to expect policemen to make on-the-spot judgments in this way or, indeed, to require trial judges to review police conduct in this fashion.

The balancing test makes more sense if it is viewed not so much as a matter for case-by-case application, but rather as a technique for establishing the quantum of evidence needed for certain distinct kinds of official action. That is, it is one thing to say that each instance of arrest or of stop and frisk requires a somewhat different measure of probable cause, depending upon all sorts of variables; it is quite another to say that through a process of balancing we can conclude that a brief stopping for investigation requires a different amount of evidence than a taking to the station. It is the latter kind of balancing which was involved in *Camara*; the Court resorted to a balancing process to decide that a lesser amount of evidence was needed to procure health and fire inspection warrants than to procure search warrants in criminal cases, and there was no suggestion that the magistrate is expected to perform a balancing act in each case to determine whether somewhat more or less evidence than was presented in *Camara* is necessary.⁸⁸

In the criminal law, however, there is one case-by-case variable—the seriousness of the offense—which cannot be ignored by police and courts.⁸⁹ Taking into account the seriousness of the offense does not require the use of some fine-spun theory whereby each offense in the criminal code has its own probable-cause standard; rather, it involves only the common-sense notion that murder, rape, armed robbery, and the like call for a somewhat different police response than, say, gambling, prostitution, or possession of narcotics. After

88. *Terry* does not appear to be inconsistent with this approach. Although the Court abjures the "stop" and "frisk" labels and limits its holding to the facts of the case, there is no suggestion that the quantum-of-evidence test which the Court begins shaping there is inapplicable to other instances of stop and frisk, except for the intimation that serious violent crimes may warrant different consideration than minor offenses. See text accompanying note 95 *infra*.

89. See, e.g., W. LAFAVE, *ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY* 246-48 (1965) [hereinafter *ARREST*]; *DETECTION OF CRIME* 36-38. See also *RESTATEMENT (SECOND) OF TORTS* § 119, comment *j* (1965), which lists "the nature of the crime committed or feared" as an important factor in determining whether the actor's suspicion was reasonable.

all, "[t]here is no war between the Constitution and common sense,"⁹⁰ and it is this pragmatic approach which prompts judges to say that the conduct of an officer is proper when a failure so to act would be "poor police work"⁹¹ or a justifiable basis for discipline⁹² or discharge⁹³ of the officer. The view one would take of police inaction under the circumstances is bound to be affected to some degree by the nature of the criminal conduct involved.

The nature of the offense takes on additional importance when the police are acting, as in *Terry*, for the purpose of preventing crime. While one might well argue that the need to detect past crimes is of considerable importance for all forms of criminal activity, the need to prevent crimes from occurring is most compelling as to offenses risking violence, and is least compelling as to offenses without victims or with willing victims.⁹⁴ Indeed, a comparison of *Terry* and *Sibron* reveals that the Court was undoubtedly influenced by the nature of crimes involved in these two cases. In *Terry*, the officer observed the suspects for no more than twelve minutes, and saw equivocal conduct; the suspects might have been casing the store for a robbery, or they might have been window-shopping or impatiently waiting for a friend in the store.⁹⁵ Yet the Court concluded, quite properly, that "it would have been poor police work indeed" for the officer "to have failed to investigate this behavior"⁹⁶ or to have waited until the suspects actually took the dangerous step of attempting the robbery. In *Sibron*, the suspect was *continuously* observed for eight hours in a vicinity frequented by narcotics addicts

90. *Mapp v. Ohio*, 367 U.S. 643, 657 (1961).

91. *Terry v. Ohio*, 392 U.S. 1, 23 (1968).

92. *E.g.*, *People v. Moore*, 35 Ill. 2d 399, 403, 220 N.E.2d 443, 445 (1966).

93. *Cf.* W. SCHAEFER, *THE SUSPECT AND SOCIETY* 41-42 (1967):

When writing opinions I have often been tempted to state the test of the reasonableness of a police officer's conduct in terms of what the reaction would be if he had not done what he is charged with having done wrongfully. "If you would fire the officer for not doing what he did, then what he did was reasonable." . . . I agree that it isn't a very stylish way of expressing the concept of reasonableness, and that somewhat circular reasoning is involved. But to me there is value in restating the question so that the whole problem may be seen.

94. The point is also reflected in Justice Jackson's statement, text accompanying note 78 *supra*. Although he was discussing crimes which have already occurred, Justice Jackson did not merely distinguish between kidnapping and bootlegging, but rather referred to a hypothetical incident in which a child was still being held and there was a need not only to "detect a vicious crime" but also to "save a threatened life."

95. On the motion to suppress, the officer acknowledged that his thirty-nine years of police experience did not give him some special insight into the conduct of suspects, since he had been assigned to watch for shoplifters and pickpockets for thirty years and had not had occasion to witness the planning or execution of a robbery. Remarks of Louis Stokes, counsel for the petitioner in *Terry*, Institute of Continuing Legal Education program on "Criminal Law and the Constitution: The Expanding Revolution," July 19, 1968.

96. 392 U.S. at 23.

and was seen conversing with as many as eleven known addicts during this time; these facts would seem to make the possibility that Sibron was attempting to sell narcotics at least as strong as the possibility that Terry and his cohorts were planning a robbery.⁹⁷ Yet there is understandably no suggestion from the Court that it would have been "poor police work" not to step in and prevent some addict from obtaining a new supply from this particular source.

IV. STOP AND FRISK AND THE HARD REALITIES

To many of those who have honestly opposed Supreme Court recognition of the power of police to stop and frisk, all of this talk about variable probable cause and the like would appear to be the irrelevant musings of a naïve academician. For them, the central point is that police often have utilized street encounters for improper purposes such as the wholesale harassment of certain elements of the community, usually minority groups and Negroes in particular.⁹⁸ These practices, it is contended, should not be sanctioned or even given indirect support by a holding that the fourth amendment allows some on-the-street interference with persons who could not lawfully be arrested. Argument along these lines was forcefully presented to the Supreme Court,⁹⁹ and it is apparent from the opinion in *Terry* that this was a matter of great concern to the Court.

The Chief Justice responds to this argument by talking about the limitations of the exclusionary rule, which "in some contexts . . . is ineffective as a deterrent."¹⁰⁰ He notes:

Doubtless some police "field interrogation" conduct violates the Fourth Amendment. But a stern refusal by this Court to condone

97. Justice Harlan, who felt that the Court should have spoken more directly to the circumstances in which a stop can be made, concluded that the suspicion in *Sibron* was not equal to that in *Terry* because during the eight-hour period the officer did not overhear any incriminating conversation or see any suspicious actions, such as the passing of packages. But, it is not too surprising that Sibron did not incriminate himself while in earshot of a uniformed officer; more convincing is Justice Harlan's later observation, that here, unlike *Terry*, there was no "need for immediate action." 392 U.S. at 73.

98. See Schwartz, *supra* note 87, at 444, 452 (1967); Souris, *Stop and Frisk or Arrest and Search—The Use and Misuse of Euphemisms*, 57 J. CRIM. L.C. & P.S. 251, 251-53 (1966). For detailed descriptions of these practices and the hostility engendered by them, see THE POLICE AND THE COMMUNITY, FIELD SURVEYS IV: A REPORT OF A RESEARCH STUDY SUBMITTED TO THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE (1966); NATIONAL CENTER ON POLICE AND COMMUNITY RELATIONS, FIELD SURVEYS V, A REPORT OF A RESEARCH STUDY SUBMITTED TO THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE (1967).

99. See Oberman & Finkel, *Constitutional Arguments Against "Stop and Frisk"*, 3 CRIM. L. BULL. 441, 470-75 (1967), which contains excerpts from the appellant's brief in *Sibron*.

100. 392 U.S. at 13.

such activity does not necessarily render it responsive to the exclusionary rule. Regardless of how effective the rule may be where obtaining convictions is an important objective of the police, it is powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forego successful prosecution in the interest of serving some other goal. . . . [A] rigid and unthinking application of the exclusionary rule, in futile protest against practices which it can never be used effectively to control, may exact a high toll in human injury and frustration of efforts to prevent crime.¹⁰¹

This language, I have been surprised to learn, has been the focus of a good deal of criticism of the *Terry* decision. As I understand the criticism, it rests on the hypothesis that the Court had no business allowing the police, in effect, to set the limits of the exclusionary rule by ignoring it under some circumstances. Or, to put the matter another way, the Court is charged with incorrectly deciding that because deterrence of the police is the primary objective of the exclusionary rule, the rule is to be applied only in those contexts where it in fact deters. It is said that this is wrong because the exclusionary rule, though intended primarily as a "deterrent safeguard,"¹⁰² also serves to "preserve the judicial process from contamination,"¹⁰³ to ensure that the government does not profit from its own wrongdoing,¹⁰⁴ and even to provide some measure of vindication for the individual whose constitutional right of privacy has been infringed.¹⁰⁵

Such criticism would be wholly justified if the Supreme Court had said something quite different—if, for example, the Court had adopted one part of the Ohio court of appeals' reasoning in *Terry*:

If we keep in mind this *raison d'être* of the exclusionary rule [deterrence], we can guard against confusion in the attendant rules that are developed. A judicial rule rendering evidence produced as the result of a "frisk" inadmissible would fail to deter the police from "frisking" suspects believed to be armed, as police "frisk" for their own protection rather than for the purpose of looking for evidence. A

101. 392 U.S. at 13-15.

102. *Mapp v. Ohio*, 367 U.S. 643, 648 (1961). Cf. Allen, *Federalism and the Fourth Amendment: A Requiem for Wolf*, 1961 SUP. CR. REV. 1, 37 ("It is clear that assumptions as to the efficacy of the rule in this respect are of the first importance in the Court's view of the matter.").

103. *Olmstead v. United States*, 277 U.S. 438, 484 (1928) (dissenting opinion of Justice Brandeis). See also *Atz v. Andrews*, 84 Fla. 43, 94 S. 329 (1922); Fraenkel, *Recent Developments in the Federal Law of Searches and Seizures*, 33 IOWA L. REV. 472, 498 (1948).

104. Allen, *supra* note 102, at 34; *People v. Cahan*, 44 Cal. 2d 434, 449, 282 P.2d 905, 912 (1955).

105. Allen, *supra* note 102, at 35 refers to a "privilege against conviction by unlawfully obtained evidence." See also *Mapp v. Ohio*, 367 U.S. 643, 656 (1961).

rule of inadmissibility in such cases could only result in allowing the armed criminal to go free although failing to any meaningful extent to protect individual liberty.¹⁰⁶

This, of course, is an extremely simplistic approach to the problem, and the criticism stated above would be fully justified if the Supreme Court had adopted such a view.

Fortunately, the Court did not subscribe to a strict deterrence rationale. Instead, it made somewhat different observations about the exclusionary rule to underscore another, most fundamental point: "*The exclusionary rule . . . cannot properly be invoked to exclude the products of legitimate police investigative techniques on the ground that much conduct which is closely similar involves unwarranted intrusions upon constitutional protections.*"¹⁰⁷ It is this sentence which the critics of *Terry* seem to have missed, for it reveals the reason underlying the observation that the exclusionary rule does not always deter. The Court's thinking was essentially this: If we really thought that exclusion of the fruits of *all* street encounters would somehow put a stop to those which are in violation of the fourth amendment, we might consider paying that price; but it is clear that this result would not follow because the illegal encounters are usually motivated by objectives other than conviction.

In considering the question of whether the Supreme Court reached the proper conclusion in *Terry*, then, it is essential to keep in mind that street 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."¹⁰⁸ In support of this observation, the Court cites the ABF study, which helpfully catalogs the various other on-the-street police practices which "raise issues substantially different from those likely to arise from field interrogation, where the questioning will be followed by arrest and prosecution if sufficient reason is found to believe the suspect guilty of a crime."¹⁰⁹ These other practices, which are commonly subsumed under the euphemism "aggressive preventive patrol,"¹¹⁰ include: (1) vice control practices, an attempt to restrict criminal activity which is difficult to detect by ordinary procedures and which is viewed ambivalently by many individuals in the community; (2) weapons confiscation, an attempt to remove weapons from circulation;

106. *State v. Terry*, 5 Ohio App. 2d 122, 131-32, 214 N.E.2d 114, 121 (1966).

107. 392 U.S. at 13 (emphasis added).

108. 392 U.S. at 13.

109. DETECTION OF CRIME 15.

110. *Id.* at 10.

(3) control of gangs and juveniles, an attempt to get teenagers off the streets; (4) disturbance control, an attempt to prevent and terminate instances of mutual combat; (5) control of public drinking and drunks, an attempt to safeguard those who are or might become incapacitated from drinking; and (6) traffic control, an attempt to find dangerous drivers and to render assistance to motorists generally.¹¹¹

Although it is true that the police have often failed to assess the wisdom of these practices¹¹² or even to distinguish them carefully from good-faith, reasonable investigative stops,¹¹³ it would be harsh medicine indeed to declare the latter unconstitutional in order to administer an indirect and ineffective slap at the former. Many arrests are also made for purposes other than the sole legitimate objective—prosecution¹¹⁴—but it has not been seriously suggested that the answer is to abolish the right to make an arrest on probable cause. It is equally clear that many searches are not prosecution-oriented,¹¹⁵ but this hardly calls for the conclusion that the police should never be permitted to conduct a search. All of these practices ought to be a matter of serious concern, but this concern would be better expressed by attempting to find new remedies to curtail potential abuses than by trying to use the exclusionary rule as a blunderbuss.

V. TEMPORARY SEIZURE FOR INVESTIGATION

The concern of the Supreme Court in the recent stop-and-frisk cases, therefore, was most directly focused upon what might be called "temporary seizure for investigation." This practice is a seizure and thus falls within the ambit of the fourth amendment; it is temporary and thus distinguishable from what is usually understood by the term "arrest"; and it is for investigation rather than for one of

111. *Id.* at 10-17.

112. *Id.* at xix: "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 police attitude toward policy-making responsibility that there has been no noticeable effort to measure the effectiveness of this technique . . . whether, even solely from a law enforcement point of view, the gain in enforcement outweighs the cost in community alienation." See also REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 159-61 (Bantam ed. 1968); PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 95 (1967).

113. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 23 (1967).

114. ARREST 436-82. For a discussion of what the police perceive as the gains from an arrest even when a conviction is not forthcoming, see LaFave, *Improving Police Performance Through the Exclusionary Rule—Part I: Current Police and Local Court Practices*, 30 Mo. L. Rev. 391, 447-55 (1965).

115. DETECTION OF CRIME 183-99.

the other purposes mentioned earlier. When is such a stop permissible?

A. Possible Limitations

It is unfortunate that a majority of the Court avoids the issue of limitations upon investigative stops in all three cases. In *Terry* we are told that "[t]he crux of this case . . . is not the propriety of Officer McFadden's taking steps to investigate petitioner's suspicious behavior, but rather, whether there was justification for McFadden's invasion of Terry's personal security by searching him for weapons in the course of that investigation."¹¹⁶ The Court acknowledges that there was a seizure of Terry at some point prior to the search of his person,¹¹⁷ but clearly does not want to talk about it: "[w]e . . . decide nothing today concerning the constitutional propriety of an investigative 'seizure' upon less than probable cause" ¹¹⁸ Similarly, in *Sibron* the Court proceeds directly to the frisk issue without a word about the propriety of the officer's previous action in directing the suspect to leave the restaurant. And in *Peters*, of course, the problem is avoided entirely by characterizing the officer's conduct as a lawful arrest.

Justice Harlan, on the other hand, correctly concludes that the issue of the officer's right to stop should be resolved before any other questions are reached:

[I]f the frisk is justified in order to protect the officer during an encounter with a citizen, the officer must first have constitutional grounds to insist on an encounter, to make a *forcible* stop. Any per-

116. 392 U.S. at 23.

117. The Court asserts that it must determine when the seizure occurred (392 U.S. at 16) but then—though seizure is defined as an instance in which "a police officer accosts an individual and restrains his freedom to walk away"—determines only that the seizure occurred at least when the officer took hold of Terry.

Whether in a given case it is to be concluded that the suspect was actually seized or only consented to remain and be questioned may prove to be a sticky problem, much like the question of whether an arrest was made, in light of the courts' insistence that arrest must precede search, and the question of whether a suspect had been "deprived of his freedom in any significant way" so as to be entitled to the *Miranda* warnings before questioning. In all three situations, it may be asked, for example, which of the following tests apply: "(1) whether the officer's conduct indicates he has restrained the individual, (2) whether the individual understands that he is restrained, and (3) whether a reasonable man under the circumstances would believe he was restrained." *Abrams*, *supra* note 70, at 1103. Perhaps, as has been suggested, it is not meaningful to attempt to distinguish between field interrogations undertaken with consent and those performed without consent, and thus the real question is when may police stop a suspect regardless of his consent. DETECTION OF CRIME 17. Thus, as in the better view of arrest and search, the admissibility of evidence found in a frisk would not rest upon whether or not the officer had first actually seized the suspect, but rather upon whether the officer had grounds to seize him.

118. 392 U.S. at 19 n.16. If the Court had followed the analysis suggested in section III *supra*, this phrase would be "less probable cause than is needed for an arrest."

son, including a policeman, is at liberty to avoid a person he considers dangerous. If and when a policeman has a right instead to disarm such a person for his own protection he must first have a right not to avoid him but to be in his presence. That right must be more than the liberty (again, possessed by every citizen) to address questions to other persons, for ordinarily the person addressed has an equal right to ignore his interrogator and walk away; he certainly need not submit to a frisk for the questioner's protection. I would make it perfectly clear that the right to frisk in this case depends upon the reasonableness of a forcible stop to investigate a suspected crime.¹¹⁹

The failure of the majority to heed this advice, it would seem, was unwise, for the Court has thereby detoured around the threshold issue about stop and frisk, one on which courts, lawyers, and police deserve guidance.

There is, to be sure, some dictum in *Terry* which lends support to the proposition that stops for investigation are permissible on evidence insufficient for arrest, but the language affords few hints as to what the proper standards are. It is said, for example, that the officer's conduct should be judged by this "objective standard: would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?"¹²⁰ It would be hard to quarrel with this generality, although it is unclear what help it offers in the development of police guidelines. More promising, perhaps, is the reference made in the holding (which, again, does *not* give separate consideration to the grounds for the seizure) to the situation "where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot."¹²¹ But Justice Harlan objects that this is not as precise as the formula provided in the New York statute, which requires that the officer must "reasonably suspect" that the person he stops "is committing, has committed, or is about to commit" an offense;¹²² and the Court refuses to pass judgment upon the New York standard.¹²³

119. 392 U.S. at 32-33 (emphasis in original).

120. 392 U.S. at 21-22.

121. 392 U.S. at 30.

122. N.Y. CODE CRIM. PROC. § 180a (McKinney Supp. 1967).

123. The Court's refusal to pass upon the facial constitutionality of the New York statute is understandable, particularly in view of the unrestrained interpretation which it has received in the New York courts. Yet, as Justice Harlan noted:

This does not mean . . . that the statute should be ignored here. The State of New York has made a deliberate effort to deal with the complex problem of on-the-street police work. Without giving *carte blanche* to any particular verbal formulation, we should, I think, where relevant, indicate the extent to which that effort has been constitutionally successful.

392 U.S. at 71.

I do not mean to underestimate the difficulty of the task which the Court has not yet even begun. Articulating meaningful standards for arrest has proved difficult enough, and the prospect of now having to give content to a different kind of probable cause for investigative stops is a chilling one. There is no ready solution, although it may be that something might be gained if an attempt were made to develop the standards for a permissible forcible stop in terms of evidence which falls short of grounds for arrest in some identifiable way.

Before considering that possibility in greater detail, note should be taken of the fact that the stop-and-frisk decisions leave ample room for the development of other kinds of limitations on the power of police to make temporary seizures for investigation. For example, one might ask whether the nature of the suspected crime should make any difference, not merely in terms of variable probable cause, but also in determining whether a stopping should ever be permitted. In *Terry* the anticipated crime was armed robbery, while in *Peters* it was burglary; both are serious offenses and not infrequently are attended by violence. *Sibron*, on the other hand, involved possession of narcotics. As noted earlier, this may have contributed in some measure to the Court's refusal to permit inferences in that case as generous as in the other two—the failure to consider, for example, if it was not unusual for a person to spend eight consecutive hours loitering in an area frequented by narcotics addicts. Justice Harlan's analysis of *Sibron* is also revealing, for he says that the real question is whether there was a need for *immediate* action, and adds that he would apply as a general formula the New York statutory requirement that the officer must reasonably suspect a felony.¹²⁴ His failure to quote the balance of the statute, which also permits stop and frisk where the officer reasonably suspects the misdemeanor of narcotics possession,¹²⁵ might well have been deliberate.

There would be considerable merit in barring the police from employing stop and frisk for minor crimes like possession of narcotics in order to remove the temptation for the police to go on fishing expeditions for contraband.¹²⁶ This may be the kind of limitation

124. 392 U.S. at 104.

125. N.Y. CODE CRIM. PROC. § 180a (McKinney Supp. 1967) also covers suspicion of "any of the crimes specified in section five hundred fifty-two of this chapter." Section 552, by reference, incorporates the crime of narcotics possession and various other narcotics offenses.

126. Cf. 43 ALI PROCEEDINGS 117 (1966) (remarks of Harris Steinberg). If an officer were permitted to stop persons suspected of carrying, say, narcotics or gambling paraphernalia, there would be a lingering temptation for the officer to look for the contraband rather than for dangerous weapons. Even if the Supreme Court's two-step frisk process would bar admission of the contraband on the theory that the

which cannot easily be drawn as a matter of fourth amendment interpretation,¹²⁷ but it could readily be imposed by state legislation designed to prevent stop and frisk from becoming "stop and fish."¹²⁸

Similarly, it may be desirable to draw some distinction, in terms of the quantum of public interest, between detection of crime and prevention of crime. *Terry* expressly deals only with the latter, for the officer feared that a crime was about to be committed; thus, there is nothing in that case which forecloses the contention that the only new police authority for which a genuine need can be shown is the power to take preventive action in such circumstances.¹²⁹ It is in this situation that the police have heretofore lacked any clear authority to act, even with the most compelling evidence; and it is here that all members of the Court agree that some new authority, in the interest of crime prevention, is imperative.¹³⁰

It is not at all clear that the line should be drawn at preventive action, but the case for additional police authority is certainly most convincing in this situation.¹³¹ As one state court judge recently ob-

officer could search only for a weapon, the officer might stretch the truth in order to establish some other apparent justification for coming onto the contraband. Such "minor 'surgery' upon the facts" is not unheard of, and it is acknowledged by those with extensive experience in prosecution offices that it happens too often. *E.g.*, Kuh, *In-Field Interrogation: Stop, Question, Detention and Frisk*, 3 CRIM. L. BULL. 597, 604 (1967).

If such stops were permitted, a police officer could employ several tactics to justify what was in fact an illegal search: (1) He might, as did the officer in *Sibron*, claim that the suspect threw the contraband away. (2) He might claim that the suspect consented to the search, in which case the admissibility of the evidence will turn upon whether the magistrate believes the officer or the offender. (3) He might claim that the suspect admitted in response to questioning that he was carrying the contraband and that on this basis an arrest and search was made. It is interesting to note that, although suspects generally do not make direct admissions of guilt during a stopping for investigation, in a substantial number of the reported cases the officer testified that the defendant voluntarily admitted possession of contraband. DETECTION OF CRIME at 65.

127. *Cf.* the similar difficulties in interpreting other constitutional provisions. The kinds of offenses for which the sixth amendment does not require provision of counsel for the indigent [*Gideon v. Wainwright*, 372 U.S. 335 (1963)] or jury trial [*Duncan v. Louisiana*, 391 U.S. 145 (1968)] remain unclear.

128. THE MODEL CODE OF PRE-ARREST PROCEDURE § 2.02(8) (Tent. Draft No. 1, 1966) might serve as a model, although it does not appear to go far enough.

129. The Court did, however, characterize the governmental interests involved as "effective crime prevention and detection," 392 U.S. at 22 (emphasis added), although the officer in *Terry* acted only because he believed the men "were contemplating a daylight robbery." 392 U.S. at 28.

130. Even Justice Douglas acknowledges that the traditional grounds for arrest—when an offense *has been* or *is being* committed—are not adequate for the "equally if not more important function [of] crime prevention." 392 U.S. at 35 n.1.

131. It could be argued that the need to establish police authority for preventive measures is not great, since the suspect presumably has not committed a crime and thus will not be subject to a prosecution in which the propriety of the officer's conduct will be put in issue. But, the tail should not wag the dog; it is in the interest of both the police and the public to have the limits on police authority clearly delineated,

served:

Prevention within the area of the criminal law is greatly underdeveloped. The doctrine is widely practiced and constantly undergoing development in business and medicine, but unfortunately not within the law . . . It is important, if constitutionally permissible, to sanction a statute whereby crime can be prevented.¹³²

I would only add that if the police are to be given the right to step in before a crime has occurred, it is certainly preferable to recognize that power openly rather than to confer it indirectly by the use of broad vagrancy provisions¹³³ or by pushing the law of attempts back into the preparation stage.¹³⁴

B. *The Required Amount of Evidence*

Whatever may be the fate of these two possible limitations (or, perhaps, a combination of the two),¹³⁵ it is clear that in the years ahead one of the major tasks of the courts will be to flesh out the evidentiary standards for temporary investigative seizures. Whether

regardless of whether or not the matter of exclusion of evidence will arise. In any event, fourth and fifth amendment exclusionary questions can arise in this context, as a person stopped for the purpose of preventing a crime may make damaging admission concerning another crime, or be frisked for a weapon.

132. *Parker v. Municipal Judge*, 427 P.2d 642, 645 (Nev. 1967) (dissenting).

133. There is considerable evidence that such substantive provisions have often been adopted for this purpose. See LaFave, *Penal Code Revision: Considering the Problems and Practices of the Police*, 45 TEXAS L. REV. 434, 451-52 n.77 (1967). This use of vagrancy statutes has often been criticized. See, e.g., Foote, *Vagrancy-Type Law and Its Administration*, 104 U. PA. L. REV. 603, 649, (1956); Note, *Use of Vagrancy-Type Laws For Arrest and Detention of Suspicious Persons*, 59 YALE L.J. 1351 (1950).

For further discussion of problems in this area, see Douglas, *Vagrancy and Arrest on Suspicion*, 70 YALE L.J. 1 (1960); Lacey, *Vagrancy and Other Crimes of Personal Condition*, 66 HARV. L. REV. 1203 (1953); Perkins, *The Vagrancy Concept*, 9 HASTINGS L.J. 237 (1958); Sherry, *Vagrants, Rogues and Vagabonds—Old Concepts in Need of Revision*, 48 CALIF. L. REV. 557 (1960); Note, *The Vagrancy Concept Reconsidered: Problems and Abuses of Status Criminality*, 37 N.Y.U. L. REV. 102 (1962).

134. The draftsmen of the Model Penal Code acknowledged that it would be difficult to justify legislation dealing with inchoate offense on grounds of deterrence, but noted that other functions of the criminal law are served by such statutes. *Model Penal Code* art. 5, Comment at 24 (Tent. Draft No. 10, 1960). They stated the first of these as follows:

When a person is seriously dedicated to commission of a crime, there is obviously need for a firm legal basis for the intervention of the agencies of law enforcement to prevent its consummation. In determining that basis, there must be attention to the danger of abuse; equivocal behavior may be misconstrued by an unfriendly eye as preparation to commit a crime. It is no less important, on the other side, that lines should not be drawn so rigidly that the police confront insoluble dilemmas in deciding when to intervene, facing the risk that if they wait the crime may be committed while if they act they may not yet have any valid charge.

Id. at 25. However, it may well be that the question of when the police should be permitted to intervene and the question of when conviction should be permitted for coming close to the commission of a coate offense will sometimes call for separate answers, in which case the former is best dealt with in terms of stop and frisk. Consider, for example, the facts of the *Terry* case.

135. See text accompanying note 282 *infra*.

one resorts to the reasonableness approach or to the variable probable cause test, it is nonetheless necessary for this process to occur if police are to have reasonably clear guidelines as to what they may do, and if trial judges are to have adequate guidelines for reviewing police action. For many opponents of stop and frisk, however, this is a most unlikely prospect; to them, any evidentiary standard which falls below that required for arrest is bound to be vague and subjective.

1. *Of Vagueness and Subjectivity*

The critics of stop and frisk "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."¹³⁶ Most of this criticism has centered upon the New York statutory test of whether the officer "reasonably suspects a . . . crime";¹³⁷ it is claimed, for example, that it is impossible to draw a distinction between "mere" suspicion and "reasonable" suspicion¹³⁸ (in contrast, I take it, to drawing a distinction between "mere" belief and "reasonable" belief for arrest). These critics, I am sure, are just as unhappy with the standard—such as it is—that is given in *Terry*, for it is no more specific.¹³⁹

The vagueness argument, of course, is a convenient means for contesting any statement of the limitations on police power with which one disagrees, and one might wonder whether the critics of stop and frisk were equally concerned, for example, with the uncertainty engendered by *Escobedo v. Illinois*.¹⁴⁰ But even apart from this, it is not at all clear what characteristics of the unique police practice of stopping for investigation render it less susceptible to clearly stated limitations than arrest, search, or in-custody interrogation.

Reasonable suspicion of crime or any comparable test will, of course, seem rather vague when unadorned by judicial interpretation based upon specific fact situations, as would the "reasonable grounds to believe" test for arrest, or, for that matter, the "probable cause"

136. Schwartz, *supra* note 98, at 434.

137. See Schwartz, *supra* note 98, at 444; Oberman & Finkel, *Constitutional Arguments Against "Stop and Frisk,"* 3 CRIM. L. BULL. 441, 451-60 (1967); Recent Statute, *Criminal Law—New York Authorizes Police to "Stop-and-Frisk" on Resasonable Suspicion*, 78 HARV. L. REV. 473, 477 (1964); Comment, *The "No-Knock" and "Stop and Frisk" Provisions of the New York Code of Criminal Procedure*, 38 ST. JOHN'S L. REV. 392, 403-04 (1964).

138. Schwartz, *supra* note 98, at 445.

139. See text accompanying note 121 *supra*.

140. 378 U.S. 478 (1964).

requirement of the fourth amendment. It is certainly asking too much to expect that the basic standard which is to serve as the starting point for analysis should from its inception provide a ready answer for every conceivable fact situation.¹⁴¹ Indeed, those who demand such a self-defining standard have a short memory, for only a few years ago it could be said that the law of arrest was largely undefined in at least half of the states. True, the Supreme Court had provided some helpful benchmarks, but there was "an exceedingly small number of cases in [that] Court indicating what suffices for probable cause."¹⁴² The law of arrest remained vague, in the sense that the police could not be instructed in concrete terms,¹⁴³ until state courts had occasion to decide a substantial number of cases, and in twenty-five jurisdictions this process began only after *Mapp v. Ohio*¹⁴⁴ in 1961.¹⁴⁵

Some of the criticism about vagueness, however, has been directed both to the New York statute and the interpretations it has received in the appellate courts of that state.¹⁴⁶ If this means that some of the decisions of these courts are troublesome and not too helpful in clarifying the statute, I would agree. But here again past experience in the development of the grounds for arrest is instructive. Some state courts, when left entirely to their own devices, failed to develop precise and reasonable limitations on the authority to arrest, but this problem has been largely overcome by a few sig-

141. This is equally true whether the starting point is a statute, which obviously cannot spell out fact constellations for all of the various kinds of cases which might arise, or a court decision. See note 28 *supra*.

142. *Sibron v. New York*, 392 U.S. 40, 74 (1968).

143. In Illinois the exclusionary rule was adopted in 1923, and as a result the appellate courts of the state have decided a substantial number of cases over the years on what are and are not grounds for arrest. It is possible, therefore, to be quite specific in instructing Illinois police on the evidence needed to arrest. See 2 Chicago Police Dept. Law Training Bulletin Series, Nos. 1, 2, 3, 5, & 6 (1967).

144. 367 U.S. 643.

145. See LaFare, *Improving Police Performance Through the Exclusionary Rule—Part II: Defining the Norms and Training the Police*, 30 Mo. L. REV. 566, 579-86 (1965). One of the principal virtues of the exclusionary rule, then, is that it "assures a great deal of judicial attention" to police practices. Paulsen, *The Exclusionary Rule and Misconduct by the Police*, 52 J. CRIM. L.C. & P.S. 255, 260 (1961). In states which did not have the exclusionary rule before *Mapp*, only a dribble of tort actions against police reached the appellate courts, and the civil suit context often diverted the courts from the question of whether the police action was proper, to the problem of whether the errant officer should be subject to personal liability. See, e.g., *Odinetz v. Budds*, 315 Mich. 512, 517-18, 24 N.W.2d 193, 195 (1946). Moreover, if a court receives only a few cases, "the bits or slices or splinters which are cast up may be too fragmentary to yield a proper picture or to allow the shaping and joining of complementary hubs and spokes and rims to form a doctrinal wheel." K. LLEWELLYN, *THE COMMON LAW TRADITION—DECIDING APPEALS* 263 (1960).

146. E.g., Oberman & Finkel, *supra* note 137, at 456-60.

nificant Supreme Court decisions.¹⁴⁷ Now that the Court has gotten its eighteen feet wet in the murky waters of stop and frisk, there is ample reason to anticipate further clarification of the grounds for stopping.

In many instances, of course, the vagueness criticism comes down to a concern that temporary seizures for investigation will be undertaken upon the subjective judgment of police officers and that courts will be reluctant to second-guess them.¹⁴⁸ Again, it is not clear why this must be so. Surely, everyone by now has grasped the simple point that the "reasonable belief" required for arrest is not to be determined by what the arresting officer did or did not believe, but rather by whether the available facts would "warrant a man of reasonable caution in the belief" that the person arrested had committed an offense.¹⁴⁹ This being so, how can it seriously be contended that the requirement of "reasonable suspicion" grants police carte blanche to detain "on a purely subjective reaction"?¹⁵⁰ If the difficulty emanates from the word "suspicion,"¹⁵¹ then it should be dropped from stop-and-frisk vocabulary as the Court suggests in *Terry*. There is no disadvantage in saying that an officer may stop an individual for investigation when he reasonably *believes* that the person *may be* guilty of a crime,¹⁵² instead of saying that he can act when he reasonably *suspects* that the person *is* guilty of a crime.¹⁵³

The notion that subjective judgments will prevail is sometimes rested on the ground that police, in determining whether to stop an individual for investigation, will reach judgments based upon their experience and expertise.¹⁵⁴ It is certainly true that they will do so, but they have long done precisely this in deciding whether an arrest or search is called for, and courts have long accepted the fact that the training and experience of police may equip them to reach conclu-

147. Compare, e.g., *State v. Beck*, 175 Ohio St. 73, 191 N.E.2d 825 (1963), with *Beck v. Ohio*, 379 U.S. 89 (1964).

148. *Oberman & Finkel*, *supra* note 137, at 456-60; *Schwartz*, *supra* note 98, at 445; Comment, *Police Power To Stop, Frisk, and Question Suspicious Persons*, 65 COLUM. L. REV. 848, 859 (1965).

149. *Carroll v. United States*, 267 U.S. 132, 162 (1925).

150. DETECTION OF CRIME 6, quoting NEW YORK STATE BAR ASSOCIATION, REPORT OF THE COMMITTEE ON PENAL LAW AND CRIMINAL PROCEDURE (Feb. 25, 1964).

151. See *Schwartz*, *supra* note 98, at 445-46.

152. The holding in *Terry* uses essentially this language by embracing the situation "where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot." 392 U.S. at 30.

153. The former standard also possesses the advantage of avoiding the use of a troublesome word which is sometimes defined as "to imagine [one] to be guilty or culpable on slight evidence or without proof." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2303 (1968 ed.) (emphasis added).

154. See, e.g., *Schwartz*, *Stop and Frisk (A Case Study in Judicial Control of the Police)*, 58 J. CRIM. L.C. & P.S. 433, 445 (1967).

sions different from those of a layman.¹⁵⁵ This fact, of course, cuts two ways: an officer because of his training and experience may be held to have probable cause when a layman confronted with the same facts would not;¹⁵⁶ or he may for this reason not be entitled to mistakes which would be reasonable for a layman, and thus not have probable cause.¹⁵⁷ In any event, a standard does not become subjective rather than objective merely because it takes into account the special skills and knowledge of the actor.¹⁵⁸

Once again, the New York Court of Appeals may be the villain in creating confusion and conflict. More than one commentator¹⁵⁹ has pointed with alarm to the Court of Appeals' statement that the New York reasonable-suspicion requirement "incorporates the police officer's intuitive knowledge and appraisal of the appearance of criminal activity."¹⁶⁰ The word "intuitive" clearly should not have been used, at least if one defines intuition as "immediate cognizance or conviction without rational thought,"¹⁶¹ and fortunately the United States Supreme Court has in effect removed it. In *Terry*, the Court emphasized that "the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion."¹⁶²

Thus, the Court has made clear its belief that there is no clash between the precept that the right of privacy is "too precious to entrust to the discretion of those whose job is the detection of crime,"¹⁶³ and the notion that the police are expected to rely upon their train-

155. *E.g.*, *Bell v. United States*, 254 F.2d 82 (D.C. Cir. 1958); *People v. Langley*, 182 Cal. App. 2d 89, 5 Cal Rptr. 826 (1960); *People v. Bartoletta*, 248 Mich. 499, 227 N.W. 763 (1929); *People v. Valentine*, 17 N.Y.2d 128, 216 N.E.2d 321, 269 N.Y.S.2d 111 (1966).

156. See cases cited in note 155 *supra*.

157. In *Jewell v. Hempleman*, 210 Wis. 265, 246 N.W. 441 (1933), a jury apparently imposed liability on an officer for his failure to use his special skills. A conservation warden made an arrest for possession of part of a deer carcass during closed season. The warden "testified that he had had a rather extended experience as a conservation warden, had seen lots of venison and deer bones, and was familiar with and knew the difference in texture, color, size of bones, etc., between venison and beef [which the meat turned out to be]; that after looking at the meat in the milkhouse and without cutting it up or particularly examining it he had considered it venison." 210 Wis. at 268, 246 N.W. at 442. The appellate court held that "the jury might well have concluded that [the warden's] examination of the meat was, to say the least, cursory and careless, that his conclusion was a hasty one, and that as an experienced warden he did not act prudently." 210 Wis. at 270, 246 N.W. at 443.

158. This has never been questioned in the law of torts; see, *e.g.*, 2 F. HARPER & F. JAMES, TORTS 919 (1956).

159. *E.g.*, Oberman & Finkel, *supra* note 148, at 457; Schwartz, *supra* note 154, at 455.

160. *People v. Peters*, 18 N.Y.2d 238, 245, 219 N.E.2d 595, 599, 273 N.Y.S.2d 217, 222 (1966).

161. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1187 (1961).

162. 392 U.S. at 21.

163. *McDonald v. United States*, 335 U.S. 451, 455 (1948).

ing and experience in reaching search and seizure decisions. It is for the courts to determine when an officer's conduct squares with the fourth amendment, giving "due weight . . . to the specific reasonable inferences which he is entitled to draw from the facts *in light of his experience*."¹⁶⁴ And, it is for the police to articulate the facts and what their experience reveals as to those facts. Such generalities as "he didn't look right" will not suffice; like Officer McFadden in *Terry*, the officer must relate what he has observed, and, when appropriate, indicate why his knowledge of the crime problem and the habits of the residents on his beat or of the practices of those planning or engaging in certain forms of criminal conduct gives special significance to what he observed.¹⁶⁵ There are limits, of course, on what may be expected from the police in terms of verbalizing their observations and impressions,¹⁶⁶ but a reasonably specific statement by an officer of the circumstances underlying his action—when considered together with how he in fact reacted to the situation which confronted him¹⁶⁷—should afford an adequate basis for judicial review.

164. 392 U.S. at 27 (emphasis added). See also the language of the Court quoted in note 152 *supra*.

165. Such knowledge is also important with respect to grounds for arrest, but officers have often failed to communicate it to the judge at the hearing on a motion to suppress. Frequently, the result is that what in fact was a lawful arrest is declared unlawful. See LaFave, *Improving Police Performance Through the Exclusionary Rule—Part I: Current Police and Local Court Practices*, 30 Mo. L. Rev. 391, 398-401, 417-18 (1965). Some police departments are making efforts to remedy this situation. *Id.* at 417-18 n.82.

166. There is no more reason to take a "grudging or negative attitude" toward such oral communication than there is to do so with respect to search warrant affidavits, which "are normally drafted by nonlawyers in the midst and haste of a criminal investigation." *United States v. Ventresca*, 380 U.S. 102, 108 (1965). Both situations have their unique difficulties. In the stop-and-frisk situation, very little time passes between observation and decision, but considerable time intervenes between the officer's decision and his articulation in court. In the search warrant situation, by contrast, there is at least some time for reflection and review between the time the evidence is received and a decision is made, but articulation—preparation of the affidavit—comes hard on the heels of the decision.

167. It has been suggested, and I think wisely, that in some cases where it appears that the officer has had some difficulty in trying to articulate the grounds of his suspicion, it would be appropriate to take into account how he reacted on the spur of the moment to the situation. For example, in the *Peters* case the fact that Officer Lasky called the police before venturing into the hallway is entitled to weight, as is the fact in *Terry* that Officer McFadden interposed the body of one of the suspects between himself and the other two suspects. Remarks of Justice Walter V. Schaefer of the Supreme Court of Illinois, at Institute of Continuing Legal Education program on "Criminal Law and the Constitution: The Expanding Revolution," July 19, 1968.

This suggestion does not seem inconsistent with the Court's admonition that good faith on the part of the officer is not enough (392 U.S. at 27) nor does it suggest that the conduct of the officer should in all cases be regarded as a kind of self-justification. Rather, as Justice Schaefer pointed out, the suggestion is merely that the law is equally as able to deal with inferences in this situation as it is in the many other civil and criminal contexts in which inferences are drawn from conduct.

2. Toward Precise Standards

The preceding discussion is not intended to reopen the pre-*Terry* debate on stop and frisk, but only to suggest that the fears of many are unwarranted when they contend that stopping for investigation, if permitted, would of necessity be judged by a vague and subjective standard. This is not to say that many answers can be found in the *Terry* decision itself; rather, *Terry*'s value lies in the Court's firm assertion that police action under this new power will be scrutinized as closely as other enforcement activities touched by the Constitution. *Terry* is not the end; it is the beginning, and more specific limits will later emerge by a process of judicial inclusion and exclusion.¹⁶⁸

Although prognostication about future Supreme Court decisions is a hazardous game, I would like to consider briefly how some of these specific limits might ultimately be drawn. One reason for such a venture is to demonstrate that the standards for an investigative stop could become just as precise as those that have been developed for arrest. Another function of the following inquiry is to explore the earlier suggestion that something might be gained from an attempt to define the grounds for a stop in terms of evidence that falls short of grounds for arrest in some identifiable way.

Despite claims that the distinction between "reasonable *grounds* to believe" and "reasonable *grounds* to suspect" is only a "semantic quibble,"¹⁶⁹ it does seem that separate, distinguishable standards for arrest and for stopping could be developed. Both procedures require probable cause, but a somewhat different kind of probable cause: for arrest the officer must have "reasonable grounds to believe" that the person has committed a crime, but for stopping (to use the language in *Terry* instead of the much-maligned New York formula) he must "reasonably . . . conclude [that is, believe] . . . that criminal activity may be afoot."¹⁷⁰ Since "in dealing with probable cause . . . we deal with probabilities,"¹⁷¹ the difference between these two formulae may lie in the degree of probability required.

As to the probability required for an arrest, it may generally be stated that it must be more probable than not that the person has committed an offense, although this is less certain as to the proba-

168. The evolution of more precise guidelines is illustrated by experience in California, the state which first expressly recognized the power of police to stop and frisk. See cases cited in DETECTION OF CRIME ch. 2.

169. *DeSalvatore v. State*, 52 Del. 550, 557, 163 A.2d 244, 249 (1960) (emphasis in original).

170. 392 U.S. at 30.

171. *Brinegar v. United States*, 338 U.S. 160, 175 (1949).

bility that a particular person is the offender than to the probability that a crime has been committed by someone. In the latter situation,¹⁷² which assumes central importance when there is no doubt who the offender is *if* a crime has been committed, courts ordinarily require that criminal conduct be more probable than non-criminal activity.¹⁷³ This approach is reflected in those decisions which say that there must be "more evidence for [the existence of criminal conduct] than against"¹⁷⁴ or that the suspect's actions must be "inconsistent with any innocent pursuit,"¹⁷⁵ and also in the many cases where grounds for arrest have been found lacking because the conduct of the suspect was equivocal, that is, where the possibility of criminal conduct was no greater than the possibility of innocent behavior.¹⁷⁶

When it is at least more probable than not that a crime has occurred, courts usually hold that a particular person may be arrested for that crime only if it is more probable than not that that person is the offender; the information must be such that "reasonable men would conclude that in all probability" the suspect is the perpetrator.¹⁷⁷ This, however, cannot be stated as a universal rule, for it does not take account of the classic case in which a man is shot in the back in a locked room and the two persons present at the time accuse each other.¹⁷⁸ In such a case, it would seem that both suspects

172. See ARREST 256-58.

173. It would be difficult to say that this should always be the case, in light of a notion of variable probable cause that takes into account the seriousness of the offense. On a variation of Justice Jackson's hypothetical, text at note 78 *supra*, one might ask if it is necessary that there be a more than 50% probability when the suspected crime is a kidnapping with the child in the hands of the suspect.

174. *E.g.*, *People v. Ingle*, 53 Cal. 2d 407, 413, 348 P.2d 577, 580, 2 Cal. Rptr. 14, 17 (1960). See also I C. ALEXANDER, *THE LAW OF ARREST IN CRIMINAL AND OTHER PROCEEDINGS* 365 (1949).

175. *E.g.*, *State v. Beadbetter*, 210 Wis. 327, 333, 246 N.W. 443, 445 (1933) (concerning statute which allows search by conservation warden on "reason to believe"). *Cf.* the recent dictum of the same court that evidence for arrest need not "be sufficient to prove that guilt is more probable than not." *Browne v. State*, 24 Wis. 2d 491, 504, 129 N.W.2d 175, 180, *rehearing denied*, 131 N.W.2d 169 (1964).

176. *E.g.*, *People v. Stein*, 265 Mich. 610, 251 N.W. 788 (1933).

177. *State v. Phillips*, 262 Wis. 303, 307, 55 N.W.2d 384, 386 (1952).

178. Quite similar is the following illustration from *RESTATEMENT (SECOND) OF TORTS* § 119, comment *j* (1965):

A sees B and C bending over a dead man, D. B and C each accuse the other of murdering D. A is not sure that either B or C did the killing, but he has a reasonable suspicion that either B or C killed D. A is privileged to arrest either or both. For other hard cases and the commentators' views about them, see ARREST 259-63.

The very fact that the right to stop and question is acknowledged may justify some limitation in this sort of arrest authority. Courts have said that although an officer must act on the information at hand, "where there is an opportunity for inquiry and investigation, inquiry and investigation should be made." *Filer v. Smith*, 96 Mich. 347, 354, 55 N.W. 999, 1001 (1893). The right to stop and question would provide the opportunity for inquiry, and thus it might be concluded that arrest of either or both of

might be arrested, although this exception is probably a limited one and may apply only (as the hypothetical suggests) where the offense is a most serious one¹⁷⁹ and, perhaps, where it is also clear that the actual offender is almost certain to be one of the persons arrested.¹⁸⁰ But whatever the boundaries of this limited exception, the general rule—as repeatedly emphasized by the Supreme Court—is that where there are several actual or potential suspects, all of them may not be arrested nor may any one be arrested at random.¹⁸¹

By contrast, when a case involves temporary seizure for investigation, and it is "more relevant to ask whether there is probable cause for restraining a suspect than to ask whether there is probable cause for believing in the suspect's guilt,"¹⁸² the more-probable-than-not test is inapplicable. Rather, as is suggested by the reference in *Terry* to reasonable belief "that criminal activity *may be* afoot,"¹⁸³ it should be sufficient that there is a substantial possibility that a crime has been or is about to be committed and that the suspect is the person who committed or is planning the offense.¹⁸⁴ Consider the following possible situations.

the suspects would be improper unless the process of questioning did not identify one of the bystanders as the killer.

179. "In determining whether such drastic action would ever be reasonable, one would probably weigh the seriousness of the crime." Foote, *Problems of the Protection of Human Rights in Criminal Law and Procedure*, U.N. Doc. TE 326/1 (40-2) LA, at 36 (1958).

180. THE RESTATEMENT (SECOND) OF TORTS, *supra* note 178, notes the anomaly of holding multiple arrests unlawful "although it is clear at the time of the arrest that one of them is guilty and that the guilty one may escape unless both are arrested."

181. In *Wong Sun v. United States*, 371 U.S. 471 (1963), an informant had said that an individual named "Blackie Toy," the proprietor of a laundry on Leavenworth Street, had sold an ounce of heroin. There were several Chinese laundries on this street, and apparently more than one Toy, and thus the arrest of one of them was unlawful because there was no showing that the officers "had some information of some kind which had narrowed the scope of their search to this particular Toy." 371 U.S. at 481.

In *Mallory v. United States*, 354 U.S. 449 (1957), involving a rape by a masked Negro, three Negroes who had access to the basement where the rape occurred and who fit the general description of the rapist were arrested. Said the Court:

Presumably, whomever the police arrest they must arrest on "probable cause." It is not the function of the police to arrest, as it were, at large and to use an interrogating process at police headquarters in order to determine whom they should charge before a committing magistrate on "probable cause."

354 U.S. at 456.

Johnson v. United States, 333 U.S. 10 (1948), was a rather ridiculous extension of the principle. Officers smelled burning opium outside a hotel room. The Court held that a search warrant could have been obtained on this evidence, but that it was improper to knock on the door and then arrest the petitioner after she was found to be alone, since "the arresting officer did not have probable cause to arrest petitioner until he had entered her room and found her to be the sole occupant." 333 U.S. at 16.

182. W. SCHAEFER, *THE SUSPECT AND SOCIETY* 25 (1967).

183. 392 U.S. at 30 (emphasis added).

184. Others have made similar suggestions. Stern, *Stop and Frisk: An Historical Answer to a Modern Problem*, 58 J. CRIM. L.C. & P.S. 532 (1967), states at 536: "Prob-

a. *Known but untested informant.* When the police act on the basis of information from an informant, the informant usually is able to identify the alleged offender with sufficient specificity.¹⁸⁵ The central problem, then, is whether there is reason for the officer to find the information credible. On this issue, courts have typically distinguished between the informer who has given reliable information in the past and the informer who is known but has not established his reliability. If the informant has given information to the police in the past, and the officer can truthfully say that this information was not merely acted upon,¹⁸⁶ but that as a result convictions¹⁸⁷ or at least indictments¹⁸⁸ were obtained, and he can also testify specifically about the manner in which the informant acquired the present information,¹⁸⁹ then an arrest made solely upon the information provided will be upheld.¹⁹⁰ In short, under such circumstances it is more probable than not that the informant's information is correct.

By contrast, courts have not held that an arrest may be made solely upon the word of a known but untested informant. Rather, in such a case it is necessary that there be some corroborating evidence. For example, if the informant says that the suspect committed some past crime, the fact that the named person seems to fit the description given by the victim would suffice;¹⁹¹ or, if the informant claims that

able cause is the officer's reasonable *belief*—the *probability* under the circumstances. The basis for detention under the stop and frisk statutes is reasonable *suspicion*—the *possibility* under the circumstances. By definition suspicion is just one step removed from belief" (emphasis in original). Another commentator has said that the grounds for stopping should ordinarily be limited "to situations in which only another detail of description or closer proximity or connection to the crime would be needed for probable cause [for arrest], or in which only an unequivocal act would be needed to constitute an attempt." Recent Statute, *supra* note 137, at 476 (emphasis in original).

185. *E.g.*, *People v. Durr*, 28 Ill. 2d 308, 192 N.E.2d 379 (1963), *cert. denied*, 376 U.S. 973 (1964). Occasionally this is not the case, as in *People v. Dewson*, 150 Cal. App. 2d 119, 310 P.2d 162 (1957), where a reliable informant said that a Negro known as "Bozo," driving a 1953 Oldsmobile "98" convertible with a black top and a light colored body was selling narcotics. The court took the view that this information was not specific enough for arrest, but that it did justify stopping for investigation a person fitting this description. The problem in such a case is essentially the same as that most frequently encountered when the information comes from a victim or witness. See text accompanying note 203 *infra*.

186. A statement that arrests followed from the prior information given by this informant is not sufficient; see, *e.g.*, *People v. McClellan*, 34 Ill. 2d 572, 218 N.E.2d 97 (1966).

187. *E.g.*, *People v. Truelock*, 35 Ill. 2d 189, 220 N.E.2d 187 (1966); *People v. Thomas*, 76 Ill. App. 2d 42, 221 N.E.2d 800 (1966).

188. *E.g.*, *People v. Miller*, 34 Ill. 2d 527, 216 N.E.2d 793 (1966).

189. *E.g.*, *People v. McCray*, 33 Ill. 2d 66, 210 N.E.2d 161 (1965), *aff'd*, 386 U.S. 300 (1967). Cf. *Aguilar v. Texas*, 378 U.S. 108 (1964) (search warrant).

190. *E.g.*, *People v. Freeman*, 34 Ill. 2d 362, 215 N.E.2d 206 (1966). Cf. *Aguilar v. Texas*, 378 U.S. 108 (1964) (search warrant).

191. *E.g.*, *People v. Ostrand*, 35 Ill. 2d 520, 221 N.E.2d 499 (1960).

the suspect is in a given area for the purpose of committing a crime, observed suspicious conduct will be adequate to sustain the arrest.¹⁹² Mere appearance of the suspect at the time and place predicted, often the clincher when a reliable informant is used,¹⁹³ does not appear to be adequate corroboration for arrest.¹⁹⁴ But, it is submitted that in this kind of case there is such a substantial possibility that the informant is right that a stopping of the suspect for investigation would be proper.¹⁹⁵ Or, to put the point another way, since the suspect's presence there may be either an innocent but predictable act (and thus a matter on which the informant could speak) or an act done in furtherance of the scheme alleged by the informant, it is appropriate to detain the suspect briefly in an attempt to determine which is the case. Such a power to stop and question dovetails neatly with the power to arrest, since a lawful arrest could be made if the suspect's presence proves to be suspicious apart from the informant's story (as it might turn out to be upon questioning).¹⁹⁶

b. *Anonymous informant.* When the police receive information from an anonymous informant,¹⁹⁷ they may not arrest solely upon the basis of that information.¹⁹⁸ This is true even when the informa-

192. The suspicious conduct may itself be equivocal and thus be insufficient for arrest by itself, as where the suspect in a narcotics case was overheard to say, "I have the money, do you have the stuff?" *People v. Brooks*, 32 Ill. 2d 81, 83, 203 N.E.2d 882, 883 (1965).

193. See *McCray v. Illinois*, 386 U.S. 300 (1967).

194. Courts have usually required more than one story to support such an equivocal appearance. Appearance has been sufficient corroboration where three informants of unknown reliability gave the information, *People v. La Bostrie*, 14 Ill. 2d 617, 153 N.E.2d 570 (1958), and where the officer heard the informant place a telephone call to the suspect to arrange his appearance for the specific purpose of selling narcotics, *People v. Jones*, 16 Ill. 2d 569, 158 N.E.2d 773 (1959).

195. Some would be unhappy with such a rule because of the fact that the police need not disclose the name of the informant, *McCray v. Illinois*, 386 U.S. 300 (1967), which creates the risk (also present in the arrest cases) that the police may create an imaginary informant after the fact to justify their earlier action. See Younger, *The Perjury Routine*, 3 CRIM. L. BULL. 551 (1967). Since real or imagined informants are utilized most often in narcotics cases, the limitation suggested earlier that stop and frisk not be permitted for this kind of offense, takes on added importance. See text accompanying note 126 *supra*.

196. Cf. *In re Boykin*, 39 Ill. 2d 617, 237 N.E.2d 460 (1968), where an assistant principal of a school told the police that he had anonymous information that a student had a gun. It was possible that the informant was not anonymous but that assistant principal said so "to avoid future difficulties in the school and the creation of a feud." Held proper to search the student for a weapon even if there were no grounds for arrest.

197. That is, the informant remains anonymous to the police, as contrasted to a case in which the police know the informer's identity but do not wish to disclose it. The police are not required to reveal an informant's identity when the information obtained from him only provides the basis for arrest. *McCray v. Illinois*, 386 U.S. 300 (1967).

198. The rule has even been applied to such a serious crime as murder. *People v. Humphreys*, 353 Ill. 340, 187 N.E. 446 (1933).

tion is to the effect that the named individual will be in a certain place at a certain time for the purpose of committing the crime and he does in fact appear;¹⁹⁹ what is needed for arrest is more substantial corroboration.²⁰⁰ This is because there is less reason to credit information received from an anonymous source; the informant simply may not want to get involved, or he may be unwilling to identify himself because he is fabricating a story for some ulterior motive.

For this reason, "using anonymous information as a basis for intrusive police action is highly dangerous,"²⁰¹ and the better view would be that such information (even with the slight corroboration of the suspect's appearance as predicted) does not, as a general proposition, justify a stopping for questioning. That is, the anonymous information ordinarily raises a possibility, but not a substantial possibility, of criminal conduct. But, in this context the word "substantial" takes on special importance; whether the possibility is great enough to justify stopping the suspect who appeared as predicted may well depend upon the nature of the crime—particularly where such action might prevent a serious crime from occurring. No one would seriously question the authority of police to detain for investigation an individual who was reported by an anonymous informant to be planning to bomb an airplane, and who appears at the airport carrying a suitcase. Action on the basis of anonymous information, then, should be allowed only in cases involving the risk of "serious personal injury or grave irreparable property damage" and certainly should not be undertaken for "the enforcement of sumptuary laws, such as gambling, and laws of limited public consequence, such as narcotics violations, prostitution, larcenies of the ordinary kind, and the like."²⁰² This is not to suggest that anonymous information must be ignored in the latter instances; it offers a legitimate basis for a "stakeout" or other surveillance, but not for a seizure.

199. *E.g.*, *People v. Pitts*, 26 Ill. 2d 395, 186 N.E.2d 357 (1962); *People v. Parren*, 24 Ill. 2d 572, 182 N.E.2d 662 (1962); *People v. Malinsky*, 15 N.Y.2d 86, 209 N.E.2d 694, 262 N.Y.S.2d 65 (1965); *People v. Coffey*, 12 N.Y.2d 443, 191 N.E.2d 263, 240 N.Y.S.2d 721 (1963).

200. Such corroboration has been found where the suspect appeared at the time and place predicted and the suspect's companion proved to be involved in the offense predicted. *People v. Tillman*, 1 Ill. 2d 525, 116 N.E.2d 344 (1954).

201. *People v. Taggart*, 20 N.Y.2d 335, 343, 229 N.E.2d 581, 586, 283 N.Y.S.2d 1, 9 (1967).

202. *People v. Taggart*, 20 N.Y.2d 335, 340, 229 N.E.2d 581, 584, 283 N.Y.S.2d 1, 6. In *Taggart* the anonymous caller stated that a specifically described person was at a certain place and that he had a loaded revolver in his pocket. The suspect was found at the named location in the midst of a group of children, which the court concluded justified a search for the weapon. Justice Fuld, dissenting, agreed that there was a need to act on this information, but thought that the police should have patted the suspect down

c. *Information from victim or witnesses.* While informants usually provide information about ongoing or future criminal conduct, the victim of or witness to a crime obviously is giving information concerning past criminal conduct. In contrast to the informer cases, there is ordinarily no problem concerning the reliability of the person providing the information. Often, as where damage to property or injury to a person is apparent, corroboration of the fact that an offense has occurred is at hand,²⁰³ and even when this is not the case the police are entitled to assume the veracity of the alleged victim or witness absent special circumstances which should put them on guard.²⁰⁴ The problem, except where the offender is a prior acquaintance of the victim or witness, is whether a sufficiently detailed description can be given to justify the arrest of any one person.

Sometimes, as where a series of crimes with the same *modus operandi* has been committed in a certain vicinity, the several victims or witnesses may together be able to provide a very specific description of the offender. Under such circumstances, a person who fits the description and is found in that area may be lawfully arrested, even though the encounter takes place sometime after the offense was reported.²⁰⁵ In the more usual case, however, the police are called to the scene of a just-completed crime and are able to obtain only a general description of the offender. Experience has shown that when the victim or witness cannot name the offender his apprehension is unlikely unless he is immediately found in the area,²⁰⁶ so the police

instead of immediately looking into his pocket. This is consistent with the view later taken by the Supreme Court in *Terry*.

The majority in *Taggart* was also concerned with the possibility that police might invent informants after the fact to justify their action (*see* note 195 *supra*), and said that "the police should be required to make contemporaneous or reasonably prompt detailed records of any such communications which should be subject to inspection and examination on a suppression hearing on the issue of credibility." *Id.* at 343, 229 N.E.2d at 587, 283 N.Y.S.2d at 9.

203. *E.g.*, *Hood v. Brinson*, 30 Ill. App. 2d 498, 175 N.E.2d 300 (1961).

204. *E.g.*, *Watkins v. Sullivan*, 11 Ill. App. 2d 134, 136 N.E.2d 528 (1956).

205. *Ellis v. United States*, 264 F.2d 372 (D.C. Cir. 1959) (rash of daytime house-breakings in northeast Washington; description of offender indicated that he was a brown-skinned Negro, about five feet seven inches tall and 150 pounds, late teens to mid-twenties, very neatly dressed, wore topcoat with half-belt and a hat; held, proper to arrest man fitting this description who, while observed, approached a house, knocked on the door, looked about for a few minutes, and then left); *Mercurius v. Rolon*, 231 Cal. App. 2d 359, 41 Cal. Rptr. 789 (1964) (series of burglary-rapes within a five-block circle; general description of offender was that he was a male Negro with short hair, about six feet tall, and 165-210 pounds, very muscular and strong with large hands, from mid-twenties to thirties in age, wore a jacket of a certain fabric with distinct cuffs, and always drove from crimes in a car; held, proper to arrest person fitting this description seated in car two or three blocks from point where most recent offense had occurred the day before).

206. *See* PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 97 (1967).

response in these cases is to broadcast the general description and bring as many officers as possible into the area to search for a person or persons fitting the description. However, courts have generally taken the position—and this is the most striking illustration of the “more probable than not” test—that an arrest may not be made upon a general description when the circumstances, including the lapse of time and size of the area being searched, are such that more than one person would likely fit that description.²⁰⁷

In such a situation, as even many who oppose stop and frisk in other contexts would likely admit,²⁰⁸ the police must have some authority to freeze the situation. If it is inherent in the circumstances that no one person can be singled out as the probable offender, then it should be permissible to detain briefly every person in the area who fits the general description. Clearly, only one can be guilty, but as to each of the suspects there exists a substantial possibility of guilt.²⁰⁹ Common sense, of course, suggests that whether the possi-

207. In *People v. Mickelson*, 59 Cal. 2d 448, 380 P.2d 658, 30 Cal. Rptr. 18 (1963), a supermarket robber was described as being a fairly tall man of large build with dark hair who was wearing a red sweater. Twenty minutes later and six blocks from the scene of the robbery, a man fitting this description was stopped. The court held that the stopping (but not the subsequent search through the car) was proper, but observed that the police officer “did not have probable cause . . . to arrest [the suspect] for robbery. There could have been more than one tall white man with dark hair wearing a red sweater abroad at night in such a metropolitan area.” 59 Cal. 2d at 454, 388 P.2d at 662, 30 Cal. Rptr. at 22. Similarly, in *People v. Gibson*, 220 Cal. App. 2d 75, 33 Cal. Rptr. 775 (1963), a report over the police radio that a robber wore a dark felt hat, a leather coat, and dark glasses, was held not to justify arrest of a man with a dark hat, dark glasses, and a coat which looked like leather (but was not), who had been spotted in a car forty blocks from the scene of the robbery.

Sometimes, however, a single fact from the victim, together with other circumstances, will identify only one person in the area. See *People v. Posley*, 71 Ill. App. 2d 186, 218 N.E.2d 47 (1966) (police called to burglary, girl reported that man in her room smelled of shaving lotion; car one block away was only car in area without condensation on the windshield; smell of shaving lotion detected in car; suspect hiding in car properly arrested). Also, it is once again important to note that the “more-probable-than-not” test may not be applicable in the case of a most serious crime; see text accompanying note 178 *supra*. Illustrative of this exception is *People v. Schader*, 62 Cal. 2d 716, 401 P.2d 665, 44 Cal. Rptr. 193 (1965), where a policeman was killed during a robbery; a radio report that the two robbers were headed east in a late model red Cadillac was held to justify the arrest of a man who was apparently alone in such a car. The defendant relied upon the *Mickelson* case, but the court said that this case was distinguishable because the crime was murder, relying upon Justice Jackson's dissent in *Brinegar*, text accompanying note 59 *supra*.

208. See, e.g., Schwartz, *Stop and Frisk (A Case Study in Judicial Control of the Police)*, 58 J. CRIM. L.C. & P.S. 443, 456 (1967).

209. See *People v. Mickelson*, 59 Cal. 2d 448, 380 P.2d 658, 30 Cal. Rptr. 18 (1963) (summarized in note 207 *supra*); *People v. King*, 175 Cal. App. 2d 386, 346 P.2d 235 (1959) (information that robbery was committed by two men in a two-tone green, dark and dirty car which rattled and had a loud muffler, held to be adequate grounds for stopping a car fitting this description two miles from the robbery); *Wilson v. State*, 186 S.2d 208 (Miss. 1966) (witness saw theft of safe from supermarket and observed four men, one in an unusually long coat, depart in a light-colored Plymouth

bility is substantial will depend upon the size of the area in which the offender might be found (which in turn depends upon how recently the crime was committed and whether the offender fled on foot or in a car), the number of persons now in the area, and the extent to which the general description affords some basis for selection. If, for example, a robbery occurred some fifteen minutes earlier and the only report is that the robber wore brown shoes, and there are several hundred people on the streets in the area, no one would seriously suggest that all those with brown shoes should be stopped.²¹⁰

d. *Calls for assistance.* A somewhat different kind of case is presented when the police find themselves on the scene of what appears to be an offense being committed or just completed, and the circumstances suggest a need for action even prior to any attempt at questioning the victim or witnesses about the details. Police on patrol duty are occasionally confronted with situations in which they suddenly hear a call of "Help!" or "Police!" and then see one or more persons leaving the area. Ordinarily, probable cause for arrest will be lacking on such facts.²¹¹ The call may be a prank or otherwise unrelated to any criminal conduct, and, in any event, no one person has been identified as the one who is more-probably-than-not guilty.

Here, as in the previous situation, there probably will be a basis for an investigative stop. Once again, the police should be required to meet the substantial possibility test, but, while in the previous situation a general description utilized to select persons in the vicin-

station wagon; court does not question police detention of three men, one with described coat, who were seated in described vehicle).

210. The real problem of this kind occurs when the victim or witness can say only that the offender had brown skin; a common complaint of Negroes is that they are a highly visible minority and thus particularly susceptible to this kind of rough selection. The complaint is a valid one when race does not afford a reasonable basis for selection from the many persons in the area, which is often—but not always—the case. See *Commonwealth v. Hicks*, 209 Pa. Super. 1, 223 A.2d 873 (1966), where the police were told a burglary had been attempted by a Negro with a brown coat and a mustache, and this was held to justify the stopping for investigation of a Negro with a light colored coat without a mustache but in need of a shave, who was walking down the street some five blocks away. In the absence of some additional data not provided in the opinion such as the fact that this incident occurred in a section of Philadelphia not frequented by Negroes, or that the streets in the area were otherwise deserted, this is an outrageous decision; one of every four persons in Philadelphia is Negro.

On the other hand, it would be foolish to contend that race alone could never provide a basis for a stopping. The question is whether, given the nature of those in the suspect population (the characteristics of persons one would expect to find at that time in the vicinity of the crime), the one factor of race (or some other single bit of information, such as the fact that the offender wore a red shirt) is sufficiently selective. A Negro in an exclusive white residential area, a white person in Chinatown, or an American Indian in a Negro area might all be stopped if a member of their race had just committed an offense in the immediate vicinity.

211. E.g., *People v. Mirbelle*, 276 Ill. App. 533 (1934).

ity will meet the test, here the requirement may be satisfied even without any description because all the suspects will be in immediate proximity to a possible crime scene.²¹²

e. *Direct observations.* Most police stops for investigation are probably the result of direct observations, a particularly difficult category because the various fact situations which arise are not all of a kind. A few of the most common, however, will provide an adequate basis for analysis.

Because of the high incidence of property crimes and the fact that such crimes are infrequently solved by other means,²¹³ most field interrogations are undertaken with respect to such crimes.²¹⁴ The typical case is one in which a patrolman sees a person on the street carrying property under circumstances which suggest that the property might have been obtained unlawfully. The problem is precisely the converse of that present when an account of a crime has been received from a victim or witness; here, it is clear that the burglar, thief, fence, or what have you, has been caught red-handed *if* a crime has occurred, but the facts may not make it more probable than not that a crime has been committed. Since the property provides a specific focus for questioning, a stopping for such investigation is certainly appropriate when there is a substantial possibility of criminality, that is, reason to believe that "criminal activity may be afoot."²¹⁵ Merely unusual conduct—such as sitting in a park in broad daylight and dividing up a pile of coins—does not of itself call for inquiry,²¹⁶ but the following actions do justify questioning: (1) carrying a large bundle of clothing carelessly wadded together at 9:20 p.m. while carefully staying in the shadows;²¹⁷ (2) carrying a new

212. With regard to calls for assistance, for example, if a policeman standing outside an apartment house were to hear a cry for help within, it should be permissible for him to stop anyone leaving the apartment house immediately thereafter, "even though it again was perfectly possible that no one present was guilty of wrongdoing, and certain that not *all* of the persons were guilty of the commission of a crime." *United States v. Bonanno*, 180 F. Supp. 71, 79 n.15 (S.D.N.Y. 1960). Similarly, when the police hear a cry for help at 4:30 a.m., a person observed running out of a nearby alley could properly be stopped. *Bell v. United States*, 280 F.2d 717 (D.C. Cir. 1960).

The distinction between this section and the one preceding is between what is referred to as a "hot" search (at the crime scene) and a "warm" search (in the general vicinity of the crime). The third possibility is a "cold" search, not limited in area, which of course would require a much more specific description. See PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 58 (1967).

213. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 97 (1967).

214. DETECTION OF CRIME 28.

215. 392 U.S. at 30.

216. *People v. Henze*, 61 Cal. Rptr. 545 (App. Ct. 1967).

217. *People v. West*, 144 Cal. App. 2d 214, 300 P.2d 729 (1956).

console-type record player with the store tags still on it, where the two men involved were recognized as having prior larceny convictions;²¹⁸ and (3) carrying a brown carton, which appeared to have come from an adjacent railway express terminal, at 1:15 a.m.²¹⁹ In each of these examples, the possibility that the property was obtained by criminal means is so compelling as to call for investigation.

A second general situation—one which provides another opportunity to juxtapose the standards for arrest with those required for a temporary seizure for investigation—arises when an individual is suspected because of his companionship with another who has just been lawfully arrested. Assume, for example, that *A* has just been arrested while in the process of committing a crime. While the possibility that his companion, *B*, may also be arrested is greater than would be the case if *A* were being arrested for an offense committed at some time in the past,²²⁰ it does not follow that *B* may always be arrested too. The cases tell us that it is necessary to distinguish between those instances in which there is evidence of a "common design" between *A* and *B*,²²¹ on the one hand, and those in which *A*'s offense might well have been unknown to *B* and their "meeting is not secretive or in a suspicious hide-out,"²²² on the other. In the latter case the probabilities are not sufficient to allow the arrest of *B*, but it would seem that the fact of companionship at the time the crime was committed²²³ might well raise a substantial possibility that *B* was involved. This would be particularly true if *B* were to engage in any unusual conduct after the officer made his move to arrest *A*.²²⁴

218. *Brooks v. United States*, 159 A.2d 876 (D.C. Mun. App. 1960).

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

220. If *A* were arrested for a crime committed in the past, then it would have to appear both that the past offense was committed by more than one person and that there was some basis for believing that *A*'s present companion had been his accomplice. Compare *People v. Henneman*, 373 Ill. 603, 27 N.E.2d 448 (1940) (unlawful to arrest man riding in car with another man who fitted description of person who held up gas station the night before) with *People v. Derrico*, 409 Ill. 453, 100 N.E.2d 607 (1951) (when man known to have burglarized safe four months previously was properly arrested, and one of the weapons found in the car appeared to belong to his companion, the companion could also be arrested for burglary, which was known to involve at least two men).

221. E.g., *People v. West*, 15 Ill. 2d 171, 154 N.E.2d 286 (1958); *People v. McGowan*, 415 Ill. 375, 114 N.E.2d 407 (1953).

222. *United States v. Di Re*, 332 U.S. 581 (1948).

223. *B*'s companionship with *A*, even at a later date, might be sufficient. In a case such as *People v. Henneman*, 373 Ill. 603, 27 N.E.2d 448 (1940), where the car was stopped so that *A* could be arrested for armed robbery, *B*, passenger in the car, has in a sense been stopped too, and given the professional and dangerous nature of the crime for which *A* is being arrested, prudence would seem to dictate a frisk of *B*.

224. In *People v. Bowen*, 29 Ill. 2d 349, 194 N.E.2d 316 (1963), two officers lawfully arrested *A* for carrying a concealed weapon. *A*'s companion *B* (later found to be *A*'s husband) then began to depart quickly, but stopped when ordered to do so by one

While the preceding five categories do not exhaust all of the possible situations in which the police might consider stopping a suspect for investigation, they do account for most of the instances of such stopping in current practice²²⁵ which appear consistent with the standard suggested by the Supreme Court in *Terry*. Without regard to whether the Court will ultimately adopt each of the distinctions suggested above, this discussion does support two important conclusions: the permissible grounds for a stopping can be made just as precise as the grounds for arrest; and, the permissible grounds for a stopping can be set forth in objective terms.

VI. PROTECTIVE SEARCH

Assuming that grounds for a temporary seizure for investigation are present,²²⁶ the next question is whether the officer may conduct what is commonly called a "frisk" or what might more appropriately be described as a "protective search." By hypothesis, it is clearly a search and thus within the fourth amendment; it is to be undertaken for the sole purpose of protecting the officer. As a consequence, it is more limited and thus distinguishable from other forms of search, such as search incident to arrest. Protective searches, said the Court in *Terry*, must be reasonable "both at their inception and as conducted,"²²⁷ and thus separate consideration must be given to these questions: (1) How much evidence of what is needed to justify a protective search? (2) What are the constitutional boundaries of a protective search made on sufficient evidence?

A. *The Required Amount of Evidence*

Much of the language in the *Terry* opinion referring to the quantum of evidence needed to search is confusing and contradictory. The problem is initially cast in terms of the authority of an

of the officers. One officer patted *B* down and found no weapons, but shortly thereafter the other officer conducted a more thorough search of *B* and found a packet of concealed narcotics. The Supreme Court of Illinois took the view that the patting down for a weapon was a lawful search of *B* incident to the arrest of *A*, but that the second, more extensive search of *B* was improper. This notion that one person may be searched for a weapon incident to the arrest of another person is an interesting idea, and certainly makes sense in some situations. See note 223 *supra*. In *Bowen*, however, it seems inapposite, since *B* was leaving the scene and did not present any danger to the arresting officers. Since the officers called *B* back to find out in what way he might be involved with *A*, a better explanation would be that the officers properly stopped *B* for investigation and frisked him incident to that stop.

225. The police practices are described in DETECTION OF CRIME 19-38.

226. This discussion is not directed to the question of whether there actually was a seizure, which would raise a difficult factual issue. See note 117 *supra*.

227. 392 U.S. at 27-28.

officer to act for his own protection when he does not have probable cause for arrest; but then it is said that "the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger."²²⁸ An officer must be allowed to conduct a protective search, says the Court, when he "is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous,"²²⁹ that is, "where he has reason to believe that he is dealing with an armed and dangerous individual."²³⁰ The conduct of Officer McFadden was proper, the Court concludes, because "a reasonably prudent man would have been warranted in believing petitioner was armed and thus presented a threat to the officer's safety."²³¹

All of this language may seem familiar; it is precisely the language which the Court has used time and again to define the probable cause requisite for arrest.²³² It thus seems to support the curious conclusion that if an officer has reasonable grounds to believe that a person is carrying a concealed weapon,²³³ so that he might make a lawful arrest,²³⁴ he may instead conduct a protective search without arrest if he also has reasonable grounds to believe that the person is dangerous. Such a conclusion would hardly be cause for celebration in the precinct stations of this country, even though it would have two limited benefits: (1) contrary to a number of silly

228. 392 U.S. at 27 (emphasis added).

229. 392 U.S. at 24 (emphasis added).

230. 392 U.S. at 27 (emphasis added).

231. 392 U.S. at 28 (emphasis added).

232. *E.g.*, *Henry v. United States*, 361 U.S. 98 (1959); *Draper v. United States*, 358 U.S. 307 (1959); *Brinegar v. United States*, 338 U.S. 160 (1949).

233. Possession of a concealed weapon is an offense in most jurisdictions, although definition of the offense varies from state to state. *See* Brabner & Smith, *Firearm Regulation*, 1 LAW & CONTEMP. PROB. 400 (1934); Eller, *Legislation—Control of Firearms*, 35 N.C. L. REV. 149 (1956); McKenna, *The Right To Keep and Bear Arms*, MARQ. L. REV. 138 (1928); Turner, *Criminal Law—The Law as to Concealed Deadly Weapons*, 21 J. CRIM. LAW [now J. CRIM. L.C. & P.S.] 375 (1957); Note, *The Law as to Concealed Deadly Weapons*, 43 KY. L.J. 523 (1955); Annot., 43 A.L.R.2d 492 (1955). Typical is the statute involved in *Terry*, which provides in part that "no person shall carry a pistol, bowie knife, dirk, or other dangerous weapon concealed on or about his person." For other illustrative statutes, *see* MODEL PENAL CODE §§ 5.06, 5.07, app. (Tent. Draft No. 13, 1961).

234. The arrest would at least be constitutional. It seems clear that a state may authorize the police to arrest without a warrant for any crime when the officer has reasonable grounds for belief, as some have done, *e.g.*, ILL. REV. STAT. ch. 38, § 107-2(c) (1965); but in several states misdemeanor arrest without a warrant is limited to crimes which occur in the officer's presence. Precisely what "in his presence" means has proved troublesome, and it is often unclear whether the officer must be positive before arrest that the crime has occurred or whether it is sufficient that he have reasonable grounds to believe that the offense is presently occurring. *See* ARREST 231-43.

decisions,²³⁵ it would now be possible to search for a weapon when there are grounds for arrest without first going through the formalities of arrest;²³⁶ and (2) it would now be possible to search on probable cause for items usable as weapons which are not (and perhaps as a matter of substantive due process could not be²³⁷) included in a statute prohibiting the carrying of dangerous weapons.

This, however, is not the conclusion implicit in *Terry*, in part because it would strike habitual readers of Supreme Court cases as a most unusual decision. We have become accustomed to opinions in which the Court's rhetoric far outruns the holding, and thus it is no longer cause for surprise to find, at the very end of an opinion, a "we-only-hold" statement in which the Court pulls up short and, in effect, converts some earlier strong language into dictum.²³⁸ But *Terry* runs the other way; after the reader has had it hammered into his head several times that a protective search is permissible only when the officer *reasonably believes* that the suspect is armed and dangerous, it finally comes out that this is not true at all:

We merely hold today that where 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 own or others' safety, he is entitled for the

235. See Annot., 89 A.L.R.2d 715 (1963). Thus, it has been said that "if the search comes before the arrest, it is clear that the search is invalid." LAW & TACTICS IN FEDERAL CRIMINAL CASES 67 (Shadoan ed. 1964). It has been noted, however, that in most of these cases "there were either other reasons for holding the search unreasonable or the statement of the rule was dictum." M. PAULSEN & S. KADISH, CRIMINAL LAW AND ITS PROCESSES 740 n.1 (1962). For a discussion of why search with probable cause should be permitted before arrest, see LaFave, *Search and Seizure: "The Course of True Law . . . Has not . . . Run Smooth,"* 1966 U. ILL. L.F. 255, 303.

236. In this regard, it should be noted that Justice Harlan was critical of the disposition of the *Peters* case on arrest-and-search grounds, in part because the Court implied that

[A]lthough there is no problem about whether the arrest of *Peters* occurred *late* enough, i.e., after probable cause developed, there might be a problem about whether it occurred *early* enough, i.e., before *Peters* was searched. This seems to me a false problem. . . . If the prosecution shows probable cause to arrest prior to a search of a man's person, it has met its total burden.

392 U.S. at 76-77 (emphasis in original).

237. See, e.g., *People v. Munoz*, 9 N.Y.2d 51, 172 N.E.2d 535, 211 N.Y.S.2d 146 (1961). See also DETECTION OF CRIME where it is stated at 47:

[O]ccasionally a small knife is found to have a matchstick inserted under the blade so that the knife can be opened hurriedly merely by catching the protruding blade point on the trouser pocket as the knife is taken out. The effect is the same as having a switchblade knife. The fact that the size of the blade would prevent prosecution for carrying a concealed weapon is not reflected in the police attitude toward these knives.

238. E.g., *Escobedo v. Illinois*, 378 U.S. 478 (1964).

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.²³⁹

Thus, assuming a proper stopping for investigation, a protective search is permissible when there is reason to believe that the suspect may be armed and dangerous. This has some advantages over the New York formulation of a reasonable suspicion that the individual is dangerous,²⁴⁰ and would seem to permit use of the substantial possibility test in much the same way as in determining whether there are grounds for a stop, as discussed earlier. In short, the officer would not have to establish that it was more probable than not that the suspect was armed, but only that there was a substantial possibility that the suspect possessed items which could be used for an attack and that he would so use them.

As the quoted language makes clear, whether it is proper to make a protective search incident to a stopping for investigation is a question separate from the issue of whether it is permissible to stop the suspect; not all stops call for a frisk. The police are frequently cautioned to assume that every person encountered may be armed,²⁴¹ which is sound advice if it means only that the officer should remain alert in every case; but it cannot mean and has not been interpreted by the police to mean that a search for weapons may be undertaken in every case.²⁴² It is undoubtedly true, however,

239. 392 U.S. at 30 (emphasis added).

240. See note 153 *supra*.

241. See, e.g., A. BRISTOW, FIELD INTERROGATION 25 (2d ed. 1964); 2 Chicago Police Dept., Training Bulletin, No. 7 (Feb. 13, 1961).

242. Available data, however, do not provide a clear picture as to how often and why frisks are made. It has been reported that New York City police made searches in 81.6% of the reported stops [PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 185 (1967)], although on another occasion the New York department released figures indicating searches occurred in 75.7% of the stops [Schwartz, *supra* note 208 at 444 n.63]. By contrast, direct observation of police activities in the high crime areas of Boston, Chicago, and Washington, D.C., disclosed that a search was conducted in about one third of the field interrogations. Reiss & Black, *Interrogation and the Criminal Process*, 374 ANNALS 47 (1967). In any event, it is clear that frisks are not always made when they might be called for. One limited study of the killing and wounding of policemen by guns disclosed that in 43% of the shootings which occurred while the officer was checking out a suspect in a vehicle, the policeman was shot *after* the initial contact had been made. Also, more officers were shot while conducting field interrogations than while dealing with those known or reasonably believed to be felons. Bristow, *Police Officer Shootings—A Tactical Evaluation*, 54 J. CRIM. L.C. & P.S. 93 (1963).

Data on the productivity of such searches are also inconclusive. The New York figures, which are questionable in many other respects, indicate that weapons were found in about 8% of the frisks (Schwartz, *supra* note 208, at 444 n.63), while the President's Commission found that "one out of every five persons frisked was carrying a dangerous weapon—10 percent were carrying guns and another 10 percent knives." PRESIDENT'S COMMISSION, *supra* at 185.

that in some cases the right to conduct a protective search must follow directly from the right to stop the suspect. The Court seems to take this view in *Terry*,²⁴³ although Justice Harlan's concurring opinion proceeds to "make explicit what I think is implicit" in the majority opinion, namely, that a protective search may always be made when the stopping is to investigate what appears to be a crime of violence.²⁴⁴ For other crimes, Harlan later asserts, there must be "other circumstances"²⁴⁵ present; in such cases, it would apparently take noticeable bulges in the suspect's clothing, movements by the suspect toward his pockets, or similar observations to give rise to a substantial possibility that the suspect was armed.²⁴⁶

B. *Scope of the Search*

The Court is somewhat more successful in stating what is required for a protective search to be conducted reasonably. For one thing, the Court's emphasis upon the procedures followed by the officer in *Terry* indicates that a two-step process must ordinarily be followed: the officer must pat down first and then intrude beneath the surface only if he comes upon something which feels like a weapon.²⁴⁷ Thus in *Sibron* the Court says that, even assuming the officer had grounds for a search, he exceeded the permissible scope of such a search in that he made "no attempt at an initial limited exploration for arms" but instead "thrust his hand into Sibron's pocket."²⁴⁸

Justice Harlan, concurring, suggests that because it was otherwise clear that the officer's actions in *Sibron* were improper, there was "no need here to resolve the question of whether this frisk exceeded

243. In finding that the officer had grounds for his search, the Court observes that the suspects' actions "were consistent with [his] hypothesis that these men were contemplating a daylight robbery—which, it is reasonable to assume, would be likely to involve the use of weapons." 392 U.S. at 28.

244. 392 U.S. at 33.

245. 392 U.S. at 74.

246. In this context, there may be some truth in the allegation that courts are not likely to second-guess the officer's judgment that he thought he might be in danger (*see* text accompanying note 148 *supra*). This may be another reason for giving consideration to the possibility of permitting investigative stops only for serious crimes (*see* text accompanying note 124 *supra*) where the right to frisk is likely to flow directly from the right to stop.

247. *See* 392 U.S. at 29-30 where the Court states:

The scope of the search in this case presents no serious problem in light of these standards. Officer McFadden patted down the outer clothing of petitioner and his companions. He did not place his hands in their pockets or under the outer surface of their garments until he had felt weapons, and then he merely reached for and removed the guns. He never did invade Katz's person beyond the outer surfaces of his clothes, since he discovered nothing in his pat down which might have been a weapon.

248. 392 U.S. at 65.

[permissible] bounds."²⁴⁹ He is apparently troubled because the Chief Justice has said that the two-step process must be followed even when, as in *Sibron*, the suspect has thrust his own hand into his pocket. Certainly a forceful argument for an exception could be made in such a case; there may not be time for a game of patty cake in this situation, and anyway the patting would likely be inconclusive if the suspect's hand were over the weapon.

On the other hand, it is understandable why there might be some reluctance to acknowledge such an exception. If some aspect of a street encounter is subsequently questioned, it is difficult to reconstruct the events.²⁵⁰ A major virtue of the two-step requirement is that the officer will not be able to justify an intrusion beneath the surface of the suspect's clothing without first showing that he felt a hard object, a matter which often could be subject to later verification by showing that there was such an object.²⁵¹ But if a beneath-the-surface search may be made without a patting-down when the suspect makes some movement toward his pockets, courts will frequently be confronted with the difficult task of determining, on the basis of conflicting testimony, whether the suspect actually made such a movement. If incriminating evidence is found, it is understandable that many suspects would claim falsely that they had not made any dangerous moves, and it is less understandable but unfortunately true that some police would claim falsely that the suspect had made such motions.²⁵²

The Court also emphasizes in *Terry* that the protective search must be used only where its sole justification—protection of the officer and others nearby—applies. Thus, it must be limited in scope "to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of [sic] the police officer."²⁵³ This seems to mean that the search must be limited to those places to which the suspect had immediate access, a limitation which had not been imposed upon the power to search an arrested person and his "immediate presence."²⁵⁴ The Court's formulation, however,

249. 392 U.S. at 74.

250. Cf. Goldstein, *Administrative Problems in Controlling the Exercise of Police Authority*, 58 J. CRIM. L.C. & P.S. 160, 165 (1967).

251. This is not a foolproof safeguard, however. Cf. Reiss, *Police Brutality—Answers to Key Questions*, TRANS-ACTION, July-Aug. 1968, at 10, 12, describing the practice of some police of carrying pistols and knives so that they may be placed at a scene should it be necessary to establish a case of self-defense.

252. See notes 126 and 195 *supra* as to similar misrepresentations in current practice.

253. 392 U.S. at 29.

254. See note 76 *supra*.

raises two questions: (1) Is a protective search limited to the person of the suspect? (2) How extensive may the patting down of the person be?

In answer to the first question, it may be that some limited extension of the officer's right to act for his own protection will be recognized when unusual circumstances present him with no reasonable alternative. The hard case involves a suspect seated in a vehicle; this has been the circumstance in many police shootings.²⁵⁵ The police can and do resort to special measures to protect themselves under these conditions: asking the suspect to get out of the car immediately or making a "flashlight search" of the automobile.²⁵⁶ However, if the suspect does not respond or if in doing so he appears to be reaching for something in the vehicle, prudence may dictate an immediate search of so much of the interior of the car as is accessible to the suspect. Recognition of an exception under these circumstances need not lead to other exceptions, such as authority to search into objects carried by the suspect; in the latter situation, there is available the easy alternative of placing the object out of reach of the suspect until the inquiry is completed.²⁵⁷

As to the permissible extent of the patting down, the Supreme Court may have inadvertently suggested that more is permitted than is necessary. In making the point that a frisk is more than a "petty indignity," the Court describes in some detail the police procedures for a frisk, which include "[a] thorough search . . . of the prisoner's arms and armpits, waistline and back, the groin and area about the testicles, and entire surface of the legs down to the feet."²⁵⁸ Several commentators, for the same reason, have supplied

255. Bristow, *Police Officer Shootings—A Tactical Evaluation*, 54 J. CRIM. L.C. & P.S. 93 (1963).

256. DETECTION OF CRIME 48-52.

257. There is no reasonable basis, for example, to follow the outrageous decision of *People v. Pugach*, 15 N.Y.2d 65, 204 N.E.2d 176, 225 N.Y.S.2d 833 (1964), which approved the search of a closed briefcase held by the suspect while he was being questioned in a patrol car surrounded by three policemen. An interesting discussion of why the court may have dealt with the case in this way is given in Schwartz, *supra* note 208, at 437-39. The New York statute, which was not the basis of the *Pugach* holding, permits only search of the "person" [N.Y. CODE CRIM. PROC. § 180a (1958)], and New York police have been advised that "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." New York State Combined Council of Law Enforcement Officials, Memorandum Re: The "Stop-and-Frisk" and "Knock, Knock" Laws, June 1, 1964, reprinted in PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 38, 40 (1967). Compare the ALI MODEL CODE OF PRE-ARREST PROCEDURE § 2.02 (Tent. Draft No. 1, 1966), which would also allow search of the suspect's "immediate surroundings."

258. 292 U.S. at 17 n.18, quoting *Prior & Martin, Searching and Disarming Criminals*, 45 J. CRIM. L.C. & P.S. 481 (1954).

equally distressing descriptions.²⁵⁹ Unfortunately, however, the Court and the commentators have failed to note that the procedures being described are those used after *arrest* and before the arrested person is taken to the station,²⁶⁰ a situation in which the need is quite different than in the context of a field interrogation.

The limited search permitted by *Terry*, it is important to remember, is to find weapons "for the assault of [sic] the police officer,"²⁶¹ not merely to find weapons; thus there is no reason to cover every square inch of the suspect's body. The need is only to find implements which could readily be grasped by the suspect during the brief face-to-face encounter, not to uncover items which are cleverly concealed and which could be brought out only with considerable delay and difficulty. By contrast, the on-the-scene search of a person who has been arrested and who is to be transported to the station (often unwatched in the rear of a police van), is also frequently referred to as a "frisk,"²⁶² but must be more extensive because the arrestee may well have an opportunity to get his hands on a carefully concealed weapon. The difference between the two situations is appreciated by the police, who normally pat down only around the armpits and pockets during a stopping for investigation²⁶³ but make a more detailed search after arrest.²⁶⁴

C. The Exclusionary Rule

Some commentators have suggested that the practice of conducting protective searches incident to a stopping for investigation ought to be dealt with by rather unusual applications of the exclusionary rule. One proposal is that nothing, not even a weapon, found in a frisk should be admissible in evidence.²⁶⁵ The rationale of this proposal apparently starts with the premise that police will frisk when they think they are in danger whatever the law reads, and therefore

259. See, e.g., Oberman & Finkel, *Constitutional Arguments Against "Stop and Frisk"*, 3 CRIM. L. BULL. 441, 462 (1967), and Comment, *Stop and Frisk: Dilemma for the Courts*, 41 S. CAL. L. REV. 161, 167 n.41 (1967), both quoting J. MOYNIHAN, *POLICE SEARCHING PROCEDURES* 7 (1963); Schwartz, *supra* note 208, at 435-36, quoting from the record in *People v. Hoffman*, 24 App. Div. 2d 497, 261 N.Y.S.2d 651 (1965).

260. Both Priar & Martin, *supra* note 258, and J. MOYNAHAN, *supra* note 259, make it absolutely clear that the procedures described are for use when a suspect has been placed under arrest. *People v. Hoffman*, 24 App. Div. 2d 497, 261 N.Y.S.2d 651 (1965), involved a case in which the officer frisked prior to taking two suspects to the station.

261. 392 U.S. at 29.

262. E.g., DETECTION OF CRIME 123. This has undoubtedly contributed to the confusion over what was being discussed in the materials cited in note 260 *supra*.

263. Pilcher, *The Law and Practice in Field Interrogation*, 58 J. CRIM. L.C. & P.S. 465, 488 (1967).

264. DETECTION OF CRIME 141, 144.

265. W. SCHAEFER, *THE SUSPECT AND SOCIETY* 43 (1967); Comment, *Selective Detention and the Exclusionary Rule*, 34 U. CHI. L. REV. 158, 166 (1966).

it would be best to acknowledge that they may lawfully do so; but, so the argument goes, frisking can best be confined to this purpose if self-protection is the only benefit to be derived.²⁶⁶ *Terry*, of course, amounts to a rejection of this view, since the Court held that the weapon was admissible in evidence.

A more reasonable theory is that only weapons should be admissible because only weapons are the proper objects of a protective search.²⁶⁷ This, of course, would be a significant departure from existing law; for under what might be called the "serendipity doctrine," contraband not sought but discovered during a properly limited search may be seized and is admissible in evidence.²⁶⁸ Many who would not question the wisdom of this rule in other contexts would refuse to apply it to frisks because the dangers of police misuse of this power seem to be so substantial that the temptation to feign justification for the seizure of other items on stop-and-frisk grounds should be removed.

It is unclear just how great this danger of abuse actually is;²⁶⁹ therefore, it might be well to reserve judgment on this proposal until we have had more experience under the newly recognized stop-and-frisk power. It may be that the Supreme Court wished to leave

266. This would not discourage all searches for purposes other than self-protection, however, since many are undertaken without any intent to prosecute. See Schwartz, *Stop and Frisk (A Case Study in Judicial Control of the Police)*, 58 J. CRIM. L.C. & P.S. 433, 462 (1967). Cf. the Administration's proposed (but unpassed) Crime Control Act which allows the President to authorize the use of electronic surveillance in any situation where he feels it is necessary to protect national security, but forbids introduction of information obtained through such surveillance as evidence "in any trial, hearing, or other proceeding" unless the surveillance was "reasonable." Proposed Crime Control Act, H.R. 5037, 90th Cong., 2d Sess. tit. 3, § 2511 (3) (1968), reprinted in 36 U.S.L.W. 109, 114 (June 25, 1968).

267. Schoenfeld, *The "Stop and Frisk" Law Is Unconstitutional*, 7 SYRACUSE L. REV. 627, 640 (1966); Note, *Probable Cause Held Not Requisite for Stop and Frisk*, 39 N.Y.U. L. REV. 1093, 1098 (1964). See also the remarks of Professor Yale Kamisar and Mr. Harris Steinberg, 1966 ALI PROCEEDINGS 140-42, 166-67, proposing such an exclusionary rule for MODEL CODE OF PRE-ARREST PROCEDURE § 2.02(5), *supra* note 22.

At the oral argument of the *Sibron* case, Justice Fortas inquired of counsel whether a distinction could be drawn between admission of a weapon and admission of, for example, narcotics, but counsel for appellant responded that no such distinction could be made. 2 CRIM. L. REP. 2213, 2214 (1967).

268. In *Harris v. United States*, 331 U.S. 145 (1947), the Supreme Court permitted seizure of contraband incident to an arrest unrelated to the presence of that contraband. *Abel v. United States*, 362 U.S. 217, 238 (1960), arguably established the even broader proposition that the fruits and instrumentalities of any crime are subject to seizure if found in a search for items related to the purpose of the arrest.

Cf. the situation in which a search is made under the authority of a proper warrant: many courts have interpreted *Marron v. United States*, 275 U.S. 192 (1927), as barring seizure of any items not named in the warrant. This hardly seems sound, because it discourages officers from resorting to search warrants. See LaFave, *Search and Seizure: "The Course of True Law . . . Has Not . . . Run Smooth,"* 1966 U. ILL. L.F. 255, 274-77.

269. The decided New York cases on stop and frisk are not encouraging. See Schwartz, *supra* note 266, at 443.

the question of the applicability of the exclusionary rule completely open; at least, it is difficult to find any other explanation for the Court's otherwise questionable disposition of the *Peters* case.²⁷⁰ *Peters*, it will be recalled, involved the admissibility of burglar's tools. Notwithstanding the fact that three state courts had already dealt with the case in terms of stop and frisk and that the evidence available to the officer was no greater than that which the Court had found inadequate for arrest on other occasions,²⁷¹ the Supreme Court concluded that the officer had arrested Peters and had done so on sufficient evidence.

VII. FIELD INTERROGATION AND IDENTIFICATION

A street encounter such as that in *Terry*, the Court acknowledged, is for the purpose "of investigating possibly criminal behavior,"²⁷² and the usual means of investigation is questioning of the suspect, long referred to by police as "field interrogation."²⁷³ Experience has shown that suspects questioned under these circumstances rarely make a direct admission of guilt,²⁷⁴ but it is even more unusual for a suspect to offer no response at all.²⁷⁵ Typically, the suspect either provides an explanation of his actions which satisfies the officer, or else gives an account which adds to the prior suspicion and thus, in many cases, presents the officer with a situation in which he may make a lawful arrest.²⁷⁶

270. Unless it is that disposition of the case on stop-and-frisk grounds would have required consideration of the difficult question of whether it was proper for the officer, once he removed the *opaque* envelope from Peters' pocket, to open the envelope to see what was inside. See Schwartz, *supra* note 266 at 441-42.

271. Cf. *Henry v. United States*, 361 U.S. 98 (1959). Justice Harlan, citing *Henry*, objected to the result in *Peters*: "I find it hard to believe that if Peters had made good his escape and there were no report of a burglary in the neighborhood, this Court would hold it proper for a prudent neutral magistrate to issue a warrant for his arrest." 392 U.S. at 76.

272. 392 U.S. at 22.

273. DETECTION OF CRIME 6.

274. *Id.* at 65. In Reiss & Black, *supra* note 242, at 54, it is reported that in 86% of all field interrogations observed in that study no admission was made by the suspect; but it is not made clear whether "admission" is intended to mean only a direct admission of criminal conduct or is meant to include a damaging admission through an unsuccessful attempt of the suspect to exonerate himself.

Judging from the appellate cases, the most frequent admissions of guilt concern the suspect's possession of contraband. DETECTION OF CRIME 65. It is not surprising that this should be so, since the suspect may often believe that the officer is about to search him and find the contraband anyway; but it may also be true that some of these cases only represent instances in which the policeman has doctored the facts in order to justify what was in fact an illegal search. See note 126 *supra*.

275. DETECTION OF CRIME 59. In Pilcher, *supra* note 263, at 475, it is reported that, of 300 field interrogations observed in Chicago, in not one instance did the suspect refuse to answer any questions.

276. The suspect's explanation may be found unconvincing because it is incon-

In other instances, the investigation involves what might be called "field identification." Sometimes this involves limited questioning for the purpose of discovering the name of the suspect. For example, an individual may be stopped because he generally resembles a person, known by name, who is wanted for some past crime. Or, more commonly, if the suspect's name can be determined but nothing else is learned which tends to verify the officer's suspicions which led to the stopping, the officer may make a quick check with headquarters to determine if there are any outstanding warrants for that individual.²⁷⁷ A quite different kind of identification, not requiring any questioning, is involved when the suspect is stopped at the scene or in the vicinity of what appears to be a just-completed crime. In such a case, it is the practice to hold the suspect briefly so that he may be viewed on the spot by those thought to be the victims or witnesses of the offense.²⁷⁸

The constitutional limits upon such investigative techniques were not in issue in the three recent cases. No attempt at identification was made in any of these cases, and only in *Peters* did the sus-

sistent with prior knowledge of the officer, because it is internally inconsistent, because it is inherently incredible, or because it is inconsistent with observable facts or other information obtained by the officer immediately thereafter. DETECTION OF CRIME 68-72. See, e.g., *United States v. Lewis*, 362 F.2d 759 (2d Cir. 1966) (man carrying box near express terminal late at night said that he found it and that he worked near there, then admitted he was not so employed when the officer indicated an intention to check); *People v. West*, 144 Cal. App. 2d 214, 300 P.2d 729 (1956) (man staying within shadows carrying large bundle of carelessly wadded clothing claimed that clothes were his own and that he had just picked them up from the cleaners; some of garments were women's clothes and men's garments not suspect's size); *Brooks v. United States*, 159 A.2d 876 (D.C. Mun. App. 1960) (men carrying console record player on street after dark explained that it was being taken in for repairs, but when officer asked about the store tags still on the record player, they claimed it was given them by a stranger, whom they could not describe); *Commonwealth v. Lehan*, 347 Mass. 197, 196 N.E.2d 840 (1964) (suspect carrying two large boxes late at night said he had a quarrel with his wife and had left with his own belongings, but then said that box contained silverware and similar items; officer then checked with the suspect's wife and found they had not quarreled).

277. Police also frequently check to see if the car that the suspect is driving has been reported as stolen. DETECTION OF CRIME 82. In a city with modern record-keeping equipment, an answer can be obtained in a minute or two. *Id.* The new National Crime Information Center (presently serving 790 police departments in 43 states, the District of Columbia, and Canada, with a great many more departments likely to become affiliated in the future) serves as a warehouse of facts on 586,000 wanted men, stolen cars, missing guns, and hundreds of other items bearing serial numbers, and is said to be responsible for 500-600 arrests or recoveries of stolen property each month. An officer in a stopping-for-investigation situation could radio his headquarters, where a teletype would be immediately sent out and relayed through one of the 62 terminals to a huge computer at the center which would supply the requested information immediately. Barr, FBI Computer Fingers Criminal in Seconds, Assoc. Press Release, Aug. 7, 1968. Brief detention for purposes of a quick records check has been upheld; e.g., *People v. Anguiano*, 198 Cal. App. 2d 426, 18 Cal. Rptr. 132 (1961); *People v. Stewart*, 189 Cal. App. 2d 176, 10 Cal. Rptr. 879 (1961).

278 DETECTION OF CRIME 83. See *People v. Hanamoto*, 234 Cal. App. 2d 6, 44 Cal. Rptr. 153 (1965).

pect give an intelligible response; in the latter case the Court avoided comment by holding that a lawful arrest had occurred prior to the statement.²⁷⁹ The Court expressly disclaimed any intention of ruling upon the dimensions of police investigative authority at this time,²⁸⁰ and only Justice White, concurring in *Terry*, appears to have been willing to do more. His opinion, to the extent that it reflects some dissatisfaction with the majority's treatment of the case, seems to say this: It would not have done any harm simply to acknowledge that there is a right to question during a stop, for if there is no such right then there is no reason to permit a stop; and, if that is so there is no reason to allow a protective search, as we have done.²⁸¹ This certainly makes sense, unless stops are permissible only to make identification (in which case *Terry* would make no sense) or may be made only on suspicion that the person is armed for the purpose of committing a crime (in which case the frisk alone would either prove or disprove the officer's suspicions). The latter possibility, though not inconsistent with *Terry*,²⁸² is an unlikely one, and thus it seems that the Supreme Court will ultimately have to resolve several difficult issues concerning the constitutionality of techniques used during a temporary seizure for investigation. In doing so, the Court will find itself in the uncharted territory between what is permitted in *Terry* and what is prohibited by *Miranda v. Arizona*,²⁸³ *Wong Sun v. United States*,²⁸⁴ and *United States v. Wade*.²⁸⁵

A. Between *Terry* and *Miranda*

Between *Terry* and *Miranda* lies the unanswered question of whether all or at least some of the fourfold warnings²⁸⁶—which are

279. In the statement of facts, the Supreme Court does not even acknowledge that the officer asked any questions, although it is clear that he did so: "Officer Lasky apprehended defendant . . . and asked him what he was doing in the building." *People v. Peters*, 18 N.Y.2d 238, 241, 219 N.E.2d 595, 597, 273 N.Y.S.2d 217, 219 (1966).

280. In *Terry* there is a cautionary footnote asserting that nothing has been decided about the constitutional propriety of seizure for investigation. 392 U.S. at 19 n.16. In *Sibron* and *Peters*, again by footnotes, the Court says it is not passing on the New York law and thus will not speculate upon whether the authority given there for the officer to "demand" an explanation involves custodial interrogation, or whether it contemplates an obligation to answer or some added power on the part of the officer if the suspect refuses to answer. 392 U.S. at 61 n.20.

281. 392 U.S. at 34-35.

282. In *Terry* the Court did not discuss the right to stop, apart from the right to frisk, thus leaving some room for the contention that a stop should be allowed only when the frisk would serve both as a means of protecting the officer and as the only necessary investigative technique.

283. 384 U.S. 436 (1966).

284. 371 U.S. 471 (1963).

285. 388 U.S. 218 (1967).

286. Since squad cars are not as yet equipped with public defenders [*Escobedo v. Illinois*, 378 U.S. 478, 496 (1964) (White, J., dissenting)], it may well be argued that

a prerequisite to at-the-station interrogation—are required in the context of a temporary on-the-street seizure for investigation. Such a seizure, the Court instructs in *Terry*, occurs whenever a police officer accosts an individual and restrains his freedom to walk away,"²⁸⁷ while in *Miranda* the Court states that the warnings are a prerequisite to any questioning that takes place "after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."²⁸⁸ The issue, then, if it were framed within the structure provided by the Court, is whether one restrained in his freedom to walk off during a brief field interrogation is deprived of his freedom of action in any significant way.

Few clues to the answer of this sixty-four-dollar question are to be found in the sixty-four pages of the Court's opinion in *Miranda*. Perhaps, as has been suggested, this is not surprising: the pre-*Miranda* controversy had centered on the rights of a suspect at the police station; the Court had much experience with stationhouse interrogation but none with on-the-street questioning; and all four cases decided in *Miranda* involved interrogation under the "police-dominated atmosphere" of the stationhouse.²⁸⁹ Much has been made, of course, of the Court's observation 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,"²⁹⁰ and the statement that "in such situations the compelling atmosphere inherent in the process of in-custody interroga-

the two warnings with respect to counsel need not be given and that it is sufficient for the officer to tell the suspect only that he has a right to remain silent and that any statement he makes may be used against him.

287. 392 U.S. at 16.

288. 384 U.S. at 444 (emphasis added). The word "significant" is itself significant, as is indicated by the fact that it appeared in only one of the several statements of the holding in the *Miranda* opinion as originally released, but was later inserted as a part of all of the various statements of the holding. See Schwartz, *supra* note 266, at 459-60 n.187.

289. Kamisar, "Custodial Interrogation" Within the Meaning of *Miranda*, in CRIMINAL LAW AND THE CONSTITUTION—SOURCES AND COMMENTARIES 335 (J. Israel & Y. Kamisar ed. 1968). This article contains a more detailed treatment of many of the recent cases raising the question of whether *Miranda* applies on the streets.

The following exchange at the oral argument of the *Sibron* case has been reported:

The Chief Justice then asked if a police officer detaining a suspect in his car could ask questions. Mr. Juviler answered that he could.

The Chief Justice: "Without giving the *Miranda* warnings?"

Mr. Juviler responded that the *Miranda* warnings would not necessarily have to be issued; the *Miranda* opinion strictly limited the requirements to circumstances involving "custodial interrogation."

The Chief Justice pointed out that such a person would surely have his freedom of movement restrained. But, Mr. Juviler answered, the suspect would have to be restricted "in a significant way."

2 CRIM. L. REP. 2213, 2215 (1967).

290. 384 U.S. at 477.

tion is not necessarily present."²⁹¹ Whether "citizens" includes "suspects" is not made clear, but at least one sharp-eyed reader has pointed out that appended to the last-quoted statement is a footnote concerning questioning of a suspect.²⁹² Those of a different persuasion prefer to place emphasis upon other language from *Miranda* which is directed more toward police questioning generally than toward questioning at the station: "there is still a general belief that you must answer all questions put to you by a policeman, or at least that it will be the worse for you if you do not."²⁹³

It is difficult to tell which of these or other quotations from *Miranda* will ultimately prove to have the greatest significance, since *Miranda* gives the fifth amendment new dimensions which, by their nature, are far less precise than those which prevailed earlier. Under the "old" fifth amendment, the privilege against self-incrimination came into play only when there were legal sanctions for remaining silent, and it then could be said with confidence that the privilege did apply in court but did not apply to police questioning.²⁹⁴ However, under the *Miranda* version of the fifth amendment, making it "available outside of criminal court proceedings . . . to protect persons in all settings in which their freedom of action is curtailed in any significant way,"²⁹⁵ there is no litmus-paper test for determining what kind or degree of interference with one's freedom of action brings the amendment into play.

1. *The Case Against Warnings on the Street*

If one carefully examines the reasons underlying the Court's concern in *Miranda*, there is some foundation for the contention that the *Miranda* warnings should not be required in a street encounter setting. This is because the inherent circumstances and the oft-used techniques of stationhouse grilling are not—and in most instances could not be—a part of field interrogation. Consider the following distinctions. (1) When a suspect is questioned at the station he has been "swept from familiar surroundings"²⁹⁶ and "thrust into an unfamiliar atmosphere"²⁹⁷ where the interrogator has the psychological advantage of selecting the locale of the questioning;²⁹⁸

291. 384 U.S. at 478.

292. Pilcher, *supra* note 263, at 486.

293. 384 U.S. at 468 n.37, quoting P. DEVLIN, *THE CRIMINAL PROSECUTION IN ENGLAND* 32 (1958).

294. *E.g.*, 8 J. WIGMORE, *EVIDENCE* § 2252 (rev. ed. 1961).

295. 384 U.S. at 467.

296. 384 U.S. at 461.

297. 384 U.S. at 457.

298. 384 U.S. at 449.

when questioned on the street he is neither "swept" nor "thrust" but is merely stopped at a place where he has chosen to be and which was not selected by the officer.²⁹⁹ (2) One questioned at the station has been "cut off from the outside world"³⁰⁰ and is alone with his interrogator;³⁰¹ a person stopped for field interrogation remains in the outside world, often but not always in the view of passersby, and is frequently in the company of his companions during the questioning.³⁰² (3) A suspect at the station is "surrounded by antagonistic forces"³⁰³ in a "police dominated atmosphere";³⁰⁴ the suspect detained on the street is confronted by few police—often only one and seldom more than two.³⁰⁵ (4) At the station the police may "interrogate steadily and without relent . . . for a spell of several hours";³⁰⁶ field interrogations seldom extend beyond a few minutes.³⁰⁷ (5) Questioning at the station house may result in "physical

299. It is most unusual for the officer to require the suspect to move away from the place where he was stopped, and in any event the movement is likely to be to another place in the same general vicinity. Moreover, when such moves are made it is usually for the purpose of having the suspect viewed by a victim or witness, or so that the officer can contact the station and request guidance or information; in these cases interrogation is less likely to follow. See DETECTION OF CRIME 82-84.

300. 384 U.S. at 445.

301. 384 U.S. at 449.

302. One empirical study reported these results:

In over one-third of the [field] interrogations observed, two or more persons were questioned, and in about one-fifth, three or more were questioned. That the field interrogation is so often a confrontation between group and group places it somewhat at odds with popular stereotypes of the interrogation as an encounter between one or more officers and a lone suspect.

Reiss & Black, *Interrogation and the Criminal Process*, 374 ANNALS 47, 52 (1967).

303. 384 U.S. at 461.

304. 384 U.S. at 445.

305. The suspect will be stopped by a lone patrolman or by an officer in a patrol car who is likely to be alone, but—particularly in high-crime areas—may be accompanied by one additional officer. This fact obviously will influence techniques of questioning; for example: "In the absence of other patrol units to lend assistance, the classic technique of separating suspects for interrogation is often unavailable to officers in a field setting. The support and surveillance given by his fellows may well mitigate some of the suspect's vulnerability in such field confrontations." Reiss & Black, *supra* note 302, at 52.

306. 384 U.S. at 451, quoting C. O'HARE, FUNDAMENTALS OF CRIMINAL INVESTIGATION 112 (1956).

307. On the basis of observation of about 300 field interrogations in Chicago, it was reported:

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

Pilcher, *supra* note 263, at 488.

Another study reports somewhat longer times:

About one-half of the suspects were detained for less than ten minutes and three-fourths for less than twenty minutes. Nearly all of these persons were released in

brutality";³⁰⁸ this is most unlikely in a street setting.³⁰⁹ (6) Police questioning at the station may involve trickery, such as the "Mutt-and-Jeff" routine or confrontation of the suspect with coached or false accusers;³¹⁰ the officer on the street is not in a position to arrange such subterfuges.³¹¹ (7) The possibility of unrestrained questioning at the station may influence the police to make wholesale arrests in the hope that one of the many suspects questioned will confess;³¹² no comparable risk exists as to street encounters, which typically involve an individual or small group involved in suspicious activity or a limited number of individuals near the scene of a recently committed crime. These are all differences of some importance, and they support the view that field interrogation need not be governed by the same restraints as station-house questioning.

It is true, of course, as Professor Kamisar has cautioned,³¹³ that we should not mistake the "advocacy" in the *Miranda* opinion for its scope. The Court, by presenting this parade of horrors, certainly did not mean to say that *Miranda* applies only when it can be shown that one or more of these evils was present. It would be absurd, for example, to contend that the police may question at the station without the warnings if they are careful to avoid use of any force, tricks, overwhelming numbers, or the like.³¹⁴ But it is quite another matter to suggest that this "advocacy" in *Miranda* may provide a clue as to whether similar fifth amendment protections are required in the context of a quite different kind of police procedure. *Miranda* should be extended to field interrogations, it is submitted, only if there is a "potentiality for compulsion"³¹⁵ in such encounters.

the field setting. Over nine-tenths of the suspects were detained less than forty minutes; nevertheless, about 5 per cent were detained an hour or more before the police made a decision to book or release.

Reiss & Black, *supra* note 302, at 52. These latter statistics are probably not an accurate indication of what is herein referred to as on-the-street or field interrogation, since they include instances of questioning on the way to the station and upon arrival there.

308. 384 U.S. at 446.

309. The various empirical studies—e.g., DETECTION OF CRIME, Pilcher, *supra* note 263; and Reiss & Black, *supra* note 302—report no instances in which force was used in a street encounter to make the suspect talk. Also, force is generally not necessary to make the individual stop, Pilcher, *supra* note 263, at 473, and thus it cannot be said that suspects are being questioned after having been physically seized.

310. 384 U.S. at 452-53.

311. This is because of the brief length of the inquiry, *see* note 307 *supra*, and the circumstances of the inquiry, *see* notes 299, 302, & 305 *supra*.

312. 384 U.S. at 482-83 n.53.

313. Kamisar, *supra* note 289, at 337.

314. For one thing, requiring a showing of abusive practices would bring us right back to the problem we started with: "A gap in our knowledge as to what in fact goes on in the interrogation rooms." 384 U.S. at 448.

315. 384 U.S. at 457.

And in determining whether there is this potentiality, it is quite logical to contrast the range of possible police action on the street with the available stationhouse practices condemned in the *Miranda* decision.

This is not to imply that *Miranda* can somehow be read as if it were limited to station-house questioning of those under formal arrest. The Court, "understandably reaching out to protect its flanks,"³¹⁶ provided a broader definition of custodial interrogation in order to guard the fifth amendment from ready manipulation by the police; *Miranda* cannot be evaded by using sleight-of-hand in the booking process or by moving the "squeal room" out of the police station. However, these and similar end runs around the *Miranda* requirements can be thwarted effectively without extending those requirements to street encounters. Instances of field interrogation are readily distinguishable from the various "custodial interrogation" situations, including both at-the-station questioning and any substantial equivalents arranged by the police.

2. *The Irrelevance of Custody If Miranda Applies on the Street*

If the above view does not prevail, then it would seem that the *Miranda* warnings should be required in all police-suspect street encounters involving questioning, without regard to whether the suspect could be said to be "deprived of his freedom of action in any significant way." That is, the only distinction to be made is between those instances in which a general inquiry (for example, "What happened?") is made to witnesses,³¹⁷ and those in which an individual is called upon to inculcate or exculpate himself (for example, "What are you doing here?" or "Where did you get that property?").³¹⁸ In the latter instances the warnings should be required whether or not there is "custody," a "seizure," or an "arrest." This is so because there are two very good reasons for not trying to distinguish between those cases in which the suspect has been temporarily

316. Kamisar, *supra* note 289, at 382.

317. As indicated in the text following, the "potentiality for compulsion" in an on-the-street setting does not seem to be significantly affected by whether or not there is custody or whether the restraint is of a particular degree (temporary seizure v. arrest). What is important is the fact that questions are being asked by a police officer (see the statement from *Miranda* quoted in the text at note 293 *supra*), and thus it is appropriate to consider the nature of the questions asked in determining whether the situation is a suspect-officer confrontation. If it is not, then the *Miranda* warnings are not called for, as a contrary rule "would venerate form over the substance of sound relations between police and citizens in a large community The police talk to too many people in the course of a day to make warnings compulsory every time they inquire into a situation." *Allen v. United States*, 390 F.2d 476, 479 (D.C. Cir. 1968).

318. But not necessarily "Who are you?" See text accompanying note 345 *infra*.

seized in the *Terry* sense, and quite similar situations on each side: questioning on the street unaccompanied by such a temporary seizure; and questioning on the street after the incident has developed to the point of arrest. First of all, if it is concluded that *Miranda* applies even when the seven circumstances listed above³¹⁹ are not present, then the fact that the suspect was in some sense "deprived of his freedom of action" becomes insignificant in terms of the "potentiality for compulsion";³²⁰ the dominant factor then is that questions were being put to a suspect by a police officer. Second, any attempt to draw distinctions among these three situations would involve police and reviewing courts with nits that are best left unpicked; there is no reasonable and readily identifiable basis by which the distinctions may be made.

The strength of these two reasons becomes apparent when a critical examination is made of the various criteria which courts and commentators have suggested or adopted for purposes of determining the reach of *Miranda* in on-the-street situations. Assume these facts: defendant enters a small clothing store and, when he believes the proprietor is not watching, grabs several articles of clothing off the counter and runs out of the store. As he leaves, he hears the proprietor call to him to stop and then direct a clerk to call the police. Defendant trots down the street carrying the large bundle of clothing carelessly wadded together, and when he sees a police car approaching he tries to conceal himself in the shadows (it is eight-thirty p.m. on a winter evening). The defendant's conduct is observed by the officer, who leaves his car, walks up to the defendant, and says, "Just a minute there." The officer asks the defendant where he obtained the clothing, and the defendant answers that he just picked up the clothing from a cleaning establishment across the street. The officer then responds that the cleaners have been closed since six p.m., and asks the suspect—after patting him down for a weapon—why price tags are hanging from some of the clothes. The suspect then says, "I'm the one, I took the clothes from the store." At no point did the officer give the *Miranda* warnings or any variation thereof. Are any of the suspect's statements admissible? If this depends upon whether the suspect was at some point "deprived of his freedom of action in any significant way," then it will be necessary to apply one of the following tests.

(1) There has been such a deprivation when there has been a "seizure" under the fourth amendment, and a "seizure" of the sus-

319. See text accompanying notes 296-312 *supra*.

320. 384 U.S. at 457.

pect at least occurred (to take the language from *Terry*) when the officer "took hold of him and patted down the outer surfaces of his clothing."³²¹ This, however, is not a convincing distinction, as there is really nothing about the frisk which substantially changes the pressures on the suspect to talk; the "potentiality for compulsion" has not changed. And, it is somewhat anomalous to say that an officer may either question without warnings or frisk but that he may not do both. Why should only the suspect who might be armed and dangerous be cautioned?

(2) There has been such a deprivation when the officer has formed an intention to arrest, that is, to take the person to the station. This test, applied by some courts³²² and rejected by others,³²³ hardly makes sense in terms of the "potentiality for compulsion," as the uncommunicated intentions of the officer do not change the situation from the suspect's point of view. Also, it would be a most difficult test for reviewing courts to apply, as it requires a determination of the officer's state of mind regarding something he had not yet done.³²⁴

(3) There has been such a deprivation when the officer has formed an intention to make a temporary seizure, that is, to prevent the suspect from leaving if he tries to do so prior to the completion of the questioning. This test³²⁵ has all the defects of the previous one.³²⁶ In addition, it is unrealistic because in most instances an officer will not think ahead to such a possibility; it is unnecessary to do so because suspects being questioned on the street ordinarily do not attempt to leave.³²⁷

321. 392 U.S. at 19.

322. *United States v. Gibson*, 392 F.2d 373 (4th Cir. 1968) (conclusion that custodial interrogation not involved based in part on fact the police "had not formed an intention to arrest [the suspect]"); *State v. Intogna*, 101 Ariz. 275, 419 P.2d 59 (1956) (suspect questioned as to killing in his front yard; conclusion that this was custodial interrogation based in part on fact "the officer had no intention of letting defendant escape"). This is also proposed as one of several appropriate tests in N. SOBEL, *THE NEW CONFESSION STANDARDS, MIRANDA V. ARIZONA; A LEGAL PERSPECTIVE, A PRACTICAL PERSPECTIVE* 60-61 (1966).

323. *People v. Hazel*, 252 Cal. App. 2d 412, 60 Cal. Rptr. 437 (1967); *People v. P.* (Anonymous), 21 N.Y.2d 1, 233 N.E.2d 255, 286 N.Y.S.2d 225 (1967).

324. N. SOBEL, *supra* note 322, at 60-61, admits that if the officer testifies at the suppression hearing that the suspect was free to go, then the court must shift to an objective test.

325. The test was applied in *People v. Reason*, 52 Misc. 2d 425, 276 N.Y.S.2d 196 (Sup. Ct. 1966), where it was held that defendants questioned about items being carried were subjected to custodial interrogation because the officer did not intend to release them until the questioning was completed. The test was rejected in *Allen v. United States*, 390 F.2d 476 (D.C. Cir. 1968).

326. For example, in *Windsor v. United States*, 389 F.2d 530 (5th Cir. 1968), the court said that even the officer's statement to the suspect that he was not being detained in any way was not conclusive.

327. Pilcher, *The Law and Practice in Field Interrogation*, 58 J. CRIM. L.C. & P.S. 465, 475 (1967).

(4) There has been such a deprivation when the investigation has "focused" on the suspect, in the sense that the officer has enough evidence to make a lawful arrest. Although this test has been applied by a number of courts,³²⁸ it has no relationship to the "potentiality for compulsion" because it does not rest upon the situation as perceived by the suspect. The "focus" approach also has been criticized for its logical inconsistencies:

[W]hile the existence of probable cause may shed light on the purpose of the police to evade—since presumably the more they have on the suspect, the more likely that their purpose is to get a confession—the dangers to the privilege are only indirectly related to probable cause. Furthermore, this application would have the anomalous result of permitting more coercive techniques to be applied to those apparently innocent than to those who are guilty.³²⁹

This notion of "focus," of course, comes from the *Escobedo*³³⁰ case, but it was abandoned in *Miranda*,³³¹ and for good reason. As the Court pointed out in *Hoffa v. United States*:

There is no constitutional right to be arrested. The police are not required to guess at their peril the precise moment at which they have probable cause to arrest a suspect, risking a violation of the Fourth Amendment if they act too soon, and a violation of the Sixth Amendment if they wait too long. Law enforcement officers are under no constitutional duty to call a halt to a criminal investigation the moment they have the minimum evidence to establish probable cause³³²

The same observation could well be made concerning street encounters; the police should not be trapped between the fourth and fifth amendments.

(5) There has been such a deprivation when the investigation has "focused" on the suspect, in the sense that he is the principal suspect with regard to a specific crime.³³³ Under this approach, the stopping of several suspects (obviously not acting in concert) near a

328. *Windsor v. United States*, 389 F.2d 530 (5th Cir. 1968); *People v. Ceccone*, 67 Cal. Rptr. 499 (1968); *People v. Bolinski*, 67 Cal. Rptr. 347 (1968); *People v. Allen*, 50 Misc. 2d 897, 272 N.Y.S.2d 249 (1966); *Commonwealth v. Jefferson*, 432 Pa. 541, 226 A.2d 765 (1967). The test was expressly rejected in *People v. P. (Anonymous)*, 21 N.Y.2d 1, 233 N.E.2d 255, 286 N.Y.S.2d 225 (1967); *State v. Taylor*, 437 P.2d 853 (Ore. 1968).

329. *Graham, What Is "Custodial Interrogation"? California's Anticipatory Application of Miranda v. Arizona*, 14 UCLA L. REV. 59, 117 (1966).

330. *Escobedo v. Illinois*, 378 U.S. 478 (1964).

331. On the significance of the curious definition of "focus" in *Miranda*, see *Kamisar, supra* note 289, at 338-51.

332. 385 U.S. 293, 310 (1966).

333. Something along these lines is suggested in *Pilcher, supra* note 327, at 478. Although somewhat ambiguous, the decisions in *People v. Glover*, 52 Misc. 2d 520, 276 N.Y.S.2d 461 (Sup. Ct. 1966); *People v. Reason*, 52 Misc. 2d 425, 276 N.Y.S.2d 196 (Sup. Ct. 1966), seem to rely in part on "focus" in this sense.

crime scene and, perhaps, the stopping of one suspect but not with regard to any specific known offense, would be distinguished from other cases. The defects in this test are essentially the same as those encountered with the previous standard.

(6) There has been such a deprivation unless the suspect has consented to the interview. Determining whether there is consent in other contexts (for example, search) is difficult enough, but it would be particularly troublesome here. In practice, suspects do not ordinarily attempt to leave³³⁴ or otherwise manifest their lack of consent. This tendency prompted one empirical study to conclude that it was not meaningful to distinguish field interrogations undertaken with consent from those that took place without consent.³³⁵

(7) There has been such a deprivation if the suspect believes that he is under arrest, that is, if he believes that the officer is going to take him to the station.³³⁶ This test, of course, does bear upon the "potentiality for compulsion," as the emphasis is upon the suspect's assessment of his predicament. It is questionable, however, if it is correct to say that on-the-street questioning becomes more compelling when the suspect thinks the officer has already decided to take him to the station house. Just as persuasive is the contention that a "false exculpatory statement" is "much more tempting when it still seems possible to avoid arrest."³³⁷ In any event, it would be wise to avoid the formulation of rules to guide the police which speak in terms of what someone else is thinking, for such rules would "place upon the police the burden of anticipating the frailties or idiosyncracies of every person whom they question."³³⁸

(8) There has been such a deprivation if the suspect believes that he is presently detained, in the sense that the officer would not permit him to go until the interview is completed.³³⁹ This presents essentially the same problems as the previous test.

(9) There has been such a deprivation if the suspect *reasonably*

334. Pilcher, *supra* note 327, at 473.

335. DETECTION OF CRIME 17:

[I]t is not meaningful in practice to attempt to distinguish between field interrogation with consent and that which takes place without consent. In high-crime areas, particularly, persons who stop and answer police questions do so for a variety of reasons, including a willingness to cooperate with police, a fear of police, a belief that a refusal to cooperate will result in arrest, or a combination of all three.

336. This test was applied in *People v. Ceccone*, 67 Cal. Rptr. 499 (App. Ct. 1968) (alternative ground); it was rejected in *People v. P.* (Anonymous), 21 N.Y.2d 1, 233 N.E.2d 255, 286 N.Y.S.2d 225 (1967).

337. Graham, *supra* note 329, at 86.

338. *People v. P.* (Anonymous), 21 N.Y.2d 1, 9-10, 233 N.E.2d 255, 260, 286 N.Y.S.2d 225, 233 (1967).

339. The test apparently was used as an alternative ground of decision in *State v. Intogna*, 101 Ariz. 275, 419 P.2d 57 (1966).

believes that he is under arrest, that is, that the officer plans to take him to the station.³⁴⁰ In terms of the "potentiality for compulsion," this test would do only rough justice, since the person who honestly but unreasonably thinks he is under arrest has been subjected to precisely the same custodial pressures as the person whose belief in this regard is reasonable. It could be argued, of course, that such a sacrifice must be made because of the difficulties of proof when a subjective test is used; here the question involves the "reasonable man," long an object of scrutiny by courts.³⁴¹ It again seems doubtful, however, whether the suspect who believes (now reasonably) that he is under arrest is under any greater compulsion to talk than the suspect who thinks he still has an opportunity to talk the officer out of deciding to arrest him. Finally, shifting from a subjective to objective test still does not put the officer in a position in which he can determine whether the suspect has such a belief. Whether the suspect has a reasonable belief is to be judged by the facts as they reasonably appear to him, which means that under this test the officer would have to know what the suspect thinks the officer knows in order to determine when the warnings must be given.³⁴² In the earlier hypothetical, for example, the suspect might have believed that the officer knew about the theft and approached to arrest him, as the suspect was aware that the shopkeeper had called the police and might have thought that the squad car had appeared in response to that call.³⁴³

(10) There has been such a deprivation if the suspect *reasonably* believes that he is presently detained, in the sense that the officer would not permit him to go until the interview is finished.³⁴⁴ The problems here are basically the same as with the previous test.

None of these tests, it is submitted, provides a sound basis for determining the reach of *Miranda* in an on-the-street setting. Some of them rest upon facts which neither police nor reviewing courts

340. The test was applied in *People v. P. (Anonymous)*, 21 N.Y.2d 1, 233 N.E.2d 255, 286 N.Y.S.2d 225 (1967); see *Kamisar*, *supra* note 289, at 362.

341. This is not to suggest that courts would have an easy time under "a 'reasonable belief' test." See *People v. P. (Anonymous)*, 21 N.Y.2d 1, 233 N.E.2d 255, 286 N.Y.S.2d 225 (1967), where the majority says that the suspect would not have reasonably believed he was under arrest, since he did not know that his accomplice was in custody and had implicated him; the dissent, on the other hand, says reasonable belief arose as soon as the officers asked if he knew the boy who in fact was his accomplice.

342. For an excellent illustration of this conundrum, see *Kamisar*, *supra* note 340, at 378 n.6.

343. Apparently the officer cannot overcome this dilemma by telling the suspect that he is not under arrest, because of the possibility that a reasonable man might not believe the officer. See *Windsor v. United States*, 389 F.2d 530 (5th Cir. 1968), and the discussion of this case in *Kamisar*, *supra* note 340, at 371-72.

344. This approach was used in *People v. Hazel*, 252 Cal. App. 2d 412, 60 Cal. Rptr. 437 (1967).

could readily determine, while others involve distinctions which really do not relate to the "potentiality for compulsion" involved. Thus, one is led to conclude either that *Miranda* should not apply to street encounters at all, or else that *Miranda* should be applied to all such encounters which involve questioning an individual about his own conduct.³⁴⁵ There is no rational middle ground. Once the former position is rejected, it must be admitted that whatever compulsion is present in an on-the-street setting stems not from minor changes in the nature of the restraint but rather from the fact that "there is still a general belief that you must answer all questions put to you by a policeman, or at least that it will be the worse for you if you do not."³⁴⁶

3. *The Significance of Refusal To Answer*

If a suspect is properly stopped for purposes of field interrogation, but he refuses to answer any questions, what significance may be attached to such a refusal? Justice White, concurring in *Terry*, declared that "refusal to answer furnishes no basis for arrest."³⁴⁷ If this means that the individual's refusal to respond, in and of itself, does not constitute grounds for arresting him for the crime suspected, it is beyond question that Justice White is correct.³⁴⁸ It is

345. It has been suggested that "there may be a distinction between eliciting a name and address, and seeking an account of a man's behavior. As to the latter, there can be no doubt that the privilege can be claimed. One must closely consider, however, whether or not a suspect may refuse on constitutional grounds to supply his name and address. This inquiry is especially important because identification of individuals is apparently the basic justification of a detention." Abrams, *Constitutional Limitations on Detention for Investigation*, 52 IOWA L. REV. 1093, 1115-16 (1967). That author goes on to suggest that *Schmerber v. California*, 384 U.S. 757 (1966), supports such a distinction:

[T]he Court suggested that certain identification techniques, such as fingerprinting and photographing, might be valid. A suspect is not likely to be more damaged by supplying name and address than by being fingerprinted and photographed, all of which may lead the prosecution to valuable testimony. Therefore, judging by the Court's action in *Schmerber*, a suspect possibly would not be permitted to refuse to give his name and address to police officers.

Abrams at 1117. Also relevant to the problem are the more recent cases of *United States v. Wade*, 388 U.S. 218 (1967), holding that it is not a violation of the defendant's privilege against self-incrimination to be required to speak a phrase uttered to the victim by a robber, and *Gilbert v. California*, 388 U.S. 263 (1967), holding that there was not fifth amendment violation in the taking of a handwriting exemplar. See also *Clark v. States*, 240 A.2d 291 (Md. Ct. App. 1968) holding that it is not a violation of *Miranda* to ask defendant his name, address and place of employment for purposes of booking, when he has been given the warnings but has indicated that he wanted to consult with counsel; and that the "fruits" of the answers—location of the stolen good as the place of employment—are therefore admissible).

346. P. DEVLIN, *THE CRIMINAL PROSECUTION IN ENGLAND* 32 (1958), quoted in *Miranda v. Arizona*, 384 U.S. 436, 468 n.37 (1966).

347. 392 U.S. at 34-35.

348. See, e.g., *State v. Gibbs*, 252 Wis. 227, 31 N.W.2d 143 (1948).

also probably unconstitutional to make refusal to answer questions put by a police officer a crime.³⁴⁹ But it does not necessarily follow that the suspect's refusal must be ignored completely by the officer; it might be argued that refusal to answer is one factor which the officer may consider, together with the evidence which gave rise to his prior suspicion, in determining whether there are grounds for an arrest.³⁵⁰

In the pre-*Miranda* era, the majority of courts concluded that the suspect's refusal to answer could be taken into account in this way,³⁵¹ although a few jurisdictions held that "no adverse inference may be drawn" from a refusal to respond.³⁵² Whether *Miranda* calls for a different result remains unclear; as noted above, the application of *Miranda* to street encounters is still an open question. If it is ultimately determined that *Miranda* warnings must be given on the street, it seems to follow that the officer may attach no significance to the suspect's refusal to respond. Where the officer has advised the suspect that he may remain silent, the suspect's acceptance

349. See DETECTION OF CRIME 62-64; 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); Schwartz, *Stop and Frisk (A Case Study in Judicial Control of the Police)*, 58 J. CRIM. L.C. & P.S. 433, 459 (1967).

350. Under the Uniform Arrest Act, appearing in INTERSTATE COMM. ON CRIME, INTERSTATE CRIME CONTROL 86-89 (1942), such refusal is grounds for an additional brief detention. Under the MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 202(6) (Tent. Draft No. 1, 1966), refusal to answer is expressly recognized as a proper factor in the arrest decision. The N.Y. CODE CRIM. PROC. § 180a (1958) says only that the officer may "demand" such information, but does not indicate what significance is to be attached to the suspect's failure to accede to the demand. However, the New York police have been advised that "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." New York State Combined Council of Law Enforcement Officials, Memorandum re: The "Stop-and-Frisk" and "Knock, Knock" Laws, June 1964, reprinted in PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 38, 40 (1967). The reasoning behind this advice is described in Kuh, *In-Field Interrogation: Stop, Question, Detention and Frisk*, 3 CRIM. L. BULL. 597, 613 (1967).

351. E.g., *People v. Simon*, 45 Cal. 2d 645, 290 P.2d 531 (1955); *People v. Romero*, 156 Cal. App. 2d 48, 318 P.2d 835 (1957); *Gisske v. Sanders*, 9 Cal. App. 13, 98 P. 43 (1908); *Baines v. Brady*, 122 Cal. App. Supp. 957, 265 P.2d 194 (1953); *Dickerson v. United States*, 120 A.2d 588 (D.C. Mun. Ct. 1965); *Harrer v. Montgomery Ward*, 124 Mont. 295, 221 P.2d 428 (1950).

352. *Poulas v. United States*, 95 F.2d 412, 413 (9th Cir. 1938). Some courts have supported the right of the police to stop and question on the supposition that refusal to answer cannot in any way adversely affect the suspect. For example, in *United States v. Bonanno*, 180 F. Supp. 71, 86 n.21 (S.D.N.Y. 1960), the court said: "It must be borne in mind that the defendants in this case had a constitutional right to remain silent when questioned by police or other investigatory agents or bodies, but they chose not to do so. Had they chosen such a course, they would have suffered no penalty." See also the similar dicta in *Green v. United States*, 259 F.2d 180 (D.C. Cir. 1958); *Brooks v. United States*, 159 A.2d 876 (D.C. Mun. Ct. 1960).

of this advice cannot be regarded as tending to show anything concerning his possible guilt or innocence.³⁵³

But if the *Miranda* warnings are neither required nor given, it seems appropriate for the investigating officer to take account of the suspect's silence when questioned. As one commentator has noted:

It may be said that a man has . . . the constitutional right . . . to refuse to answer incriminating questions, so that his refusal to answer is not a circumstance of suspicion. But this would appear to be too legalistic a view, for innocent people do in fact help the police in their inquiries After all, the policeman is not trying the guilt of the accused, but is only making an administrative decision whether to arrest.³⁵⁴

This is not to suggest that no innocent person would refuse to respond; some do refuse,³⁵⁵ but common sense suggests that such refusals are more likely when the person questioned is guilty.³⁵⁶ The Supreme Court has made it clear that the arrest decision involves a common-sense judgment which may take into account facts which would not be admissible in evidence: "[i]n dealing with probable cause . . . we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians act."³⁵⁷

In practice, very few suspects stopped for field interrogation refuse to respond,³⁵⁸ so that the ultimate resolution of this issue may

353. *Cf. People v. Ellis*, 65 Cal. 2d 529, 421 P.2d 393, 55 Cal. Rptr. 385 (1966), where officers advised the defendant of his right to remain silent and defendant then refused to speak for purposes of a voice identification. This refusal was admitted as evidence at trial, but on appeal this was held to be error on the ground that even though such a refusal is not covered by the fifth amendment, it was the direct result of the police warning that he could remain silent and thus was not an indication of guilt.

The same situation would be present even without the warnings if the suspect were to claim the privilege in refusing to say anything. "The express claim of the privilege would explain the failure to deny the accusation thus destroying the inference which would otherwise be raised." Remington, *Police Investigation and the Privilege Against Self-Incrimination*, 26 WIS. B. BULL. 7, 64 (Dec. 1953).

354. Williams, *Arrest for Felony at Common Law*, 1954 CRIM. L. REV. 408, 413.

355. DETECTION OF CRIME 60:

It is probable that innocent persons may sometimes be indignant at the accusation necessarily implicit in a field interrogation and therefore refuse to cooperate. In addition, persons with generally antagonistic attitudes toward the police may occasionally decide to defy the police. To such persons, arrest may be preferable to cooperating with the police.

356. Similarly, common sense suggests that one who flees a police officer is more likely guilty, though obviously some innocent persons may panic and flee. Courts have recognized flight as a factor; *see e.g., United States v. One 1951 Cadillac Coupe*, 139 F. Supp. 475 (E.D. Pa. 1956); *but cf. Wong Sun v. United States*, 371 U.S. 471, 483 n.10 (1963), and Broeder, *Wong Sun v. United States: A Study in Faith and Hope*, 42 NEB. L. REV. 483, 494 n.40 (1963).

357. *Brinegar v. United States*, 338 U.S. 160, 175 (1949).

358. DETECTION OF CRIME 59; Pilcher, *supra* note 327, at 475.

be of less than major importance. It has also been suggested that there is little to be gained from recognizing refusal to answer as a factor, because "an officer who has so little probable cause to make an arrest that the refusal of a person to answer his questions will swing the decision one way or the other, in all likelihood has a pretty weak arrest to begin with."³⁵⁹ It would be a "weak arrest," of course, in the sense that no rational prosecutor would go to trial on such facts, but to test an arrest in this way inappropriately confuses the functions of arrest and charging.³⁶⁰ An arrest sometimes serves as the invocation of the criminal process, in that it is a means of gaining control over the person of an individual who is to be prosecuted; but it may also serve to facilitate an investigation which would not be possible without custody of the suspect.³⁶¹ Thus, if a suspect is stopped because he resembles a man named X who was responsible for a crime, an arrest following that suspect's refusal to indicate whether he is or is not X³⁶² is not "weak"—custody of the suspect will make identification possible. Similarly, if a suspect is stopped because of suspicious activity with respect to property in his possession³⁶³ and he refuses to offer an explanation for his actions, arrest is not "weak" in that it provides a lawful basis for seizure of the property, which may then be checked against the stolen property file.

B. *Between Terry and Wong Sun*

Few Supreme Court decisions have caused as much confusion³⁶⁴ as that delightful Chinese puzzle, *Wong Sun v. United States*.³⁶⁵ The case arose when federal narcotics agents, without probable cause, broke into Blackie Toy's laundry, pursued him into the bedroom

359. Pilcher, *supra* note 327, at 475.

360. See ARREST ch. 15.

361. The investigative techniques made possible by arrest are discussed in ARREST at 308-16.

362. In terms of the application of *Miranda* and the requirement of warnings, this may be a special case. See note 345 *supra*.

363. This is the most common field interrogation situation. DETECTION OF CRIME 28.

364. See Broeder, *supra* note 356; Note, *Constitutional Law: Probable Cause for Arrest Without Warrant*, 51 CALIF. L. REV. 637 (1963); Recent Decision, *Evidence—Defendant's Statement Made Immediately After His Illegal Arrest and Narcotics Received from a Third Party as a Result of Such a Statement Are Inadmissible into Evidence and Will Not Serve To Corroborate a Confession in a Federal Criminal Proceeding*, 51 GEO. L.J. 838 (1963); Recent Decision, *Constitutional Law—Fourth Amendment Bans Use of Voluntary Statement Made During Illegal Arrest*, 31 GEO. WASH. L. REV. 851 (1963); *The Supreme Court, 1962 Term*, 77 HARV. L. REV. 54, 117 (1963); Note, *Criminal Law—Confessions—Admissibility of Corroborative Evidence*, 42 N.C. L. REV. 219 (1963); Comment, *Admissibility of Evidence—the Exclusionary Rule Under the Fourth Amendment*, 2 WASHBURN L.J. 292 (1963).

365. 371 U.S. 471 (1963).

where his wife and child were sleeping, arrested and handcuffed him, and then searched him and his premises, but found no narcotics. Toy was then questioned; he denied having sold narcotics but admitted knowing one Yee, who he said had done so. The officers subsequently apprehended Yee, who surrendered a quantity of narcotics to them, saying that he had obtained them from none other than Blackie Toy. On these facts the Supreme Court held that Toy's statement and the narcotics uncovered thereby could not be admitted into evidence against him. The reasoning of the Court, however, was far from clear. The Court first indicated that it was handling the case as it would a search case because "the policies underlying the exclusionary rule [do not] invite any logical distinction between physical and verbal evidence."³⁶⁶ If this is the crux of the case, *Wong Sun*—contrary to the then-existing weight of authority at both the state and federal levels³⁶⁷—stands for the proposition that confessions or damaging admissions elicited from an illegally arrested person are to be excluded in the same way as tangible evidence uncovered following an illegal arrest. But the Court went on to say that the oppressive circumstances present made it "unreasonable to infer that Toy's response was sufficiently an act of free will,"³⁶⁸ leaving open the possibility that *Wong Sun* actually rests upon the conclusion that Toy's admission was coerced.

Despite some early confusion about the applicability of *Wong Sun*—whatever it stands for—to state proceedings,³⁶⁹ it now seems clear that *Wong Sun* is constitutionally grounded and thus binding on the states.³⁷⁰ It is of some importance, therefore, to consider the possible significance of the case in the context of field interrogations and identifications.

1. *Temporary Seizure on Insufficient Evidence*

Assume that a suspect is "seized" on the street for purposes of field interrogation, but that the officer has acted on less than sufficient evidence—less evidence than is required to make the seizure

³⁶⁶ 371 U.S. at 486.

³⁶⁷ See Kamisar, *Illegal Searches or Seizures and Contemporaneous Incriminating Statements: A Dialogue on a Neglected Area of Criminal Procedure*, 1961 U. ILL. L.F. 78.

³⁶⁸ 371 U.S. at 486.

³⁶⁹ The confusion was engendered by language in *Wong Sun v. United States*, 371 U.S. 471, 486, referring to the need for "detering lawless conduct by federal officers" and "closing the doors of the federal courts" to such evidence (emphasis added). Moreover, the Court never cited *Mapp v. Ohio*, 367 U.S. 643 (1961).

³⁷⁰ See *Traub v. Connecticut*, 374 U.S. 493 (1963), in which a remand was granted in light of *Wong Sun*; Herman, *The Supreme Court and Restrictions on Police Interrogation*, 25 OHIO ST. L.J. 449, 459 (1964).

"reasonable" under the *Terry* approach, or, as I have suggested, evidence insufficient to meet the special probable cause test which should apply here. If required, the *Miranda* warnings are given; the suspect agrees to answer some questions, and proceeds to incriminate himself. Should this statement be admissible? Or, if the suspect's statement puts the officer "over the top" as to the evidence needed for arrest, and physical evidence is found in a search incident to that arrest, should such evidence be excluded as the "fruits" of a statement made while the suspect was illegally seized?

In the absence of any indication from the Supreme Court as to what it meant in *Wong Sun* (or what it now wishes the case to mean³⁷¹), it can only be said that the answers will depend upon which of the following propositions accurately reflects the Court's primary concern in that case: (1) to deter the police from making illegal seizures, all evidence gained by such seizures, tangible or intangible, must be excluded from evidence; or (2) to protect suspects from having to speak except as "an act of free will," statements (and their fruits) given during an unconstitutional seizure of the person must be excluded whenever the circumstances of the seizure might have deprived the suspect of his freedom to decide whether to speak or remain silent. That is, the answers depend upon whether *Wong Sun* is bottomed on the fourth or the fifth amendment.

The first of these alternatives has considerable appeal. As experience in the arrest area has shown, a "narrow" exclusionary rule—that is, one limited only to tangible evidence—restricts the development of fourth amendment standards relating to certain situations commonly confronted by the police.³⁷² Also, it is clear from pre-*Wong Sun* practice that in important cases police were careful about the grounds for arrest when the risk was that they might "blow the case" by finding physical evidence on grounds insufficient to permit admission of that evidence, but not when they simply wanted to

371. Consider the Court's rewriting of *Escobedo* in the *Miranda* decision by stating that when it said "focus" in the former case it actually meant "custody," *Miranda v. Arizona*, 384 U.S. 436, 444 n.4 (1966), notwithstanding the fact that *Escobedo* listed "focus" and "custody" side by side as separate elements.

372. Cf. *ARREST* 495-96:

Until the recent case of *Wong Sun v. United States*, only physical evidence found incident to an arrest could be challenged. Therefore, only crimes involving physical evidence, such as narcotics, were likely to raise the issue of the lawfulness of the arrest. As a consequence there is a profusion of cases on the question of when information from a narcotics informant is sufficient to justify an arrest. But there is little guidance on such questions as when, if ever, an officer can arrest one or more than one member of a group of suspects each with physical characteristics fitting the description given by an eyewitness, or when an officer can make a felony arrest on the basis of suspicious conduct which he observes. These questions, seldom considered, confront law enforcement officers daily.

bring a suspect in for questioning.³⁷³ Thus, exclusion of *all* statements made after a temporary seizure on insufficient evidence would have two advantages: it would lead to a more complete development of case law on when such stoppings are permissible; and it would result in some deterrence of such fourth amendment violations when the police are motivated primarily by a desire to obtain statements from suspects.³⁷⁴ One major disadvantage of this approach, however, would be that whenever a court found that evidence to support a temporary seizure was lacking, it would then have to determine whether the street encounter in question involved a "seizure" or was merely an instance of a citizen consenting to a delay in his journey while responding to police inquiries. As noted earlier, there is good reason to save courts from this difficult task.³⁷⁵

The argument against the above-stated alternative, of course, is simply that the search cases and confession-admission cases are not of a kind. As one court declared well before *Wong Sun*:

[T]here is lacking the essential connection between the illegal detention and the voluntary statements made during that detention that there is between the illegal search and the evidence obtained thereby When questioned by arresting officers a suspect may remain silent or make only such statements as serve his interest; the victim of an illegal search, however, has no opportunity to select the items to be taken by the rummaging officer.³⁷⁶

That language clearly has a pre-*Miranda* flavor to it, for at the heart of *Miranda* lies the notion that a suspect in custody does not necessarily have the choice to "remain silent or make only such statements as serve his interest." But, keeping this fact in mind, it may well be that if *Wong Sun* is actually based on the "act of free will" point, then that decision may have in effect been superseded

373. ARREST 430-33.

374. Under this view of *Wong Sun*, even if the *Miranda* warnings were required and given, so that there arguably is no room for a compulsion argument, the suspect's statement would be excluded to effectuate the ban against illegal seizures.

375. See note 117 *supra* and text accompanying note 335 *supra*.

376. *Rogers v. Superior Court of Alameda County*, 46 Cal. 2d 3, 10-11, 291 P.2d 929, 933-34 (1955). Analysis along these lines is not uncommon in the cases holding that *Wong Sun* does not mean that an illegal arrest renders inadmissible a statement obtained some time later at the station. See, e.g., *Rogers v. United States*, 330 F.2d 535 (5th Cir.), *cert. denied*, 379 U.S. 916 (1964); *Hollingsworth v. United States*, 321 F.2d 342 (10th Cir. 1963); *United States v. Burke*, 215 F. Supp. 508 (D. Mass. 1963), *aff'd*, 328 F.2d 399 (1st Cir.), *cert. denied*, 379 U.S. 849 (1964), *rehearing denied*, 380 U.S. 927 (1965); *State v. Lavalley*, 104 N.H. 443, 189 A.2d 475 (1963); *State v. Jackson*, 43 N.J. 148, 203 A.2d 1 (1964), *cert. denied*, 379 U.S. 982 (1965). *Contra*, *United States v. Sims*, 231 F. Supp. 251 (D. Md. 1964); *People v. Robinson*, 13 N.Y.2d 296, 196 NE.2d 261, 246 N.Y.S.2d 623 (1963).

by *Miranda*. That is, if *Wong Sun* stands for the proposition that there is sometimes a "potentiality for compulsion" in police custody and that therefore statements obtained by *illegal* custody must be excluded, it may now have given way to the broader rule in *Miranda*, which recognizes this potentiality without regard to whether the custody complies with the fourth amendment.

If *Wong Sun* should now be interpreted in this manner, so that it is more of a fifth amendment case than a fourth amendment case, it would take its place with *Escobedo* as a false start on the problem finally resolved in *Miranda*. Under this theory, the only questions to be answered when a temporary seizure for investigation is made on insufficient evidence are whether the *Miranda* warnings are required in this context and, if so, whether they were given. Assuming that they are required and were given, there would be no occasion to apply *Wong Sun* since the suspect's freedom of choice would have been restored by the warnings; that is, the "taint" of the illegal seizure would be "dissipated" by the warnings.³⁷⁷ Or, assuming that the Court takes the view that the warnings are not required during street encounters because there is no "potentiality for compulsion," consistency again would require the conclusion that *Wong Sun* (under its second interpretation) has no application.

Whether *Wong Sun* rests upon the fourth amendment or the fifth amendment will also be important in those cases where the illegal temporary seizure for investigation bears fruit apart from the suspect's statements or physical evidence obtained as a consequence of his statements. Assume, for example, that a suspect is seized on insufficient evidence, immediately thereafter viewed by the victim of a crime just committed in the area, and identified as the perpetrator. Apart from the problems which would exist even if the seizure had been lawful,³⁷⁸ there is the question of whether the identification (and, indeed, any subsequent identification in court by the victim) is the inadmissible fruit of a fourth amendment violation. Obviously this situation is more like a search incident to an unlawful seizure than a statement incident to unlawful custody, since the suspect cannot prevent the temporary seizure for investigation from bearing this particular fruit; thus *Wong Sun* may have greater vitality here. It would not necessarily follow, of course, that the vic-

377. There would remain, of course, cases in which it might be argued that *Wong Sun* applies even though *Miranda* does not, as where a statement is volunteered following an illegal seizure.

378. Discussed in the next subsection; see text accompanying note 385 *infra*.

tim could not make an in-court identification; the issue, as in the more recent lineup cases, would be whether such identification was "not tainted . . . but . . . of independent origin."³⁷⁹

2. "Fruits" of Failure To Give the *Miranda* Warnings

If it is ultimately decided that the *Miranda* warnings must be given prior to on-the-street questioning, the following situation will sometimes arise: a police officer stops a suspect for purposes of investigation, having ample evidence for doing so. However, he proceeds to question the suspect without first giving him the *Miranda* warnings, and the suspect then makes certain damaging admissions. Taking account of these admissions, together with the evidence which caused the officer to stop the suspect in the first place, it is clear that the probable cause standard for arrest has been satisfied, and the officer places the suspect under arrest. A search of the suspect incident to that arrest yields certain physical evidence. Is that evidence inadmissible on the theory that it is the "fruit" of a failure to comply with the fifth amendment requirements of *Miranda*?

While the "fruit of the poisonous tree" doctrine is well established in cases involving fourth amendment violations,³⁸⁰ the traditional rule with regard to confessions and admissions has been that physical evidence is admissible even though found as the result of an inadmissible statement.³⁸¹ Although such a rule may have made some sense during the time when the primary concern was with confessions that were not trustworthy, it is clearly "constitutionally indefensible"³⁸² now that statements of defendants are excluded for other reasons. Indeed, *Wong Sun* amounts to a rejection of the traditional rule if it is interpreted as a fifth amendment case: Toy's statement was excluded because it was not "an act of free will," and the narcotics uncovered by using his statement were also held to be inadmissible. Since the *Miranda* warnings are intended to ensure that a suspect is not compelled "to speak where he would not otherwise do so freely,"³⁸³ it seems clear, as some courts have recently held, that physical evidence which is the "fruit" of a failure to give the *Miranda* warnings must be excluded.³⁸⁴

379. *Gilbert v. California*, 388 U.S. 263, 272 (1967). Cf. *People v. Stoner*, 65 Cal. 2d 595, 422 P.2d 585, 55 Cal. Rptr. 897 (1967).

380. *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920).

381. 3 J. WIGMORE, EVIDENCE §§ 856-59 (3d ed. 1940).

382. *People v. Ditson*, 57 Cal. 2d 415, 439, 369 P.2d 714, 727, 20 Cal. Rptr. 165, 178 (1962).

383. 384 U.S. at 467.

384. This is implicit in *Miranda*, where it is said that unless "such warnings and

C. *Between Terry and Wade and Its Companions*

It is also necessary to take account of the implications of the Court's three recent decisions dealing with certain police practices for the identification of suspects. *United States v. Wade*³⁸⁵ concerned a lineup conducted by federal agents and consisting of the defendant and five or six other prisoners; notice of the procedure was not given to Wade's attorney, although Wade had already been indicted and counsel had been appointed. The Court held that "for Wade the post-indictment lineup was a critical stage of the prosecution at which he was 'as much entitled to such aid [of counsel] . . . as at the trial itself.'"³⁸⁶ The proper procedure, according to the Court, is to notify both the prisoner and his counsel of the impending lineup; and, even after such notice, the lineup should be held only when counsel is present, unless the defendant has made an intelligent waiver. In the companion case of *Gilbert v. California*,³⁸⁷ the same standard was imposed upon a state lineup, and the Court ruled that "the admission of . . . in-court identifications without first determining that they were not tainted by the illegal lineup but were of independent origin was constitutional error."³⁸⁸

The third case in this series is *Stovall v. Denno*,³⁸⁹ where it was held that the *Wade* doctrine would not be applied retroactively. This holding made it necessary for the Court to consider the defendant's other claim, namely, that the pretrial identification in this case was conducted in such a manner as to violate due process. *Stovall* had been arrested on the basis of evidence found at the scene of a double stabbing, and was taken to the surviving victim's hospital room, where he was identified as the assailant. No lineup was attempted; the defendant was the only Negro in the room at the time

waiver are demonstrated by the prosecution at trial, *no evidence* obtained as a result of interrogation can be used against him," 384 U.S. at 479 (emphasis added).

See *Dowlut v. State*, 235 N.E.2d 173 (Ind. 1968) (fruit of poisonous tree doctrine held applicable to *Miranda* violation, and weapon suppressed); *State v. Taylor*, 421 S.W.2d 310 (Mo. 1967) (doctrine held applicable to *Miranda* violation, but weapon admitted on ground it came from an independent source); *People v. Soto*, 285 N.Y.S.2d 166 (1967) (same). As the latter two cases illustrate, courts sometimes have to stretch quite far to find that the physical evidence has an independent source when the defendant has given a confession telling where the evidence could be found. Such a finding, however, would seem most unlikely where the failure to give the *Miranda* warnings results in arrest and the arrest in turn results in the immediate finding of physical evidence on the defendant's person.

385. 388 U.S. 218 (1967).

386. 388 U.S. at 237.

387. 388 U.S. 263 (1967).

388. 388 U.S. at 272.

389. 388 U.S. 293 (1967).

and was handcuffed to a police officer; the victim was merely asked if the defendant "was the man." Before the Supreme Court, *Stovall* claimed that "the confrontation conducted in this case was so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law."³⁹⁰ The Court noted that the practice of showing suspects without a lineup has been widely condemned, but held that due process was not violated, considering the "totality of the circumstances," because an immediate hospital confrontation between the suspect and the badly wounded victim was imperative.

It is important to consider the possible impact of these decisions upon one kind of "field identification," that which involves temporary seizure of a suspect to take him to a nearby crime scene or to hold him on the spot so that he can be viewed by one or more victims or witnesses. This form of investigation is undertaken when the police are conducting a "hot" or "warm" search³⁹¹ at or near the scene of a crime, and thus is not involved in a numerical majority of temporary seizures for investigation. In terms of results, however, it is probably true that such stops constitute a very significant police practice.

1. *The Due Process Issue*

In a field identification situation, it is obviously unlikely that the suspect will be viewed in anything resembling a lineup. Although in some instances the police may stop two or more suspects while acting on a general description and searching the area immediately adjacent to the scene of a just-completed crime,³⁹² in the usual field identification case there will be but one suspect. Frequently, either a single suspect is stopped on the basis of a description too general to justify an arrest, or a single person is stopped because he is leaving the scene from which a call for police assistance has been received. *Stovall* indicates that in such a nonlinearup situation the "totality of the circumstances" must be considered in determining whether the identification violates due process.

One of the circumstances to be considered is the exigency of the particular situation, as reflected by the Court's emphasis in *Stovall* on the fact that the victim was seriously injured and might have died

390. 388 U.S. at 301-02.

391. See note 212 *supra*.

392. There are other possibilities which are equally unusual, such as police taking both a suspect and his companion to the crime scene, *e.g.*, *State v. Sears*, 182 Neb. 384, 155 N.W.2d 332 (1967).

without either implicating or clearing Stovall if the identification had been delayed. While this kind of need can seldom be shown in a field identification situation, there is a substantial need for the police promptly to check out suspects at the crime scene. As the data gathered by the President's Crime Commission make clear, a crime committed by a person not known by name to the victims or witnesses is unlikely to be cleared up by arrest of the offender unless he is apprehended in the immediate vicinity soon after the crime.³⁹³ And, as the Supreme Court has recently indicated, the need for police "swiftly to determine whether they were on the right track" is "hardly less compelling than that which we found to justify the 'one-man lineup' " in *Stovall*.³⁹⁴

To put the matter another way, *Stovall* does not condemn all non-lineup identifications, but only those which are "unnecessarily suggestive."³⁹⁵ The Court, while expressing a preference for carefully conducted lineup identifications, seems to have recognized that the more suggestive one-man identification may sometimes be a necessary police procedure.³⁹⁶ This obviously is so when the police have grounds for a temporary investigative seizure but not grounds for a to-the-station arrest. A full lineup—attended by the victims, witnesses, the suspected offender, and his attorney—which displays several other persons bearing some resemblance to the suspect can hardly be arranged within time limits that would pass muster for a "temporary" seizure. If any attempt is to be made to identify the suspect as the offender or to clear him, it must be done by other means.³⁹⁷

393. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 58 (1967) (emphasis added):

In the survey, there were 1,905 crimes examined, of which 482 (25 percent) resulted in arrests or other clearances. Of these, 70 percent involved arrests, 90 percent of which were made by the patrol force. More than half of the arrests were made within eight hours of the crime, many at or near the crime scene, and almost two-thirds of the arrests were made within the first week after the crime. *If a suspect is neither known to the victim nor arrested at the scene of the crime, the chances of ever arresting him are very slim.* Of the 482 cleared cases, 63 percent involved "named suspects." In the 1,556 cases without named suspects, only 181 (or 12 percent) were solved later by arrest.

See also INSTITUTE FOR DEFENSE ANALYSIS, A REPORT TO THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: SCIENCE AND TECHNOLOGY ch. 2, App. B (1967).

394. *Simmons v. United States*, 390 U.S. 377, 385 (1968).

395. *Stovall v. Denno*, 388 U.S. 293, 302 (1967).

396. Similarly, in *Simmons v. United States*, 390 U.S. 377 (1968) the Court noted that there was no suggestion that the identification by photograph was "unnecessary," and emphasized that it was necessary in that the evidence against the suspects was inconclusive.

397. This is not to suggest that a reviewing court should condemn a crime-scene identification on a finding that the officer *did* have grounds to arrest; as the Court pointed out in *Hoffa v. United States*, 385 U.S. 293, 310 (1966), "The police are not required to guess at their peril the precise moment at which they have probable

There are, to be sure, risks involved in having a suspect viewed outside a lineup.³⁹⁸ However, these risks are far less when witnesses can see a suspect minutes after they have seen the offender. The ability to remember details drops off sharply in the first few hours after an event occurs;³⁹⁹ thus, a "factor which has a substantial effect upon the reliability of an identification is the amount of time which elapsed between crime and identification."⁴⁰⁰ Indeed, a nonlinearup identification which occurs shortly after the crime is probably more reliable than the most carefully conducted lineup identification days, weeks, or months later.⁴⁰¹ It is not surprising, therefore, that the Supreme Court has concluded that there is little chance of mistake when the identification is made by witnesses only a day after the crime, "while their memories were still fresh."⁴⁰²

It may be argued that a crime-scene identification is suggestive in the sense that if a person is brought to the scene by police shortly after the crime the witnesses may be willing to assume that the police have apprehended the right man. The fact that the police have found the suspect in the immediate area may have some such impact; but this situation may be less suggestive than police presentation of an individual at some later date, when the witness might assume that the police "certainly would not have brought him here if he were not the right man."⁴⁰³ In the latter case, the witness might assume that police investigation in the interim had established the guilt of that individual—an assumption which is less likely when the suspect is produced minutes after the crime. Also, many of the suggestive procedures which may be a part of a lineup at the police station simply cannot be arranged during a crime-scene identification.⁴⁰⁴

For all of these reasons, it is appropriate to conclude that the

cause to arrest a suspect." See text accompanying note 328 *supra* for the related point of why this should not be the test for when the *Miranda* warnings are required.

398. See P. WALL, EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES 27-40 (1965).

399. M. BROWN, LEGAL PSYCHOLOGY 88-89 (1926); H. BURTT, LEGAL PSYCHOLOGY 54-55 (1931).

400. P. WALL, *supra* note 398, at 127.

401. Consider the case of *State v. Reeves*, 20 Utah 434, 439 P.2d 288 (1968). Witnesses to a theft identified the thief on the scene immediately after his apprehension, and the identification was beyond question in that the suspect had been found by the police in the immediate area with the stolen items in his possession. Four months later, these same witnesses picked someone else out of a lineup containing the thief.

402. *Simmons v. United States*, 390 U.S. 377, 385 (1968). In *Biggers v. Tennessee*, 390 U.S. 404 (1968), an equally divided Court affirming, Justice Douglas noted in dissent this language from *Simmons*, and then contrasted the instant case, where the victim in a nonlinearup identification "confronted petitioner seven months after the rape, and the sharpness of her recall was being severely tested." 390 U.S. at 407.

403. H. GROSS, CRIMINAL PSYCHOLOGY 37 (1911).

404. In *United States v. Wade*, 388 U.S. 218, 233-34 (1967), the Court listed the following suggestive procedures: everyone in lineup known to witness except for suspect; participants in the lineup grossly dissimilar; only suspect required to wear

requirements of due process may be met in a field identification of a person temporarily seized for purposes of such investigation promptly after the commission of a crime. Several recent cases support this conclusion.⁴⁰⁵

2. *The Right to Counsel Issue*

The question of whether the right to counsel requirements contained in *Wade* and *Gilbert* apply to field identifications depends, as have earlier right to counsel issues,⁴⁰⁶ upon when that right attaches. This is not to say, of course, that the right to counsel "begins" for all purposes at the same time; during the short life of *Escobedo*, for example, it was never seriously suggested that the coincidence of focus and custody marked the point at which counsel had to be pro-

distinctive clothing; witness told by police that they have caught the culprit; suspect pointed out to witness before or during lineup; participants in lineup asked to try on clothing which fits only suspect; wholesale identification of defendant as perpetrator of several different crimes.

405. In these cases, it often appears that the suspect was actually under arrest, although in many instances it would seem that the situation should be characterized as a temporary "seizure" in the sense of the *Terry* case. In most of them, the suspect had been detained for a very brief period of time and the circumstances suggest that the purpose of the detention was to permit a viewing by the witness, with a to-the-station arrest to follow only if the witness identified the suspect as the offender. None of these cases involved a lineup. See *Hanks v. United States*, 388 F.2d 171 (10th Cir. 1968) (victim of postal robbery brought to postal inspector's office after suspect's arrest; held no due process violation); *United States v. Quarles*, 387 F.2d 551 (4th Cir. 1967) (FBI agents brought suspect, apparently not then under arrest, to bank where robbery occurred, procedure upheld without discussion of due process point); *Commonwealth v. Bumpus*, 238 N.E.2d 343, 346 (Mass. 1968) (suspect found nearby brought back to scene of burglary about half hour after crime, held no due process violation; court noted that victim, "while the events were very fresh in his mind . . . was probably in a better position to have a clear recollection of the intruder than at any later time"); *Harris v. State*, 206 S.2d 829 (Miss. 1968) (suspect brought to scene of window-peeking the day following crime; court stated that this fact affected only the weight of the identification, no discussion of due process point); *State v. Keeney*, 425 S.W.2d 85 (Mo. 1968) (suspect stopped two blocks away from scene of crime minutes after robbery of store; no due process violation in bringing suspect to store, especially since "the lapse of time between observation, description, arrest, and identification is insignificant"); *State v. Sears*, 182 Neb. 384, 155 N.W.2d 332 (1967) (a few hours after burglary, owner of car identified as used in crime and his companion brought to scene of crime for viewing; held no due process violation); *People v. Rodriguez*, 288 N.Y.S.2d 853 (1968) (identification at police station twenty minutes after robbery, held no due process violation).

In the *Bumpus* case, the court had this to say about a stopping for investigation situation:

If Greenberg [the victim] had pursued the intruder and the intruder had been stopped by a policeman during the pursuit and then had been shown at close range to Greenberg, it would have been a wholly reasonable confrontation, which hardly could have been avoided. The field confrontation which in fact took place seems to us to be of much the same type.

238 N.E.2d at 346-47.

406. *Massiah v. United States*, 377 U.S. 201 (1964); *White v. Maryland*, 373 U.S. 59 (1963); *Hamilton v. Alabama*, 368 U.S. 52 (1961).

vided to facilitate preparation for trial. The purpose of the *Wade-Gilbert* right to counsel is to "assure a meaningful confrontation at trial"⁴⁰⁷ by making it possible for counsel "to reconstruct at trial any unfairness that occurred at the lineup" and thus "attack the credibility of the witness' courtroom identification."⁴⁰⁸ This being so, it would seem that the fact that those two cases involved post-indictment lineups is not significant, and they would seem to "apply whenever lineups are conducted."⁴⁰⁹ Yet, there obviously must be some limits, and even though the right of cross-examination would be bolstered if counsel were able to be present at every prior witness-suspect confrontation, it is inherently impossible to extend the rule that far.⁴¹⁰

In groping for the yet undefined limits on the *Wade-Gilbert* right to counsel, one court recently held that the right begins only at the "accusatory stage,"⁴¹¹ relying upon "the Court's repeated use of the term 'accused' and its reference . . . to *Escobedo v. Illinois*."⁴¹² This, however, does not seem consistent with the above-stated rationale of *Wade*; moreover it ignores the fact that in *Gilbert* the Court suppressed testimony given at the penalty stage of the trial by eight witnesses concerning their lineup identification of the defendant as the perpetrator of other robberies. Insofar as can be determined, *Gilbert* had not yet been indicted for these other crimes, although it might be said that he had become the "accused" as to these crimes if "accused" does not mean "formally charged"⁴¹³ but only—as in *Escobedo*—that the investigation "had begun to focus" upon him.⁴¹⁴

407. *United States v. Wade*, 388 U.S. 218, 236 (1967).

408. *United States v. Wade*, 388 U.S. 218, 232 (1967). Thus, the Court said that there would be no right to counsel at a lineup if procedures were adopted "which eliminate the risks of abuse and unintentional suggestion at lineup proceedings and the impediments to meaningful confrontation at trial." 388 U.S. at 239.

409. L. HALL & Y. KAMISAR, *MODERN CRIMINAL PROCEDURE* 87 (2d ed., 1967 Supp.). As noted in *United States v. Davis*, 3 BNA CRIM. L. RPTR. 3221 (2d Cir. July 31, 1968), there is language in the recent Supreme Court cases which "outrun their facts," such as the assertion in *Wade* that the Court must "scrutinize any pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial," 388 U.S. at 227, and the statement in *Stovall* that "we have, therefore, concluded that the confrontation is a 'critical stage,' and that counsel is required at all confrontations," 388 U.S. at 298.

410. It would be helpful, for example, if counsel could be present at the time of the crime and thus more effectively cross-examine the witnesses as to their ability to observe the features of the offender.

411. *United States v. Davis*, 3 BNA CRIM. L. RPTR. 3221 (2d Cir. July 31, 1968). This issue has been faced by few courts to date, as most cases in which the defendant has raised a *Wade* argument have been disposed of on the nonretroactivity ground. See, e.g., *United States v. Quarles*, 387 F.2d 551 (4th Cir. 1967); *State v. Sears*, 182 Neb. 384, 155 N.W.2d 332 (1967).

412. *United States v. Davis*, 3 BNA CRIM. L. RPTR. 3221, 3223 (2d Cir. July 31, 1968).

413. This was the interpretation given to "accused" by four members of the Court in the pre-*Escobedo* case of *Spano v. New York*, 360 U.S. 315 (1959).

414. Clearly the investigation had begun to focus on *Gilbert*; six days before the

However, the now-discredited "focus" test has no more appeal here than in other contexts.⁴¹⁵ If the right to counsel during identification comes into bloom at the time of "focus," then a defendant, by showing that he could have been arrested, could challenge the most cautious of police identification procedures, such as arranging to have the suspect viewed "on the streets, entering or leaving his home or place of business, at places of amusement, or at any other place where he is not entitled to privacy."⁴¹⁶ Likewise, it would also mean that an officer could not confidently take a suspect a brief distance to the scene of a just-completed crime for identification unless he were certain that he did *not* have grounds for arrest, which again would have the unfortunate result of requiring police "to guess at their peril the precise moment at which they have probable cause to arrest."⁴¹⁷

Another possibility is that the *Wade-Gilbert* right to counsel commences at the time the suspect is taken into custody. One court has rejected the view that "the mere fact of custody . . . automatically triggers the Sixth Amendment right to counsel" and has concluded that "the fact of custody adds little of Sixth Amendment relevance";⁴¹⁸ this makes particularly good sense if custody is taken to include a *Terry* type of seizure. A contrary view would mean that street encounters for purposes of identification would be improper "unless police cars are equipped with public defenders."⁴¹⁹ As a federal court recently said of a hypothetical case in which a man running away from the scene of an assault was collared by an officer who asked the victim and the bystanders whether the man was the perpetrator:

It is hard to believe the Court meant to prevent an officer from making such a routine, uncontrived inquiry and to require that the

lineup he had admitted committing the other crimes. *Gilbert v. United States*, 366 F.2d 923, 946 n.26 (1966), *cert. denied*, 388 U.S. 922 (1967).

415. See text accompanying note 328 *supra*.

416. *Rigney v. Hendrick*, 355 F.2d 710, 712 (3d Cir. 1965). Illustrative is *United States v. Quarles*, 387 F.2d 551 (4th Cir. 1967), where FBI agents took employees of a robbed bank to one of the suspect's place of employment, where they picked the suspect out of a group of employees lounging in the area.

417. *Hoffa v. United States*, 385 U.S. 293, 310 (1966).

418. *United States v. Davis*, 3 BNA CRIM. L. RPT. 3221, 3222 (2d Cir. July 31, 1968). But cf. *Rivers v. United States*, 37 U.S.L.W. 2183 (5th Cir. Sept. 16, 1968), where the court held that failure to provide counsel for (or to obtain a waiver of the right to counsel from) a suspect who was apprehended, placed under arrest, and immediately brought before the victim for identification barred use of the victim's identification as evidence in a federal criminal trial. The fifth circuit apparently noted that the record did not reveal that an emergency existed or that the police feared that the victim was dying as in *Stovall*.

419. *Escobedo v. Illinois*, 378 U.S. 478, 496 (1964) (Justice White, dissenting).

victim and the bystanders be carted off to a police station, held on the spot until counsel could be provided, or dismissed until a lineup attended by counsel could be arranged at some later time.⁴²⁰

The notion that *Wade* and *Gilbert* do not apply to such field identifications, it is submitted, does not do violence to the reasoning in those cases. The risks in field identification, for the most part, are inherent in that particular procedure and identical in almost every case. Only one suspect is viewed, and it is apparent to all parties that it was possible for the suspect to have committed the crime because he was in the area. The presence of counsel at the identification is not necessary to establish these points at trial. By contrast, there are an infinite number of variations in the manner in which a station-house lineup might be conducted, and counsel's knowledge of precisely what occurred is of great value in making possible a meaningful cross-examination at trial.⁴²¹ Most of the suggestive procedures listed in *Wade* simply could not occur in the context of a field identification.⁴²² Moreover, a suspect in a lineup is seldom in a position to detect such suggestive procedures⁴²³ and thus needs counsel to act as his eyes and ears, but a similar dilemma is unlikely in a field identification.

VIII. CONCLUSIONS

"Street encounters," the Chief Justice noted in *Terry*, "are incredibly rich in diversity."⁴²⁴ To this might be added the observation that the fourth, fifth, and sixth amendment issues presented by such encounters are likewise "rich in diversity." And, as reflected in a number of recent state and federal cases, the solutions tendered for these issues are also diverse; the authority of the police to make on-the-street investigations has sometimes been limited by such imponderables as the undisclosed intentions of the officer and the undisclosed assumptions of the suspect, or by such dubious factors as whether the officer could have required the suspect to submit to more than a street encounter.

420. *United States v. Davis*, 3 BNA CRIM. L. RPTR. 3221, 3222 (2d Cir. July 31, 1968).

421. Of course, the presence of a lawyer at a stationhouse lineup also serves as a deterrent against suggestive police tactics.

422. See the list of abuses of the lineup procedure in note 404 *supra*. The only one of these "suggestive procedures" which might occur at a field identification is a police statement that they have caught the culprit.

423. See *United States v. Wade*, 388 U.S. 218, 230-31 n.13 (1967) where the Court stated:

An additional impediment to the detection of such influences by participants, including the suspect, is the physical conditions often surrounding the conduct of the lineup. In many, lights shine on the stage in such a way that the suspect cannot see the witness In some a one-way mirror is used and what is said on the witness' side cannot be heard.

424. 392 U.S. at 13.

All street encounters, despite their diversity, have in common the fact that they are less of an intrusion on the suspect than what has traditionally been referred to as an "arrest"—an actual taking to the station for purposes of investigation or prosecution. In terms of the fourth amendment, the seizure is a lesser invasion of personal security, as emphasized in *Terry*. In terms of the fifth amendment, the "potentiality for compulsion" does not approach that which pervades stationhouse questioning. And, in terms of the *Wade-Gilbert* sixth amendment right and the *Stovall* due process protection, crime-scene identifications are not attended by the risks of a one-man station-house showup or a lineup conducted long after the event.

Because this is so, such efforts at crime prevention and detection⁴²⁵ should be encouraged rather than discouraged through "a grudging or negative attitude by reviewing courts."⁴²⁶ Until police and judges are replaced by computers, the contours of permissible police action should not be drawn by resort to highly complex formulae or largely unascertainable facts. Specifically, attempts to resurrect the "focus" test for various purposes should be resisted strenuously; the fact that the officer underestimated the amount of evidence at hand or thoughtfully elected a lesser form of intrusion upon the suspect should not be decisive. After all, "there is no constitutional right to be arrested."⁴²⁷

If the courts do take a positive attitude toward permitting street encounters, *Terry* and its companions may mark the beginning of a rational assessment of a highly important but long-ignored aspect of police work. These cases, it may be hoped, will prompt the following developments.

First: Terry paves the way for courts and lawyers to see street encounters for what they are—a unique and distinct form of police activity which should not be judged as something indistinguishable from other police practices. The police have long viewed their on-the-street actions in this way, and it is time for the law to do likewise. For too many years, instances of what in fact were temporary seizures for investigation have come before trial and appellate courts, but the issues involved were argued and decided solely in terms of whether there was a lawful arrest.⁴²⁸

Second: It is time for rethinking of what constitutes probable

425. Obviously the use of somewhat similar actions for purposes of harassment should be distinguished. See section IV *supra*.

426. *United States v. Ventresca*, 380 U.S. 102, 108 (1965).

427. *Hoffa v. United States*, 385 U.S. 293, 310 (1966).

428. See Remington, *The Law Relating to "On the Street" Detention, Questioning and Frisking of Suspected Persons and Police Arrest Privileges in General*, 51 J. CRIM. L.C. & P.S. 386, 390 (1960).

cause for arrest. Because of the long-standing judicial practice of classifying a variety of police conduct as arrests, there has been a tendency to water down the requirements for arrest in order to justify what were in fact only stops for investigation. Now that it is clear that such temporary seizures may be authorized without calling them arrests, a reconsideration of the grounds for a taking to the station are in order.⁴²⁹

Third: Police authority to investigate suspicious activity should be conferred in terms of the power to make a temporary seizure; concomitantly, the courts should become more vigilant in striking down other investigative techniques which are more offensive. These include the use of broad and vague crimes of vagrancy and the like which permit arrest, prosecution, and conviction merely for being suspicious,⁴³⁰ and such subterfuges as arrests for insignificant traffic violations in order to investigate, search, or harass.⁴³¹ Recognition of police authority to detain suspects briefly in suspicious circumstances should make it somewhat easier to uncover many of these other techniques.⁴³²

Fourth: It is imperative that police agencies take the initiative in developing sound policies to ensure that this newly recognized authority concerning street encounters is exercised with restraint. Unfortunately, the police have not done so in the past,⁴³³ but rather have often proved to be their own worst enemies by pushing every uncertainty or ambiguity in their power to its outer limits. The result heretofore has been that the courts ultimately slam the door on the police—sometimes a bit too hard—and they are then caught within strict restraints that are essentially of their own

429. Experience has shown, however, that such a reappraisal will not necessarily result from recognition of the police power to stop for investigation. See Schwartz, *Stop and Frisk (A Case Study of Judicial Control of the Police)*, 58 J. CRIM. L.C. & P.S. 433, 450-51 (1967).

430. See note 133 *supra*.

431. See, e.g., *Tagliavore v. United States*, 291 F.2d 262 (9th Cir. 1961) (*vice squad* investigator observed man suspected of being a narcotics seller commit two minor traffic violations—failure to signal for a turn and faulty lights—and obtained an arrest warrant for these offenses; the suspect was then arrested and a search incident to arrest uncovered narcotics); *People v. Watkins*, 19 Ill. 2d 11, 166 N.E.2d 433 (1960) (officers assigned to *gambling* detail followed man suspected of being a policy "bag-man" and arrested him for parking too close to a crosswalk; search of his person incident to the arrest uncovered policy slips).

432. For example, it has been suggested that the common subterfuge of arresting a suspicious person and then justifying it by finding a description of a wanted criminal which comes close to fitting the suspect (see ARREST 296-97) could now be more easily detected because the right to stop for investigation would call for the officer to give the suspect an opportunity to identify himself. Younger, *Stop and Frisk: "Tell It Like It Is"*, 58 J. CRIM. L.C. & P.S. 293, 295 (1966).

433. Some think it is unlikely that they will do so in the future. See Schwartz, *supra* note 429, at 449.

making.⁴³⁴ The intentional ambiguity in *Terry* would make it quite simple for the Supreme Court to give that decision a most narrow interpretation should the facts of subsequent cases suggest such a course; thus the warning of the President's Crime Commission still rings true:

The continuation of field interrogation as a police investigative technique depends upon a police willingness to develop policies which carefully distinguish field interrogation from clearly illegal street practices and to take administrative steps to demonstrate that a proper field interrogation program can be carried out without it leading also to indiscriminate stopping and searching of persons on the street. As yet, police have failed to make this kind of demonstration, and thus today field interrogation as a police investigative technique remains in jeopardy.⁴³⁵

Fifth: Legislatures should also become involved in the entire matter of police-citizen street confrontations. It is true, of course, that the Court has made it clear that the fourth amendment is not subject to "verbal manipulation,"⁴³⁶ and thus there is little to be gained from enactment of a mere carbon copy of the New York stop-and-frisk law. But there are other matters which are quite appropriate for legislation. For one thing, as to *Terry*-type seizures, there are a number of issues which are unlikely to reach the courts and which are even more unlikely to be resolved as a matter of constitutional law. Examples of these issues include whether force may be used for such a temporary seizure;⁴³⁷ whether a citizen may resist an unlawful seizure of this kind;⁴³⁸ and whether police

434. Courts are undoubtedly influenced by their assumptions as to how police will respond to legal requirements. If there is confidence that the police will stay well within defined limits, their powers may be stated broadly. Cf. P. DEVLIN, *THE CRIMINAL PROSECUTION IN ENGLAND* 16 (1958): "We like to grant large powers so as to prevent any legal quibble about their extent, but we expect the holders of them to act fairly and reasonably and well within them." On the other hand, if it is thought that the police will exceed the limits regularly, the tendency is to impose severe and perhaps unrealistic limitations. "Among the opponents of the amendment [broadening the powers of police in Japan] there seems to have been this feeling: Allow the police seven miles and they will go nine miles; therefore, if we want to keep them at seven miles, better give them six miles." Abe, *Police Detention and Arrest Privileges Under Foreign Law—Japan*, 51 J. CRIM. L.C. & P.S. 429, 433 (1960).

435. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 23 (1967). But, in PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 103 (1967), the Commission has praise for the efforts of the New York State Combined Council of Law Enforcement Officials in giving the police practical guidance on the implementation of the New York stop-and-frisk law.

436. See text accompanying note 66 *supra*.

437. Although occasions where force is needed are rare, see Pilcher, *The Law and Practice of Field Interrogation*, 58 J. CRIM. L.C. & P.S. 465, 473 (1967), it is obvious that the police deserve guidance on this point. For one view, see MODEL CODE OF PRE-ARREST PROCEDURE § 2.02 (Tent. Draft No. 1, 1966).

438. This issue should probably be dealt with in the same terms as whether an

should be permitted or required to maintain records on all temporary seizures.⁴³⁹ And perhaps even more important, legislation is needed to deal with those street encounters which are unrelated to a desire to prosecute for crime. In *Terry* there is the healthy admission that courts cannot effectively deter such actions because their only weapon is the exclusionary rule,⁴⁴⁰ and this admission is accompanied by a plea for "the employment of other remedies than the exclusionary rule to curtail abuses for which that sanction may prove inappropriate."⁴⁴¹ Clearly, there is a need for laws which create other means to control the police, new channels for citizen complaints about police misconduct, and realistic remedies for individuals dealt with unfairly by the police.

Hopefully, *Terry*, *Sibron*, and *Peters* will give impetus to developments such as these. But it is clear that they will not just happen, nor can the Supreme Court alone make them happen. What is needed here, indeed, what is needed for the larger task of striking a fair balance between all individual and societal interests, is

the high resolve of political officials, law-makers and law-implementers, to take affirmative steps to protect and enlarge the liberties of those they govern. . . . [N]ow is the opportune time for congressmen and aldermen, and for cabinet members and mayors and police commissioners . . . to begin to view their official obligations in more spacious terms. They must see it as their responsibility to exercise the liberating, as well as the regulating, powers of the charters they work under. Fidelity to the supreme law of the land requires no less.⁴⁴²

unlawful arrest may be resisted. While some states take the position that such force is privileged, e.g., *City of Monroe v. Ducas*, 203 La. 971, 14 S.2d 781 (1943), the better view is that fourth amendment issues should not be fought out on the street and that the individual illegally seized should submit and then resort to available legal remedies. See MODEL PENAL CODE § 3.04(2)(a)(i) (Proposed Official Draft, 1962).

439. See DETECTION OF CRIME ch. 5, and note the ALI proposal, *supra* note 22. The keeping of such records has been opposed by some as a threat to the reputations of innocent persons, but insufficient attention has been given to the potential use of such records as a means of control over the patrolman's actions. DETECTION OF CRIME 80; Pilcher, *supra* note 3, at 478-79.

440. 392 U.S. at 13-14:

Doubtless some police "field interrogation" conduct violates the Fourth Amendment. But a stern refusal by this Court to condone such activity does not necessarily render it responsive to the exclusionary rule. Regardless of how effective the rule may be where obtaining convictions is an important objective of the police, it is powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forego successful prosecution in the interest of serving some other goal.

441. 392 U.S. at 15.

442. Pollack, *To Secure the Individual Rights of Many*, in *LAW IN A CHANGING AMERICA* 43, 55 (G. HAZARD ed. 1968).