Cornell Law Review

Volume 53
Issue 5 *May 1968*

Article 9

Stop and Frisk a Perspective

John J. Duffy Jr.

STOP AND FRISK: A PERSPECTIVE

The fourth amendment protects a citizen's privacy from arbitrary invasion by the police. Before the police may search or seize a person or his property, evidence of probable cause usually must be presented to a magistrate in order to obtain the necessary warrant.[1] A policeman may make a lawful arrest without a warrant, however, if he has probable cause to believe that a felony has just been committed and the individual he intends to arrest has committed it.[2] The policeman making such an arrest may contemporaneously make a limited search of the prisoner's person,[3] the property under his control,[4] and the place where he is arrested.[5]

Several recent statutes and court decisions have given police the authority to forcibly stop and frisk persons and detain them for investigation on grounds less than probable cause.[6] Stop and frisk legislation is applicable in two distinct situations. The first is often referred to as "preventive criminality." *P*, a patrolman, observes *S*, poorly dressed and unshaven, leaning against a tree in an unlighted section of the city park. As *P* approaches, *S* begins to walk rapidly in the other direction. Although *P* does not have probable cause to arrest *S*, *S*'s demeanor and the accompanying circumstances arguably justify a suspicion that he is about to engage in criminal activity. Proponents of stop and frisk contend that *P* should be allowed to stop *S*, ask him to explain his conduct, and, failing a satisfactory explanation, detain him for further investigation and interrogation.[7]

---

1 Aguilar v. Texas, 378 U.S. 108, 110-11 (1964); McCray v. Illinois, 386 U.S. 300, 314 (1967) (dissenting opinion).

2 McCray v. Illinois, 386 U.S. 300 (1967). *See also* Perkins, *The Law of Arrest*, 25 IOWA L. REV. 201, 228-33 (1963). Police authority to arrest a suspected misdemeanant without a warrant varies among jurisdictions. *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, 388-89 (1960).

3 McCray v. Illinois, 386 U.S. 300 (1967).

4 Carroll v. United States, 267 U.S. 132 (1925).

5 *See* United States v. Rabinowitz, 339 U.S. 56 (1950); Harris v. United States, 331 U.S. 145 (1947); *cf.* Preston v. United States, 376 U.S. 364 (1964).

6 *See generally* N.Y. CRIM. PROC. LAW § 180-a (McKinney Supp. 1967); the proposed Uniform Arrest Act §§ 2-3, in Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315, 344 (1942); MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE §§ 2.01, 2.02 (Tent. Draft No. 1, 1966); UNIFORM ARREST ACT §§ 5-6 (Tent. Draft No. 1, 1965) [hereinafter cited as UNIFORM ARREST ACT]. In a case that arose before, but was heard after, the effective date of the New York statute, the Court of Appeals recognized police authority to stop and frisk a "suspicious" person. People v. Rivera, 14 N.Y.2d 441, 201 N.E.2d 32, 252 N.Y.S.2d 458 (1964), *cert. denied*, 379 U.S. 978 (1965). The California Supreme Court has upheld a similar practice. People v. Mickelson, 59 Cal. 2d 448, 380 P.2d 658, 30 Cal. Rptr. 18 (1963).

7 Wilson, *Police Arrest Privileges in a Free Society: A Plea for Modernization*, 51

In the second situation the object is not to prevent crime, but to allow the patrolman to conduct an "investigation" of a person he suspects has committed a crime. *P* observes *S*, unshaven and poorly attired, carrying a new and obviously expensive radio in an area where a number of appliance warehouses are located. Law enforcement officials again argue that *P* should have authority to stop and question *S* and detain him should he fail to dispel the suspicion aroused.[8]

Stop and frisk legislation has its roots in vagrancy and loitering statutes and is subject to many of the same criticisms. Beyond any technical constitutional objections lies a more important issue—whether stop and frisk is a necessary or even desirable law enforcement tool. Does the cost to individual liberty outweigh the uncertain contribution to the preservation of law and order?

I

PREVENTIVE CRIMINALITY: VAGRANCY AND LOITERING STATUTES

To properly evaluate statutes permitting detention on suspicion that the person is about to commit a crime, it is useful to review similar legislative attempts to intercept the potential criminal—vagrancy and loitering statutes.

A. *Vagrancy Statutes*

Vagrancy statutes punish status rather than conduct by making illegal a pattern of behavior, not the commission of any single act.[9] Generally these statutes define a vagrant in terms of the repeated occurrence of conduct that in isolated instances would be considered harmless—for example, wandering.[10] Historically, the justification for punishing a pattern of otherwise innocuous behavior is based on two

J. CRIM. L.C. & P.S. 395, 399 (1960). *See also* Younger, *Stop and Frisk: "Say It Like It Is,"* 58 J. CRIM. L.C. & P.S. 293, 299 (1967).

8 *See* Younger, *supra* note 7, at 293-94.

9 On the problems of status criminality in general, see Douglas, *Vagrancy and Arrest on Suspicion*, 70 YALE L.J. 1 (1960); Foote, *Vagrancy-Type Law and Its Administration*, 104 U. PA. L. REV. 603 (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).

10 This is not always the case. Modern vagrancy statutes often make a pattern of *criminal* behavior the basis of a status crime, such as prostitution or habitual drunkenness. Note, *The Vagrancy Concept Reconsidered: Problems and Abuses of Status Criminality*, 37 N.Y.U.L. REV. 102, 115 (1962).

propositions. First, the mode of life subject to sanction is thought to be injurious to the individual's moral well-being.[11] Punishment is often applied simply to deter the idle wanderer from continuing to travel the road to ruin. Second, the vagrant's behavior is thought to evidence criminal inclinations that should be punished before they mature into serious crimes.[12] These two propositions continue to serve as the rationale for modern vagrancy statutes; courts still assert that a vagabond life fosters a tendency to commit crime[13] and that "[a] vagrant is a probable criminal."[14]

In Elizabethan England groups of idle wanderers, the notorious brotherhoods of beggars, roamed the countryside engaging in criminal activity.[15] Although it was probably true that a member of such a brotherhood was a potential felon, his modern counterpart probably is not.[16] Many vagrants by personal choice prefer to travel about the country living by odd jobs. Their needs are few and can usually be supplied without resort to crime.[17] Many others who fall within the ambit of the vagrancy statutes do not choose the vagabond life voluntarily. They are either mentally ill or suffering from the combination of mental and physical deterioration that often accompanies old age. Some, unable to deal with their environment, welcome arrest and incarceration.[18]

1. *Constitutional Objections*

Vagrancy statutes impose sanctions on a particular status because the legislature has decided that persons who adopt that status are likely to commit crimes. In similar situations where a particular status, harmless in itself, has been made a crime, the Supreme Court has stated that there must be a substantial likelihood that the assumption of the status

---

11 *See id.* at 105.

12 *Id.*

13 *See* District of Columbia v. Hunt, 163 F.2d 833, 835 (D.C. Cir. 1947); Lucas v. State, 31 Okla. Crim. 297, 238 P. 502 (1925).

14 District of Columbia v. Hunt, 163 F.2d 833, 835 (D.C. Cir. 1947).

15 Note, *supra* note 10, at 105.

16 *See* Douglas, *supra* note 9; Foote, *supra* note 9, at 627.

17 Foote, *supra* note 9, at 627.

18 As the writer arrived in the morning, the guards were trying to get rid of an inmate who had just been discharged but who was sitting on the sidewalk just outside the entrance. Three hours later he was still sitting, this time 100 yards further down the sidewalk. Two mornings later he was observed arriving in the police van with a three month sentence as a vagrant.

A number of inmates appeared to be of this type, and some had as many as seventy prior commitments to the House of Correction.

Id. at 636.

will be attended by the activity the legislature desires to prohibit. Justice Harlan, writing for the Court in *Scales v. United States*,[19] said:

> In our jurisprudence guilt is personal, and when the imposition of punishment on a status or on conduct can only be justified by reference to the relationship of that status or conduct to other concededly criminal activity . . . that relationship must be sufficiently substantial to satisfy the concept of personal guilt in order to withstand attack under the Due Process Clause of the Fifth Amendment.[20]

In view of the tenuous relationship between the harmless conduct punished by the vagrancy statutes and "other concededly criminal activity," it is possible that these laws do not satisfy the due process requirements of the fourteenth amendment. Recently two state courts have invalidated vagrancy statutes on just such grounds. In *Reno v. Second Judicial District Court*,[21] the Supreme Court of Nevada held a statute unconstitutional that made criminal the consorting of two persons of evil reputation.[22] In *Fenster v. Leary*,[23] the New York Court of Appeals struck down a vagrancy statute that made a criminal of a person who, with no visible means of support, lives without employment. The court noted that the proscribed state of idleness was not in itself harmful to the commonwealth and that this harmless conduct had no substantial relation to future criminal activity.[24]

Many vagrants do not voluntarily choose their "degenerate" way of life; their behavior is the product of mental and physical deficiencies. Although their presence in public parks and on public streets offends the sensibilities of many citizens, medical treatment seems more appropriate than penal sanctions. In many urban areas, however, these

---

19 367 U.S. 203 (1961).

20 367 U.S. 203, 224-25 (1961). *See* Aptheker v. Secretary of State, 378 U.S. 500, 519-21 (1964) (Douglas, J., concurring); Whitney v. California, 274 U.S. 357, 372-73 (1927) (Brandeis, J., concurring).

21 83 Nev.——, 427 P.2d 4 (1967).

22 The enactment does not demand the doing of an act or the presence of criminal intent in order to punish for disobedience. These requisites are sought to be supplied by inference from the mere fact that the defendant has an evil reputation and is found consorting with another who bears the same burden. . . .
. . . .
. . . One possessing an evil reputation may be arrested, booked, [and] arraigned . . . all because of the officer's subjective, on the spot evaluation, aided, of course, by the presumption that the defendant had some unlawful purpose in mind. In our judgment the interests of a free society are not promoted by such an ordinance.

Id. at ____, 427 P.2d at 7-8. *See also* Parker v. Municipal Judge, 83 Nev. ____, 427 P.2d 642 (1967) (disorderly persons).

23 20 N.Y.2d 309, 229 N.E.2d 426, 282 N.Y.S.2d 739 (1967).

24 *Id.* at 312-13, 229 N.E.2d at 429-30, 282 N.Y.S.2d at 744.

unfortunates constitute a considerable proportion of those arrested on vagrancy charges.[25]

Driver v. Hinnat[26] suggests the possibility that punishing these unfortunates as criminals may violate the eighth and fourteenth amendments. The Fourth Circuit held that any punishment of a chronic alcoholic for public drunkenness was cruel and unusual, noting that "[t]he alcoholic's presence in public is not his act, for he did not will it."[27] The same might well be said of the aged and infirm vagrant. His vagabond life is the result of his psychological and physiological infirmities. Although no court has held mental or physical inadequacy a defense to a charge of vagrancy, the court in *Fenster v. Leary* indicated that its decision to strike down a vagrancy statute on due process grounds was influenced by considerations of the inequity of punishing involuntary vagrants.[28]

2. *Practical Problems*

Besides its constitutional difficulties, status criminality also presents problems in practical application. American courts have interpreted vagrancy statutes as prohibiting a pattern of conduct, not a single act.[29] As a result, the statutes have only limited value as a means of preventing crime; the policeman cannot theoretically arrest as a vagrant a person he suspects is about to commit a crime, unless he is aware of that person's habitual mode of being.[30] In urban areas it is

---

25 *See* Foote, *supra* note 9, at 633-34.

26 356 F.2d 761 (4th Cir. 1966). *See also* Robinson v. California, 370 U.S. 660 (1962); Easter v. District of Columbia, 361 F.2d 50 (D.C. Cir. 1966).

27 356 F.2d at 764.

28 20 N.Y.2d at 314, 229 N.E.2d at 429, 282 N.Y.S.2d at 743.

29 "[T]he idleness and wandering about described in our vagrancy statute is aimed at a mode of life, and certainly not at one isolated instance of idleness of only a few hours duration at most." Brooks v. State, 33 Ala. App. 390, 392, 34 So. 2d 175, 177 (1948).

> [S]uch persons are denominated vagrants because their course of conduct . . . is habitual in its nature. . . . In order to prove that a person is a drunkard, or common drunkard, so as to be punished as a vagrant, it would be necessary to show that drunkenness was his course of conduct, or condition of being, or status, in a continuous, or at least habitual, way.

Parshall v. State, 62 Tex. Crim. 177, 192, 138 S.W. 759, 766 (1911). *See also* Commonwealth v. O'Brien, 179 Mass. 533, 534, 61 N.E. 213, 214 (1901). *Compare* State v. Grenz, 26 Wash. 2d 764, 175 P.2d 633 (1946), *appeal dismissed*, 332 U.S. 748 (1947).

30 As a practical matter the theory of vagrancy statutes is ignored:

> No cases were observed in this study in which the police gave any indication of trying to get evidence on a defendant's mode of life and making an arrest only after they had observed a sufficient series of acts to add up to the prohibited status. Vagrancy is of use to the police in Philadelphia today as a weapon against suspicious persons only because the law is so loosely and illegally administered that an isolated act is all that is required for conviction. The magistrates were

exceedingly difficult to gain this awareness. Furthermore, the categories of conduct that define a vagrant, although broad enough to cover many situations, are often inapplicable in situations where the modern police officer must act. For example, many statutes define a vagrant in terms of nightwalking or wandering at late and unusual hours. The modern criminal's activity, however, does not take place solely at night.[31]

B. *Loitering Statutes*

Although the vagrancy laws were recognized as "archaic in concept, quaint in phraseology, a symbol of injustice to many and very largely at variance with prevailing standards of constitutionality," they were thought to "serve a necessary purpose and remain as essential means by which law enforcement agencies discharge their primary function of preserving law and order and preventing the commission of crime."[32] The proposed solution to this dilemma was the loitering statute, which was intended to "make it possible for police departments to discharge their responsibilities in a straightforward manner without . . . evasions and hypocrisies . . . ."[33]

Loitering statutes usually contain several definitions of the crime. For our purposes, however, discussion can be limited to those provisions that, like the "suspicious-loitering" provision of a late draft of the Model Penal Code, place an obligation upon "[a] person who loiters or wanders . . . under circumstances which justify suspicion that he may be . . . about to engage in crime" to identify himself and give a reasonable explanation of his behavior.[34] Although these statutes

apparently unaware of the proof necessary to establish the status elements which are essential ingredients of the offense; in any event, they never applied them. Foote, *supra* note 9, at 630.

31 Warner, *supra* note 6, at 321.

32 Sherry, *supra* note 9, at 566. The author of this article was the draftsman of CAL. PEN. CODE § 647 (West Supp. 1967), which replaced the California vagrancy law. For a similar judicial evaluation of vagrancy statutes, see Parker v. Municipal Judge, 83 Nev. ____, ____, 427 P.2d 642, 645-46 (dissenting opinion) (salutory object: prevention of crime).

33 Sherry, *supra* note 9, at 567.

34 MODEL PENAL CODE § 250.12 (Tent. Draft No. 13, 1961). Compare the wording of the California and New York loitering statutes with the two drafts of the Model Code provision. N.Y. PEN. LAW § 240.35(6) (McKinney 1967) provides that one is guilty of loitering if he:

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

eliminate the quaint phraseology of the vagrancy statutes, they retain the vagrancy concept—the punishment of a person on suspicion of criminal potential. The Model Code draft's "suspicious-loitering" section made the suspicious situation only the *basis* for police inquiries to which the actor must respond rather than an offense in itself.[35] Creating a duty to respond to police inquiries may, however, be invalid as an infringement of the suspect's privilege against self-incrimination.[36] Recognition of this problem may have influenced the drafts-

---

CAL. PEN. CODE § 647(e) (West Supp. 1967) is similar in that it makes both the conduct and the failure to respond elements of the offense, but the conduct is described as "wander[ing] upon the streets or from place to place without apparent reason or business." A late MODEL PENAL CODE draft (§ 250.12 of Tent. Draft No. 13, 1961) made the gravamen of the offense the failure to respond: a person "commits a violation if he refuses the request of a peace officer that he identify himself and give a reasonably credible account of the lawfulness of his conduct and purposes." But MODEL PENAL CODE § 250.6 (Official Draft 1962) makes behavior the essence of the offense:

> A person commits a violation if he loiters or prowls in a place, at a time, or in a manner not usual for law-abiding individuals under circumstances that warrant alarm for the safety of persons or property in the vicinity.

The draftsmen explained the change to justifiable alarm as a means of saving the section "from attack and possible invalidation as a subterfuge by which the police would be empowered to arrest and search without probable cause." MODEL PENAL CODE, Comment at 227 (Official Draft 1962). *But see* Schwartz, *The Model Penal Code: An Invitation to Law Reform*, 49 A.B.A.J. 447, 455 (1963):

> [B]y preserving the right of police action in these situations, real criminality may be exposed. The policeman who arrests the illegal loiterer may search the person arrested and find stolen goods or illegal weapons, or the arrested person may turn out to be a wanted felon.

[35] *See* note 34 *supra*. The draftsmen inserted the section as the "least objectionable" method for "jurisdictions unwilling to break entirely from the vagrancy concept." MODEL PENAL CODE, Comment at 65 (Tent. Draft No. 13, 1961).

[36] MODEL PENAL CODE, Comment at 60 (Tent. Draft No. 13, 1961). At common law the citizen had no duty to respond to the policeman, and the policeman had no formal means of compelling an answer. Hence, the privilege as such did not apply to police interrogations.

> Since police have no legal right to compel answers, there is no legal obligation to which a privilege in the technical sense can apply. That is, it makes no sense to say that one is privileged not to disclose—that one is excused from the legal consequences of contumacy—when there are no legal consequences of contumacy.

8 J. WIGMORE, EVIDENCE § 2252, at 329 n.27 (rev. ed. J. McNaughton 1961). Confessions coerced by state police were dealt with under the due process clause of the fourteenth amendment. Brown v. Mississippi, 297 U.S. 278 (1936). But one Supreme Court case had suggested that in federal courts, such confessions were dealt with under the fifth amendment privilege against self-incrimination. Bram v. United States, 168 U.S. 532, 542 (1897). Thus, when Malloy v. Hogan, 378 U.S. 1 (1965), applied the full scope of the federal privilege against self-incrimination to the states, the privilege may have been extended to state police interrogations. That the privilege does apply in this context was made clear by Miranda v. Arizona, 384 U.S. 436 (1966). Thus, penal sanctions for failure to explain one's conduct are probably unconstitutional as a penalty making the assertion of the privilege costly. *See* Spevack v. Klein, 385 U.S. 511 (1967); Garrity v. New Jersey,

men to change the final version to make the "suspicious behavior," and not the failure to respond, the gravamen of the offense.

II

STOP AND FRISK

Statutory grants of authority to stop and frisk are, on the whole, very similar. The most important are the New York Stop and Frisk Law,[37] the Uniform Arrest Act,[38] and the Model Code of Pre-Arraignment Procedure.[39] All three authorize the police to stop and question a person whose behavior gives rise to a justifiable suspicion that he has committed or is about to commit a crime[40] and to frisk those individuals they reasonably believe to be dangerous.[41] The provisions

385 U.S. 493 (1967); Griffin v. California, 380 U.S. 609 (1965); Malloy v. Hogan, 378 U.S. 1 (1965). Any argument to the contrary based upon the exculpatory nature of the required statements seems to be undermined by the recoguition in *Miranda* that exculpatory statements are often as likely to incriminate as inculpatory statements. Similarly, any statements made under the pressure of penal sanctions are probably inadmissible because involuntary. Garrity v. New Jersey, 385 U.S. 493 (1967).

37 N.Y. CRIM. PROC. LAW § 180-a (McKinney Supp. 1967).

38 Warner, *supra* note 6, at 344; *see also* UNIFORM ARREST ACT, §§ 5-6.

39 MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE §§ 2.01-.02 (Tent. Draft No. 1, 1966).

40 The Model Code provides that a policeman may stop a person if that person "is observed in circumstances which suggest that he has committed or is about to commit a felony or misdemeanor . . . ." *Id.* § 2.02(2). N.Y. CRIM. PROC. LAW § 180-a (McKinney Supp. 1967) allows a policeman to stop a person "whom he reasonably suspects is committing, has committed or is about to commit a felony . . . ." Section 2 of the Warner's Uniform Arrest Act (see Warner, *supra* note 6, at 344) provides that "[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 . . . ." Statutes modeled on the Warner's Uniform Arrest Act have been passed in three states: DEL. CODE ANN. tit. 11 § 1902 (1953); N.H. REV. STAT. ANN. § 594:2 (1955) (four-hour detention); R.I. GEN. LAWS ANN. § 12-7-1 (1956). The Delaware Supreme Court has interpreted its statute to require probable cause for a detention. De Salvatore v. State, 52 Del. 550, 163 A.2d 244 (1960). For comment on this case see Foote, *The Fourth Amendment: Obstacle or Necessity in the Law of Arrest?*, 51 J. CRIM. L.C. & P.S. 402, 403 (1960); Note, *The Law of Arrest: Constitutionality of Detention and Frisk Acts*, 59 NW. U.L. REV. 641, 647 (1964). The Rhode Island Supreme Court, in the face of an express two-hour limitation, has held that there is no such limitation and that the intent of the statute includes detention for a reasonable time. State v. Kilday, 90 R.I., 91, 155 A.2d 336 (1959).

41 The standard suggested by the Model Code is reasonable belief "that [the policeman's] safety so requires." MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 2.02(5) (Tent. Draft No. 1, 1966). The New York stop and frisk law requires the policeman's reasonable suspicion "that he is in danger of life or limb." N.Y. CRIM. PROC. LAW § 180-a (McKinney Supp. 1967). Section 3 of the Warner's Uniform Arrest Act (see Warner, *supra* note 6, at 344) permits a frisk by a policeman who has "reasonable ground to believe that he is in danger if the person possesses a dangerous weapon."

differ principally in the length of time for which the police are permitted to detain a suspicious person who has either refused to respond to questions or has given unsatisfactory answers. Both the Uniform Act and the Model Code authorize detention for a fixed period. The Uniform Act permits a two-hour restraint without limitation on the place of confinement. The Model Code allows the officer to detain a suspect for up to twenty minutes in the vicinity of the suspect's apprehension. Although on its face the New York statute has no such provision, the courts have interpreted it to permit a reasonable period of detention.[42]

A. *The Constitutional Problem—The Fourth Amendment*

The fourth amendment is the principal constitutional hurdle which stop and frisk legislation must face. If the necessary detention authorized by such legislation is considered an "arrest" within the meaning of the fourth amendment, any such police activity without probable cause will be unconstitutional unless the courts are prepared to redefine probable cause.[43]

1. *The Detention*

In tort law, the term "arrest" is used to refer to any interference with the liberty of a person, no matter how slight.[44] This definition has been applied in criminal law as well.[45] Proponents of the stop and frisk laws, however, reject the assertion that for purposes of the criminal law *any* infringement on an individual's freedom must be considered an arrest. When a policeman makes a formal arrest, he intends to initiate a process that ultimately results in a criminal trial. The person arrested is booked, fingerprinted, indicted, and if he cannot

42 United States v. Thomas, 250 F. Supp. 771 (S.D.N.Y. 1966) (not unreasonable in length and search still investigatory rather than accusatory).

43 For a case in which the Court has changed traditional notions of probable cause, see Camara v. Municipal Court, 387 U.S. 523 (1967), wherein the test of probable cause to obtain a health inspection warrant was made a function not of the qualities of the suspect but rather of the legitimacy of the inspector's undertaking.

44 "If the plaintiff submits, or if there is even a momentary taking into the custody of the law, there is an arrest . . . ." W. PROSSER, TORTS § 12, at 58 (3d ed. 1964) (footnotes omitted).

45 United States v. Mitchell, 179 F. Supp. 636 (D.D.C. 1959) (accompaniment to call box one block away); United States v. Scott, 149 F. Supp. 837 (D.D.C. 1957) (restrained of full liberty). It has been suggested that the conflict with the fourth amendment could be avoided if the Supreme Court held that the informal detention is not a "seizure," and thus could have a separate legal existence on grounds less formal than probable cause. Comment, *Police Power to Stop, Frisk, and Question Suspicious Persons*, 65 COLUM. L. REV. 848, 858 (1965).

provide bail, incarcerated to await trial. Since this is such a serious restriction of individual liberty, it is unreasonable to subject an individual to it on grounds less than probable cause. It is argued that a brief detention, on the other hand, is not as serious a restriction as an arrest.[46] Moreover, the individual is not subjected to fingerprinting nor must he suffer the stigma of a recorded arrest.[47]

The Supreme Court may have already decided that the standard of probable cause applies to any forcible detention regardless of duration. In *Henry v. United States*,[48] the Court reversed a conviction imposed after the denial of a motion to suppress evidence obtained by federal agents after they had stopped a car without probable cause to arrest the occupants. Proponents of the stop and frisk laws have distinguished the case on two grounds. First, because of the particular circumstances—the government had conceded that an arrest had taken place the moment the officers had stopped the defendant's car—the court never reached the question of what constitutes an arrest.[49] Second, the case dealt only with the concept of arrest in federal procedural law, and the holding did not establish a constitutional mandate binding upon the states.[50] Thus, it may still be uncertain whether a

46 *See* United States v. Thomas, 250 F. Supp. 771, 794 (S.D.N.Y. 1966); United States v. Bonanno, 180 F. Supp. 71, 77-78 (S.D.N.Y. 1960); People v. Rivera, 14 N.Y.2d 441, 446, 201 N.E.2d 32, 35, 252 N.Y.S.2d 458, 463 (1964).

47 United States v. Thomas, 250 F. Supp. 771, 794 (S.D.N.Y. 1966). The court further points out that detention of an innocent person for a short time would be welcomed as an opportunity to display his innocence quickly. *Id.*

48 361 U.S. 98 (1959).

49 *See* United States v. Thomas, 250 F. Supp. 771, 781 (S.D.N.Y. 1966); United States v. Bonanno, 180 F. Supp. 71 (S.D.N.Y. 1960); Younger, *supra* note 7, at 293. *But see* Souris, *Stop and Frisk or Arrest and Search—The Use and Misuse of Euphemisms*, 57 J. CRIM. L.C. & P.S. 251 (1966).

In opposition to this argument is the language of the majority opinion: "The prosecution conceded below, and adheres to the concession here, that the arrest took place when the federal agents stopped the car. That is our view on the facts of this particular case." 361 U.S. at 103 (footnote omitted). The dissent also took that view: "The Court seems to say that the mere stopping of the car amounted to an arrest of the petitioner. I cannot agree." *Id.* at 106.

50 *See* People v. Mickelson, 59 Cal. 2d 448, 380 P.2d 658, 30 Cal. Rptr. 18 (1963). The Supreme Court has indicated that the state may deviate from the federal procedural norm and yet remain within the constitutional standard of reasonableness.

> [A]lthough the standard of reasonableness is the same under the Fourth and Fourteenth Amendments, the demands of our federal system compel us to distinguish between evidence held inadmissible because of our supervisory powers over federal courts and that held inadmissible because prohibited by the United States Constitution. . . . The States are not thereby precluded from developing workable rules governing arrests, searches and seizures to meet "the practical demands of effective criminal investigation and law enforcement" in the States, provided that those rules do not violate the constitutional proscription of unreasonable searches and seizures . . . .

state can constitutionally authorize its police to stop and detain persons on grounds less than probable cause.[51]

2. *The Frisk*

Assuming a policeman is given the authority to stop suspicious persons, many insist that, for his own protection, he must also have authority to search for weapons.[52] To support this exception to the general rule that police must obtain a warrant before they search, proponents of the "frisk" point to an analogous exception, the authority to search incident to a lawful arrest.[53] In both cases the justification for the search is the protection of the policeman, who is lawfully detaining a suspected criminal. Furthermore, they assert that the frisk is a less serious invasion of the individual's privacy than a search, and is reasonable even in the absence of probable cause.[54]

3. *Are the Frisk and Detention Lesser Infringements?*

The similarity between a detention and an arrest depends upon a number of factors, such as the location, duration, and incidents of the custody.[55] All three stop and frisk statutes under consideration here eliminate disagreeable incidents of arrest such as fingerprinting

Ker v. California, 374 U.S. 23, 33-34 (1963). In a case involving evidence seized by state policemen but used in a federal trial, the Court was again faced with the problem of defining arrest. Rios v. United States, 364 U.S. 253 (1960). The Court avoided a decision on the issue by remanding for evaluation of conflicting testimony on the question of the officers' intent.

51 The Court's language in *Henry* may, however, tilt the balance toward disallowing stop and frisk: "Under our system *suspicion is not enough* for an officer to lay hands on a citizen." 361 U.S. at 104 (dictum) (emphasis added).

52 *See* Remington, *supra* note 2, at 390. *See also* Wilson, *supra* note 7, at 399. Warner suggests that in one sense the question of whether to grant the police authority to frisk is academic. Police officers will continue to " 'frisk' suspects whether or not such action is legal." Warner, *supra* note 6, at 325. The real question is whether the weapons which the police discover in the course of the frisk should be admissible as evidence. This militates toward allowing the frisk, since disallowing it will insure no benefit to the innocent while allowing the guilty to go free.

53 *See* notes 3-5 *supra*.

54 *See* People v. Sibron, 18 N.Y.2d 603, 219 N.E.2d 196, 272 N.Y.S.2d 374 (1966); People v. Rivera, 14 N.Y.2d 441, 201 N.E.2d 32, 252 N.Y.S.2d 458 (1964).

55 The extension of the privilege against self-incrimination to include police interrogation, *see* note 36 *supra*, and the development of procedural rules to insure its free exercise, raise the possibility that even when the suspect is lawfully in custody, his incriminating statements might be inadmissible if they were made before he was properly warned of his constitutional rights and offered an opportunity to consult with counsel. The so-called *Miranda* warnings need only be given, however, in those situations which qualify as "custodial interrogations." For a discussion of the scope of "custodial interrogation" under *Miranda*, see Graham, *What is "Custodial Interrogation"?: California's Anticipatory Application of Miranda v. Arizona*, 14 U.C.L.A.L. REV. 59 (1967).

and booking. The inconvenience of being taken into custody remains, but the innocent individual avoids the onus of an arrest record. The statutes differ as to the duration of the detention and its permissible location. The Uniform Act and the New York law, as interpreted, provide for rather lengthy detention and permit removal of the suspect from the place of apprehension. The detention they authorize thus seems very close to an arrest. On the other hand, the Model Code permits only a twenty minute on-the-spot detention.

Exactly what constitutes "frisking" for a weapon is not clear. The New York Court of Appeals has defined the procedure as passing one's hands over the suspect's outer clothing,[56] but has also approved the actions of a patrolman who searched a closed briefcase during a frisk.[57] The confusion over the scope of the permitted search has made possible the expansion of a frisk for weapons into a full-scale search on mere suspicion of criminal activity. Although the language of the statute usually limits the policeman's right to frisk to situations in which he reasonably believes himself to be in danger, the standard is often difficult to administer. As a result, courts have not generally held police to a very strict standard.

Police have taken advantage of this situation to make use of the frisk in circumstances where the discovery of contraband rather than safety was the motivating factor.[58] In fact, there is some indication that the desire to give the police a means of seizing evidence supplied an important part of the impetus for enacting the New York law. Newspaper articles appeared while the bill was before the legislature emphasizing that

> The measure would make it easier for the police to search for and seize narcotics, burglar's tools, pistols, knives and other illegal material . . . .
>
> . . . .

---

56 People v. Rivera, 14 N.Y.2d 441, 201 N.E.2d 32, 252 N.Y.S.2d 458 (1964).

57 People v. Pugach, 15 N.Y.2d 65, 204 N.E.2d 176, 255 N.Y.S.2d 833 (1964), *cert. denied*, 380 U.S. 936 (1966).

58 People v. Sibron, 18 N.Y.2d 603, 219 N.E.2d 196, 272 N.Y.S.2d 374 (1966), *probable jurisdiction noted*, 389 U.S. 950 (1967); People v. Peters, 18 N.Y.2d 238, 219 N.E.2d 595, 273 N.Y.S.2d 217 (1966), *probable jurisdiction noted*, 389 U.S. 950 (1967).

Section 3 of the Warner's Uniform Arrest Act see Warner, *supra* note 6, at 344 talks only in terms of weapons and does not indicate whether other evidence found in the course of a frisk would be admissible. Section 2.02(5) of the MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE (Tent. Draft No. 1, 1966) defines the scope of the frisk in terms of "the extent necessary to discover any dangerous weapons," but does not indicate whether contraband discovered by a frisk within these bounds could legally be seized. The New York law expressly authorizes seizure of "a weapon or any other thing the possession of which may constitute a crime . . . ." N.Y. CRIM. PROC. LAW § 180-a (McKinney Supp. 1967).

> The so-called "Stop-and-Frisk" bill would permit the police to search persons under suspicion and to seize the evidence.[59]

B. *Is the Power to Stop, Question, and Detain Necessary?*

Much like its predecessors—vagrancy and loitering—the stop and frisk statute presents constitutional and practical difficulties. Proponents of the stop and frisk laws insist, however, that such authority is necessary if the police are to function effectively. A proper analysis of this claim requires a separate consideration of the demands of the two situations in which this authority is used.

1. *Preventive Criminality*

Few would take exception to the proposition that it is better to prevent a crime from occurring than to apprehend the criminal after the fact. This is especially true with respect to crimes of violence to the person; the victim of a mugging receives little direct benefit from the arrest of his assailant. Thus, it is understandable that the current rise in criminal activity, and particularly the increase in crimes involving bodily injury, should produce an increased emphasis on crime prevention.[60]

> Prevention, within the area of the criminal law, is greatly undeveloped. 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.[61]

Proponents of the vagrancy laws or their more modern substi-

---

59 N.Y. Times, Feb. 12, 1964, at 41, col. 3.

60 Proponents of stop and frisk laws stress the danger of physical injury.

> It is better to have an alert police force that prevents the crime than one that devotes its time to seeking to identify the assailant after the life has been taken, the daughter ravished, or the pedestrian slugged and robbed.

Wilson, *supra* note 7, at 398.

> Children are entitled to the law's protection against idlers, loafers, and vagrants who lurk about the schoolhouse and public toilets. May police not question an elderly man who wanders through a public park offering children candy and urging them to come visit him?

Younger, *supra* note 7, at 299. Such emphasis is misleading:

> [A]bout 70 percent of all willful killings, nearly two-thirds of all aggravated assaults and a high percentage of forcible rapes are committed by family members, friends, or other persons previously known to their victims.
>
> . . . .
>
> . . . [T]he risk of serious attack from spouses, family members, friends, or acquaintances is almost twice as great as it is from strangers on the street.

PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY, 18-19 (1967) [hereinafter cited as PRESIDENT'S COMM'N].

61 Parker v. Municipal Judge, 83 Nev. ____, ____, 427 P.2d 642, 645 (1967) (dissenting opinion).

tutes, the loitering statutes and the stop and frisk laws, often stress the importance of the role the police play in preventing crime, and suggest that proper performance of this function requires authority to forcibly detain individuals suspected of immediate criminal potential.[62] Although it is clear that the presence of a patrolman in the vicinity very often prevents crime,[63] this suggests enlarging the police force rather than increasing the power of the present force.[64] If the mere appearance of a policeman on the scene will result in the abortion of any criminal plans the suspect might harbor, why is the power to apprehend him necessary?[65]

There is little doubt that the authority to detain and frisk provided by the stop and frisk laws or the authority to arrest provided by the loitering statutes is valuable to the police. Such authority permits the police to investigate possible past criminal activity and to ascertain whether the suspect is in possession of weapons or contraband. Neither of these activities is, however, directly related to the prevention of crime. Preventive criminality is actually a misleading title for the doctrine that suspicion of future criminal activity justifies an invasion of privacy to search for evidence of past or present criminal activity.

Proponents of preventive criminality stress the danger of permitting "suspicious" persons to wander and loiter in public places, but in the interest of preserving the freedom of the individual, society must run the risk of antisocial behavior.[66]

Moreover, the benefits resulting from detention and frisking of suspicious persons might well be outweighed by an increase in tension between police and citizens, especially members of minority groups.

---

62 The "basic purpose [of the police] is to remove or lessen by both physical and psychological means the opportunity to commit crimes." Wilson, *supra* note 7, at 398.

63 PRESIDENT'S COMM'N, *supra* note 60, at 95.

64 One commentator has suggested that the stop and frisk laws represent an attempt by the legislature to appear to take strong measures against increasing criminal activity without any extra expenditures. Foote, *supra* note 40, at 405-06. But there is some question as to how far a police force can be expanded. "Presumably, deterrence would best be served by placing a policeman on every corner. . . . But few Americans would tolerate living under police scrutiny that intense, and in any case few cities could afford to provide it." PRESIDENT'S COMM'N, *supra* note 60, at 95.

65 Even proponents of stop and frisk laws agree that the policeman's presence alone is usually enough to prevent the crime. *See* Wilson, *supra* note 7, at 398.

66 Those with the right of free movement use it at times for mischievous purposes. But that is true of many liberties we enjoy. We nevertheless place our faith in them, and against restraint, knowing that the risk of abusing liberty so as to give rise to punishable conduct is part of the price we pay for this free society.

Aptheker v. Secretary of State, 378 U.S. 500, 520 (1964) (Douglas, J., concurring).

Even though properly enforced, the law will be applied primarily to members of minority groups whose habits, dress, or environment will no doubt make them appear more suspicious to the patrolman.[67] Such an anticipation formed the basis of the objection of a number of Negro assemblymen to the New York law, which they charged would subject "the people of their districts to 'even greater abuse than they now suffer at the hands of police.' "[68]

2. *Apprehending Criminals*

Granting authority to apprehend persons suspected of having committed a crime presents a problem distinct from that of granting authority to detain and search persons suspected of being about to commit a crime. The pressure to permit the police to apprehend individuals on grounds less than probable cause has developed in response to the demands of modern law enforcement. It may very well be true that, given the prevailing state of investigatory techniques, the power to stop and detain is vital to the solution of many crimes. Indeed, the evidence gathered by the members of the President's Commission on Crime indicates that the police are not exaggerating when they insist that, if the suspicious person has actually committed a crime, permitting him to walk away from the policeman is tantamount to permitting him to walk away from punishment. The effectiveness of police investigation when no suspect is identified is very low. In the case of crimes against property such as burglary and larceny in which identification of a suspect is rare, seventy-eight percent of the reported serious crimes in one sample were never solved.[69]

Nor is there much hope that improved methods of investigation will decrease this percentage in the near future. Although one hears much about scientific crime detection, in reality police technology is lagging.[70]

Furthermore, even if more modern techniques were available, there would still be a shortage of personnel trained in their use. Indeed, there is a shortage of personnel trained to make effective use of the present limited scientific tools.[71]

---

67 Souris, *supra* note 49, at 256.

68 N.Y. Times, Feb. 12, 1964, at 41, col. 3.

69 PRESIDENT'S COMM'N, *supra* note 60, at 97.

70 "Scientific crime detection . . . at present is a limited tool." *Id.*

71 [T]here is a shortage of policemen who are skilled in the collection, analysis and preservation of evidence. Only the biggest and best-run departments

The rise in the crime rate combined with the inefficiency of our methods of investigation has placed pressure on the police to apprehend individuals whom they suspect have committed crimes. As a consequence of this pressure, the police are apt to detain individuals under circumstances that are not sufficient to satisfy the standard of probable cause. Proponents of the stop and frisk laws contend that unless the police are allowed to detain on grounds less than probable cause, courts reluctant to release guilty men will begin to dilute that standard.

> If the police seek to justify their actions as an arrest based on probable cause, the dangers are great. For if the concept of probable cause is expanded to cover these necessary though ambiguous cases, the effect will be to widen the power of the police to visit upon persons the consequences of arrest when such should not be done.[72]

Although this analysis is probably correct, it is not clear that it supports the authorization of a stop and frisk. Preserving probable cause as the standard for an arrest is not particularly important if the detention permitted on the basis of a lesser standard is an equally severe invasion of the suspect's right of privacy. Although some statutes authorize only a very brief detention limited to the immediate vicinity of the suspect's apprehension, supporters of stop and frisk laws generally agree that a longer detention is necessary to afford the police an adequate opportunity to investigate and confirm or rebut their suspicions.[73]

To permit the police to detain suspects only for a period so short that the purpose of the detention is thwarted does not seem sensible. On the other hand, to permit an extended period of detention, which, from the standpoint of the liberty and privacy of the subject is indistinguishable from an arrest is, in effect, to permit the legislature to reduce the standard of probable cause.[74]

If the choice, then, is between permitting the legislature to promulgate what in effect is a new standard to govern search and seizure or accepting the possibility that some courts, in an attempt to pre-

---

have personnel with sufficient technical training to search a crime scene effectively and have laboratory facilities to make use of the fruits of such searches. *Id.*

72 United States v. Thomas, 250 F. Supp. 771, 796 (S.D.N.Y. 1966).

73 Younger, *supra* note 7, at 293 n.1.

74 *See* pp. 909-11 *supra*. Although the person stopped under these circumstances avoids the burden of a recorded arrest and may, therefore, prefer the stop, this does not justify reducing the standard of probable cause, but, rather, suggests a reevaluation of the policy of making public the record of arrest.

serve the admissibility of seized evidence, will strain to find probable cause in situations where its existence is questionable, the latter seems preferable. Retaining the present standard of probable cause will limit the "extention" of police power to those situations in which probable cause arguably exists, whereas a new standard of "reasonable suspicion" would expand police authority to cover a multitude of new situations. Moreover, forcing the police to conform to the present standard will encourage improvement in methods of investigation, the only real solution to the problem.

John J. Duffy, Jr.