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67/08/31 Brief for the N.A.A.C.P Legal Defense and Educational Fund, Inc., as Amicus Curiae

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1967

Nos. 63, 74, and 67

NELSON, SIBRON, *Appellant,*
—v.—
STATE OF NEW YORK, *Appellee.*

JOHN FRANCIS PETERS, *Appellant,*
—v.—
STATE OF NEW YORK, *Appellee,*

JOHN W. TERRY, *Petitioner,*
—v.—
STATE OF OHIO, *Respondent.*

BRIEF FOR THE N.A.A.C.P. LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AS AMICUS CURIAE

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August 31, 1967

INDEX

TABLE OF AUTHORITIES

Cases:

PAGE

Other Authorities:

PAGE

PAGE

PAGE

PAGE

PAGE

PAGE

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BRIEF FOR THE N.A.A.C.P. LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AS *AMICUS CURIAE*

Interest of the *Amicus Curiae*

"I am married to Raymond Fullwood, a Negro. Because I am Caucasian, in the five years of our marriage, we have been stopped no less than twenty times by Los Angeles police officers. . . . I am certain that the reason they chose to stop us is because we are a mixed

couple." Mrs. Marilyn Fullwood, in Los Angeles, California.[1]

"Association of a woman with men of another race usually results in the immediate conclusion that she is a prostitute. If a Negro woman is found in the company of a white man, she is usually confronted by the police and taken to the station unless it is clear that the association is legitimate." Detroit, Michigan police practice, as observed by Professor Wayne R. LaFave.[2]

The N.A.A.C.P. Legal Defense and Educational Fund, Inc., is a non-profit membership corporation, incorporated under the laws of the State of New York in 1939. It was formed to assist Negroes to secure their constitutional rights by the prosecution of lawsuits. Its charter declares that its purposes include rendering legal aid gratuitously to Negroes suffering injustice by reason of race or color who are unable, on account of poverty, to employ and engage legal aid on their own behalf. The charter was ap-

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[1] Quoted in AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA, REPORT, POLICE MALPRACTICE AND THE WATTS RIOT 15-16 (1965), reproduced in CRAY, THE BIG BLUE LINE 31 (1967). Cray documents for other cities as well as the prevalence of the police practice of accosting interracial couples. *Id.* at 227 n. 3. See also *Rexroth, The Fuzz*, 14 PLAYBOY (No. 7) 76 (July 1967).

[2] LAFAVE, ARREST—THE DECISION TO TAKE A SUSPECT INTO CUSTODY 455 (1965). See PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 184 (1967): "[F]ield interrogations are sometimes used in a way which discriminates against minority groups, the poor, and the juvenile. For example, the Michigan State Survey found, on the basis of riding with patrol units in two cities, that members of minority groups were often stopped, particularly if found in groups, in the company of white people, or at night in white neighborhoods, and that this caused serious problems." Cf. *Dokes* v. *Arkansas*, O. T. 1967, No. 109.

proved by a New York court, authorizing the organization to serve as a legal aid society. The N.A.A.C.P. Legal Defense and Educational Fund, Inc., is independent of other organizations and supported by contributions of funds from the public.

A central purpose of the Fund is the legal eradication of practices in our society that bear with discriminatory harshness upon Negroes and upon the poor, deprived, and friendless, who too often are Negroes. The stop and frisk procedure which New York and Ohio ask this Court to legitimate in these cases is such a practice. The evidence is weighty and uncontradicted that stop and frisk power is employed by the police most frequently against the inhabitants of our inner cities, racial minorities and the underprivileged.[3] This is no historical accident or passing circumstance. The essence of stop and frisk doctrine is the sanctioning of judicially uncontrolled and uncontrollable discretion by law enforcement officers.[4] History, and not in this century alone, has taught that such discretion comes inevitably to be used as an instrument of oppression

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[3] PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 183-185 (1967); 2 STUDIES IN CRIME AND LAW ENFORCEMENT IN MAJOR METROPOLITAN AREAS (Field Surveys III) 82-108 (Report of a Research Study Submitted to the President's Commission on Law Enforcement and Administration of Justice, 1967) [hereafter cited as University of Michigan Study]; SKOLNICK, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY 217-219 (1966); TIFFANY, MCINTYRE & ROTENBERG, DETECTION OF CRIME: STOPPING AND QUESTIONING, SEARCH & SEIZURE, ENCOURAGEMENT & ENTRAPMENT 20-21 (1967); Schwartz (Herman), "Stop and Frisk" in New York Law and in Practice: A Case Study in the Abdication of Judicial Control Over the Police (unpublished manuscript) 31-34, and authorities cited.

[4] See part III, *infra*.

of the unpopular.[5] It was so in the case of the search and seizure practices which the Fourth Amendment was written to condemn.[6] We believe that that Amendment protects the unpopular, the Negro, and all our citizens alike, from subjection to the oppressive police discretion which stop and frisk embodies.

In the litigation now before the Court—as is usual in cases where police practices are challenged—two parties essentially are represented. Law enforcement officials, legal representatives of their respective States, ask the Court to broaden police powers, and thereby to sustain what has proved to be a "good pinch." Criminal defendants caught with the goods through what in retrospect appears to be at least shrewd and successful (albeit constitutionally questionable) police work ask the Court to declare that work illegal and to reverse their convictions. Other parties intimately affected by the issues before the Court are not represented. The many thousands of our citizens who have been or may be stopped and frisked

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[5] "Where lawless police forces exist, their activities may impair the civil rights of any citizen. In one place the brunt of illegal police activity may fall on suspected vagrants, in another on union organizers, and in another on unpopular racial and religious minorities, such as Negroes, Mexicans, or Jehovah's Witnesses. But wherever unfettered police lawlessness exists, civil rights may be vulnerable to the prejudices of the region or of dominant local groups, and to the caprice of individual policemen. Unpopular, weak, or defenseless groups are most apt to suffer." PRESIDENT'S COMMITTEE ON CIVIL RIGHTS, REPORT: TO SECURE THESE RIGHTS 25 (1947). See also TREBACH, THE RATIONING OF JUSTICE 5-6 (1964); CRAY, THE BIG BLUE LINE 113-127, 183-194 (1967); AMERICAN CIVIL LIBERTIES UNION, POLICE POWER AND CITIZENS' RIGHTS 6-13 (1967); *Lankford* v. *Gelston*, 364 F. 2d 197, 203-204 (4th Cir. 1966) (*en banc*).

[6] See the history recounted in *Marcus* v. *Search Warrant*, 367 U. S. 717 (1961), and *Stanford* v. *Texas*, 379 U. S. 476 (1965).

yearly, only to be released when the police find them innocent of any crime, are not represented.[7] The records of their cases are not before the Court and cannot be brought

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[7] The prevalence of the practice of street detention and interrogation, and of the related practice of arrest for investigation, is universally acknowledged. Concerning the former, see PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *op. cit. supra,* note 3, at 183-185; SKOLNICK, *op. cit. supra,* note 3, at 224-225; LAFAVE, *op. cit. supra,* note 3, at 344-345; TIFFANY, MCINTYRE & ROTENBERG, *op. cit. supra,* note 3, at 5-86; Note, *Detention, Arrest, and Salt Lake City Police Practices,* 9 UTAH L. REV. 593, 610-616, 618 (1965); Note, *Philadelphia Police Practices and the Law of Arrest,* 100 U. PA. L. REV. 1182, 1189, 1193, 1195, 1200-1206 (1952). Concerning the latter, see DISTRICT OF COLUMBIA, REPORT AND RECOMMENDATIONS OF THE COMMISSIONERS' COMMITTEE ON POLICE ARRESTS FOR INVESTIGATION (1962) (*The Horsky Report*); LAFAVE, *op. cit. supra,* note 3, at 300-364; TREBACH, *op. cit. supra,* note 5, at 4-7; Foote, *Law and Police Practice: Safeguards in the Law of Arrest,* 52 NW. U. L. REV. 16 (1957); LaFave, *Detention for Investigation by the Police: An Analysis of Current Practices* [1962], WASH. U. L. Q. 331.

What proportion of persons subjected to these practices and frisked or searched is found to be innocent of any crime cannot now be reliably determined. The National Crime Commission's Task Force on Police describes a study finding that two out of ten persons "frisked" were found to be carrying either a gun or a knife. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *op. cit. supra,* note 3, at 185. We have not been able to determine whether the study referred to is the same study (involving 224 cases) that is summarized in 2 University of Michigan Study 87, but it appears to be. The summary coincides with the Task Force Report in showing that guns or knives were discovered in twenty-one per cent of personal searches by police. Like the Task Force Report, it does not purport to say what proportion of these weapons was illegally possessed. It does disclose that stolen property and other criminal evidence was very infrequently found, with the result that seventy-nine out of one hundred persons searched by police in confrontations originating "on view" were discovered to have nothing incriminating; and seventy-four out of one hundred persons searched in confrontations originating with a police dispatch also were discovered to have nothing incriminating. Most significant, the University of Michigan study makes clear what the Task Force Report leaves ambiguous: that the personal searches studied include (and may well be com-

here. Yet it is they, far more than those charged with crime, who will bear the consequences of the rules of constitutional law which this Court establishes. The determination of the quantum of "belief" or "suspicion" required to justify the exercise of intrusive police authority is precisely the determination of how far afield from instances of obvious guilt the authority stretches. To lower that quantum is to broaden the police net and, concomitantly, to increase the number (and probably the proportion)[8] of innocent people caught

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prised primarily of) searches incident to a valid arrest on probable cause. Id. at 89. This last circumstance doubtless explains the extraordinarily high yield (a little over 20 per cent) reported here, compared with the low yield elsewhere observed for police investigative practices undertaken without probable cause—for example, the arrests for investigation studied in the Horsky Report, DISTRICT OF COLUMBIA, REPORT AND RECOMMENDATIONS OF THE COMMISSIONERS' COMMITTEE ON POLICE ARRESTS FOR INVESTIGATION 34 (1962); Kamisar, *Book Review,* 76 HARV. L. REV. 1502, 1506 (1963) (seventeen out of eighteen persons arrested for investigation are released without being charged), and the automobile stops and related practices mentioned in Foote, *The Fourth Amendment: Obstacle or Necessity in the Law of Arrest,* 51 J. CRIM. L., CRIM. & POL. SCI. 402, 406 (1960). The data, of course, are fragmentary. *Cf.* the testimony of a retired Detroit policeman before the United States Civil Rights Commission, quoted in CRAY, *op. cit. supra,* note 5, at 185:

> "I would estimate—and this I have heard in the station also—that if you stop and search 50 Negroes and you get one good arrest out of it that's a good percentage; it's a good day's work. So, in my opinion, there are 49 Negroes whose rights have been misused, and that goes on every day. That's just about the entire population of Detroit over a period of time."

[8] Again, it is difficult to test this supposition empirically. See note 7 *supra;* and see Foote, *Law and Police Practice: Safeguards in the Law of Arrest,* 52 NW. U. L. REV. 16 (1957). However, if the sort of police judgment assumed alike by the differing concepts of probable cause and reasonable suspicion is at all rational, one would suppose that the less compelling the perceived evidence of guilt on which an officer acts, the higher proportion of persons he will affect who turn out to be innocent.

up in it. The innocent are those this Court will never see.[9] Yet we believe that some attention to their situation and appreciation of their interests is indispensable to the appropriate resolution of the constitutional controversy now presented. With deference, *amicus curiae* wishes to speak principally in behalf of their interests—which we conceive to be indistinguishable (but for the vagaries of a "reasonable suspicion") from those of the citizenry generally.

These interests, of course, are not adverse to those of the police, except insofar as the police interests may be quite parochially defined. The citizen on the street needs the protection of the police, amply empowered, just as he needs protection from them. He is the potential victim both of crime and of law enforcement. His interest does not lie in "handcuffing the police." But neither does it lie in giving the police every power over his life which they *claim* is indispensable to efficient crime control.[10] Against

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[9] "The statistical data [about abusive police practices] are difficult to find and document, for most people who are mistreated by the police tend to be poor, friendless, out-of-the-ordinary members of society and frequently in trouble with the law in other situations. They don't complain often, and when they do, seldom have the money, time, confidence in the 'system' or knowledge of the agencies that could help them to thread their way through the maze of legal steps necessary to challenge the abuse.

"Moreover, fear of reprisal by the police is quite real, especially among Negroes and other minorities, but this trepidation has no social or economic bounds. There is a general wish to 'stay out of trouble' among many white, middle-class citizens." AMERICAN CIVIL LIBERTIES UNION, POLICE POWER AND CITIZENS' RIGHTS 6 (1967). See also SKOLNICK, *op. cit. supra,* note 3, at 221-222, 233-234.

[10] Cf. *Johnson* v. *United States,* 333 U. S. 10, 14 (1948): "Crime, even in the privacy of one's own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom

that latter course the Fourth Amendment and every aspiration of a free society oppose.[11]

The parties have consented to the filing of an *amicus curiae* brief by the N.A.A.C.P. Legal Defense and Educational Fund, Inc. Copies of their letters of consent will be submitted to the Clerk with this brief.

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from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent."

[11] It is not so with some societies. Consider the extraordinarily efficient South African police practice reported in the *New York Times,* January 23, 1966:

> "JOHANNESBURG, Jan. 22—The police in Johannesburg have hit on an effective, if crude, way to reverse an alarming rise in armed robberies in the city: to treat every black man as a criminal suspect.
>
> "This is done by saturating a proscribed area with policemen under orders to check the 'reference books'—the passports all blacks must carry in 'white' areas—of every African they encounter. Sometimes the orders also call for thorough searches of any parcels the blacks may be carrying, or even of their persons.
>
> "These police blitzes employ anywhere from 1,000 to 2,500 officers each. They come without warning, usually to the city's business district. . . .
>
> "The arrests are almost always for irregularities in the reference books, not for armed robbery. But the effect is evidently to keep criminals off the streets and off balance. Since early November the raids have been held almost weekly, with the result that the number of armed robberies has been reduced by more than 50 per cent.
>
> ". . .
>
> "The undeniable success of the raids shows that it is not a fantastic notion for the white authorities to find a suspicion of criminality in a black skin—an indication of the extent to which this is a society at war with itself."

ARGUMENT

I.

The Issues.

These stop and frisk cases present a congeries of issues. May a police officer constitutionally restrain an individual for the sole purpose of investigating him? If so, under what circumstances? Upon probable cause to believe him guilty of a crime? Upon "reasonable suspicion"?[12] What is the permissible extent of the restraint? How long may it last?[13] How much force may be used to effect it? May the police officer constitutionally search the citizen incident to such restraint, or incident to questioning without restraint? If so, under what circumstances? Whenever a citizen is restrained or questioned? When there is probable cause to believe (or when there is "reasonable suspicion") that the citizen is armed? How intrusive may the search be? May some or all objects discovered in the search be admitted

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[12] The present cases do not present factually the question of the extent of police powers to "freeze" the scene of a recent and palpable crime, as where patrol officers responding to a call find a man bleeding on the ground and others fleeing. Nor are those cases necessarily controlled by what the Court may hold here.

[13] The present cases do not present factually instances of extended on-the-street detention. Nor do they present instances of removal of the citizen to a squad car or to the police station. However, insofar as the New York statute here attacked on its face may allow extended detention and a shift in the locus of custody, this Court may properly consider the constitutionality of a stop-and-frisk authorization which is not limited in the time or place of the detention it allows. Cf. *Berger* v. *New York*, —— U. S. ——, 87 S. Ct. 1873 (1967).

into evidence against the citizen in a criminal trial? Weapons? Burglars' tools? Narcotics?[14]

This Court may wish to treat these issues more or less discretely. But their proliferation should not conceal the point that what is fundamentally in question here is the choice, under the Constitution, between two antagonistic models of the police investigative process. This is true conceptually, as study of the burgeoning literature of stop and frisk reveals.[15] It is true historically, because the Court

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[14] The present cases do not present factually the question whether objects seized in a frisk, other than those which it is illegal to possess, may be used in evidence in a criminal trial of the frisked citizen. However, because of the intimate relationship between the substantive constitutional rules regulating police conduct and the exclusionary sanction by which they are enforced, see part II, *infra*, the Court may wish to consider that question.

[15] Detailed and useful analyses of stop and frisk doctrine and related issues are found in AMERICAN LAW INSTITUTE, MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE, Tent. Draft No. 1, March 1, 1966, Commentary on §2.02, at pp. 91-105; DISTRICT OF COLUMBIA, REPORT AND RECOMMENDATIONS OF THE COMMISSIONERS' COMMITTEE ON POLICE ARRESTS FOR INVESTIGATION (1962) (*The Horsky Report*); LAFAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY 300-364 (1965); TIFFANY, MCINTYRE & ROTENBERG, DETECTION OF CRIME: STOPPING & QUESTIONING, SEARCH & SEIZURE, ENCOURAGEMENT AND ENTRAPMENT 5-94 (1967); Barrett, *Personal Rights, Property Rights, and the Fourth Amendment* [1960], SUPREME COURT REV. 46, 57-70; Bator & Vorenberg, *Arrest, Detention, Interrogation and the Right to Counsel: Basic Problems and Possible Legislative Solutions*, 66 COLUM. L. REV. 62 (1966); Foote, *Law and Police Practice: Safeguards in the Law of Arrest*, 52 NW. U. L. REV. 16 (1957); Foote, *The Fourth Amendment: Obstacle or Necessity in the Law of Arrest*, 51 J. CRIM. L., CRIM. & POL. SCI. 402 (1960); 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., CRIM. & POL. SCI. 393 (1963); Remington, *The Law Relating to "On the Street" Detention, Questioning and Frisking of Suspected Persons and Police Privileges in General*, 51 J. CRIM. L., CRIM. & POL. SCI. 386 (1960); Souris, *Stop and Frisk or Arrest and Search—The Use and Misuse of Euphemisms*, 57 J. CRIM. L.,

is now asked for the first time to legitimate criminal investigative activity that significantly intrudes upon the privacy

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CRIM. & POL. SCI. 251 (1966); Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315 (1942); Wilson, *Police Arrest Privileges in a Free Society: A Plea for Modernization*, 51 J. CRIM. L., CRIM. & POL. SCI. 395 (1960); Note, *Stop and Frisk in California*, 18 HASTINGS L. J. 623 (1967); Comment, *Selective Detention and the Exclusionary Rule*, 34 U. CHI. L. REV. 158 (1966); Comment, *Police Power to Stop, Frisk, and Question Suspicious Persons*, 65 COLUM. L. REV. 847 (1965); Note, *Detention, Arrest, and Salt Lake City Police Practices*, 9 UTAH L. REV. 593 (1965); Symposium Note, *The Law of Arrest: Constitutionality of Detention and Frisk Acts*, 59 NW. U. L. REV. 641 (1964); Note, *Philadelphia Police Practices and the Law of Arrest*, 100 U. PA. L. REV. 1182 (1952); Note, 4 HOUSTON L. REV. 589 (1966); Case Note, 35 FORDHAM L. REV. 355 (1966); Recent Statute, 78 HARV. L. REV. 473 (1964).

See also STATE OF NEW YORK, TEMPORARY STATE COMMISSION ON THE CONSTITUTIONAL CONVENTION, INDIVIDUAL LIBERTIES, THE ADMINISTRATION OF CRIMINAL JUSTICE 67-70 (1967); Aspen, *Arrest and Arrest Alternatives: Recent Trends* (1966), U. ILL. L. FORUM 241, 250-253; Goldstein, *Police Policy Formulation: A Proposal for Improving Police Performance*, 65 MICH. L. REV. 1123, 1139-1140 (1967); Kamisar, *A Dissent from the Miranda Dissents: Some Comments on the "New" Fifth Amendment and the "Old" Voluntariness Test*, 65 MICH. L. REV. 59, 60-61 n. 8 (1966); Kamisar, *Book Review*, 76 HARV. L. REV. 1502 (1963); Kuh, *Reflections on New York's "Stop-and-Frisk" Law and Its Claimed Unconstitutionality*, 56 J. CRIM. L., CRIM. & POL. SCI. 32 (1965); LaFave, *Search and Seizure: "The Course of True Law . . . Has Not . . . Run Smooth"* [1966], U. ILL. L. FORUM 255, 308-311; 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); Siegel, *The New York "Stop and Frisk" and "Knock-Not" Statutes: Are They Constitutional?*, 30 BROOKLYN L. REV. 274 (1964); Traynor, *Mapp* v. *Ohio at Large in the Fifty States* [1962], DUKE L. J. 319, 333-334; Vorenberg, *Police Detention and Interrogation of Uncounselled Suspects: The Supreme Court and the States*, 44 B. U. L. REV. 423 (1964); Note, *"Stop and Frisk" and its Application in the Law of Pennsylvania*, 28 U. PITT. L. REV. 488 (1967); Recent Decision, 18 W. RES. L. REV. 1031 (1967); Recent Case, 71 DICK. L. REV. 682 (1967); Recent Decision, 5 DUQUESNE L. REV. 444 (1967); Note, 13 WAYNE L. REV. 449 (1967); Legislation, 38 ST. JOHN'S L. REV. 392, 398-405 (1964).

of individuals who are undifferentiable from Everyman as the probable perpetrators of a crime.[16] It is true in the practical, day-to-day world of the streets and the lower courts, as we propose to develop more fully in the discussion that follows. Initially it will be helpful, we believe, to identify the two contending models and their attributes.

The Classical Arrest-Search Model

Under classical criminal procedure, the police may accost and question any person for the purpose of criminal investigation.[17] But they may not detain him, restrain or "arrest" his liberty of movement in any significant way, except

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[16] See notes 35-36 *infra* and accompanying text.

[17] Most of the older cases cited by the proponents of modern-day stop and frisk do no more than recognize that the police are free to question an individual on the street so long as they do not detain him in any way. Cases which denominate such questioning an "arrest," forbidden in the absence of probable cause, are generally found to involve circumstances in which the police communicated to the individual an effective sense of restraint. The decisions are discussed exhaustively in the literature cited in note 15 *supra;* note 18 *infra.* They are adequately summarized in the following passage from Recent Decision, 37 MICH. L. REV. 311, 313 (1938):

> "[A]lthough the courts rarely discuss the question, whether stopping and questioning is an arrest seems to be decided on the basis of whether any restraint of personal liberty is involved. Thus, where force or threat of force is used and the subject submits to the authority of the officer for questioning, an arrest occurs. On the other hand, where the officer merely approaches or accosts the suspect and asks him questions, there is no arrest because there is no restraint of the person. Still other courts hold that merely stopping a traveler on the highway is an arrest."

So far as we are aware, no one seriously contends that the police are or should be prohibited from non-coercive questioning of an individual on the street, provided that it remains clear to him that he is free to leave and to refuse to answer questions. We, certainly, would not so contend.

for the purpose of holding him to answer criminal charges.[18] Any such restraint of an individual is an arrest, and may be made only on probable cause to believe him guilty of an offense.[19] The police may not make a personal search of an individual, without a warrant or effective consent, except

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[18] "The police have no power to detain anyone unless they charge him with a specified crime and arrest him accordingly. Arrest and imprisonment are in law the same thing. Any form of physical restraint is an arrest, and imprisonment is only a continuing arrest. If an arrest is unjustified, it is wrongful in law and is known as false imprisonment. The police have no power whatever to detain anyone on suspicion or for the purpose of questioning him. They cannot even compel anyone whom they do not arrest to come to the police station." DEVLIN, THE CRIMINAL PROSECUTION IN ENGLAND 82-83 (1958). *Accord*: Williams, *Police Detention and Arrest Privileges under Foreign Law*: *England*, 51 J. CRIM. L., CRIM. & POL. SCI. 413, 413-414 (1960). This is assumed by the principal American writers on arrest, see Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315, 318 (1942); Waite, *The Law of Arrest*, 24 TEXAS L. REV. 275, 279 (1946); Perkins, *The Law of Arrest*, 25 IOWA L. REV. 201, 261 (1940); Wilgus, *Arrest Without a Warrant*, 22 MICH. L. REV. 541, 798 (1924). It is also assumed in this Court's decisions under the Fourth Amendment, see note 54 *infra*. Concerning the "charging purpose" component of classical arrest theory, see note 55 *infra*.

Nothing said here touches the question what powers police may have to take custody of an individual for non-criminal purposes—as when a sick or drunk adult or a lost child is found on the street. The question is not now before the Court.

[19] E.g., *United States* v. *Di Re*, 332 U. S. 581 (1948); *Johnson* v. *United States*, 333 U. S. 10 (1948); *Wong Sun* v. *United States*, 371 U. S. 471 (1963); *Beck* v. *Ohio*, 379 U. S. 89 (1964). See Foote, *The Fourth Amendment*: *Obstacle or Necessity in the Law of Arrest*, 51 J. CRIM. L., CRIM. & POL. SCI. 402:

> "In the law of arrest and by long constitutional history, 'reasonable' has been interpreted as the equivalent of probable cause. An officer acts reasonably if, on the facts before him, it would appear that the suspect has probably committed a specific crime. This is the context in which the word is used in the fourth amendment and in most state arrest laws. Our cases sharply distinguish the reasonableness of an arrest on probable cause from an unreasonable apprehension grounded on 'mere' suspicion."

that, incidental to a valid arrest, they may make a more or less intensive personal search.[20] The *Classical Arrest-Search Model* thus recognizes two categories of police investigative powers. Powers whose exercise does not significantly invade personal liberty and the right of privacy—the "right to be let alone" [21]—are given the police to use at large, indiscriminately, at their discretion, and without judicial supervision. Powers whose exercise does invade these rights may be used by the police, but not indiscriminately, not against Everyman. They may be used only against persons whom there is probable cause, to believe are criminal actors, and hence distinguishable from Everyman. The "probable cause" determination made by a policeman

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[20] See note 54 *infra* concerning search incident to arrest. It is plain that a personal search without a warrant, not incident to arrest, is forbidden by the Fourth Amendment. *United States* v. *Di Re,* 332 U. S. 581 (1948); *Beck* v. *Ohio,* 379 U. S. 89 (1964); and see *Schmerber* v. *California,* 384 U. S. 757 (1966).

[21] See Mr. Justice Brandeis, dissenting, in *Olmstead* v. *United States,* 277 U. S. 438, 471, 478-479 (1928):

> "The protection guaranteed by the Amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are found in material things. They sought to protect Americans in their beliefs, their thought, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth."

Justice Brandeis' view, of course, has subsequently been vindicated by the Court. *Berger* v. *New York,* —— U. S. ——, 87 S. Ct. 1873 (1967); *Griswold* v. *Connecticut,* 381 U. S. 479 (1965).

as the precondition of the exercise of these powers is judicially reviewable.[22] "The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests [of law enforcement and personal liberty]. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice." [23]

The Stop-Frisk Model

In theory, the *Stop-Frisk Model* differs from the *Classical Arrest-Search Model* in that it recognizes at least three, perhaps more, categories of police powers.[24] First, police may accost and question any person, so long as they do not restrain or search him. Second, they may arrest him on probable cause and search his person incident to that valid arrest. The third category of powers is lodged between these two. A law enforcement officer lacking probable cause but having some state of mind (or encountering some circumstances) which makes his focus upon a given individual something other than random, something more particular-

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[22] "The requirement of probable cause has roots that are deep in our history. The general warrant, in which the name of the person to be arrested was left blank, and the writs of assistance, against which James Otis inveighed, both perpetuated the oppressive practice of allowing the police to arrest and search on suspicion. Police control took the place of judicial control, since no showing of 'probable cause' before a magistrate was required." *Henry* v. *United States*, 361 U. S. 98, 100 (1959).

[23] *Brinegar* v. *United States*, 338 U. S. 160, 176 (1949) (a case of warrantless search), quoted in *Beck* v. *Ohio*, 379 U. S. 89, 91 (1964) (a case of warrantless arrest).

[24] The conceptual basis for the Model may involve the repudiation of any attempt to categorize, leaving every individuated instance of police activity to be determined lawful or unlawful, constitutional or unconstitutional, through a "balancing" of its intrusiveness against its justification. See note 57 *infra*.

ized than whim, may "stop" or detain the individual without an "arrest." The nature of the prerequisite state of mind (or set of circumstances) varies. The Uniform Arrest Act uses the phrase "reasonable ground to suspect."[25] New York Code of Criminal Procedure, § 180-a, employs "reasonably suspects." The A. L. I. Model Code of Pre-Arraignment Procedure uses other formulations.[26] The common theme is something less than probable cause, but something which purports to provide a judicial curb against wholly indiscriminate police action.

The nature of the "stop" that is not an arrest also varies. The Uniform Arrest Act permits an officer, unsatisfied by initial answers to questioning, to detain his suspect for two hours. The A. L. I. Model Code limits the period to twenty minutes, and expressly disallows the use of deadly force in effecting a "stop." The New York statute is silent both on the period of permitted detention and on the amount of force which the officer may employ to enforce it. Specific "stop" authorizations also differ as to whether the "stopping" officer is allowed to remove his detainee from the

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[25] Uniform Arrest Act, § 2. The Act is set out in Warner, *The Uniform Arrest Act,* 28 VA. L. REV. 315, 343, 344 (1942). Versions of the Act (using the terms "reasonably suspects" or "reason to suspect") are in effect in Delaware, New Hampshire and Rhode Island. Del. Code Ann., tit. 11, §§ 1902-1903 (1953); N. H. Rev. Laws, §§ 594:2–594:3 (1955); and Rhode Island, R. I. Gen. Laws, §§ 12-7-1–12-7-12 (1956). The Act appears to have been gutted by judicial construction at least in Delaware and Rhode Island, see *De Salvatore* v. *State,* 2 Storey (Del.) 550, 163 A. 2d 244 (1960); *Kavanaugh* v. *Stenhouse,* 93 R. I. 252, 174 A. 2d 560 (1961), *appeal dismissed for want of a substantial federal question,* 368 U. S. 516 (1962). These decisions appear to equate reasonable suspicion with the constitutional standard of probable cause.

[26] AMERICAN LAW INSTITUTE, MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE, § 2.02, Tentative Draft No. 1, March 1, 1966, at p. 6.

scene of their first encounter.[27] They differ with regard to the places in which and the circumstances under which the "stop" power is given. The Uniform Arrest Act allows stops of persons "abroad." The A. L. I. Code has no such restriction, but delimits the stop power by providing that it shall not be used "solely to aid in investigation or prevention of" designated offenses. The New York statute uses the term "abroad in a public place" (which the Court of Appeals in *Peters* construed to include the common hallways of apartment buildings, inconsistently with the construction previously put on the phrase in a circular published for police guidance by the New York State Combined Council of Law Enforcement Officials),[28] and also delimits the "reasonable suspicion" to suspicion of felonies and designated misdemeanors.

Under the *Stop-Frisk Model,* persons authorized to be detained may also be "frisked" or searched. (Undoubtedly, a legislature might give the power to "stop" without accompanying power to "frisk," but all of the significant pieces of legislation so far proposed or enacted couple "stop" with "frisk," and the proponents of stop and frisk seem unanimous that "frisk" is necessary if "stop" is to be effective.[29] Frisk may be allowed whenever stop is al-

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[27] The Uniform Arrest Act, § 2(2), (3) implicitly permits removal to a station house. The A. L. I. Model Code, § 2.02(1), (2), (3) more or less explicitly disallows it. The New York Courts, construing the New York statute, appear to permit it. *People* v. *Pugach,* 15 N. Y. 2d 65, 204 N. E. 2d 176 (1964); *People* v. *Hoffman,* 24 App. Div. 2d 497, 261 N. Y. S. 2d 651 (1965).

[28] See pp. 54-55, *infra.*

[29] E.g., AMERICAN LAW INSTITUTE, MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE, Commentary to § 2.02, Tent. Draft No. 1, March 1, 1966, at p. 102; Remington, *supra,* note 15, at 391; Symposium Note, *supra,* note 15, 59 Nw. U. L. REV. at 652-653.

lowed; or it may be allowed only upon the fulfilment of additional conditions, such as the existence of reasonable grounds to suspect that the officer is in danger.[30] It may be allowed more or less extensively[31] and more or less intrusively.[32] Its object may be limited or unlimited,[33] and the nature of the items discovered in the search which may be

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[30] The Uniform Arrest Act, § 3, allows search whenever the officer "has reasonable ground to believe that he is in danger *if* the person possesses a dangerous weapon." (Emphasis added.) The A. L. I. Model Code allows search if the officer "reasonably believes that his safety so requires." The New York statute purports to limit the search power to situations in which the officer "reasonably suspects that he is in danger of life or limb," but the Court of Appeals in the *Peters* case appears to have read that restriction out of the statute, by force of a presumption of law that an officer making a stop is always *ipso facto* in danger of life or limb.

[31] The Uniform Arrest Act, § 3, and the New York statute authorize search of the "person" stopped. The New York courts have extended the search power to packages carried by that person, even though these might be put out of his reach during the period of the stop. *People* v. *Pugach,* 15 N. Y. 2d 65, 204 N. Y. 2d 176 (1964); *People* v. *Reason,* —— Misc. 2d ——, 276 N. Y. S. 2d 196 (Sup. Ct. 1966); see *People* v. *Cassesse,* 47 Misc. 2d 1031, 263 N. Y. S. 2d 734 (Sup. Ct. 1965). The A. L. I. Model Code explicitly allows the search of the stopped "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."

[32] See the provision of the A. L. I. Model Code quoted in the preceding footnote. The Commentary to the section explains that the "search envisaged here should not usually be more intensive than an 'external feeling of clothing,' that is, the traditional 'frisk.'" AMERICAN LAW INSTITUTE, MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE, Commentary on § 2.02, Tentative Draft No. 1, March 1, 1966, at p. 102. Neither the Uniform Arrest Act nor the New York statute restrict the intrusiveness of searches, except perhaps by implication in specifying a weapon as the object of search. But see pp. 50-51, *infra.*

[33] The Uniform Arrest Act, A. L. I. Model Code, and New York statute alike specify a dangerous weapon as the object of permitted search.

seized may also be limited or unlimited.[34] The common characteristic of the "frisk" authorizations is that they seek to delimit in some fashion the personal searches that may be made incident to a "stop," but none apparently include within the limitations any requirement of probable cause (in the classical sense) to believe that the person searched has a weapon.

It is relatively clear that the *Classical Arrest-Search Model* was and is the common law of England, which has never permitted detention for investigation nor on less than probable cause.[35] The same model has also been

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[34] Both the Uniform Act and the New York statute give the officer power to seize a weapon. This might appear to exclude power to seize other items found, but of course the New York courts have not given it this effect. The A. L. I. Model Code leaves the question for later resolution.

[35] This is the interpretation of the English law by such celebrated scholars of that law as Sir Patrick Devlin and Glanville Williams. See note 18 *supra*. We recognize that some American commentators have purported to find a warrant for detention without probable cause in the old English books. E.g., Kuh, *supra*, note 15. But the authorities upon which they rely, principally *Lawrence v. Hedger*, 3 Taunt. 14. 128 Eng. Rep. 6 (C. P. 1810); 2 HALE, PLEAS OF THE CROWN 89. 96-97 (1st Amer. ed. 1847); 2 HAWKINS, PLEAS OF THE CROWN 118-132 (8th ed. 1824), entirely fail to support any such principle, as the more careful American studies make clear. See Leagre, *supra*, note 15, at 408-411; Comment, *Police Power to Stop, Frisk and Question Suspected Persons*, 65 COLUM. L. REV. 847, 851-852 (1965). The Americans who trace stop-and-frisk to the English books have simply permitted themselves to be confused by the English use of the term "reasonable suspicion" which is not the equivalent of the same form of words used in the Uniform Arrest Act and New York's stop and frisk legislation, but is the equivalent of American constitutional "probable cause." Hale makes this clear enough. See 2 HALE, *op. cit. supra* 76-86, 110. And see Thomas, *Arrest; A General View*, (1966) CRIM. L. REV. 639, and comments following. There does appear to be in English law some patchwork statutory authorization for stops and searches without warrant, rather in the nature of the usual American game-law inspections. Whether probable

invariably assumed by this Court to describe the constitutional law of the Fourth Amendment.[36] This is more than historical happenstance. For the root notion of "probable cause" which is mainstay of the model is not simply a long cherished Anglo-American symbol of individual liberty. It is, in view of the practical realities of criminal administration, an inevitable evolutionary product of our system's use of courts to confine police power within reasonable bounds consistent with the conscience of a free people.

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cause is required for these is not wholly clear, but it seems to be, see Thomas, *The Law of Search and Seizure; Further Ground for Rationalisation,* (1967) CRIM. L. REV. 3, 11-18, and comments following. In any event, the statutes are of very limited scope, as Glanville Williams has noted. Williams, *supra,* note 18, at 414.

[36] *Brinegar* v. *United States,* 338 U. S. 160 (1949); *Henry* v. *United States,* 361 U. S. 98 (1959); *Rios* v. *United States,* 364 U. S. 253 (1960). *Brinegar* explicitly repudiates the grounds of decision of the lower courts in that case, purporting to authorize an automobile stop not amounting to a search on reasonable suspicion not amounting to probable cause. The *Henry* decision is plainly based on the same rejection of the same conception. (We can hardly believe that the Solicitor General's concession as to the point of arrest in *Henry* was dispositive of the view the Court took of the matter.) And *Rios* cannot possibly be read as anything but a repudiation of stop and frisk. Although the force of the decision has been slighted by some, e.g., AMERICAN LAW INSTITUTE, MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE, Commentary on § 2.02, Tentative Draft No. 1, March 1, 1966, at p. 94, the *Rios* opinion is not comprehensible on any other theory. The Government argued at length in *Rios* for the recognition of a power of limited detention without arrest or probable cause. The Court's opinion was written to identify for the lower court on remand the issues posed for its factual resolution. Those issues were, simply, when there occurred an arrest and whether at that time the arresting officers had probable cause. These are the issues framed by the *Classical Arrest-Search Model,* with its two categories of police powers—those given officers with probable cause (including arrest), and those given officers without. If the Court had imagined that the *Stop-Frisk Model* presented an alternatively permissible way of viewing the case, it is simply inconceivable that its opinion would not have identified for the district court the quite distinct issues (involving several degrees of detention, with several accompanying states of justification) posed by that model.

II.

The Genius of Probable Cause.

Whatever uncertainties there may be in the pre-Constitutional history[37] and the post-Constitutional evolution of the Fourth Amendment, two core conceptions of the Amendment emerge with indisputable clarity. First, the Amendment's purpose is to restrict the allowance of intrusive police investigative powers to circumstances of *particularized justification,* disallowing police discretion to employ those powers against the citizenry in general. Second, this restriction is enforced by the interposition of *judicial judgment* between the police decision to intrude and the allowability of intrusion.

The first conception is visible upon the face of the Amendment. It is the essential idea that gives meaning both to the requirement of "probable cause" and to the requirement of warrants "particularly describing" the place to be searched, and the things or persons to be seized. Concerning both the occasions and extent of police intrusion upon the individual, "nothing is left to the discretion of the officer. . . . " *Berger* v. *New York,* —— U. S. ——, ——, 87 S. Ct. 1873, 1883 (1967), quoting *Marron* v. *United States,* 275 U. S. 192, 196 (1927).

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[37] The history is canvassed in the *Stanford* and *Marcus* decisions cited *supra,* note 6, and in LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT: A STUDY IN CONSTITUTIONAL INTERPRETATION (Johns Hopkins University Studies in Historical and Political Science, ser. 84, no. 1) 19-48 (1966); LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION (Johns Hopkins University Studies in Historical and Political Science, ser. 40, no. 2) 13-105 (1937); Fraenkel, *Concerning Searches and Seizures,* 34 HARV. L. REV. 361 (1921).

History tells us why. The general warrants and writs of assistance against which the Fourth Amendment was principally aimed were vicious precisely because they "permitted the widest discretion to petty officials." [38] "Armed with their roving commission, they set forth in quest of unknown offenders; and unable to take evidence, listened to rumors, idle tales, and curious guesses. They held in their hands the liberty of every man whom they pleased to suspect." [39] This practice was doubly damnable. In a society profoundly committed to the liberty of the subject, the notion that government should be given the power to intrude indiscriminately and at the mere will of its officers into the affairs of every citizen was wholly unacceptable. Neither the random visitations of the King's messengers nor the practice in its more terrifying forms as an increasingly powerful bureaucracy might develop it—such as the South African "blitz" described in note 11 *supra*—were to be countenanced in this free country. Government could not invade the province of Everyman. To further its important purposes, including criminal investigation, it might invade the provinces of some individual men, but only those whom circumstances sufficiently distinguished from the generality of men so that the invasion could not be broadside.[40] The general warrant infringed this concern

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[38] Fraenkel, *supra*, note 37, at 362.

[39] *Stanford* v. *Texas*, 379 U. S. 476, 483 (1965), quoting 2 MAY'S CONSTITUTIONAL HISTORY OF ENGLAND 246 (Amer. ed. 1864).

[40] See Patrick Henry in the Virginia Convention, 3 ELLIOT'S DEBATES 588 (2d ed. 1836):

> "I feel myself distressed, because the necessity of securing our *personal rights* seems not to have pervaded the minds of men; for many other valuable things are omitted:—for instance, general warrants, by which an officer may search suspected places, without evidence of the commission of a fact,

and was accordingly denounced as a " 'ridiculous warrant against the whole English nation.' " [41]

In addition, the unbounded discretion allowed under the general warrants and writs of assistance left government officers free to heed every urging of personal spite, paltry tyranny, arbitrariness and discrimination. "In effect, complete discretion was given to the executing officials; in the words of James Otis, their use 'placed the liberty of every man in the hands of every petty officer.' " [42] "The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing, and history shows that the police acting on their own cannot be trusted." [43] So the Fourth Amendment was designed both to delimit the breadth of power and to constrain the possibility of its abuse. Its language sometimes speaks obscurely in the context of twentieth century circumstances, "but this much is certain: there is no authority [in any American gov-

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> or seize any person without evidence of his crime, ought to be prohibited. As these are admitted, any man may be seized, any property may be taken, in the most arbitrary manner, without any evidence or reason. Every thing the most sacred may be searched and ransacked by the strong hand of power. We have infinitely more reason to dread general warrants here than they have in England, because there, if a person be confined, liberty may be quickly obtained by the writ of *habeas corpus*. But here a man living many hundred miles from the judges may get in prison before he can get that writ."

For a brilliant modern expression of the same concern, with particular reference to police street interrogation, see Reich, *Police Questioning of Law Abiding Citizens*, 75 YALE L. J. 1161 (1966).

[41] *Stanford* v. *Texas*, 379 U. S. 476, 483 (1965), quoting 2 MAY'S CONSTITUTIONAL HISTORY OF ENGLAND 247 (Amer. ed. 1864).

[42] *Marcus* v. *Search Warrant*, 367 U. S. 717, 729 n. 22 (1961), quoting TUDOR, LIFE OF JAMES OTIS 66 (1823).

[43] *McDonald* v. *United States*, 335 U. S. 451, 455-456 (1948).

ernment] for the molestation of all those on whom the long shadow of suspicion falls in the hope that something damaging might turn up in the course of the search." [44]

Not surprisingly, these concerns of the Fourth Amendment converge with others that our society has found essential and given enduring constitutional expression. They deserve to be recalled here, because all are threatened by the *Stop-Frisk Model* of criminal investigative process. The Fifth Amendment Privilege also forbids government to treat suspicion as guilt and to throw upon the citizen the obligation to exculpate or explain himself to a government officer. *Miranda* v. *Arizona,* 384 U. S. 436 (1966). It denies government power to employ coercive force of any sort (be it brief or extended physical restraint or other means of compulsion) to secure the cooperation of the citizen in pursuing law enforcement efforts that may secure his own criminal conviction. *Ibid.* Lessons to which the First Amendment and the Due Process Clauses of the Fifth and Fourteenth respond have taught us the impermissibility of making law enforcement officers the unconstrained rulers of the streets. *Shuttlesworth* v. *Birmingham,* 382 U. S. 87 (1965).[45] And our especial national history has given

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[44] LANDYNSKI, *op. cit. supra,* note 37, at 46.

[45] "Literally read, . . . the second part of this ordinance says that a person may stand on a public sidewalk in Birmingham only at the whim of any police officer of that city. The constitutional vice of so broad a provision needs no demonstration. It 'does not provide for government by clearly defined laws, but rather for government by the moment-to-moment opinions of a policeman on his beat.' Cox v. Louisiana, 379 U. S. 536, 579 (separate opinion of MR. JUSTICE BLACK). Instinct with its ever-present potential for arbitrarily suppressing First Amendment liberties, that kind of law bears the hallmark of the police state." *Id.* at 90-91.

See also *Hague* v. *C. I. O.,* 307 U. S. 496 (1939); *Thornhill* v. *Alabama,* 310 U. S. 88 (1940); *Cox* v. *Louisiana,* 379 U. S. 536 (1965).

us the Equal Protection Clause as a bulwark both against arbitrary and discriminatory abuses of our citizens by government officials,[46] and against the dangerous generality of governmental authorizations rife with the potential for such abuses.[47]

But the Fourth Amendment, most specifically addressed to protecting these concerns where they may be threatened by powers exercised in the investigative process, provides its own singular procedural mechanism for the necessary accommodation of individual privacy and investigation. That mechanism is judicial review of the police justification offered to support an investigative intrusion. Time and again this Court has repeated the theme:

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a

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[46] *Yick Wo* v. *Hopkins,* 118 U. S. 356 (1886); cf. *Wright* v. *Georgia,* 373 U. S. 284 (1963).

[47] *Louisiana* v. *United States,* 380 U. S. 145 (1965); cf. *Niemotko* v. *Maryland,* 340 U. S. 268 (1951).

> nullity and leave the people's homes secure only in the discretion of police officers." [48]

The Court has insisted upon procedures which assure that the judicial determination will be rendered as an independent judgment, not a mere routine validation of police discretion. See *Aguilar* v. *Texas,* 378 U. S. 108 (1964). Although the requirement of *prior* judicial authorization of police intrusions has sometimes been excused on considerations of history and practicability, the provision of some available and effective judicial review of the police has always been insisted upon. See *Henry* v. *United States,* 361 U. S. 98, 104 (1959). Whether the forum be a criminal trial against the individual who claims abuse of the police investigative power, *Mapp* v. *Ohio,* 367 U. S. 643 (1961), or a damage action by the individual, *Monroe* v. *Pape,* 365 U. S. 167 (1961), a court sits to provide in the last analysis the "neutral and detached" judgment which the Fourth Amendment commands. This is no less true of arrests than of other searches and seizures. *Beck* v. *Ohio,* 379 U. S. 89 (1964).

Within this framework, the significance and the unique genius of the "probable cause" concept is apparent. "Probable cause" is not a self-efficient talisman. Nothing depends upon the words themselves. "Probable cause" is not inherently more fit for use than the verbalism "reasonable suspicion" (which the English have long used to serve the same function).[49] But as it has evolved, probable cause

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[48] *Johnson* v. *United States,* 333 U. S. 10, 13-14 (1948), quoted in *Chapman* v. *United States,* 365 U. S. 610, 614-615 (1961). See also LANDYNSKI, *op. cit. supra,* note 37, at 47.

[49] See note 35 *supra.*

has taken on an operative meaning and efficiency that *is* inherently fit—indeed, irreplaceable—as an instrument for mediating the demands of order and liberty in criminal investigation. The particular efficacy assigned to it in the *Beck* opinion, *id.* at 91, bears repeating: "[P]robable cause is a practical, non-technical conception affording the best compromise that has been found for accommodating these often opposing interests." [50]

Probable cause is addressed bluntly to the issue of particularized justification that is the Fourth Amendment's first principle. As it has developed judicially, the phrase connotes exactly that quantum of evidence pointing to likely or probable guilt that serves to single an individual out reasonably persuasively from the mass of men. It is the standard designed to distinguish him from Everyman with sufficient sureness that, if the individual's arrest or search be authorized, Everyman's arrest or search will not be authorized by parity of reasoning.

To serve such a function—to protect the "liberty of every man" [51] from subjection to police discretion—a test must be relatively objective. The probable cause standard seeks precisely to objectify, to regularize, the reasoning process by which the judgment of allowability of police intrusions is made. Of course, no judgmental standard governing an issue of this sort can wholly eliminate the influence of subjective and impressionistic responses—particularly a standard composed for general service in a multitude of varying factual circumstances. And so (as the proponents of the *Stop-Frisk Model* are quick to point out) even the Justices

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[50] See text at note 23 *supra*.

[51] See text at note 42 *supra*.

of this Court have from time to time divided in applying "probable cause" to the facts of one case or another. But the probable cause conception does operate—and its essential design makes it operate with peculiar efficiency—to diminish as much as is institutionally possible the impact of subjective factors.

First, probable cause invokes that traditional juridical device for the depersonalization of judgment: the enforced perspective of the "reasonable man" or "ordinary man." Second, it frames very specifically the question which it purports to submit to the ordinary judgment of the "ordinary man." The question is one of objective factual probabilities: is the individual whose arrest is sought to be justified likely guilty on the perceived facts? No debatable issue of values is expressly submitted. Doubtless, policemen and judges do in fact import some normative considerations into the determination. They may conclude "likely *enough* guilty," or "not likely *enough* guilty." But this is a small matter compared to tests (the inevitable instruments of the *Stop-Frisk Model,* as we shall see) which baldly invite consideration of the normative desirability of the particular police practice sought to be justified: "Is the suspect likely enough guilty so that he should be arrested?" "Is he likely enough guilty so that he should not be arrested, but should be detained?" There are no answers to such questions that do not turn almost entirely upon one's personal approval or disapproval of arrest or of detention.

Third, probable cause speaks to policeman's, to the judge's and to the citizen's common thought processes as rational men. Although it may take account of the specialized knowledge and the expert perceptual accuity of the policeman (to the extent that these can be objectified and com-

municated to a court), it subjects them to review by ordinary judgment operating upon objective facts. It avoids the dangerous mysticism of police professional, and professionally motivated, intuition—what Mr. Justice Jackson recognized as the mobilized mentality of "the officer engaged in the often competitive enterprise of ferreting out crime." [52] (We shall discuss the characteristics of that mentality more fully in the next section of this brief.) Probable cause therefore directs the judge toward an exercise of independent and autonomous judgment, properly responsive to the policeman's expert capacity for observation and induction, but freed from the controlling imposition of police value judgments or from necessary reliance upon the policeman's inexplicable "hunches" which inevitably embody those value judgments.

In short, probable cause is a common denominator for police, judicial and citizen judgment. It permits the judge, after hearing the officer's account of his observations and his inferences from them, to pass a detached, independent and objective judgment on the rationality of those inferences. It permits the judge to express his judgment in terms that are more or less comprehensible to the police, for their future guidance. The same terms are more or less accessible to the citizen who wants to know his rights or to pass political judgment in turn upon a system which functions as the probable cause system does.[53] This is not to

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[52] See text at note 48 *supra*.

[53] One of the attorneys for *amicus curiae* has been for a while adviser to a law student program under which students teach an eight-week course in basic legal rights to ghetto-area high school children in a large Eastern city. The law students report that the concept of "probable cause" is one of the easiest to communicate to their pupils. Even children who have endless complaints to

say that "probable cause" functions unerringly, or with perfect clarity. Of course, it does not. No standard for the case-by-case determination of the legitimacy of police investigative intrusions could. But the very failings of "probable cause" in this regard, together with its relative successes, caution against its abandonment in favor of more arcane, more impressionistic, less objective, less historically developed standards. It should not be forgotten that probable cause is the *only* standard which this Court has ever developed under the Fourth Amendment for judicial regulation of the police.[54] We think that the nature of the

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voice about real or supposed police mistreatment (and this appears to be the case for a very large number of the children) are able to appreciate and will admit the legitimacy of police stops, arrests and searches of "innocent" people where appearances of guilt amounting to probable cause (as developed by discussion of hypothetical cases) exist.

[54] Probable cause is, of course, the constitutional standard for the issuance of both search warrants, *Aguilar* v. *Texas*, 378 U. S. 108 (1964), and arrest warrants, *Giordenello* v. *United States*, 357 U. S. 480 (1958) (constitutionalized in *Aguilar*, *supra*). Warrantless searches may be made only in a handful of historically defined situations (see *Jones* v. *United States*, 357 U. S. 493 (1958); *Chapman* v. *United States*, 365 U. S. 610 (1961); *Stoner* v. *California*, 376 U. S. 483 (1964); *Berger* v. *New York*, —— U. S. ——, 87 S. Ct. 1873 (1967)): incident to a valid arrest (in which case, of course, probable cause is required for the arrest; and cf. *Cooper* v. *California*, 376 U. S. 58 (1967)); in the case of moving vehicles (where probable cause is required, see *Carroll* v. *United States*, 267 U. S. 132 (1925); *Henry* v. *United States*, 361 U. S. 98, 104 (1959)); and in certain emergencies or "exigent circumstances" where there is no time to obtain a warrant (in which case, the existence of the criminal circumstances creating the emergency must be established by probable cause, *Schmerber* v. *California*, 384 U. S. 575 (1966); cf. *Warden* v. *Hayden*, —— U. S. ——, 87 S. Ct. 1642 (1967)). (We put aside the consent doctrine, bottomed on a theory of waiver, see *Stoner* v. *California*, *supra*.) Although warrantless arrests may be made under a greater range of circumstances than warrantless searches, the constitutional standard for warrantless arrest is also probable cause. *Wong Sun*

concept and the setting of its use as we have just described them demonstrate the inevitably, as well as the wisdom, of this development. We turn now to the "reasonable suspicion" construct with which the *Stop and Frisk Model* undertakes—for partial but vitally important purposes—to displace probable cause.

III.

The Deceptive Allure of "Reasonable Suspicion."

At first blush, the argument for a *Stop-Frisk Model* of criminal investigation, controlled by the standard of "reasonable suspicion," seems eminently, beguilingly reason-

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v. *United States,* 371 U. S. 471 (1963); *Beck* v. *Ohio,* 379 U. S. 89 (1964). In *Brinegar* v. *United States,* 338 U. S. 160 (1949), the Court explicitly rejected the argument that warrantless stops of automobiles (amounting, in the view of the courts below, to less than "searches") could be made without probable cause. And the Court has recently extended the warrant requirement, with its probable cause constraint, to some sorts of non-criminal regulatory searches. *Camara* v. *Municipal Court,* —— U. S. —— , 87 S. Ct. 1727 (1967). In the latter cases, "probable cause" may not necessarily mean probability of individual culpability, as it does in the criminal area (see *Berger* v. *New York, supra*), but it does preserve its individualizing function, requiring scrutiny to assure "that reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling," 87 S. Ct. at 1736.

The only exception to the probable cause requirement in this Court's jurisprudence touching law enforcement practices is the "border search" doctrine announced in dictum in the *Carroll* case, *supra.* In that area, no form of judicial regulation was intended by the Court be substituted for probable cause, nor has any such regulation developed. Customs and immigration officials at the border are simply permitted to search as and when they will. E.g., *Blefare* v. *United States,* 362 F. 2d 870 (9th Cir. 1966). The unique justifications for that principle range too far afield to justify discussion here.

able.[55] Surely, say the proponents of stop and frisk, our inherited notions of "arrest" and "search" and "probable cause" are too dogmatic, too inflexible. Not all police intrusions are equally intrusive. Therefore, the same degree

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[55] The argument which we address in text is that which seems to have persuaded the New York and Ohio courts, and which is expounded by the most persuasive proponents of stop and frisk. There is also another argument frequently made to square the *Stop-Frisk Model* with the Fourth Amendment which is so palpably insubstantial as not to require extended answer. This argument goes: (1) The Fourth Amendment requires probable cause for an "arrest"; (2) an "arrest" is "the taking of a person into custody in order that he may be forthcoming to answer for an offense" (quoting AMERICAN LAW INSTITUTE, CODE OF CRIMINAL PROCEDURE, § 18, Official Draft, June 15, 1930, or some similar text); (3) but a "stop" (or an "arrest for investigation") lacks the *charging purpose* of an "arrest" (i.e., the person detained is not detained "in order that he may be forthcoming to answer"); (4) therefore, a "stop" is not an "arrest"; (5) hence, a "stop" may be made without probable cause. There are three things wrong with this argument. (A) *Its premise is wrong.* Common-law doctrine did not require "charging purpose" as an element of an arrest. It is true that some criminal procedure codes *authorized* an arrest only for the purpose of charging a citizen with crime. (Not even all of these, it should be noted, including "charging purpose" in their definitions of "arrest," as the A. L. I. Code commentary recognizes, see *id.* at 227-228.) But the body of common-law lore whose purpose was to define the citizen's right against arrest—the tort law of false imprisonment—treated any restraint of liberty, whether with or without charging purpose, as an arrest. See Mascolo, *The Role of Functional Observation in the Law of Search and Seizure: A Study in Misconception,* 71 DICK. L. REV. 379, 390-391 (1967); Note, *Philadelphia Police Practices and the Law of Arrest,* 100 U. PA. L. REV. 1182, 1185-1188 (1952). (B) *Its conclusion does not follow from its premise.* Even were it true that a common-law "arrest" required *charging purpose,* it would not follow that a detention without charging purpose was legal at common law. The point which the argument misses is that, at common law, the *only* detention that was lawful at all was one which an officer (or private citizen) could justify under his privilege of arrest. See Remington, *supra,* note 15, at 387. The common law gave no power, *with or without probable cause,* to detain any person for any purpose other than to charge him with an offense. See note 18, *supra.* So, if a "stop" is distinguished from

of justification should not be demanded for all. "The attempt to apply a single standard of probable cause to all [police] interferences [with individual privacy and liberty] —i.e., to treat a stop as an arrest and a frisk as a search— produces a standard either so strict that reasonable and necessary police work becomes unlawful or so diluted that the individual is not adequately protected." [56] Far more sensible, far more realistic, is the accommodating approach of "balancing" the extent of each particular police intrusion against the extent of its justification. This "balancing" approach (which seems to have been borrowed from the First Amendment area without carrying along the First Amendment's strong preference for individual freedom) finds its most articulate expression in Dean Edward L. Barrett's often quoted suggestion:

> "Would not the policy of the Fourth Amendment be better served by an approach which determines the reasonableness of each [police] investigative technique

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an "arrest" by the absence of charging purpose, the consequence is not that it is lawful without probable cause, but that it is unlawful even with probable cause. Thus it has been held under the Fourth Amendment in the case of "arrest for investigation," *Staples* v. *United States,* 320 F. 2d 817 (5th Cir. 1963), and thus it is, for the same reason, in the case of a "stop" which is sought to be distinguished from arrest only by the absence of charging purpose. (C) *Its conclusion is irrelevant in any event.* This is so, of course, because the restrictions of the Fourth Amendment are not cast in terms of "arrest." They are cast in terms of "seizures" of the person. An "arrest" is a seizure of the person, but so is any other seizure, for whatever purpose. The "charging purpose" argument, essentially a verbal quibble, is adequately laid to rest in Foote, *The Fourth Amendment: Obstacle or Necessity in the Law of Arrest,* 51 J. CRIM. L., CRIM. & POL. SCI. 402, 403-404 (1960).

[56] Judge Keating for the Court of Appeals in *Peters.* See *People* v. *Peters,* 18 N. Y. 2d 238, 219 N. E. 2d 595, 600 (1966).

> by balancing the seriousness of the suspected crime and the degree of reasonable suspicion possessed by the police against the magnitude of the invasion of the personal security and property rights of the individual involved?" [57]

The answer to that provocative question, *amicus curiae* submits, is a flat and unequivocal No. However intellectually reasonable Dean Barrett's balancing approach may be in the corridors of academe, it is a delusive and unworkable proposition on the streets of our cities, and particularly on the streets of our ghettos where stop-frisk logic does its daily work. Closely inspected, we believe, both the "balancing" theory of Fourth Amendment rights and the *Stop-Frisk Model* that is built upon it show themselves to be mere fine, scholastic pretexts for oppression. The "minor interference with personal liberty" [58] that they sanction is a major interference; the protections which they promise are unreal illusions; the "balance" scale which they purport to employ is invariably tipped by the police commissioner's thumb; and their consequence is nothing more or less than a police dictatorship of the streets. We urge this Court to repudiate any such triflings with the vital freedoms secured by the Fourth Amendment, and to respond as it did nearly one hundred years ago when asked to approve another like "minor" invasion of those same freedoms:

> "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and un-

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[57] Barrett, *Personal Rights, Property Rights, and the Fourth Amendment* [1960], SUPREME COURT REV. 46, 63.

[58] Chief Judge Silbert for the Court of Appeals in *Terry*. See *State* v. *Terry*, 5 Ohio App. 2d 122, 214 N. E. 2d 114, 118 (1966).

> constitutional practices get their first footing in that way, namely: by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. . . . It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis.*" [59]

Let us examine first the nature of the "minor" invasion of liberty involved. Proponents of the "stop" like to portray it as though it consisted at worst of a police "Hey, there." Several points should be obvious about this "Hey, there."

(1) "Hey, there" itself, when said by a policeman, is a significant intrusion, except perhaps to those fortunate citizens whose sole image of the police is a vague memory of the friendly face of the school crossing guard. Such citizens are not very often stopped. "Hey, there" to the man likely to be stopped—the man on the street in a "bad" neighborhood, the man in the ghetto—is a challenge, an act of dominion by the Fuzz, a thinly veiled threat of force.

(2) "Hey, there" may or may not be thought unduly intrusive—once. But the man likely to be stopped is not likely to be stopped once. He is likely to be stopped again and again, day in day out, and for the same reasons. The following comment of a "lower income Negro," which the

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[59] *Boyd* v. *United States*, 116 U. S. 616, 635 (1886).

National Crime Commission's Task Force on Police thought worthy of publication, is a perfectly representative picture of ghetto life—and resultant ghetto attitudes:

> "When they stop everybody, they say, well, they haven't seen you around, you know, they want to get to know your name, and all this. I can see them stopping you one time, but the same police stopping you every other day, and asking you the same old question." [60]

(3) "Hey, there" looks better on paper than it sounds on the streets. (We put aside the consideration that it is almost invariably "Hey, there, *boy*" in the ghetto.[61]) "Field interrogation procedure" is thus described (at its mildest) in an instructional article for police:

> ". . . Meeting head-on. Let the subject get up even with you or slightly beyond you. Then turn toward the subject facing his side. Your hand should either be holding onto the subject's arm at the elbow or in a ready position so that you will be able to spin him forward and away from you in a defensive move. This is the position of interrogation. You should make

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[60] PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 184 (1967).

[61] See CRAY, *op. cit. supra,* note 1, at 193; SKOLNICK, *op. cit. supra,* note 3, at 80-82. The Crime Commission Task Force found that "field interrogations are frequently conducted in a discourteous or otherwise offensive manner, which is particularly irritating to the citizen." PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 185 (1967). An underlying study found that *"Brusqueness or nastiness was evident in the approaches more often than was courtesy."* 2 University of Michigan Study 97 (emphasis in original).

a habit of interrogating from this position. Your greatest hazard is the unknown." [62]

(4) The method of police approach just described, the power of the policeman to make "Hey there" sound like a threat, and the inevitable citizen response together make the "stop" power a *de facto* arrest power. The pattern can be observed daily on any ghetto street. The policeman on "aggressive patrol" (as it is coming to be known in police circles) makes his approach; the citizen, touched on the elbow or startled by the voice at his side and the policeman with his hands up, raises an arm slightly in an instinctive defensive gesture; the policeman is now free to arrest him for assaulting an officer, obstructing an officer, etc.[63] Every policeman on the beat knows that the power to make an enforced stop is the power to escalate the episode into a technical "assault" and to make an arrest for the assault. The ghetto resident knows it too—although he is seldom clever and dispassionate enough to avoid the trick.

(5) In any event, the authority which the proponents of "stop" seek to give the police is not the authority to say "Hey, there." It is the authority to *detain* the citizen who does not stop when "Hey, there" is said. It is the power to order him to a stand-still, and to lay hands on him if he moves. It is the power, in the American Law Institute's draft Model Code, to use all force short of deadly force to stop him. We do not know that New York or Ohio law embodies even that humane limitation. Assum-

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[62] Adams, *Field Interrogations,* 7 POLICE 26, 28 (1963).

[63] One version of the pattern is described in CRAY, *op. cit. supra,* note 1, at 124-125.

ing that it does, the "stop" power ranges from a hand on the sleeve to a tackle, a patrol car careening up on the sidewalk, a bullet in the citizen's leg. It must be thus, we are informed, because "it would be frustrating and humiliating to the officer to grant him an authority to order persons to stop, and then ask him to stand by while his order is flouted." [64]

(6) Finally, the "stop" power comports the "frisk" power. The argumentation of the proponents of stop and frisk is, in this regard, wonderfully devious. We are told that "stop" should be allowed without probable cause because it is not very intrusive; and, in support of this proposition, the attributes of "stop" alone are described (or partially described). Invariably, we are later told that the "frisk" power is absolutely indispensable to the safe exercise of the police power to "stop"; hence, that once the power to "stop" is given, the power to "frisk" must follow.[65] We suggest that this is chop-logic. If "frisk" is indeed the necessary accoutrement of "stop," we think it obvious that the kind of intrusion involved in "frisk" must be taken into account in the initial determination whether "stop" is, indeed, not very intrusive. We think that the intrusiveness of "frisk" hardly needs demonstration.

We pass next to the supposed safeguard of stop and frisk—the preventive against its abuse—the prerequisite of "reasonable suspicion." Used as the English use it, the phrase means "probable cause" in the American con-

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[64] AMERICAN LAW INSTITUTE, MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE, Commentary to § 2.02, Tentative Draft No. 1, March 1, 1966, at p. 100.

[65] See note 29 *supra*.

stitutional sense.[66] But where it is used to mean something less than probable cause, as it is in the *Stop-Frisk Model,* what exactly does it mean? It seems to mean, under Dean Barrett's balancing formula, the degree of suspicion which is sufficient so that the police *ought* to be allowed to do whatever it is they do, in light of its intrusiveness. That is a simply impossible test, depending as it does upon the normative appraisal of the policeman himself in the first instance and (in the few cases that come to court) upon the retrospective, subjective and impressionistic judgment of a lower-court judge who has before him a defendant caught with the goods. It should not be forgotten that this Court does not sit to decide every search-and-seizure case in this country, still less every stop-and-frisk *case,* still less every *instance* of stop and frisk. With all due deference, we suggest that the liberty of the citizen in the street would be a meaningless thing if it were committed almost wholly to *ad hoc* police and criminal court determinations of the normative propriety of particular police intrusions.

One careful student of stop and frisk has offered the conception that "reasonable suspicion" is something more objective. "If probable cause . . . can be defined as a reasonable belief in the probability that a crime has been committed [and, to justify an arrest, that a particular citizen has committed it], . . . [reasonable suspicion] means that it must be reasonably possible that the individual has committed some crime."[67] But as to what citizen is it not reasonably possible that he has committed some crime? As to what unknown citizen on the street (even a crowded street) near the scene of a known crime? As to what group

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[66] See note 35 *supra.*

[67] Leagre, *supra,* note 15, at 413.

of ill-dressed young men on a ghetto street corner? As to what Negro abroad on the streets in a "white" neighborhood late in the day? Surely, it is reasonably possible that each of these has committed a crime (or is about to commit one, as the New York statute and common *Stop-Frisk* logic provide). "The finger of suspicion is a long one. In an individual case it may point to all of a certain race, age group or locale. Commonly it extends to any who have committed similar crimes in the past. Arrest on mere suspicion collides violently with the basic human right of liberty. It can be tolerated only in a society which is willing to concede to its government powers which history and experience teach are the inevitable accoutrements of tyranny." [68]

Speaking for the New York Court of Appeals in *Peters,* Judge Keating assures us that "Where a person's activities are *perfectly normal,* he is fully protected from any detention or search." [69] That is hardly very reassuring.[70] It is still less reassuring when it is announced that "By requiring the reasonable suspicion of a police officer, the statute incorporates the experienced officer's intuitive knowledge and appraisal of the appearances of criminal activity." [71] Yet here, we suggest, Judge Keating has laid his finger precisely on the pulse of "reasonable suspicion"

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[68] Hogan & Snee, *The McNabb-Mallory Rule: Its Rise, Rationale and Rescue,* 47 GEO. L. J. 1, 22 (1958).

[69] *People* v. *Peters,* 18 N. Y. 2d 238, 219 N. E. 2d 595, 600 (1966) (emphasis added).

[70] It also appears not to be an accurate statement of common stop and frisk law or practice. See the discussion of Pennsylvania's *Hicks* case, *infra.*

[71] *People* v. *Peters,* 18 N. Y. 2d 238, 219 N. E. 2d 595, 599 (1966).

and given the best available sententious description of its character.

For the native quality of "reasonable suspicion"—as opposed to the "probable cause" concept which our constitutional law has heretofore developed—consists precisely in judicial recognition of the trained police "hunch" or "intuition," without more, as the basis for legitimating police action.[72] All of the mysticism of police expertise, of police "feel" for a street situation, is invoked here.[73] Judges are not expected to detach themselves from the reasoning processes of the police. They are not to take an independent view of police logic. They are to assimilate police logic

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[72] See, e.g., *Goss* v. *State,* 390 P. 2d 220 (Alaska, 1964) (sustaining stop of automobile on nothing more than policeman's testimony that he observed it under the following "suspicious circumstances": it pulled away from the side of a commercial building at 12:45 a.m. and drove one-half block without lights); *People* v. *Beverly,* 200 Cal. App. 2d 119, 19 Cal. Rptr. 67 (D. C. A. 1962) (sustaining stop of automobile on nothing more than policeman's testimony that "it was kind of unusual for a car to be coming out of that area [a street occupied primarily by automobile wreckers] at that time [9:33 p.m.] . . . all the auto wreckers at that time is usually closed," 19 Cal. Rptr. at 69); *Commonwealth* v. *Hicks,* 209 Pa. Super. 1, 223 A. 2d 873 (1966) (sustaining stop and frisk of pedestrian on downtown street at 4:30 p.m. on ground that policemen observed him five blocks from the scene of a burglary; the burglar was reported to be a Negro with a brown coat and mustache; pedestrian was a Negro with a light-colored coat needing a shave).

[73] See TIFFANY, MCINTYRE & ROTENBERG, *op. cit. supra,* note 15, at 40:

> "Training officers and officers in command of patrol forces commonly urge patrol officers to rely on their own good sense and to learn which persons should be stopped and questioned from their own experiences in the field. Some police assert that it is not possible to express, in a meaningful way, the basis for the conclusion that the circumstances are sufficiently suspicious to justify a field interrogation. It is said that the officer must be 'beat-' or 'alley-wise.' "

and appraise the officer's work product by its lights. They are to accept the attitudes of police intelligence for the purpose of adjudging the soundness of police guesswork—exclusively in cases, of course, where that guesswork has already proved itself right. Sound police intuition thus becomes the measure of the citizen's protection under the Fourth Amendment.

What exactly is the nature of that intuition? Jerome Skolnick's recent systematic observation of the police confirms the obvious:

> "[T]he policeman's role contains two principal variables, danger and authority, which should be interpreted in light of a 'constant' pressure to appear efficient. The element of danger seems to make the policeman especially attentive to signs indicating a potential for violence and lawbreaking. As a result, the policeman is generally a 'suspicious' person.
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> ". . .
>
> "However complex the motives aroused by the element of danger, its consequences for sustaining police culture are unambiguous. This element requires him, like the combat soldier, the European Jew, the South African (white or black), to live in a world straining toward duality, and suggesting danger when 'they' are perceived. Consequently, it is in the nature of the policeman's situation that his conception of order emphasize regularity and predictability. It is, therefore, a conception shaped by persistent *suspicion*. . . .
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> "Policemen are indeed specifically *trained* to be suspicious, to perceive events or changes in the physical

surroundings that indicate the occurrence or probability of disorder. . . ." [74]

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[74] SKOLNICK, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY 44, 47-48 (1966) (emphasis in original). See generally, *id.* at 42-48, 54, 59, 64-65, 83, 206-207, 217-218, 220, 232. Skolnick's observations were made in Oakland, California (sub nom. "Westville"), which has a particularly good and enlightened police department. *Id.* at 25, 32, 62. The observations are tersely summarized by Geoffrey Hazard, of the American Bar Foundation:

> ". . . The chief environmental influence on police work is a sensitization to dangerous behavior. Dealing with dangerous behavior is at the same time the unique characteristic and the special responsibility of the police. This orientation to danger results in a peculiar type of social perception. If one's job is to deal with violence should it arise, it is both natural and prudent to develop an alertness for signs of violence. People incipient upon violence give off signs of their mood—agitation, loud and excited speech, changes in posture and position in preparation for action, and the like. The skill of the police is to notice these signs and to react to them. Of course, such signs are also emitted by people who are just naturally agitated, loud-mouthed, or shifty, and it is often difficult to tell what behavioral signs portend. The point is that, because they have special responsibilities, the police read these signs—and others more subtle—in a way that other people do not. Compared to other people, they seem to have an anxiety neurosis, as indeed in a relative sense they do.
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> ". . .
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> ". . . Beginning with the fact that deviance may be a sign of danger, the police tend to see all deviance as dangerous. Policemen's work thus tends to make policemen socially conservative in the most fundamental sense. This has all sorts of consequences. For one thing, it helps to explain the strong negative responses that the police tend to display toward such events as picketing, wearing beards and sandals, and other socially disassociative activities. For another, and perhaps more practically significant, the police are inclined to classify as crime all behavior that they see as discrepant with 'ordinary' behavior, regardless of whether such behavior is technically a violation of law. This inclination is, of course, checked by other pressures—political, social, and legal—so

This suspicious cast of mind is intensified in the ghetto. The policeman on patrol in the inner city has little understanding of the way of life of the people he observes, and he believes (with considerable justification)[75] that they are hostile to him.[76] The result is inevitable. "The patrolman

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that the police in operation do not fulfill their inclinations. The policeman's tendency to regard all deviance as crime is, however, a real and largely uncontrollable social force."

Hazard, *Book Review*, 34 U. CHI. L. REV. 226, 228-229 (1966). See also Schwartz (Herman), "Stop and Frisk" in New York Law and Practice: A Case Study in the Abdication of Judicial Control Over the Police (unpublished manuscript) 29-31, and authorities cited.

[75] "The hatred and fear of the police, whether overt or hidden, felt by many Negroes, Puerto Ricans and Mexican-Americans cannot be overstated." AMERICAN CIVIL LIBERTIES UNION, POLICE POWER AND CITIZENS' RIGHTS 11 (1967). See also REPORT OF THE PRESIDENT'S COMMISSION ON CRIME IN THE DISTRICT OF COLUMBIA ON THE METROPOLITAN POLICE DEPARTMENT 62-65 (1966); Cross, *The Negro, Prejudice and the Police*, 55 J. CRIM. L., CRIM. & POL. SCI. 405, 407 (1964). Stop and frisk practice, of course, is a not inconsiderable part of the complex causes for this hatred and fear. See notes 108-10 *infra*.

[76] See BALDWIN, NOBODY KNOWS MY NAME 61-62 (Dell ed. 1963):

> ". . . None of the Police Commissioner's men, even with the best will in the world, have any way of understanding the lives led by the people they swagger about in twos and threes controlling. . . .
>
> ". . . [The policeman] is facing, daily and nightly, people who would gladly see him dead, and he knows it. There is no way for him not to know it; there are few things under heaven more unnerving than the silent, accumulating contempt and hatred of a people. He moves through Harlem, therefore, like an occupying soldier in a bitterly hostile country; which is precisely what, and where, he is, and the reason he walks in twos and threes. And he is not the only one who knows why he is always in company: the people who are watching him know why, too. . . ."

See also Brooks, *New York's Finest*, 40 COMMENTARY 29, 29-32 (Aug. 1965).

in Westville, and probably in most communities, has come to identify the black man with danger . . . ." [77] Little wonder that "field interrogations are sometimes used in a way which discriminates against minority groups, the poor, and the juvenile." [78]

This is not an isolated or ephemeral abuse,[79] nor one that courts can control under the rubric of "reasonable suspicion." Can any court say that the policeman is *not* reasonably suspicious of the group of young men lounging on the ghetto corner? Of the man on parole for narcotics violations who consorts with another? Of the man walking at night with two companions who have records for robbery? Of the interracial couple in the neighborhood frequented by prostitutes? A police authority on field interrogation gives policemen this advice respecting the "selection of subjects":

> "A. Be suspicious. This is a healthy police attitude, but it should be controlled and not too obvious. [*Sic.*]
>
> "B. Look for the unusual.
>
> 1. Persons who do not 'belong' where they are observed.
>
> 2. Automobiles which do not 'look right.'
>
> 3. Businesses opened at odd hours, or not according to routine or custom.

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[77] SKOLNICK, *op. cit. supra,* note 74, at 49.

[78] PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 184 (1967).

[79] See note 3 *supra.*

"C. Subjects who should be subjected to field interrogations.

. . .

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

. . .

4. Any person observed in the immediate vicinity of a crime very recently committed or reported as 'in progress.'

5. Known trouble-makers near large gatherings.

6. Persons who attempt to avoid or evade the officer.

7. Exaggerated unconcern over contact with the officer.

8. Visibly 'rattled' when near the policeman.[80]

9. Unescorted women or young girls in public places, particularly at night in such places as cafes, bars, bus and train depots, or street corners.

. . .

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

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[80] There doubtless is some safe middle ground between showing exaggerated unconcern for the officer and being visibly rattled in his presence, but one wonders how many inhabitants of our cities are sufficiently astute students of the police mind to find that ground. The same damned-if-you-do, damned-if-you-don't dilemma is presented in BRISTOW, *op. cit. infra,* note 81, at 15.

[81] Adams, *Field Interrogation,* 7 POLICE 26, 28 (March-April 1963). Similar generalizations are found in the leading texts. BRISTOW, FIELD INTERROGATION 13-19, 23, 31-46 (2d ed. 1964);

Is a judge to say that these bases of suspicion are unreasonable? How, in any meaningful way, is he to review a police "stop" based on any of them?

The answer to this question is evident from the reports. The courts have not in fact imposed any limitations or restrictions upon the stop and frisk power once that power is granted. They have not done so because they could not do so—because the essence of the doctrine of stop and frisk on less than probable cause is judicial abdication to police judgment. The judicial decisions demonstrate trenchantly the practical unworkability of the *Stop-Frisk Model.* New York's cases will serve as an example.[82]

As we shall see, the major failing of the cases is that "reasonable suspicion" has proved to be a broad, all-purpose rubber stamp for validating police intrusions. Before passing to that point, however, we pause to examine the nature of the intrusions which the New York cases allow upon "reasonable suspicion." What appears from such examination is a thorough vindication of the most dire predictions of those commentators who warned that no mere wordplay

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PAYTON, PATROL PROCEDURE 179-188, 190-195 (1966). TIFFANY, MCINTYRE & ROTENBERG, *op. cit. supra,* note 15, at 38-43, remark the failure of police departments generally to develop standards governing field interrogation and related practices. Bristow rather explicitly gives up the attempt: "The question of what is suspicious cannot be answered for the individual patrolman. Each officer must seek this answer for himself on a basis of his knowledge of the area. BRISTOW, *op. cit. supra,* at 19.

[82] The only other jurisdiction which has had substantial case-law development of the stop and frisk conception is California. The decisions there make up a pattern much like New York's. The cases are discussed in Note, *Stop and Frisk in California,* 18 HASTINGS L. J. 623 (1967).

could make a "stop" something less than an arrest, or "frisk" something less than a search.[83]

"The stopping of the individual to inquire is not an arrest," the New York Court of Appeals announced in its first stop and frisk decision, explaining why "the ground upon which the police may make the inquiry may be less incriminating than the ground for an arrest . . . ." *People* v. *Rivera,* 14 N. Y. 2d 441, 445, 201 N. E. 2d 32 (1964). Yet within two years, in the *Peters* case now before this Court, the Court of Appeals was prepared to sanction as a "stop" something that seems to all appearances a quite conventional arrest. A police officer collared Peters at gunpoint on a stairway between floors of a private apartment building. He tugged Peters down a flight of stairs to the next floor where he questioned him. He then felt his clothing, removed an opaque packet, took it out of Peters' reach, and searched it. About all that is wanting here to exhaust the powers ordinarily given an officer who makes an arrest is a trip to the precinct station. The question of the propriety of such a trip was not reached in *Peters* because the "frisk" had served its purpose. It had disclosed the making of a *de jure* arrest, which followed. In any event, the Court of Appeals had already made clear in *People* v. *Pugach,* 15 N. Y. 2d 65, 204 N. E. 2d 176 (1964), that the "stop" power alone included a trip to the precinct station, if the officer found that desirable. *Accord*:

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[83] CRAY, *op. cit. supra,* note 1, at 38; Foote, *Law and Police Practice: Safeguards in the Law of Arrest,* 52 NW. U. L. REV. 16, 37-38 (1957); Foote, *The Fourth Amendment: Obstacle or Necessity in the Law of Arrest,* 51 J. CRIM. L., CRIM. & POL. SCI. 402, 403-405 (1960); Souris, *Stop and Frisk or Arrest and Search—The Use and Misuse of Euphemisms,* 57 J. CRIM. L., CRIM. & POL. SCI. 251 (1966).

People v. *Hoffman,* 24 App. Div. 2d 497, 261 N. Y. S. 2d 651 (1965).

"The frisk is less . . . invasion [of privacy] than an initial full search of the person would be." So held *People* v. *Rivera, supra,* 14 N. Y. 2d at 446, reasoning that it "ought to be distinguishable also on pragmatic grounds from the degree of constitutional protection that would surround a full-blown search of the person." *Ibid.* However valid this proposition,[84] its endurance was fleeting. In *Pugach, supra,* the Court of Appeals sustained as a "frisk" the searching of a brief case which police officers had taken from their "stopped" suspect in a squad car en route to the precinct station.[85] *Peters,* we have seen, sustained the search of an opaque packet taken from the suspect and wholly within the control of an armed policeman. *Sibron* sustained a policeman who "without first frisking the defendant, reached into his pocket and pulled out . . . nar-

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[84] Consider the frisk described by police testimony in the record in *People* v. *Hoffman, supra,* as recorded by Schwartz, *supra,* note 74, at 6:

> "I asked both the defendant and his passenger to put their hands on the roof of the police car and I started from their necks and worked across their shoulders and under their arms (indicating) all the way down their sides and down each leg to determine whether they could possibly have a weapon on them or not."

Schwartz reports on the basis of conversations with police that "the procedure employed in *Hoffman* is 'customary usage.'" *Id.,* at note 14. That report concurs with the procedures recommended for policemen in PAYTON, *op. cit. supra,* note 81, at 224-228 (with photographs). Cf. TIFFANY, MCINTYRE & ROTENBERG, *op. cit. supra,* note 15, at 46-48.

[85] Compare *United States* v. *Margeson,* 259 F. Supp. 256 (E. D. Pa. 1966); *Commonwealth* v. *Lehan,* 347 Mass. 197, 196 N. E. 2d 840 (1964).

cotics."[86] Lower New York courts have gone further. *People* v. *Reason,* 52 Misc. 2d 425, 276 N. Y. S. 2d 196 (Sup. Ct. 1966), authorizes search of a tin box standing atop a pile of other articles on the sidewalk near the suspect. *People* v. *Cassesse,* 47 Misc. 2d 1031, 263 N. Y. S. 2d 734 (Sup. Ct. 1965) (alternative ground), holds that a frisk may encompass the search of an automobile in which the "stopped" suspect is riding.[87] There is no need to put our own characterization on this New York evolution of the "frisk." The Court of Appeals has recently reviewed its prior decisions and, explicitly recognizing that in *Pugach, Sibron* and *Peters* "the arresting [sic] officers engaged in 'searches' rather than 'frisks' in order to obtain inculpating evidence," nevertheless adhered to those holdings. *People* v. *Taggart,* C. A. N. Y., App. T. 2, No. 120, decided July 7, 1967.

It is significant that the New York courts have been as unable to restrain police subversion of the purpose of the "frisks" that they have authorized as to contain their extent or intrusiveness. Although the New York statute authorizes only a search for weapons, and the Court of Appeals in sustaining its constitutionality continues to stress that concept, the police ignore it with impunity. The officer in *Sibron,* for example, had no concern with weapons. He suspected Sibron of narcotics dealings, asked him for narcotics, and searched him for narcotics. Indeed, he was so little concerned with his own self-protection, that he let Sibron go into his pocket.[88] This is

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[86] *People* v. *Taggart,* C. A. N. Y., App. T. 2, No. 120, decided July 7, 1967, slip opinion, p. 6 (describing *Sibron*).

[87] Compare *People* v. *Mickelson,* 59 Cal. 2d 448, 380 P. 2d 658 (1963).

[88] See *People* v. *Reason, supra,* for a similar case.

apparently no rare practice. The National Crime Commission Task Force on Police reports that "In some cities, searches are made in a high proportion of instances not for the purpose of protecting the officer but to obtain drugs or other incriminating evidence. In New York, for example, where searches are permitted only when the officer reasonably believes he is in bodily danger, searches were made in 81.6 percent of stops reported." [89]

Particularly as the scope of permissible "stop" and "frisk" expanded, and as evidence of their use as pretexts to justify plainly illicit searches accumulated, one might have expected the Court of Appeals to tighten up on the standards for "reasonable suspicion." It has not been able to do so. In the first place, the statutory requirement for a "frisk," that the officer "reasonably suspects . . . he is in danger of life or limb," has been entirely abrogated by the New York Court. This has been done by recognizing what appears to be a conclusive presumption that officers making a "stop" are always in danger.[90] Such might very well be doubtful as a fact,[91] but surely the Court of Ap-

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[89] PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 185 (1967).

[90] "The answer to the question propounded by the policeman may be a bullet; in any case the exposure to danger could be very great." *People* v. *Rivera, supra,* 14 N. Y. 2d at 446. See also *People* v. *Peters,* 18 N. Y. 2d 238, 219 N. E. 2d 595, 598 (1966) (although the officer had Peters collared and was armed, "the tables are easily turned").

[91] It is rather interesting to notice that it is common practice for policemen not to search females, even when they arrest them. See McIntyre & Chabraja, *The Intensive Search of a Suspect's Body and Clothing,* 58 J. CRIM. L., CRIM. & POL. SCI. 18 (1967);

peals cannot be faulted for believing that an officer may always "reasonably suspect" he is in danger.[92] That is the nature of reasonable suspicion.

As for the reasonable suspicion that is a statutory prerequisite to the initial stop, it is fair to say that police officers in New York State have been left to define that concept pretty much as they go along. In the recent *Taggart* decision of the Court of Appeals, an anonymous telephone tip that a described young man on a designated street corner had a gun was held to justify an officer's accosting him, placing him against a wall, and searching his

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TIFFANY, MCINTYRE & ROTENBERG, *op. cit. supra,* note 15, at 20. The reasons for this appear to be a combination of chivalry, public relations, and political sensitivity. It may well be that women are less dangerous than men. But it may also be that the police do not lack other means than a weapons search to protect themselves from a suspect or an arrestee with a concealed weapon. One may speculate, at least, as to whether the police are not here subordinating to considerations of political expediency a concern for their safety which this Court, in its cases authorizing warrantless search incident to arrest, thought sufficiently important to require the subordination of important Fourth Amendment values.

It is also interesting that Bristow in his work on field interrogation does not mention a frisk for self protection. To him the search incident to field interrogation is the last step in the process and designed to determine "the subject's possible criminality." BRISTOW, *op. cit. supra,* note 81, at 92. Bristow therefore seems of the view that probable cause is not a prerequisite for this search, although it is desirable.

> "While it is true that the primary purpose of the search in a field interrogation is not to secure evidence, but to aid in establishing the subject's character or criminal tendencies, the legal rule of search and seizure should be conformed with whenever possible. The subject of search and seizure is presently receiving widespread interest on the part of the general public, and violations of supposed 'Constitutional Rights,' no matter how groundless, may bring unfavorable publicity."

Id. at 93.

[92] Bristow indicates that "the patrolman should assume every person he encounters may be armed." *Id.*, at 25.

pockets. In *Sibron,* eight hours' observation of the defendant by a police officer discovered nothing but that he was holding conversations with a number of narcotics addicts; nothing passed hands, and the officer overheard none of the conversations. Reasonable suspicion was found. The procedural history of the case, as we read the record, portrays quite starkly the role of stop and frisk logic in the dialectic of Fourth Amendment evasion. The arresting officer appears at first to have wanted to present the case as an ordinary "dropsie"—one of those wonderfully lucky cases in which the defendant takes occasion to toss away a packet of heroin just as the officer appears on the horizon. (See Complaint, Sibron R. 1.) At the hearing, however, his testimony seemed designed to make out a "consent" case (*id.,* 16). When the judge properly found no consent (*id.,* 19), the prosecutor persuaded him that there was probable cause for an arrest and search (*id.,* 19-20). That, of course, would not stand up on the record, and "reasonable suspicion" stepped into the breach at one or another appellate stage. "Reasonable suspicion" being essentially unreviewable because the officer had a hunch which proved right, the *Stop-Frisk Model* amply served to justify the unjustifiable.

We have found only one New York decision in which any court invalidated a stop for want of reasonable suspicion: *People* v. *Anonymous,* 48 Misc. 2d 713, 265 N. Y. S. 2d 705 (Cty. Ct. 1965), where an officer stopped a boy walking on a summer Sunday, in Hicksville, Long Island, with a carton of books. It is enlightening, we think, to compare that decision with *People* v. *Reason, supra.* In the latter case, reasonable suspicion was found to be made out by an officer's observation that two Negro men got very quickly

into a taxi, on a Harlem street, one carrying a portable phonograph and the other a portable T.V., during daylight hours when the streets were full of people. A few days prior to this date, the officer had attended a community meeting at which residents complained of numerous burglaries in the area, but no complaint was made of burglaries in the building before which the two Negro men were seen to hail a cab, nor in the immediate surroundings, nor did the officer have any information relating to any burglaries accomplished or in progress on that date. Harlem is not Hicksville, however; burglaries *do* occur frequently in Harlem; and there, doubtless lies the difference in the cases. Such again is the nature of reasonable suspicion.

One additional point in the New York experience deserves note. Coincidentally with the enactment of the Stop and Frisk statute in that State, a circular was issued by the New York State Combined Council of Law Enforcement Officials setting guidelines for police performance under the stop and frisk authorization. That circular is appended as Appendix A to this brief. *Inter alia,* it provides that the suspect is to be questioned and frisked "in the immediate area in which he was stopped," *but see People* v. *Pugach, supra; People* v. *Hoffman, supra;* that for "purposes of practical enforcement procedures," the language of the statute "abroad in a public place" does not include public portions of private buildings, such as hotel lobbies, etc., *but see People* v. *Peters, supra;* and 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 repre-

sent any immediate danger to the officer," but see *People* v. *Pugach, supra; People* v. *Peters, supra; People* v. *Reason, supra;* and *People* v. *Cassesse, supra.* Obviously, officers have regularly broken these rules, and the New York courts as regularly have ignored them. The rules—flexible and imprecise as they are—appear to be altogether too confining for a volatile conception of the nature of reasonable suspicion.

We submit that what has happened even on the face of the reported judicial decisions in New York fully confirms our description earlier in this brief of the inevitable consequences of the *Stop-Frisk Model.* "Stops" have been sanctioned that are not distinguishable in the extent of their invasion of privacy from arrests; full-blown searches are conducted in the name of "frisks"; and "reasonable suspicion," incapable alike of explanation and judicial supervision, serves only as a sophistical pretext for the wholesale destruction of Fourth Amendment rights.

We do not think that the New York experience is aberrant in this regard, or that other States and other varieties of stop and frisk might succeed where New York and its section 180-a have totally failed. It is the basic *Stop-Frisk Model,* we believe, that is aberrant. The intrusions which it authorizes against the liberty and privacy of the citizen are intolerable in a free society, unless they are hedged about with effective checks and restraints. Such restraints involve, first, the requirement of particularized justification for the use of the intrusions against particular individuals reliably believed to be criminally connected. They require, second, that the justificatory standard be couched in terms sufficiently objective and communicable that the citizen can ascertain some inkling of the nature of his rights and the

policeman some conception of his powers and their limitations, so that, if those limitations be oppressively transgressed, the policeman and his superiors can be held accountable legally or politically as the case may be. They require, in this last aspect, some fair opportunity for independent review by the judiciary of the policeman's asserted justification for intrusion upon the citizen. The means of providing these several related safeguards in Anglo-American law has always been the probable cause concept; and this Court has noted that it is a "troublesome line" which separates "mere suspicion" from probable cause. *Brinegar* v. *United States,* 339 U. S. 160, 176 (1949). The innovation of stop and frisk theory which purports to straddle that line with a turbid, amorphous, unsubstantial conception of some state of police-perceived putative guiltiness that is more than suspicion but less than cause—whether the state be called "reasonable suspicion" or some other euphemism—is inherently, irremediably defective.

The defect is exposed, we suggest, at the point where the *Stop-Frisk Model* meets the real world of streets and courts. There is nothing endemically wrong with the *idea* of stop and frisk. Indeed, the mission of stop and frisk theory to establish some third state of police powers, midway between those that can be exercised wholly arbitrarily (such as the power of non-coercive, non-detentive street questioning) and those available only upon probable cause (such as arrest and search), has the allure of sweet reasonableness and compromise. The rub is simply that, in the real world, there is no third state; the reasonableness of theory is paper thin; there can be no compromise. Probable cause is the objective, solid and efficacious method of

reasoning—itself highly approximative and adaptable, but withal tenacious in its insistence that common judgment and detached, autonomous scrutiny fix the limits of police power—which has become, within our system of criminal law administration, the indispensable condition of non-arbitrariness in police conduct. Police power exercised without probable cause *is* arbitrary. To say that the police may accost citizens at their whim and may detain them upon reasonable suspicion is to say, in reality, that the police may both accost and detain citizens at their whim. But against that dangerous doctrine the Fourth Amendment sets its head. We urge that the Court so hold, unequivocally and forcefully, in these cases.

We so urge although we recognize that, in some ways, the issues before the Court in the *Sibron, Peters* and *Terry* cases are framed quite narrowly. The immediate questions are whether, on each record, the respective rights of Sibron, Peters and Terry were violated and, in the New York cases, whether Code of Criminal Procedure, § 180-a is facially unconstitutional, see *Berger* v. *New York, supra.* Those questions naturally invite attention to the factual circumstances of each case—which show, we think, differing degrees of police intrusiveness and differing degrees of ostensible justification for it—and to the detailed body of legal rules (which might be held separately or in combination offensive to the Fourth Amendment) that emerge from the several provisions of the New York statute as construed. In this situation, we earnestly hope that the Court will not choose to treat the questions before it as isolated and independent matters—perhaps, in the process, giving some color of authority to a "balancing" theory of the

Fourth Amendment.[93] Apart from Sibron, Peters and Terry, thousands of our citizens daily are being stopped, detained and searched without probable cause. The extent of the intrusion varies from case to case; but all are unconstitutional, we believe, if there is (a) any restraint, or communicated sense of restraint, of the citizen's liberty of movement; or (b) any physical touching, probing, "frisking" or searching of the citizen, (c) without probable cause in its time-honored Fourth Amendment sense. We urge the Court to so declare.

IV.

Stop-and-Frisk, Law Enforcement and the People.

We have as yet said nothing about the various arguments to necessity and/or efficiency of the proponents of stop and frisk. We think that, on any fair appraisal of the state of present knowledge,[94] those arguments can be dispatched summarily: either as not proved (as the Court viewed similar arguments urged upon it from *Chambers* v. *Florida,* 309 U. S. 227 (1940), to *Miranda* v. *Arizona,* 384 U. S. 436 (1966)), or as necessarily subordinated by the Constitution of the United States (as the Court viewed the efficiency arguments made in *Berger* v. *New York, supra*). Particularly where, as here, the argument of police need is advanced to support the allowance of *new* police powers —powers never heretofore given under the Constitution; indeed, powers that erode *pro tanto* the bedrock principle of probable cause which undergirds the settled constitu-

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[93] See note 57 *supra* and accompanying text.

[94] See the literature collected in notes 15, 81 *supra.*

tional doctrine of the Fourth Amendment—we believe that the showing of need required to sustain the argument should be both factually convincing and normatively compelling. The argument of police need for street detention and frisk powers is neither.

Professor Herman Goldstein, a long-time student of the police and police administrator put the matter most succinctly in a recent article:

> "It is probably true that a program of preventive patrol does reduce the amount of crime on the street, although there has been no careful effort to measure its effectiveness. It is also apparent, however, that some of the practices included in a preventive patrol program contribute to the antagonism toward the police felt by minority groups whose members are subjected to them. A basic issue, never dealt with explicitly by police, is whether, even from a purely law enforcement point of view, the gain in enforcement outweighs the cost of community alienation." [95]

Others have asked the same or similar questions.[96]

Proponents of stop and frisk are fond of asserting that "aggressive patrol" keeps the crime rate down. We have not seen convincing evidence of this proposition. But even were it established that the *result* of aggressive patrol *was*

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[95] Goldstein, *Police Policy Formulation: A Proposal for Improving Police Performance*, 65 MICH. L. REV. 1123, 1140 (1967).

[96] See Traynor, *Lawbreakers, Courts and Law-Abiders*, 31 Mo. L. REV. 181, 201 (1966); Norris, *Constitutional Law Enforcement Is Effective Law Enforcement: Toward a Concept of Police in a Democracy and a Citizens' Advisory Board*, 43 U. DET. L. J. 203, 221-224 (1965); Foote, *Law and Police Practice: Safeguards in the Law of Arrest*, 52 NW. U. L. REV. 16, 28.

a decrease in street crime, of course it would not follow that the stop and frisk methods of aggressive patrol were *necessary* to achieve the decrease. Aggressive patrol involves both increased police presence on the streets and increased police intrusion. To say, when a program of aggressive patrol is followed by lower rates of reported crime (if it is) that the increased intrusion, or the combination of increased intrusion and presence is causing the observed effect—rather than that the increased presence alone is causing it—is mere speculation. The South African "blitz" practice described in note 11, *supra,* provides an obvious example. We are told that when a wave of 1000 to 2500 policemen suddenly inundates an area and manhandle all the blacks in sight, the robbery rate falls 50 per cent. That is an impressive figure. But one is led to wonder whether the robbery rate would not be quite as startlingly affected if 1000 to 2500 policemen suddenly appeared on the streets of the same small area, even if they did not stop and search the blacks. Surely, 2500 policemen flooding a neighborhood would have some effect, even if they did nothing but stand on the corners and talk to one another.[97]

However that may be, the point remains, as Professor Goldstein notes, that the evidence of the ill effects of stop and frisk practices, particularly in the ghetto, is as strong at least as any evidence of their good effects "from a purely law enforcement point of view." We have earlier noted the obvious, unhappy fact that the policeman today is the ob-

[97] For suggestions of the strong effect of increased police presence alone on crime control, see Foote, *The Fourth Amendment: Obstacle or Necessity in the Law of Arrest,* 51 J. CRIM. L., CRIM. & POL. SCI. 402, 405 (1960); Kennedy, *Crime in the Cities: Improving the Administration of Criminal Justice,* 58 J. CRIM. L., CRIM. & POL. SCI. 142, 143 (1967).

ject of widespread and intense hatred in our inner cities.[98] The National Crime Commission's Task Force on Police points to stop and frisk practices as one (obviously, only one) of the causes of this phenomenon.

> "Misuse of field interrogations . . . is causing serious friction with minority groups in many localities. This is becoming particularly true as more police departments adopt 'aggressive patrol' in which officers are encouraged routinely to stop and question persons on the street who are unknown to them, who are suspicious, or whose purpose for being abroad is not readily evident. The Michigan State survey found that both minority group leaders and persons sympathetic to minority groups throughout the country were almost unanimous in labelling field interrogation as a principal problem in police community relations." [99]

The least implication of these observations is that the police assertion of a need for stop and frisk power may itself reflect the same battle psychology[100] that is responsible for over-frequent use of the power—a psychology that is not always conducive to the best judgment, even on the question of what is good for the police. But the observations have other, more troubling implications which, in candor, we cannot pretermit. We are gravely concerned by the dangers of legitimating stop and frisk, and thus encouraging, and increasing the frequency of occasions for,

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[98] See note 75 *supra*.

[99] PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 184 (1967).

[100] See notes 74-77 *supra*. See also SKOLNICK, *op. cit. supra*, note 74, at 87-88, 105.

police-citizen aggressions. Speaking bluntly, we believe that what the ghetto does *not* need is more stop and frisk.

It is no accident that many major riots suffered since 1964 have been sparked by a public confrontation between the police and Negroes. Regardless of the underlying factors which set the stage for riot or increase its likelihood, it is plain that police-community encounters have triggered outbreaks of group hostility:

> In Cincinnati a Negro man protesting the death sentence of another Negro is arrested. In Boston, police advance with truncheons on women sitting-in at the welfare department. In Tampa, a cop shoots a Negro burglary suspect in the back after he had refused to halt. Each incident triggered violence. Stores were burned and looted, people injured. Rioting ended in Boston not because the police had dispersed crowds, but because the cops went away.[101]

Or as the *New York Times* put it:

> "Even before Newark the script was familiar. Some minor incident begins it all, often the arrest of a Negro by a policeman." [102]

We do not suggest, we emphasize lest we be misunderstood, that police conduct in any way "causes" riot or is responsible for it. Would it were so; the wrong could then be more readily righted. We will not repeat the "appall-

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[101] "Summer Riots" New Republic, June 24, 1967, p. 7. See also Hayden, *The Occupation of Newark,* 9 New York Review of Books, No. 3, Aug. 24, 1967, p. 14.

[102] Edit., *New York Times* July 16, 1967.

ingly familiar, statistical litany" [103] of social ills which are responsible. We only observe that the frustration and bitterness of poverty, unemployment, slum housing, ignorance and segregation easily fixes on the police; that in return, and often for quite good reasons, the police view the Negro with fear; and—how apt the word here—suspicion. The bloody turmoils which we have experienced are ignited and intensified by this mutual hostility.

The gap between Negroes and the police is enormous. A study by the National Crime Commission shows that "nonwhites, particularly Negroes, are significantly more negative than whites in evaluating police effectiveness in law enforcement." [104] Negroes and whites have widely different perceptions of police discourtesy, misconduct and honesty and the need for police protection.[105] The Commission's study supports the conclusions of the Director of the Lemberg Center for the Study of Violence, in a letter to counsel, that the police and Negro youth have perceptions of each other which escalate the conflict between them.[106]

> You have asked whether the Lemberg Center for the Study of Violence is in a position to make a statement on police-community relations as they affect behavior within the Negro ghetto. We have done a

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[103] Rustin, *Black Power and Coalition Politics* 42 Commentary 37 (Sept. 1966).

[104] PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 146 (1967).

[105] PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 146-149 (1967).

[106] The original of Dr. Spiegel's letter of July 14, 1967 has been deposited with the clerk.

great deal of face-to-face interviewing with Negroes in the ghettos of six different cities and have accumulated observations on some of the psychological aspects of interactions between Negro youth and young adults on the one hand and white police officers on the other.

According to our observation, police attitudes toward working class Negro youths and young adults are often based on the concept of the Negro as a savage, or animal, or some being outside of the human species. Therefore, the police expect behavior from Negroes in accordance with this concept. The young Negroes in cities have complementary attitudes toward police officers. The police are perceived as animal-like, brutal, and sadistic—again, outside the human species.

Because of the police officers conception of the Negro male, he frequently feels that most Negroes are dangerous and need to be dealt with as an enemy even in the absence of visible criminal behavior. Since he feels that he is dealing with an unreliable and powerful enemy, he has to deal with the threat in drastic ways, namely by suddenly and ruthlessly stripping and disarming any Negro who has aroused his suspicion. Because of the Negro's concept of the police, the young Negro male feels that he has only two alternatives open to him—intense resistance or abject surrender.

These complementary attitudes result in a vicious circle of behavior which serves to confirm the image which Negro males and police officers hold of each other. In addition, police practices meant to overpower or cow the suspect before evidence of his of-

fense is obtained have mainly a provocative effect. Such provocation is especially unfortunate in that it tends to produce an impression in the suspect that the police are not only as brutal as assumed, but are also frightened. In the mind of the Negro male, the police officer is over-reacting to the potential offense involved in the usual situation and this over-reaction is probably the result of fear as well as sadism. If the policeman is perceived as either frightened or brutal, the Negro male develops an attitude of contempt for the policeman as for his authority.

It is clear to me that it will be difficult to correct this complex process of interaction. As a start, better guidelines are needed for police behavior in respect to young Negro males. Specifically, it would be helpful if the police were trained to make more careful discriminations, wherever possible, with respect to potential Negro offenders. They should begin by interrogating any suspect as if he were a human being and as if he could be trusted to give responsible answers to the police officer in his mandatory role of investigating possible criminal behavior. It is often said that the police should be asked to show more "respect" for ghetto dwellers. I think this expression oversimplifies the situation as it is difficult to show respect to someone not considered to be a human being. My idea is that police officers should have more familiarity with the psychology of Negro youths so that they could make a more differentiated and appreciated response to their behavior. This would enable the police officer more readily and reliably to distinguish those Negro youths who are actually dangerous from those

who would cooperate with police officers if they were treated as responsible human beings.

I realize that these statements are only a beginning and that much more work in this area needs to be done. However, I hope that you will find what I have to say helpful in your own work.

John P. Spiegel, M.D.
Director

The Center's study of recent riots describes how police conduct may function, if perceived as unjust, to ignite violence:

" . . . riots tend to break out as a result of the interaction of two factors—the 'grievance level' of people in the ghetto and the inflammatory nature of the event which precipitates the initial disturbance. These two factors are in a reciprocal relation with each other: the higher the grievance level, the slighter the event required to trigger the riot. Low levels of Negro discontent require an event which is highly inflammatory in order that a riot break out. An 'inflammatory event' is usually an incident which is initiated by white people and which is perceived by black people in the ghetto as an act of injustice or as an insult to their community. The greater the injustice is perceived to be, the more 'inflammatory' is the effect of the incident.[107]

[107] Six Cities Study—a Survey of Racial Attitudes in Six Northern Cities: Preliminary Findings, A Report of the Lemberg Center for the Study of Violence, Brandeis University, June 1967.

There is, therefore, growing dissatisfaction on the part of many Negroes, especially the young, which focuses on the police as the most visible and provocative members of the white community. At the same time, police conduct and capacity is viewed in a dramatically distinct manner by Negroes, the police and other residents of the community.

In such a context, the need for "better guidelines . . . for police behavior", as Dr. Spiegel writes, is obvious. The National Crime Commission Task Force on Police felt compelled to repeat again and again the conclusion we have previously noted: that "field interrogations are a major source of friction between the police and minority groups" [108] and that "misuse of field interrogations" causes "serious friction with minority groups in many localities." [109] Arbitrary police conduct epitomizes, and sets off a response to, many grievances.[110]

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[108] PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 183 (1967).

[109] *Id.*, at 184. Although the Crime Commission believes that there is a need to authorize the police to stop suspects and possible witnesses of major crimes to detain them for brief questioning and to search for dangerous weapons, the Commission recommends such authority be hedged about with restrictions which the New York and Ohio practices under scrutiny do not contain. *Id.* at 185. In addition, the Commission concluded that "arrests for investigation or on suspicion, whatever label is attached, should be abolished by all departments that now utilize them. This practice has long been a source of justified community hostility." The Commission reached this conclusion after surveying arrest statistics which showed that arresting persons as a means of detaining them while an investigation of their possible involvement in the crime is conducted has been a common practice. But as we have shown, there is no real distinction between arrest on suspicion and detention and search for suspicion.

[110] See *id.*, at 185:

> 'The study concluded that the juveniles understood being sought and interrogated for their illegal activity:

To legitimate detention and search on "reasonable suspicion"—without probable cause—therefore is to give free reign to police intervention in the most dangerous way (without objective standards) in the most dangerous place (the ghetto street). If the police and the ghetto dweller view each other with fear, suspicion, often hatred, any enforced stop is a potential source of conflict. But when the stop is based on the inarticulate, unregulated judgment of the cop on the beat, the potential is magnified.

We do not suppose that such considerations as these can or should determine the Fourth Amendment question. We have rested our constitutional submission not on them, but on the firm grounds of history, authority and (we respectfully submit) reason, set out in Parts I-III of this Brief. However, we anticipate that the States of New York and Ohio will make the familiar inflated claims for stop and frisk as tools of law and order. If they do, let there be no mistake about this call to practicality. Whatever its conveniences and benefits to a narrow view of law-enforcement, stop and frisk carries with it an intense danger of inciting destructive community conflict. To arm the police with an inherently vague and standardless power to detain and search, especially where that power cannot effectively be

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'If you done something and you be lying and yelling when the boys from juvy come around and they catch you lying, well, what you gonna do? You gonna complain 'cause you was caught? Hell man, you can't do that. You did something and you was caught and that's the way it goes.

But they were indignant about field interrogation for offenses they did not commit—when "we were just minding our own business when the cops came along." And they particularly resented being singled out because of their clothes or hair: "Hell man, them cops is supposed to be out catching criminals! They ain't paid to be lookin' after my *hair!*" The juveniles consider this harassment by the police as a policy of confinement by a "foreign army of occupation."'

regulated, contributes to the belief which many Negroes undeniably have that police suspicion is mainly suspicion of them, and police oppression their main lot in life. Arbitrary police interrogation, street detention, and frisk are nothing less than a major part of that social and psychological constellation which in them produces "untoward counter reactions of violence." *Lankford* v. *Gelston,* 364 F. 2d 197, 204, n. 7 (4th Cir. 1966).

CONCLUSION

The Court should hold that neither stops nor frisks may be made without probable cause. In each of these cases, the judgment of conviction should be reversed.

Respectfully submitted,

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