9-29-1967

67/09/27 Brief of American Civil Liberties Union, American Civil Liberties Union of Ohio, and New York Civil Liberties Union, Amici Curiae

Thomas H. Barnard

Irwin M. Feldman

Lewis R. Katz

Bernard A. Berkman

Lewis A. Stern

See next page for additional authors

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

Nos. 67, 74, and 63

JOHN W. TERRY and RICHARD D. CHILTON, *Petitioners,*

—v.—

STATE OF OHIO, *Respondent.*

JOHN FRANCIS PETERS, *Appellant,*

—v.—

STATE OF NEW YORK, *Appellee.*

NELSON SIBRON, *Appellant,*

—v.—

STATE OF NEW YORK, *Appellee.*

BRIEF OF AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF OHIO, AND NEW YORK CIVIL LIBERTIES UNION, AMICI CURIAE

BERNARD A. BERKMAN
1320 The Superior Building
Cleveland, Ohio

LEWIS A. STERN
120 Broadway
New York, New York

MELVIN L. WULF
ALAN H. LEVINE
156 Fifth Avenue
New York, New York

Attorneys for Amici Curiae

THOMAS H. BARNARD
IRWIN M. FELDMAN
LEWIS R. KATZ
Of Counsel

September 29, 1967

INDEX

Table of Authorities

PAGE

Statutes:

Other Authorities:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 67

JOHN W. TERRY and RICHARD D. CHILTON,

Petitioners,

—v.—

STATE OF OHIO,

Respondent.

No. 74

JOHN FRANCIS PETERS,

Appellant,

—v.—

STATE OF NEW YORK,

Appellee.

No. 63

NELSON SIBRON,

Appellant,

—v.—

STATE OF NEW YORK,

Appellee.

BRIEF OF AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF OHIO, AND NEW YORK CIVIL LIBERTIES UNION, *AMICI CURIAE*

Interest of *Amicus*

The American Civil Liberties Union, of which the American Civil Liberties Union of Ohio and the New York Civil Liberties Union are affiliates, is a national organization of persons dedicated to the preservation of a free and open society, principally through the protections embodied in our Bill of Rights and the Fourteenth Amendment to the United States Constitution.

The formulation of standards of criminal due process consistent with the imperatives of individual liberty in an ordered society has long been a vital function of this Court. The entire spectrum of the rights of the accused has demanded, and quite properly received, its ever-increasing attention. Nowhere, however, is the relationship between the accused and prosecutorial government more critical than at the very inception of the criminal process—at the point of arrest and accompanying search—an area traditionally safeguarded by the protections of the Fourth Amendment.

The instant cases involve the application of the Fourth Amendment to on-the-street detention and interrogation, (known in street vernacular as "stop and frisk,").[1] In the opinion of the President's Commission on Law Enforce-

---

[1] The use by *amici* of the term "stop and frisk" throughout this brief is occasioned by its brevity. Wherever generally used, and as used here, the phrase has come to mean on-the-street detention for purposes of police interrogation, accompanied by a search of the person of the suspect, ostensibly for the purpose of protecting the safety of the police officer. In the absence of probable cause, the subsequent use of incriminating evidence so obtained to convict the suspect of a crime, demonstrates that, under some circumstances, a policeman's suspicion, like virtue, is its own reward.

ment, "No matter is more important to police-community relations than the manner in which police officers talk to people on the street." [2] The failure, in the name of police efficiency, to compel constitutional conduct in this sphere is, in the long view, inefficient as well as unconstitutional—it serves only to discredit the entire system of law enforcement in the eyes of the community which it serves and upon which it must ultimately depend to combat crime.

It is in the hope that in some measure *amici* may be of assistance to the Court in performing its delicate task in the instant case of weighing "the social need that crime shall be repressed" [3] against "the social need that the law will not be flouted by the insolence of office" [4] that this brief is filed.

The written consent of the parties to this appearance by *amici* has been obtained and filed with the Clerk of the Court.

Statement of the Case

Terry and Chilton

On October 31, 1963, at about 2:30 p.m., in broad daylight, petitioners were seen on a busy street in the business district in downtown Cleveland, Ohio (R. 12, 116). A plain-clothes police officer (R. 122), assigned to stores and pick-pockets in the downtown area (R. 106), observed their behavior for a period of about ten minutes (R. 13) from a

---

[2] Task Force Report: The Police 180 (1967).

[3] Cardozo, J. in *People* v. *Defore*, 242 N. Y. 13, 24, 150 N. E. 585, 589 (1926).

[4] *Ibid.*

vantage point across the street approximately 300 to 400 feet away (R. 12). He noted that petitioners, both Negroes, were walking back and forth on the sidewalk in front of a row of stores, peering in the windows of one of several stores (R. 23, 119) and returning to the corner, when they engaged in conversation with each other, and ultimately with a third man, a white man, who joined them later (R. 13, 22). Although he had no previous information about them (R. 119), did not know them (R. 119), and admitted that there was nothing unusual about their dress or appearance (R. 120) or their gait (R. 15, 121), he "suspected they were waiting for an opportunity to pull a stick-up" (R. 138) despite the fact that he had never arrested anyone before for a prospective "stick-up" (R. 160) nor had he ever in his entire thirty-five years of experience as a detective observed anyone "casing a place" for prospective misconduct (R. 46).

He subsequently testified that he "didn't like them (R. 118) or "their actions" (R. 42), that he "was just attracted to them and * * * surmised that there was something going on" (R. 47), and that he did not know whether if he saw them engaged in the identical conduct again he would have had any cause for suspicion (R. 47).

In any event, when the police officer saw the three men conversing, he ran across the street (R. 121) and in the ordinary pedestrian traffic of a busy street in a commercial district during business hours (R. 124), accosted petitioners and the other man (R. 16). He said he was a police officer but did not show his badge (R. 122), or identify himself further (R. 123). He asked the men their names (R. 16, 123), and they responded with alacrity (R. 16). Whereupon the police officer grasped petitioner Terry, turned

him around and patted the outside of his topcoat, felt the outlines of a weapon, reached into the upper left hand inside pocket of his topcoat, felt the handle of a gun, and, when he could not pull the gun out of the pocket easily, pulled the topcoat off petitioner and seized the weapon (R. 16, 124). The police officer then ordered the three men into a nearby store (R. 13, 125), shouted to the storekeeper to "call the wagon" (R. 125)—at which point the police officer conceded all three men were under arrest, Terry for carrying a concealed weapon (R. 33), the other two for "association with him" (R. 131). While they had their hands raised above their heads, the police officer proceeded to search petitioner Chilton and the other man (R. 17), and discovered and seized a gun in the outer left hand pocket of Chilton's coat (R. 17, 19). Search of the other man revealed no weapons (R. 17). All three men were transported to the police station (R. 134). Petitioners were charged initially with "investigation" and then with carrying concealed weapons in violation of Section 2923.01 Ohio Revised Code (R. 129).

The trial judge, after expressly rejecting the contention of the prosecution that the seizure of the weapons was pursuant to a lawful arrest (R. 100), overruled defense motions to suppress on the ground that "the guns [were] the fruit of the frisk, and not of a search" (R. 98).

Peters

On July 10, 1964 at about 1:00 p.m., Samuel Lasky, a New York City Policeman, at the time off-duty, heard a noise at the door of his apartment in Mount Vernon. He looked through the peephole of the door and saw appellant Peters and another man "tiptoeing" down the hallway (R.

15). Although Lasky's apartment building houses approximately 120 tenants (R. 14), when Lasky didn't recognize the men he called police headquarters to report the incident (R. 15). He then returned to the peephole and saw the two men still tiptoeing down the hall toward a stairway (R. 15). With his service gun in hand he ran down the hallway and down the stairs after the two men. Lasky apprehended Peters as the latter was "walking in a rapid way" down the stairway away from him (R. 15, 19).

Seizing Peters by the shirt collar (R. 16, 20), Lasky questioned him at gunpoint (R. 18) as to what he was doing in the building. There is no testimony in the record which would indicate that Lasky was in any danger of any kind as he held Peters at gun point. Peters said that he was looking for a girl friend. When asked for her name, he stated that she was a married woman and declined to name her (R. 21). Lasky then "frisked" Peters (R. 21), felt a hard object in Peters' right pants pocket, and took out an opaque plastic envelope (R. 17, 18). In the envelope, Lasky found "6 picks and 2 Allen wrenches with the short leg filed down to a screwdriver edge, and a tension bar" (R. 17).

Peters was then arrested by City of Mount Vernon Police who arrived in response to Lasky's earlier telephone call. After indictment for illegal possession of burglar's tools, defendant's motion for the suppression of the evidence seized by Lasky during the "frisk" was denied (R. 3-4).

Sibron

On March 9, 1965, Patrolman Anthony Martin of the New York Police apprehended Sibron in a restaurant in Brooklyn. Officer Martin, in uniform, ordered Sibron to

step outside. As Sibron left the restaurant, the officer stated, "You know what I am after" (R. 16). Sibron and the officer then, more or less simultaneously, reached into Sibron's jacket pocket where the officer grabbed several packets of narcotics (R. 16-17). The officer did not have a search warrant (R. 9-10).

Officer Martin testified that on March 9th, over a period of eight hours, he had observed Sibron in conversation with six or eight persons who he knew to be drug addicts (R. 13-15). When Sibron went into the restaurant, Officer Martin saw him speaking with three other known addicts (R. 15). He did not know what any of the conversations were about (R. 18). He then called Sibron from the restaurant, questioned and searched him, and discovered the packets of heroin (R. 16-17).

A motion to suppress the evidence was denied (R. 20).

In the view of *amici,* although some factual distinctions among these cases might be made, they are distinctions without a constitutional difference and all are entitled to reversal for the same legal reasons. Accordingly, *amici* have consolidated their legal arguments for reversal of all three cases in the balance of this brief.

Argument

The instant cases present for review examples of a growing trend of state court decisions[5] and statutes[6] authorizing police to stop, question, and "frisk" or search "suspicious persons" without probable cause to believe that the suspect

---

[5] *California:* People v. Garrett, 238 Cal. App. 2d 292, 47 Cal. Rptr. 731 (3d Dist. Ct. App. 1965); People v. Michelson, 59 Cal. 2d 448, 450-51 (1963); *Massachusetts:* Commonwealth v. Ballou, 217 N. E. 2d 187 (1966); *New York:* People v. Pugach, 15 N. Y. 2d 65, 204 N. E. 2d 176, cert. den. 380 U. S. 936 (1965); People v. Rivera, 14 N. Y. 2d 441, 201 N. E. 2d 32, cert. denied 379 U. S. 978 (1964); *New Jersey:* State v. Dilley, 49 N. J. 460 (1967); *Pennsylvania:* Commonwealth v. Hicks, 223 A. 2d 873 (Pa. Super. Ct. 1966). But see United States v. Margeson, 259 F. Supp. 256 (E. D. Pa. 1966) and cases cited at footnote 22 *infra*.

[6] N. Y. Code Crim. Proc. § 180-a, which is raised for review in Nos. 63 and 74. A "Stop and Search" bill was introduced in the Ohio legislature early in the 1967 session and defeated after a vigorous floor debate. See Cleveland Plain Dealer, Feb. 23, 1967, p. 4 col. 3. A similar fate was met by recently proposed statutes in Illinois (H. B. 1078) and Michigan (S. B. 747). See, *Frisking in the Absence of Sufficient Grounds for Arrest as a Common Police Practice Today*, 1965 U. ILL. L. F. 119, 127; see also, AMERICAN LAW INSTITUTE, MODEL CODE OF PREARRAIGNMENT PROCEDURE § 2.02 (Tent. Draft No. 1, 1966); A REPORT BY THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY (U. S. Govt. Printing Office, Feb. 1967).

Section 180-a of the N. Y. Code of Criminal Procedure is modeled upon the Uniform Arrest Act promulgated more than twenty years ago by the Interstate Commission on Crime. See Warner, "The Uniform Arrest Act", 28 U. Va. L. Rev. 315 (1942). Statutes modeled on the Uniform Arrest Act have been enacted in New Hampshire, Rhode Island, and Delaware. N. H. Laws, §§ 594:2-3 (1955); R. I. Gen. Laws Ann. § 12-7-1 (1965); Del. Code Ann. Tit. 11, § 1902 (1953). Similar legislation has also been enacted in Hawaii, Massachusetts and the City of Miami, Florida. Rev. Laws of Hawaii, Tit. 30, ch. 255, §§ 4-5 (1955); Mass. Gen. Laws ch. 41, § 98 (1961); Code of City of Miami, Florida, § 43-46 (1957), as amended by Ord. No. 7,367 (1965).

has committed a crime. Unless this Court acts, this trend will effectively emasculate the shield of probable cause which the Fourth Amendment has heretofore interposed between the legitimate investigative function of the police and the right of the individual to be let alone.

It cannot be doubted that for many years, state police officers have been stopping and frisking suspects, without their consent, without a search warrant or probable cause, and using the yield of such searches to convict them of crimes. The constitutionality of such police practice has been in doubt at least since *Wolf* v. *Colorado,* 338 U. S. 25 (1949), which applied the core of the Fourth Amendment to the states through the Due Process Clause of the Fourteenth. The evidence so seized has been constitutionally inadmissible in state criminal cases since *Mapp* v. *Ohio,* 367 U. S. 643 (1961) as a result of the elevation of the federal exclusionary rule of *Weeks* v. *United States,* 232 U. S. 383 (1914), to a constitutional command. And when *Beck* v. *Ohio,* 379 U. S. 89 (1964) made it clear that federal standards of arrest, including the constitutional condition precedent of probable cause, set the minimal requirements of valid *state* arrest as well, the constitutional threat to continued state police "stop and frisk" activity was evident.

The decisions and statutes which have upheld the validity of "stops and frisks" have reasoned (i) that a "stop"—a compulsory detention by the police for purposes of interrogation—is not an arrest requiring probable cause for its validity, but a species of sub-arrest or non-arrest to which none of the constitutional requirements of arrest apply and which may lawfully be effected on "suspicion" or "reason-

able suspicion" of past or even future crimes, and (ii) that a "frisk"—which the courts have frequently defined as "the patting of the exterior of one's clothing in order to detect by touch the presence of a concealed weapon" [7]—is a "lesser degree" invasion of privacy than a "full-blown search of the person" and is accordingly "reasonable" within the meaning of the Fourth Amendment when effected incident to a "stop" and when the policeman "suspects" (although without probable cause) that the frisk is necessary for his self protection. In No. 67, the lower court added the further novel observation that even if the frisk was unconstitutional, the raison d'etre of the exclusionary rule of *Mapp* v. *Ohio,* 367 U. S. 643 (1961) does not require the product of the frisk to be barred from evidence since "a judicial rule rendering evidence produced as the result of a 'frisk' inadmissible would fail to deter the police from 'frisking' suspects believed to be armed, as police 'frisk' for their own protection rather than for the purpose of looking for evidence." [8]

Tenuous as the foregoing reasoning is, the lower courts have in practice applied the "stop and frisk" doctrine so as to reduce their own stated requirement of "reasonable suspicion" to mere "intuition," and to validate arrests which are more than mere temporary detentions, and general searches which are more than mere "frisks" and which have no relation whatever to the self-protection needs of the police officer.

---

[7] People v. Peters, 18 N. Y. 2d 238, 245 (1966); People v. Rivera, 14 N. Y. 2d 441, 446 (1964); State v. Terry, 214 N. E. 2d at 120. But see People v. Taggart, —— N. Y. 2d —— (July 7, 1967).

[8] 214 N. E. 2d 121.

Thus, in No. 74, the New York Court of Appeals defined the "reasonable suspicion" required for stop and frisk under Section 180-a of the N. Y. Code of Criminal Procedure in the broadest possible terms as constituting the mere *intuition* of the experienced police officer:

> "By requiring the reasonable suspicion of a police officer, the statute incorporates *the experienced police officer's intuitive knowledge and appraisal* of criminal activity. *His* evaluation of the various factors involved insures a protective, as well as definitive, standard" 18 N. Y. 2d at 245. (Emphasis added.)

Judge Van Voorhis accurately defined the scope of §180-a and the New York case law in his dissent in No. 63 below, as follows:

> "The power to frisk is practically unlimited, inasmuch as whether an officer 'reasonably suspects' that someone is committing, has committed or is about to commit a felony necessarily depends to a large extent upon the subjective operations of the mind of the officer" 18 N. Y. 2d 605.[9]

In No. 74, the lower court upheld the forcible apprehension of appellant Peters at gunpoint as a mere "frisk" since no formal arrest was made. Yet the Supreme Court of New Jersey has since held that a "stop", not an arrest, occurred even where the officer formally advised the accused that he was under arrest. The Court observed:

---

[9] Indeed, the lower courts in No. 67 and No. 74 implied that a person is protected from detention and search under the "stop and frisk" doctrine only where his activities are "perfectly normal". See People v. Peters, 18 N. Y. 2d at 246 and 254 N. Y. Supp. 2d at 13; State v. Terry, 214 N. E. 2d at 118.

> "... it seems evident to us that the legality of incidental street detention for purposes of summary inquiry should not be permitted to turn on whether it is formally labelled as an arrest but rather on whether it was reasonable in the light of the circumstances." *State* v. *Dilley,* 49 N. J. 460, 467-68 (1967).

Moreover, "frisks" have not been limited to "the patting of the exterior of one's clothing". In No. 74, the frisk of appellant was completed when he felt a hard object in appellant's pocket and withdrew an opaque envelope from the pocket. The officer went further, however, and searched the envelope. Similarly, in No. 63, the New York Court of Appeals held valid a so-called frisk where "the officer put his hand into the suspect's pocket" (18 N. Y. 2d 604). In *People* v. *Taggart,* —— N. Y. 2d —— (July 7, 1967), the New York Court of Appeals explicitly acknowledged that the so-called "frisks" in these cases were "searches" and explicitly held that §180-a of the New York Code of Criminal Procedure authorized searches of the person without probable cause.

Finally, although the stop and frisk doctrine has been rationalized on the basis of the self-defense needs of the police officer, lower courts have not limited the doctrine to circumstances where a frisk is genuinely necessary for the protection of the policeman. In No. 74 there is not one shred of evidence that the officer reasonably—or even unreasonably—believed he was in any danger as he held appellant Peters by the collar, at gun point, and questioned him. Moreover, any danger that may have existed in that situation was removed at the moment when the officer removed the opaque envelope from appellant's pocket. There

existed no further possible danger to justify the officer's opening the envelope and examining its contents.[10] There is a similar complete lack of evidence of danger to the officers in Nos. 67 and 63. As Judge Van Voorhis noted in his dissent in No. 63 below, the authorization to search granted to the police in New York has been defined so broadly that "the safety of the officer or public from violence is not remotely involved". 18 N. Y. 2d 607.

Amici urge that (I) the detentions and interrogations in the three cases at bar were arrests or "seizures of persons" within the purview of the Fourth Amendment, as applied to the states through the Fourteenth, and that they were invalid by operation of that same constitutional authority; (II) the "frisks" were searches within the meaning of the Fourth Amendment, as applied to the states through the Fourteenth, and invalid by that same authority; and (III) the use of the yield of the searches in evidence against the defendants cannot be justified by the public policy of protecting the safety of police officers.

Each of these contentions will be considered in sequence below.

---

[10] Similarly, in People v. Pugach, 15 N. Y. 2d 65 (1965), cert. den. 380 U. S. 936 (1965), where the police searched the defendant's briefcase before taking him to the police station for questioning, any possible danger to the police from a weapon in the briefcase could have been eliminated by the simple expedient of keeping the briefcase away from the defendant in the front seat of the police car, and no search of the briefcase was necessary. See 15 N. Y. 2d at 71 (Fuld, J., dissenting).

I.

The detentions and interrogations were illegal seizures of the person.

This Court has repeatedly held that the Fourth Amendment prohibits any arrest without "probable cause".[11] In the context of the instant cases, it is well to bear in mind that this prohibition is based upon the Fourth Amendment's restrictions on "seizures" of "persons":

> ". . . it is the command of the Fourth Amendment that no warrants for either searches or arrests shall issue except 'upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.'" *Henry* v. *United States,* 361 U. S. 98, 100 (1959)

Thus, it is clear that the well settled requirement of probable cause extends to all seizures of the person and is not limited to "arrests" in some restricted, formal sense as the courts below have held.[12]

Each of the so-called "stops" in the instant cases unquestionably constituted an unlawful seizure of the person in violation of the Fourth Amendment.

---

[11] See Wong Sun v. United States, 371 U. S. 471 (1963); Rios v. United States, 364 U. S. 253 (1960); Henry v. United States, 361 U. S. 98 (1959); Draper v. United States, 358 U. S. 307 (1959); Brinegar v. United States, 338 U. S. 160 (1949); Carroll v. United States, 267 U. S. 132 (1925).

[12] See also Souris, *Stop and Frisk or Arrest and Search—The Use or Misuse of the Euphemisms,* 57 J. Crim. L. C. & P. S. 251, 257; Foote, *The Fourth Amendment: Obstacle or Necessity and the Law of Arrest,* 51 J. Crim. L. C. & P. S. 402, 403-04.

There is ample authority for the contention that at the moment Terry and Sibron were first stopped and questioned by a police officer who identified himself as such—at the moment they were restrained of their liberty of motion by a law enforcement authority of the state—they were under arrest for constitutional purposes.[13] *Henry* v. *United States*, 361 U. S. 98, 103 (1959) so holds. Those who seek to avoid the consequences of the *Henry* "moment of restriction of liberty" rule of arrest urge that the Government concession in *Henry* that the arrest took place at the moment of the "stop" limits that decision to its particular facts. Such attempts to dilute the holding of *Henry* fail to consider the fact that although the Court was not bound by the Government's concession,[14] it viewed the facts of the case independently and concluded that "[w]hen the officers interrupted the two men and *restricted their liberty of movement*, the arrest * * * was complete."[15] There is substantial lower court authority to support this interpretation of *Henry*.[16]

---

[13] It might parenthetically be noted that the authority granted a police officer under the instant cases to stop and question suspects raises separate substantial questions under Miranda v. Arizona, 384 U. S. 436 (1966), should an attempt be made to introduce the suspect's response to such questioning in evidence. See also Reich, *Police Questioning of Law-Abiding Citizens*, 75 Yale L. J. 1161 (1966).

[14] 361 U. S. at 105 (Clark, J., dissenting).

[15] *Id.* at 103. *Cf.* Rios v. United States, 364 U. S. 253 (1960).

[16] See United States v. Baxter, 361 F. 2d 116 (6th Cir. 1966), cert. den. 385 U. S. 134 (1966); Seals v. United States, 325 F. 2d 1006 (D. C. Cir. 1963); United States v. Viale, 312 F. 2d 595, 601 (2nd Cir. 1963); Kelly v. United States, 298 F. 2d 310 (D. C. Cir. 1961); Coleman v. United States, 295 F. 2d 555 (D. C. Cir. 1961), cert. den. 369 U. S. 813 (1962); Green v. United States, 259 F. 2d 180 (D. C. Cir. 1958), cert. den. 359 U. S. 917 (1959);

In any case, there can be little doubt that once a police officer lays hands on a suspect and forceably restrains his movement or exacts involuntary movement from him, an "arrest" or "seizure" for constitutional purposes has occurred, and philosophic and semantic distinctions between "arrest" and "detention" become (if they have not always been) hopelessly irrelevant. See *Henry* v. *United States*, 361 U. S. 98, 104 (1959):

> "Under our system suspicion is not enough for an officer to *lay hands on a citizen.*"

See also *United States* v. *Rios*, 364 U. S. 253, where, in remanding the cases for resolution of a conflict in testimony, this Court held that if a police officer approached a suspect with his revolver drawn and "took hold of the defendant's arm" (364 U. S. at 257-58) before the officer had probable cause to make an arrest, an unconstitutional arrest or seizure of the person had occurred. 364 U. S. at 261-62.[17]

United States v. Scott, 149 F. Supp. 837 (D. D. C. 1957); Long v. Ansell, 69 F. 2d 386 (D. C. Cir. 1934); United States v. Mitchell, 179 F. Supp. 636 (D. D. C. 1959); Turney v. Rhoades, 42 Ga. App. 104, 155 S. E. 112 (1930).

See also Foote, *The Fourth Amendment: Obstacle or Necessity and the Law of Arrest*, 51 J. Crim. L., C. & P. S. 402 (1960). But see *contra:* United States v. Thomas, 250 F. Supp. 771 (S. D. N. Y. 1966); United States v. Vita, 294 F. 2d 524 (2d Cir. 1961), cert. denied 369 U. S. 823 (1962); Busby v. United States, 296 F. 2d 328 (9th Cir. 1961); United States v. Bonanno, 180 F. Supp. 71 (S. D. N. Y. 1960) *rev'd on other grounds sub nom.;* United States v. Bufalino, 285 F. 2d 408 (2d Cir. 1960).

[17] And see Green v. United States, 259 F. 2d 180, 182 (D. C. Cir. 1958), cert. den. 359 U. S. 917 (1959): "Had he remained standing where he was first accosted, or had he merely refused to talk, the police would have lacked probable cause either to arrest or to search him. The officers would have had no justifiable reason *to lay hands upon him.*"

If the protections of privacy derived from the Fourth Amendment are to remain meaningful, if they are not to be diluted beyond recognition and beyond the legitimate needs of law enforcement, Fourth Amendment standards should be applied in each instance of governmental restraint of the person of its citizenry, no matter how fleeting, without the substitution of semantic devices for constitutional requirements. For careful analysis "exposes the thinness of the claim that investigative arrests are essential to public safety. On the contrary, the practice of investigative arrests breeds resentment, discourages thorough police work, and sets an official standard of lawlessness." [18]

II.

The frisks were illegal searches.

Amici have urged that arrests or seizures of the person for purposes of constitutional analysis occurred before the "frisks," that they were invalid arrests or seizures in the absence of probable cause to make them, and that the suppression of evidence obtained incidental thereto was therefore constitutionally compelled. If the Court so holds, the legal analysis in these cases is over. For it has never been seriously contended that a non-consensual warrantless search, without independent probable cause to search, may be justified by a contemporaneous unconstitutional arrest.

But even if this court should somehow affirm the position taken by the courts below and hold that the "stopping"

---

[18] Joint Comm. on the District of Columbia, *Crime in the District of Columbia*, H. R. Rep. No. 176, 89th Cong., 1st Sess. 139 (1965) (minority views).

of some or all of the petitioners and appellants in the instant cases constituted an "investigatory detention" which is not itself in violation of the Fourth Amendment, such a non-arrest cannot validate under the Fourth Amendment the frisks of petitioners and appellants which occurred. The Fourth Amendnment, as construed by this Court, does not merely prohibit searches incident to unlawful arrests; heretofore any search without a warrant, based upon probable cause has been considered lawful only if made incident to a lawful arrest made upon probable cause. E.g. *Aguilar* v. *Texas,* 378 U. S. 108, 112, n. 3, 122 (1964); *Rios* v. *United States,* 364 U. S. 253, 261-64 (1960). There is no authority whatever justifying any search on the basis of its being reasonably incident to an "investigatory detention" made on less than probable cause.

The attempted constitutional justification which has been advanced for the "frisk" is even more tenuous than the constitutional sanction advanced for the "stop." The attempt to exempt the "frisk" from the Fourth Amendment protections has taken two forms. First, by semantic alchemy, it is denied that a "frisk" is a search within the operation of the Fourth Amendment. Second, even where it is conceded that, within the meaning of the Fourth Amendment, the "stop" is a seizure of the person and the "frisk" is a search, both the "stop" and incidental "frisk" are sought to be justified, in the absence of probable cause, as "reasonable searches and seizures," under a test of "reasonableness" which, it is argued, is an interchangeable alternative to the requirement of probable cause.[19]

Each of these arguments will be discussed below.

---

[19] The American Law Institute has taken this view. See MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE (Tent. Draft No. 1, 1966).

A. *A "Frisk" Is a Search Within the Meaning of the Fourth Amendment*

The suggestion that a police officer who runs his hands over the *outside* clothing on the body of a suspect in the public street without his consent for the express purpose of determining what the suspect has concealed *inside* his clothing is conducting, not a *search,* but a *frisk*—a form of non-search or sub-search which defies Fourth Amendment proscription—would be ludicrous if its consequences were not so destructive of "the right to be let alone." [20]

Judge Fuld, dissenting in *People* v. *Rivera,* has properly destroyed this attempted distinction:

> "This is nothing but an exercise in semantics; a search by any other name is still a search. Viewed in the perspective of constitutionally protected interests, a police tactic—call it a search or, more euphemistically, a 'frisk'—which leads to discovery of a gun in an individual's pocket by trespassing on his person is indisputably an invasion of privacy. A 'frisk' is a species of search and, in point of fact, both decisions and dictionaries so define it * * *.
>
> "Free men should no more be subject to having the police run their hands over their pockets than through them. Neither the Fourth Amendment nor, for that matter, the common law of tort distinguishes * * * between a cursory search and a more elaborate one. In both instances, it is the slightest touching which is condemned, and the reason for this is the insult

---

[20] Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

> to individuality, to individual liberty, is as grave and as objectionable in the one case as in the other." [21]

Indeed, in *People* v. *Taggart,* —— N. Y. 2d —— (July 7, 1967), the New York Court of Appeals abandoned its distinction between a "frisk" and a "search" and explicitly held that §180-a of the New York Code of Criminal Procedure authorized searches of the person incident to "stops" made on less than probable cause.

The governing principle that any invasion of privacy is subject to constitutional protection was clearly stated as long ago as *Boyd* v. *United States,* 116 U. S. 616 (1886). In *Boyd,* where the Court struck down a statute requiring importers to produce certain invoices or admit the government's allegations as to the contents of the invoices, this Court discussed Lord Camden's decision in *Entick* v. *Carrington,* 19 How. St. Tr. 1030, and concluded, 116 U. S. at 630:

> "The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where

[21] People v. Rivera, 14 N. Y. 2d 441, 449-450, 201 N. E. 2d 32, 37, 252 N. Y. S. 2d 458, 466 (1964), cert. denied 379 U. S. 978 (1964).

> that right has never been forfeited by his conviction of some public offense,—it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of that judgment. In this regard, the Fourth and Fifth Amendments run almost into each other."

The Court further noted 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." *Id.* p. 635.

It is obvious that the patting of the exterior of one's clothing is an invasion into the "privacies of life", "personal security", and "personal liberty", and that, under the *Boyd* and *Entick* decisions, it is this invasion "that constitutes the essence of the offense" while any distinctions of degree which may exist between such a "frisk" and a "full-blown search" are merely differences as to the "circumstances of aggravation".

It is noteworthy that the specific portions of the *Boyd* decisions quoted above were reaffirmed in *Mapp* v. *Ohio,* 367 U. S. 643, 646-67 (1961), and more recently in *Berger* v. *United States,* 388 U. S. 41 (1967).[22]

---

[22] Several lower courts have squarely held that a frisk of an accused for weapons is indistinguishable from a "full-blown search"

The attempt to withdraw searches of any particular variety from the operation of the Fourth Amendment by a process of nomenclature and classification is both sterile and dangerous. Calling a search a "frisk" and excluding it from Fourth Amendment controls because of its label is a form of non-analysis which will survive neither logic, common experience, nor the decided case law of this Court in the area of individual privacy. The greatest danger of such a device, however, is its destructive effect upon one of the basic guarantees which a society, if it is to remain free, must provide each citizen—the right to walk the public streets secure in the knowledge that, without probable cause to do so, the police cannot put their hands on his or her body for any purpose.

B. *A "Frisk" in the Absence of Probable Cause Is Not a Reasonable Search Within the Meaning of the Fourth Amendment*

Once it has been determined that a frisk is, in fact and law, a search within the operation of the Fourth Amendment, those who seek constitutional justification for police frisks without either a contemporaneous arrest or a search warrant based upon probable cause, urge that such frisks

---

of the accused's person. In White v. United States, 271 F. 2d 829 (D. C. Cir., 1959), the court held that a law enforcement officer had violated the accused's constitutional rights where:

> "The officer had no warrant of any kind and no probable cause to accost appellant, require him to place his hands in a certain position, and frisk him."

In State v. Collins, 150 Conn. 488, 491-92, the court held:

> "The 'frisking' of the defendant, as he stood against the car, to see if he was armed was also a search of the person."

See also Ellis v. United States, 264 F. 2d 372, 374 (D. C. Cir. 1959) cert. den. 359 U. S. 948; People v. Esposito, 118 Misc. 867, 871-72, 194 N. Y. S. 326, 331-32 (1922).

are "reasonable" police conduct whenever they are based upon the police officer's "suspicion"—which in New York, at least, may be a purely "intuitive" one—that the subject of the search has committed a crime or is about to commit a crime *in futuro* and that the police officer may be in danger. Since the Fourth Amendment prohibits only "unreasonable" searches and seizures (the argument runs) the reasonableness of the police conduct is a constitutionally adequate substitute for probable cause, and the "frisk" is therefore a valid search.

This contention, although novel, flatly contradicts a wealth of authority construing the Fourth Amendment. More importantly, the adoption of such a construction of the Fourth Amendment would effectively eviscerate the right of privacy the Amendment was designed to protect.

This Court has unmistakably held on numerous occasions that any search of the person of an accused without a warrant is constitutional only if made incident to an arrest based upon "probable cause" to believe that the accused has committed a crime.[23] The historical roots of the requirement of probable cause were explored at length in *Henry* v. *United States,* 361 U. S. 98, 100-102 (1959). Since the stop and frisk doctrine purports to authorize searches on "suspicion", "reasonable suspicion" or even "intuition", it is relevant to note that in the *Henry* case this Court specifically held:

---

[23] This Court has never used the "reasonableness" test to take the place of probable cause as a necessary element of a lawful arrest or search. In United States v. Rabinowitz, 339 U. S. 56 (1950), this Court enunciated the "reasonableness" test solely for the purpose of determining whether, after an arrest pursuant to a valid warrant, a showing of probable cause to search was sufficient to preclude the necessity of obtaining a search warrant as well.

> "As the early American decisions both before and immediately after its [the Fourth Amendment's] adoption show, common rumor or report, *suspicion, or even 'strong reason to suspect'* was not adequate to support a warrant for arrest. And that principle has survived to this day . . . It was against this background that scholars recently wrote, 'Arrest on mere suspicion collides violently with the basic human right of liberty'. . . . While a search without a warrant is, within limits, permissible if incident to a lawful arrest, if an arrest without a warrant is to support an incidental search, it must be made with probable cause." (361 U. S. 101-102) (emphasis added).

The basic constitutional requirement of "probable cause" is clearly stated in *Ker* v. *California,* 374 U. S. 23 (1963), a case which has been cited by proponents of the stop and frisk doctrine for the proposition that:

> "A State is not precluded from 'developing workable rules' governing searches to meet 'the practical demands of effective criminal investigations and law enforcement' if the State does not violate the constitutional standard of what is reasonable." [24]

Although the majority of this Court divided evenly on applying the Fourth Amendment's constitutional criteria to the facts of the *Ker* case, eight of the nine justices unequivocally agreed that probable cause is an absolute necessity for any search. Mr. Justice Clark, with the concurrence of Justices Black, Stewart, and White, observed:

---

[24] People v. Rivera, 14 N. Y. 2d 441, 448 (1964); see also People v. Peters, 18 N. Y. 2d 238, 247 (1966); State v. Terry, 214 N. E. 2d 714, 121-22 (1966); State v. Dilley, 49 N. J. 460, 470 (1967).

> "The evidence at issue, in order to be admissible, must be the product of a search incident to a lawful arrest, since the officer had no search warrant. The lawfulness of the arrest without a warrant, in turn, must be based upon probable cause . . . " (374 U. S. at 34-35).

And Mr. Justice Brennan noted in an opinion in which the Chief Justice, Mr. Justice Douglas, and Mr. Justice Goldberg concurred:

> "It is much too late in the day to deny that a lawful entry is as essential to vindication of the protections of the Fourth Amendment as for example, probable cause to arrest or a search warrant for a search not incident to an arrest" (374 U. S. at 53).

In *Aguilar* v. *Texas*, 378 U. S. 108 (1964) both the majority and dissenting justices of this Court again agreed that the Fourth Amendment requires "probable cause" for any search whether with or without a warrant (378 U. S. at 112, n. 3 and 378 U. S. at 122).

Thus, our analysis of the "frisk" as a Fourth Amendment violation returns to its place of beginning. A frisk must be a search as that term is used in the Fourth Amendment. And as a search it cannot be a reasonable search unless it is accompanied by probable cause to arrest or search. Since, in the cases at bar, neither probable cause to arrest nor probable cause to search could be shown, except by use of the yield of the frisk itself, the frisks themselves were unreasonable searches and their yield should have been suppressed by command of the Fourth and Fourteenth Amendments.

III.

Protection of police officers cannot justify the use of the yield of the frisk in evidence against petitioners.

Amici have demonstrated (Argument II, *supra*) that a frisk for weapons without probable cause to arrest or search is an unreasonable search expressly prohibited by the Fourth Amendment. It follows that the yield of such a search must be suppressed by virtue of the exclusionary rule made applicable to the states in *Mapp* v. *Ohio,* 367 U. S. 643 (1961).

But the sponsors of exceptional constitutional treatment for such frisks urge that society's substantial interest in protecting the lives of its law enforcement authorities in the course of their investigation of crime compel relaxation of settled constitutional principles to achieve this important societal purpose. They urge that such searches are necessary for crime investigation and police protection, that they are, therefore, not constitutionally infirm, and that, as a result, the exclusionary rule does not reach their fruits. Because everyone is quite correctly concerned with the safety of the police in the performance of their dangerous and highly important function of preserving order, the argument has a certain surface appeal.

Upon closer inspection, however, the argument disintegrates entirely. For (A) adequate exceptions for police necessity already exist in the Fourth Amendment case law, and the addition of new ones in the "stop and frisk" sphere is not necessary for the protection of legitimate police interests, and (B) as a practical matter, the use in evidence of the yield of searches made in violation of

clear Fourth Amendment principle would provide great incentive for police officers, under the guise of self-protection, to make general searches of the person, thus frustrating the great purposes of the Fourth Amendment which the exclusionary rule was designed to protect.

Each of these contentions will be considered below.

A. *There Is No Legitimate Police Need for the "Frisk" Exception to Fourth Amendment Protections*

When police necessity is urged as a ground for legitimizing frisks without probable cause, the listener has the unerring feeling that he has heard the argument somewhere before. It was precisely this argument that was made to obtain this Court's approval of the warrantless search incidental to a valid arrest, an exception to the general requirement that searches must be by warrant.[25]

Originating as a dictum justifying the search of the person of an accused pursuant to valid arrest,[26] it was expanded to include the immediate place of arrest[27] and

---

[25] "Unquestionably, when a person is lawfully arrested, the police have the right, without a search warrant, to make a contemporaneous search of the person of the accused for weapons or for the fruits of or implements used to commit the crime * * * . This right to search and seize without a search warrant extends to things under the accused's immediate control * * * and, to an extent depending on the circumstances of the case, to the place where he is arrested * * * ." Preston v. United States, 376 U. S. 364, 367 (1964). See also Schmerber v. California, 384 U. S. 770 (1966); United States v. Ventresca, 380 U. S. 102 (1965); United States v. Rabinowitz, 339 U. S. 56 (1950); Harris v. United States, 331 U. S. 145 (1947); Marron v. United States, 275 U. S. 192 (1927); Agnello v. United States, 269 U. S. 20 (1925); Weeks v. United States, 232 U. S. 383 (1914).

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

[27] Agnello v. United States, 269 U. S. 20 (1925).

the entire four-room apartment of an accused who was arrested in one of the rooms.[28] Although the "incidental search" exception to the requirement of a warrant has gone far beyond its origins and, perhaps, its rationale,[29] there is no denying the fact that it was originally conceived as a means of protecting the arresting officer against attack by concealed weapons and as a means of preventing the immediate destruction of fruits or instrumentalities of crime.[30]

Never, until the "stop and frisk" cases, however, has there been any claim that an officer may utilize an *invalid* arrest to justify the seizure and use of evidence for which he was *not* entitled to search.

This Court has never heretofore permitted any relaxation of the constitutional requirements for searches and seizure on the grounds of self-defense of the police officer. Any such exception on grounds of expediency would seem markedly inconsistent with this Court's many holdings that fundamental Fourth and Fifth Amendment rights may not be violated in the supposed interests of better law enforce-

---

[28] Harris v. United States, 331 U. S. 145 (1947).

[29] See Justice Frankfurter's strong critique of the extension of the "incidental search" rule in his dissent in United States v. Rabinowitz, 339 U. S. 56, 68-86 (1950).

[30] "The rule allowing contemporaneous searches is justified * * * by the need to seize weapons and other things which might be used to assault an officer or effect an escape, as well as by the need to prevent the destruction of evidence of the crime—things which might easily happen where the weapon or evidence is on the accused's person or under his immediate control." Preston v. United States, 376 U. S. 364, 367 (1964); United States v. Ventresca, 380 U. S. 102 (1965). See also United States v. Rabinowitz, 339 U. S. 56, 72 (Frankfurter, J., dissenting) (1950); Palmer v. United States, 203 F. 2d 66, 67 (D. C. Cir. 1953); and Note, 17 BAYLOR L. R. 312 (1965).

ment or greater public safety. E.g., *Miranda* v. *Arizona,* 384 U. S. 436, 479-82 (1966); *Mapp* v. *Ohio,* 367 U. S. 643, 659-60 (1961).

Moreover, the claim that the right to stop and frisk without probable cause is necessary for police or public safety is at best an unproven one. Cf. *Berger* v. *United States,* 388 U. S. 41, 60 (1967). As Judge Fuld stated in his dissenting opinion in No. 74 below:

> "Of course, there are risks inherent in investigatory activities undertaken by the police but, certainly, it does not follow from that that the police are privileged, absent probable cause, to search anyone who looks or acts suspiciously and to use against him any articles they may find on his person. As I previously observed, 'Other methods are available whereby the police may protect themselves while carrying on their investigations, other procedures which, if utilized, will safeguard the police and the community from the criminal minority without destroying the sense of dignity and freedom with which the law-abiding majority walk the the streets.' (*People* v. *Rivera,* 14 N. Y. 2d 441, 452 [dissenting opinion], cert. den. 379 U. S. 978.)" 18 N. Y. 2d at 248.[31]

Amici submit that the warrantless search of the person and the area within his immediate control permitted incident to a contemporaneous valid arrest is sufficient recognition of the police officer's legitimate need to protect him-

[31] Justice Souris of the Supreme Court of Michigan has also expressed doubts as to the necessity for stop and frisk legislation. Souris, *Stop and Frisk or Arrest and Search—The Use and Misuse of Euphemisms,* 57 J. Crim. L., C. & P. S. 251 (1966).

self, without fashioning new exceptions to Fourth Amendment principle which would eliminate the need for "some valid basis in law [to justify] the intrusion" of arrest or search.[32]

B. *The Deterrent Effect of Strict Application of the Exclusionary Rule Will Keep Invasions of Privacy to a Practical Minimum*

The Court of Appeals in *Terry* stood logic upon its head by pointing out, as part of its rationale for refusing to enforce the exclusionary rule that—even if "stops and frisks" without probable cause are unconstitutional—vigorous application of the exclusionary rule in the "stop and frisk" area is inappropriate since the rule will have no deterrent effect upon police officers who, not wishing to commit suicide, will continue to frisk suspects for weapons, no matter what courts choose to do with the resulting evidence.[33] Such reasoning ignores this Court's clear holding in *Mapp* v. *Ohio,* 367 U. S. 643 (1963), that "the exclusion-

---

[32] Johnson v. United States, 333 U. S. 10, 17 (1948).

[33] Paraphrasing will not do justice to the reasoning of the Court of Appeals on this point. "The Mapp exclusionary rule was imposed upon the states not because of some command inherent in the fourth amendment, but rather because the Supreme Court believed that it was the only way the police could be forced to respect the fourth amendment. If the police could not obtain a conviction using evidence unlawfully obtained, they would have no incentive to conduct illegal searches. If we keep in mind this raison d'etre of the exclusionary rule, we can guard against confusion in the attendant rules that are developed. *A judicial rule rendering evidence produced as a result of a frisk inadmissible would fail to deter the police from frisking suspects believed to be armed as police frisk for their own protection rather than for the purpose of looking for evidence.* A rule of admissibility in such cases could only result in allowing the armed criminal to go free although failing to any meaningful extent to protect individual liberty." (Emphasis added.)

ary rule is an essential part of both the Fourth and Fourteenth Amendments" [34] and is not a discretionary rule of evidence for courts to apply or withhold from application as they deem appropriate. The Court of Appeals' reasoning also does not consider the possibility, well evidenced by the facts of No. 63 and No. 74,[35] that there are law enforcement personnel who, in an excess of zeal, engage in general searches of the persons of suspects for purposes of general harassment and to see what incriminating evidence they can find even though they have no reason at all to fear for their safety.[36] Those of us who are not as convinced that the police will use their vast power with such unanimous *bona fides,* but who adhere instead to the principle announced by this Court, that "[p]ower is a heady thing; and history shows that the police acting on their own cannot be trusted," [37] must disassociate ourselves from the rosy view of law enforcement embraced by the Court of Appeals.

In view of the fact that general exploratory searches will unquestionably occur under the guise of self-protection, it seems perfectly clear that the incentive for such unconstitutional police conduct will be materially reduced only by vigorous application of the Fourth Amendment ex-

---

[34] 367 U. S. at 657. See also, Mapp v. Ohio, 367 U. S. at 655 (1961); Ker v. California, 374 U. S. 23, 30 (1963).

[35] See also People v. Pugach, 15 N. Y. 2d 65, 204 N. E. 2d 176 (1964), cert. den. 380 U. S. 936 (1965); People v. Machel, 234 Cal. App. 2d 37, 44 Cal. Rptr. 126 (1st Dist. Ct. of App. 1965), cert. den. 382 U. S. 839 (1965); People v. Garrett, 238 Cal. App. 2d 324, 47 Cal. Rptr. 731 (3rd Dist. Ct. App. 1965).

[36] The Court of Appeals opinion disingenuously notes that "police officers seem unanimous in stating that frisking is done for self-protection and not as a mere evidentiary fishing expedition."

[37] McDonald v. United States, 335 U. S. 451, 456 (1948).

clusionary rule. If law enforcement authorities know that weapons and other evidence seized during the course of an unconstitutional frisk will be suppressed by constitutional command, the number of unconstitutional invasions of privacy will be reduced, at the very least, to those instances where the officer genuinely fears for his safety.

And thus the threat of "stop and frisk" police procedures, another of the new devices "that have emerged from century to century wherever excessive power is sought by the few at the expense of the many" [38] will be laid to rest.

CONCLUSION

Amici have urged the constitutional infirmity of an on-the-street detention as an illegal arrest, the invalidity of an accompanying "frisk" as an unreasonable search, and the barrenness of the attempted justification of both in the name of crime prevention and the safety of the interrogating officer. Despite the clamor of the constabulary to the contrary, the highly critical area of on-the-street arrests and accompanying searches demands no relaxation of Fourth Amendment standards, but vigorous adherence to them. Otherwise, "a method will have been devised by which the Fourth Amendment's prohibition against unreasonable searches and seizures may be evaded and the exclusionary rule of *Mapp* v. *Ohio*, * * * to a large extent, written off the books." [39]

---

[38] Black, J., dissenting in Adamson v. California, 332 U. S. 46, 89 (1947).

[39] Fuld, J., dissenting in People v. Rivera, 14 N. Y. 2d 441, 448, 201 N. E. 2d 32, 36 (1964).

The requirement of probable cause is a compromise which has been found for accommodating the citizen's basic right to privacy and the need for effective criminal investigation and law enforcement. "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." [40]

If probable cause is to continue to be a workable and useful concept to balance the citizen's right of privacy against police necessity, it ought not be relegated to a caricature of a stricture against law enforcement excesses, a status which must surely follow if police officers, with constitutional sanction, are permitted—rather, encouraged—to compel suspects, during a period of non-arrest, to disgorge incriminating information and evidence which will raise their suspicions to probable cause and thereby validate a subsequent arrest. It is too late in the day and too destructive of constitutional values to attempt to "justify the arrest by the search and at the same time justify the search by the arrest." *Johnson* v. *United States,* 333 U. S. 10, 15 (1947).

Accordingly, *amici* join in, and call upon this Court to make its own, the stirring language of Judge Fuld:

> "* * * The loss of liberty entailed in authorizing a species of search on the basis of mere suspicion is too high a price to pay for the small measure of added security it promises. Other methods are available whereby the police may protect themselves while carrying on their investigations, other procedures which, if utilized, will safeguard the police and the community from the criminal minority without de-

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

stroying the sense of dignity and freedom with which the law-abiding majority walk the streets.

"To what end security if liberty be sacrificed as its price? The privacy which the Constitution guarantees is assured to the best of men only if it is vouchsafed to the worst, however distasteful that may be. Thus, although the defendant before us undoubtedly merits the punishment provided by law for carrying a concealed weapon, I venture that it is better that he go free than that we sanction a significant inroad on the rights of all our citizens." [41]

Respectfully submitted,

BERNARD A. BERKMAN,
1320 The Superior Building,
Cleveland, Ohio 41114

LEWIS A. STERN,
120 Broadway,
New York, New York

MELVIN L. WULF,
ALAN H. LEVINE,
156 Fifth Avenue,
New York, New York,
Attorneys for Amici Curiae

THOMAS H. BARNARD,
IRWIN M. FELDMAN,
LEWIS R. KATZ,
Of Counsel.

September 1967

[41] 14 N. Y. 2d at 452-53, 201 N. E. 2d at 39.