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Richard H. Kuh

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REFLECTIONS ON NEW YORK'S "STOP-AND-FRISK" LAW AND ITS CLAIMED UNCONSTITUTIONALITY*

RICHARD H. KUH

Mr. Kuh is Coordinator for the New York State Combined Council of Law Enforcement Officials. He has also served, until recently, as Assistant District Attorney in New York County in charge of the Criminal Court Bureau.

Does New York's new "Stop-and-Frisk" law constitute a threat to the civil liberties of New Yorkers? Does it permit the police to require information of persons on mere suspicion of possible wrongdoing? Is there any common law precedent for the law? In the following article, Mr. Kuh discusses these and other questions, of interest not only to New Yorkers, but also to others concerned with the general area of detention and arrest.—EDITOR.

Some lawyers, who seem to share the gossip columnists' vanity of boasting "I-told-you-so," have been dooming New York State's recently enacted "Stop-and-Frisk" law as "unconstitutional." This omniscience, proclaimed before the new law's enactment, was largely inspired at the time by defense attorneys, political professionals, and others confirmed in their habit of fighting any and every strengthening of police power. But even since the bill was signed into law in early March, 1964 (it became effective July 1, 1964), there have been those at the bar who have continued to pontificate what they contend is the statute's clear and obvious fallibility.

The more positive of these Cassandras-in-law assume that constitutionality—or the lack of it—is fixed and readily discoverable. Changes in attitudes on the part of our high courts, both state and federal, especially in the criminal field during the past three decades should demonstrate to all with legal training that certain predictability on an issue of constitutionality is rare.

The truly judicial judge (and lawyer), analyzing a police statute's constitutionality, will not condemn solely because *in his pre-judgment* extending police power is dangerous. He will recognize the wisdom of the Frankfurter admonition that "It makes a great deal of difference whether you start with an answer or with a problem." He will wish to consider closely the wording of the particular

* A summarized version of this article appeared in the *New York Law Journal* on May 29, 1964. Since that date, in its opinion in *People v. Miguel Rivera*, 14 N.Y.2d 441 (July 10, 1964), the New York Court of Appeals sustained the right of police to stop persons upon reasonable suspicion of felonious conduct, and in so holding commented upon New York's "Stop-and-Frisk" law.

law that is involved; of course, existing case law may lend at least some guidance; he will have clearly in mind the facts of the particular case that brings that enactment to the reviewing court's attention; and he will wish to be fully informed about the background—the facts of community life—that led to the statute's enactment and that reflects its impact in practice. Appellate judges are likely to lack accurate information concerning this last factor; they are far distant from the overcrowded streets that are crime's seedbeds. It is the briefing and argument of counsel that are chargeable with bringing this reality, not solely fine-spun legal theory, to the distant heights of appellatedom.

Recognizing these items that bear on the ultimate decision as to constitutionality, let us look at New York's new "Stop-and-Frisk" statute.

THE WORDING OF THE STATUTE

The statute adds a new provision, section 180-a, to New York's Code of Criminal Procedure:

"Temporary questioning of persons in public places; search for weapons. 1. A police officer may stop any person abroad in a public place whom he reasonably suspects is committing, has committed or is about to commit a felony or any of the crimes specified in section five hundred fifty-two of this chapter, and may demand of him, his name, address and an explanation of his actions.

2. When a police officer has stopped a person for questioning pursuant to this section and reasonably suspects that he is in danger of life or limb, he may search such person for a dangerous weapon. If the police officer finds such a

weapon or any other thing the possession of which may constitute a crime, he may take and keep it until the completion of the questioning, at which time he shall either return it, if lawfully possessed, or arrest such person."

Comparison of this language with the characterization of the new law as expressed by some of its detractors, suggests that the resemblance is, at best, coincidental. A so-called "Committee for Fair Police Practice" (self-appointed) summoning—in handbills printed both in English and in Spanish—the neighboring citizenry to an uptown protest meeting *after* the Governor's signature had transmuted the bill into law, proclaimed: "Do you know that the State legislature has passed bills giving the police the power to *stop, question and search you whenever and wherever they want.*" The new act's twice-repeated phrase "reasonably suspects"—clearly rendering the officer's judgment reviewable by the courts—was ignored. That the police power conferred was limited to actions of persons "abroad in a public place" was similarly misconstrued. Nor was any suggestion conveyed that the stopping might be only for felonies and a limited number of the more serious misdemeanors.

So much for learning, from its wording, what the new statute clearly is *not*. But what *is* it? Is it, indeed, so vague a piece of criminal legislation that reviewing courts *must* find it unconstitutional? The new law's use of the phrase "reasonably-suspects" should not render it so. "Reasonable"—be it in the phrase "reasonable man," "reasonable doubt," or "reasonable cause"—is the law's most commonly interpreted, necessarily somewhat ambiguous, single word. And although its current handmaiden, "suspects," may be virginal to the vocabulary of New York criminal procedure, common sense—and any dictionary—will indicate that it is simply a step down from the word "believes." It should be just as susceptible of legal usage as has been that more common word. "Believes," concededly, connotes a greater degree of certainty *on the part of the actor*, but the word itself is no simpler, no more fixed, no more inflexible, than is the word "suspects." In brief, "reasonably suspects," as used in the "Stop-and-Frisk" statute, refers to a conglomerate of such circumstances as would merit the sound suspicions of a properly alert policeman, performing his sworn duty.

Unhappily, unsubstantiated charges have been made suggesting that New York's proposal of stopping suspicious persons was wholly without

common law antecedent: that it was some strange, vague, and shapeless creature from legal outer space. Thus the Committee on Penal Law and Criminal Procedure of the New York State Bar Association opined that the new bill

"... permits a police officer, on a purely subjective reaction, to detain a citizen without any probable cause other than his suspicion Nowhere in the history of Anglo-Saxon jurisprudence have we so closely approached a police state as in this proposal to require citizens to identify themselves to police officers and 'explain their actions' on such a meager showing." A strong statement indeed, and a damning one—were it accurate. But troubling to dip into "the history of Anglo-Saxon jurisprudence" can be quite a different thing from merely assuming that it is what one might wish it to be. Sir Matthew Hale, Serjeant William Hawkins, and our contemporary Professor Leon Radzinowicz, all reveal that English constables and watchmen, in eras long gone by, clearly *did* possess the power of stopping—indeed, also of detaining—on mere suspicion.¹

In an English case of a century and a half ago, *Lawrence v. Hedger*, 3 Taunt. 14 (1810), three judges of Trinity Term sustained a directed verdict for the defendant in a trespass and false imprisonment action. The claimant had been stopped by a watchman on a London street at ten at night, where he had been seen with a bundle in his hand. These judges noted, in upholding the legality of stopping on suspicion:

"It would be extremely mischievous if it were not so. At every Old Bailey session numbers of persons are convicted in consequence of their being stopped by watchmen while they are carrying bundles in this way [I]n the night,

¹ See 2 HALE, PLEAS OF THE CROWN 89, 97 (Wilson ed. 1800) ("The constable may arrest suspicious night walkers by the statute of 5 E. 3. cap. 14" "Their [watchmen's] power is to arrest such as pass by until the morning, and if no suspicion, they are then to be delivered, and if suspicion be touching them, they shall be delivered to the sheriff"); 2 HAWKINS, PLEAS OF THE CROWN c. 12, §20, p. 164 and c. 13 §5, p. 173 (7th ed. 1795) ("Yet it is holden by some, that any private person may lawfully arrest a suspicious night-walker, and detain him till he make it appear that he is a person of good reputation." "As to the power of watchmen, it is further enacted by the said statute of Winchester, c. 4 'That if any stranger do pass by the watch, he shall be arrested until morning. And if no suspicion be found, he shall go quit; and if they find cause of suspicion, they shall forthwith deliver him to the sheriff'"). See also 3 RADZINOWICZ, HISTORY OF ENGLISH CRIMINAL LAW 127 (1957).

when the town is to be asleep, and it is the especial duty of these watchmen and other officers, to guard against malefactors, it is highly necessary that they should have such a power of detention. And, in this case, what do you talk of groundless suspicion? There was abundant ground of suspicion here. We should be very sorry if the law were otherwise."

Up-dating "Anglo-Saxon jurisprudence" to the twentieth century reveals that the Uniform Arrest Act, proposed by Professor Sam Bass Warner (then of the Harvard Law School) in 1942, presently the law in several of our Northeastern states, uses the phrase "reasonable ground to suspect." Also contemporaneously, our English brethren have not succumbed to the State Bar Committee's alarm. Reflecting both solid British reserve and good British common sense, Cambridge Professor Glanville Williams has noted:

"Where a suspected criminal is also suspected of being offensively armed, can the police search him for arms, by tapping his pockets, before making up their minds whether to arrest him? There is no English authority, but the power is so obviously necessary for the protection of the police that it is difficult to believe that it can be condemned by the courts. It might be regarded as a reasonable extension of the existing law of self-defense, or as an application of the doctrine of necessity, or as an essential power of the police in the performance of their duty of preserving the peace."²

"Reasonably suspects" may thus be a concept sufficiently exotic to startle those New Yorkers prone to be alarmed by any increase in police power, but it is a concept clearly neither so original nor so vague as to *require* certain judicial abnegation.

Partisans determined to ascribe vagueness to the new law have resorted to the ingenuous stratagem of reading into it matter nowhere found within its four corners and then concluding that the uncertainty of this interpolation renders the entire statute vague! This tack was the one taken by the New York Civil Liberties Union:

"That provision of the statute which states that an officer 'may demand' the name and address of the suspect and an explanation from him *appears to command* compliance by the suspect. This violates his rights under the Fifth

Amendment to remain silent and refuse to incriminate himself. What if the suspect is unwilling to cooperate—may he be detained until he does? Opportunity for prolonged interrogation is a dangerous threat to our system of law." (Emphasis supplied.)

The statute, of course, does not "command" the suspect to answer. And so this entire house of cards tumbles: the suspect *may* refuse to answer; he *may not* be detained until he cooperates; no *lawful* opportunity for prolonged interrogation is provided. And the conjured "dangerous threat to our system of law" sinks appropriately, without a ripple, into the oblivion of rhetoric.

Bona fide critics of the new law who question how long the suspect may be held, whether he can be brought to the station house for detention, and whether he must answer questions put to him, will, upon analysis, probably find their queries traceable not to the "Stop-and-Frisk" law itself, but to that model which the new law somewhat resembles. The Uniform Arrest Act³—not the law in the State of New York—permits a police officer to detain a suspect up to two hours (apparently at the station house) when the suspect "fails to identify himself or explain his actions to the satisfaction of the officer." The "Stop-and-Frisk" law, in contrast, is infinitely more limited. It contains no such detention provision, nor any such authority the natural force of which may be designed to induce responses to police questioning. The "stop" that the law permits is solely, as the statute says,

³"Section 2. Questioning and Detaining Suspects.

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

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

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

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

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

² Williams, *Police Detention and Arrest Privileges—England*, 51 J. CRIM. L., C. & P.S. 413, 418 (1960).

for that brief time required to "demand of [the suspect] his name, address and an explanation of his actions" and—in appropriate instances—to make a quick precautionary search for dangerous weapons.

Nor is the statute's "search" provision ambiguous. In permitting the brief stopping of suspects "abroad in a public place," and their search "for a dangerous weapon" when the officer "reasonably suspects that he is in danger of life or limb," it permits just that—not a fine combing of the person for tiny heroin packets, nor a turning out of pockets in a quest for policy slips. Customary police *self-protective* practice is all that is authorized by the "Stop-and-Frisk" law: a "patting down" for bulky objects that may be guns or knives, followed by a reaching into clothing or a turning out of pockets only when such solid bulges have been located. Concealed non-bulky contraband is not ordinarily legally discoverable in such a search; there would be no way of discovering it—other than the rare off-chance of its being jointly pocketed with the weapon-like bulge!

THE EXISTING DECISIONAL LAW

Judicial precedent is of little value. There are no federal or New York cases interpreting a "stop-and-frisk" type of statute. The Uniform Arrest Law provision, as enacted in Delaware, has, it is true, been sustained by the highest court of that state.⁴ But in holding the statute constitutional the Delaware court stated that "an attempt to draw a distinction between an admittedly valid detention upon 'reasonable ground to believe' and the requirement of . . . 'reasonable ground to suspect' is a semantic quibble." This tactic neatly avoided the need for wrestling seriously with the question of whether detention on "suspicion" would be constitutional; by equating "suspicion" and "belief" the court ignored common English usage, and—to all intents and purposes—repealed the statute! In the federal courts, in the absence of a statute conferring upon police the power of stopping (as something distinctly less than making an arrest), there is some little indication that, inherently, police possess this power to stop.⁵ At

⁴ See *DeSalvatore v. State*, 163 A.2d 244, 249 (Del. 1960).

⁵ See *Henry v. United States*, 361 U.S. 98, 103 (1959), especially dissent 104-06; see also *Rios v. United States*, 364 U.S. 253, 261-62 (1960). For more extended consideration, see Kaufman, J., in *People v. Bonanno*, 180 F. Supp. 71, 77-83, *rev'd on other grounds*, 285 F.2d 408 (2d Cir. 1960).

best, however, this is an exceedingly murky area, with the existing decisions letting through precious little light.

The words of the Fourth Amendment are not themselves dispositive of the constitutional issue. Their ban is directed "against unreasonable searches and seizures." The word "seizures" has various shades of meaning. Momentary *stopping* to ask a few questions is one, just barely classifiable as a seizure. *Detention* for a set period of time, to permit both questioning and other investigative means, quite clearly is in the seizure category. And, as seizures go, *arrest* is the most definitive of the genre: the person seized then bears the onus of being publicly charged with crime, he may be saddled with the expense of counsel and bail, and ultimately he is exposed to the risk of criminal conviction. Moreover, in the phrase "unreasonable . . . seizures," the noun is not the only word thus possessed of variable meaning. The adjective "unreasonable," chameleon-like, adopts coloration from its surroundings. (That which is "reasonable" beach attire is likely to be highly "unreasonable" church finery.) Common sense would seem to dictate that as we diminish the concept of "seizure" from one of *arrest*, with the heavy burden that it carries, to one of the briefest *stopping*, entailing at most minor inconvenience, the Constitution should not be offended if, simultaneously, fewer and less weighty reasons are required to justify the police action. Sparse circumstances, sufficient to render a *stopping* "reasonable," may well be found "unreasonable" justification for the more lastingly inconvenient and significant *arrest*.

THE FACTS OF THE PARTICULAR CASE ON APPEAL

One of the earliest solemn phrases a law student learns to intone, as part of his training for membership in the elite company of lawyers and counselors-at-law, is likely to be that of "Hard cases make bad law." To contemporary American prosecutors this should be more than a pompous aphorism; it is a phrase to be inscribed upon the doorposts of the mind. Had error been confessed in the Ohio obscenity prosecution that germinated when police—allegedly searching for a fugitive extortionist-bomber believed to be hiding in a private home—made a warrantless entry, forcibly fished a pseudo search warrant out of Miss Dollree Mapp's bosom, and ultimately prosecuted her for dirty pictures found—not there, but concealed in

a basement trunk—, then the exclusionary rule articulated by a divided United States Supreme Court in *Mapp v. Ohio*⁶ might not be the law today. It was clearly a “hard case”; and there are those among prosecutors and police (*not*, incidentally, including this writer) who are vociferous in their characterizations of it as “bad law.”

Similar cases involving abusive conduct are certain to arise in the future. Policemen must often act quickly, under time and danger pressures native to the streets in which they work, and police judgment may be excited by the “chase” inherent in criminal investigations. Even allowing leeway for these items in determining whether particular police action was or was not “reasonable,” there will always be instances of human error, instances in which police will themselves recognize that their colleagues’ acts, scrutinized under the cold light of the morning after, will not withstand the test of “reasonableness.” Judgment errors are inevitable when humans behave under stress, despite the most painstaking training and the most systematic efforts at self-regulation.

But it is important that these “hard cases” not be permitted to be those that make our law. Much as the spindly, homely, and solemn wallflower may espouse virtue—having neither suffered nor enjoyed exposure to actual temptation—our similarly cerebral appellate courts may, on occasion, proclaim limitations upon police conduct premised not upon reality, but only upon those printed records they have seen. In viewing such transcripts, these benches will be abetted by defense briefs that will take pains to underscore—nay, even to distort—all instances of alleged misconduct. This being so, prosecutors should avoid supplying grist to the appellate mills of such nature as will be virtually certain to sustain defense contentions.

It is to be hoped that district attorneys will throw in the towel in those cases (if any develop) that stem from police “stopping” that is not premised on at least arguably reasonable suspicion, or searches that were not at least both arguably incident thereto and arguably necessary for the officer’s protection. Otherwise, remote appellate courts will be prompted to believe that police in practice view the new statute as a blank check, justifying capricious stopping and high-handed search. If this impression is conveyed, the courts

will, appropriately, interpret the law as being just as broad as—in the judicial view—the police seem to deem it to be. As such, it will be vague, unreasonable—and unconstitutional.

THE “AURA” IN WHICH THE APPEAL IS TAKEN, AND THE ADEQUACY OF BRIEFING

More than a half century ago, the State of Oregon found itself before the United States Supreme Court defending the constitutionality of its statute that barred the employment of women for more than ten hours daily. The West turned to a prominent Boston attorney, Louis Dembitz Brandeis, for aid. Brandeis had the good sense to do something different. His brief consisted of a relatively short analysis of Oregon’s (and other similar) statutes, and of almost one hundred pages of social data. This first “Brandeis brief” focussed on *society’s needs* as against the importance of the employer’s absolute freedom. It suggested that the community was the loser when the female organism suffered under relentlessly excessive strain, and when chronic fatigue contributed heavily to immorality, to accidents, and to ailments. In February, 1908, a unanimous Supreme Court upheld the Oregon statute, and praised Brandeis’ “copious collection” of facts.⁷

Legislation setting maximum hours for the labor of women was demonstrably necessary to community well-being a half century ago. So, today, if safeguarding our communities requires some extension—or at least clarification—of police powers, this should be similarly demonstrable. The now old, but still rarely used, innovation of the Brandeis brief should be adopted as a law enforcement appellate tool.

The data demonstrating the need for police authority to stop suspicious persons should be brought before the judges. If the judiciary is armed with this data—not merely with arguments and emotion laden conclusions—the judicial inclination may be to sustain reasonable legislative efforts to rectify the situation. True judicial craftsmen may be expected to respect the Cardozo injunction “to keep the balance true.”

How successfully police conduct will, in actual practice, be circumscribed cannot now be foretold. The auguries are suspicious, however. Before the *Mapp* decision of June 19, 1961, evidence lawlessly

⁶ 367 U.S. 343 (1961).

⁷ See *Muller v. Oregon*, 208 U.S. 412.

obtained by police—whether pursuant to defective detention or improper searches—was admissible in a criminal action. Concededly, pre-*Mapp*, police and prosecutors were too frequently unconcerned with the "technicalities" of the arrest and search laws, and the violation of such laws was too often taken for granted. Yet there is no indication that New York State was then in the grip of that storm-trooper fascism that "Stop-and-Frisk" detractors now profess to fear. Moreover, experience with search warrants since the *Mapp* case shows clear police compliance with existing statutory and decisional regulations. Warrants, rarely used in New York and the other non-exclusionary states before *Mapp*, have since been utilized in vast numbers, and as a daily occurrence by our urban police. Figures reflecting this usage, and thus expressing conscientious police efforts to comply with vital procedural safeguards while enforcing the substantive law, should be part of the demonstration that is made before the appellate courts.⁸

Not only should statistics be available, but an important flavor of what police will be doing under the new statute may be supplied by reference to particular samples of their conduct. For instance, there are certain to be instances in which burglars are apprehended, having initially been stopped under the new law, although prior to July 1, 1964—as in *People v. Albert Brown*⁹—the cases against them would have had to have been dismissed. Cases should also be noted in which the "Stop-and-Frisk" statute, used to prevent the commission of robberies, results in the lawful apprehension of felons, not in their dismissal, as was initially true in *People v. Rivera*,¹⁰ which arose when there was

⁸ The extent of current misinformation as to police practice, certain to have its impact on appellate judgments, cannot be overstated. At a forum in which this writer recently participated, one of America's most eminent law professors, renowned particularly in the fields of criminal and constitutional law, *discussing post-Mapp law enforcement*, stated—in substance—that the requirement that the police procure search warrants was solely of academic and not real interest. In support of this statement he cited a *pre-Mapp* statistic showing how rarely warrants had then been used in Detroit, but he did not indicate that the statistic failed to reflect the current picture! The exclusionary rule has in fact had the very real effect of forcing police to live by—or, at least, the scoffers would contend, to testify by—these rules of criminal procedure imposed by the legislatures and the courts.

⁹ 32 Misc. 2d 846 (1962).

¹⁰ 38 Misc. 2d 586, *aff'd*, 19 A.D.2d 863 (1st Dep't 1963), *reversed*, 14 N.Y.2d 441 (July 10, 1964).

no statute to permit police action upon reasonable suspicion.

CONCLUSION

In March, 1964, shortly after Governor Nelson A. Rockefeller had signed into law the "Stop-and-Frisk" bill, as well as a second item of legislation, the so-called "Knock, Knock" bill (designed to facilitate police conduct in executing search warrants), a self-constituted and self-styled "Emergency Committee for Public Safety" defined these bills as "the worst police state measures ever enacted in the history of our nation—ominously dangerous enactments threatening a reign of unrestrained terror in our state." Although in so saying this Committee painted a view of law enforcement officialdom chuckling morbidly while plotting this "reign of unrestrained terror," New York State law enforcement moved in precisely the opposite direction.

Both bills had been, initially, posed by representatives of the statewide organizations of chiefs-of-police, police line officers, sheriffs, and district attorneys, along with other law enforcement colleagues, all of whom working together had mustered legislative and executive support for them. The bills having been signed, this coalition continued, this time seeking to minimize the chance that a single constable, in any remote township in the state, misguided by the calamitist interpretations of the new laws, might arrogate unto himself powers that the statutes clearly did not bestow. Functioning through their New York State Combined Council of Law Enforcement Officials, these associations took prompt steps to train every single enforcement officer in the State as to the limitations inherent in the new legislation.

A month after the *Mapp* decision's first birthday, the suggestion was made at a conference of the New York State Association of Chiefs of Police that law enforcement would be able to work effectively under the exclusionary rule in the future, were but three items of legislation enacted.¹¹ One, permitting misdemeanor arrests on probable cause, rather than barring police action until police certainty existed, was passed during the

¹¹ The talk, given in July, 1962, was reprinted: see Kuh, *The Mapp Case One Year After: An Appraisal of Its Impact in New York*, 148 N.Y.L.J. nos. 55-56, p. 4, Sept. 18-19, 1962.

1963 Legislative Session and has been effective since July 1, 1963.¹² Despite dire forebodings of abuse—much akin to those presently reverberating—that act provided a wholesome and wisely used tool, of great aid in safeguarding our communities. The other two items then suggested, a “Stop-and-Frisk” and a “Knock, Knock” bill became effective in New York July 1, 1964.

¹² See New York Session Laws, 1963, ch. 580, amending §177(1) of the Code of Criminal Procedure, to permit an officer to arrest when he has “reasonable grounds for believing that a crime is being committed in his presence.”

If all three of these acts are wisely used by police *and* realistically policed—*and sustained*—by the courts, it is hoped that our communities will learn that the guardians of peace and safety whom they have designated are to be trusted safely to invoke sorely needed lawful weapons. Such recognition would be an important start towards such a police-community concordat that all may come to recognize the fruitlessness of continuing to preach antipathy—indeed, hate—between the people and their servants, the police.