Indiana Law Journal

Volume 51 | Issue 1 Article 15

Fall 1975

A Constitutional Analysis of Indiana's "Fleeing a Police Officer" Statute

Jane Mallor
Indiana University School of Law

A Constitutional Analysis of Indiana's "Fleeing a Police Officer" Statute

No challenge to the constitutionality of the Indiana statute which makes it a crime to flee from a police officer after having been commanded to stop[1] has yet been presented to an appellate court.[2] The statute contains no requirement that the command to stop be justified by the police officer's reasonable suspicion that the subject has committed, or is about to commit, a crime.[3] The bare language of the statute indicates that a person could be convicted of fleeing a police officer even where there had been no reasonable basis for the officer's command to stop. This note will examine whether the fleeing statute comports with the fourth amendment's prohibition against unreasonable seizures and the fourteenth amendment's guarantee of due process of law.

The Fleeing Statute and the Street Encounter

Until the late 1960's, the fourth amendment's prohibition against unreasonable searches and seizures was construed to mean that no person could be arrested or searched without probable cause to believe that he had committed a crime.[4] During this period, however, many commentators agitated for judicial interpretation of the per-

---

[1] Ind. Code § 35-21-2-1 (1971), Ind. Stat. Ann. § 10-1817 (Burns Supp. 1975): Whoever shall intentionally and knowingly flee from any peace or police officer of this state after such peace or police officer has, by visible or audible means identified himself as such and commanded such person to stop, shall be guilty of a misdemeanor separate and distinct from any other offense he may have committed prior to or after such command to stop, and upon conviction thereof shall be subject to a fine not to exceed $500 or imprisonment not to exceed 6 months, or to both such fine and imprisonment; and any person who shall, during such unlawful flight, cause the injury of, any third party, shall be guilty of a felony, and upon conviction thereof shall be subject to a fine not to exceed $5000 or imprisonment not to exceed any determinate period from one [1] to five [5] years, or to both such fine and imprisonment.

[2] In Jones v. State, —— Ind. App. ——, 328 N.E.2d 221 (1975), the only question raised on appeal regarding the conviction for fleeing a police officer was whether there had been sufficient evidence that the defendant knowingly fled after the arresting officer had identified himself. The court found that the evidence permitted the reasonable inference that the defendant knew that he had been commanded to stop by a police officer, and held this to be sufficient for conviction. Similarly, in Tyler v. State, —— Ind. App. ——, 296 N.E.2d 140 (1973), no question bearing on the constitutionality of the statute was raised.

[3] Ind. Code § 35-21-2-1 (1971), Ind. Stat. Ann. § 10-1817 (Burns Supp. 1975).

[4] *See, e.g.*, Henry v. United States, 361 U.S. 98 (1959).

vasive police practice of "stop and frisk,"[5] whereby a person is detained and possibly searched for weapons, but not arrested. In *Terry v. Ohio*,[6] stop and frisk was constitutionally legitimized by the Supreme Court in situations where the officer has reasonable suspicion, but less than probable cause to believe that criminal activity is afoot.

In 1969, the Indiana legislature enacted statutes authorizing stop[7] and frisk.[8] These statutes contain reasonableness standards for stop and frisk very similar to those set out in the *Terry* opinion. The fleeing statute was enacted in the same year.[9]

It is doubtful that the absence of a reasonableness requirement for the command to stop in the fleeing statute was the result of a guileless omission, for the digest of the bill states:

> This bill would preserve the present concept of resisting arrest or interferring [*sic*] with a police officer and add additional sanction against such resisting or interferring [*sic*] eventhough [*sic*] the arrest might be technically invalid. Would not affect civil remedy for false arrrest [*sic*] or false imprisonment.[10]

The fleeing statute puts real teeth into the practice of stop and frisk, since it not only criminalizes the failure to obey the command to stop, but does so even where the stop would not have been a valid one under the stop statute.

As a practical matter, the missing element of reasonableness in the fleeing statute creates enormous potential for abuse. Harassment

---

[5] *See, e.g.*, Abrams, *Constitutional Limitations on Detention for Investigation*, 52 IOWA L. REV. 1093 (1967); LaFave, *'Street Encounters' and the Constitution: Terry, Sibron, Peters, and Beyond*, 67 MICH. L. REV. 40 (1968) [hereinafter cited as *LaFave*]; Reich, *Police Questioning of Law Abiding Citizens*, 75 YALE L.J. 1161 (1966); Ronayne, *The Right to Investigate and New York's 'Stop and Frisk' Law*, 33 FORDHAM L. REV. 211 (1964); Schwartz, *Stop and Frisk*, 58 J. CRIM. L.C. & P.S. 433 (1967); Younger, *Stop and Frisk: "Say It Like It Is,"* 58 J. CRIM. L.C. & P.S. 293 (1967); Comment, *Police Power to Stop, Frisk, and Question Suspicious Persons*, 65 COLUM. L. REV. 848 (1965).

[6] 392 U.S. 1 (1968).

[7] IND. CODE § 35-3-1-1 (Burns 1971):

> When a law enforcement officer in a distinctive uniform, or in plain clothes after having identified himself as a law enforcement officer reasonably infers, from the observation of unusual conduct under the circumstances and in light of his experience, that criminal activity has been, is being, or is about to be committed by any person, observed in a public place said officer may stop such person for a reasonable period of time and may make reasonable inquiries concerning the name and address of such person and an explanation of his action. Said stopping and inquiry shall be limited to those matters under the enforcement jurisdiction of the particular officer and when conducted within the limits specified herein shall not constitute official custody or arrest and shall not constitute grounds for civil liability for false arrest or false imprisonment.

[8] IND. CODE § 35-3-1-2 (Burns 1971).

[9] IND. CODE § 35-21-2-1 (1971), IND. STAT. ANN. § 10-1817 (Burns Supp. 1975).

[10] 3 SENATE BILLS 469, 96th Ind. Gen. Assembly, Reg. Sess. (1969).

of minorities, youths, and unpopular people is an obvious possibility.[11] Less obvious, but surely as much a threat to fourth amendment liberties, is the potential for pretext searches under this statute. Since an officer can arrest without a warrant for any misdemeanor committed in his presence,[12] he could arrest a person who ignored his command to stop, and conduct a full search incident to that arrest,[13] although the initial command was entirely unjustified. This search, since it would be incident to an arrest, could go far beyond the scope of the limited, self-protective search permitted by *Terry*,[14] and the Indiana frisk statute.[15]

Such potential for abuse is especially disturbing in view of the fact that the pre-arrest, or "street encounter," area of criminal law enforcement is among the most potentially violent encounters between police and citizen.[16] To the extent that police conduct under the fleeing statute is perceived by the public as unfair or unlawful, the statute may breed a poor image of the police,[17] disrespect for the criminal justice system, or even violence.

TERRY AND THE "REASONABLENESS" STANDARD

In *Terry*, the Supreme Court first inquired whether the fourth amendment attached at all in investigatory stop situations. The Court rejected the argument that there is a constitutional distinction between

---

[11] *See, e.g.*, PRES. COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, Field Surveys IV, 1 *The Police and the Community* 139–40 (1966); Reich, *Police Questioning of Law Abiding Citizens*, 75 YALE L.J. 1161 (1966).

[12] *See, e.g.*, Lander v. State, 238 Ind. 680, 154 N.E.2d 507 (1958); Doering v. State, 49 Ind. 56 (1874).

[13] In both United States v. Robinson, 414 U.S. 218 (1973) and Gustafson v. Florida, 414 U.S. 260 (1973), the Supreme Court affirmed convictions where evidence had been obtained as a result of full searches incident to relatively minor traffic offenses. The Court based its holdings on the ground that a search incident to a lawful arrest is not only an exception to the warrant requirement, but also a "reasonable" search, even though the searching officers had no reason to believe that the defendants were armed.

[14] 392 U.S. at 29–30.

[15] IND. CODE § 35-3-1-2 (Burns 1971):

> When a law enforcement officer has stopped a person for temporary questioning pursuant to the preceding section and he further reasonably concludes in light of his experience that the person with whom he is dealing may be armed and presently dangerous, he shall be entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such person in an attempt to discover weapons which might be used to assault him. If the officer discovers a weapon he may seize it and if it is unlawfully possessed, said weapon shall be held for evidence in the prosecution of the appropriate criminal charge. If such person is not arrested and charged, said weapon shall be returned to him.

[16] PRES. COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, Field Surveys IV, 1 *The Police and the Community* 127–28 (1966).

[17] *Id.* at 141–47.

a stop and a full-blown arrest, and that the Constitution does not even apply to a stop. The Court held instead that "[w]henever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person," thereby invoking the fourth amendment's protection against unreasonable seizures.[18] In his concurring opinion, Mr. Justice Harlan observed that before a policeman has the right to disarm a person,

> he must first have a right not to avoid him but to be in his presence. That right must be more than the liberty (again, possessed by every citizen) to address questions to other persons, for ordinarily the person addressed has an equal right to ignore his interrogator and walk away. . . .[19]

Under the Indiana fleeing statute, a person is subject to criminal penalties if he disobeys a police officer's command to stop.[20] His freedom is therefore restrained by the officer's command, and a seizure of his person has occurred to which the fourth amendment attaches.[21]

Terry held also that since the stop and frisk situation does not involve police conduct which is subject to the warrant clause of the fourth amendment, there was no need to show probable cause.[22] Rather, the conduct involved was to be judged by the fourth amend-

---

[18] 392 U.S. at 19. *See also* Abrams, *Constitutional Limitations on Detention for Investigation,* 52 IOWA L. REV. 1093, 1104–05 (1967).

[19] 392 U.S. at 32–33. A related question is whether a person can be forced to answer police questions in the investigatory stop context. Professor LaFave feels that it is proper for silence to be considered in the determination of probable cause in situations where *Miranda* warnings are neither given nor required. *See LaFave, supra* note 5, at 107–08. *But see* Terry v. Ohio, 392 U.S. 1, 34–35 (1968) (White, J., concurring), and Davis v. Mississippi, 394 U.S. 721, 727 n.6 (1969), where it is noted that although an officer may have the right to pose questions, he has no right to compel an answer.

[20] IND. CODE § 35-21-2-1 (1971), IND. STAT. ANN. § 10-1817 (Burns Supp. 1975).

[21] It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person.

392 U.S. at 16. *See also* Loyd v. Douglas, 313 F. Supp. 1364 (S.D. Iowa 1970):

> Certainly when a police officer requests an individual to stop for the purpose of conducting a field interrogation, that individual is, in a sense, restrained. His freedom is restricted in that he must take the time to stop and at least listen to the questions propounded. Furthermore, although the officer does not employ physical force as a means of restraint, his uniform and badge . . . are sufficient to constitute the requisite show of authority.

Id. at 1367. *Cf.* People v. Howlett, 1 Ill. App. 3d 906, 910, 274 N.E.2d 885, 888 (1971).

Where a person is subjected to *criminal penalties* for failing to heed a police officer's command to stop—as one would be under Indiana's fleeing statute—there is little difficulty in concluding that his freedom has been restrained in the fourth amendment sense whenever he is commanded to stop.

[22] 392 U.S. at 20. The Court stated that, while it did not retreat from its position that advance judicial approval through the warrant procedure is a requirement for valid searches and seizures whenever practicable, the necessarily swift action of stop and frisk, based on the officer's on-the-spot observations, could not practically be subjected to the warrant procedures.

ment's more general proscription against *unreasonable* searches and seizures.[23] Reasonableness, said the Court, would be determined by balancing the government's need to seize (or search) against the instrusion which the seizure (or search) entails.[24] In order to justify the government's need to intrude, the officer must identify specific and articulable facts available to him at the time of the seizure which would lead a reasonable man to believe that the action taken was appropriate.[25] Mere suspicion, or "hunch," will not suffice.[26] This stand-

[23] 392 U.S. at 20.

[24] *Id.* at 21–22. Reasonableness, at used in *Terry,* is a two-tiered concept. First, since reasonable suspicion is an evidentiary standard of probabilities, reasonableness in this context refers to the quantum of suspicious facts known to the police at the time of the stop. The question here is whether the facts known are sufficient to override the individual's interest in privacy. *See, e.g.,* Luckett v. State, 259 Ind. 174, 284 N.E.2d 738 (1972); State v. Smithers, 256 Ind. 512, 269 N.E.2d 874 (1971); Elliott v. State, —— Ind. App. ——, 309 N.E.2d 454 (1974), vacated, —— Ind. ——, 317 N.E.2d 173 (1974); King v. State, —— Ind. App. ——, 314 N.E.2d 788 (1974); Bryant v. State, —— Ind. App. ——, 299 N.E.2d 200 (1973). *But see* Williams v. State, —— Ind. ——, 307 N.E.2d 457 (1974), and a critique thereof, 7 IND. L. REV. 1064 (1974).

The second tier of the reasonableness concept means that there may be differential amounts of suspicion required to effect different types of intrusions. When the intrusion upon the person is very slight, and the governmental interest very strong, an intrusion may be reasonable, despite the fact that there is no particularized suspicion of criminal conduct. *See, e.g.,* Camara v. Municipal Court, 387 U.S. 523 (1967). An example of this type of situation would be one in which a routine roadblock is set up for the purpose of checking for automobile safety inspection stickers. Since all citizens are briefly stopped, and there is no threat of criminal prosecution or stigma, the stop may be justified by the strong state interest in safe vehicles upon the highways, even though no particular person is suspected of failing to have had his automobile inspected.

The second tier of the reasonableness concept speaks to the fact that the practice of stop and frisk is permissible in certain circumstances, rather than to standards for determining whether a particular stop is reasonable. Since the *Terry* Court recognized that an investigatory stop is an acute intrusion upon the individual, 392 U.S. at 17, it is unlikely that an investigatory stop would be one of those situations where the individual's interests are to be automatically overcome by the state's interests.

Since this note is concerned with standards for when a stop is reasonable, the term "reasonableness," as used here, refers to the first tier of the concept.

[25] 392 U.S. at 20, 21.

[26] *Id.* at 22. What constitutes a reasonable stop will depend upon the facts of a given situation. It has been suggested that the balancing test is too difficult to apply in everyday practice:

> While this might be a stimulating exercise in the rarefied atmosphere of an appellate court or a law school classroom, it is clearly asking too much to expect policemen to make on-the-spot judgments in this way or, indeed, to require trial judges to review police conduct in this fashion.

LaFave, *supra* note 5, at 57.

The Fourth Circuit Court of Appeals, in Arnold v. United States, 382 F.2d 4 (4th Cir. 1967), set out a number of criteria for consideration:

> The seriousness of the offense, the degree of likelihood that the person detained may have witnessed or been involved in the offense, the proximity in time and space from the scene of the crime, the urgency of the occasion, the nature of the detention and its extent, the means and procedures employed by the officer, the presence of any circumstances suggesting harassment or a deliberate effort to avoid the necessity of securing a warrant . . . .

Id. at 7. A number of these criteria, however, would seem to be more aptly used by a reviewing court than by the police.

ard is generally referred to as "reasonable suspicion."[27] Thus, the inquiry becomes whether the police officer has observed enough facts, from which an inference of criminal participation can be drawn, in order to elevate the state's need to intrude over the individual's interest in privacy.[28]

Terry leads ineluctably to the premise that, at the very least, some "reasonableness" is required before the detention of a citizen can be constitutional. If a citizen has the constitutional right to be free from unreasonable seizures, it is logical and basic to due process of law that, before the state can punish the exercise of that right,[29] some element must intervene to transform the right to walk away into a duty to stop. That element must be the police officer's apprehension of circumstances which make it reasonable to infer that the citizen has committed a crime. Since the Indiana statute does not require that the command to stop be grounded upon reasonable suspicion, the statute is unconstitutional as applied to those not reasonably suspected of criminal acts.[30]

Police administrative rulemaking has been suggested as a means of making the balancing test more useful. *See, e.g.*, Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 417–32 (1974) [hereinafter cited as *Amsterdam*]; Quinn, *The Effect of Police Rulemaking on the Scope of Fourth Amendment Rights*, 52 J. URB. L. 25, 38–41 (1974).

[27] For a discussion of "reasonable suspicion," *see generally Amsterdam, supra* note 26. In Adams v. Williams, 407 U.S. 143 (1972), the Supreme Court held that reasonable suspicion could be based on an informant's tip. Since the Court stated that the informant's unverified tip may have been insufficiently reliable for an arrest or search warrant under the *Spinelli-Aguilar* line of cases, but was nevertheless sufficient to support a forcible stop, it would seem that a lesser degree of reliability of tips will be required for stops than for arrests. *See also* Elliott v. State, —— Ind. ——, 317 N.E.2d 173 (1974) (DeBruler, J., dissenting).

[28] For an example of a case in which reasonable suspicion sufficient to effect a stop was found, see Bryant v. State, —— Ind. App. ——, 299 N.E.2d 200 (1973). In *Bryant*, the defendant was observed shortly after a robbery had occurred, driving in the vicinity of the crime. He fit the description of the robber, behaved nervously, and drove in a circuitous route when he saw the policemen. Under these circumstances, it would have been poor police practice not to have stopped the defendant for further investigation. *Cf.* Robinson v. United States, 278 A.2d 458 (D.C. App. 1971), in which the detaining officers had never seen the suspect before, and there had been no report of a crime. The only facts known by the officers were that the suspect was walking down the street at 2:00 a.m., and when asked by the policemen to stop, continued walking. It was held that these facts did not constitute reasonable suspicion.

[29] *See* Wright v. Georgia, 373 U.S. 284 (1963):

> Obviously, however, one cannot be punished for failing to obey the command of an officer if that command is itself violative of the Constitution.

Id. at 291–92.

[30] While this analysis might seem to apply equally to Indiana's resisting arrest statute, underlying factors peculiar to forcible resistance and arrest may mean that a probable cause standard constitutionally need not be included in the resisting arrest statute. See generally Comment, *The Right to Resist Unlawful Arrest*, 31 LA. L. REV. 120 (1970).

The constitutional status of the right to resist unlawful arrest is unclear. At common law, the right to resist an unlawful arrest has existed since 1710. The Queen v. Tooley, 2 Ld. Raym. 1296, 92 Eng. Rep. 349 (K.B. 1710). For a summary of the history of the right, *see* Comment, *The Right to Resist An Unlawful Arrest: An Outdated Concept?*, 3

A REDRAFTED FLEEING STATUTE AND THE VAGUENESS DOCTRINE

In order to bring the fleeing statute into harmony with the fourth amendment, it must require at least reasonable suspicion for the com-

---

TULSA L.J. 40, 43–46 (1966) [hereinafter cited as *Tulsa Comment*]; Chevigny, *The Right to Resist An Unlawful Arrest*, 78 YALE L.J. 1128 (1969) [hereinafter cited as *Chevigny*]. In 1900, the Supreme Court recognized the right to resist unlawful arrest in John Bad Elk v. United States, 177 U.S. 529 (1900). The Court stated:

> . . . where the officer is killed in the course of the disorder which naturally accompanies an attempted arrest that is resisted, the law looks with very different eyes upon the transaction, when the officer had the right to make the arrest, from what it does if the officer had no such right.

177 U.S. at 537. The right was again recognized by the Supreme Court, in dictum, in United States v. Di Re, 332 U.S. 581, 594 (1948).

The right to resist unlawful arrest is still a defense to prosecution for resisting arrest in many jurisdictions, including Indiana, *see* Heichelbech v. State, 258 Ind. 334, 281 N.E.2d 102 (1972); Williams v. State, —— Ind. App. ——, 42 Ind. Dec. 194, 311 N.E.2d 619 (1974). Other jurisdictions have emasculated the right, *see, e.g.*, United States v. Cunningham, 509 F.2d 961 (D.C. Cir. 1975); United States v. Moore, 483 F.2d 1361 (9th Cir. 1973); United States v. Martinez, 465 F.2d 79 (2d Cir. 1972) (dictum); United States v. Ferrone, 438 F.2d 381 (3d Cir. 1971) (dictum), *cert. denied* 402 U.S. 1008 (1971); United States v. Beyer, 426 F.2d 773 (2d Cir. 1970); United States v. Simon, 409 F.2d 474 (7th Cir. 1969), *cert. denied* 396 U.S. 829 (1969); while still others have abolished it entirely, *see, e.g.*, CAL. PENAL CODE § 834(a) (West 1970); ILL. REV. STAT., ch. 38, § 7–7 (1962); N.H. REV. STAT. ANN. 594:5 (1955); N.Y. PENAL LAW § 35.27 (McKinney 1968); R.I. GEN. LAWS ANN. § 12–7–10 (1956); State v. Koonce, 89 N.J. Super. 169, 214 A.2d 428 (1965). *See also* ALI, MODEL PENAL CODE § 3.04(2)(a)(i), Tent. Draft VII; and UNIFORM ARREST ACT § 5.

The question of whether the right to resist unlawful arrest is a constitutional right was presented to the Supreme Court in Wainwright v. City of New Orleans, 392 U.S. 598 (1968). The Court dismissed the writ of certiorari as improvidently granted because of an inadequate record. *Id.*

The argument that *Terry* requires that a reasonable suspicion standard be included in the fleeing statute does not imply that the right to resist an unlawful arrest is a constitutional right. The policies which underlie forcible resistance and arrest differ from those which underlie flight and investigatory stops. While the fourth amendment violation in the case of an unlawful arrest is at least as great as in the case of an unreasonable stop, other interests and procedural safeguards override the arrestee's interest in immediate vindication of his fourth amendment rights. It is well documented that the potential for escalating violence presented by forcible resistance has discredited the right to resist, *see, e.g.*, State v. Koonce, 89 N.J. Super. 169, 214 A.2d 428 (1965); People v. Curtis, 70 Cal. 2d 347, 450 P.2d 33, 74 Cal. Rptr. 713 (1969); Commonwealth v. Beam, 227 Pa. Super. 293, 324 A.2d 549 (1974); *Tulsa Comment, supra* at 49; Comment, *The Right to Resist Unlawful Arrest*, 7 NAT. RES. L.J. 119, 123 (1967) [hereinafter cited as *Nat. Res. Comment*]. Indeed, several federal courts have announced that they are seeking to provide protection for police officers acting in good faith, by not allowing them to be physically resisted. See, *e.g.*, United States v. Cunningham, 509 F.2d 961 (D.C. Cir. 1975); United States v. Moore, 483 F.2d 1361 (9th Cir. 1973); United States v. Martinez, 465 F.2d 79 (2d Cir. 1972) (dicutm); United States v. Ferrone, 438 F.2d 381 (3d Cir. 1971) (dictum); United States v. Simon, 409 F.2d 474 (7th Cir. 1969). The act of fleeing can clearly be distinguished from the act of resisting an officer in this respect. Although resisting arrest necessarily implies a struggle of some sort, merely "fleeing" does not. Flight is entirely a one-party act. Therefore, the state's interests in protecting its police officers and in preventing violence do not apply to the fleeing situation, and should not override the citizen's fourth amendment right to walk away. On the other hand, the state's interest in protecting police officers seems overwhelming in the case of resisting arrest.

When the arrest is based on a warrant, even an invalid one, the state has an additional interest in insisting on compliance with judicial orders. See generally Walker v. City of

mand to stop. The existence of reasonable suspicion should be affirmatively proven by the state.[31] The fleeing statute could be construed *in*

Birmingham, 388 U.S. 307 (1967) and United States v. United Mine Workers of America, 330 U.S. 258 (1947). Where a warrant exists, there is also an assumption that the arresting officer is acting as a mere agent of the issuing authority, and should not be subjected to possible physical harm. *See, e.g., Chevigny, supra,* at 1149–50: "It is questionable today if resistance to written process may ever be justified." *See also* Note, *Defiance of Unlawful Authority,* 83 HARV. L. REV. 626, 636 (1970) [hereinafter cited as *Harvard Note*]. Failure to obey a police order, on the other hand, does not invoke those governmental interests which require that one submit to an arrest. In fact, failure to obey an unlawful police order cannot constitutionally be punished, *see* Wright v. Georgia, 373 U.S. 284 (1963). *See also Harvard Note, supra,* at 639:

> The categorical rule running through these cases [defiance of unlawful police orders] . . . is in sharp contrast to . . . defiance of voidable injunctions and, in some states, resistance to unlawful arrests. . . . As with unconstitutional statutes, however, alternative remedies for improper police actions are particularly unsuited for vindication of the rights which a policeman's on the spot order generally infringes, and any major state interest in requiring temporary compliance with such unlawful orders is difficult to discern.

Likewise, it is difficult to find a state interest sufficient to override the constitutional right to walk away from an unlawful order to stop.

Moreover, there are procedural safeguards and remedies which are more readily available to the unlawfully arrested individual than to the victim of an unlawful stop. First, after Gerstein v. Pugh, 420 U.S. 103 (1975), all persons arrested must be taken before a judicial officer for a determination of probable cause. Upon submission to an illegal arrest, then, the legality of the arrest will be determined very shortly thereafter, and constitutional rights will be vindicated. Since the *Gerstein* holding does not extend to investigatory stops, however, there is no such immediate review of their constitutionality.

Secondly, it is often said that the right to resist unlawful arrest can constitutionally be abolished because the aggrieved party may obtain a remedy through a later civil action, *see e.g., Tulsa Comment, supra,* at 47; *Nat. Res. Comment, supra,* at 127; People v. Curtis, 70 Cal. 2d 347, 450 P.2d 33, 74 Cal. Rptr. 713 (1969). *See generally* Foote, *Tort Remedies for Police Violations of Individual Rights,* 39 MINN. L. REV. 493, 494 (1955); Gilligan, *The Federal Tort Claims Act—An Alternative to the Exclusionary Rule?,* 66 J. CRIM. L. & C. 1, 10–22 (1975). While the civil remedies open to wrongfully arrested persons may leave much to be desired, *see Chevigny, supra,* at 1134, it is much less likely that the victim of an unlawful investigatory stop could obtain effective redress through a civil action, because few people, aside from the detainee himself, can appreciate the indignity and humiliation that such a stop may engender. *See, e.g., Chevigny, supra,* at 1142–43.

As a matter of logic, it may seem that a constitutional requirement that a conviction for fleeing a police officer be grounded in reasonable suspicion implies that a lack of reasonable suspicion should at least provide a defense to resisting arrest. However, given the different policies involved, a "reasonableness" requirement for the fleeing statute makes no inroads upon the law of resisting arrest, because lack of reasonable suspicion may already be an implicit defense. The lack of "reasonable suspicion" in an arrest would seem to raise the inference that the arrest was made in bad faith. Bad faith generally is a defense to the crime of resisting arrest, even in those jurisdictions which severely limit the right to resist. *See* United States v. Moore, 483 F.2d 1361 (9th Cir. 1973); *Chevigny, supra.* Moreover, even if the courts refuse to recognize a lack of reasonable suspicion as a defense to resisting arrest, this would be justified by the policy considerations discussed above. In the arrest context, procedural remedies and civil actions seem to provide a better accommodation of the constitutional and state interests involved, and do not raise the same potential for violence that resistance could entail.

[31] The difference between an element and an affirmative defense, obviously, is which party must bear the burden of proof. *See* Terry v. Ohio, 392 U.S. 1 (1968):

> [I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.

pari materia with the Indiana stop statute,[32] which contains adequate reasonableness requirements, or it could be amended by the legislature to include a reasonableness requirement.

If the fleeing statute were redrawn to include a reasonableness requirement, it would satisfy *Terry*. However, even if the statute were redrawn in this manner, there would remain an additional constitutional problem of statutory vagueness.

The vagueness doctrine is traditionally defined as the requirement that a statute be sufficiently specific to give a person of normal intelligence notice as to what conduct is required or forbidden.[33] If the fleeing statute is construed to include a reasonableness requirement—as it must be in order to comport with *Terry*—a citizen would still be unable to determine whether the police officer's command to stop was reasonable, since many facts contributing to reasonable suspicion may be outside the scope of the citizen's knowledge (*e.g.*, that he fits the description of a murderer, and is present in the vicinity of the crime).[34] He is thus placed in the double bind of either submitting to an unlawful seizure, or fleeing and later suffering criminal prosecution if it turns out that there actually were reasonable grounds for the command to stop.[35]

However, it cannot be said that adequate notice is the sole interest of the vagueness doctrine. While "[c]ertainly a precondition to the Court's accepting an argument of uncertainty seems to be that the statute

---

Id. at 21. This statement strongly suggests that the burden of proving reasonableness must rest on the state. As a practical matter, it is only fair that the party having knowledge of facts bear the burden of proof. Since a person commanded to stop very often has no knowledge of what facts are known to a police officer, he could not aptly carry the burden of an affirmative defense. *See* note 33 *infra* & text accompanying. Since fleeing a police officer is a crime, and reasonable suspicion is constitutionally required for the crime to be committed, it follows that the reasonable suspicion must be proven as a part of the state's case.

[32] IND. CODE § 35-3-1-1 (Burns 1971).

[33] *See, e.g.*, Papachristou v. City of Jacksonville, 405 U.S. 156 (1972); Coates v. City of Cincinnati, 402 U.S. 611 (1971); Brandenburg v. Ohio, 395 U.S. 444 (1969); Dombrowski v. Pfister, 380 U.S. 479 (1965); Aptheker v. Secretary of State, 378 U.S. 500 (1965); NAACP v. Button, 371 U.S. 415 (1963); Shelton v. Tucker, 364 U.S. 479 (1960); Winters v. New York, 333 U.S. 507 (1948); Thornhill v. Alabama, 310 U.S. 88 (1940).

[34] While this may seem an unlikely state of facts, a very similar situation was presented in Wainwright v. City of New Orleans, 392 U.S. 598 (1968). The petitioner, a law student at Tulane University, was on his way to get something to eat late at night, when he was observed by policemen. The police had been searching for a murderer who allegedly had a tatoo on his forearm. They stopped the petitioner because they thought he fit the description of the murderer. Wainwright gave his name and address, and informed the officers where he was going. He refused, however to remove his jacket so that the officers could inspect his forearm for a tatoo, apparently because he suffered from a skin disease. He was subsequently charged with and convicted of resisting an officer. *See* note 30 *supra*.

[35] Although a similar bind faces an arrestee, there is a crucial difference—his rights will be vindicated by a constitutionally mandated probable cause hearing. *See* notes 30 *supra*, and 48 *infra*.

is in fact more uncertain . . . than the mine run of statutes,"[36] the vagueness doctrine concerns itself with the relationship of individual rights to arbitrary exercise of state power, and with ensuring that the judiciary will be able to safeguard those rights.[37] In this sense, the vagueness doctrine stands for the proposition that a legislature may not create standardless statutes which leave the equilibrium between an individual's rights and the state's demands upon the individual to be determined subjectively, and on an ad hoc basis.[38]

In *Smith v. Goguen*,[39] the Supreme Court recognized that since few people actually gauge their conduct by statutes, the notice element of vagueness cannot be considered its driving force. The Court stated:

> . . . [p]erhaps the most meaningful aspect of the vagueness doctrine is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement. . . . Statutory language of such standardless sweep allows policemen, prosecutors, and juries to pursue their personal predilections. Legislatures may not so abdicate their responsibilities for setting standards for the criminal law.[40]

Even if the fleeing statute contained the required element of reasonable suspicion, without more, it would still delegate almost unrestrained discretion to determine what constitutes reasonable suspicion sufficient to justify the arrest and prosecution of a fleeing[41] suspect to the police

---

[36] Note, *The Void-For-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 88 (1960) [hereinafter cited as *Vagueness Note*].

[37] *Id.*

[38] *Id.* at 93.

[39] 415 U.S. 566 (1975).

[40] *Id.* at 574–75. The Court also stated:

> There are areas of human conduct where, by the nature of the problems presented, legislatures simply cannot establish standards with great precision. Control of the broad range of disorderly conduct that may inhibit a policeman in the performance of his official duties may be one such area, requiring as it does an on-the-spot assessment of the need to keep order.

Id. at 581 (dictum). It should be noted that this language derives from Colten v. Kentucky, 407 U.S. 104 (1972), in which the petitioner had intervened in a discussion between a police officer and a friend of the petitioner's over a traffic matter. The petitioner refused to desist from the conversation, although requested to do so several times.

The facts of the *Colten* case and the above-quoted dictum from *Goguen* are distinguishable from the situation in which a person avoids a police officer's command to stop. In the latter case it is the police officer who seeks to thrust himself into the fabric of the citizen's life, instead of vice versa. Thus, it is incumbent on the state to develop standards for when they may disturb an individual's peace.

[41] In point of fact, the meaning of the bare word "flees," as used in the statute, is unclear. Is the mere act of walking away sufficient for conviction, or must one trot, canter, or run? If the purpose of the legislature was to punish disobedience to the command to stop, it would not seem to matter at what gait one avoids the command to stop, yet "fleeing," in the common vernacular, usually denotes running. A person who had walked away from an officer's command to stop would probably be surprised to learn that he had "fled" from a police officer.

and prosecutors.[42] As a practical matter, the potential for abuse would still be great.[43] More importantly, review of the fourth amendment right impinged upon by a stop made without reasonable suspicion would be practically impossible because reasonable suspicion is a nebulous standard which requires less proof than, say, probable cause.[44] Historically, "new" crimes have been more vulnerable to vagueness challenges than the more venerable crimes adopted from the common law, because legislatures have not equipped the courts and police with sufficient standards with which to enforce them.[45]

The fleeing statute would be unconstitutionally vague, then, for two reasons. First, if it were redrafted to include the requisite reasonableness element, it would fail to give notice as to when the person commanded to stop can insist upon his fourth amendment rights and when he must submit, since reasonable suspicion may be based on facts outside his knowledge. Second, a statute merely requiring reasonableness suspicion would be vague because it would provide no standards to guide police, courts, and juries as to what constitutes reasonable suspicion. The potential for differences in interpretation may well lead to

---

[42] Several means of limiting discretion in investigatory stops have been suggested. *See, e.g.,* MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 110.2 (Proposed Official Draft No. 1, 1972); *Amsterdam, supra* note 26.

[43] *See generally* notes 11, 13, 16, & 17 *supra* & text accompanying. A further abuse which may be practiced if police officers are not given more explicit guidance as to what constitutes reasonable suspicion is the relevance of the flight itself as an indication of probable cause or reasonable suspicion. Since flight from an unlawful order is an exercise of one's fourth amendment rights, it is clear that this type of "bootstrapping" could undo the exercise of those rights.

Flight has traditionally been admissible as evidence of guilt at trial, although the Supreme Court has deprecated its probity because of the inherent ambiguity of flight. *See, e.g.,* Hickory v. United States, 160 U.S. 408 (1896); Alberty v. United States, 162 U.S. 499 (1896); Wong Sun v. United States, 371 U.S. 471, 484–85 (1963). *See also* Austin v. United States, 414 F.2d 1155 (D.C. Cir. 1969); Miller v. United States, 320 F.2d 767 (D.C. Cir. 1963); Vick v. United States, 216 F.2d 228, 232 (5th Cir. 1954).

Several lower courts have held that absent other suspicious circumstances, flight alone is insufficient to justify detention and investigation, *see, e.g.,* Wilson v. Porter, 361 F.2d 412 (9th Cir. 1966); Robinson v. United States, 278 A.2d 458 (D.C. App. 1971); or that where the flight is the result of unlawful police action, evidence gained during flight should be suppressed, *In re* V, 10 Cal. 3d 665, 111 Cal. Rptr. 693, 517 P.2d 1145, 1147 (1974); Gascon v. Superior Court, 169 Cal. App. 2d 356, 337 P.2d 201 (1959); Badillo v. Superior Court, 46 Cal. 2d 269, 294 P.2d 23 (1956).

It would seem that the best accommodation of fourth amendment values with police practices would be to view flight from an unlawful command as an exercise of fourth amendment rights, which does not supply probable cause or reasonable suspicion. However, where the officer can point to other facts from which he can infer criminal acts, it would be proper to allow the flight to bear on reasonable suspicion or probable cause. Under this scheme, the state could not "bootstrap" itself into a superior position where no reasonable suspicion existed before the command to stop; but where reasonable suspicion existed before the flight, the flight itself may corroborate the suspicion, or even elevate it to probable cause for an arrest.

[44] *Vagueness Note, supra* note 36, at 81.

[45] *Id.* at 82.

arbitrary and discriminatory enforcement, an evil which the vagueness doctrine is designed to avoid.[46] Therefore, unless the statute were drafted so that clear standards for reasonable suspicion were provided, it would be void on its face.[47] Its due process infirmity could not be rehabilitated by merely including the words "reasonable suspicion."[48]

CONCLUSION

It appears that in enacting the "fleeing a police officer" statute, the Indiana legislature failed to appreciate the fact that the fourth amendment demands a delicate balancing of a state's needs with an individual's rights. Not content with the state's power to detain citizens without arrest where reasonable cause exists,[49] it sought to gain additional power by enacting a criminal statute to punish anyone who failed to obey even an invalid command to stop. In so doing, it used too blunt an instrument to accomplish its intended purpose.

---

[46] *E.g.*, Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

[47] *See* Steffel v. Thompson, 415 U.S. 452, 473–74 (1974) for a discussion of the ramifications for purposes of judicial review, of the distinction between a statute which is void on its face and one which is void as applied.

[48] Assuming a right to resist unlawful arrest, given either by the federal Constitution or by state law, *see* note 30 *supra*, it may be asked whether resisting arrest statutes do not share the infirmities of the Indiana fleeing statute under the vagueness doctrine. In those states which permit the affirmative defense of unlawful arrest to a charge of resisting arrest, the notice problem is indistinguishable from the notice problem posed by the Indiana fleeing statute. Affirmative defenses are bound by the constitutional requirements of the vagueness doctrine, *cf., e.g.*, Doe v. Bolton, 410 U.S. 179, 191–92 (1974); United States v. Vuitch, 402 U.S. 62, 71–72 (1971); Ginsberg v. New York, 390 U.S. 629 (1968); Edgar A. Levy Leasing Co. v. Siegel, 258 U.S. 242 (1922).

However, even if resisting arrest raises a notice problem as serious as that raised by the fleeing statute, this would probably not suffice to invalidate resisting arrest statutes. Lack of notice, without more, is often insufficient to mount a successful challenge on vagueness grounds. Excessive discretion in the hands of law enforcement personnel is an essential element of a vagueness attack. *See generally Vagueness Note, supra* note 36. Several factors limit the amount of discretion in the arrest context, but not in the stop context. First, a resisting arrest statute does not create a new crime, and police officers, courts and juries are not left without standards for its enforcement. Second, the appearance before a magistrate which is mandated by Gerstein v. Pugh, 420 U.S. 103 (1975), ensures that all arrests will be reviewed speedily by an impartial tribunal. This procedure guarantees redress for constitutional violations, and will deter arbitrary use of the arrest power. Third, a civil damage remedy is likely to be far more effective in the case of an unlawful arrest than in the case of an unreasonable stop. The intrusion is more easily understood by a jury, the recoverable damages are greater, and the magistrate's finding of a lack of probable cause could probably be introduced into evidence in the civil action. This relatively effective civil remedy may also operate to deter arbitrary police action.

In a stop situation, on the other hand, there may never be any judicial review of an officer's actions and, in any event, the fleeing statute, which creates a new crime, provides little in the way of a standard to police, courts, and juries. Moreover, a civil damage remedy is likely to be ineffective where the intrusion is not likely to command the sympathies of a jury. Therefore resisting arrest statutes and the Indiana fleeing statute are distinguishable under the vagueness doctrine, given the much broader discretion and potential for arbitrary enforcement inherent in the stop situation.

[49] *See* Terry v. Ohio, 392 U.S. 1 (1968); IND. CODE § 35-3-1-1 (Burns 1971).

If the general purpose of the statute is to assist the police in preventing and detecting crime, this purpose can be accomplished through the use of existing laws and practices which are not as replete with constitutional flaws. The stop statute gives an officer the right to stop a citizen who is reasonably suspected of a crime. If flight is an element of probable cause when there are other bases for suspicion,[50] this would enable an officer to give chase and to apprehend a fleeing suspect, and arrest or detain him for the offense of which he is suspected. If the suspect then offers forcible resistance, he could be prosecuted under the resisting arrest statute.[51] If the arrest were unlawful, the suspect would have available the defense of resisting unlawful arrest,[52]

Ideally, the "fleeing a police officer" statute should be repealed or stricken completely by the courts. As it now reads, the statute violates the fourth amendment, and even if it were construed in harmony with the fourth amendment, it would raise questions of statutory vagueness. As a practical matter, the statute is too fraught with potential for confusion and abuse to be workable.

JANE MALLOR

---

[50] *See* note 43 *supra.*

[51] IND. CODE § 35-21-4-1, 35-21-4-2 (1971), IND. STAT. ANN. § 10-1005, 10-1005(a) (Burns 1973).

[52] The right to resist unlawful arrest is recognized in Indiana. *See, e.g.,* Heichelbech v. State, 258 Ind. 334, 281 N.E.2d 102 (1972); Williams v. State, —— Ind. App. ——, 311 N.E.2d 619 (1974). It is difficult to understand why Indiana sanctions the resistance of unlawful arrest, yet punishes the less violent act of flight from an unlawful command to stop. Perhaps these cases, which were decided subsequent to the promulgation of the fleeing statute, evidence the courts' intention to permit flight from an unconstitutional command to stop. *See also* note 30 *supra.*