

4-15-1981

The Policeman's Duty and the Law Pertaining to Citizen Encounters

Charles M. Oberly III

Follow this and additional works at: <https://digitalcommons.pepperdine.edu/plr>



Part of the [Constitutional Law Commons](#), [Criminal Law Commons](#), [Jurisprudence Commons](#), and the [Law Enforcement and Corrections Commons](#)

Recommended Citation

Charles M. Oberly III *The Policeman's Duty and the Law Pertaining to Citizen Encounters*, 8 Pepp. L. Rev. Iss. 3 (1981)

Available at: <https://digitalcommons.pepperdine.edu/plr/vol8/iss3/2>

This Article is brought to you for free and open access by the Caruso School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Pepperdine Law Review by an authorized editor of Pepperdine Digital Commons. For more information, please contact bailey.berry@pepperdine.edu.

The Policeman's Duty and the Law Pertaining to Citizen Encounters

CHARLES M. OBERLY III*

In this article the author, by case analysis, identifies the confusion facing police officers when dealing with stop and frisk situations and suggests adoption of the Model Rules of Stop and Frisk as a possible solution to the problem.

I. INTRODUCTION

The issue of when police may make on the street stops has been avoided by the United States Supreme Court for over twelve years. This lack of specific guidance is particularly troublesome to police officers who are charged with the responsibility of making split-second decisions, which may prevent crimes from being committed or result in the apprehension of those recently committing criminal acts.

The confusion in this area is demonstrated by such cases as *People v. Howard*.¹ It is the purpose of this article to review the opinions of the United States Supreme Court in this area and sug-

* By Charles M. Oberly III, Former Chief Prosecutor of the State of Delaware; argued *State v. Prouse*, 440 U.S. 648 (1979); B.A. Pennsylvania State University, 1968, Phi Beta Kappa; J.D. University of Virginia Law School 1971. Also assisting in the preparation of this article was Joseph J. Longbardi III, a second year law student at Delaware Law School.

1. *People v. Howard*, 50 N.Y.2d 583, 587, 408 N.E.2d 908, 911, 430, N.Y.S.2d 578, 581 (1980), *cert. denied*, 49 U.S.L.W. 3401 (1980).

gest the adoption of the Stop and Frisk Model Rules² as a possible solution to the confusion in the stop and frisk area.

II. CONFUSION DEMONSTRATED: *HOWARD V. NEW YORK CITY* THE POLICEMAN'S DUTY AND THE LAW PERTAINING TO CITIZEN ENCOUNTERS

While on patrol in an area of the Bronx in New York City, Officers Charles Hanley and Cornelius Brosnan of the New York City Police Department observed William Howard crossing a street. The time was approximately 1:00 p.m.; the area was one plagued by a high incidence of burglaries. The officers, who were in plain clothes and an unmarked vehicle, were attracted to Howard by the fact that he appeared to be carrying a woman's vanity case. As the police car passed, Howard looked over his shoulder in a "furtive" manner two or three times.³ The officers then pulled the car over to the right side of the curb, at which time Howard reversed his direction and "walked to the west side of the street and proceeded south on the sidewalk."

The police car then made a U-turn and the officers again observed Howard looking in their direction. As the car approached, Howard quickened his pace. The officers drove up to Howard and Officer Brosnan, displaying his police identification, stated: "Police Officer, I would like to speak to you."⁴ Howard looked directly at the officers, ignored them, and kept walking. The officers then drove to an opening between parked cars where Brosnan repeated his earlier statement. As Brosnan began to exit the vehicle, Howard ran away, clutching the vanity case to his chest.⁵

Confronted with a situation requiring an immediate decision, officers Brosnan and Hailey made the reasonable decision to pursue the fleeing suspect. Howard jumped an iron fence, ran down an alleyway and into the basement of a building where he was captured after failing to escape through a locked door and small window. Prior to the capture, Howard took the vanity case and threw it "into a pile of junk."⁶ The officers were directed to the

2. See Appendix.

3. 50 N.Y.2d at 587, 408 N.E.2d at 911, 430 N.Y.S.2d at 581.

4. *Id.* at 587, 408 N.E.2d at 911, 430 N.Y.S.2d at 581. At the time the police car passed Howard he was walking across a street diagonally in a southeast direction. Apparently the car then pulled ahead of Howard and was in front of him. Rather than walk ahead and pass the police vehicle, Howard abruptly changed his course. At this point, the police officers had done nothing more than observe Howard.

5. *Id.* at 587, 408 N.E.2d at 911, 430 N.Y.S.2d at 581.

6. *Id.* at 587, 408 N.E.2d at 911, 430 N.Y.S.2d at 581. Howard's behavior was suspicious and deserving of further investigation, because he was pursued by a college freshman named Victor Dragaj, who actually captured Howard. Since the officers were in plainclothes and in an unmarked vehicle, it is questionable

vanity case by a third person who had seen Howard throw it away.⁷ Upon opening the vanity, the officers discovered Howard's source of concern. The case contained a .38 caliber revolver and a quantity of heroin in glassine bags.⁸

Howard's motion to suppress the evidence was initially granted at the trial level. The trial judge concluded the "defendant's flight could not escalate suspicion to anything more; even if a stop and frisk was made permissible by the defendant's flight, the officers went beyond the allowable scope of [New York law]⁹ since (the) defendant was no threat to the officers' safety."¹⁰ Furthermore, the trial judge concluded that the officers had no right to take possession of the vanity case because it had not been abandoned and was outside the "grabbable area."¹¹

On appeal, the New York appellate division reversed the trial judge on both the law and facts.¹² Howard then pleaded guilty to possession of a controlled substance.¹³ Later, the New York Supreme Court affirmed the conviction without an opinion.¹⁴ The conviction was subsequently reversed by a four to three majority

whether Dragaj knew they were police officers. The opinion, however, is strangely silent on Dragaj's role in the incident.

7. *Id.* at 587, 408 N.E.2d at 911, 430 N.Y.S.2d at 582.

8. *Id.*

9. *Id.* at 588, 408 N.E.2d at 911, 430 N.Y.S.2d at 582.

10. *Id.* "[W]here, as here, there is nothing to establish that a crime has been or is being committed, flight, like refusal to answer, is an insufficient basis for seizure or for the limited detention that is involved in pursuit." *People v. Howard*, 50 N.Y.2d at 588, 408 N.E.2d at 914, 430 N.Y.S.2d at 585 (citations omitted). *See also* *Brown v. Texas*, 443 U.S. 47 (1979) (where the Court held that there were no grounds for a stop where the officers saw defendant and another man walk away from each other in an alley in an area with a high incidence of drug traffic. There was no indication, however, that it was unusual for people to be in the area and the police had no supporting evidence for suspiciousness). *See* *Sibron v. New York*, 392 U.S. 40 (1968) (the Court found that the officer could not reasonably believe he was in danger due to his observation of the defendant consorting with narcotic addicts).

11. *Id.* at 592, 408 N.E.2d at 914, 430 N.Y.S.2d at 585. *See also* *Adams v. Williams*, 407 U.S. 143 (1972) (an officer must be entitled to make a stop and have reasons to believe that the suspect is armed and dangerous in order to conduct a weapon search limited to a protective purpose); *Sibron v. New York*, 392 U.S. 40 (1968) (this case involved the search of a man observed consorting with narcotic addicts, and there the Court found the officer had no reason to believe that Sibron was armed and dangerous). *See also* *Terry v. Ohio*, 392 U.S. 1 (1968) (the frisk must be limited to that which is necessary for the discovery of weapons which might be used to harm officers or others nearby).

12. *People v. Howard*, 65 A.D.2d 714, 411 N.Y.S.2d 12, 13 (1978).

13. 50 N.Y.2d at 584, 408 N.E.2d at 911, 430 N.Y.S.2d at 582.

14. *People v. Howard*, 72 A.D.2d 503, 420 N.Y.S.2d 526 (1979).

of the New York Court of Appeals,¹⁵ which held that while the officers had sufficient basis to make an inquiry,¹⁶ Howard had a right not to respond and could leave the scene free from any further police investigation.¹⁷ In reaching this result, the majority opined that the officers were only confronted by facts "susceptible of innocent interpretation"¹⁸ which justified a limited right of inquiry and observation.¹⁹

In a bitter dissent, Justice Jasen, characterized the decision as dealing "another serious and unjustifiable blow to effective law enforcement."²⁰ Noting that Howard's actions evidenced an intent to abandon the vanity case, the dissent concluded that the police officers acted in a most reasonable manner.²¹

With the United States Supreme Court having denied certio-

15. 50 N.Y.2d 583, 408 N.E.2d 908, 430 N.Y.S.2d 578 (1980).

16. On this point the Court stated:

We have no difficulty in concluding that the officers' request for information from defendant was justified under those criteria. In an area beset by a high burglary rate defendant was seen carrying a woman's vanity case by the officers, one of whom testified that it was not uncommon for a burglar to carry away loot in his victim's luggage. Considering those facts together with defendant's numerous glances at the officers' car, his change of direction and his quickened pace, we conclude that, though the carrying by a man of a woman's purse does not constitute probable cause . . . and though defendant could, the car being unmarked and the officers in plain-clothes, have acted evasively out of fear for his own safety, the circumstances constituted a sufficient basis for the inquiry made, which of itself constituted no more than a minor inconvenience to defendant. . . .

Id. at 584, 408 N.E.2d at 912, 430 N.Y.S.2d at 583 (citations omitted).

17. *Id.* at 590, 408 N.E.2d at 913, 430 N.Y.S.2d at 584. See *Davis v. Mississippi*, 394 U.S. 721, 727 n.6 (1969) (citizens cannot be compelled to answer questions upon the request of officers); *Illinois Migrant Council v. Pilliod*, 398 F. Supp. 882, 889 (E.D. Ill. 1975), *aff'd.*, 540 F.2d 1062 (7th Cir. 1976), *aff'd in part on rehearing*, 548 F.2d 715 (7th Cir. 1977); AMERICAN LAW INSTITUTE, A MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE 275 (1975) [hereinafter cited as PRE-ARRAIGNMENT PROCEDURE].

18. *Id.* at 590, 408 N.E.2d at 913, 430 N.Y.S.2d at 583.

19. *Id.* The majority states: "The circumstances justified the inquiry made and would have justified the officers in keeping defendant under observation . . . but were not a predicate for anything more." *Id.* at 590, 408 N.E.2d at 913, 430 N.Y.S.2d at 583 (citations omitted). A reasonable assumption from this statement would be that observation might lead the officers to heightened suspicion justifying a further intrusion upon Howard's right to privacy. No indication is given as to just what the officers might have permissibly observed. It is submitted that Howard's actions upon being approached by the police were inherently indicative that criminal activity was afoot.

20. *Id.* at 594, 408 N.E.2d at 915, 430 N.Y.S.2d at 586 (Jasen J., dissenting).

21. *Id.* Since even the majority fails to conclude that the officers did not act in a reasonable manner, the "good faith" exception to the exclusionary rule may have avoided this unfortunate decision. Sufficient probability, not certainty, is the touchstone of reasonableness which governs the good faith exception. *Theodor v. Superior Court*, 8 Cal. 3d 77, 561 P.2d 234, 104 Cal. Rptr. 226 (1972). See *Hill v. California*, 401 U.S. 797 (1971) (the officers' mistake was understandable and the arrest a reasonable response to the situation facing them at the time); *Michigan v. DeFilippo*, 443 U.S. 31 (1979). See also *Terry v. Ohio*, 392 U.S. 1 (1968).

rari,²² *Howard* establishes standards for frisks in New York.

III. ELOCUTION OF STOP AND FRISK: *TERRY V. OHIO*

The United States Supreme Court's first foray into issues of police street stops began with *Terry v. Ohio*,²³ in which the Court addressed the narrow issue of "whether it is unreasonable for a policeman to seize a person and subject him to a limited search for weapons unless there is probable cause for arrest."²⁴

The factual context of *Terry v. Ohio* is critical to understanding its impact.²⁵ Officer McFadden, a Cleveland police officer with thirty-nine years experience, saw Terry and another man, Richard Chilton, walk in front of a jewelry store and duck in to a nearby alley approximately a dozen times. McFadden did not recognize Terry, Chilton, or a third person who spoke with them for a few moments, but McFadden approached the three men and asked their names; their response was unintelligible. McFadden then

22. See note 1 *supra*. See also *People v. Earl*, 40 N.Y.2d 941, 358 N.E.2d 1037, 390 N.Y.S.2d 412 (1976), *cert. denied*, 431 U.S. 943 (1977), *rehearing denied*, 434 U.S. 881 (1978), where the Supreme Court denied certiorari in another bizarre opinion from the New York Court of Appeals, which reversed an opinion from the New York Supreme Court. In this case an off-duty New York policeman, riding home in his car around midnight in New York City, observed two men crouched behind an automobile in a partially deserted and unfenced hotel parking lot. The officer noticed that one of the figures was holding something in his hand in a raised position and the other appeared to place something in his back pocket. Believing something of a criminal nature was in the works, the officer decided to investigate. He pulled up to where the men were and jumped from his car with his badge in one hand and yelled "freeze." One of the men immediately dropped a loaded .38 caliber revolver. They were arrested.

The New York Court of Appeals held the officer's actions to be illegal seizure. While certiorari was denied, Chief Justice Burger and Justices Blackmun and Rehnquist dissented. Acknowledging the Court cannot accept for review every case brought before it, the dissenters suggested this decision was so clearly wrong it could be summarily reversed. The strength of their conviction is set forth in footnote 7 of the dissenting opinion:

Respondent suggests that '[o]f course, Officer Carter, like any other citizen, would have had the right to satisfy his curiosity by addressing questions to defendant' [Response to petition for certiorari, at 6.]

Of course, no citizen or policeman in his right mind would have approached respondent and his companion as he would a tourist in Times Square at high noon merely to satisfy idle curiosity. Officer Carter, unlike ordinary citizens, had a sworn duty to investigate such suspicious behavior, and was acting pursuant to such duty when he approached the suspects. His conduct should be commended, not reproached.

431 U.S. at 948 n.7 (Burger, C.J., dissenting).

23. 392 U.S. 1 (1968).

24. *Id.* at 15.

25. *Id.* at 6.

grabbed Terry, spun him around, and while conducting a pat-down search²⁶ of his clothing found a .38 caliber revolver. A similar pat-down search of Chilton also produced a revolver. Nothing was found on the third person, Katz.²⁷

In upholding the actions of McFadden, the Supreme Court concluded that Terry had been seized when frisked by broadly stating: "It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person."²⁸ The broad statement was clarified in a subsequent footnote which states:

We thus decide nothing today concerning the constitutional propriety of an investigative "seizure" upon less than probable cause for purposes of "detention" and/or interrogation. Obviously not all personal intercourse between policemen and citizens involves "seizures" of persons. Only when the officer, by means of physical force or show of authority has in some way restrained the liberty of a citizen may we conclude that a "seizure" has occurred. We cannot tell with any certainty upon this record whether any such "seizure" took place here prior to Officer McFadden's initiation of physical contact for purposes of searching Terry for weapons and we thus may assume that up to that point no intrusion upon constitutionally protected rights had occurred.²⁹

The question whether Terry was seized when first approached by Officer McFadden was left unanswered in the Court's opinion. The majority appears to imply that no "seizure" occurred until the officer physically placed his hands on Terry.³⁰ Recognizing the gap left by the majority opinion, Justice Harlan attempted to address the issue by indicating that officer McFadden had cause to seize Terry when he first approached the three men. Absent cause to seize, the person addressed by a police officer has the right to ignore his interrogator and walk away.³¹

Justice White, concurring in the opinion, similarly noted that not every police-citizen encounter is proscribed by the fourth amendment.

There is nothing in the Constitution which prevents a policeman from ad-

26. *Id.* at 7. Assuming that the detention is proper, the right to search is initially limited to a frisk which consists of running the hands over the outer surface of the suspect's clothing for the limited purpose of determining if he is armed.

27. *Id.* at 7.

28. *Id.* at 16.

29. *Id.* at 19 n.16. See also *Sibron v. New York*, 392 U.S. 40, 61 n.20 (1968).

30. Thus, when Officer McFadden approached the three men gathered before the display window at Zucker's store he had observed enough to make it quite reasonable to fear that they were armed; and nothing in their response to his hailing them, identifying himself as a police officer, and asking their names served to dispel that reasonable belief. We cannot say *his decision at that point to seize Terry* and pat his clothing for weapons was the product of a volatile or inventive imagination, or was undertaken simply as an act of harassment

Id. at 28 (emphasis added).

31. *Id.* at 32-33 (Harlan, J., concurring).

dressing questions to anyone on the streets. Absent special circumstances, the person approached may not be detained or frisked but may refuse to cooperate and go on his own way. However, given the proper circumstances, such as those in this case, it seems to me the person may be briefly detained against his will while pertinent questions are directed to him. Of course, the person stopped is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest, although it may alert the officers to the need for continued observation.³²

Although the opinion left undecided the point at which a police-citizen encounter activates the protection of the fourth amendment against unreasonable search and seizure, the Court found that Officer McFadden was able to point to "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion."³³ The intrusion warrants a protective search for weapons "where he has reason to believe he is dealing with an armed and dangerous individual,"³⁴ an unassailed fact in *Terry* since Officer McFadden believed the defendant was casing the store for a possible robbery. *Terry*, therefore, stands for the proposition that if a police officer believes, based upon specific and articulable facts warranting the intrusion, that criminal activity may be afoot, and he is dealing with an armed person, the officer may subject that person to a seizure for the purpose of a pat-down search or frisk.³⁵

In reaching its decision in *Terry*, the Court balanced the governmental interest of the need to search against the invasion entailed by the seizure.³⁶ The interest of society was seen as clearly paramount, when the Court stated that it would have been poor police work for Officer McFadden not to further investigate.³⁷ Because of the possible threat to an officer's physical safety, "it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon."³⁸

32. *Id.* at 34 (White, J., concurring).

33. *Id.* at 21 (two men pacing along a street corner for an extended period of time, pausing to stare in the same store window roughly 24 times, followed by conferences in which a third man later joined them, constituted specific and articulable facts).

34. *Id.* at 27.

35. *Id.* at 30-31.

36. *Id.* at 21. See *Camara v. Municipal Court*, 387 U.S. 523, 534-37 (1967).

37. *Id.* at 23: "It would have been poor police work indeed for an officer of 30 years experience in the detection of thievery from stores in this same neighborhood to have failed to investigate this behavior further."

38. *Id.* at 24. See also *Id.* at 24 n.21, in which the Court cites figures showing that from 1960 through 1966, a total of 335 police officers were killed in the line of

The same day that *Terry* was decided, the Court handed down the opinions of *Sibron v. New York*³⁹ and *Peters v. New York*,⁴⁰ each addressing a factually different twist from *Terry*.

In *Sibron*, Brooklyn patrolman Anthony Martin, while patrolling his beat in uniform on March 9, 1965, observed Sibron continually from the hours of 4:00 p.m. to 12:00 midnight. During this period, Officer Martin saw Sibron converse with six or eight persons whom Martin knew were narcotic addicts. The officer did not overhear any of the conversations and did not observe any object pass between Sibron and the others. Later that evening, Sibron was seen speaking to three other known addicts inside a restaurant where he ordered a piece of pie and coffee.⁴¹ Officer Martin approached Sibron while he was seated and requested him to come outside. Once outside the restaurant, the officer addressed Sibron, stating, "you know what I am after." Sibron mumbled something and as he began to reach into his pocket, Martin thrust his hand into Sibron's pocket and removed several glassine envelopes containing heroin.⁴² Sibron's conviction for possession of heroin was upheld on appeal by all New York courts hearing the case.⁴³ Relying upon the *Terry* decision, the United States Supreme Court reversed the conviction, finding nothing in Sibron's behavior giving rise "to particular facts from which he (Officer Martin) reasonably inferred that the individual was armed and dangerous."⁴⁴

In reaching the *Sibron* decision, the Court again limited its scope of review to whether or not the officer had the right to seize and frisk Sibron for weapons.⁴⁵ The Court went on to state that

duty. This carnage has greatly increased since the *Terry* opinion. In the five year period from 1969 through 1973, some 565 police officers were killed. From 1974 through 1978, the figure was 558 police officers. Over the ten year span after *Terry*, an average of 112.3 police officers have died yearly while attempting to protect the public. In 1966, only 57 law enforcement officers lost their lives in the line of duty. Similarly in 1966, the number of assaults on police officers was 23,851. By 1978, this figure had mushroomed to 56,130. See U.S. DEPT. OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION UNIFORM CRIME REPORTS, CRIME IN THE UNITED STATES 300, 307-08 (1978).

39. 392 U.S. 40 (1968).

40. *Id.* at 40.

41. *Id.* at 45.

42. *Id.* The arrest of Sibron and Peters was made pursuant to New York's "stop and frisk" law, N.Y. CRIM. PROC. LAW § 180-a (McKinney 1980). The decisions, however, were not premised on the constitutional validity of the statute. *Id.* at 45, 60 n.20.

43. *Id.* at 40-41.

44. *Id.* at 64.

45. We are not called upon to decide in this case whether there was a "seizure" of Sibron inside the restaurant antecedent to the physical seizure which accompanied the search. The record is unclear with respect to what transpired between Sibron and the officer inside the restaurant. It

even assuming such cause existed, the search went too far because *Terry* only sanctioned pat-downs and did not include reaching into pockets⁴⁶ prior to finding or knowing the location of a weapon.

The final decision in the June 10, 1968, trilogy was *Peters v. New York*,⁴⁷ which also arose in the context of New York's stop and frisk law.⁴⁸ The stated facts show that on July 10, 1964, Officer Samuel Lasky of the New York City Police Department was home in his apartment at approximately 1:00 p.m. Lasky heard a noise at the door of his apartment, but as he approached it, the telephone rang and he took the call. Following the conclusion of the conversation, Lasky peered through the peephole in his door and observed two unfamiliar men "tiptoeing out of the alcove toward the stairway."⁴⁹ Lasky called the police, and then he dressed in civilian clothes and armed himself with his service revolver. As he exited his apartment, Lasky slammed the door behind him. "This precipitated a flight down the stairs on the part of the two men, and Officer Lasky gave chase."⁵⁰ Defendant Peters was

is totally barren of any indication whether Sibron accompanied Patrolman Martin outside in submission to a show of force or authority which left him no choice, or whether he went voluntarily in a spirit of cooperation with the officer's investigation.

Id. at 63.

46. *Id.* at 65.

47. *Id.* at 40. This was a companion case decided with *Sibron*.

48. The Supreme Court notes that the New York Court of Appeals justified the search based on N.Y. CRIM. PROC. LAW § 180-a (McKinney 1980); this is New York's "stop and frisk law." *Id.* at 40. The law at that time provided that "a police officer may stop any person abroad in a public place whom he reasonably suspects is committing . . . [certain crimes] and may demand . . . his name, address and an explanation of his actions, [and when the officer] suspects he is in danger . . . he may search such person for a dangerous weapon." N.Y. CRIM. PROC. LAW § 180-a (McKinney 1980). This statute has since been amended to N.Y. CRIM. PROC. LAW § 140.50 (McKinney Supp. 1980). The statute now provides, in part, that "a police officer may stop a person in a public place located *within the geographical area of such officer's employment* when he reasonably suspects that such person is committing, has committed, or is about to commit . . . a felony or misdemeanor." *Id.* at § 140.50(1) (emphasis added). See also *People v. Arthurs*, 24 N.Y.2d 688, 249 N.E.2d 462, 301 N.Y.S.2d 614 (1969) (a police officer who reasonably believes that he is dealing with an armed and dangerous individual may make a reasonable search for weapons, even though he does not have probable cause for arrest or if he's not certain the individual is armed); *People v. Hoffman*, 24 A.D.2d 497, 261 N.Y.S.2d 651 (1965) (a police officer has the authority to stop and question a person as the result of their suspicious activities in the operation of an automobile at 4 a.m.).

49. 392 U.S. at 48.

50. *Id.* at 49.

physically apprehended one floor below by Lasky, who grabbed him by the collar. The second man successfully avoided capture. After being seized, Peters attempted to explain his presence and behavior by claiming he was visiting an unnamed married woman. Unconvinced of the truthfulness of Peters' reason for being in the building, Officer Lasky frisked Peters and found a hard object in the pocket of his pants. Believing that the object might be a knife, Lasky removed it and discovered an "opaque plastic envelope, containing burglar's tools".⁵¹

Peters was tried and "convicted of possessing burglary tools under circumstances evincing an intent to employ them in the commission of a crime."⁵² The United States Supreme Court affirmed the conviction on grounds other than theories of stop and frisk.⁵³ Chief Justice Warren, speaking for the majority, concluded that Officer Lasky's search was permissible as being incident to a lawful arrest.⁵⁴ In so holding, the Court stated: "It is difficult to conceive of stronger grounds for an arrest short of actual eyewitness observation of criminal activity."⁵⁵

As he did in the *Terry* decision, Justice Harlan squarely met the issue presented. Stripped to bare essentials, Justice Harlan believed it clear that Officer Lasky possessed only a strong suspicion that Peters and his associate were engaged in illegal activity. The officer believed he heard a noise at his door, but engaged in a telephone conversation before investigating. He did not see either man holding implements or attempting to manipulate any locks. The suspects were evidently not masked or dressed in any

51. *Id.*

52. *Id.* at 48.

53. *Id.* at 67.

54. *Id.* The Court noted that "a search incident to a lawful arrest may not precede the arrest and serve as part of its justification." *Id.* at 67. The issue, then, concerns when the lawful arrest took place, and whether or not the search came before or after the lawful arrest. The Court reasoned that the arrest took place "[w]hen the policeman grabbed Peters by the collar, he abruptly 'seized' him and curtailed his freedom of movement on the basis of probable cause to believe that he was engaged in criminal activity." *Id.* Thus, the search came after this lawful arrest.

55. *Id.* at 66. It is interesting to note the following observation of the Chief Justice:

As the trial court explicitly recognized, deliberately furtive actions and flight at the approach of strangers or law officers are strong indicia of *mens rea*, and when coupled with specific knowledge on the part of the officer relating the suspect to the evidence of crime, they are proper factors to be considered in the decision to make an arrest.

Id. (citations omitted).

Except for the fact that Peter's purported offense was to take place inside an apartment building and had yet to be completed, it is submitted that *Peters* is indistinguishable from the *Howard* case where the officers there had as much probable cause as the officer on patrol. Intellectual distinctions between the quantum of evidence facing the officers in *Howard* and *Peters* are best left in the classroom.

peculiar fashion, but they were "tiptoeing" and fled at the slam of a door. Rather than avoiding the critical issue by finding probable cause to arrest existed, Justice Harlan explicitly stated there was *no* probable cause to arrest, but there were articulable circumstances.⁵⁶ Furthermore, Justice Harlan stated that the Court should "take into account a police officer's trained instinctive judgment operating on a multitude of small gestures and actions impossible to reconstruct."⁵⁷

While *Terry*, *Sibron*, and *Peters* are helpful in setting the parameters as to when a police officer may physically intrude upon one's person,⁵⁸ they serve as little guidance when the scope of an investigative stop falls short of a pat-down search or arrest.⁵⁹

Over the next six years, the Court did little to ameliorate the problems confronting policemen on the beat. In 1969, the Court in *Davis v. Mississippi*,⁶⁰ struck down the rape conviction of a Negro youth whose fingerprints were obtained through a dragnet arrest⁶¹ of numerous black youths in Meridian, Mississippi for the purpose of investigation. In reversing the conviction, the Court further opined that the fourth amendment protections apply during the investigatory stage of a case insofar as the mass arrest of innocent people is concerned. Yet, as in *Sibron*, the Court re-

56. "I do not think that Officer Lasky had anything close to probable cause to arrest Peters before he recovered the burglar's tools. Indeed, if probable cause existed here, I find it difficult to see why a different rationale was necessary to support the stop and frisk in *Terry*. . . ." 392 U.S. at 74 (Harlan, J.; concurring).

57. *Id.* at 78. See also LaFave, "Street Encounters" and the Constitution: *Terry*, *Sibron*, *Peters*, and *Beyond*, 67 MICH. L. REV. 39, 63 (1968).

58. If a police officer observes unusual conduct, which in light of his experience leads him to believe criminal activity has been or will be committed, he may conduct a limited search of the outer clothing for weapons if he believes the person is armed and dangerous in order to protect himself and others. 392 U.S. at 30.

59. In his concurring opinion, Justice Harlan seemingly approves of the PRE-ARRAIGNMENT PROCEDURE, *supra* note 17. 392 U.S. at 71 n.1. These procedures state that only a judicial official may issue a warrant, an application describing with particularity the individuals and places to be searched may only be made by a prosecuting attorney. If the affidavit is based on hearsay, the informant's reliability must be set forth. The official acting on the application may call witnesses to aid him in coming to a decision. When a warrant is issued, it must state with particularity the identity of the issuing authority, the identity of the applicant and all persons whose affidavits were given in support, the finding of sufficiency of the application, the name of the person to be searched or the location of the place to be searched, and when the warrant may be executed. PRE-ARRAIGNMENT PROCEDURE, *supra* note 17, at 87-105.

60. 394 U.S. 721 (1969).

61. *Id.* at 726-27. The Court construed the "investigatory detentions" of this case to be arrests.

ferred to the fact that there was no evidence that the defendant voluntarily accompanied the police to the station.⁶² Once again the concept of "voluntary cooperation" was alluded to but reserved for another time.⁶³

In the 1972⁶⁴ case of *Adams v. Williams*,⁶⁵ the Supreme Court was again called upon to judge the conduct of a police officer who reasonably believed he was dealing with an armed suspect. Police Sgt. John Connolly was patrolling a high-crime area in Bridgeport, Connecticut when he was approached at approximately 2:15 a.m. by a person known to him.⁶⁶ The informant related "that an individual, seated in a nearby vehicle, was carrying narcotics and had a gun at his waist."⁶⁷ The officer radioed for assistance and approached Williams' car. He tapped on the window and asked Williams to open the door. Instead, Williams rolled down the window. Making a split-second decision, Sgt. Connolly reached through the window and removed a fully loaded revolver from Williams' waistband; the precise spot the informant said the gun

62. *Id.* at 726.

63. The issue of voluntary cooperation was addressed in *United States v. Mendenhall*, 100 S. Ct. 1870 (1980). It was stated that if a person voluntarily consents to a search, the requirements of a warrant and probable cause are not needed. The important issue in such a case then becomes whether or not the cooperation was voluntary, *i.e.*, free of duress, threats, or unlawful detention. See also note 45 *supra*.

64. It is interesting to note at this point the rarely cited opinion of *Palmer v. City of Euclid*, 402 U.S. 554 (1971), where the Court in a *per curiam* opinion struck down an ordinance of the town of Euclid, Ohio, that permitted the arrest of suspicious persons. The statute was ruled to be unconstitutionally vague. The facts and the concurring comments of Justice Douglas were noteworthy.

Palmer was observed late at night in a parking lot. A female passenger in Palmer's car exited and entered an adjoining apartment house. Palmer then pulled onto the street, parked his vehicle with its lights on, and began to use a two-way radio. He was approached by a police officer and was arrested after he gave three different addresses for himself and could not identify his female associate. Palmer was not armed. *Id.* at 545.

While agreeing the statute was void, Justice Stewart offered the following observation in which Justice Douglas joined.

A policeman has a duty to investigate suspicious circumstances, and the circumstances of a person wandering the streets late at night without apparent lawful business may often present the occasion for police inquiry. But in my view government does not have constitutional power to make that circumstance, without more, a criminal offense.

Id. at 546 (Stewart, J., concurring).

It is submitted that this view is in accord with Douglas' apparent belief that, short of intruding upon a person's physical being, the police do have a duty to confront and possibly freeze a situation pending further inquiry. See *Terry*, 392 U.S. at 35 n.1 (Douglas, J., dissenting).

65. 407 U.S. 143 (1972).

66. *Id.* at 144. The informant was personally known to the officer and had provided him with information in the past. This factual situation was contrasted with that of the anonymous informant.

67. *Id.* at 145.

would be located. Williams was placed under arrest. A search of Williams and the vehicle uncovered substantial quantities of heroin, a machete, and a second revolver.⁶⁸

The seizure of the weapon was upheld in an opinion authored by Justice Rehnquist.⁶⁹ Adding to *Terry's* ambiguous stance on the initial approach by Officer McFadden, Justice Rehnquist was more specific, stating: "A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time."⁷⁰

The majority opinion, however, did not squarely decide whether the fourth amendment is applicable to the initial stop.⁷¹ Rather, the opinion approaches the problem by concluding that "[t]he Fourth Amendment does not require a policeman who lacks probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape."⁷² As in *Terry*, the Court applied a balancing test,⁷³ and specifically referred to the incidence of violence directed towards police officers, especially from guns.⁷⁴

68. *Id.*

69. "[U]nder the circumstances surrounding Williams' possession of the gun seized by Sgt. Connolly, the arrest on the weapons charge was supported by probable cause, and the search of his person and of the car incident to that arrest was lawful." *Id.* at 149.

70. *Id.* at 146 (citations omitted).

71. The specter of voluntary cooperation is raised once again, but since the petitioner did not contend that Williams rolled down the window voluntarily, the issue was avoided. *Id.* at 146 n.1, 151 (Brennan, J.; dissenting). See notes 45 and 63 *supra*.

72. 407 U.S. at 145.

73. The Court in *Terry*, quoting *Camara v. Municipal Court*, 387 U.S. 523, 534-35, 536-37 (1967), said that it is necessary "first to focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen,' for there is 'no ready test for determining reasonableness other than by balancing the need to search (or seize) against the invasion which the search (or seizure) entails.'" 392 U.S. at 20-21. The Court notes the governmental interests involved in the balancing approach: Effective crime prevention, detection, and the need for law enforcement officers to protect themselves and others, *id.* at 22; as opposed to the "nature and quality of the intrusion on individual rights which . . . constitutes a severe, though brief, intrusion upon cherished personal security, and . . . [is] an annoying, frightening, and perhaps humiliating experience." *Id.* at 24-25.

74. 407 U.S. at 146-48 n.3, which noted that 125 policemen were murdered in 1971, that all but five were killed by gunshot wounds, and that approximately 30% of police shootings occur when an officer approaches someone in a car. See note 38 *supra*.

Justices Douglas, Marshall, and Brennan dissented.⁷⁵ Justice Brennan believed that the holding of *Terry* should not be extended to possessory offenses.⁷⁶ Justices Marshall and Douglas felt the informant's information was devoid of factual support permitting the intrusion sanctioned by the opinion and, even assuming there was reason to believe Williams was armed, Connecticut law allows people to carry guns with a permit. Officer Connolly had no knowledge the gun was being unlawfully carried.⁷⁷

What little can be gleaned from the Court's opinions in *Terry*, *Sibron*, *Peters*, and *Adams*, is the recognition of the need to prevent crime, particularly those crimes carrying the potential of physical violence.⁷⁸ Application of the balancing test suggested in *Terry* certainly favors an approach having cognizance of the police officer's duty to prevent crime as well as to solve crime.⁷⁹

Taking into account the seriousness of the offense does not require the use of some finespun theory whereby each offense in the criminal code has its own probable cause standard; rather, it involves only the common-sense notion that murder, rape, armed robbery, and the like call for a somewhat different police response than, say, gambling, prostitution, or possession of narcotics.⁸⁰

Nevertheless, the opinions, excepting *Peters* in which probable cause for arrest was found to exist, avoid deciding when a law enforcement officer may stop someone to inquire into suspicious behavior. The Court has not decided whether such inquiry invokes the full protections of the fourth amendment,⁸¹ or whether the

75. *Id.* at 149 (Douglas, Marshall, J.J.; dissenting), 151 (Brennan, J.; dissenting).

76. *Id.* at 151-53. While not mentioned by Justice Brennan, this is the recommended approach proposed by the American Law Institute's PRE-ARRAIGNMENT PROCEDURE, *supra* note 17, at 5-6, Commentary at 263.

77. Justice Marshall, dissenting, claimed that the frisk was illegal under *Terry*. Due to Connecticut law, there was no reason for the officer to believe the person was dangerous. Justice Marshall states that *Terry* only produces a very narrow exception to a search without a warrant and that this case did not fall into that exception. The officer had no specific facts other than what the informant told him to suggest illegal activity. 407 U.S. at 159-60.

78. "Indeed, a comparison of *Terry* and *Sibron* reveals that the Court was undoubtedly influenced by the nature of the crimes involved in these two cases." LaFave, *supra* note 57, at 58.

79. 392 U.S. at 22 (the Court noted the governmental interest in preventing and detecting crime).

80. LaFave, *supra* note 57, at 57. See also 3 W. LAFAVE, SEARCH AND SEIZURE 97 (1978).

81. It might be argued that Justice Rehnquist's words in *Adams* concerning brief stops effectively set forth the applicable test. He stated that "[a] brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time." 407 U.S. at 146 (citations omitted). However, that dictum suggesting a maintenance of the status quo has yet to be elevated to law and *Adams* cannot be read any broader than the facts presented.

Amendment is even applicable where there is not a physical touching.⁸²

IV. STOPS IN BORDER PATROL CASES

After a two year silence,⁸³ the Supreme Court again ventured into the murky waters of non-arrest stops in the case of *United States v. Brignoni-Ponce*.⁸⁴ The case involved two roving border patrol officers who were observing northbound traffic in the vicinity of a fixed checkpoint in California that was closed because of inclement weather. The patrol car's headlights were used to illuminate passing vehicles. When the car in question passed, the officers decided to pursue and stop it because the occupants appeared to be of Mexican descent. Upon stopping the vehicle, the officers learned the occupants were illegal aliens.⁸⁵ The trial court refused to suppress testimony concerning the stop.⁸⁶ The Ninth Circuit Court of Appeals, however, disagreed and ruled the stop illegal.⁸⁷ The United States Supreme Court affirmed, emphasizing the need for some minimal restraints upon the unfettered interference with the right of citizens to use the highways.⁸⁸ Citing *Terry*, the Court held that if an "officer's observations lead him reasonably to suspect that a particular vehicle may contain aliens who are illegally in the country, he may stop the car briefly and investigate the circumstances that provoke suspicion."⁸⁹ The Court stated that the determination of reasonableness was made

82. While being largely ignored by the Supreme Court, the problem generated considerable discussion and proposals. See PRE-ARRAIGNMENT PROCEDURE, *supra* note 17. This report was in its fifth draft in 1972 and was finally completed in 1975; AMERICAN BAR ASSOCIATION, PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, THE ADMINISTRATION OF CRIMINAL JUSTICE (1974); L. TIFFANY, D. MCINTYRE, & D. ROTENBERG, DETECTION OF CRIME (1967) [hereinafter cited as TIFFANY]; THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, RESEARCH DIVISION'S MODEL "STOP AND FRISK" ORDINANCE AND COMMENTARY (1972); U.S. DEPT. OF JUSTICE, NATIONAL DISTRICT ATTORNEY'S ASSOCIATION, MANUAL ON THE LAW OF SEARCH AND SEIZURE (rev. ed. 1972); ARIZONA STATE UNIVERSITY, COLLEGE OF LAW, PROJECT ON LAW ENFORCEMENT POLICY AND RULE MAKING, MODEL RULES OF STOP AND FRISK (1974).

83. In 1973, the Court decided *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973), striking down the use of roving border patrols to search vehicles without a warrant or probable cause at points removed from the border or its functional equivalents.

84. 422 U.S. 873 (1975).

85. *Id.* at 874-75.

86. *Id.* at 875.

87. *United States v. Brignoni-Ponce*, 499 F.2d 1109 (9th Cir. 1974).

88. 422 U.S. at 882-83.

89. *Id.* at 881.

to depend upon "specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country."⁹⁰

Keenly aware of the existence of a severe problem involving illegal aliens, the Court carefully attempted to delineate what might suffice as reasonable suspicion. Included among the possible criteria are "obvious attempts to evade officers," and attempts to "hide."⁹¹ That the standard for determining reasonableness is less than onerous can scarcely be argued.

One term later, the Court considered another border patrol case. In *United States v. Martinez-Fuerte*,⁹² the use of permanent checkpoints came under scrutiny. Reversing the Ninth Circuit Court of Appeals⁹³ and affirming a decision from the Fifth Circuit Court of Appeals,⁹⁴ the Court, in an opinion by Justice Powell, upheld the use of fixed checkpoints for the visual screening or questioning of all occupants of vehicles, even though there is no reason to believe that a particular vehicle contains illegal aliens.⁹⁵ Further, it is constitutionally permissible to refer some of the stopped motorists to a secondary inspection area for questions regarding citizenship and immigration status, even though many referrals are made solely on the basis of apparent Mexican ancestry.⁹⁶

Balancing the public interest in restricting the flow of illegal aliens against the brief inconvenience of the stop and questions concerning immigration status, the Court found the fixed checkpoints to pass constitutional muster. Unlike the roving patrol stop condemned in *Brignoni-Ponce*, the fixed checkpoint involved "less discretionary enforcement activity" and provided "less room for abusive or harassing stops."⁹⁷ Furthermore, the occupants

90. *Id.* at 884. The Court further stated that the fourth amendment was applicable to such brief detentions. In order to be lawful, a seizure must be "reasonable." *Id.* at 878. To permit the stop in issue in this case would "dispense entirely with the requirement [of] reasonable suspicion. . . ." *Id.* at 882.

91. *Id.* at 885. Other factors suggested by the Court are: characteristics of the area where the vehicle is encountered; proximity to the border; usual traffic patterns, and previous experience with alien traffic; recent illegal crossings in an area; erratic driving; a vehicle appearing to be heavily loaded; a large number of passengers; and particular dress and appearance of persons who live in Mexico. *Id.* at 884-85.

92. 428 U.S. 543 (1976).

93. *United States v. Martinez-Fuerte*, 514 F.2d 308 (9th Cir. 1975).

94. *United States v. Sifuentes*, 517 F.2d 1402 (5th Cir. 1975).

95. Whether all vehicles were actually stopped was not important as the Court noted that for fourth amendment purposes a seizure had occurred when vehicles were slowed for inspection. 428 U.S. at 546 n.1.

96. *Id.* at 546-47, 549-50, 562-63.

97. *Id.* at 559.

were initially subjected to only visual inspection and questioning, not actual searches of their persons or vehicles.⁹⁸

Although the Court limited its holding to the type of stop before it, it suggested further detention would be proper if founded upon probable cause or consent.⁹⁹

V. STOP AND FRISK MATURES

The Court allowed nearly three years to pass before it undertook further explanation of the law pertaining to police stops.¹⁰⁰ In 1979, four separate opinions were written, none of which provided an overall structural framework by which to judge police stops.

The first opinion was that of *Delaware v. Prouse*,¹⁰¹ which dealt a fatal blow to the police practice commonly referred to as the "routine license and registration check." The facts of the case are uncomplicated. On November 30, 1976, a New Castle County, Delaware, patrolman stopped Prouse's vehicle for no reason except to check his license and registration. Upon approaching the vehicle, the officer smelled marijuana smoke; he seized marijuana that was allegedly in plain view¹⁰² and arrested Prouse. The trial court suppressed the evidence as being the fruit of an illegal search and seizure. On appeal, the Delaware Supreme Court affirmed.¹⁰³ The United States Supreme Court similarly affirmed by an eight to one majority. Following its lead in *United States v. Brignoni-*

98. The Court in discussing the fixed checkpoint inspection stated that "here, . . . we deal neither with searches nor with the sanctity of private dwellings, ordinarily afforded the most stringent Fourth Amendment protection." *Id.* at 561. See also *United States v. Ortiz*, 422 U.S. 891 (1975) (striking down searches of occupants and their vehicles without probable cause or consent at fixed checkpoints).

99. 428 U.S. at 567.

100. In 1977, the Court decided *Pennsylvania v. Mimms*, 434 U.S. 106 (1977), where it held that once a person has been lawfully detained for a motor vehicle violation, the police may order the driver out of the car without violating the fourth amendment. *Id.* at 111 n.6. A *Terry* frisk was then permitted when the arresting officer noticed a bulge that he feared might be a weapon, the Court stating: "The bulge in the jacket permitted the officer to conclude that Mimms was armed and thus posed a serious and present danger to the safety of the officer." *Id.* at 112. The frisk uncovering the weapon was ruled reasonable. Justices Marshall, Stevens, and Brennan dissented, focusing primarily upon the fact that the arresting officer had no suspicion of any wrongdoing except that Mimms had an expired plate, an offense not requiring his being removed from the vehicle. *Id.* at 112-13 (Marshall, J.; dissenting), 115-24 (Stevens, Brennan, Marshall, J.J.; dissenting).

101. 440 U.S. 648 (1979).

102. *Id.* at 650.

103. *State v. Prouse*, 382 A.2d 1359 (Del. Super. Ct. 1978).

Ponce, the Court condemned the seizure of individuals in their vehicles without “articulable and reasonable suspicion that a motorist is unlicensed or . . . not registered,”¹⁰⁴ unless, as in *United States v. Martinez-Fuerte*, the seizure was conducted pursuant to a procedure assuring true randomness, such as the use of “roadblock-type stops,”¹⁰⁵ where everyone is questioned.¹⁰⁶

When *Prouse* is considered in juxtaposition with the opinions of *Brignoni-Ponce* and *Martinez-Fuerte*, a pattern of logical consistency emerges. The stop of a motor vehicle in the absence of any articulable facts suggesting a violation of the law is forbidden where the stop is the result of the unfettered discretion of the police officer in the field.¹⁰⁷ Because the government has an interest in preventing illegal aliens from entering the country and seeing that drivers of motor vehicles are properly licensed and their vehicles registered, the interest may be effectuated in other, less intrusive, ways as long as the manner chosen treats everyone similarly.¹⁰⁸ However, once minimal articulable facts suggest a possible violation of the law, a stop may be made by an individual officer free from the strictures imposed by *Brignoni-Ponce* and *Prouse*.¹⁰⁹

The *Prouse* decision was followed by *Dunaway v. New York*,¹¹⁰ a case involving statements made by Dunaway implicating him-

104. 440 U.S. at 663.

105. *Id.*

106. The State of Delaware’s primary emphasis was that the governmental interest in safe highway usage outweighed the individual’s right of privacy, a position the State erroneously believed was left open in *United States v. Brignoni-Ponce*, 422 U.S. at 883 n.8 and *United States v. Martinez-Fuerte*, 428 U.S. at 560 n.14. The Court considered the governmental interest, but felt it could be served in a manner less intrusive and free from total discretion subject to abuse.

107. 440 U.S. at 662-63. The Court stated that:

[E]xcept in those situations in which there is a least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, stopping an automobile and detaining the driver in order to check his driver’s license and the registration of the automobile are unreasonable under the Fourth Amendment We hold only that persons in automobiles on public roadways may not for that reason alone have their travel and privacy interfered with at the unbridled discretion of police officers.

Id. at 663.

108. *See, e.g., id.* at 663 (where the Court suggests the possible alternative of questioning all oncoming traffic at roadblock-type stops).

109. *See, e.g., United States v. Barnard*, 553 F.2d 389 (5th Cir. 1977), where a stop was upheld, one factor was that the car from another country was seen in an area where tourist or business traffic was unlikely; *United States v. Sperow*, 551 F.2d 808 (10th Cir. 1977), upheld a stop using as one factor that it was 2 a.m., when ranchers in the area were not prone to drive. Another factor was that the driver repeatedly and nervously looked at the border patrol officer and then drove erratically.

110. 442 U.S. 200 (1979).

self in the murder of the proprietor of a pizza parlor nearly five months earlier. The circumstances under which the statements were made were held to be violative of the fourth amendment.

In *Dunaway*, a detective with the Rochester Police Department received information through another officer that an informant had implicated Dunaway in the crime. After questioning the informant, the detective did not learn anything that would have justified an arrest warrant.¹¹¹ In lieu of seeking Dunaway's cooperation, such as by asking him to come to the police station,¹¹² the detective "ordered other detectives to 'pick-up' [Dunaway] and 'bring him in.'"¹¹³ Dunaway was subsequently taken from a neighbor's house and escorted to police headquarters, where he was placed in an interrogation room and questioned after being given *Miranda* warnings.¹¹⁴ When told to come with the officers, Dunaway was not informed he was under arrest although "he would have been physically restrained if he had attempted to leave."¹¹⁵

In finding that the police lacked probable cause to arrest Dunaway, the Supreme Court held that the statements made by Dunaway during interrogation were unlawfully obtained. This case was not a "stop and frisk" situation based upon reasonable suspicion requiring further investigation sanctioned by *Terry* and its progeny.¹¹⁶ Instead, the police attempted to effectuate an actual arrest, far removed in time from the incident, while lacking probable cause.¹¹⁷ The opinion was a natural extension of the Court's prior holdings in *Davis v. Mississippi* and *Brown v. Illinois*;¹¹⁸ cases where similar custodial arrests and their fruits were stricken for being made without probable cause.

Justice Rehnquist, joined by Chief Justice Burger, dissented,

111. *Id.* at 203.

112. *See, e.g., Oregon v. Mathiason*, 429 U.S. 492 (1977).

113. 442 U.S. at 203.

114. *Id.*

115. *Id.*

116. *Id.* at 210-11 (where the Court stated that "[t]he investigative stops usually consumed less than a minute and involved 'a brief question or two.'").

117. *Id.* at 202-03. The murder took place on March 26, 1971, yet Dunaway was not taken into custody until August 11, 1971, as a result of a lead given by an informant on August 10, 1971. However, this lead was not "enough information to get a warrant" for Dunaway's arrest. *Id.* at 203.

118. *See* 422 U.S. 590 (1975). Comment, *Dunaway v. New York: Fourth Amendment Protections Against Unreasonable Searches and Seizures Closely Guarded*, 6 OHIO N.U.L. REV. 618, 621 (1979).

stating that "this is a case where the defendant voluntarily accompanied the police to the station to answer their questions."¹¹⁹ Dunaway was never physically seized, never told he was under arrest, or warned that he would not be permitted to decline the invitation. Thus, the dissenters concluded on the record before the Court, that the police behavior appeared free of "physical force or show of authority," the touchstone phrase used in *Terry* to determine when a seizure has occurred.¹²⁰ Moreover, the fact that the police had orders to "pick up" Dunaway and would not have let him decline the invitation was of no importance in determining whether Dunaway cooperated voluntarily.¹²¹ The fact that Chief Justice Burger, as expected, joined in this approach to the issue of voluntary cooperation, will become more meaningful when the controversial decision of *United States v. Mendenhall*¹²² is discussed.

Only three weeks after the *Dunaway* decision, *Brown v. Texas*,¹²³ a case very similar to *Sibron*, was handed down. In *Brown*, two officers with the El Paso Police Department were cruising in their patrol car at 12:45 in the afternoon in an area having a high incidence of drug traffic. The officers observed Brown walking away from another man in an alley. Not suspecting Brown of any "specific misconduct" or having any reason to believe he was armed, the officers decided to stop him because he looked suspicious and was not known to either of them.¹²⁴ When asked to identify himself, Brown refused and angrily asserted that the officers had no right to stop him.¹²⁵ After he continued to refuse to identify himself, Brown was arrested for violating a Texas law requiring a person "lawfully stopped" to give his name and address.¹²⁶

On appeal, the Supreme Court reversed Brown's conviction without any dissent.¹²⁷ The Court found that Brown was seized within the meaning of the fourth amendment when he was detained for the purpose of requiring him to identify himself.¹²⁸ Ab-

119. 442 U.S. at 222.

120. 392 U.S. at 19 n.16.

121. "[T]he unexpressed intentions of police officers as to hypothetical situations have little bearing on the questions whether the police conduct, objectively viewed, restrained petitioner's liberty by show of force or authority." 442 U.S. at 224.

122. 100 S. Ct. 1870 (1980).

123. 443 U.S. 47 (1979).

124. *Id.* at 49.

125. *Id.*

126. TEX. PENAL CODE ANN. tit. 8, § 38.02(a) (Vernon 1974).

127. 443 U.S. at 53. Chief Justice Burger delivered the opinion for a unanimous court.

128. *Id.* at 50.

sent any articulable facts justifying the stop, however, the police action was viewed as an arbitrary invasion of Brown's rights "solely at the unfettered discretion of [the] officers,"¹²⁹ a police procedure soundly put to rest by *Prouse*. The record was void of any evidence justifying the stop. The Court concluded by stating that "[i]n the absence of any basis for suspecting appellant of misconduct, the balance between the public interest and appellant's right to personal security and privacy tilts in favor of freedom from police interference."¹³⁰

At first blush, the *Brown* opinion appears entirely consistent with *Prouse*. Neither a motor vehicle nor pedestrian may be seized absent some articulable suspicion justifying the stop. Apart from this congruence, however, the opinions differ. *Prouse* holds a motor vehicle may not be stopped without a certain modicum of suspicion. *Brown* only condemns the seizure performed for the purpose of requiring identification, and voided the conviction for violation of Texas's identification law. The opinion does not state or imply that the officers could not have approached Brown and asked him if he were new in the area, or even asked him his name. But absent additional facts, Brown was perfectly within his rights to refuse to cooperate and the officer had no further right to detain him.¹³¹ However, had Brown voluntarily cooperated and in some manner caused sufficient suspicion to be cast upon himself, a detention or frisk may well have been proper. Assuming a police officer has the same rights as any other citizen to ask questions of anyone, consent to answer or give up certain rights should not be thwarted, if in hindsight cooperation proves to be detrimental or the person contends the police presence was inherently coercive.¹³²

129. *Id.* at 51.

130. *Id.* at 52.

131. See *Terry*, 392 U.S. at 19 n.16. See also *id.* at 32 (Harlan, J., concurring).

132. See *Schneckloth v. Bustamonte*, 412 U.S. 218, 247 (1973), in which the Court specifically rejected this latter argument as follows: "*Miranda*, of course, did not reach investigative questioning of a person not in custody, which is most directly analogous to the situation of a consent search, and it assuredly did not indicate that such questioning ought to be deemed inherently coercive." See also *Dunaway v. New York*, 442 U.S. at 222 (Rehnquist, J., dissenting), in which it was stated:

Voluntary questioning not involving any "seizure" for Fourth Amendment purposes may take place under any number of varying circumstances. And the occasions will not be few when a particular individual agrees voluntarily to answer questions that the police wish to put to him either on the street, at the station, or in his house, and later regrets his willingness to answer those questions. However, such morning-after regrets do not

A fourth case was decided during the 1979 term which touched upon the bounds of seizures authorized by the *Terry* line of decisions. In *Ybarra v. Illinois*,¹³³ the Court by a six to three majority struck down an Illinois statute authorizing the police to search anyone on the premises where a lawful warrant search was being carried out.¹³⁴ Pursuant to a search warrant for drugs directed at the Aurora Tap Tavern and the bartender, Ybarra, who happened to be on the premises when the warrant was executed and who was doing nothing suspicious, was frisked.¹³⁵ A cigarette pack was removed from his person and found to contain six tinfoil packets of heroin. He was arrested and convicted of possession of heroin.¹³⁶ In reversing the conviction, the Court reiterated that mere propinquity to others possibly engaged in crime does not justify a search.¹³⁷ Nor was there any reason to suspect that Ybarra might be armed and, therefore, a threat to police safety.

The dissent by Chief Justice Burger, and Associate Justices Rehnquist and Blackmun, would have affirmed the conviction, suggesting that the balance between individual privacy and safety of police officers should be struck in favor of the police, particularly where the search is pursuant to a warrant and confined to a narrow area.¹³⁸

VI. RECENT DEVELOPMENTS

No case decided during the *Terry* era had produced as severe an internal split among the justices as the opinion in *United States v. Mendenhall*.¹³⁹ Recognizing the possible significance of this decision, the factual setting merits extended treatment.

Sylvia Mendenhall arrived early on the morning of February 10, 1976, at the Detroit Metropolitan Airport aboard a commercial flight originating in Los Angeles, California. She was observed disembarking from the plane by two agents of the Drug Enforcement Administration (DEA) who were at the airport for the purpose of detecting narcotics traffic.¹⁴⁰ Believing that Ms.

render involuntary responses that were voluntary at the time they were made.

133. 444 U.S. 85 (1979).

134. Code of Criminal Procedure of 1963, 1963 Ill. Laws § 108-1 *et. seq.*, ILL. REV. STAT. ch. 38, § 108-9 (West 1975).

135. "Ybarra made no gestures indicative of criminal conduct, made no movements that might suggest an attempt to conceal contraband, and said nothing of suspicious nature to the police officers." 444 U.S. at 91.

136. *Id.* at 89.

137. *Id.* at 91. See also *Sibron v. New York*, 392 U.S. at 62-63.

138. 444 U.S. at 96-97 (Opinion by Burger, C.J.; Blackman, Rehnquist, J.J.; concurring).

139. 100 S. Ct. 1870 (1980).

140. 100 S. Ct. at 1873.

Mendenhall's conduct was "characteristic of persons carrying narcotics," the agents walked up to her in the concourse area, identified themselves, and asked to see her identification and airline ticket. The conduct causing the agents to conclude Ms. Mendenhall fit the "drug courier profile" was as follows:

1. She arrived on a flight from Los Angeles, a city believed to be the origin of much of the heroin reaching Detroit;
2. She was the last person to leave the plane, appeared "very nervous" and "completely scanned the whole area", including where the agents were stationed;
3. After leaving the plane she walked past the baggage claim area without picking up any luggage; and
4. She changed airlines for her flight out of Detroit.¹⁴¹

Ms. Mendenhall complied with the agents' request. The license was in her name, but the airline ticket bore the name "Annette Ford," an alias Ms. Mendenhall confessed she "just felt like using."¹⁴² After answering another question that revealed she had only been in California for two days, one of the agents further identified himself as a federal narcotics agent. At that point, Ms. Mendenhall became visibly shaken and had a hard time speaking. The agent then returned her ticket and license and asked if she would come with him to the airport DEA office for further questions. Ms. Mendenhall, apparently without making a verbal response, proceeded to the office which was located approximately fifty feet from where she was approached.¹⁴³ Once in the office, one of the agents requested permission to search her person and handbag. Despite being advised that she could refuse the requested searches, Ms. Mendenhall responded, "Go ahead."¹⁴⁴ The search of her bag revealed a receipt for another airline ticket from Pittsburg, through Chicago, to Los Angeles in the name "F. Bush." In response to another query, she said the receipt was hers.¹⁴⁵

A female officer arrived to conduct the search of Ms. Mendenhall's person. Before undertaking the search, the female officer again inquired whether Ms. Mendenhall was consenting to the search. Again the response was affirmative. As Ms. Mendenhall removed her clothes, she took from her undergarments two small packages, one of which appeared to contain heroin, and handed

141. 100 S. Ct. at 1873 n.1.

142. *Id.* at 1874.

143. *Id.*

144. *Id.*

145. *Id.*

both to the policewoman.¹⁴⁶ Ms. Mendenhall was then arrested for possession of heroin.

The trial court refused to suppress the heroin, finding there existed specific and articulable facts justifying suspicion of criminal activity, that the defendant voluntarily cooperated with the agents, and had lawfully consented to the searches.¹⁴⁷ The court of appeals reversed, disapproving of the "drug courier profile," finding nothing inherently suspicious in Ms. Mendenhall's conduct. The court assumed that there was a permissible stop, but it also assumed that an arrest lacking the necessary probable cause occurred when the agents asked her to come to their office.¹⁴⁸

The Supreme Court reversed the Court of Appeals in a five to four decision, in which the majority split three to two in its analysis of the facts. Upon stating the facts in the opinion, Justices Stewart and Rehnquist proceeded to find there was no seizure within the meaning of the Fourth Amendment. The issue of consent,¹⁴⁹ broached in several earlier decisions, was this time raised by the United States.¹⁵⁰

Focusing upon that part of the *Terry* opinion stating that "not all personal intercourse between policemen and citizens involves 'seizures' of persons,"¹⁵¹ Justices Stewart and Rehnquist drew a line "between an intrusion amounting to a 'seizure' of the person and an encounter that protrudes upon no constitutionally protected interest."¹⁵² Since the agents did not seize¹⁵³ Ms. Mendenhall by means of physical force or a show of authority,¹⁵⁴ Justices

146. *Id.*

147. This was reiterated by the Supreme Court, 100 S. Ct. at 1872.

148. 596 F.2d 706 (6th Cir. 1979).

149. For one to validly consent to a search, the person must understand exactly what he is consenting to. In light of the fact his consent constitutes a waiver of his constitutional rights under the fourth amendment, at a subsequent suppression hearing, the prosecution has the burden of establishing that any purported consent was "understandably, freely, and voluntarily" given, and that the consent was "specific and absolutely clear." J. CREAMER, *THE LAW OF ARREST, SEARCH AND SEIZURE* 88 (3d ed. 1980). For a more thorough discussion of the nature and scope of consent, see 3 W. LAFAYE, *supra* note 80, at 611.

150. *Dunaway v. New York*, 442 U.S. at 221-25 (Rehnquist, J.; dissenting).

151. *Terry v. Ohio*, 392 at 19 n.16.

152. 100 S. Ct. at 1876. See also *Terry*, 392 U.S. at 31-34 (Harlan, J.; concurring).

153. The unexpressed intention of the agents to detain Ms. Mendenhall was viewed as "irrelevant" to the inquiry at hand. 100 S. Ct. at 1877 n.6.

154. Justices Stewart and Rehnquist defined a show of authority as follows:

We conclude that a person has been "seized" within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be

Stewart and Rehnquist conclude she had voluntarily cooperated with them.

On the facts of this case, no "seizure" of the respondent occurred. The events took place in the public concourse. The agents wore no uniforms and displayed no weapons. They did not summon the respondent to their presence, but instead approached her and identified themselves as federal agents. They requested, but did not demand to see the respondent's identification and ticket. Such conduct, without more, did not amount to an intrusion upon any constitutionally protected interest.¹⁵⁵

The fact that Ms. Mendenhall was not informed that she could refuse to cooperate from the inception of the stop was seen as immaterial.¹⁵⁶

After holding the stop did not implicate the fourth amendment, Justices Stewart and Rehnquist, joined by Chief Justice Burger and Justices Powell and Blackmun, held that, under the totality of the circumstances, Ms. Mendenhall had voluntarily consented to the searches of her pocketbook and person in the DEA office.¹⁵⁷

Without disagreeing with Justices Stewart and Rehnquist,¹⁵⁸ the remaining members of the Court's majority found the stop valid for another reason which was explained by Justice Powell: "I would hold . . . that the federal agents had reasonable suspicion that the respondent was engaging in criminal conduct, and,

compelled. [citations omitted] In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person.

100 S. Ct. at 1877. Can it be argued that a reasonable person would not believe he or she was detained when approached by two federal agents, who show their identity and request specific information? Consider the following:

The motives that lead one to cooperate with the police are various. To put an extreme case, the police may in purely precatory language request a person to give information. Even if he is guilty, such a person might accede to the request because he has been trained to submit to the wishes of persons in authority, or because he fears that a refusal will focus suspicion, or because he believes that concealment is no longer possible and a cooperative posture tactically or psychologically preferable. Regardless of the particular motive, the cooperation is clearly a response to the authority of the police.

PRE-ARRAIGNMENT PROCEDURE, *supra* note 17, at 259-60.

155. 100 S. Ct. at 1877.

156. *Id.* at 1878. *Cf.* *Schneckloth v. Bustamonte*, 412 U.S. at 227 (failure of police to advise accused of rights before inquiry is a factor, but not in and of itself determinative).

157. 100 S. Ct. at 1879.

158. "I do not necessarily disagree with the views expressed in Part II-A. For me, the question whether respondent in this case reasonably could have thought she was free to "walk away" when asked by two government agents for her driver's license and ticket is extremely close." *Id.* at 1880 n.1 (Powell, J.; concurring in part, joined by Burger, C.J. and Blackman, J.).

therefore, that they [the agents] did not violate the Fourth Amendment by stopping the respondent for routine questioning.”¹⁵⁹

The public’s “interest in detecting those who would traffic in deadly drugs for personal profit”¹⁶⁰ was seen as compelling. In an attempt to combat the menace, the DEA developed a nationwide “drug courier profile” which statistics showed to be successful.¹⁶¹ The reasonable and articulable suspicion of criminal activity was that of specially trained officers acting pursuant to the federal program.¹⁶²

A bitter dissent was authored by Justice White, and joined by Justices Brennan, Marshall, and Stevens. The dissent emphatically rejects the notion that consent can be presumed from a showing of acquiescence to authority and suggests that all stops are seizures.¹⁶³ Additionally, it was argued that, “[n]one of the aspects of Ms. Mendenhall’s conduct, either alone or in combination, were sufficient to provide reasonable suspicion that she was engaged in criminal activity.”¹⁶⁴

The impact of the Mendenhall decision is obvious. As the Court suggested in *United States v. Brignoni-Ponce*,¹⁶⁵ the standard for determining what suffices as reasonable and articulable suspicion may be substantially less than first supposed. It is an inalterable fact that none of Ms. Mendenhall’s actions singularly suggest criminal behavior, and the dissenters cogently argued that, even taking the facts all together, her behavior was innocent in nature. Nevertheless, it is quite evident that a majority of the Court appears to be moving in a direction that sanction police actions based upon a reasonable, common sense standard of suspicion.

Before the legal community had sufficient time to digest the meaning of *Mendenhall* and speculate on its future implications, the Court decided *Reid v. Georgia*,¹⁶⁶ which also involved a stop made on the basis of the drug courier profile. In a very brief opinion, the Court by an eight to one majority ruled the stop of Reid was not based on reasonable articulable suspicion.¹⁶⁷ Reid ar-

159. *Id.* at 1880.

160. *Id.* at 1881.

161. *Id.*

162. *Id.* at 1882. On this issue, the Justices placed a heavy emphasis on the ability of trained police personnel to “perceive and articulate meaning in given conduct which would be wholly innocent to the untrained observer.” *Brown v. Texas*, 443 U.S. at 52 n.2.

163. 100 S. Ct. at 1883. *See also* *Bumper v. North Carolina*, 391 U.S. 543, 548-49 (1968).

164. *Id.* at 1886.

165. 422 U.S. 873 (1975). *See* notes 94-97 *supra*.

166. 100 S. Ct. 2752 (1980).

167. *Id.* at 2754.

rived at the Atlanta Airport on a commercial flight from Fort Lauderdale, Florida, in the early morning hours of August 14, 1978.¹⁶⁸ As he left the plane, Reid was observed by a DEA agent. He was carrying a shoulder bag like one carried by another man several persons behind, who also exited the same plane. As he walked through the concourse area and past the baggage area, Reid "occasionally looked backward in the direction of the second man."¹⁶⁹ The two met in the main lobby and left the terminal together.

Outside the building, the agent approached, identified himself, and asked to see each of their airline ticket stubs and identification. Each man complied.¹⁷⁰ The agent then asked if they would accompany him to the terminal and consent to a search of their bags and persons. According to the agent, the petitioner nodded affirmatively and the other man verbally responded: "Yeah, okay." As they neared the terminal, Reid began to run and abandoned his bag. He was apprehended and the bag, which was recovered, was found to contain cocaine.¹⁷¹

The trial court suppressed the evidence, holding the DEA agent lacked articulable suspicion that Reid was carrying narcotics.¹⁷² The Georgia Court of Appeals reversed, finding the stop permissible since Reid fit the profile of drug couriers in a number of respects and that Reid consented to return to the terminal.¹⁷³ Once he fled, the court of appeals found there existed probable cause to search the discarded shoulder bag.¹⁷⁴

Incredibly, the United States Supreme Court¹⁷⁵ ignored *United States v. Mendenhall*, which was decided barely a month earlier. Arguably abandoning *Mendenhall*¹⁷⁶ and echoing the sentiments

168. *Id.* at 2752.

169. *Id.* at 2753.

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. Justices Brennan, Stewart, White, Marshall, and Stevens comprised the five member majority. Justice Powell, joined by Chief Justice Burger and Justice Blackmun concurred, agreeing that there was not sufficient facts to justify a seizure. *Id.* at 2754 n.1.

176. The suspicious criteria relied upon to justify the stop were: (1) that Reid arrived on a flight from Fort Lauderdale, a city serving as a principal place of origin of cocaine sold throughout the country; (2) Reid arrived early in the morning during a time when law enforcement activity is minimal; (3) Reid and his companion appeared to be trying to conceal the fact that they were traveling together; and

of the three dissenting judges therein, the Court stated:

We conclude that the agent could not, as a matter of law, have reasonably suspected the petitioner of criminal activity on the basis of these circumstances. Of the evidence relied on, only the fact that the petitioner preceded another person and occasionally looked backward at him as they proceeded through the concourse relates to their particular conduct. The other circumstances describe a very large category of presumably innocent travellers, who would be subject to virtually random seizures were the Court to conclude that as little foundation as there was in this case could justify a seizure. Nor can we agree, on this record, that the manner in which petitioner and his companion walked through the airport reasonably could have led the agent to suspect them of wrongdoing.¹⁷⁷

In lieu of an outright reversal, the case was remanded for further proceedings not inconsistent with the holding, leaving open the possibility that a further development of the facts might show that Reid voluntarily cooperated until he decided to flee.¹⁷⁸ The initial seizure question was not addressed by the lower courts, which "apparently assumed that the stop for routine identification questioning constituted a seizure."¹⁷⁹

VII. FUTURE IMPLICATIONS

Despite the activity in the past two years, the proper standard for determining when a fourth amendment "seizure" has occurred remains unanswered.¹⁸⁰

Recognizing that it may be difficult to develop a standard applicable to all cases,¹⁸¹ it is incumbent upon the Court to resolve the most basic issue, namely, when contact between a citizen and police officer constitutes a seizure pursuant to the fourth amend-

(4) Reid and his friend apparently had no other luggage. *Id.* at 2753-54. A comparison of these circumstances to those in *Mendenhall* shows them to be virtually identical in nature. Why Justice Stewart joined the four dissenters in *Mendenhall* remains unexplained.

177. *Id.* at 2754. The relatively innocent behavior of Reid stands in sharp contrast to Howard's behavior in *People v. Howard*, 50 N.Y.2d 583, 408 N.E.2d 908, 430 N.Y.S.2d 578 (1980). It is submitted that Howard's behavior was far more suspicious and is only similar in the fact that both he and Reid fled and abandoned property.

178. This conclusion stems from the factual findings of the appellate court. See note 174 *supra* and accompanying text.

179. 100 S. Ct. at 2755 (Powell, J., concurring).

180. See *United States v. Hill*, 626 F.2d 429 (5th Cir. 1980). The Fifth Circuit reversed the district court's finding and held that a DEA agent violated defendant's fourth amendment rights when defendant had twice refused to consent to a search without a search warrant, and was never informed he was free to go, and where the situation indicated that the defendant's detention was for the purpose of additional interrogation. *United States v. Robinson*, 625 F.2d 1211 (5th Cir. 1980). The court of appeals remanded the case to the district court in an effort to make further findings of fact and conclusions of law on the question of whether a person stopped by a DEA agent in an airport, was free to leave.

181. See *LaFave*, note 57 *supra*, at 65-69.

ment.¹⁸² To date, the opinions have not discussed this.¹⁸³ Police officers throughout the United States have continuing contact with citizens in a wide variety of circumstances, many of which are specifically associated with crime prevention.¹⁸⁴ Officers deserve to know beforehand what is lawfully permitted. In this regard, it is of little assistance to decide narrow issues, which may stir spirited debate among legal scholars, when the crime rate has soared since *Terry* was decided and shows no signs of abatement.¹⁸⁵

On January 21, 1981, the Supreme Court, without any dissent, reversed the Ninth Circuit Court of Appeals decision in *United*

182. In this regard it is interesting to note the following comments from the California Court of Appeal in *People v. Guzman*, 108 Cal. App. 3d 601, 610, 166 Cal. Rptr. 633, 638 (1980) (citations omitted), a case holding that the hailing of someone to a police car cannot be viewed as a seizure.

The question in each case remains, of course, as to "where to draw the line" in the world of hard discrete fact. To equate mere looking at or speaking to a possible candidate for "seizure", or the driving of a police car to the curb adjacent to where a lone man is walking, or the honking of a horn to attract a person's attention, or the motioning to a stranger requesting him to come to the curb, without more, with an "arbitrary and oppressive interference with the privacy and personal security of the individual," is mere sophistry. The Fourth Amendment prohibits "unreasonable seizures" not eye contacts and greetings. To characterize such minimal, fleeting, gossamerlike contacts as involved in a simple accosting or hailing of a person on the street as a detention or "seizure" would impose unrealistic, unreasonable if not impossible restrictions on law enforcement officers.

See also *United States v. Elmore*, 595 F.2d 1036 (5th Cir. 1979) (refusing to find the police officers' show of their identification and a request for identification from the person stopped to be a "seizure").

183. See LaFave, *supra* note 57, at 46, 64. Another issue not resolved involves the *Miranda* warnings. It is submitted, however, that this issue can be settled by holding the warnings are not applicable in the stop situation unless it escalates into true custodial interrogation. *Miranda* itself stated it was not meant to "hamper the traditional functions of police officers in investigating crime." 384 U.S. 436, 477 (1966). See also *Laury v. State*, 260 A.2d 907 (Del. Super. Ct. 1969) (accosting a robbery suspect near the scene); *People v. Schwartz*, 30 A.D.2d 385, 292 N.Y.S.2d 518 (1968) (two questions of persons leaving the scene of a reported assault); *United States v. Brown*, 436 F.2d 702 (9th Cir. 1970); *People v. Manis*, 268 Cal. App. 2d 653, 74 Cal. Rptr. 423 (1969); *State v. Patterson*, 59 Hawaii 357, 581 P.2d 752 (1978); NATIONAL DISTRICT ATTORNEY'S ASSOCIATION, *CONFESSIONS AND INTERROGATIONS AFTER MIRANDA* 18 (5th ed. 1975); LaFave, *supra* note 57, at 97-105.

184. See TIFFANY, *supra* note 82, at 18-43; 3 W. LAFAVE, *supra* note 80, at 36-37, 69-107.

185. According to the U.S. DEPT. OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION UNIFORM CRIME REPORTS, *CRIME IN THE UNITED STATES* (1968 and 1979), the following increase of crime is documented.

States v. Cortez.¹⁸⁶ As anticipated, the decision does little to advance clarification as to when a police officer may approach a citizen, yet not seize him, in order to investigate crime.¹⁸⁷ Although the opinion leaves some questions unanswered, it nevertheless continues the trend toward upholding good faith police actions based upon circumstances relevant in the police milieu.¹⁸⁸

The Court initially concluded that the Cortez vehicle was seized within the meaning of the fourth amendment.¹⁸⁹ At this point, however, the Court significantly departs from the language of its

	1968 Rate-one per every;		1979 Rate-one per every.	
Murders	10,920	48 min.	20,591	24 min.
Rapes	25,330	21 min	75,989	7 min.
Robbery	153,420	2 1/2 min.	466,881	68 sec.
Assault	231,800	2 min.	614,213	51 sec.
Burglary	1,370,300	23 sec.	3,299,484	10 sec.

During the first six months of 1980, serious crime increased another 10%. See *Fear Stalks the Streets*, U.S. NEWS & WORLD REPORT, Oct. 27, 1980, at 58-60. Even more appalling are the results of the "Figgie Report" cited in the above article which indicates that "fear of crime is so pervasive that it is reshaping the way people lead their lives." *Id.*

Perhaps the best summary of what really occurs, appears in a statement made by New York City Police Commissioner Robert McGuire, who was a prosecutor and defense attorney during his career.

This system is in crisis, yet there's no crisis atmosphere. You don't see people in the system working through the night or anything like that. Instead, we're all trivializing crime because there's just so much of it A residential burglary is treated like an insurance claim. A robbery is just another robbery We've literally changed the normative standards by which we live, and those of us in the system have hidden behind lack of resources to say that we can't do anything about.

Brill, *Crime and No Punishment*, THE AMERICAN LAWYER, Jan. 1981, at 23 (emphasis in original).

186. 49 U.S.L.W. 4099 (1981).

187. The Court reiterates the standard that the police must comply with in order to permissibly stop a vehicle. First, the assessment must be based on all the circumstances. This standard refers to the objective observations of the officer surrounding the incident. The Court held that by looking at the whole picture, it could be justified "by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity." 49 U.S.L.W. at 4101. This standard had recently been articulated by the Court in *Brown v. Texas*, 443 U.S. at 51 (1979). The second element contained in the assessment of the whole picture is that the circumstances, investigation, and inferences lead the officer to suspect the particular individual is engaged in wrongdoing. This principle was established in *Terry v. Ohio*, 392 U.S. at 16-19 by Chief Justice Warren. Consequently, the holding of the Court in this case, does little to clarify the right of a policeman to approach a citizen; however, it does provide another set of circumstances in which the Court has allowed an officer to stop a citizen and conduct a brief investigation.

188. The Court took notice of the fact that patrolling a 2,000 mile open border was difficult and that certain skills are required when attempting to halt illegal entry. Furthermore, the Court stated that, "[w]e see here the kind of police work often suggested by judges and scholars as examples of appropriate and reasonable means of law enforcement." 49 U.S.L.W. at 4102.

189. *Id.* at 4101.

previous opinions which used terms like "articulable reasons" and "founded-suspicion."¹⁹⁰ These terms are seen as falling "short of providing clear guidance dispositive of the myriad factual situations that arise."¹⁹¹ Instead, the Court, still holding that suspicion is the *sine qua non* to justify a seizure, expressly stated that the field of reference is to encompass "the totality of the circumstances—the whole picture"¹⁹² which faces an officer at the moment of decision making.

Applying the above test, the Court had little difficulty concluding that the collection of facts, some meaningless to the "untrained," gathered by the border patrol officers justified the seizure of the vehicle to question the occupants about immigration status and citizenship.¹⁹³ Despite permitting the stop, the Court did not decide whether the search of the vehicle was a right concomitant with the seizure. This critical issue was avoided by concluding that the search resulted from voluntary cooperation by Cortez, who opened the back of the camper.¹⁹⁴

VIII. THE MODEL RULES OF STOP AND FRISK

There is nothing inherently wrong with allowing police officers at least that right possessed by every citizen to make innocuous contacts with pedestrians and the further right to request information.¹⁹⁵ Unless the officers possess articulable facts leading a

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.* at 4102.

194. *Id.* See *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). The Court held that when a search is justified on consent and the suspect is not in custody, the protection of the fifth and fourteenth amendments require that the state demonstrate the consent was voluntary. This problem was avoided by the Court. Chief Justice Burger concluded, "only the stop, not the search is at issue here." *Id.* However, the Court did note that the right to search the camper was not based on probable cause, but instead, on the whole picture. As experienced border patrol officers, they could reasonably believe that a criminal activity was taking place in the vehicle they stopped. *Id.*

195. Perhaps the leading case espousing this position is *People v. De Bour*, 40 N.Y.2d 210, 352 N.E.2d 562, 386 N.Y.S.2d 375 (1976), holding a police officer, in the absence of any specific indication of criminal conduct, may approach a private citizen on the street and request information. At the time of the stop, De Bour was walking along at approximately 12:15 a.m. When he got to within 30 to 40 feet of two New York police officers he crossed the street. The officers followed and upon reaching De Bour, asked what he was doing in the area. Shortly thereafter, one of the officers noticed a bulge in De Bour's jacket and asked him to unzip it. A revolver was found in his waistband and De Bour was arrested. *Id.* at 214-15. While

reasonable person to believe criminal activity may be afoot, citizens possess the right under the constitution not to be detained. Should an officer, however, have a reasonable belief of possible criminal conduct based upon articulable facts, or develop such belief as the result of voluntary action or lack of cooperation, such as immediate flight, a further detention for investigative purposes must be permitted.¹⁹⁶ In those situations justifying an investigative detention, a frisk should be permitted where the police officer reasonably believes the suspect is armed or the possible crime is one which the suspect might likely be armed.¹⁹⁷ Such a test would preserve individual privacy in those minor cases of suspected criminality such as gambling, prostitution, and minor possessory drug offense.¹⁹⁸ Additionally, where an investigative

this writer believes *De Bour* was correctly decided, the case has been subject to criticism. See Note, *People v. De Bour: The Power of Police to Stop and Frisk Citizens*, 30 SYRACUSE L. REV. 893 (1979); Comment, *Criminal Procedure—Search and Seizure—Admissibility of Evidence Seized During Police-Citizen “Encounter” Determined Solely by Reasonableness of Police Conduct*, 8 RUT.-CAM. L.J. 359 (1977). Other writers condemn any stops based upon less than probable cause. See Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 395 (1974); Schwartz, *Stop and Frisk*, 58 J. CRIM. L.C. & P.S. 433 (1967).

196. It should be noted that the situation in which the detention occurs has often influenced the Court in determining the amount of suspicion the officer must have. For instance, in *Terry v. Ohio*, 392 U.S. 1 (1968), the Court stated a limited search could be conducted if the officer had reasonable fear for his own or others' safety. Whereas, an officer conducting a driver's license check must have articulable and reasonable suspicion that the motorist is unlicensed. See *Delaware v. Prouse*, 440 U.S. 648 (1979). In another instance, the automobile has traditionally been viewed as having a lesser degree of privacy than a person's home, effects and self. See *Chambers v. Maroney*, 399 U.S. 42 (1970); *Carroll v. United States*, 267 U.S. 132 (1925). In *Prouse*, however, the Court lays the groundwork for the proposition that a police officer may have a greater right to stop a person on the street than in a vehicle by stating: "Many people spend more hours each day traveling in cars than walking on the streets. Undoubtedly, many find a greater sense of security and privacy in traveling in an automobile than they do in exposing themselves by pedestrian or other modes of travel." 440 U.S. at 662.

197. See *Terry*, 392 U.S. 1 (1968), where the Court held that where an officer observes unusual conduct which leads him to believe, in light of his experience, that criminal conduct may be afoot and that he may be dealing with armed and dangerous individuals, the officer has the right to conduct a limited search of the outer clothing of the suspect in an attempt to discover weapons. For an additional discussion by the Supreme Court on this principle, see, e.g., *Sibron v. New York* and *Peters v. New York*, 392 U.S. 40 (1968). See also *Adams v. Williams*, 407 U.S. 143 (1972), where the Court, based upon its holding in *Terry*, stated an officer had the right to reach in a car and remove a gun from the suspect's waistband, based upon a tip by an informant known to the officer.

198. The detention would be permitted where the officer reasonably, under the circumstances, felt a crime had been or was going to be committed. However, those accused of so-called victimless crimes would not be suspect to a frisk unless, in the light of his experiences, he could reasonably believe that the person with whom he is dealing may be armed. Additionally, he must reasonably fear for his own or others' safety. This is assuming that generally those accused of a victimless crime will not exhibit traits which would justify an officer invading the individual's right to privacy.

detention is called for, the officer should be permitted to temporarily freeze the situation for a short period of time to make the necessary investigation of the suspect, including the right to obtain the person's name, address, and explanation of behavior without the requirement of *Miranda* warnings.¹⁹⁹

The format suggested above is essentially that of the Model Rules of Stop and Frisk prepared by the Project on Law Enforcement Policy and Rulemaking, College of Law, Arizona State University in 1974.²⁰⁰ Adoption of the standards set out in the Model Rules and urged in this article will have the salutary effect of bringing order to an area of the law presently plagued by ambiguous decisions and absurd results, offering no guidance to the very people who must make split-second decisions which sometimes determine whether a criminal is captured or avoids arrest. In effecting such a standard, due regard must be given to the rights of law-abiding citizens to feel secure in their homes.

Application of the above test and a closer scrutiny of the Supreme Court's opinions since *Terry* would surely have avoided the unfortunate result reached by the New York Court of Appeals in the *Howard* case, a result that cannot possibly increase respect for the fourth amendment or protect society's interest in preventing and solving crime.

APPENDIX

STOP AND FRISK MODEL RULES

By the Project on Law Enforcement Policy and Rulemaking,
College of Law Arizona State University

Rule 101 *Preference for Contacts.*

Unless an officer concludes that an arrest should be made, or

199. See *Terry*, 392 U.S. 1 (1960) and Appendix, Rule 22, B-D. For application of this principle to border searches, see *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973), where the Court permitted brief detention of individuals crossing the border in order to allow the individual to identify himself and prove his citizenship.

200. See Appendix.

that a stop is justifiable and appropriate under Rule 201, communications with a private person should begin with a contact.

Rule 102 *Initiating a Contact.*

An officer may initiate a contact with a person in any place that an officer has a right to be. The officer shall identify himself as a law enforcement officer as soon as reasonably possible after the contact is made.

Rule 103 *Conduct of Contacts.*

Persons contacted may not be halted or detained against their will, or frisked. They may not be required to answer questions or to cooperate in any way if they do not wish to do so. An officer may not use force or coercion in initiating a contact or in attempting to obtain cooperation once the contact is made. If persons contacted refuse to cooperate, they must be permitted to go on their way; however, if it seems appropriate under the circumstances, they may be kept under surveillance. Since a contact is not a stop or an arrest, and those persons contacted may be innocent of wrongdoing of any kind, officers should take special care to act in as restrained and courteous a manner as possible.

Rule 201 *Basis for a Stop.*

If an officer reasonably suspects that a person has committed, is committing, or is about to commit any crime, he has the authority to stop that person. He may exercise this authority in any place that he has a right to be. Both pedestrians and persons in vehicles may be stopped.

Rule 202 *Reasonable Suspicion.*

The term *reasonable suspicion* is not capable of precise definition; it is more than a hunch or mere speculation on the part of an officer, but less than the probable cause necessary for arrest. It may arise out of a contact, or it may exist prior to or independently of a contact. Reasonable suspicion has been defined as a combination of specific and articulable facts, together with reasonable inferences from those facts which, in light of the officer's experience, reasonably justify a belief that the person to be stopped has committed, is committing, or is about to commit a crime.

The following list contains some factors which—alone or in combination—may be sufficient to establish *reasonable suspicion* for a stop:

- A. The Person's Appearance. Does he generally fit the

description of a person wanted for a known offense? Does he appear to be suffering from a recent injury, or to be under the influence of alcohol, drugs, or other intoxicants?

- B. The Person's Actions. Is he running away from an actual or possible crime scene? Is he otherwise behaving in a manner indicating possible criminal conduct? If so, in what way? Were incriminating statements or conversations overheard? Is he with companions who themselves are *reasonably suspicious*?
- C. Prior Knowledge of the Person. Does he have an arrest or conviction record, or is he otherwise known to have committed a serious offense? If so, is it for offenses similar to one that has just occurred, or which the officer suspects is about to occur? Does the officer know of the person's record?
- D. Demeanor During a Contact. If he responded to questions during the contact, were his answers evasive, suspicious or incriminating? Was he excessively nervous during the contact?
- E. Area of the Stop. Is the person near the area of a known offense soon after its commission? Is the area known for criminal activity (a high crime area)? If so, is it the kind of activity the person is thought to have committed, be committing, or about to commit?
- F. Time of Day. Is it a very late hour? Is it usual for people to be in the area at this time? Is it the time of day during which criminal activity of the kind suspected usually occurs?
- G. Police Training and Experience. Does the person's conduct resemble the pattern or *modus operandi* followed in particular criminal offenses? Does the investigating officer have experience in dealing with the particular kind of criminal activity being investigated?
- H. Police Purpose. Was the officer investigating a specific crime or specific type of criminal activity? How serious is the suspected criminal activity? Might innocent people be endangered if investigative action is not taken at once?
- I. Source of information. If the basis of the officer's rea-

sonable suspicion is, in whole or in part, information supplied by another person, what kind of person is the information source? Is he a criminal informant, a witness, or a victim of a crime? How reliable does the person appear to be? Has he supplied information in the past that proved to be reliable? Is he known to the officer? Did the officer obtain the information directly from the person? How did the person obtain his information? Was any part of the information corroborated prior to making the stop?

Rule 203 *Citing Justification for a Stop.*

Every officer who conducts a stop must be prepared to cite those specific factors which led him to believe that the stop was justified.

Rule 204 *Stopping Vehicles at Roadblocks.*

If authorized to do so by (insert title of ranking police official), a law enforcement officer may order the drivers of vehicles moving in a particular direction to stop. Authority to make such stops shall only be given in those situations where such action is necessary to apprehend the perpetrator of a crime who, if left at large, can be expected to cause physical harm to other persons, or to discover the victim of a crime whose physical safety is presently or potentially in danger. Once a vehicle is stopped pursuant to this Rule, it may be searched only to the extent necessary to determine if the perpetrator or victim is present in the vehicle, and such search shall be made as soon as possible after the stop.

Rule 301 *Duration of a Stop.*

A person stopped pursuant to these Rules may be detained at or near the scene of the stop for a reasonable period not to exceed 20 minutes. Officers should detain a person only for the length of time necessary to obtain or verify the person's identification, or an account of the person's presence or conduct, or an account of the offense, or otherwise determine if the person should be arrested or released.

Rule 302 *Explanation to Detained Person.*

Officers shall act with as much restraint and courtesy towards the person stopped as is possible under the circumstances. The officer making the stop shall identify himself as a law enforcement officer as soon as practicable after making the stop. At some

point during the stop the officer shall, in every case, give the person stopped an explanation of the purpose of the stop. [The officer shall briefly note in the record of the stop the fact that he gave the person an explanation for the stop and the nature of that explanation.]

Rule 303 *Rights of Detained Person.*

The officer may question the detained person for the purpose of obtaining his name, address, and an explanation of his presence and conduct. The detained person may not be compelled to answer these questions.

The officer may request the person to produce identification and may demand the production of certain documents (such as operator's license and vehicle registration) if the person has been operating a vehicle and state law authorized such demand. During the questioning, the detained person need not be advised of his *Miranda* rights until probable cause to arrest develops, or until the questioning becomes *sustained and coercive* rather than brief and casual. When either of these events occurs, the officer should immediately halt the questioning and advise the detained person of his *Miranda* rights.

Rule 304 *Effect of Refusal To Cooperate.*

Refusal to answer questions or to produce identification does not by itself establish probable cause to arrest, but such refusal may be considered along with other facts as an element adding to probable cause if, under the circumstances, an innocent person could reasonably be expected not to refuse.

[Refusal to answer questions or to produce identification may not be considered as an element of probable cause to arrest. However, such refusal is cause for a further investigation of the circumstances surrounding the stop. In such cases, the 20-minute time limitation imposed by Rule 301 does not apply, and the person may be detained for a reasonable time.]

Rule 305 *Effecting a Stop and Detention.*

- A. General Rule. An officer shall use the least coercive means necessary under the circumstances to effect the stop. The least coercive means may be a verbal request, an order, or the use of physical force.

- B. Use of Physical Force. An officer may use only such force as is reasonably necessary to carry out the authority granted by these Rules. The amount of force used to effect a stop shall not, however, be such that it could cause death or serious bodily harm to the person stopped. An officer must not use a weapon or baton to effect a stop. he may use his hands, legs, arms, feet, or handcuffs. If the officer is attacked, or circumstances exist that create probable cause to arrest, the officer may use the amount of force necessary to defend himself or to effect a full-custody arrest.

Rule 401 *Identification of Witnesses.*

An officer who has probable cause to believe that any felony, or a misdemeanor involving danger to persons or property, has just been committed, and who has probable cause to believe that a person found near the scene of such offense has knowledge of significant value to the investigation of the offense, may order that person to stop. The sole purpose of this stop is to obtain a reluctant witness' identification so that he may later be contacted by the officer's agency or a prosecuting agency. Officers shall not use force to obtain this identification. (This Rule does not regulate or limit interviews with willing and cooperative witnesses.)

Rule 501 *When To Frisk.*

A law enforcement officer may frisk any person whom he has stopped when the officer reasonably suspects that the person is carrying a concealed weapon or dangerous instrument and that a frisk is necessary to protect the officer or others. The frisk may be conducted immediately upon making the stop or at any time during the stop—whenever a *reasonable suspicion* to frisk arises.

Rule 502 *Reasonable Suspicion for a Frisk.*

Reasonable suspicion for a valid frisk is more than a vague hunch and less than probable cause. (See Rule 202.) If a reasonably prudent officer, under the circumstances, would believe his safety or that of other persons in the vicinity is in danger because a particular person might be carrying a weapon or dangerous instrument, a frisk is justified.

The following list contains some factors which—alone or in combination—may be sufficient to create reasonable suspicion for a frisk:

- A. The Person's Appearance. Do his clothes bulge in a

- manner suggesting the presence of any object capable of inflicting injury?
- B. **The Persons's Actions.** Did he make a furtive movement, as if to hide a weapon, as he was approached? Is he nervous during the course of the detention? Are his words or actions threatening?
 - C. **Prior Knowledge.** Does the officer know if the person has a police record for weapons offenses? For assaults (on police officers or others)? Does the officer know if the person has a reputation for carrying weapons or for violent behavior?
 - D. **Location.** Is the area known for criminal activity—a "high crime" area? Is the area sufficiently isolated so that the officer is unlikely to receive aid if attacked?
 - E. **Time of Day.** Is the confrontation taking place at night? Does this contribute to the likelihood that the officer will be attacked?
 - F. **Police Purpose.** Does the officer's suspicion of the suspect involve a serious and violent offense? An armed offense? (If so, the same factors justifying the stop also justify the frisk.)
 - G. **Companions.** Has the officer detained a number of people at the same time? Has a frisk of a companion of the suspect revealed a weapon? Does the officer have assistance immediately available to handle the number of persons he has stopped?

Rule 503 *Citing Justification for a Frisk.*

Every officer who conducts a frisk must be prepared to cite those specific factors which led him to conclude that reasonable suspicion existed before the frisk began.

Rule 601 *General Conduct of a Frisk.*

- A. **Securing Separable Possessions.** If the person is carrying an object immediately separable from his person, e.g., a purse, shopping bag or briefcase, it should be taken from him. The officer should not immediately look inside the object, but should place it in a secure location out of the person's reach for the duration of the detention.
- B. **Beginning the Frisk: Pat-down.** The officer should

begin the frisk at that part of the person's apparel most likely to contain a weapon or dangerous instrument. Frisks are limited to a *pat-down* of the person's outer clothing unless:

(i) The outer clothing is too bulky to allow the officer to determine if a weapon or dangerous instrument is concealed underneath. In this event, outer clothing such as overcoats and jackets may be opened to allow a pat-down directly on the inner clothing, such as shirts and trousers; or

(ii) The officer has a reasonable belief, based on reliable information or his own knowledge and observations, that a weapon or dangerous instrument is concealed at a particular location on the person, such as a pocket, waistband, or sleeve. In this event, the officer may reach directly into the suspected area. This is an unusual procedure, and any officer proceeding must be prepared to cite the precise factors which led him to forego the normal pat-down procedure.

- C. **Securing Areas Within Reach.** The officer may also *frisk* or secure any areas within the detained person's immediate reach, if the officer reasonably suspects that such areas might contain a weapon or dangerous instrument.

Rule 602 *Procedures When a Frisk Discloses an Object That Might Be or Contain a Weapon or Dangerous Instrument.*

If, when conducting a frisk, the officer feels an object which he reasonably believes is a weapon or dangerous instrument or may contain such an item, he may reach into the area of the person's clothing where the object is located, e.g., a pocket, waistband, or sleeve, and remove the object. The object removed will be one of the following:

- (i) A weapon or dangerous instrument;
- (ii) A seizable item;
- (iii) An object that is none of the above.
- (iv) an object capable of containing a weapon or dangerous instrument.

Depending on which category the removed object falls into, the officer should proceed in one of the following ways:

- A. (Category 1) **The Object Is a Weapon or Dangerous Instrument.** The officer should determine if the person's possession of the weapon or dangerous instru-

ment is licensed or otherwise lawful. If lawful, the officer should place the object in a secure location out of the person's reach for the duration of the detention. Ammunition may be removed from any firearm, and the weapon [and ammunition] returned in a manner that insures the officer's safety. [The officer should tell the person that he may claim the ammunition within — hours at (insert location of property custodian)].

If the possession is unlawful, the officer may seize the weapon or dangerous instrument, and he may arrest the person and conduct a full-custody search of him.

- B. (Category 2) The Object Is a Seizable Item. If the object is a seizable item, the officer may seize and consider it in determining if probable cause exists to arrest the person. If the officer arrests the person he may conduct a full-custody search of him.
- C. (Category 3) The Object Is a Container Capable of Holding a Weapon or Dangerous Instrument. If the object is a container that could reasonably contain a weapon or dangerous instrument and if the officer has a reasonable belief that it does contain such an item, he may look inside the object and briefly examine its contents. If the object does contain a weapon or dangerous instrument, or seizable item, the officer should proceed as in (A) or (B) above. However, if the officer upon examining the contents of the object finds no weapon or dangerous instrument, or seizable item, he should return it to the person and continue with the frisk or detention.

If the object is a container that could not reasonably contain a weapon or dangerous instrument, or if the officer does not have a reasonable belief that it contains such an item, then he should not look inside it. He may either return the object to the person and continue with the frisk or detention, or he may treat the object as a separable item, as provided in Rule 601(A).

- D. (Category 4) The Object Is Not a Weapon or Dangerous Instrument, Not a Seizable Item, and Not Capable of Holding a Weapon or Dangerous Instrument. If

the object does not fall into any of the Categories 1, 2, or 3 above, the officer should not look inside the object but should return it to the person and continue with the frisk or detention.

- E. Inadvertent Discovery of Another Object. If removal of the suspected object simultaneously discloses a second object that itself is a seizable item, the officer may lawfully seize the second object. The second object should be considered in determining whether probable cause exists to arrest the person. If probable cause does exist, the officer should tell the person he is under arrest, and conduct a full-custody search incidental to the arrest.

Rule 603 Procedure When a Frisk Discloses an Object That Might Be a Seizable Item.

If, while conducting a frisk, an officer feels an object which he does not reasonably believe to be a weapon or dangerous instrument, but does believe to be a seizable item, he may not—on the basis of his authority to frisk—take further steps to examine the object. However, if the nature of the object felt—alone or in combination with other factors—creates probable cause to believe that a crime is being committed in his presence, the officer should tell the person he is under arrest for that crime. He may then conduct a full-custody search incidental to arrest, but must not take any step to examine the object before making the arrest. If a seizable item is not found, the person should be released pursuant to (insert appropriate agency procedure).

Rule 604 Procedure Following Unproductive Frisk

If the frisk discloses nothing properly seizable, the officer nevertheless may continue to detain the person while concluding his investigation, unless 20 minutes have elapsed since the start of the detention.

Rule 605 Returning Separable Possessions.

If the person frisked or detained is not arrested by the officer, any objects taken from him pursuant to Rule 601(A) or Rule 602(C) should be returned to him upon completion of the frisk or detention. However, if something occurring during the detention has caused the officer to reasonably suspect the possibility of harm if he returns such objects unexamined, he may briefly inspect the interior of the item before returning it.

Rule 701 *Prompt Recording.*

A law enforcement officer who has stopped or frisked any person shall, with reasonable promptness thereafter, complete (insert the stop and frisk form provided in the department).

Rule 702 *Stop Based on Informant's Tip.*

If the stop or frisk is based in whole or in part upon an informant's tip, the officer making the stop or frisk shall make every reasonable effort under the particular circumstances to obtain and record the identity of the informant. Further, the officer shall record the facts concerning such tip, e.g., how it was received, the basis of the informant's reliability, and the origin of the informant's information.

