A common police practice is to stop and question persons the police suspect are or will be engaged in, or have knowledge of, criminal activities, but whom they cannot arrest due to lack of probable cause. Such practices have become known as detentions and have recently attracted widespread attention and comment because of the passage of the New York "Stop and Frisk" Act and the increasing recognition of the constitutional validity of these detentions by state and lower federal courts.


Arrests and detentions may be distinguished by the degree of interference with the liberty of the person. A detention may be of limited duration, the person detained may not be removed from the area in which he was stopped, and the stigmatizing effect may be minimal.\(^5\)

\(^5\) Many articles have discussed the proper limitations on detentions and have argued that because detentions are so limited, the interference with the person is reasonable. See, e.g., Leagre, *supra* note 1, at 407-18; Kuh, *supra* note 3, at 35; Vorenburg, *supra* note 2, at 424-26; Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315, 317-34 (1942); Cf. MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 2.02 (Tent. Draft No. 1, March 1, 1966) (twenty minute time limit on detentions, parties may not be removed from area where detention
By enabling police to stop persons who have not yet committed crimes, detentions permit police to engage in aggressive patrol practices which prevent crimes. Preliminary investigation of past crimes is often furthered by detentions which allow the police to obtain information from persons (e.g., bystanders) they could not arrest, and which enable them to release the obviously innocent. No matter how brief the detention, however, adequate provision for the safety of the detaining policemen demands that the policemen be allowed to "frisk" (or search for weapons) those detained persons whom they suspect may have weapons.

There is a readily apparent tension between the fourth amendment's protection of the individual from unreasonable searches and seizures and the unlimited use of detentions—restraining individuals on grounds insufficient to provide probable cause for arrest. While fairly

occurs). The statutes of four states—Delaware (2 hours), Missouri (20 hours), New Hampshire (4 hours), and Rhode Island (2 hours)—provide that the duration of the detention be limited to a specified number of hours, although they do not limit the detention to on-the-street investigation. However, the Massachusetts and New York statutes limit detentions by providing that the investigation can take place only in the vicinity of the stopping. The fact that the questioning conducted under these circumstances should be less intensive, as well as less prolonged, than stationhouse interrogation should help establish that this is a lesser interference with personal freedom than an arrest. Furthermore, the stigmatization resulting from an arrest record, booking, and fingerprinting is lacking in a detention. Arrest 346-48; Kuh, supra note 2, at 35; cf. United States v. Bonanno, 180 F. Supp. 71, 77 (S.D.N.Y. 1960), rev'd on other grounds sub nom. United States v. Bufalino, 285 F.2d 408 (2d Cir. 1960).

Vorenburg, supra note 2, at 425 (aggressive patrol including detention is an important police procedure especially in urban areas); Wilson, Police Arrest Privileges in a Free Society: A Plea for Modernization, 51 J. CRIM. L., C. & P.S. 395, 397-98 (1960). For some evidence of the importance of routine patrol in solving crimes and reducing the crime rate in an urban area, see the discussion of the saturation policy in Foote, supra note 2, at 405.

There is a readily apparent tension between the fourth amendment's protection of the individual from unreasonable searches and seizures and the unlimited use of detentions—restraining individuals on grounds insufficient to provide probable cause for arrest. While fairly


See, e.g., People v. Rivera, 14 N.Y.2d 441, 201 N.E.2d 32 (1964), cert. denied, 379 U.S. 978 (1965). A frisk "is a contact or patting of the outer clothing of a person to detect by the sense of touch if a concealed weapon is being carried." Id. at 446, 201 N.E.2d at 35.

It should be noted that the cases upholding detentions have given some indications that the scope of police power to detain is very extensive. See cases cited note 4 supra. Thus, in People v. Exum, 382 Ill. 204, 212, 47 N.E.2d 56, 60 (1943), the Illinois Supreme Court held that the police could lawfully stop and question a man sitting in a parked car late at night in the vicinity of thefts reported earlier that night. In People v. Martin, 46 Cal. 2d. 106, 108, 293 P.2d 52, 53 (1956), the California Supreme Court stated that "the presence of two men in a parked automobile on a lover's lane late at night was itself reasonable cause for police investigation." That court has also upheld police power to stop and question the occupants of a cab double-parked in front of a hotel at 3 a.m., People v. Blodgett, 46 Cal. 2d 114, 293 P.2d 56 (1956), two young men walking.
flexible but ascertainable standards of probable cause limit arrests and the searches incident to them, no comparable standards have been developed for detentions or for the limits of searches incident to them. Furthermore, it would seem that the standard for determining when a person may be detained—usually expressed as "reasonable grounds for suspicion," or some equivalent phrase—is not capable of precise delineation.

through a warehouse district late at night, People v. Simon, 45 Cal. 2d 645, 290 P.2d 531 (1955), and even two men in a moving vehicle near the scene of a recent crime where one of the men resembled the description given of one of the participants, People v. Mickelson, 59 Cal. 2d 448, 380 P.2d 658, 30 Cal. Rptr. 18 (1963). Other state courts have recognized detentions as reasonable where the police have observed activity on the part of the suspect indicating that he may be fleeing the scene of a burglary, People v. Ambrose, 155 Cal. App. 2d 513, 318 P.2d 181 (1957); Commonwealth v. Lehan, 347 Mass. 197, 196 N.E.2d 840 (1964); see People v. Garcia, 20 App. Div. 2d 855, 249 N.Y.S.2d 154 (1964), or that he is preparing to commit a crime, People v. Rivera, 14 N.Y.2d 441, 201 N.E.2d 32 (1964), cert. denied, 379 U.S. 978 (1965); State v. Terry, 5 Ohio App. 2d 122, 214 N.E.2d 114 (1966). There has even been some explicit recognition of the right to seal off an area through roadblocks to catch the perpetrators of a very recent major crime. See Comment, Interference with the Right to Free Movement, Stopping and Search of Vehicles, 51 Calif. L. Rev. 907, 916 & n.79 (1963), and authorities cited therein. See also Brinegar v. United States, 338 U.S. 160, 180, 183 (1949) (Jackson, J., dissenting).

The Supreme Court has stated that: "Probable cause exists where 'the facts and circumstances within [the arresting officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." Draper v. United States, 358 U.S. 307, 313 (1958), quoting from Carroll v. United States, 267 U.S. 132, 162 (1925) (brackets in original).

Although the standards articulated for detentions have been challenged for vagueness, see Foote, supra note 2, at 403-07 (challenging for vagueness any standard less than probable cause of arrest); 78Harv. L. Rev. 473, 477 (1964); 38 St. John's L. Rev. 392, 403-04 (1964) (the last two works mentioning possible challenges to the New York statute for vagueness), it has been asserted that there is "no reason to suspect that the Court . . . [is] incapable of eliciting fundamental standards through a process of judicial inclusion and exclusion," just as it has developed criteria in the "probable cause for arrest" cases. Leagre, supra note 1, at 420. However, both statutes and judicial authorities have failed to articulate clearly the need for the power to detain and the reasons for its outweighing the individual's right to be free from disturbance. Instead, such authorities rely on the mere assertion that detentions are reasonable restraints. See Paulsen, Criminal Law Administration: The Zero Hour Was Coming, in Symposium on the Contributions of Roger J. Traynor, 53 Calif. L. Rev. 103, 110-11 (1965). Furthermore, the courts have been unable to set any meaningful minimum standards for determining when "reasonable grounds for suspicion" exist and show little inclination to do so. See cases cited note 4 supra. In fact, only two cases which hold that detentions were unreasonable because "reasonable ground to suspect" did not exist have been found. Porter v. Wilson, 245 F. Supp. 396 (N.D. Cal. 1965) (no reason to suspect two men merely because they were riding in an automobile in the predawn hours); People v. Anonymous, 48 Misc. 2d 713, 265 N.Y.S.2d 705 (Nassau County Ct. 1965) (no reason to suspect a young man carrying a box of books along a street on Sunday). The threshold for reasonable ground to suspect is so low that the distinction between the included cases and the excluded cases seems an impossible one to make. Compare People v. Martin, 46 Cal. 2d 106, 293 P.2d 52 (1956) with Porter v. Wilson, 245 F. Supp. 396 (N.D. Cal. 1965).
If a detention may serve the purposes of an arrest, including allowing the police to make an evidentiary search of the person, the protection from unreasonable searches and seizures which the Supreme Court has provided through the concept of "probable cause" may be effectively circumscribed by a simple change in terminology. Yet if detentions are held illegal per se, the police will have lost a valuable tool for preventing crimes and making preliminary investigations. From a practical standpoint, it appears important to develop a system which will allow police to use detentions for preliminary investigations and crime prevention with adequate provision for police safety without impairing the individual's freedom from unreasonable searches and seizures. This comment examines whether, through legislative or judicial regulation of searches incident to detentions, safeguards may be devised which can reasonably accommodate these competing interests.

I. THE ROLE OF THE FOURTH AMENDMENT IN ARREST AND SEARCH LAW

The fourth amendment, which articulates a general right against "unreasonable searches and seizures," has long been held to govern arrests and presumably applies to lesser physical interferences with the person as well. The expression "probable cause" found in the amendment has been used as a measure of the reasonableness of arrests in general. Although it has been argued that probable cause for arrest is an absolute standard which will not justify interferences of any sort based on less than probable cause for arrest, it seems more logical, and more consistent with authority, to regard probable cause as a standard, flexible within limits, that balances the need for interference with the extent of interference.
The fourth amendment's requirement that all searches be reasonable has been held to permit searches of the person incident to valid arrests. Since probable cause must exist for an arrest to be valid, there often is a sufficient connection between the individual and criminality to warrant a belief that he may have on his person either evidence of the crime of which he is suspected or weapons. In either case, a search is valid. In addition, guidelines imposing limitations on such searches have been developed: it has been held that the permissible area of search incident to an arrest can extend beyond the arrestee's person to premises within his control at the time of arrest; however, the search must be closely related in time and space to the arrest and reasonably designed to produce weapons and direct evidence—fruits or instrumentalities—of the crime of which the accused is suspected.

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22 See Preston v. United States, 376 U.S. 364 (1964), a case in which three men seated in a car were arrested for vagrancy. After their arrest the car was towed to a garage and searched there. The search was held not to be incident to a valid arrest. In Agnello v. United States, 269 U.S. 20 (1925), A, B, and others were arrested at B's home. A search of A's home a short time later was held not to be incident to the arrest.

23 United States v. Rabinowitz, 339 U.S. 56, 63-64 (1950). The police may search only for items connected with the crime and weapons with which the defendant might resist or escape. Taglavore v. United States, 291 F.2d 262 (9th Cir. 1961); McIntire v. United States, 217 F.2d 663 (10th Cir. 1954), cert. denied, 348 U.S. 953 (1955). In the federal courts, at least, merely evidentiary matter such as letters and personal papers, as distinguished from direct evidence such as contraband or instrumentalities of a crime, has been held not properly subject to seizure. See, e.g., United States v. Rabinowitz, supra, at 64 n.6 and cases cited therein; United States v. Alberti, 120 F. Supp. 171 (S.D.N.Y. 1954) (primary object of search incident to arrest can not be documentary evidence). If items other than instrumentalities or fruits of the crime suspected come into the possession of the arresting officer through a search reasonably designed to uncover these fruits or instrumentalities, they are admissible if they are instrumentalities of another crime and are recognized as such, Abel v. United States, 362 U.S. 217, 238 (1960), or if the possession of them is a crime in itself, Harris v. United States, 331 U.S. 145 (1947). The arresting officer cannot make a general exploratory search, Go-Bart Importing Co. v. United States, 282 U.S. 344, 357-58 (1931); he "must have in mind some reasonably specific thing he is looking for and reasonable grounds to believe it is in the place being searched," United States v. Tate, 209 F. Supp. 762, 765 (D. Del. 1962), and the fact that forfeited property, such as a weapon, turns up does not validate the search. Go-Bart Importing Co. v. United States, supra; United States v. Tate, supra. Under recent interpretation, the constitutional requirements are probably the same as in federal courts. See Ker v. California, 374 U.S. 23 (1963); Comment, The Federal Standard of Search and Seizure, 13 Drake L. Rev. 65-66 (1963).
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The overriding requirement in both arrests and searches, “reasonableness,” is not based on precise distinctions, but rather is apparently the product of a balancing of practical considerations: the need for the search, arrest, or other restraint on personal freedom is balanced against the actual amount of interference with the person caused by the restraint.

II. TENSION BETWEEN THE FOURTH AMENDMENT AND DETENTIONS

The use of detentions by the police has been criticized on the ground that the fourth amendment forbids any police interference with the person unless the police have probable cause for arrest. However, since in arrest and search law the reasonableness of the restriction involves a balancing of the needs for the restriction and the actual hardship imposed, it would seem that judging lesser interferences such as detentions on the basis of reasonableness under the particular circumstances of each case would not necessarily violate the fourth amendment simply because the threshold of probable cause for arrest was not achieved. Another criticism of the use of detentions is that the standards for judging whether a detention is reasonable are so indefinite as to be unconstitutionally vague. Thus, the New York “stop and frisk” law, which provides that “a police officer may stop any person abroad in a public place whom he reasonably suspects is committing, has committed or is about to commit a felony or any of . . . [certain serious misdemeanors] and may demand of him his name, address and an explanation of his actions,” has been charged with setting unconstitutionally vague standards. However, courts, both in states where

24 For example, it is not an automatic rule that everyone arrested may be searched. To justify such a search it must be shown that it was reasonable to believe that one of the justifications advanced above, see text accompanying note 20 supra, would be applicable. Comment, supra note 19, 59 Nw. U.L. Rev. at 619 & n.61, and authorities cited therein. Even a search for weapons incidental to a lawful arrest may be unreasonable in some circumstances. For example, in United States v. Tate, supra note 23, a policeman had arrested Tate for speeding and after Tate had resisted, the policeman handcuffed him and placed him in the patrol car. Then the policeman searched Tate’s car and found a sawed-off shotgun. The court held that the search was unreasonable since there was no indication of what the policeman was looking for in the car.

25 Foote, supra note 2, at 407.

26 Arrest 346; Leagre, supra note 1, at 406-08, 411-16; Comment, supra note 2, 65 Colum. L. Rev. at 858; Comment, supra note 2, 59 Nw. U.L. Rev. at 652-55.

27 See, e.g., Foote, supra note 2, at 403-07.


the initial recognition of detentions is statutory and in states where it is judicial, have recognized that practical considerations for upholding detentions are significant.\textsuperscript{30} In addition, the standard may be sharpened through a process of judicial inclusion and exclusion,\textsuperscript{31} and the requirement of reasonableness, enforced by a balancing of practical considerations, may be a bar to arbitrary action.\textsuperscript{32}

Since the balancing process is an effort to provide the police with only that amount of investigative and preventive power consistent with individual freedoms, it is important to note that detentions and frisks have been justified only for purposes of preliminary investigations, crime prevention, and the safety of police while engaged in investigation and crime prevention.\textsuperscript{33} Whenever the police use the detention as an arrest and the frisk incident to the detention as an evidence-gathering search they are violating the fourth amendment's requirement that an arrest which will validate a search be based on probable cause. Clearly, the ideal solution to the problem created by the unrestricted use of detentions would be a system which permits

\textsuperscript{30} See cases cited note 4 supra.
\textsuperscript{31} See Porter v. Wilson, 245 F. Supp. 896 (N.D. Cal. 1965); People v. Anonymous, 48 Misc. 2d 713, 265 N.Y.S.2d 705 (Nassau County Ct. 1965); Leagre, supra note 1, at 415.
\textsuperscript{32} For the balancing of practical considerations to be a bar to arbitrary action, the criteria used to determine whom the police are to detain must be rationally related to the objectives sought—crime prevention, preliminary investigation, and police safety—and uniformly applied. In an attempt to provide appropriate criteria for uniform application, the New York State Combined Council of Law Enforcement Officials has enumerated a number of factors which a law enforcement officer should consider in determining whether there is, under the New York "stop and frisk" law, N.Y. CODE CRIM. PROC. § 180-a, "reasonable suspicion" which justifies stopping a suspect:

i. The demeanor of the suspect.

ii. The gait and manner of the suspect.

iii. Any knowledge the officer may have of the suspect's background or character.

iv. Whether the suspect is carrying anything, and what he is carrying.

v. The manner in which the suspect is dressed, including bulges in clothing—when considered in light of all of the other factors.

vi. The time of the day or night the suspect is observed.

vii. Any overheard conversation of the suspect.

viii. The particular streets and areas involved.

ix. Any information received from third persons, whether they are known or unknown.

x. Whether the suspect is consorting with others whose conduct is "reasonably suspect."

xi. The suspect's proximity to known criminal conduct.

(This listing is not meant to be all inclusive.)


\textsuperscript{33} See authorities cited notes 2 & 4 supra.
the police to detain in order to prevent crime, to investigate, and to search persons detained so far as is necessary for the protection of the police, but which deters the police from using detentions for obtaining evidence against persons whom they could not otherwise search.

III. A PROPOSED SOLUTION

The tension between the use of detentions and the fourth amendment is most visible in cases where the frisk or other search incident to a detention has revealed a weapon, an item the possession of which is a crime, or the fruits of a crime, and the party detained is seeking, in a subsequent criminal trial, to prevent the items discovered from being admitted into evidence. Two positions regarding the admissibility of items found pursuant to a detention search are: (1) anything found pursuant to a permissible weapon-oriented search is admissible because obtained as a result of an authorized search; and (2) the search is considered unlawful, therefore nothing is admissible—it is, however, acknowledged that officers will disregard the law and make such searches where they feel a need to protect themselves. A third position suggested here as more practicable than the others, is that while the defensive frisk be construed as lawful, nothing be admissible as evidence where the search or frisk is carried on with less than probable cause for arrest.

The first position, with the qualification that only weapons or other items the possession of which is a crime are admissible, has been adopted by the New York legislature and accepted by the New York state courts. The essence of this position is a step-by-step approach to

34 See, e.g., N.Y. PEN. CODE § 408 (burglars' tools).

35 This is the way in which most of the cases cited in note 4 supra were presented to the courts. See, e.g., Mapp v. Ohio, 367 U.S. 643 (1961) (holding inadmissible evidence obtained as a result of an illegal search).

36 Because of the public demand for more effective service than the police would be allowed to render under the law (especially where detentions and frisks are not recognized as lawful), the police often consider themselves pressured into violating the law with respect to on-the-street stoppings and searches and seizures incident thereto. LaFave, Improving Police Performance Through the Exclusionary Rule—Part I: Current Police and Local Court Practices, 30 Mo. L. Rev. 391, 444 (1965); Parker, The Police Service—A Key to Community Quality, 55 J. CRIM. L., C. & P.S. 273, 276 (1964); Wilson, Police Authority in a Free Society, 54 J. CRIM. L., C. & P.S. 175, 177 (1963). Vorenburg, supra note 2, at 424, notes that what has been done in the case of detentions arising out of routine patrol is to assume that the police will do what they think necessary even if they do not have probable cause; he contends that this approach to, or failure to approach, the problem is impermissible.

37 New York's "stop and frisk" law, N.Y. CODE CRIM. PROC. § 180-a, provides that when
detentions in which the information obtained in one step is used to justify the next step. This method is illustrated by the leading New York case of People v. Rivera. At 1:30 a.m. on May 25, 1962, police officers observed two men who walked in front of a bar and grill, stopped, looked in the window, resumed walking for a few steps, came back, looked in the window again, and then walked away rapidly. One of the officers stopped them and patted the outside of the defendant's clothing. In doing so he felt a hard object which he thought was a pistol. He then reached inside the defendant's pocket and removed a fully loaded pistol. The New York Court of Appeals recognized the authority of the police to stop and question persons under suspicious circumstances and held that this authority carried with it the right to frisk the persons questioned because of the danger of armed resistance. The frisk was reasonable when Rivera was detained, and, after the hard object had been felt, probable cause for arrest existed. Since the frisk was a reasonable interference with the defendant's privacy, and the subsequent search which resulted in removing the pistol from Rivera's pocket was valid as incident to a lawful arrest, evidence obtained thereby was not acquired in violation of the defendant's constitutional rights and was admissible.

a policeman has detained a person and "reasonably suspects that he is in danger of life or limb, he may search such person for a dangerous weapon," and if he finds a weapon or "any other thing the possession of which may constitute a crime" he may take it from the detained person. In cases interpreting this provision, and in other cases which were decided after the passage of the law but not governed by it, the New York courts have held that items which the police officer could take from the detained person are admissible as evidence. See, e.g., People v. Rivera, 14 N.Y.2d 441, 201 N.E.2d 32 (1964), cert. denied, 379 U.S. 978 (1965); People v. Peters, 44 Misc. 2d 470, 254 N.Y.S.2d 10 (Westchester County Ct. 1964), aff'd, 35 U.S.L.W. 2087 (N.Y. Ct. App. July 7, 1966). See generally Lafave, Search and Seizure: "The Course of True Law . . . Has Not . . . Run Smooth," 1966 U. ILL. L.F. 255, 308-11 (discussing frisks incident to detentions).

The occurrences out of which Rivera arose took place before the effective date of the New York "stop and frisk" law, but the decision was handed down after the law had been enacted. The court in effect accommodated its judgment on the reasonableness of the detention and the frisk to the provisions of the statute despite the fact that the law did not govern the situation, People v. Rivera, 14 N.Y.2d 441, 201 N.E.2d 32 (1964), cert. denied, 379 U.S. 978 (1965), and despite some New York precedents which would indicate a contrary result. See New York cases cited in ARREST 346 n.13.

The information which the policeman possessed was deemed sufficient to allow him to frisk Rivera. This holding must mean that the standard for believing the suspect to be armed and dangerous is very low, and possibly that the police may frisk any person whom they may stop on the street for questioning at night.

People v. Rivera, 14 N.Y.2d 441, 447, 201 N.E.2d 32, 35-36 (1964), cert. denied, 379 U.S. 978 (1965). The frisk serves as a means of obtaining probable cause for arrests, and the subsequent search of the person which involves removing the gun from his clothing is valid because incident to a lawful arrest.
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In *People v. Pugach*, the Court of Appeals extended the doctrine of the *Rivera* case to cover the search of a brief case carried by the defendant when he was being interrogated by officers in a police car. The dissent pointed out that this search was not necessary to protect the officers since they could have achieved the same protection merely by moving the brief case out of the petitioner’s reach and concluded that the search was therefore unlawful. In a subsequent case, *People v. Peters*, where the detaining officer testified that in frisking the defendant, he thought the object which he felt in the defendant’s pocket might be a knife, it was held that burglary tools taken from a person detained under the statute were admissible as evidence in a prosecution for felonious possession of burglar’s tools.

The argument for admissibility in these cases is that the police are proceeding in accordance with a lawful procedure which consists of an initial frisk that is reasonable because of the need to protect the detaining officers and then, after the hard object in the suspect’s pocket has been touched, the officer’s removal of the object is reasonable.

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42 15 N.Y.2d 65, 204 N.E.2d 176 (1964), *cert. denied*, 380 U.S. 986 (1965). Like *Rivera*, the fact situation presented by this case took place before the effective date of the “stop and frisk” law.

43 *Id.* at 70-71, 204 N.E.2d at 178-79. The dissent is consistent with the claimed purposes of the “frisk.” Any search is an inconvenience and an indignity; if a search is to be justified only on the grounds that it is needed to protect the officers, and if clear alternative means of protecting the officers are feasible, the alternative which involves no search or the more limited search should be chosen.

44 44 Misc. 2d 470, 254 N.Y.S.2d 10 (Westchester County Ct. 1964), *aff’d*, 34 U.S.L. Week 2037 (N.Y. Ct. App. July 7, 1966). Here an off-duty policeman observed defendant Peters and another man tiptoeing around the hall of an apartment building at 1 p.m. When they saw that they were being observed, they rapidly descended the stairs. The officer pursued and overtook Peters. The court agreed with the officer that Peters’ explanation of his presence in the building—that he was visiting a married girl friend whom he declined to name—was unsatisfactory and held that the officer could legally frisk him. This was the first case presented to the New York Court of Appeals under the “stop and frisk” law. The provision in the law governing the frisk is as follows:

When a police officer has stopped a person for questioning pursuant to this section [see text accompanying note 28 *supra*] and reasonably suspects that he is in danger of life or limb, he may search such person for a dangerous weapon. If the police officer finds such a weapon or any other thing the possession of which may constitute a crime, he may take and keep it until the completion of the questioning, at which time he shall either return it, if lawfully possessed, or arrest such person.

N.Y. CODE CRIM. PROC. § 180-a. A provision quite similar in many respects has been included in the ALI's *Model Code of Pre-Arraignment Procedure* § 2.02(5) (Tent. Draft No. 1, March 1, 1966). This provision is as follows:

(5) *Search for Dangerous Weapons.* A law enforcement officer who has stopped or ordered any person to remain in his presence pursuant to this section may, if he reasonably believes that his safety so requires, search such person and his immediate surroundings, but only to the extent necessary to discover any dangerous weapons which may on that occasion be used against the officer.
since he has probable cause to arrest the suspect and to search incident to that arrest. Thus, since no unreasonable search or seizure is made, the items found pursuant to this procedure are admissible.\textsuperscript{45}

This position enables the police to investigate and patrol aggressively and to take adequate precautions for their own safety while doing so. It is consistent with legislative and judicial deference to the policeman's expertise and intuition for the probabilities of criminal activity and the dangers inherent in a particular fact situation. It recognizes that if the police are not allowed to frisk, they may well be subjected to considerable danger. However, since the probable cause requirements for a detention and for a frisk are slight and the criteria are very subjective, any incident on a dark night could produce an automatically sanctioned evidentiary search.\textsuperscript{46} Thus, to validate a frisk, the officer need only say that he noticed a bulge in the suspect's jacket or a furtive movement which might indicate that he was armed.\textsuperscript{47} Since

\textsuperscript{45} The Uniform Arrest Act jurisdictions also appear to have accepted the position that weapons and other items which are found pursuant to a frisk and the possession of which is a crime are admissible. Under this act, a policeman may search incident to a valid detention when he has "reasonable ground to believe that he is in danger if the person possesses a dangerous weapon." Warner, supra note 5, at 344. In State v. Moore, 187 A.2d 807 (Del. Sup. Ct. 1963), for example, a policeman stopped a car which was being driven slowly back and forth in front of a service station late at night. After noting that the jacket pockets of both occupants of the car bulged, he frisked them and found pistols. The Delaware Supreme Court held that the pistols were admissible into evidence since the officer had a right to detain where he had reasonable ground to suspect that a crime was about to be committed and the right to frisk since he reasonably thought he was in danger. Ibid. It is unclear whether the court held that the frisk was valid as a reasonable adjunct to the detention (reasonable when the bulging pockets were observed) or that the policeman's observation of the bulging pockets gave him probable cause to search or arrest. As an alternative ground for justifying the search, apparently thrown in as an afterthought, the court stated that the search could also be supported as incident to a valid arrest for a traffic violation. Ibid. at 821-22. Although the propriety of a search incident to a traffic violation has been questioned under many circumstances, in this case it seems that a search for weapons of the persons arrested was proper since the large bulges in the suspects' pockets gave the policeman strong reason to believe that the men were armed.

Although many of the courts which have recognized detentions in the absence of legislation have not faced the question whether items discovered pursuant to weapon-oriented detention searches are admissible, there is some support in the cases for the proposition that such items are admissible. See, e.g., People v. Mickelson, 59 Cal. 2d 448, 551, 380 P.2d 658, 660, 30 Cal. Rptr. 18, 20 (1963) (dictum); People v. Simon, 45 Cal. 2d 645, 650, 290 P.2d 531, 533 (1955) (dictum).

\textsuperscript{46} When carried to its logical conclusion, this position could result in admission of all items which the police might encounter in the process of making a proper frisk, since the nature of the discovered item does not change the reasonableness of the search.

\textsuperscript{47} Comment, supra note 9, 51 CALIF. L. REV. at 922 n.134, refers to searches incident to arrests for traffic violations where the officer claims he feared for his safety thusly:
people seldom challenge searches which produce nothing.\textsuperscript{48} nearly every case which comes before a court is one in which the officer's assessment of the situation is strongly reinforced by the discovery of a weapon or criminal tools,\textsuperscript{49} and there may be strong incentive for him to fabricate grounds for a frisk since evidence leading to a conviction may be obtained thereby. As a result, the reliability of the officer's testimony in these cases should be subject to considerable doubt.\textsuperscript{50} The probable existence of such situations should warrant the application of a "high visibility" standard, like those announced in recent confession cases,\textsuperscript{51} in order to insure that the detained party's constitutional rights have been respected. The lack of this, or any other, safeguard in the New York law has the ultimate effect of legalizing otherwise illegal searches by simply clothing them in the rhetoric of "stop and frisk."\textsuperscript{52}

Almost a polar opposite of the first position on the admissibility of evidence is the second—that all of the items discovered by frisking are inadmissible because the frisk, since not based on probable cause for arrest, is unreasonable. Such a rule would deter the police from using the frisk except where they feel it necessary because of danger to themselves. Although no explicit provision for police safety is made, in

\textsuperscript{48} See authorities cited note 58 infra.


\textsuperscript{50} The incentive to search as many persons as possible is very high where any weapons (or items like burglars' tools) found would be admissible. The incentive to obtain admissible evidence and the case with which the required standard can be fabricated lead to a substantial danger that the police would frisk a considerable number of persons whom they would not actually have probable cause to frisk in the hope of turning up evidence. Were there no incentive to turn up evidence to convict the persons frisked, as would be the case if the exclusionary rule were applied to the fruits of the frisk, no incentive to stop and frisk would exist which does not exist under the second position.


\textsuperscript{52} One suspects that, in cases such as Rivera, the result may be dictated by an unspoken desire to expand powers of detention and search because of increasing concern with rising crime rates and that the safety of the policeman is nothing but a convenient vehicle for the expansion of police powers to search for evidence. A significant result of these extended powers of search is the conviction of persons through evidence obtained by searches made where the police had neither probable cause to arrest or probable cause to search. If a lessening of the constitutional standards for searches is what is sought, it would seem advisable to examine the subject on its own merits rather than obfuscate the real issue by speaking of police safety.
Stop and Frisk practice the illegality of the frisk will not deter the police from detaining and from frisking when they believe they are in danger.

An important consideration which militates against this position is that it reduces the policeman's respect for law. The system is taking a two-faced position in requiring for practical purposes an act which it declares illegal. It would be surprising if this did not lead to a disrespect for lawful police practices which would operate directly against the policy of deterring unlawful police practices. Since one of the primary aims of recent Supreme Court cases excluding illegally obtained items from evidence was to discourage illegal police practices, this result would appear unacceptable.63

Even assuming that the officers will generally frisk where they believe they are in danger, the possibility of obtaining admissible evidence might serve as an inducement to an officer to delay frisking when actually in danger. Moreover, if the search is deemed illegal, as it would be in jurisdictions which have not legislatively or judicially recognized detentions and frisks, the party detained and frisked has cause for a civil action in trespass against the officer.64 An officer may also be subject to criminal prosecution or disciplinary proceedings for making illegal searches and seizures.65 Furthermore, in most states some degree of re-

63 A concern with lawfulness of police conduct runs through both the confession cases and the search and seizure cases. See, e.g., Linkletter v. Walker, 381 U.S. 618 (1965); Traynor, Mapp v. Ohio at Large in the Fifty States, 1962 DuKE L.J. 319, 325-26.


sistance to an unlawful search is permissible.\textsuperscript{56} Thus, if a frisk is illegal, not only may the suspect resist with an amount of force necessary to repel the policeman,\textsuperscript{57} but, in subsequent litigation, such as an assault and battery action by either party against the other, the suspect may raise the illegality of the policeman's conduct as a complete justification for his actions as well as an affirmative basis for recovery. Although civil suits for illegal searches and criminal suits or disciplinary proceedings against policemen for illegal searches are infrequent,\textsuperscript{58} it seems inappropriate to impose the risk of civil liability or criminal prosecution on a policeman who is taking reasonable precautions for his own safety in the line of duty. The risk of lawful resistance, however insubstantial it may be in practice, also seems an inappropriate one to cast upon the policeman who frisks when he suspects he may be in danger.

The policy of the first position—police safety in detention situations—as well as that of the second—deterrence of unreasonable searches—would be promoted by the third position: the defensive frisk is lawful but nothing is admissible where the frisk is carried on with less than probable cause for arrest. The third position would recognize a search for weapons or a frisk as a permissible means of protecting the police but not as a permissible evidence-gathering device. The reason for excluding items found pursuant to a frisk is that there are, as indicated earlier, substantial difficulties in enforcing the desired limi-

\textsuperscript{56} If the search was unlawful because incident to an unlawful arrest it could be lawfully resisted. Perkins, \textit{The Law of Arrest}, 25 Iowa L. REV. 201, 264 (1940), and authorities cited therein. This of course rests on the ground that the search involves a deliberate touching of the person without color of right and therefore constitutes an intentional tort. However, some states may have changed this result by statutes making resistance even to an unlawful arrest illegal. See Ill. REV. STAT. ch. 38, § 7-7 (1965); Warner, \textit{supra} note 5, at 345. See also \textsc{Model Penal Code} § 3.04(2)(a)(i) (Tent. Draft No. 8, 1958). Since under these laws resistance to an unlawful arrest by an officer is not lawful, resistance to a search incident to such an arrest is probably also unlawful. See State v. Koonce, 89 N.J. Super. 169, 214 A.2d 428 (1965) (prospective overruling of doctrine of right to resist illegal arrest).

\textsuperscript{57} The common law rule is that a person may use such force as may be reasonably necessary to repel or prevent an illegal arrest. \textsc{Wharton, Criminal Law} §§ 851-54 (12th ed. 1932). American jurisdictions generally adhere to this rule. State v. Koonce, 89 N.J. Super. 169, 175, 214 A.2d 428, 431, 433 (1965) (dictum); see People v. Cherry, 307 N.Y. 308, 121 N.E.2d 238 (1954); Note, \textit{Justification for Use of Force in the Criminal Law}, 13 \textsc{Stan. L. Rev.} 566, 567 & n.7 (1961).

\textsuperscript{58} Criminal prosecutions for illegal searches are extremely rare, and the threat they pose is an ineffective sanction. See Wolf \textit{v. Colorado}, 338 U.S. 25, 41-42, 47 (1949) (Murphy and Rutledge, JJ., dissenting); \textit{Arrest} 425-27; Foote, \textit{supra} note 49, at 494-95. For example, a federal statute, 18 \textsc{U.S.C. 2286} (1964), making it a misdemeanor for a federal officer to participate in an unlawful search and seizure, has been in force since 1921, yet there are no reported cases in which any federal officer has been prosecuted under it.
tations on the power to frisk; thus, application of a high visibility standard in the form of a general exclusionary rule appears to be warranted.\textsuperscript{59} Since the breadth of the detention and frisk standards limits the safeguards protecting individuals against unreasonable detentions and searches, the only feasible way to insure that detentions are used for legitimate purposes and not for "fishing expeditions" appears to be the exclusion of any item found as a result of a frisk or search based on less than probable cause for arrest.\textsuperscript{60} While sanctioning the use of frisks by the police for protection, this position would improve upon the first by withdrawing the incentive to frisk which is occasioned by the possibility of obtaining admissible evidence. At the same time, the detained party reasonably suspected of having a weapon is afforded all of the safeguards provided under the second position except those which are admittedly ineffective—the right to recover in a civil suit for trespass, the criminal penalties for illegal search, and the right lawfully to resist an officer making such a search.\textsuperscript{61}

A rule designed to accomplish this could be formulated as follows: The fruits of a search based on less than probable cause for arrest shall not be admissible as evidence in a criminal trial of the party aggrieved; however, a policeman shall not be deemed to act unlawfully or outside his authority if he makes a weapon-oriented search of a person lawfully detained for questioning where he reasonably suspects that the detained person may be armed and dangerous, and where the search is the only feasible method of disarming him.

Such a rule would not encourage officers to search where the search is not necessary to protect them since no admissible evidence could be obtained thereby.\textsuperscript{62} Furthermore, if the officer delays the search until

\textsuperscript{59} See text accompanying note 51 \textit{supra}.

\textsuperscript{60} It is admitted that detentions may be used for harassment purposes. Yet little incentive to use them as such is present under this position that is not also present under the second position.

\textsuperscript{61} See notes 54-58 \textit{supra} and the accompanying text.

\textsuperscript{62} For a discussion of harassment incentives see LaFave, \textit{supra} note 36, at 447-55.

Whether or not the frisk is legal or the evidence admissible, the weapon (or other item the possession of which is itself a crime) does not have to be returned to the suspect. See, e.g., People v. Jordan, 37 Misc. 2d 33, 234 N.Y.S.2d 323 (Orleans County Ct. 1962) (revolver excluded from evidence but application for its return denied); State v. Wood, 183 Ore. 650, 195 P.2d 703 (1948). Although the general rule is that one whose property has
he has probable cause for arrest or search, then any items obtained would be admissible. The scope of the search permitted should be limited to one reasonably calculated to protect the officers; in some instances a search somewhat more extensive than a frisk might be needed, but in no event should the search be more detailed than one needed to discover weapons, nor should it be made if a feasible way to protect the officer other than the search exists.

This rule would most appropriately be adopted by legislative action since it embodies wise policy but may well not be required by the Constitution. Judicial recognition, however, is also feasible. The Supreme Court, in exercising its power to prescribe rules of procedure, including rules of evidence, for the lower federal courts, may rule that evidence obtained through a frisk based on less than probable cause for arrest is inadmissible. The courts of appellate and original jurisdiction in each state, insofar as they have power to formulate rules for admissibility (on nonconstitutional grounds) could also presumably require the exclusion of evidence pursuant to this rule.

been illegally seized is entitled to have such property returned to him, contraband, or property the possession of which is illegal, which has been illegally seized need not be returned. E.g., United States v. Jeffers, 342 U.S. 48, 54 (1951); United States v. Smalls, 223 F. Supp. 387, 390 (S.D.N.Y. 1963); cf. United States v. Macri, 185 F. Supp. 144 (D. Conn. 1960) (illegally seized property used in violation of tax laws not returned).

See, e.g., Draper v. United States, 358 U.S. 507 (1959). One possible drawback of this position is that police may sometimes not frisk even when they feel they are in danger in the hope of gathering enough information to meet the standards for probable cause for arrest so they can then search and obtain admissible evidence.

However, this should not be construed to validate for any purpose a search such as the one in People v. Pugach, 15 N.Y.2d 65, 204 N.E.2d 176 (1964), cert. denied, 380 U.S. 936 (1965).

See MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 2.02, comment at 102-03 (Tent. Draft No. 1, March 1, 1966). The identity of the objects searched for (weapons) should not obfuscate the distinction in basis between a search justified only for the protection of an officer making a relatively unfocused inquiry into suspicious activity and a search for evidence pursuant to probable cause sufficient for a search warrant or one justified on grounds of both protection and the desire for evidence and safeguarded by probable cause for arrest.


E.g., Appeal of Dattilo, 136 Conn. 488, 72 A.2d 50 (1947); Perin v. Peuler, 373 Mich. 531, 542, 130 N.W.2d 4, 10 (1964); 1 WIGMORE, EVIDENCE § 7(d) (5d ed. 1964 Pocket Supp. 55); Green, To What Extent May Courts Under the Rule-Making Power Prescribe Rules of Evidence?, 26 A.B.A.J. 482, 487 (1940). In addition, state constitutional provisions or statutes may confer on courts the express power to formulate their own rules.
It may be argued, however, that such a rule is constitutionally compelled. The Supreme Court, in order to preserve probable cause as a standard for searches leading to admissible evidence, might rule that the dangers presented to the public from unreasonable searches because of the admissibility of evidence obtained through detention searches are so great that although the frisk is lawful, it will not give rise to admissible evidence.69


Within the bounds of constitutional and statutory requirements, courts of original jurisdiction have some discretion in deciding what evidence is to be admitted. See, e.g., State v. Black, 5 N.J. Misc. 48, 135 Atl. 685 (1926) (items admissible as evidence despite being obtained by illegal police search—rule of evidence). Appellate courts, within similar bounds, may decide whether evidence is properly admissible when reviewing lower court judgments. Representative of the power of appellate courts to decide questions of admissibility are the state cases which involved the admissibility of evidence obtained by illegal searches and seizures in the period from 1914 to 1949. It had been held, in Weeks v. United States, 232 U.S. 383 (1914), that evidence obtained as a result of an illegal search by federal officials was inadmissible in federal courts, but the exclusion was not held to be constitutionally required. Consequently, state courts, in passing on the admissibility of illegally acquired evidence, were not required by the federal constitution to exclude such evidence, and the state appellate courts made decisions on the admissibility of evidence of this sort unhampered by constitutional or statutory requirements. Many state courts decided that such evidence was inadmissible, but a larger number reached the opposite conclusion. See, e.g., Youman v. Commonwealth, 189 Ky. 152, 224 S.W. 860 (1920) (inadmissible); People v. Defore, 242 N.Y. 13, 150 N.E. 585 (1926) (admissible); State v. Lindway, 131 Ohio St. 166, 2 N.E.2d 490 (1936) (admissible); Commonwealth v. Dabbierio, 290 Pa. 174, 138 Atl. 679 (1927) (admissible). See also the additional state cases cited in Tables D-H of the appendix to the majority opinion in Wolf v. Colorado, 338 U.S. 25, 55-38 (1949), and Green, supra at 489 ("courts change the law of evidence by decision").

69 An analogy may be found in the recent confession cases where the Supreme Court has established rules for the procedure which must be followed during interrogation in order to produce admissible confessions. Rather than judge whether the statement was involuntary (or coerced) in each individual situation, the Court has stated that unless certain procedures (or their equivalents) are followed, the statements obtained are inadmissible. See Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964). Since these procedures, or their equivalents, are constitutionally required of the states, and since
In summary, the procedure suggested above would seem to be the most reasonable accommodation of the competing goals of police efficiency and individual freedom from unreasonable searches. On the one hand, it assures police that they can detain persons for preliminary on-the-street investigation and crime prevention with adequate provision for their safety, and, on the other, it minimizes the potential for abuse of the powers to detain and frisk by assuring that frisks cannot be used as general exploratory searches.

situations could be easily formulated where the statements obtained from the defendants were voluntary despite the absence of such procedures, these cases may indicate that a court may exclude evidence on constitutional grounds where the defendant's rights have not been violated but where the court feels that it is necessary to exclude such evidence to protect the rights of others.