MODEL RULES FOR LAW ENFORCEMENT

Stop and Frisk

Project on Law Enforcement Policy and Rulemaking

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The Project on Law Enforcement Policy and Rulemaking was created in 1972, pursuant to a two-year grant from the Police Foundation. Its purpose is to assist law enforcement agencies in promulgating rules to govern their own conduct. The exercise of rulemaking authority, it is believed, offers great benefits not only to law enforcement but to the entire criminal justice system. Rulemaking provides guidance to officers on how to proceed in difficult situations, promotes uniformity of practices, and immunizes officers who follow the rules from civil liability or departmental discipline. Most important, rulemaking enables law enforcement agencies to seize the initiative in formulating policy, and by reasoned exposition to win the support not only of courts and legislatures but also of the communities served.

Each set of Model Rules is the product of a joint enterprise between the Project Advisory Board and the Project Staff. Under the terms of the grant, the Advisory Board has responsibility for identifying the subject matter of the Rules, reviewing them as they are drafted, and in implementing them in a form that meets the needs of their own jurisdictions.

The Project is optimistic that these Model Rules will, over the next several years, be widely implemented by law enforcement agencies.

Gerald M. Caplan
Director

Approved Draft

Project on Law Enforcement Policy and Rulemaking

Model Rules:

STOP AND FRISK

Approved by the Project Advisory Board

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STOP AND FRISK

MODEL RULES FOR LAW ENFORCEMENT

Purpose.

In performing his responsibilities, a law enforcement officer must often approach individuals who appear to be engaged in some activity calling for investigation. Such activities may cover a wide range of situations; in some, the officer will be preventing or detecting crime; in others, he will be providing assistance to persons in need. Depending on the nature of the situation encountered, the police response may vary from a mere "contact," to a formal "stop" or "frisk," or, under certain specified conditions, to a full "search" of the person. In providing directions for handling these varied situations, the Model Rules that follow attempt not only to promote the public safety and safeguard law enforcement officers from harm, but also to hold invasions of personal rights and privacy to a minimum.

SECTION 1. CONTACTS.

The face-to-face communication between an officer and a private person--under circumstances where the person is free to leave if he wishes--is a "contact." A contact may be undertaken by an officer when he reasonably believes that under the circumstances some investigation of a situation is called for. The standard for initiating a contact is not "probable cause," "reasonable suspicion," or any other specific indication of criminal activity.

Rule 101. Preference for Contacts. Unless an officer concludes that an arrest should be made, or that a stop is justifiable and appropriate under Rule 201, communications with a private person should begin with a contact.

Example: An officer on patrol observes a man moving along a sidewalk late at night, who appears to be having difficulty walking. The man might be drunk, or ill, or the victim or perpetrator of a crime. The officer should initiate a contact with the man to discover what the situation is.

Rule 102. Initiating a Contact. An officer may initiate a contact with a person in any place that the officer has a right to be.[1] 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.

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[1] It is difficult to define precisely those places where an officer has a right to be. Generally, however, they would include (1) areas of government controlled property normally open to members of the public; (2) places intended for public use, or normally exposed to public view; (3) any place with the consent of a person empowered to give such consent; (4) any place pursuant to a court order (such as an arrest or search warrant); (5) places where circumstances require an immediate law enforcement presence to protect life, well-being, or property; (6) any place in which the officer is present to effect a lawful arrest.

An officer may not use force or coercion in initiating a contact or in attempting to obtain cooperation once the contact is made. If they 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.

SECTION 2. STOPS.

A "stop" is a temporary detention[2] of a person for investigation. A stop occurs when an officer uses his authority either to compel a person to halt, to remain in a certain place, or to perform some act (such as walking to a nearby location where the officer can use a radio, telephone, or call box). If a person is under a reasonable impression that he is not free to leave the officer's presence, a "stop" has occurred.

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

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[2]Temporary detention is considered a "seizure" of a person, and is therefore governed by the Fourth Amendment.

stop that person. He may exercise this authority in any place that he has a right to be.[3] 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 believing that the person to be stopped had committed, was committing, or was 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:

1. 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

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[3]See the footnote to Rule 102.

of alcohol, drugs or other intoxicants?

2. 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"?

3. 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 it is suspected is about to occur? Does the officer know of the person's record?

4. 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?

5. 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 be about to commit?

6. 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?

7. 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?

8. 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?

9. Source of Information: If the basis of the officer's "reasonable suspicion" is, in whole or in part, information supplied by another person, what kind of person was involved? Was 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?

Example 1: In the early morning hours, an officer on patrol receives a broadcast that a homicide has just occurred at a stated location. A general physical description of the suspect is given, and he is said to be wearing a dark jacket. Soon afterwards, in the vicinity of the homicide, the officer observes a man fitting the broadcast physical description, but not wearing a dark jacket. The officer stops the man. This was a proper stop. Based on the person's appearance, the area of the stop, and the type of crime under investigation, the officer had "reasonable suspicion" justifying the stop.

Example 2: Police receive an anonymous tip that a named person is selling narcotics from his apartment in a named building. The apartment manager confirms that the person resides there. Officers then occupy an apartment directly across the hall from the suspect, and there observe a man previously arrested for a narcotics violation enter the apartment. When he exits the apartment 15 to 20 minutes later the officers stop him. This was a proper stop. The officers had "reasonable suspicion" justifying the stop, based on the informant's tip and their subsequent observation of suspicious, partially-corroborating circumstances.

Rule 203. Citing Justification for a Stop. Every officer who conducts a stop must be prepared to cite those specific factors which lead him to believe that the stop was justified.

[Optional Rule 204. Stopping Vehicles at Roadblocks.[4] If

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[4] Neither this Rule, nor any other Rule herein, applies to stopping vehicles for traffic inspections. Those procedures, which have the purpose of determining if equipment or license

authorized to do so by (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.]

SECTION 3. POLICE CONDUCT DURING A STOP.

Proper justification for a stop does not permit unreasonable conduct during the stop. Every phase of a stop will be considered by the courts in determining whether the stop was reasonable--and therefore lawful. For this reason all police activity during a stop must be done in a reasonable manner.

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regulations have been violated, are grounded on state motor vehicle laws.

Rule 301. Duration of 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[5] of the purpose of the stop. [The officer shall briefly note on the record of the stop the fact that he gave the person an explanation for the stop, and the nature of that explanation.]

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[5]This explanation need not be very explicit. Its purpose is to reassure the person stopped that he was not being harassed and to help in obtaining his willing cooperation.

Rule 303. Rights of Detained Person.[6] The officer may direct questions to 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 authorizes such demand].

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

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[6] Alternative Formulations of Rule 303. Prior to the text of the Rule, various jurisdictions may want to insert language from one of the following alternative admonitions.

A. The officer making the stop shall warn the detained person that he is not under arrest, and that he will be detained no longer than 20 minutes unless he is arrested.

B. The officer making the stop shall warn the detained person that he is not under arrest, and that he will be detained no longer than 20 minutes unless he is arrested, that he is not obligated to say anything, and that anything he says may be used in evidence against him.

reasonably be expected not to refuse. [Or: 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.[7]]

Rule 305. Effecting a Stop and Detention. An officer shall use the least coercive means necessary under the circumstances to effect the stop of a person. The least coercive means may be a verbal request, an order or the use of physical force.

Rule 305.1 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 sought to be stopped. (This means that an officer must not use a weapon or baton [or mace] to effect a stop. He may use his

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[7If the implementing agency adopts alternative A or B of Rule 303, and adopts the second formulation of Rule 304, then the 20 minute limitation of alternatives A or B should be modified.]

hands, legs, arms, feet, or handcuffs [or mace].) 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 effect a full-custody arrest.

SECTION 4. STOPPING WITNESSES NEAR THE SCENE OF A CRIME.

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 the stop authorized by this Rule is the obtaining of 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.)

SECTION 5. FRISKS.

A frisk is a limited protective search for concealed

weapons or dangerous instruments.

Example: An officer stops a person to ask him some questions. While the two are talking, the officer notices a large bulge at the person's waist, covered by a sweater. The person seems quite nervous during the questioning. The officer feels the object to see if it resembles a weapon or dangerous instrument. This is a proper frisk (a limited search).

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 himself 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" appears.

Rule 502. Reasonable Suspicion for 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 of the factors which--alone or in combination--may be sufficient to create "reasonable suspicion" for a frisk:

1. The Person's Appearance: Do his clothes bulge in a manner suggesting the presence of any object capable of inflicting injury?

2. The Person'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?

3. Prior Knowledge: Does the officer know if the person has a police record for weapons offenses? For assaults (on policemen or others)? Does the officer know if the person has a reputation for carrying weapons or for violent behavior?

4. Location: Is the area known for criminal activity--a "high crime" area? Is the area sufficiently isolated so that a law enforcement officer is unlikely to receive aid if attacked?

5. Time of Day: Is the confrontation taking place at night? Does this contribute to the likelihood that the officer will be attacked?

6. 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.)

7. 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 lead him to conclude that "reasonable suspicion" existed before the frisk began.

SECTION 6. FRISK PROCEDURES.

As Section 5 notes, a frisk is a limited search, for the purpose of protection only. Officers must not use the frisk power to conduct full-scale searches designed to produce contraband or other incriminating items. Full-scale searches of persons without their consent--even those conducted with "reasonable suspicion"--are invalid, because probable cause must exist before a full-scale search is proper.

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 then 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:

1. 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

2. 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 so proceeding must be prepared

to cite the precise factors which lead 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 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:

1. A weapon or dangerous instrument;
2. A seizable item[8];
3. An object capable of containing a weapon or dangerous instrument;
4. An object that is none of the above.

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[8]Seizable items include contraband, loot, anything used in the commission of a crime, or other evidence of a crime.

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 instrument is licensed or otherwise lawful, or if it is unlawful. 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 it 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 items, the officer should proceed as in A or B above.

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 601A.

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, then 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.

Example: While conducting a proper frisk

an officer feels an object he reasonably believes to be a weapon or dangerous instrument inside a person's pocket. While removing the object from the pocket the officer sees a baggie of marijuana. He may lawfully seize the marijuana regardless of the nature of the object he felt in the pocket.

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.

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 601A or Rule 602C should be returned to him upon completion of the frisk or detention. However, if something occuring 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.

SECTION 7. RECORD KEEPING.

Adequate records of stop and frisk activity will serve to insure the proper exercise of law enforcement authority. They will also greatly enhance an officer's ability to reconstruct what factors occasioned the stop or frisk, and what took place during the confrontation. Such records are vital not only when the stop and frisk results in immediate arrest; they also may be valuable as "leads" in other investigations. Further, such records serve as protection against groundless civil suits.

Rule 701. Prompt Recording. A law enforcement officer who has stopped or frisked any person shall, with reasonable promptness thereafter, complete (the

stop and frisk form provided by the department).[9]

Rule 702. Stop Based on Informant's Tip. If the stop or frisk was based in whole or 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 his information.[10]

SECTION 8. WHEN FOREGOING MODEL RULES MAY BE DISREGARDED.

Whenever it appears that any of the foregoing Rules should be modified or disregarded because of special circumstances, specific authorization to do so shall be obtained from the department's legal advisor or (insert name of other appropriate police or prosecution official).

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[9] If the explanation requirement of Rule 302 is adopted the department form should be modified accordingly.

[10] This information need be recorded only if the stop or frisk was productive, i.e., it led to an arrest or the discovery of incriminating evidence.

Approved Draft

August 1973

MODEL RULES: STOP AND FRISK

with

COMMENTARY

Introduction.

These Rules provide guidance for law enforcement officers in the use of investigative techniques geared to the prevention of crime, and the detection and apprehension of criminals, in "on-the-street" settings. In performing these duties, officers will necessarily encounter a wide range of situations, many of which do not permit an immediate full-custody arrest or a full-scale search.

However, the absence of authority either to make a full-custody arrest or to conduct a full-scale search does not mean that the investigating officer cannot or should not take any action. It does mean, rather, that limits exist on what he can lawfully do. The constitutional periphery of these limits has been set out by the United States Supreme Court in the cases of Terry v. Ohio, 392 U.S. 1 (1968); Sibron v. New York, 392 U.S. 40 (1968); and Adams v. Williams, 407 U.S. 143 (1972).

The Rules cover--in the order of the degree of intrusion upon personal privacy--various investigative techniques that may or may not lead to a full-custody arrest or full-scale search. In both format and language they strive to help the officer on the street, for "the police are in need of an escalating set of flexible responses, graduated in relation to the amount of information they possess." Terry v. Ohio, 392 U.S. at 10.

Existing departmental policies played a substantial part in the drafting of these Rules. Policies cited in this commentary are:

Cambridge, Massachusetts	Operations Procedures and Policies Nos. IV and V (1972).
Cincinnati, Ohio	Training Memos Nos. 53 and 56 (1968).
Daytona Beach, Florida	Legal Bulletins Nos. 72-16 and 72-17 (1972).

District of Columbia	Guidelines (August 27, 1969)[11] and General Order 304.10 (July 1973).
New York (Combined Council of Law Enforcement Officials)	Policy Statement (June 1, 1964)(Reprinted in the "Task Force Report on The Police," The President's Commission on Law Enforcement and Administration of Justice, p. 38-41 (1967)).
San Diego, California	Training Bulletin No. 1 (1972).

Whenever existing policies contain provisions pertinent to a Rule, the policy is cited. Absence of a citation to existing policy means that no applicable administrative precedent was found.

Other valuable sources for both Rules and commentary were:

The American Law Institute's Model Code of Pre-Arraignment Procedure (Official Draft, 1972)(Referred to herein as "ALI Model Code"); the International Association of Chiefs of Police, Research Division's "Model 'Stop and Frisk' Ordinance and Commentary" (1972)(Referred to herein as "IACP Ordinance"); Wayne LaFave, "'Street Encounters' and the Constitution: Terry, Sibron, Peters and Beyond," 67 MICHIGAN LAW REVIEW 39 (1969); and the National District Attorneys Association's "Manual on the Law of Search and Seizure" (Prepared by the United States Department of Justice)(rev. ed. 1972)(Referred to herein as "NDAA Manual").

SECTION 1. CONTACTS.

These Rules define conduct which places an officer in face-to-face communication with an individual under circumstances in which the individual may decline to communicate and leave

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[11]These guidelines were lauded by the U.S. Court of Appeals for the District of Columbia Circuit in Long v. District of Columbia, 469 F.2d 927, at 932 (1972): "The Department's Stop and Frisk guidelines are clearly a sincere effort to describe the bounds of permissible police activity . . . . Such efforts are commendable and are to be encouraged."

the officer's presence as a "contact." Contacts are different from stops or arrests because they do not involve the "seizure" of persons within the meaning of the Fourth Amendment and, as a result, they are not subject to its requirements and limitations.

The concept of this type of police activity, and its legitimacy, was recognized in Terry, supra.

Chief Justice Warren, in authoring the majority opinion, made it clear that the Fourth Amendment applied only when the conduct in question rose to the level of a "search or seizure." "[N]ot all personal intercourse between policemen and citizens involves 'seizures' of persons." 392 U.S. at 19, n.16.

Justice Harlan, concurring, felt that the right of a policeman to "frisk" a person logically includes the corollary right to make a forcible "stop." The right to stop, he concluded, must itself

> be more than the liberty (. . . possessed by every citizen) to address questions to another person, for ordinarily the person addressed has an equal right to ignore his interrogator and walk away . . . . 392 U.S. at 32-33.

Justice White's concurrence was even more explicit:

> There is nothing in the Constitution which prevents a policeman from addressing 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 way.
> 392 U.S. at 34 (emphasis added).

More recent recognition of the concept occurred in Cady v. Dombrowski, ___ U.S. ____ 93 S.Ct. 2523, 13 Cr.L. 3231 (June 21, 1973). Taking note of the frequency of "police-citizen contact" involving automobiles, the Court stated:

> Some such contacts will occur because the officer may believe the operator has violated a criminal statute, but many more will not be of that nature. Local police officers . . . frequently investigate vehicle accidents in which there is no claim of criminal liability and engage in what, for want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.
> 93 S.Ct. at 2528.

Much of the above will apply in non-vehicle circumstances as well.

In Batts v. Superior Court, 100 Cal. Rptr. 181 (App. 1972), the Court approved the conduct of a Newport Beach policeman in knocking on the window of a van parked on a public lot at 9:30 p.m., to warn its occupants of an ordinance prohibiting persons from sleeping after 10:00 p.m. in an automobile parked within the city. When the window was opened, the officer smelled burnt marijuana, and arrested those inside. Following his conviction, the appellant contended that when the officer knocked on the van window he had detained the occupants, and because a basis for such detention was then absent, evidence discovered as a result of the knocking should have been suppressed.

Rejecting this argument, the Court noted that this case made clear the importance of drawing a distinction between the police activity here, and "detentions," which are subject to the Fourth Amendment:

> This case is another . . . in which defense counsel equate every contact between police and citizen as a "detention" and thus demand that the police establish a Henze[12] foundation before they can carry on any conversation with the citizen.
> 100 Cal. Rptr. at 183 (emphasis added).

The fault with such reasoning, according to the Court, was its failure to consider the many contacts between the police and citizens that do not derive from a suspicion of criminal activity, but which might result in the disclosure of evidence of crime nonetheless. Examples of such contacts include the questioning of witnesses to a crime (who are not themselves suspected of criminal activity), or warning a pedestrian that he is entering a dangerous neighborhood.

Contacts of this sort are entirely reasonable and permissible and within the normal scope of activities of law enforcement officers; they are not "detentions" in any sense.

Batts involves a contact initiated for a purpose other than investigating possible criminal activity by the person

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[12] See People v. Henze, 61 Cal. Rptr. 545 (App. 1967), holding that before the police may "detain" a person they must have a rational suspicion that some activity out of the ordinary is taking place, some basis for connecting the person under suspicion with the unusual activity, and some basis for believing that the activity is related to crime.

contacted. Other courts have used reasoning akin to Batts to uphold contacts initiated to investigate possible criminal activity, but where the officer's suspicion was too weak to justify a stop or arrest.

One such case is People v. Rosemond, 308 N.Y.S.2d 836 (1970), where the Court of Appeals approved the conduct of an officer in approaching and questioning two men he had observed enter an apartment building empty-handed and leave a short time later carrying a suitcase and a shopping bag. This led to the discovery of a burglary in the building, and a subsequent plea of guilty to attempted burglary by Rosemond. On appeal, two issues were raised: (1) Was the officer's action authorized by the New York "Stop and Frisk" law? (Code Crim.Pro. § 180-a); and (2) Did the officer's conduct violate the Fourth Amendment?

In disposing of the first issue the Court held that the statute is not the "beginning and the end of the right and duty of police to make inquiries of people on the public streets. Nor does it prescribe the full scope of police activity," 308 N.Y.S.2d at 838 (emphasis added). The Court said that the statute would not be read in a fashion that restricted the normal duty of police to find out by "suitable inquiry" what is occurring on the public streets, because "to be alert, aware and knowledgeable of street events would seem the fundamental test of competent police work." Id. at 838.

The Court found no Fourth Amendment violation, since the officer at first merely asked questions of the suspects and no detention or search took place until after the responses to questions provided the officer with probable cause.

Other cases discussing the contact concept are:

State v. Rhodes, 508 P.2d 764 (Ariz.App. 1973). (Police approaching vehicle parked on park grass at an unusual hour to question occupants held to be "reasonable." One of the officers testified that had he not received suspicious replies to his inquiries he would not have tried to detain the occupants of the vehicle.)

State v. Sheffield, 303 A.2d 68, 71 (N.J. 1973). (Holding that the attempt of an experienced narcotics officer to approach and speak with a "known narcotics pusher" was proper, the Court stated:

> In a given situation, even though a citizen's behavior has not reached the level of "highly suspicious activities," the officer's experience may indicate that some investigation is in order.
>
> . . . .
>
> [M]ere field interrogation . . . does not

involve detention in the constitutional sense so long as the officer does not deny the individual the right to move.)

Perhaps because the authority to "contact" citizens has been taken for granted by policies, as had the practice itself, none[13] of the police consulted mentioned this type of activity. Two of the sources used in preparing the Rules--the "NDAA Manual" and the "ALI Model Code"--do contain materials relevant to the "contact" concept.

The "NDAA Manual," at page 7a, refers to a procedure called a "voluntary conversation" which seems analogous to what these Rules call "contacts." The Manual states that no evidence is necessary to justify a voluntary conversation (i.e., neither "reasonable suspicion" nor "probable cause" is required), that no force may be used, that no warnings are required, and that no firsk or search may be conducted.

The "ALI Model Code" contains a section[14] entitled

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[13]General Order 304.10 of the Metropolitan Police Department (District of Columbia), based on an earlier draft of these Rules, incorporates the Rules relating to "contacts."

One important reason for the issuance of the new Order is the decision by the United States Court of Appeals for the D.C. Circuit in Gomez v. Wilson, 477 F.2d 411 (No. 71-1484, March 23, 1973), which involved a lawsuit seeking to restrict police "spot-checking" of pedestrians.

The Court of Appeals, in remanding the case to the District Court for further hearings, pointed out that it had been conceded that the Department's "spot-check" procedures did permit citizens to be halted and questioned even in situations under which Terry, supra, did not purport to authorize such intrusion. But see United States v. Ward, ___F.2d ____, 13 Cr.L. 2123 (9 Cir. April 5, 1973).

Gomez makes clear the need for a method of investigating unusual conduct in situations that do not permit police actually to detain an individual. In the absence of an investigatory technique that permits an officer to approach and question an individual regarding his conduct, on grounds less than either reasonable suspicion or probable cause, officers are reduced to simply ignoring unusual conduct or, at most, only observing an individual's actions.

[14]Section 110.1(1) and (2).

"Requests for Cooperation by Law Enforcement Officers" that is similar in some respects to the Rules in this section.

The section provides that a law enforcement officer may (subject to other Code provisions or law) request any person to furnish information or otherwise cooperate in the investigation or prevention of crime. It prohibits an officer from indicating any legal obligation on the part of a person to cooperate unless such an obligation actually exists.

The section further provides that should the officer suspect that the person has committed a crime he must warn him that no legal obligation exists to answer the officer's questions. More extensive warnings are required if the person is to be questioned at the police station, prosecutor's office, etc., or similar locations, or if the officer requests the person to come to or remain at such a location.

The Note to the section states that:

> This section does not grant any new authority to law enforcement officials. It innovates only by giving express legislative authority to officials to seek cooperation. Given the importance of voluntary cooperation to the successful investigation of crime, such an explicit statement is appropriate . . . in order to encourage officials to seek voluntary cooperation wherever possible, and to express to the public that official requests for cooperation are lawful.
> ALI Model Code at 4.

Rule 101. Preference for Contacts. Unless an officer concludes that an arrest should be made, or that a stop is justifiable and appropriate under Rule 201, communications with a private person should begin with a contact.

Commentary

"A community's attitude toward the police is influenced most by the actions of individual officers on the streets. No community-relations or recruiting or training program will avail if courteous and cool-headed conduct by policemen in

their contacts with citizens is not enforced." The President's Commission on Law Enforcement and Administration of Justice, "The Challenge of Crime in a Free Society," at 102 (1967).

This Rule indicates that "contacts are a preferred technique to be employed by officers in conducting 'on the street' investigations." There are several reasons for this:

(1) As the above quote from the President's Commission emphasizes, a community's attitude toward the police is shaped largely by the content of encounters between officers and citizens on the streets. Because contacts are a low-visibility variety of police activity, often involving no hostile or adversary overtones and a minimum exercise of police authority, they should reduce considerably any resentment toward the police on the part of the citizen contacted;

(2) An officer will often feel a need to investigate the activities of a person when he does not possess sufficient information to allow him to make a stop or an arrest. In these circumstances a contact is the only investigatory method available, other than surveillance, since a seizure of the person would be in violation of the Fourth Amendment;

(3) As the example indicates, there are many situations where the information known to an officer is ambiguous. Clearly the situation calls for further investigation, but it is not clear that a stop or arrest is justified or, even if justified, would be an appropriate response. By initiating a contact, an officer can make his presence felt and perhaps discover whether the observed activity is criminal, or innocent, or if the person is in need of assistance.

Whatever the circumstance, the contact procedures prescribed by the following Rules should be followed closely to avoid later judicial characterization of the contact as a stop or arrest (thus bringing the Fourth Amendment into play), for "[I]t must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." Terry, supra, at 16 (emphasis added).

Rule 102. Initiating a Contact. An officer may initiate a contact with a person in any place that the 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.

Commentary

This Rule authorizes an officer to initiate a contact in any place where the officer has a right to be. As indicated, it is difficult to define precisely these places, but they would include, as examples: A common hallway, People v. Foster, 97 Cal. Rptr. 94 (App. 1971); a common driveway, People v. Lee, 98 Cal. Rptr. 182 (App. 1971); a public restroom, People v. Roberts, 64 Cal. Rptr. 70 (App. 1967); or the sidewalk, United States v. Hanahan, 442 F.2d 649 (7 Cir. 1971).

The purpose of the identification requirement is threefold. First, a person's normal reluctance to speak to strangers may be overcome by this gesture. Second, the person, by his responses to an individual he knows is a police officer, may provide more information than would otherwise be the case. Third, even if the contact does not lead to escalated police activity, such identification may discourage contemplated criminal activity. An officer should take care that in identifying himself he does not make an unnecessary show of authority. Courts have rejected the claim that officer identification is itself an express or implied assertion of authority tantamount to intimidation and duress. See, e.g., People v. Lee, 108 Cal. Rptr. 555 (App. June 5, 1973); People v. Harrington, 88 Cal. Rptr. 161, 164, 471 P.2d 961, 964 (1970); cf. Schneckloth v. Bustamonte, ____U.S. _____, 93 S.Ct. 2041, 2058 (1973)("there is no reason to believe . . . that the response to a policeman's question is presumptively coerced . . . ." This Rule is very similar to § IA(1) of D.C. Gen. Order 304.10.

Rule 103. Conducting a Contact. 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 they 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.

Commentary

The procedures set forth in this Rule must be closely followed in initiating and conducting a contact, for they are the procedures that separate contacts from Fourth Amendment-governed stops and full-custody arrests. Avoiding actions that might later be characterized as involving a seizure or search of the person is of central importance. For this reason, Rule 103 emphasizes refraining from using (or appearing to use) force or coercion in halting or questioning a person in a contact situation. See Cupp v. Murphy, ____U.S.___, 93 S.Ct. 2000 (1973).

In addition to the cases cited in the introduction to the section, the following cases illustrate the initiation and conduct of contacts:

In United States v. Burrell, 286 A.2d 845 (D.C.App. 1972), a policeman's suspicion was aroused by Burrell's unusual conduct on the street during the day. Lacking an adequate basis for a stop or arrest, the officer nevertheless approached Burrell from behind, put his hand on Burrell's elbow and said: "Hold it, Sir, could I speak with you a second?" Burrell blurted out, "It's registered . . . ." This led to a brief discussion about Burrell's possessing a pistol, and seizure of the weapon. The Court reversed the lower court's suppression of the pistol as evidence, holding that no seizure of the person had occurred prior to the discovery of the weapon. The Court cited from United States v. Mekethan, 247 F.Supp. 324 (D.D.C. 1965) the following language:

> [T]he test [of whether or not a seizure or arrest has occurred] must not be what the defendant himself . . . thought, but what a reasonable man, innocent of any crime, would have thought had he been in the defendant's shoes. (comment added)

In Knight v. State, 502 P.2d 347 (Okl.Cr. 1972), the Court viewed a police officer's 4 a.m. request to a pedestrian to come over to a police vehicle as non-coercive. In complying with the request, the pedestrian inadvertently exposed a .38 revolver. In upholding his conviction for carrying a firearm following a prior felony conviction, the Court stated:

> For an officer to merely stop and make inquiry

> on the street does not constitute an arrest . . . . [T]he officer was merely making an inquiry of the defendant and in no way had attempted to restrain him of his liberty or take him into custody. Id. at 348.

SECTION 2. STOPS.

Prior to Terry v. Ohio, the Supreme Court had not considered the validity of temporary detention on less than probable cause. However, the issue had been posed in an earlier opinion:

> It is only by alertness to proper occasions for prompt inquiries and investigations that effective prevention of crime and enforcement of law is possible. Government agents are commissioned to represent the interests of the public in the enforcement of the law, and this requires affirmative action not only when there is reasonable ground for an arrest or probable cause for a search but when there is reasonable ground for an investigation. Brinegar v. United States, 338 U.S. 160, 178-179 (1949) (Burton, J. concurring).[15]

The Terry holding voiced the same concern. Speaking of the suspicious activities observed by the officer in Terry, the Court stated:

> 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. 392 U.S. at 23.

In Terry, the Court by implication approved temporary detention in certain instances. In so doing, the Court also held that "whenever a police officer accosts an individual and restrains his freedom to walk away he has seized that person," 392 U.S. at 16, and that the Fourth Amendment governs such actions. The issue in every temporary detention is this:

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[15] A similar statement is more recently to be found in United States v. Hines, 455 F.2d 1317, 1325 (D.C. Cir. 1972): "Police officers charged with the responsibility of patrolling our urban centers are not limited to the alternatives of either arrest or ignoring suspicious activity. If the activity of an individual reasonably suggests to an officer that criminal activity is afoot, he may temporarily detain that individual for the purpose of questioning."

> [W]ould the facts available to the officer at the moment of the seizure [i.e., the stop] . . . 'warrant a man of reasonable caution in the belief' that the action taken was appropriate? 392 U.S. at 21-22.

The purposes of the Rules in Section 2 are to justify proper police investigatory action, to provide guidance in determining whether to conduct a stop, and to minimize violations of the Fourth Amendment.

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.

Commentary

The majority in Terry v. Ohio, supra, specifically declined to rule on the constitutionality of temporary seizures upon less than probable cause. 392 U.S. at 19, n.16. Nevertheless, others were quick to point out that the Court implicitly approved such actions.[16] Subsequently in Adams v. Williams, 407 U.S. 143 (1972) the Supreme Court directly approved temporary seizures of the person, i.e., "Stops."

In addition, temporary detention for investigation has been called for in model statutory proposals,[17] permitted by other statutes as well.[18]

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[16] See Terry v. Ohio, 392 U.S. at 33-34 (Harlan, J. concurring); LaFave, 'Street Encounters' and the Constitution: Terry, Sibron, Peters and Beyond. 67 MICH. L. REV. 40, 63-64 (1968).

[17] See § 2, Uniform Arrest Act, Interstate Commission on Crime, 1942--enacted in three states (Del. Code Ann. tit. 11, §§ 1902-1903 (1953); N.H. Rev. Stat. Ann. § 594:2,3 (1955); and R.I. Gen. Laws §§ 12-7-1 to 2 (1956)); see also ALI Model Code § 110.2 (1972).

[18] See Mass. Gen. Laws Ann. Ch. 41, § 98 (Supp. 1967) and N.Y. Code Crim. Proc. § 180-a (Supp. 1966).

The "reasonable suspicion" provision in Rule 201 is taken from N.Y. Code Crim. Proc. § 180-a (Supp. 1966). The term does not appear in either Terry or Adams. It is, however, the term used in both the ALI Model Code, § 110.2(1)(a), and the IACP Model Ordinance, §1; it further is found in the policies of Cambridge and the District of Columbia.[19]

The following cases are significant to Rule 201:

Gaines v. Craven, 448 F.2d 1236 (9 Cir. 1971), affirming 71 Cal. Rptr. 468 (App. 1968). (This case was cited approvingly in Adams v. Williams.) Holds that "well-founded suspicion is all that is necessary to justify a brief detention for purposes of limited inquiry during a routine police investigation." 448 F.2d 1236-1237.

United States v. Unverzagt, 424 F.2d 396, 398 (8 Cir. 1970). (Also cited approvingly in Adams v. Williams.) "The officers did not know that Unverzagt had committed a crime or that a crime had been committed at all but they were reasonable in believing that further investigation was necessary."

People v. Mickelson, 30 Cal. Rptr. 18, 380 P.2d 658 (1963). "[C]ircumstances short of probable cause to make an arrest may still justify an officer's stopping pedestrians or motorists on the streets for questioning . . . . [This rule] strikes a balance between a person's immunity from police interference and the community's interest in law enforcement. It wards off pressure to equate reasonable cause to investigate with reasonable cause to arrest, thus protecting the innocent from the risk of arrest when no more than reasonable investigation is justified." [Citing Barrett, Personal Rights, Property Rights, and the Fourth Amendment, 1960 Sup. Ct. Rev. 46.]

People v. Robles, 104 Cal. Rptr. 907 (App. 1972). "The applicable test to determine the validity of a temporary detention is to inquire whether the circumstances are such as to indicate to a reasonable man in a like position that such a course is necessary to the proper discharge of the officer's duties, and the inquiry must be based on an objective perception of events rather than the subjective feelings of the detaining officers."

People v. Morales, 290 N.Y.S.2d 898 (1968).[20] "This court

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[19] Cf. LaFave, 67 MICH.L.REV. at 75: "[I]t should be sufficient that there is a substantial possibility that a crime has been or is about to be committed and that the suspect is the person who committed or is planning the offense."

[20] In remanding this case, 396 U.S. 102 (1969), the Supreme

recognized the common-law authority of law enforcement officials to detain persons for investigation as a reasonable and necessary exercise of the police power for the prevention of crime and the preservation of public order. . . ." 290 N.Y.S.2d at 903. "This prerogative of police officers to detain persons for questioning is not only essential to effective criminal investigation, but it also protects those who are able to exculpate themselves from being arrested and having formal charges made against them before their explanations are considered." 290 N.Y.S. 2d at 906.

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 believing that the person to be stopped had committed, was committing, or was 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:

Court noted that "the ruling below, that the State may detain for custodial questioning on less than probable cause for a traditional arrest, is manifestly important [and] goes beyond our subsequent decisions in Terry and Sibron. . . ." 396 U.S. 104-105. The case was nevertheless sent back for further proceedings to develop the factual issues.

1. The Person's Appearance . . . .
2. The Person's Actions . . . .
3. Prior Knowledge of the Person . . . .
4. Demeanor During a Contact . . . .
5. Area of the Stop . . . .
6. Time of Day . . . .
7. Police Training and Experience . . . .
8. Police Purpose . . . .
9. Source of Information . . . .

Rule 203. Citing Justification for a Stop. Every officer who conducts a stop must be prepared to cite those specific factors which lead him to believe that the stop was justified.

COMMENTARY (FOR BOTH RULE 202 AND RULE 203)

Every governmental intrusion upon personal privacy, when challenged, must be justified by the intruding agency:

> [I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts, which taken together with rational inferences from these facts, reasonably warrant that intrusion. Terry v. Ohio, 392 U.S. 1 at 21.

The Supreme Court cannot specify just what facts--and the inferences therefrom--support a finding of "reasonable suspicion" in every case. Judicial interpretation in specific cases is as much a "fact of life" in stop and frisk procedures as it is in other Fourth Amendment governed activities.[21] But if police

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[21] See LaFave, supra, 67 MICH. L. REV. at 68-69: "Reasonable suspicion of crime or any other comparable test will, of course, seem rather vague when unadorned by judicial interpretation based upon specific fact situations, as would the 'reasonable grounds to believe' test for arrest, or, for that matter, the 'probable cause' requirement of the Fourth Amendment."

officers are to have a clear understanding of their authority, they must be instructed in readily understood terms of how much evidence is needed to justify a stop.

Rule 202's list of factors that may yield reasonable suspicion was compiled principally from case law of various jurisdictions. The drafters of these Rules also drew from other attempts to catalog such factors. The District of Columbia's General Order 304.10 has a very similar compendium, with slight variations in factors 3 and 9. The D.C. order deletes altogether the Rule's factor 8 (Police Purpose). See also the "stop" policies of the Cambridge and San Diego Police Departments; the 1964 New York Combined Council Policy Statement; Jacksonville, Florida, Ordinance Code § 330.116 (1972); and Comment, An Analytical Model for Stop and Frisk Problems, 43 U. Colo. L. Rev. 201, 212-213 (1971).[22] While it is possible that a single consideration, e.g., close resemblance to a "Ten Most Wanted" poster photograph, may be sufficient justification, most often two or more factors will coalesce to create a reasonable suspicion.[23] The result of these considerations must be a reasonable belief that "criminal activity may be afoot"; that there is a substantial possibility that a crime has been, is, or is about to be committed; and, that the suspect is a person connected with the criminal activity.

In addition to the examples of reasonable suspicion that accompany Rule 202, the following cases provide further guidance:

> Fields v. Swenson, 459 F.2d 1064, 1067 (8 Cir. 1972) (officer sees strange car in business parking lot after closing; license plate is recognized as belonging to burglary suspect; over an hour later, three men approach car from the direction of business entrance; two are carrying something, and one of these gets into back seat; other two leave, then one returns and drives car away; officer stops the car. Held: Stop was reasonable. "It would be inconceivable to require the police to track and follow a car until verification that a crime has been committed is received.")

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[22] Cf. State v. Holmes, 256 So. 2d 32, 37 (Fla. App. 1971), and People v. Henze, 61 Cal. Rptr. 545 (App. 1967).

[23] To illustrate, in Terry v. Ohio, the coalescing factors were the person's actions (factor 2), the officer's experience (factor 7) and the purpose of the stop (factor 8). In Adams v. Williams, the factors were the area of the stop (factor 5), the time of day (factor 6), the police purpose (factor 8), and the reliability of the informant (factor 10). See also United States v. Riggs, 474 F.2d 699, 703-704 (2 Cir. 1973).

United States v. Davis, 459 F.2d 458 (9 Cir. 1972) (Officers see several men standing in front of a motel frequented by addicts; one man is having trouble standing up; officers, feeling there is "something wrong," return to motel; the "woozy" man is now the passenger in a car leaving the motel; officers stop the car; driver and passenger are immediately frisked. Held: Stop not reasonable; concern for the man's welfare did not motivate the stop, since frisk occurred immediately. "These observations and suspicions do not sufficiently suggest that criminal activity was afoot. They suggest that an intoxicated person was being driven away from a resort of ill-repute. This does not suffice under Terry. . . .")

United States v. Unverzagt, 424 F.2d 396 (8 Cir. 1970) (anonymous informant gives detailed description of man selling postal money orders; description is corroborated; bartender and woman companion both say suspect is armed; suspect is ordered to exit a men's room. Held: Order to exit is a seizure, but reasonable under these facts.)

Smith v. United States, 295 A.2d 64 (D.C. App. 1972) (Officers watching for car burglars see Smith amble around looking into cars for about 90 minutes. Smith enters zoo grounds and is lost to officers sight for 25 minutes. Then Smith exits zoo, now carrying a brown bag containing a square object. Smith sees officers, then walks away until ordered to stop. Held: Police had ample reason to believe the bag contained proceeds of a crime--even though the theft of the stereo tape player found in the bag was not reported until an hour later.)

Bailey v. State, 455 S.W.2d 305, 308 (Tex. 1970) (Experienced officer patrolling business district at 5 a.m., sees man enter alley and then retreat upon seeing police car; officer follows the man and sees him walking fast and pulling his coat tightly. Officer then recognizes him as having extensive record of theft and burglary arrests, and calls for him to stop. Held: Stop was reasonable under these circumstances. "Surely it cannot be argued that a police officer should refrain from making any investigation of suspicious circumstances until such time as he has probable cause for arrest.")

People v. Henze, 61 Cal. Rptr. 545 (App. 1967) (Officers see several unknown men counting out and passing coins in a public park in the early afternoon; the men drive off in normal fashion, but are stopped by the officers

who are unaware of any recent coin theft and do not suspect narcotics activity. Held: Stop improper; insufficient showing of reasonable suspicion.)[24]

People v. Martin, 293 P.2d 52, 53 (Cal. 1956) (opinion by Traynor, J.): ("Although the presence of two men in a parked automobile on a lover's lane at night was itself reasonable cause for police investigation . . . their sudden flight from the officers and the inference that could reasonably be drawn therefrom that they were guilty of some crime . . . left no doubt not only as to the reasonableness but also the necessity of investigation.")

A few added comments about the more complex Rule 202 are in order. Regarding factor 8 (Police Purpose), the purpose of police activity is important in weighing the reasonableness of the activity. See Justice Jackson's conclusion that the gravity of the offense under investigation contributes to judging the reasonableness of a warrantless search, in Brinegar v. United States, 338 U.S. 160 at 183; see also Terry v. Ohio, 392 U.S. 1 at 21; United States v. Davis, 459 F.2d 458, n.3 (citing such factors as "the seriousness of the suspected offense, the need for immediate police work and the need for preventive action."); United States v. Lopez, 328 F.Supp. 1077, 1095 (E.D.N.Y. 1971) (detention as part of anti-skyjack procedures held justifiable; "overwhelming societal interest" in minimizing passenger danger permits low degree of probability to justify airport stop and frisk).

Regarding the source of information (factor 9), see Gaskins v. United States, 262 A.2d 810 (D.C.App. 1970), where cabbie's telling policeman that one of three men had just tucked a gun under belt was found sufficient to justify stop and frisk of all three men. See also Adams v. Williams, 407 U.S. at 147, and People v. Superior Court (Martin), 97 Cal. Rptr. 646, 650 (App. 1971).

[Optional Rule 204. Stopping Vehicles at Roadblocks. If authorized to do so by (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

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[24] Henze lists nine different factors, the presence of any one of which would likely have made the stop valid. 61 Cal. Rptr. at 547-548.

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.]

Commentary

This Rule permits police officers to stop vehicles traveling in a given direction in order to search for a dangerous felon, his victim, or both. It is adapted from § 110.2(2) of the ALI Model Code. As the commen ary to that Code notes, specific authority for this procedure is needed "since the officers cannot be said to have 'reasonable suspicion' as to each of the hundred cars that may be stopped." ALI Model Code, p. 12.

Optional Rule 204 is intended for use only when the police have little or no information about the kind of vehicle being used by the suspected dangerous felon. When a roadblock is set up to stop a specific class of vehicles (e.g., 1971 Chevrolets; old blue pickup trucks) or a particular vehicle, Rule 201 or full-scale arrest procedures are then applicable. Furthermore, public intolerance to frequent use of this procedure, along with the heavy burden it places on law enforcement personnel, seem likely to act as a restraint on unreasonable use.

The best judicial basis for Optional Rule 204 is probably Justice Jackson's well-known statement in Brinegar v. United States:

> If . . . a child is kidnapped and the officers throw a roadblock about the neighborhood and search every outgoing car, it would be a drastic and undiscriminating use of the search. The officers might be unable to show probable cause for searching any particular car. However, I should candidly strive hard to sustain such an action, executed fairly and in good faith because

> it might be reasonable to subject travelers to that indignity if it was the only way to save a threatened life and detect a vicious crime. 338 U.S. 160 at 183 (dissenting opinion).

United States v. Bonanno, 180 F. Supp. 71 (S.D.N.Y. 1960), rev'd on other grounds sub nom. Bufalino v. United States, 285 F.2d 408 (2 Cir. 1960) also supported the concept expressed in this Rule. See also People v. Euctice, 20 N.E. 83 (Ill. 1939); Williams v. State, 174 A.2d 719 (Md. 1961), cert. denied, 369 U.S. 855 (1962).

No consulted policy discussed this police activity, and it was not adopted in the recent District of Columbia General Order 304.10.

SECTION 3. POLICE CONDUCT DURING A STOP.

Rule 301. Duration of 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.

Commentary

The case law is virtually unanimous in requiring that stops be "brief;" i.e., that they last only as long as necessary to ascertain the detainee's identification and an explanation of his activities. The case law is also virtually unanimous in refraining from saying what "brief" means.

The drafters felt that in the interest of providing maximum guidance for the street policeman, and of convincing the courts of the wisdom of police rulemaking, some self-imposed time limit

on temporary detention was necessary.[25] We chose twenty minutes because the prestigious American Law Institute had done so, ALI Model Code § 110.2(1), and because this limit was used in the excellent Cambridge Policy Manual. See "Stops," § IV D(5). The new District of Columbia General Order adopts a ten-minute limit. See § I B4a. Other sources consulted are less precise. The NDAA Manual states:

> [D]o not detain an individual beyond the time absolutely necessary to clear up the situation, one way or another. (Normally, this should be a matter of minutes.)

The IACP Ordinance takes a different approach; it intentionally does not fix a time limit for detentions.[26]

A proposed codification of stop and frisk law for Oregon, § 31 of the Proposed Oregon Criminal Procedure Code (Final Draft 1972) also takes the imprecise "reasonable time" approach.

The drafters feel that officers will use Rule 301 in good faith. Ideally, they will excuse detainees as soon as the business of obtaining identification and an explanation of their activities is concluded--unless probable cause has developed during the detention.

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.

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[25] This conclusion conforms to that reached regarding the time limit for confrontations in the Model Rules: Eyewitness Identification. See Rule 201.

[26] "A fixed time period has the disadvantage of encouraging the officer involved to hold the person for the full length of time and of forcing the officer to arrest the suspect at the end of the time period or release him even if the officer's suspicion hasn't been dispelled." IACP Model Ordinance, p. 10.

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 on the record of the stop the fact that he gave the person an explanation for the stop, and the nature of the explanation.]

Commentary

The manner in which a stop is conducted is as important from a constitutional standpoint as whether the stop was warranted at the outset. Terry v. Ohio, 392 U.S. at 28-29. It thus is "good police work" to conduct the detention in as amenable a manner as possible. One commentator has noted that

> People object less to the fact of being questioned by the police than to the way they are treated. The police are often brusque and unfriendly to the citizen during the initial encounter. The verbal or physical constraints used by the officer can disturb people more than the questioning itself.[27]

The policies of Cambridge and the District of Columbia, the Jacksonville ordinance, the NDAA Manual, the IACP ordinance and the New York Policy Statement all require officers to identify themselves. Of these, only New York makes a distinction between uniformed and plainclothes officers. This distinction was rejected here to avoid the claim that a detainee believed the stopping officer was some sort of "private policeman."

Both the NDAA Manual and the D.C. General Order (§ I B4b) require that the purpose of the Stop be explained. This simple step may often go a long way toward soothing ruffled feelings.

(Note: the D.C. General Order adopts the optional record-keeping requirement of this Rule.)

Rule 303. Rights of Detained Person. The officer may direct

[27] Strauss, Field Interrogation: Court Rule and Police Response, 49 J.URB.LAW 767, 770 (1972).

questions to 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 authorizes such demand].

[Alternative Formulations of Rule 303. Prior to the text of the Rule, various jurisdictions may want to insert language from one of the following alternative admonitions.

A. The officer making the stop shall warn the detained person that he is not under arrest, and that he will be detained no longer than 20 minutes unless he is arrested.

or

B. The officer making the stop shall warn the detained person that he is not under arrest, and that he will be detained no longer than 20 minutes unless he is arrested, that he is not obligated to say anything, and that anything he says may be used in evidence against him.]

Commentary

Cambridge, Jacksonville, the NDAA Manual, the New York Policy and the IACP ordinance do not require the giving of any sort of warnings prior to asking preliminary questions[28] of a detained person. Rule 303 takes the identical approach, but in recognition of the uncertainty of the case law concerning street interrogations two alternatives are presented.

Uncertainty indeed is present in what has been characterized as the "uncharted territory between what is permitted in Terry [v. Ohio, 392 U.S. 1] and what is prohibited by Miranda v. Arizona, [384 U.S. 436 (1966)]. . . ."[29]

Neither Terry nor Miranda provides significant direct help in meeting the issue. Language in those cases suggests but does not answer the key question: "Is a person who is restrained of his freedom to walk away during a stop also 'deprived of his freedom of action in any significant way'?"[30] Prof. LaFave asserts that:

> If one carefully examines the reasons underlying the Court's concern in Miranda, there is some foundation for the contention that the Miranda warnings should not be required in a street [detention] setting. 67 MICH L. REV. at 97.

Following a seven-part analysis of the distinctions between stationhouse and street interrogations, LaFave concludes "Miranda should be extended to field interrogations . . . only if there is a 'potentiality for compulsion' in such encounters." Id at 99. This conclusion was reached prior to the Supreme Court's holding in Orozco v. Texas, 394 U.S. 324 (1969). The drafters of these Rules believe that Orozco does not invalidate the conclusion, but only further confuses the issue.[31]

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[28] I.e., name, address and explanation of conduct and actions. Cambridge refers to this as a "threshold inquiry.'"

[29] LaFave, 67 MICH L. REV. at 95.

[30] Miranda v. Arizona, 384 U.S. 436, 444 (1966)(emphasis supplied).

[31] The American Law Institute has reached a similar conclusion regarding Orozco,but is less sanquine about the inapplicability of Miranda:

> The Reporters are not convinced that . . . the Miranda decision clearly requires a warning in the case of a stop. On the other hand, it must be recalled that the Miranda decision in respect to custodial interrogation clearly did not limit its rule to cases where there is a possibility of coercion, however much the possibility of coercion is made the reason for the rule. Further, the Reporters would feel no confidence in arguments that represented the stop as an insignificant deprivation of liberty. Neither the variety in the scattered decisions of

Unlike the typical "street interrogation," Orozco involved a full-scale arrest, a severe invasion of privacy, and the far greater coercion and police domination inherent when several policemen--as opposed to the usual one or two at the street interrogation--arouse a person from sleep in his own dwelling.

Support for the Rule 303 procedure can be found in many places in addition to those cited above. In Miranda itself, the Supreme Court firmly stated:

> Our decision is not intended to hamper the traditional function of police officers in investigating crime. . . . General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding. It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement. In such situations the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present. 384 U.S. at 477-78.

And in Adams v. Williams, the Supreme Court made no mention of pre-questioning warnings in noting 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 eight of the facts known to the officer at the time." 407 U.S. at 145.[32] See also United States v. Riggs, 474 F.2d 699, 702 (2d Cir. 1973), where the Court, per Chief Judge Friendly, observed that requests . . . for identification are proper under Terry and Adams v. Williams.

In People v. Manis, 74 Cal. Rptr. 423 (App. 1969), the Court

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state and lower federal courts, nor the Supreme Court's decision in Orozco . . . permit a resolution of this issue on the basis of authority. ALI Model Code, p. 126 (commentary to § 110.2).

[32] Surely Schneckloth v. Bustamonte, ___ U.S. ___, 93 S.Ct. 2041 (1973) supports the philosophy of limiting Miranda applicability. Id. at 2047, 2049 (quoting Traynor, J., in People v. Michael, 290 P.2d 852, 854 (Cal.1955)) and 2050. The Court found no evidence of the "inherently coercive tactics"--condemned in Miranda--in the "street interrogation" that precipitated Mr. Bustamonte's arrest; thus at the least, no per se inherent coercion exists for street interrogations.

of Appeals exhaustively dealt with the issues of police officers' power to ask questions of temporary detainees and the detainees' right to be warned of the privilege against self-incrimination. In resolving the issues consistent with the language here proposed in Rule 303, the Court held:

> We conclude that persons temporarily detained for brief questioning by police officers who lack probable cause to make an arrest or bring an accusation need not be warned about incrimination and their right to counsel, until such time as the point of arrest or accusation has been reached or the questioning has ceased to be brief and casual and become sustained and coercive. Id. at 433.

In United States v. Jackson, 448 F.2 963 (9 Cir. 1971), the Court held that officers "acted reasonably" in both stopping a vehicle shortly after a robbery and in "questioning the occupants concerning their residences and occupations." Concluding that the activity was "intelligent, effective police work," the Court sensibly noted that "if law enforcement officers may not do what was done here, law enforcement would be seriously crippled." Id. at 970. See also United States v. Hunter, 471 F.2d 6 (9 Cir. 1972); State v. Ruiz, 504 P.2d 1307, 1309 (Ariz. App. 1973) (dicta).

Both the recently promulgated D.C. General Order (§ I B4c) and the Proposed Oregon Criminal Procedure Code (§ 31) permit inquiry without preliminary admonition of rights. Nevertheless, any agency that chooses--or is compelled--to make some admonition may wish to follow Alternatives A or B.

Alternative A serves to remove some of the coerciveness inherent in much street interrogation. It restricts the "potentiality for compulsion" that so concerned the Miranda majority. It is somewhat akin to the Cambridge rule, but if anything is less coercive.[33]

Alternative B is very similar to the ALI's "Questioning of Suspects" formulation (ALI Model Code, § 110.2(5)). Alternative B additionally requires that the detained person be informed he is not under arrest. Of the ALI's proposal, the Reporters say the following:

> Since this section authorizes a restraint on liberty, some warning to the person stopped is appropriate prior to any sustained questioning. . . . The Reporters seriously doubt the efficacy of a full Miranda warning immediately following a stop, particularly since much of it must look to contingent future events. Furthermore, a detailed

[33] Cambridge requires its officers to "inform the person stopped that this is not an arrest but that he is under suspicion and that it is likely he will be free to go once he has been asked a few questions." "Stops" policy § D2.

> warning is likely to appear burdensome and bizarre to the officer making the stop. . . . ALI Model Code, p. 13. (Note)

A fourth alternative requiring full Miranda warnings was rejected for inclusion by the Project Advisory Board.

The Rule is in accord with the Cambridge and District of Columbia policies in limiting initial street inquiry to asking for name, address and an explanation of presence and conduct. There is little doubt that sustained questioning should be preceded by Miranda warnings. See People v. Manis, supra.

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. [Or: 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.]

Commentary

The lack of authority to compel answers or production of identifying documents is noted by the policies of Cambridge, the District of Columbia and New York.

The recommended version of Rule 304 permits an inference to be drawn from a refusal to answer reasonable inquiries. This language is derived from the NDAA manual, p. 4(a). The Uniform Arrest

Act, cited supra, n.17, and in effect in Delaware, New Hampshire and Rhode Island, has a similar provision:

> Any person so questioned who fails to identify himself or explain his actions to the satisfaction of the officer may be detained and further questioned and investigated. Section 2(2).[34]

Prof. LaFave's article states that very few detained persons refuse to respond at all to street interrogation:

> Typically, the suspect either provides an explanation of his actions which satisfies the officer, or else gives an account which adds to the prior suspicion and thus, in many cases, presents the officer with a situation in which he may make a lawful arrest.[35]

The difference of opinion (see note 34 and accompanying text) on the issue of whether a refusal to answer routine questions can contribute to probable cause for a later full-custody arrest is not surprising. Our research failed to turn up a case squarely on point, and dicta goes both ways. However, there is ample authority approving police conduct preliminary to a refusal to answer. It seems logical, as Prof. LaFave has pointed out, supra, n.35, that if the policeman is permitted to stop and pose questions, that he be permitted to draw a common sense conclusion from clear non-cooperation.

As discussed in the commentary to Rule 303, a law enforcement officer is permitted to pose questions concerning identity and presence. Furnishing of identification can be required during a street interrogation. In California v. Byers, 402 U.S. 424 (1971), the Court spoke of identifying oneself as "an essentially neutral act" that does not by itself implicate anyone in criminal conduct. See United States v. Jackson, supra, 448 F.2d at 970; People v. Solomon, Cal. Rptr. (App., July 18, 1973) (upholding the identification requirement of Penal Code § 647e); Jones v. United States, 286 A.2d 861 (D.C. App. 1971). See also United States v. Kelley, 462 F.2d 372 (4th Cir. 1972); Washington v. United States,

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[34] See contra, New York Policy Statement § I C(3); Cambridge Policy § IV D(4).

[35] 67 MICH L. REV. at 93. LaFave also reasons that if Miranda warnings are not required and have not been given to a detained person, "it seems appropriate for the . . . officer to take account of a refusal to answer. . . ." [C]ommon sense suggests that such refusals are more likely when the person questioned is guilty. The Supreme Court has made it clear that the arrest decision involves a common-sense judgment which may take into account facts which would not be admissible in evidence . . . [citing Brinegar v. United States, 338 U.S. 160, 175 (1949)], 67 MICH. L. REV. at 108.

397 F.2d 765 (D.C. Cir. 1968); and People v. Murphy, 343 P.2d 273 (Cal. 1959). Cf. Wainwright v. City of New Orleans, 392 U.S. 598, 600 (1968).

Evasive answers by the detainee can combine with other circumstances to support further seizures. The frisk in Terry itself, followed "mumbled" responses to the officer's questions. See United States v. Bell, 464 F.2d 667 (2 Cir. 1972) (airport frisk). See also State v. Heitner, 149 F.2d 105 (2 Cir. 1945); People v. Ceccone, 67 Cal. Rptr. 499 (App. 1968). And in United States v. West, 460 F.2d 374 (5 Cir. 1972), the Court held that where one detainee gave evasive answers to routine questions, and another refused to identify himself and made furtive movements, the officer had the right and the duty to investigate.

Other cases supporting the concept of Rule 304 are:

> People v. Romero, 318 P.2d 835, 836 (Cal. App. 1957) (A person fitting description of burglary suspect was found walking at 12:40 A.M. in the neighborhood of the crime. "The officers questioned him. He refused to give his name and address, and his only explanation of his presence . . . was that he was looking for a girl named Mary, whose address he did not know. This combination of circumstances clearly warranted the arrest of the appellant for investigation of burglary.")
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> People v. Simon, 290 P.2d 531, 534 (Cal. 1955) (dicta) "[I]t is possible that in some circumstances even a refusal to answer would, in the light of other evidence, justify an arrest."
>
> Harrer v. Montgomery Ward, 221 P.2d 428, 434 (Mont. 1950) (false arrest case) ("The failure to identify, in and of itself, alone, is not sufficient to justify such an arrest. It is a fact and circumstance, among others, which may be shown in an attempt to justify the arrest.")
>
> Gisske v. Sanders, 98 Pac. 43, 45 (Cal. App. 1908) (false arrest case) ("The fact that crimes had recently been committed in that neighborhood, that plaintiff at a late hour was found in the locality, that he refused to answer proper questions establishing his identity, were circumstances which should lead a reasonable officer to require his presence at the station. . . .")

Even Mr. Justice White in his restrictive concurrence in Terry recognizes that a refusal to answer must be given some weight. He only forecloses the possibility that alone it does not justify arrest (as does Rule 304):

> 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 officer to the need for continued observation. 392 U.S. at 34 (emphasis supplied).

The very test pronounced by the Terry majority supports the theory that an officer is entitled to draw from the facts in light of his experience, 392 U.S. at 27, and in Miranda the Court acknowledged that the responsible citizen normally will aid law enforcement, and the police officer knows this on the basis of his experience. 384 U.S. at 478. It is thus reasonable that the police officer should attach some weight to a person's refusal to answer routine questions.

Rule 305. Effecting a Stop and Detention. An officer shall use the least coercive means necessary under the circumstances to effect the stop of a person. The least coercive means may be a verbal request, an order or the use of physical force.

Rule 305.1 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 sought to be stopped. (This means that an officer must not use a weapon or baton [or mace] to effect a stop. He may use his hands, legs, arms, feet, or handcuffs [or mace.) 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 effect a full-custody arrest.

Commentary

The two sections of Rule 305 are derived from the Cambridge policy and the New York Policy Statement. The former states:

> [I]f a person resists or runs, reasonable force may be used to hold him. . . .

> Never use deadly force or force that may cause serious harm. The guideline is this: Where the clear need arises, hands, legs, feet, and handcuffs may be used. The use of guns, clubs, club substitutes, or mace is not allowed. § IV D2 and 3.

The New York text was the forerunner of the Cambridge requirements. It reads:

> If a suspect refuses to stop, the officer may use reasonable force, but only by use of his body, arms and legs. He may not make use of a weapon or nightstick in any fashion. § I B(1).

The provisions of Rule 305 and 305.1 are thus more restrictive than those promulgated in the ALI Model Code, which would allow "such force, other than deadly force, as is reasonably necessary to stop any person. . . ."§ 110.2(3). See also State v. Taras, 504 P.2d 548 (Ariz. App. 1972). The new D.C. General Orders §§ I B4d and I B5 are virtually the same as Rules 305 and 305.1. Chemical mace is included in the list of forbidden weapons in that general order.

Fortunately, physical force is rarely necessary to subdue a person in street interrogations. See Strauss, Field Interrogation: Court Rule and Police Response, 49 J. URB. LAW 767, 776 (1972).

SECTION 4. STOPPING WITNESSES NEAR THE SCENE OF A CRIME.

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 the stop authorized by this Rule is the obtaining of 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.)

Commentary

This Rule is taken from a provision in the ALI Model Code. See § 110.2(1)(b). The Rule authorizes an officer arriving at the scene of a crime to "freeze" witnesses at the scene, and to seek identification--and accounts of what had occurred--from them. The major departure of this Rule is its applicability to non-suspects. The stricter, two-part probable cause requirement acts as a restraint against over-use of this Rule, which is designed for application to some truly innocent persons.

While the commentary to the ALI Model Code provision cited above states that the provision "broke new ground in stop and frisk legislation [and] has since been copied in a number of jurisdictions,"[36] no citation of authority is given. However, additional language in that commentary recognizes the urgency of such authority, and states the logical case for Rule 401:

> The Reporters are convinced that such an authority [to conduct brief detention absent probable cause] is essential to the control of crime in an urban, mobile and anonymous environment . . . .
>
> * * *
>
> The draft proceeds on the premise that a law enforcement officer will be confronted with many situations in which it seems necessary to acquire some further information from or about a person whose name he does not know, and whom, if further action is not taken, he is unlikely to find again . . . .
>
> * * *
>
> The person to whom the officer would like to direct an inquiry may not himself even appear to be involved in criminality. He may be a person who is found near the scene of a crime, and thus a potential source of information. Or it may be impossible to tell in advance whether the person stopped is a suspect or a source of information. . . . . As to these cases it would be disingenuous not to recognize the need for further inquiry in terms of an authority to detain suspects.
>
> * * *

[36] ALI Model Code 107.

> [W]here a crime may have been committed and a suspect or important witness is about to disappear, it seems irrational to deprive the officer of the opportunity to "freeze" the situation for a short time, so that he may make inquiry and arrive at a considered judgement about further action to be taken. To deny the police such a power would be to pay a high price in effective policing and in the police's respect for the good sense of the rules that govern them. ALI Model Code 110-113.

Case law in this realm is very limited. While not directly in point, the Supreme Court's unanimous opinion in United States v. Van Leeuwen, 397 U.S. 249 (1970) authorized detaining a first-class mail parcel 1-1/2 hours for investigation, and for an additional 27-1/2 hours upon probable cause while a search warrant was obtained. Arguably then, maintaining the status quo, (i.e., "freezing" the situation) for 20 minutes by detaining a witness would not be unreasonable. See also State v. Ramos, 102 Cal. Rptr. 502 (App. 1972), where a policeman's requiring a person found four blocks from the scene of a hit-and-run accident--and who admitted being at the accident scene--to return to the scene for further investigation was held "reasonable."

The recent D.C. General Order incorporates the concept of Rule 401 in § IB7; that section allows stopping witnesses upon slightly lesser grounds than Rule 401, and does permit application of a "minimum amount of force" to carry out the stop.

SECTION 5. FRISKS.

The sole purpose of a frisk is to neutralize a threat of harm to the frisking officer or to others. Most often the frisk is a brief, non-specific touching of the outer clothing of a stopped person.[37] However, reaching into a specific area of a detained person's clothing--without first patting down that person--is proper when the officer suspects a weapon is in that location. In Adams v. Williams, the officer had been informed not only that a certain person was carrying a pistol, but also that the pistol was in his waistband. He approached the person, who was seated in a car, reached immediately to the waistband, and removed a loaded revolver. In approving this conduct, the Supreme Court restated the law regarding frisks:

[37] "In its pristine sense 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.'" People v. Moore, 295 N.E.2d 780, 785 (N.Y. 1973)(Wachtler, J., dissenting) quoting People v. Rivera, 201 N.E.2d 32, 35 (1964).

> When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, he may conduct a limited protective search for concealed weapons. . . . . The purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence. . . . . So long as the officer is entitled to make a forcible stop, and has reason to believe that the suspect is armed and dangerous, he may conduct a weapons search limited in scope to this protective purpose. 407 U.S. at 146. (emphasis supplied.)

Rule 501. When to Frisk. A law enforcement officer may frisk any person whom he has stopped when the officer reasonable suspects that the person is carrying a concealed weapon or dangerous instrument and that a frisk is necessary to protect himself 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" appears.

Commentary

Adams v. Williams sets out the three components of a valid frisk:

1. A valid stop.
2. Reason to believe that the suspect is armed, and dangerous to the stopping officer or others.
3. Police conduct limited to revealing the existence of a suspected weapon.

These requirements have been widely implemented. See Cambridge Policy; Cincinnati Code of Ordinances § 903-6 (1968); D.C. General Order Part IC; Jacksonville Ordinance Code §330.116 (1972); NDAA Manual; IACP Ordinance; ALI Model Code § 110.2(4); and San Diego Police Training Bulletin No. 1 (1972); see also Proposed Oregon Criminal Procedure Code § 32.

There is ample authority for the view that for certain stops,

viz., those in connection with a suspected crime of violence, the right to frisk follows automatically. See Terry v. Ohio, 392 U.S. at 33 (Harlan, J. concurring): "[T]he right to frisk must be immediate and automatic if the reason for the stop is . . . an articulable suspicion of a crime of violence." The same conclusion was reached by the New York Court of Appeals in People v. Mack, 310 N.Y.S.2d 292, 298, 258 N.E.2d 703, 707 (1970):

> Where, however, the officer confronts an individual whom he reasonably suspects has committed, is committing or is about to commit such serious and violent crime as robbery or . . . burglary, then it is our opinion that that suspicion not only justifies the detention but also the frisk, thus making it unnecessary to particularize an independent source for the belief of danger.

Rule 501 also points out that frisks need not occur at the beginning of a stop--although both Terry and Adams v. Williams involved immediate frisks. An officer's belief that a frisk is necessary may well exist prior to a stop, and may be all or a substantial part of the reason for the stop. Or the belief that a frisk is called for may have developed during the conversation and observation that followed the stop.

A thorough exposition of the standard of probability required to justify a frisk occurs in United States v. Lopez, 328 F.Supp. 1077 (E.D.N.Y. 1971), an anti-skyjacking frisk case. In determining the validity of a frisk, the court concluded that the reviewing court must:

> 1) determine the objective evidence then available to the law enforcement officer, and
>
> 2) decide what level of probability existed that the individual was armed and about to engage in dangerous conduct; it must then rule whether that probability justified the 'frisk' in light of
>
> 3) the manner in which the frisk was conducted as bearing on the resentment it might justifiably arouse in the person frisked . . . and in the community, and
>
> 4) the risk to officer and community of not disarming the individual at once.
>
> Id. at 1097.

Rule 502. Reasonable Suspicion for 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 of the factors which--alone or in combination--may be sufficient to create "reasonable suspicion" for a frisk:

1. The Person's Appearance . . . .
2. The Person's Actions . . . .
3. Prior Knowledge . . . .
4. Location . . . .
5. Time of Day . . . .
6. Police Purpose.
7. Companions.

Rule 503. Citing Justification for a Frisk. Every officer who conducts a frisk must be prepared to cite those specific factors which lead him to conclude that "reasonable suspicion" existed before the frisk began.

Commentary (For both Rule 502 and Rule 503)

Much of the justification for these Rules has already been set out in the commentary to Rules 202 (Reasonable Suspicion for a Stop) and 501 (When to Frisk) and in the introductory commentary to Section 5.

The listing of factors that may justify a frisk is common practice. See the policies of Cambridge and San Diego, and the New York Policy Statement. See also Oakland Police Department Training Bulletin I-I-4 (1971); New York City Police Department

Legal Division Bulletin Vol. 1, No. 3 (1971); Comment, 43 U.COLO. L.REV. 201, 218 (1971).

The officer conducting a frisk need not show that it was more probable than not that the detained person was armed. He need only show that there was a substantial possibility that the person possessed something which could be used to commit bodily harm and that he would so use it. LaFave, 67 MICH.L.REV. at 87.

A brief listing of some cases relevant to this Rule follows:

Arizona

State v. Yuresko, 493 P.2d 536 (App. 1971).

California

People v. Lawler, 507 P.2d 621 (1973)(frisk held unjustified).

People v. Martin, 293 P.2d 52 (1956).

People v. Grace, 108 Cal. Rptr. 66 (App.)(frisk held unjustified).

People v. Smith, 106 Cal. Rptr. 272 (App. 1973).

People v. Petter, 103 Cal. Rptr. 16 (App. 1972).

District of Columbia

United States v. Lee, 271 A.2d 566 (Mun.App. 1970).

Florida

Thomas v. State, 250 So.2d 15 (App. 1971).

Missouri

State v. Davis, 462 S.W.2d 798 (1971).

See also State v. Onishi, 499 P.2d 657 (Haw. 1972)(frisk held unjustified).

D.C. General Order 304.10 § IC(2) is much the same as Rule 503. Slight differences appear in the Order's version of factors 1 and 4, and the Order deletes the parenthetical material in factor 6.

SECTION 6. FRISK PROCEDURES.

> The sole justification of the [frisk] . . . is the protection of the police officer and others nearby, and it must therefore be confined in scope

to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer. Terry v. Ohio, 392 U.S. at 29.

A "reasonably designed" intrusion is that which goes no further than necessary to accomplish its goal of protection. The procedures outlined in this section are intended to limit the officer's actions so that he intrudes only enough to neutralize the threat of a weapon.

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 then 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:

1. 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

2. The officer has a reasonable belief, based

on reliable information or his own knowledge and observations, that a weapon or dangerous instrument is concelaed 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 so proceeding must be prepared to cite the precise factors which lead him to forego 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.

Commentary

Because of the limited purpose of a frisk, only minimal intrusion upon personal privacy is permitted. In regard to items that can be separated from a detained person, the minimum intrusion that will neutralize the threat of harm is taking the item from the person and placing it out of his reach. Subsection A adopts this procedure, which is similar to the Cambridge and District of Columbia policies, and the New York policy statement.

Subsection B requires the frisk to begin at the place most likely to conceal a weapon. This codifies what common-sense and self-preservation would seem to make obvious. Following this procedure also will give some credence to an officer's judgement that danger existed. Police credibility suffers considerably if he makes a stop following a tip that a man has a gun in his back pocket, but begins his frisk face-to-face. Adams v. Williams involved a frisk of this nature, but the outcome of that case may well have been different if Sgt. Connolly had done anything other than reach at once for the spot where he believed a gun was

concealed.[38] An officer who does not trust his senses or his informants enough to act directly and immediately to protect himself after a stop will find the courts extending even less confidence.

Just as a frisk may be justified inside outer clothing if a pat-down would probably not reveal a weapon's presence, so too a frisk, i.e., a limited intrusion, can extend to other areas immediately accessible to a detained person. See United States v. Riggs, supra, 474 F.2d 699 ("frisk" of camera case at detainee's feet); United States v. Berryhill, 445 F.2d 1189 (9 Cir. 1971) ("frisk" of wife's purse after husband's arrest); Meade v. Cox, 438 F.2d 323 (4 Cir. 1971)("frisk" of wife's purse during husband's detention); People v. Moore, 295 N.E.2d 780 (N.Y. 1973)("frisk" of handbag of detainee while at a police station); State v. Howard, 502 P.2d 1043, 1047 (Wash.App. 1972)("frisk" can extend to the area of a vehicle "reasonably accessible to the occupants," including the "front seat and floor.") While ambiguous, the decision in State v. Reynolds, 290 N.E.2d 557 (Ohio 1972) may also support this concept.

The new D.C. General Order § I C(4)a, b, and d, are very similar to the three parts of Rule 601.

Rule 602. Procedures When a Frisk Discloses an Object that Might Be 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:

1. A weapon or dangerous instrument;
2. A seizable item;

[38]See also People v. Moore, 295 N.E.2d 780 (N.Y. 1973), United States v. Walker, 294 A.2d 376 (D.C.App. 1972) and Murphy v. United States, 293 A.2d 849 (D.C.App. 1972). All uphold "specific-area" frisks.

3. An object capable of containing a weapon or dangerous instrument;
4. An object that is none of the above.

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 instrument is licensed or otherwise lawful, or if it is unlawful. 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 it 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 items, the officer should proceed as in A or B above.

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 601A.

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, then 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.

Commentary

The initial part of Rule 602--removal of an object reasonably believed to be a weapon--is taken from the ALI Model Code, §110.2(4). See also Proposed Oregon Criminal Procedure Code § 32(2), which permits removal of the object upon reasonable suspicion that it is dangerous.[39]

The phrase "weapon or dangerous instrument" is not limited to guns and knives. Since the purpose of the frisk is protection, the officer must be permitted to remove from the detainee any objects which, while not specifically seeming to be a gun or knife, feel capable of being used in an attack. An object which does not feel like a gun or knife may nevertheless be removed if its size, weight or shape, in light of existing circumstances, indicate that it might be a weapon.

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[39]"The Supreme Court has made it clear that a law enforcement officer, when he justifiably believes that the individual he is investigating at close range is armed, has the power for his own protection to take necessary measures to determine whether that person is in fact carrying a weapon."

United States v. Thompson, 420 F.2d 536, 540 (3 Cir. 1970).

If the frisk reveals a weapon, the officer should determine whether possession of the weapon was lawful. Adams v. Williams, supra, permitted an immediate arrest for illegal possession of a handgun discovered during a frisk even though Connecticut allows handguns to be carried concealed if authorized by a permit. Nevertheless, more reasonable procedure is to ask the detainee--in those jurisdictions where permits are issued--if he has a permit. See Adams v. Williams, 407 U.S. at 160 (Marshall, J., dissenting).

If the weapon is illegally possessed, an immediate full-custody arrest and search are appropriate. If the weapon is lawfully possessed the officer may temporarily seize it for the duration of the frisk. The policies of Cambridge and the District of Columbia, and Cincinnati Code of Ordinances § 903-6(1), contain similar provisions. The purpose of the frisk is to neutralize the threat of harm. The fact that the weapon is legally in the possession of the detained person does not in itself dispel the reasonable suspicion that the officer's safety is threatened. Cf. Adams v. Williams, 407 U.S. at 146. Therefore, the officer is justified in keeping the weapon during the stop, and is also justified in disarming the weapon prior to its return.

Rule 602 B is limited to instances where the suspected object is removed and is not a weapon or dangerous instrument--but instead is another species of seizable item.[40] See State v. Yuresko, 493 P.2d 536 (Ariz.App. 1971) where a soft pack of Marlboro cigarettes, removed from a pocket by an officer who feared a weapon, was seen to contain handrolled marijuana cigarettes; and People v. Watson, 90 Cal. Rptr. 483 (App. 1970), where a long-stemmed pipe with marijuana in the bowl was removed from a pocket in the belief it was a knife. The NDAA Manual, p. 5a, notes that such seizures are proper.

Such discoveries are varieties of "plain view" observation; i.e., they followed justifiable intrusions into constitutionally protected areas. Cf. MODEL RULES FOR LAW ENFORCEMENT: WARRANTLESS SEARCHES OF PERSONS AND PLACES Rule 101 and Commentary (pp. 21-23).

Subsection C involves a logical extension of "frisk" theory. If removal of the questioned object does not disclose whether it is or is not a weapon, then surely further probing is proper if the object could reasonably contain a weapon. (A small knife or razor blade device probably are the weapons likely to be found under the subsection C procedure.)

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[40] Seizable items include contraband, loot, anything used in the commission of a crime, or other evidence of a crime.

Subsection D directs that unobtrusive objects removed during a frisk be returned. Any other course of action would run afoul of Terry v. Ohio:

> The manner in which the seizure [of the person] and search [frisk] were conducted is, of course, as vital a part of the inquiry as whether they were warranted at all. . . . . Thus evidence may not be introduced if it was discovered by means of a seizure and search which were not reasonably related in scope to the justification for their initiation.
>
> 392 U.S. at 28-29.

Subsection E is similar to subsection B, but treats the inadvertent discovery of a second item simultaneously with removal of a suspected weapon. (Subsection B relates to the suspected object itself being seizable, but not a weapon. For example, a folded pocket knife is removed, and a balloon containing heroin is caught on a blade. In People v. Atmore, 91 Cal. Rptr. 311 (App. 1970), the frisking officer removed what he thought was a shotgun shell from a pocket, at the same time grasping a marijuana cigarette. Seizure of the cigarette and subsequent conviction were affirmed.)

The Cambridge policy (Frisks, § IV D(5)) and the D.C. General Order (§ I C(6)) contain provisions similar to subsection E.

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.

Commentary

A knotty problem arises when a frisking officer feels an object which he knows or reasonably believes is not a weapon, but which he reasonably believes to be contraband. This latter belief may arise from the way the object feels and such other factors as needle marks, the smell of marijuana, or physical condition of the detained person.

To pinpoint the problem, suppose that during a frisk the officer feels a soft object in a pocket of the person's clothing. The object feels like a plastic bag containing a crumbled, leafy substance. In such cases, what action should the officer take? The drafters recommend that if the officer is convinced that the object is contraband on the basis of the specific facts known to him at that time prior to examining the suspected object, he should place the person under arrest, tell the person what the arrest is for, and then remove the object in the course of the search incident to arrest. It is possible in some cases that an officer could justify removal of the object before making the arrest on the basis of probable cause plus exigent circumstances. Cf. MODEL RULES FOR LAW ENFORCEMENT: WARRANTLESS SEARCHES OF PERSONS AND PLACES, Rule 502 B and Commentary (pp. 43-46). But announcing the arrest prior to searching will certainly lend greater probability to the officer's contention--sure to be contested in most instances--that he had probable cause before he removed the suspect item. There is no conflict between probable cause to search and probable cause to arrest here, since they are, for the purpose of Rule 603, identical.

Cases supportive of the view expressed in Rule 603 include: Tinney v. Wilson, 408 F.2d 912 (9 Cir. 1967); Ricci v. State, 506 P.2d 601 (Ok.Cr. 1973) and State v. Bueno, 475 P.2d 702 (Colo. 1970).

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.

Commentary

Ordinarily, the failure of a frisk to reveal a weapon does not then obviate the need for continuing the investigation of suspicious activities. An exception to this postulate exists when the criminal activity believed to be afoot was itself the unlawful carrying of a weapon.

Continuation of the stop after an unproductive frisk[41] is subject to the limitations of Rule 202 (does reasonable suspicion continue to exist after such frisk?), Rule 301 (has the stop exceeded time limits?), and Rule 302 (are courtesy and restraint still part of the officer's conduct?).

None of the resource materials used by the drafters set out procedures to be used after unproductive frisks.

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.

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[41] It seems clear that the majority of frisks are unproductive. The President's Commission on Law Enforcement and Administration of Justice commented that its observers in high-crime areas of large cities reported that 10 percent of those frisked were carrying guns, and another 10 percent were carrying knives. The Challenge of Crime in a Free Society, pp. 94-95 (1967).

The Cambridge policy ("Frisks" § IV D(2)) and the New York Policy Statement also call for separating certain possessions from detainees, and then returning after the detention is over. Unlike them, Rule 605 alerts the officer to make his safety the paramount consideration when returning any unsearched item. The D.C. General Order § I C4(a), however, is very similar to Rule 605.

SECTION 7. RECORD KEEPING.

The introduction to this Section enumerates the reasons for stop and frisk record keeping. The ability to reconstruct accurately the specific factors leading to both the decision to stop and the decision to frisk often saves vital evidence from suppression. Requiring record keeping should act as a check on excessive use of stop and frisk. Further, record keeping is vital to defending lawsuits--particularly federal civil rights actions seeking to enjoin some stop and frisk activities. See Long v. District of Columbia, 469 F.2d 927 (D.C.Cir. 1972).

Another reason for record keeping is the usefulness which such records may play in solving criminal cases. For example, consider the case of a burglary discovered by an officer in the early morning hours. No leads to a suspect are found at the scene. However, an officer had stopped and questioned a suspiciously-acting person in the area at about the time of the burglary but prior to its discovery. The officer making the stop had released the person after obtaining name and address and recording this information. Here a suspect exists, but absent record keeping he might remain unknown to the officers investigating the burglary. Even if they become aware of his existence he might, absent record keeping, not ever be capable of being found.

Rule 701. Prompt Recording. A law enforcement officer who has stopped or frisked any person shall, with reasonable promptness thereafter, complete (the stop and frisk form provided by the department).

Commentary

Cambridge has different recording requirements for stops and frisks. For frisks, "time, place, identity of the suspect, and all

important circumstances surrounding the incident" are to be logged. (§ IV D(6)). The D.C. General Order, § E, is heavily record-oriented. The NDAA Manual also specifies notetaking, without specifying how or why, and San Diego requires it as an aid to courtroom credibility. The IACP Ordinance contains an optional--but extensive--record keeping requirement. § 110.2(7) of the ALI Model Code also calls for record keeping, commenting thereon in part:

> It is hoped that officers in the field will be more attentive to the legal restrictions on their authority if they know they must report their actions and a record of them will be kept. The precise form of the record is left to departmental regulations. It might even be an oral report dictated into a tape recorder. The record should make reference to such things as whether force was used or threatened, whether there was a frisk, and whether a warning was issued.
>
> ALI Model Code at 128.

Rule 702. Stop Based in Informant's Tip. If the stop or frisk was based in whole or 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 his information.

Commentary

Rule 702 requires more thorough record keeping when the information which led to a stop or frisk came to the officer via an informant. Such recordation is essential in defending challenges to the officer's reliance on the informant. See Harris v. United States, 403 U.S. 573 (1971). Although Harris involved probable cause, its holding gives an indication of the type of

information necessary to show informant reliability, including: What kind of person is the informant? Is he known to the officer? Has he given information in the past? Has this information proven reliable? What has the officer done to corroborate the statements of the informant? See also Adams v. Williams, 107 U.S. 143.

Other case law indicates the need for strict record keeping in informant situations. In United States v. Frye, 271 A.2d 788, 791 (1971), the District of Columbia Court of Appeals spoke of its hope that police departments would "make every reasonable effort to commensurate with the circumstances to obtain and record the identity of their informants in these moving street scenes." The Court felt that this would "go far to remove from subsequent prosecutions the troublesome factors of the unknown and unidentified and uncorroborated informant . . . . In other words, it would strengthen law enforcement."

In People v. Taggart, 229 N.E.2d 581, 586-587 (1967), the New York Court of Appeals was even more explicit:

> [T]he credibility of the police in claiming anonymous information should be subject to the most careful and critical scrutiny. . . . . Moreover, the police should be required to make contemporaneous or reasonably prompt detailed records of any such communications which should be subject to inspection and examination on a suppression hearing on the issue of credibility.

SECTION 8. WHEN FOREGOING MODEL RULES MAY BE DISREGARDED.

Whenever it appears that any of the foregoing Rules should be modified or disregarded because of special circumstances, specific authorization to do so shall be obtained from the department's legal advisor or (insert name of other appropriate police or prosecution official).

Commentary

Section 8 recognizes that there may be a few unanticipated situations where the application of the foregoing rules will interfere with or impede reasonable law enforcement action. For these unusual circumstances it provides an escape hatch whereby certain designated high officials have the authority to suspend application of the Rules.

END