

1-1-1969

An Analysis of Terry v. Ohio and Its Implications upon the California Law of Stop and Frisk

Judith N. Keep

Follow this and additional works at: <https://digital.sandiego.edu/sdlr>

Part of the [Fourth Amendment Commons](#)

Recommended Citation

Judith N. Keep, *An Analysis of Terry v. Ohio and Its Implications upon the California Law of Stop and Frisk*, 6 SAN DIEGO L. REV. 57 (1969).

Available at: <https://digital.sandiego.edu/sdlr/vol6/iss1/4>

This Comments is brought to you for free and open access by the Law School Journals at Digital USD. It has been accepted for inclusion in *San Diego Law Review* by an authorized editor of Digital USD. For more information, please contact digital@sandiego.edu.

COMMENTS

AN ANALYSIS OF *TERRY v. OHIO* AND ITS IMPLICATIONS UPON THE CALIFORNIA LAW OF "STOP AND FRISK"

The controversy surrounding the legality of police "stop and frisk" practices at last has been partially resolved by the Supreme Court. In the case of *Terry v. Ohio*,¹ which is further illuminated by its companion case *Sibron v. New York*,² the Court established a constitutional standard for the frisk under the search and seizure clause of the fourth amendment. Additionally, it strongly suggested that the same standard would be applied to the stop.³ Thus, not only did the Court resolve the debate in favor of this often employed police practice,⁴ but under the doctrine of *Mapp v. Ohio*,⁵ the standard it set applies to the states.

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

2. 392 U.S. 40 (1968). The significance of *Sibron* is that it illustrates an illegal application of the limited search or "frisk." In *Sibron*, a uniformed policeman observed the defendant from four until twelve a.m. near 7th and Broadway in New York City. He saw him conversing with six to eight known narcotics addicts. The patrolman did not overhear the conversations nor see anything pass between the addicts and Sibron. Later, the officer saw Sibron go into a restaurant and speak with three addicts. The officer approached Sibron and asked him to follow him outside. He said, "You know what I am after." As Sibron reached into his pocket, the officer thrust his hand in also and discovered glassine envelopes containing heroin. Sibron was convicted of possessing heroin. The issue on appeal was whether the heroin was admissible in evidence.

The Supreme Court rejected on two grounds the theory that the heroin was retrieved during a self-protective search for weapons. The first was that the officer had no reasonable suspicion that Sibron was armed. The fact that he was speaking with addicts and that he stuck his hand into his pocket in response to the officer's statement, "You know what I am after," would not justify a claim that Sibron was thought to be armed. Second, the Court said that the scope of the search exceeded the bounds of a limited search. The officer did not attempt a superficial pat-down for weapons, but instead thrust his hand directly into Sibron's pocket. Thus, the heroin was held to be improperly admitted.

Consolidated in the same decision was *Peters v. New York*, 392 U.S. 40 (1968). New York sought to justify the police action under New York's "stop and frisk" statute. The Supreme Court rejected this theory, deciding there was probable cause for an arrest, and Peters' conviction was upheld.

3. See textual material accompanying note 18 *infra*.

4. In some states, the practice is authorized by statutes. See, e.g., DEL. CODE ANN. tit. 11, §§ 1902, 1903 (1953). Section 1902 is an example of a detention statute authorizing a police officer to stop a person abroad whom he has reasonable ground to suspect is committing, has committed, or is about to commit a crime for purposes of checking his

This note will seek: (1) To analyze *Terry v. Ohio* to determine what the standard is, what trends are suggested by the dicta, where problem areas remain in applying the standard; and (2) to discuss the California law of "stop and frisk" in order to ascertain how the California practice correlates to the constitutional standard defined in *Terry v. Ohio*: what practices are compatible and which appear either below the minimum standard or in need of greater clarity.

I. *Terry v. Ohio*

One afternoon, Terry and Chilton stood together on a downtown corner in Cleveland. Each alternately walked down the street, paused in front of a particular store window, walked on, turned around, peered in again, rejoined his companion, and conferred a moment. This was repeated five or six times, comprising about twelve trips. A third man briefly joined the two and then walked off. After completing these maneuvers, the two men followed the path taken by the third. An experienced policeman, witnessing this sequence of events, followed the two and saw them join the third man. The officer approached, identified himself, and asked them their names. They mumbled an answer. The policeman then grabbed Terry, patted down his outer-clothing, and felt a gun. Unable to reach it, he removed the coat and retrieved the gun. On the basis of testimony describing this incident and the introduction into evidence of the gun and bullets, Terry was convicted of carrying a concealed weapon. Certiorari was granted to determine whether the admission of the gun and bullets violated petitioner's fourth amendment rights.

The issue was framed as follows: "[W]hether it is always unreasonable for a policeman to seize a person and subject him to a

identification and ascertaining his destination. If the answers are unsatisfactory, the officer may detain the individual for up to two hours for further questioning and investigation. Section 1903 authorizes the officer to search for weapons whenever he has reasonable grounds to believe he is in danger if the detained individual possesses a gun; HAWAII REV. LAWS §§ 255-4, -5, -8, -9 (1955) which provide for a more controlled stop and frisk practice than the Delaware statutes. For example, Section 255-4 allows police to arrest without a warrant a person found under suspicious circumstances in an area where a crime was committed and the offender is unknown; N.Y. CODE CRIM. PROC. § 180(a) (McKinney Supp. 1967) which is similar to Delaware's statute except there is no detention provision.

In some states, stop and frisk is authorized by case law. *See, e.g.,* *People v. Mickelson*, 59 Cal. 2d 448, 380 P.2d 658, 30 Cal. Rptr. 18 (1963); *State v. Chronister*, 353 P.2d 493 (Okla. Crim. App. 1960).

5. 367 U.S. 643 (1961).

limited search for weapons unless there is probable cause for an arrest.”⁶

Confronting the court were the traditional constitutional argument “that the authority of the police must be strictly circumscribed by the law of arrest and search as it has developed to date,”⁷ and the policy argument that the police need an “escalating set of flexible responses, graduated in relation to the amount of information they possess.”⁸ However, the fact that so many policemen are killed or wounded each year, primarily by guns or knives, was the most significant consideration.⁹ In reaching its decision, the Court rejected the suggestion that stop and frisk do not come under the purview of the fourth amendment and declared that a stop is a seizure and the frisk is a search.¹⁰ Applying the “reasonableness” test prescribed by the fourth amendment, it concluded that the governmental interest in crime prevention and detection, plus the governmental and police interest in disarming a person who might kill the investigating officer or harm passersby, justified a limited search for weapons on less than probable cause for arrest.

[W]here a *police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous; where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries; and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a*

6. 392 U.S. at 15.

7. *Id.* at 11. See *Terry* wherein Justice Douglas, dissenting, states that a search and seizure is unconstitutional unless there is probable cause to believe that (1) a crime has been committed, (2) a crime was in the process of being committed or (3) a crime was about to be committed. *Id.* at 35. See generally, Raphael, “*Stop and Frisk*” in a *Nutshell: Some Last Editorial Thrusts and Parries Before It All Becomes History*, 20 ALA. L. REV. 294 (1968); Notes and Comments, *Stop and Frisk: A Perspective*, 53 CORNELL L. REV. 899 (1967-68) in which the authors analyze policy considerations of stop and frisk, and conclude that the standard is too flexible and subjective to protect individual rights.

8. 392 U.S. at 10. See Kuh, *Reflections on New York's “Stop-and-Frisk” Law and Its Claimed Unconstitutionality*, 56 J. CRIM. L.C. & P.S. 32 (1965) where the author concludes stop and frisk is not only constitutional but deeply rooted in common law, and that it can be a valuable tool of police practice if applied reasonably.

9. 392 U.S. at 23-24 & n.21 in which statistics of recent deaths and assaults of police officers are recited.

10. 392 U.S. at 16.

carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.¹¹

Essentially, this case is concerned with the justification for and the scope of the limited search. The Court concluded that the right to search for weapons arises when the policeman can articulate the grounds for a reasonable suspicion which, in the light of his experience, justifies this intrusion; the scope of the search must be confined to one aimed at the discovery of dangerous weapons. Thus, the Court approved a superficial pat-down of the outer-clothing: only if a policeman believes that he feels a dangerous weapon may he place his hands inside the clothing to extract the item.¹²

The Supreme Court impliedly recognized in *Terry* the right to seize (or stop) the individual to make an investigation on grounds less than the probable cause required to make an arrest.¹³ In writing for the Court, Chief Justice Warren stated that a seizure occurs "whenever a police officer accosts an individual and restrains his freedom to walk away"¹⁴ Additionally, according to the standard set, the right to conduct a limited search arises if, after investigating the suspect, nothing dispels the officer's suspicion that the suspect may be armed.¹⁵ It is carefully pointed out that "a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest."¹⁶ Additionally, the facts in this

11. *Id.* at 30 (emphasis added).

12. *Id.* See discussion of *Sibron v. New York*, 392 U.S. 40 (1968) in note 2 *supra*.

13. *But see* 392 U.S. at 19 n.16 where the Court states that it is deciding nothing concerning the propriety of an investigative seizure upon less than probable cause for arrest because, from the record, it is not clear whether the investigating officer so seized Terry prior to the search.

14. 392 U.S. at 16.

15. *Id.* at 30. See also Justice Harlan's concurring opinion in which he states the following:

[I]f the frisk is justified in order to protect the officer during an encounter with a citizen, the officer must first have constitutional grounds to insist on an encounter, to make a *forcible* stop. Any person, including a policeman, is at liberty to avoid a person he considers dangerous. If and when a policeman has a right instead to disarm such a person for his own protection, he must first have a right not to avoid him but to be in his presence.

Id. at 32.

16. 392 U.S. at 22.

case which justified Officer McFadden in approaching Terry are recited in detail.

In deciding *Terry*, the Court was not compelled to “canvass in detail the constitutional limitations upon the scope of a policeman’s power when he confronts a citizen without probable cause to arrest him.”¹⁷ However, it appears the same standard will be applied to justify both the limited seizure and search: The officer must observe unusual conduct which leads him reasonably to conclude in the light of his experience that the particular intrusion (a seizure or search) is necessary.¹⁸ There is little indication, however, what the scope of the limited seizure will be—how much force can be used to detain the individual or how long he may be detained—other than that the conduct of the officer will have to meet the test of reasonableness as the Court develops it.

Assuming the standard for the search and seizure to be the same, the circumstances necessary to validate the search may be different from those justifying the seizure. For example, if the suspected offense were a non-violent one, such as a narcotics violation or pick-pocketing, the facts justifying the seizure of the individual for questioning undoubtedly would not alone justify the protective search; the officer would be required to point to factors other than the suspected offense which supported a belief that the individual was armed.¹⁹ In a case similar to *Terry* where a violent crime was suspected, the same facts probably would be sufficient to support a limited seizure and protective search. Indeed, Justice Harlan, in his concurring opinion, suggested that if the reason for the stop is to investigate a crime of violence, the right to frisk must be immediate and automatic.²⁰

In both *Terry* and its companion case *Sibron*, the police officer suspected a particular crime, armed robbery and possession of narcotics, respectively; hence, it is not yet certain if the required suspicion of “criminal activity” justifying a limited search or seizure refers to a specific crime or can be more broadly applied to suspicious behavior conducive to a variety of crimes.

17. *Id.* at 16.

18. *Id.* at 21-22.

19. See discussion of *Sibron v. New York*, 392 U.S. 40 (1968) at note 2 *supra*. What factors would support the limited search has not yet been determined by the Supreme Court. It is implied in *Sibron* that if the officer had a reasonable belief that *Sibron* was reaching for a weapon when he reached into his pocket, a frisk would have been justified. *Id.* at 64 & n.21.

20. 392 U.S. at 33.

II. *The Law of the Limited Search and Seizure in California*

A. *Seizure*

In California, there is no statutory authority for a limited seizure of suspicious individuals;²¹ rather, this practice is approved by case law.²² The traditional standard is generally expressed as follows:

[A] police officer may question a person outdoors at night when the circumstances are such as would indicate to a reasonable man in like position that such a course is necessary to the discharge of the officer's duties.²³

Contrary to the implication of the quoted standard, it seems to be applied by the courts to support the fact that California recognizes the right to conduct a limited seizure, and not to qualify that right. Although the majority of detentions do occur outdoors at night, there are cases approving daytime detentions²⁴ and indoor detentions.²⁵ The primary requirement is that there be some suspicious or unusual circumstances to which the officer can refer to justify his interference; the mere hunch or unfounded suspicion of a policeman will not suffice.²⁶ Although it is impossible to compile an exhaustive list of suspicious circumstances which the courts have upheld,²⁷ the following are some of the more frequent:

21. There are general crime prevention and detection statutes, however, which can be referred to as justifying the practice of stopping a suspicious person: *See, e.g.*, CAL. GOV'T CODE §§ 26600, 26602 (West 1955) (Sheriff shall preserve peace and prevent and suppress any affrays, breaches of the peace, riots, and insurrections). *See also* CAL. PENAL CODE § 647(e) (West 1955), *as amended* (West Supp. 1967), which provides that a person is guilty of disorderly conduct if he is loitering on the streets and refuses to identify himself and account for his presence when so requested by a peace officer when surrounding circumstances indicate the identification is needed for public safety. The constitutionality of this statute was recently upheld in *People v. Weger*, 251 Cal. App. 2d 584, 59 Cal. Rptr. 661 (1967) *cert. denied*, 389 U.S. 1047 (1968).

22. *Gisske v. Sanders*, 9 Cal. App. 13, 98 P. 43 (1908), is one of the earliest cases expressly recognizing this authority.

23. *People v. Barquera*, 207 Cal. App. 2d 725, 728, 24 Cal. Rptr. 675, 676 (1962).

24. *E.g.*, *People v. Parham*, 60 Cal. 2d 378, 348 P.2d 1001, 33 Cal. Rptr. 497 (1963); *People v. Sanchez*, 189 Cal. App. 2d 720, 11 Cal. Rptr. 407 (1961); *People v. Green*, 183 Cal. App. 2d 736, 7 Cal. Rptr. 235 (1960).

25. *E.g.*, *People v. Beasley*, 250 Cal. App. 2d 71, 58 Cal. Rptr. 485 (1967); *People v. Machel*, 234 Cal. App. 2d 37, 44 Cal. Rptr. 126 (1965), *cert. denied*, 382 U.S. 839 (1965); *People v. Sanchez*, 191 Cal. App. 2d 783, 12 Cal. Rptr. 906 (1961).

26. *People v. Cowman*, 223 Cal. App. 2d 109, 116, 35 Cal. Rptr. 528, 533 (1963).

27. *People v. Henze*, 253 Cal. App. 2d 986, 989-90, 161 Cal. Rptr. 545, 547-48 (1967), contains an analysis of some of the more frequently court approved "suspicious" circumstances. *See* L. TIFFANY, D. MCINTIRE, JR., & D. ROTHENBERG, DETECTION OF CRIME, Part 1 (1967) for a thorough analysis of what the police consider to be circumstances

(1) A furtive act;²⁸ (2) a tip, particularly one coming through police channels;²⁹ (3) the location of the suspect, *e.g.*, in a high crime area or an area where a crime has recently been reported;³⁰ (4) the time seen;³¹ (5) known reputation of the individual as a criminal or suspect;³² (6) association of the suspect with other suspects or known criminals;³³ and (7) erratic driving or the commission of a traffic violation.³⁴ In most cases, of course, there is a combination of these and other factors which leads the policeman to detain an individual for investigation.

There is a growing trend among the California appellate courts to demand that there be not only unusual circumstances to which the suspect is linked, but also some suggestion that the

warranting a reasonable suspicion. It is stated that in addition to particular factors (such as the individual's record) there is usually present a combination of general factors which places the individual in a group or setting which police believe warrants investigation. These general factors are sex, age, race, general appearance of the suspect, time of day, and crime rate of the location. *Id.* at 19. It is the police reliance on these general factors which causes much of the criticism of stop and frisk since, by their application, minority groups are often subjected to police interrogation and the limited search. In *Terry*, the Supreme Court reflects an awareness of the harassment problems. However, it reasons that the exclusionary rule is an ineffective tool to combat this, particularly since the police often decide not to prosecute. 392 U.S. at 12-14 & n.11.

28. *E.g.*, *People v. Wigginton*, 254 Adv. Cal. App. 353, 62 Cal. Rptr. 104 (1967); *People v. Randal*, 226 Cal. App. 2d 105, 37 Cal. Rptr. 809 (1964).

29. *E.g.*, *People v. Russell*, 259 Adv. Cal. App. 674, 66 Cal. Rptr. 594 (1968), *modified* 260 Adv. Cal. App. 300 (1968); *People v. Perez*, 259 Adv. Cal. App. 391, 66 Cal. Rptr. 473 (1968).

30. *E.g.*, *People v. Parham*, 60 Cal. 2d 378, 348 P.2d 1001, 33 Cal. Rptr. 497 (1963); *People v. Reed*, 260 Adv. Cal. App. 933, 67 Cal. Rptr. 514 (1968). Because of the high crime rate of ghetto areas, this factor stimulates protests of police discrimination and harassment by persons residing in such areas. *See* note 27 *supra*.

31. *E.g.*, *People v. Cruppi*, 265 Adv. Cal. App. 13, 71 Cal. Rptr. 42 (1968) (5:15 a.m.); *People v. Rogers*, 241 Cal. App. 2d 384, 50 Cal. Rptr. 559 (1966) (4:00 a.m.). This factor is often combined with location in that the suspect is seen at an unusual hour where no businesses are open, and thus there is no apparent explanation for his presence.

32. *E.g.*, *People v. Ambrose*, 199 Cal. App. 2d 846, 19 Cal. Rptr. 102 (1962); *People v. Sanchez*, 191 Cal. App. 2d 783, 12 Cal. Rptr. 906 (1961).

33. *E.g.*, *People v. Britton*, 264 Adv. Cal. App. 843, 70 Cal. Rptr. 586 (1968); *People v. Ambrose*, 199 Cal. App. 2d 846, 19 Cal. Rptr. 102 (1962).

34. *E.g.*, *People v. McVey*, 243 Cal. App. 2d 215, 52 Cal. Rptr. 259 (1966); *People v. Gibson*, 220 Cal. App. 2d 15, 33 Cal. Rptr. 775 (1963). The California Supreme Court has supported the frequent practice of police in stopping automobiles in order to investigate a driver or passenger. *People v. Mickelson*, 59 Cal. 2d 448, 450, 380 P.2d 658, 660, 30 Cal. Rptr. 18, 21 (1963). Neither *Terry* nor *Sibron* involves the problem of stopping autos; in both cases, the officer searched a pedestrian. The question which arises is will post-*Terry* decisions affect the practice of stopping cars? Because of the policy reasons behind the decision, notably the need of crime prevention and detection, a reasonable stop of a car would probably be approved by the Supreme Court.

activity is related to crime.³⁵ Although in practical effect this may be no different from the traditional standard which requires merely unusual or suspicious activity,³⁶ it does insure that the police will specify why they believed the suspect was involved in criminal behavior. Thus, on its face, this trend appears closer to the standard suggested by *Terry v. Ohio*³⁷ than does the traditional one.

California is in accord with the Supreme Court in recognizing that the suspicious circumstances must be tested in light of an officer's experience. For example, in *People v. Beasley*,³⁸ two experienced policemen on the pawn shop patrol stopped to interrogate a man and his companion when the prospective customer could not produce identification at the broker's request. The court concluded that as a result of their long experience, the policemen had developed a *modus operandi* whereby lack of identification indicated the individual was using a fictitious name, and use of a fictitious name implied that his ownership was suspect. The court concluded that:

In evaluating the total situation that confronted [the policemen] as they entered the pawnshop we may consider their training and experience as police officers and their expertise in the area of detecting suspicious circumstances which, to an ordinary individual, might appear innocent.³⁹

Just how much influence the experience of the policeman has is unclear. For example, in contrast to *Beasley*, is the case of *People v. Henze*⁴⁰ in which police officers saw two men seated in a park in the afternoon. One officer observed them through binoculars and testified they appeared to be counting coins and passing them back and forth. As the men stood up, one appeared to be placing a roll of coins in his pocket. The police followed their car and stopped them for an investigation which later led to an arrest for burglary. The court held the detention unjustified.⁴¹ To the layman, neither lack of

35. *E.g.*, *People v. Villareal*, 262 Adv. Cal. App. 442, 68 Cal. Rptr. 610 (1968) (individual resembling suspected parole violator was seen leaving suspect's house at night and refused to stop when the police commanded thus lending credence to the belief he was the violator and justifying a stop); *People v. Reed*, 260 Adv. Cal. App. 933, 67 Cal. Rptr. 514 (1968) (suspect furtively carrying garment bag at 9:15 p.m. in high frequency crime area held sufficient to link him with a possible burglary, and a stop was proper).

36. See text accompanying note 23 *supra*.

37. 392 U.S. at 30.

38. 250 Cal. App. 2d 71, 58 Cal. Rptr. 485 (1967).

39. *Id.* at 79, 58 Cal. Rptr. at 490 (citations omitted).

40. 253 Cal. App. 2d 986, 61 Cal. Rptr. 545 (1967).

41. *Id.*

identification in a pawn shop nor counting coins and passing them back and forth in a park might be particularly suspicious. However, in evaluating suspicious circumstances, the court appeared more inclined to rely on police experience in *Beasley* than in *Henze*.⁴²

In theory, the California standard governing the limited seizure does not differ appreciably from the standard suggested by *Terry v. Ohio*—it demands suspicious circumstances and tests them through the experience of the officer. However, because the Supreme Court has not yet decided a case involving a limited seizure, it is difficult to predict how the constitutional standard will affect the application and scope of the right to stop for a limited investigation.⁴³

B. Search

The right to search a suspicious individual for weapons on less than probable cause for arrest is also a product of California case law. A typical statement of this right declares that:

The right to investigate gives rise to the right to conduct a reasonable superficial search for concealed weapons to protect the safety of the officers, if the circumstances warrant it.⁴⁴

In many of the pre-*Terry* cases, circumstances warranting a protective search were not carefully analyzed, and thus, it often appeared as though the right to stop gave rise to an automatic right to search for weapons.⁴⁵ More recently, however, the courts have

42. It should be noted that the *Henze* case was decided by a court demanding that the unusual circumstances be apparently related to crime. Thus, the effect of this criterion may be to restrict the subjectivity of the police in deciding when to investigate.

43. *Wainwright v. New Orleans*, 248 La. 1097, 184 So. 2d 23 (1966) cert. granted, 385 U.S. 1001 (1967), was believed to be the case which would bring the issue of a forced stop before the Supreme Court. However, in a per curiam decision, the Court dismissed the writ of certiorari as "improvidently granted." 392 U.S. 598 (1968).

44. *People v. Alvarado*, 250 Cal. App. 2d 584, 590, 58 Cal. Rptr. 822, 825 (1967).

45. E.g., *People v. Davis*, 260 Adv. Cal. App. 182, 67 Cal. Rptr. 54 (1968). Policemen saw defendant walking through a parking lot of a gas station at 2:15 a.m. in an area frequented by burglars. They stopped him and frisked him immediately discovering burglary weapons. The court approved his conduct by the police. *People v. McGlory*, 226 Cal. App. 2d 762, 38 Cal. Rptr. 373 (1964). The police saw two suspects seated in a car in a high frequency narcotics area; after noting the bulge between the breasts of one suspect, the police ordered them out of the car for a frisk. There was no indication that the police believed the two to be armed. In upholding the police procedure, the court commented:

The evasive answers of Miss Thomas concerning the bulge between her breasts would justify the inference that the bulge might be contraband. This, in turn, justified the search for weapons.

begun to carefully survey the facts in order to determine whether an officer is justified in this temporary invasion of privacy.⁴⁶

Bearing in mind that California courts have often neglected to explain the circumstances justifying a protective search, the situations validating a pat-down seem to fall into two broad categories: (1) Police investigation of a suspected crime of violence;⁴⁷ and (2) absent a crime of violence, circumstances in which the officer can point to factors which make him fear for his safety, such as, a quick movement on the part of the suspect as if he were reaching for a weapon,⁴⁸ the number of suspects and their location,⁴⁹ or a police report that the suspect or his companion may be armed.⁵⁰ This application seems compatible with *Terry*.⁵¹

Prior to the *Terry* decision, the scope of a search was not always restricted. Some previous decisions limited the search to a superficial pat-down, and allowed the police officer to penetrate the clothing only if he believed that he felt a dangerous weapon.⁵² Other decisions apparently sanctioned the right of the officers to go directly into the suspect's pockets without a prior cursory search indicating the possibility of dangerous weapons.⁵³ The more recent post-*Terry* California cases demonstrate a determination to meet

Id. at 765, 38 Cal. Rptr. at 375. See also 18 HASTINGS L.J. 623, 630 (1966-67) where the author concludes that circumstances justifying a stop are sufficient to justify a frisk.

46. *People v. Smith*, 264 Adv. Cal. App. 850, 70 Cal. Rptr. 591 (1968), held that it was reasonable to search an individual for arms in the company of a robbery suspect who was carrying a loaded gun; *People v. Britton*, 264 Adv. Cal. App. 843, 70 Cal. Rptr. 586 (1968), held that when police made a valid stop of the defendant and saw the barrel of a rifle protruding under the front seat, they were justified in making a protective search.

47. *People v. Smith*, 264 Adv. Cal. App. 850, 70 Cal. Rptr. 591 (1968) armed robbery); *People v. Lewis*, 187 Cal. App. 2d 373, 9 Cal. Rptr. 659 (1960) (burglaries).

48. *People v. Sanchez*, 256 Adv. Cal. App. 779, 64 Cal. Rptr. 331 (1967).

49. *People v. Alcalá*, 204 Cal. App. 2d 15, 22 Cal. Rptr. 31 (1962). The police stopped defendant because they suspected he was driving while intoxicated. The court held that the number of men in the car (five) plus the fact that the event occurred at 2:00 a.m. justified a protective search.

50. *People v. Hastings*, 253 Cal. App. 2d 191, 61 Cal. Rptr. 275 (1967).

51. See text accompanying notes 19 & 20 *supra*.

52. *E.g.*, *People v. Rich*, 259 Adv. Cal. App. 418, 66 Cal. Rptr. 246 (1968); *People v. Martinez*, 228 Cal. App. 2d 245, 39 Cal. Rptr. 526 (1964).

53. *E.g.*, *People v. Koelzer*, 222 Cal. App. 2d 20, 34 Cal. Rptr. 718 (1963) (the search of one suspect revealed a pair of plastic gloves and a Volkswagen key); *People v. One 1958 Chevrolet*, 179 Cal. App. 2d 604, 4 Cal. Rptr. 128 (1960) (during a search, a marijuana cigarette was found in the suspect's pocket). *Terry* establishes that an officer can not reach into the pockets unless he believes he feels a weapon. 392 U.S. at 30. In both cases previously mentioned, the facts do not indicate that the officer felt a suspicious object or that he made a superficial pat-down before retrieving the objects from the defendants' pockets.

the constitutional standard. In *People v. Britton*,⁵⁴ for example, the policeman felt a soft bag in the defendant's pocket; when it was removed and analyzed, it was found to contain marijuana. The court applied the exclusionary rule to the marijuana holding that:

By requiring defendant to empty his pockets and by removing from his pocket a soft pouch which had no possible use as a weapon, the search exceeded the bounds of a permissible "frisk."⁵⁵

Although the traditional California standard for the limited search for weapons does not differ substantially from that announced in *Terry v. Ohio*, *Terry* will affect the application and scope of the search. It appears that the policeman will be required to describe circumstances warranting the search more specifically than heretofore. Further, the courts will be required to exclude evidence seized from the person unless the officer has conducted a proper superficial search.

III. Conclusion

In deciding *Terry v. Ohio*, the Supreme Court has not only given constitutional recognition to the frequently applied police practice of stop and frisk, but has demanded that this practice meet the fourth amendment's standard of reasonableness. *Terry* demonstrates how that standard will be applied to the protective search for weapons and strongly suggests the way in which it will apply to the limited seizure. Yet, the problem with *Terry*, if it can be called a problem, is that the suspicious circumstances are so glaring. Certainly, such conduct as witnessed by the policeman would lead even a reasonable layman to believe that criminal activity was afoot and that the suspect might be armed. Most of the cases reported in California are not so clear. A policeman observes a few unusual or suspicious circumstances and has to make a quick decision as to whether he should investigate or search. *Terry* will not help him make this decision. At this writing, the constitutional standard imposed by *Terry* is ill-defined; the boundary separating a reasonable stop and frisk from an unjustified invasion of privacy is uncertain. For example, if the officer saw Terry make one trip, but also knew he had a record for burglary, or that he was a burglary suspect, or that several stores in the area had recently been robbed,

54. 264 Adv. Cal. App. 843, 70 Cal. Rptr. 586 (1968).

55. *Id.* at 849.

would there have been a right to detain? If the suspects were "casing" the store after it was closed, thus negating a theory of armed robbery, what additional facts would justify a search? While such questions are surely academic, they illustrate the type of situations usually confronting the police.

Flexibility in the law is to be desired, and a rigid set of rules which will bind the courts and forbid them to properly evaluate the peculiar facts of each case should not be expected. Nonetheless, greater certainty in the application and scope of the limited search and seizure is needed to insure not only effective police practice, but the privacy of the individual.

JUDITH N. KEEP