AMERICAN CONSTITUTIONALISM
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Supplementary Material

Chapter 8: The New Deal/Great Society Era—Criminal Justice/Search and Seizure

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Terry v. Ohio, 392 U.S. 1 (1968)

John Terry attracted the attention of plainclothes detective Martin McFadden on October 31, 1963. Terry and another man were standing on a street corner in Cleveland when McFadden first saw them. At times, Terry or the other man would walk up to a store, look in the window, then turn to confer with the other. McFadden, convinced they were casing the store for a planned robbery, approached the men, identified himself as a police officer, and asked for their names. When Terry mumbled something, McFadden grabbed him and patted his outside garments. The frisk revealed that Terry was carrying a gun. McFadden arrested Terry for carrying a concealed weapon. Terry's trial motion to suppress the fruits of McFadden's search was overruled. He was found guilty and sentenced to prison. The Supreme Court of Ohio sustained the trial court's decision to admit the gun. Terry appealed to the Supreme Court. The United States, National District Attorney's Association and Americans for Effective Law Enforcement filed amicus briefs urging the Supreme Court to affirm the ruling of the Ohio courts. The brief for the United States pointed out,

> *Federal agents, although they do not exercise the broad powers of local police, are not infrequently confronted with situations where effective law enforcement in the areas within their jurisdiction would require them to stop and detain persons for a limited period of time in order to obtain and verify information. . . . If a right of limited detention does exist, we suggest further that a law enforcement officer has the right to pat down the suspect's outer clothing in order to determine whether he possesses a weapon, assuming that this step appears reasonably necessary for the detaining officer's self-protection.*

The brief for the National District Attorney's Association insisted, "granting the police the right of temporary field detention and protective patdown on a standard less than probable cause to arrest is the only effective way to meet the challenge of crime in a free society." The NAACP Legal Defense Fund and American Civil Liberties Union filed amicus briefs urging the Court to declare "stop and frisk" practices unconstitutional. The NAACP brief began with these two quotations.

> *"I am married to Raymond Fullwood, a Negro. Because I am Caucasian, in the five years of our marriage, we have been stopped no less than twenty times by Los Angeles police officers. . . . I am certain that the reason they chose to stop us is because we are a mixed couple."* Mrs. Marilyn Fullwood, in Los Angeles, California.

> *"Association of a woman with men of another race usually results in the immediate conclusion that she is a prostitute. If a Negro woman is found in the company of a white man, she is usually confronted by the police and taken to the station unless it is clear that the association is legitimate."* Detroit, Michigan police practice, as observed by Professor Wayne R. LaFave.

The Supreme Court by an 8-1 vote held that Office McFadden behaved constitutionally. Chief Justice Warren's majority opinion held that police did not have to obtain a warrant when they had a reasonable suspicion that persons before them were dangerous. Terry *was one of several important cases in which Warren Court majorities rejected constitutional claims made by persons suspected or convicted of criminal offenses. Compare these cases to the cases in which Warren Court majorities accepted constitutional claims made by persons suspected or*

convicted of criminal offenses. Can you identify a reasonable legal principle that explains the difference between these cases? Do these decisions simply reflect idiosyncratic judicial preferences? Could the justices have been acting strategically in 1967 and 1968, retreating a bit in response to increased political pressures to crack down on crime?

Both the National District Attorney Association's brief and the brief for the NAACP Legal Defense Fund raise important prudential and constitutional questions. How vital is "stop and frisk" as a means for preventing crime? Does the constitutionality of that practice depend on the answer to that question? No judicial opinioned mentioned that Terry and his confederate were persons of color. In your opinion, would Officer McFadden be as likely to stop white persons engaged in the same behaviors?[1] *Should that consideration be taken into account when considering the constitutionality of "stop and frisk" practices in general?*

CHIEF JUSTICE WARREN delivered the opinion of the Court.

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We would be less than candid if we did not acknowledge that this question thrusts to the fore difficult and troublesome issues regarding a sensitive area of police activity issues which have never before been squarely presented to this Court. . . .

On the one hand, it is frequently argued that in dealing with the rapidly unfolding and often dangerous situations on city streets the police are in need of an escalating set of flexible responses, graduated in relation to the amount of information they possess. For this purpose it is urged that distinctions should be made between a 'stop' and an 'arrest' (or a 'seizure' of a person), and between a 'frisk' and a 'search.' Thus, it is argued, the police should be allowed to 'stop' a person and detain him briefly for questioning upon suspicion that he may be connected with criminal activity. Upon suspicion that the person may be armed, the police should have the power to 'frisk' him for weapons. If the 'stop' and the 'frisk' give rise to probable cause to believe that the suspect has committed a crime, then the police should be empowered to make a formal 'arrest,' and a full incident 'search' of the person. This scheme is justified in part upon the notion that a 'stop' and a 'frisk' amount to a mere 'minor inconvenience and petty indignity,' which can properly be imposed upon the citizen in the interest of effective law enforcement on the basis of a police officer's suspicion.

On the other side the argument is made that the authority of the police must be strictly circumscribed by the law of arrest and search as it has developed to date in the traditional jurisprudence of the Fourth Amendment. It is contended with some force that there is not—and cannot be—a variety of police activity which does not depend solely upon the voluntary cooperation of the citizen and yet which stops short of an arrest based upon probable cause to make such an arrest. The heart of the Fourth Amendment, the argument runs, is a severe requirement of specific justification for any intrusion upon protected personal security, coupled with a highly developed system of judicial controls to enforce upon the agents of the State the commands of the Constitution. Acquiescence by the courts in the compulsion inherent in the field interrogation practices at issue here, it is urged, would constitute an abdication of judicial control over, and indeed an encouragement of, substantial interference with liberty and personal security by police officers whose judgment is necessarily colored by their primary involvement in 'the often competitive enterprise of ferreting out crime.' . . . This, it is argued, can only serve to exacerbate police-community tensions in the crowded centers of our Nation's cities.

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The exclusionary rule has its limitations, however, as a tool of judicial control. . . . Regardless of how effective the rule may be where obtaining convictions is an important objective of the police, it is powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forgo successful prosecution in the interest of serving some other goal.

Proper adjudication of cases in which the exclusionary rule is invoked demands a constant awareness of these limitations. The wholesale harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently complain, will not be stopped by the exclusion of any evidence from any criminal trial. Yet a rigid and unthinking application of the exclusionary rule, in

[1] Imagine Terry was a fifteen-year-old girl wearing designer jeans. Was she "casing the joint" or window shopping with friends?

futile protest against practices which it can never be used effectively to control, may exact a high toll in human injury and frustration of efforts to prevent crime. No judicial opinion can comprehend the protean variety of the street encounter, and we can only judge the facts of the case before us.

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. . . There is some suggestion in the use of such terms as 'stop' and 'frisk' that such police conduct is outside the purview of the Fourth Amendment because neither action rises to the level of a 'search' or 'seizure' within the meaning of the Constitution. We emphatically reject this notion. It is quite plain that the Fourth Amendment governs 'seizures' of the person which do not eventuate in a trip to the station house and prosecution for crime-'arrests' in traditional terminology. It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person. And it is nothing less than sheer torture of the English language to suggest that a careful exploration of the outer surfaces of a person's clothing all over his or her body in an attempt to find weapons is not a 'search,' Moreover, it is simply fantastic to urge that such a procedure performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised, is a 'petty indignity.' It is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly.

The danger in the logic which proceeds upon distinctions between a 'stop' and an 'arrest,' or 'seizure' of the person, and between a 'frisk' and a 'search' is twofold. It seeks to isolate from constitutional scrutiny the initial stages of the contact between the policeman and the citizen. And by suggesting a rigid all-or-nothing model of justification and regulation under the Amendment, it obscures the utility of limitations upon the scope, as well as the initiation, of police action as a means of constitutional regulation. This Court has held in the past that a search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope. . . . The scope of the search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible. . . .

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In this case there can be no question, then, that Officer McFadden 'seized' petitioner and subjected him to a 'search' when he took hold of him and patted down the outer surfaces of his clothing. . . .

. . . We do not retreat from our holdings that the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure, . . . or that in most instances failure to comply with the warrant requirement can only be excused by exigent circumstance. . . . But we deal here with an entire rubric of police conduct—necessarily swift action predicated upon the on-the-spot observations of the officer on the beat—which historically has not been, and as a practical matter could not be, subjected to the warrant procedure. Instead, the conduct involved in this case must be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures.

. . . In order to assess the reasonableness of Officer McFadden's conduct as a general proposition, it is necessary 'first to focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen.'. . And in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. . . . And in making that assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate? . . . And simple "good faith on the part of the arresting officer' is not enough. . . . If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers and effects,' only in the discretion of the police." . . .

. . . One general interest is of course that of effective crime prevention and detection; it is this interest which underlies the recognition 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. It was this legitimate investigative function Officer McFadden was discharging when he decided to approach petitioner and his companions. . . .

. . . [I]n addition, there is the more immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him. Certainly it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties. . . .

In view of these facts, we cannot blind ourselves to the need for law enforcement officers to protect themselves and other prospective victims of violence in situations where they may lack probable cause for an arrest. 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, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm.

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. . . A search for weapons in the absence of probable cause to arrest, however, must, like any other search, be strictly circumscribed by the exigencies which justify its initiation. . . . Thus it must be limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby, and may realistically be characterized as something less than a 'full' search, even though it remains a serious intrusion.

. . . The protective search for weapons . . . constitutes a brief, though far from inconsiderable, intrusion upon the sanctity of the person. It does not follow that because an officer may lawfully arrest a person only when he is apprised of facts sufficient to warrant a belief that the person has committed or is committing a crime, the officer is equally unjustified, absent that kind of evidence, in making any intrusions short of an arrest. Moreover, a perfectly reasonable apprehension of danger may arise long before the officer is possessed of adequate information to justify taking a person into custody for the purpose of prosecuting him for a crime. Petitioner's reliance on cases which have worked out standards of reasonableness with regard to 'seizures' constituting arrests and searches incident thereto is thus misplaced. It assumes that the interests sought to be vindicated and the invasions of personal security may be equated in the two cases, and thereby ignores a vital aspect of the analysis of the reasonableness of particular types of conduct under the Fourth Amendment. . . .

Our evaluation of the proper balance that has to be struck in this type of case leads us to conclude that there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime. The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger. . . . And in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience. . . .

. . . We think on the facts and circumstances Officer McFadden detailed before the trial judge a reasonably prudent man would have been warranted in believing petitioner was armed and thus presented a threat to the officer's safety while he was investigating his suspicious behavior. The actions of Terry and Chilton were consistent with McFadden's hypothesis that these men were contemplating a daylight robbery—which, it is reasonable to assume, would be likely to involve the use of weapons—and nothing in their conduct from the time he first noticed them until the time he confronted them and identified himself as a police officer gave him sufficient reason to negate that hypothesis. . . . We cannot say his decision at that point to seize Terry and pat his clothing for weapons was the product of a volatile or inventive imagination, or was undertaken simply as an act of harassment; the record evidences the tempered act of a policeman who in the course of an investigation had to make a quick decision as to how to protect himself and others from possible danger, and took limited steps to do so.

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The scope of the search in this case presents no serious problem in light of these standards. Officer McFadden patted down the outer clothing of petitioner and his two companions. He did not place his hands in their pockets or under the outer surface of their garments until he had felt weapons, and then he merely reached for and removed the guns. He never did invade [their person beyond the outer surfaces of his clothes, since he discovered nothing in his patdown which might have been a weapon.

Officer McFadden confined his search strictly to what was minimally necessary to learn whether the men were armed and to disarm them once he discovered the weapons. He did not conduct a general exploratory search for whatever evidence of criminal activity he might find.

. . . We merely hold today that where 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 carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him. Such a search is a reasonable search under the Fourth Amendment, and any weapons seized may properly be introduced in evidence against the person from whom they were taken.

JUSTICE BLACK concurs in the judgment and the opinion except where the opinion quotes from and relies upon this Court's opinion in *Katz v. United States* (1967) and the concurring opinion in *Warden v. Hayden* (1967).

JUSTICE HARLAN, concurring.

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I would affirm this conviction for what I believe to be the same reasons the Court relies on. I would, however, make explicit what I think is implicit in affirmance on he present facts. Officer McFadden's right to interrupt Terry's freedom of movement and invade his privacy arose only because circumstances warranted forcing an encounter with Terry in an effort to prevent or investigate a crime. Once that forced encounter was justified, however, the officer's right to take suitable measures for his own safety followed automatically.

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JUSTICE WHITE, concurring.

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. . . [i]f the investigative stop is sustainable at all, constitutional rights are not necessarily violated if pertinent questions are asked and the person is restrained briefly in the process.

JUSTICE DOUGLAS, dissenting.

. . . [I]t is a mystery how that 'search' and that 'seizure' can be constitutional by Fourth Amendment standards, unless there was 'probable cause' to believe that (1) a crime had been committed or (2) a crime was in the process of being committed or (3) a crime was about to be committed.

The opinion of the Court disclaims the existence of 'probable cause.' If loitering were in issue and that was the offense charged, there would be 'probable cause' shown. But the crime here is carrying concealed weapons; and there is no basis for concluding that the officer had 'probable cause' for believing that that crime was being committed. Had a warrant been sought, a magistrate would, therefore, have been unauthorized to issue one, for he can act only if there is a showing of 'probable cause.' We hold today that the police have greater authority to make a 'seizure' and conduct a 'search' than a judge has to authorize such action. We have said precisely the opposite over and over again.

In other words, police officers up to today have been permitted to effect arrests or searches without warrants only when the facts within their personal knowledge would satisfy the constitutional standard of probable cause. At the time of their 'seizure' without a warrant they must possess facts concerning the person arrested that would have satisfied a magistrate that 'probable cause' was indeed present. The term 'probable cause' rings a bell of certainty that is not sounded by phrases such as 'reasonable suspicion.' . . .

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To give the police greater power than a magistrate is to take a long step down the totalitarian path. Perhaps such a step is desirable to cope with modern forms of lawlessness. But if it is taken, it should be the deliberate choice of the people through a constitutional amendment. Until the Fourth Amendment, which is closely allied with the Fifth, is rewritten, the person and the effects of the individual are beyond the reach of all government agencies until there are reasonable grounds to believe (probable cause) that a criminal venture has been launched or is about to be launched.

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