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Criminal Law--Search and Seizure--New York's "Stop and Frisk" Law Held Not Violative of the Fourth Amendment Despite Lack of "Probable Cause" Requirement (People v. Peters, 18 N.Y.2d 238 (1966))

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ments present in operational negligence and unseaworthiness situations.[56] In addition, it appears that the courts have completely disregarded the position of the shipowner. As stated in the dissent in *Skibinski*, the courts are using shipowners as a conduit for imposing the liability on the stevedore companies, which are regularly impleaded.[57] However, where the stevedore company is judgment proof, the innocent shipowner must suffer the judgment without any effective recovery over.

An aim of the Longshoremen's and Harbor Workers' Compensation Act is to limit the liability of the longshoreman's employer. Section 905 provides that the employer's liability under the act is exclusive and in place of all other liability.[58] It is possible that the courts are motivated by a belief that the compensation, which ranges downward from a maximum of two-thirds of the employee's average weekly wage for total disability, is inadequate;[59] however, the remedy provided by statute is clear and it is beyond the scope of the courts' functions to attempt to circumvent this legislation. It appears that it is time for a legislative review of this entire area, emphasizing the interrelationships between the unseaworthiness doctrine and the Harbor Workers' Compensation Act. Without such legislative action the Supreme Court should examine the ill-defined distinctions of the unseaworthiness doctrine in the same context.

CRIMINAL LAW — SEARCH AND SEIZURE — NEW YORK'S "STOP AND FRISK" LAW HELD NOT VIOLATIVE OF THE FOURTH AMENDMENT DESPITE LACK OF "PROBABLE CAUSE" REQUIREMENT. — Appellant was apprehended in an apartment house by a tenant, an off-duty policeman, who had observed appellant and his companion tiptoeing around the hallway. Upon receiving an unsatisfactory answer as to their presence in the hallway, the officer "frisked" the appellant for a weapon. He felt something hard "which could have been a knife," and withdrew from appellant's pocket an opaque plastic envelope which, upon examination, was found to contain burglar's tools. This evidence was used to secure an indictment against appellant for unlawful possession of burglar's tools. Appellant's pretrial motion to suppress the evidence as constitutionally inadmissible was denied and he was convicted upon

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[56] The court carefully indicated that no determination had been made as to the validity of the distinction.

[57] *Supra* note 37, at 544.

[58] This is provided so that the employer secures payment for his injured employees. Longshoremen's & Harbor Workers' Compensation Act, 44 Stat. 1426 (1927), 33 U.S.C. § 905 (1964).

[59] Longshoremen's & Harbor Workers' Compensation Act, 44 Stat. 1427 (1927), 33 U.S.C. § 908(a) (1964).

a plea of guilty. The New York Court of Appeals *held* that the frisk, pursuant to the New York "Stop and Frisk" law,[1] was not a constitutionally prohibited search and that the evidence disclosed thereby was admissible. *People v. Peters,* 18 N.Y.2d 238, 219 N.E.2d 595, 273 N.Y.S.2d 217 (1966).

In *Mapp v. Ohio,*[2] the United States Supreme Court, for the first time, made the federal rule excluding evidence obtained by an unreasonable search and seizure applicable to the states. The Court held that the admission of such evidence was a violation of the fourth amendment[3] as made applicable to the states by virtue of the due process clause of the fourteenth amendment. The Court, however, did not attempt to set down any specific guidelines by which the state courts were to decide whether a search and seizure was reasonable.[4] In *Ker v. California,*[5] the Court openly stated that *Mapp* had not laid down any "fixed formula,"[6] and that the states are not precluded from developing workable rules of their own.[7] It was also pointed out, however, that the states will be expected to adhere to the "'fundamental criteria' laid down by the Fourth Amendment . . ." and that state courts' "findings of reasonableness . . . are respected only insofar as consistent with federal constitutional guarantees."[8] The Court has scrutinized, and will continue to scrutinize, any attempts by the states to set their own standards of reasonableness under the fourth amendment.

Traditionally, the primary constitutional prerequisite for a reasonable search and seizure has been "probable cause." The term seizure as used in the fourth amendment applies both to the seizure of property and of persons, *i.e.*, an arrest.[9] Probable cause for an

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[1] N.Y. CODE CRIM. PROC. § 180-a.

[2] 367 U.S. 643 (1961).

[3] U.S. CONST. amend. IV states: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

[4] The lack of specific criteria in *Mapp* led to discussion as to whether the states were free to develop their own standards of reasonableness, or whether they must adhere to federal requirements. See Commonwealth v. Richards, 198 Pa. Super. 39, 182 A.2d 291 (1962). See also People v. Tyler, 193 Cal. App. 2d 728, 734, 14 Cal. Rptr. 610, 613 (Dist. Ct. App. 1961), where it is stated that "we find nothing in Mapp v. Ohio . . . to indicate that . . . the states are bound to follow the federal requirements of reasonableness and probable cause instead of their own."

[5] 374 U.S. 23 (1962).

[6] *Id.* at 31-32.

[7] *Id.* at 34.

[8] *Id.* at 33. It should be noted that Harlan, J., dissenting, interpreted the majority decision in *Ker* as indicating that "state searches and seizures are to be judged by the same constitutional standards as apply in the federal system." *Id.* at 45 (dissenting opinion).

[9] Henry v. United States, 361 U.S. 98, 100-02 (1959); Brinegar v. United States, 338 U.S. 160, 164 (1949).

arrest has been said to exist where the facts and circumstances within the arresting officer's knowledge, and of which he has reasonably trustworthy information, are sufficient to cause a man of reasonable caution to believe that an offense has been or is being committed.[10] There must be something more than common rumor, suspicion, or even a showing of a strong reason to suspect.[11] The United States Supreme Court has adopted the constitutional test of "probable cause" for determining the reasonableness of an arrest or search on the ground that it is the best compromise between the individual's right to privacy and efficient law enforcement. "Requiring more would unduly hamper law enforcement. *To allow less* would be to leave law-abiding citizens at the mercy of the officers' whim or caprice."[12]

New York's "Stop and Frisk" law does not adopt the traditional standard of "probable cause" as its test of reasonableness. Under it, a police officer is authorized to stop, question, demand identification and an explanation of any person in a public place whom he *"reasonably suspects"* has committed, is commiting, or is about to commit a felony or serious misdemeanor.[13] If, in the course of inquiry, the officer "reasonably suspects" that he is in danger of life or limb, he may frisk the suspect for dangerous weapons. If the officer discovers a dangerous weapon or *anything else*, the *possession of which* constitutes a *crime*, he must make an arrest.[14] The basic question raised by such a statute is whether its standards and procedures meet the requirement of reasonableness dictated by the fourth amendment.

The United States Supreme Court has never specifically answered the question. Nevertheless, there are indications both from it and the lower federal courts that police may rightfully stop and question, even where there is no "probable cause" to make an arrest.[15] Several states, either by statute[16] or judicial decision,[17] have endorsed this practice.

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[10] Ker v. California, 374 U.S. 23 (1962); Brinegar v. United States, *supra* note 9.

[11] Henry v. United States, *supra* note 9, at 101; Brinegar v. United States, *supra* note 9, at 175.

[12] Brinegar v. United States, *supra* note 9, at 176. (Emphasis added.)

[13] N.Y. CODE CRIM. PROC. § 180-a(1).

[14] N.Y. CODE CRIM. PROC. § 180-a(2).

[15] Rios v. United States, 364 U.S. 253, 262 (1960); United States v. Vita, 294 F.2d 524, 530 (2d Cir. 1961), *cert. denied*, 369 U.S. 823 (1962); United States v. Bonanno, 180 F. Supp. 71, 78 (S.D.N.Y. 1960), *rev'd on other grounds sub nom.* United States v. Bufalino, 285 F.2d 408 (2d Cir. 1960).

[16] See DEL. CODE ANN. tit. 11, §§ 1901-03 (1953); N.H. REV. STAT. ANN. ch. 594, §§ 1-3 (1955); R.I. GEN. LAWS tit. 12, ch. 7, §§ 1-2 (1956). See generally Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315 (1942).

[17] People v. Simon, 45 Cal. 2d 645, 290 P.2d 531 (1955); People v. Hennenman, 367 Ill. 151, 10 N.E.2d 649 (1937); Commonwealth v. Lehan, 347 Mass. 197, 196 N.E.2d 840 (1964).

Prior to the enactment of the "Stop and Frisk" law, it was not clear whether or not an officer in New York could detain a suspect for questioning without an arrest warrant, or without "probable cause" to make an arrest.[18] The grounds for arrest were clearly delineated by statute,[19] but there was no statutory provision for the "stop." In 1964, after the enactment of the "Stop and Frisk" law but prior to its effective date, the New York Court of Appeals, in *People v. Rivera*,[20] declared that the right to detain without arresting was a valid, "indispensable" exercise of police power. It was held that a "stop" is clearly distinguishable from an arrest. The "stop" was characterized as an "immediate and summary street inquiry" which need not be justified by a showing of "probable cause."[21] Although the Court did not explicitly so state, its determination was undoubtedly made with the future application of the "Stop and Frisk" law in mind.[22]

It has become a firmly entrenched urban police practice to frisk a suspect prior to arrest under circumstances in which the officer feels that his life may be in danger.[23] Over the years, there has been an increasing clamor for the official sanctioning of what is seen by many as an invaluable precaution against deadly assaults on police officers.[24] Heretofore, only two types of warrantless searches have been deemed constitutionally permissible—searches which were incidental to a lawful arrest,[25] and those which were made with consent.[26] These standards have been jealously guarded by the Supreme Court, which has shown concern where any attempt is made to circumvent the fourth amendment's prohibitions.[27]

Proponents of the frisk have sought to distinguish it from the search, for which the standard of reasonableness is clearly "prob-

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[18] Legislation, 38 ST. JOHN'S L. REV. 392, 399 (1964). New York defines an arrest as "the taking of a person into custody that he may be held to answer for a crime." N.Y. CODE CRIM. PROC. § 167.

[19] Legislation, 38 ST. JOHN'S L. REV. 392, 399 (1964).

[20] 14 N.Y.2d 441, 201 N.E.2d 32, 252 N.Y.S.2d 458 (1964), *cert. denied*, 379 U.S. 978 (1965).

[21] *Id.* at 444-45, 201 N.E.2d at 34, 252 N.Y.S.2d at 461-62.

[22] *Id.* at 447, 201 N.E.2d at 36, 252 N.Y.S.2d at 464. It should be remembered that any discussion of the "frisk" presupposes the legality of the "stop," which must be deemed reasonable before any right to "frisk" may arise.

[23] See examples cited in Note, *Philadelphia Police Practice and the Law of Arrest*, 100 U. PA. L. REV. 1182, 1203-06 (1952).

[24] Kuh, *New York's New "Stop and Frisk" Law*, 151 N.Y.L.J., May 29, 1964, p. 4, cols. 1-5; Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315, 325 (1942).

[25] Preston v. United States, 376 U.S. 364 (1964); Henry v. United States, 361 U.S. 98 (1959).

[26] Stoner v. California, 376 U.S. 483 (1964).

[27] See, *e.g.*, Stanford v. Texas, 379 U.S. 476 (1965); United States v. Lefkowitz, 285 U.S. 452, 467 (1932), where it was said that "an arrest may not be used as a pretext to search for evidence."

able cause."[28] A frisk has been defined as a running of the hands over another's person or pockets, as distinguished from a search, which is a stripping "to examine the contents more particularly."[29] Those states which have adopted the Uniform Arrest Act have sanctioned a frisk for a weapon by a police officer who reasonably believes that he is in danger.[30] In California, it has been held that a police officer, in order to insure his safety, may frisk a suspect he is questioning.[31] In *People v. Rivera*,[32] the New York Court of Appeals held that a police officer may frisk a suspect as an incident to a lawful stop if he reasonably suspects that he is in danger. In *Rivera*, a loaded pistol had been found on the suspect's person. The defendant contended that such a search and seizure without "probable cause" for an arrest was illegal and the evidence thereby obtained was inadmissible. After deciding that the stop by the officer was a reasonable procedure, the Court stated that "we are required to recognize hazards involved in this kind of police duty . . . [and] we think the frisk is a reasonable and a constitutionally permissible precaution to minimize that danger."[33] The frisk "may be justified as an incident to inquiry upon grounds of elemental safety and precaution which might not initially sustain a search."[34] Although recognizing that "probable cause" is required to justify a search, the Court viewed the frisk as not nearly as great an invasion of privacy. The Court found that the frisk did not violate constitutional notions of reasonableness and that the arrest based on the "probable cause" acquired by the frisk was valid. The Court concluded that since the weapon had been legally seized, it was therefore admissible evidence. Since the purpose of the frisk in *Rivera* was to find a weapon which might prove dangerous to the officer stopping and frisking, and the weapon found was the item sought to be admitted into evidence, the Court had no occasion to discuss an arrest where the frisk results in a discovery that the person stopped had no weapon but instead had an object the possession of which constitutes a crime.

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[28] See Chapman v. United States, 365 U.S. 610, 613 (1961).

[29] Kalwin Business Men's Ass'n v. McLaughlin, 126 Misc. 698, 701, 214 N.Y. Supp. 99, 102-03 (Sup. Ct.), *rev'd on other grounds*, 216 App. Div. 6, 214 N.Y. Supp. 507 (2d Dep't 1926).

[30] UNIFORM ARREST ACT § 3. Note that the act speaks only of a "search" for a dangerous weapon, and has no confiscatory provision comparable to that found in New York's "Stop and Frisk" law.

[31] People v. Martin, 46 Cal. 2d 106, 293 P.2d 52 (1956); People v. Jones, 176 Cal. App. 2d 265, 1 Cal. Rptr. 210 (Dist. Ct. App. 1959); Gisske v. Sanders, 9 Cal. App. 13, 98 Pac. 43 (Dist. Ct. App. 1908).

[32] 14 N.Y.2d 441, 201 N.E.2d 32, 252 N.Y.S.2d 458 (1964). See also People v. Pugach, 15 N.Y.2d 65, 204 N.E.2d 176, 255 N.Y.S.2d 883 (1964), *cert. denied*, 380 U.S. 936 (1965).

[33] *Id.* at 446, 201 N.E.2d at 35, 252 N.Y.S.2d at 463.

[34] *Id.* at 447, 201 N.E.2d at 35, 252 N.Y.S.2d at 463.

The instant case arose subsequent to the effective date of New York's "Stop and Frisk" statute. The evidence seized as a result of the "stop and frisk" was not a dangerous weapon but instead was a set of burglar's tools. In upholding the validity of the stop, the Court stated that where the circumstances are reasonably suspicious, the ability of the police to make inquiry is indispensable to effective crime prevention.[35] The Court noted that the power to make such a limited intrusion has long been recognized.[36] Since "the statute makes it clear that the Legislature did not intend the stopping and frisking to be an arrest,"[37] it was reasoned that this kind of limited intrusion can reasonably be made on less than "probable cause." The standard of "reasonable suspicion" set by the statute was seen by the Court to be as equally capable of objective meaning as is "probable cause," thus providing a useful working standard for testing the legality of the stop.[38] The frisk was distinguished from a full search and was held to be a reasonable and constitutionally permissible precaution to minimize the danger to a police officer. The fact that the frisk produced a set of burglar's tools rather than a dangerous weapon was held not to be controlling. Since the officer, upon frisking the defendant, reasonably believed that he felt a knife, he had a right to remove the object from the defendant's pocket. Upon discovery that it was a packet of burglar's tools the officer had probable cause for an arrest and the right to seize the evidence.[39] Therefore, since the evidence was properly seized it was held to be legally admissible.

Judge Fuld, dissenting, reasoned that merely calling a search a "frisk" for a dangerous weapon cannot justify evading the "probable cause" requirement.[40] No search can be made without sufficient grounds to make a lawful arrest, *i.e.*, "probable cause." In his opinion, the "probable cause" to arrest in the instant case had been obtained unconstitutionally, and, therefore, the evidence revealed by the frisk should have been suppressed.

Judge Van Voorhis, in his dissenting opinion, which was stated in *People v. Sibron*,[41] a companion case, was willing to concede the theoretical reasonableness of the statute, but doubted that it could be reasonably applied in practice. In *Sibron*, a police officer, after watching the appellant engage in conversations with known narcotics

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[35] People v. Peters, 18 N.Y.2d 238, 242, 219 N.E.2d 595, 597, 273 N.Y.S.2d 217, 220 (1966).

[36] *Id.* at 244, 219 N.E.2d at 598, 273 N.Y.S.2d at 222.

[37] *Ibid.*

[38] *Id.* at 244, 219 N.E.2d at 599, 273 N.Y.S.2d at 222.

[39] *Id.* at 245, 219 N.E.2d at 599, 273 N.Y.S.2d at 222.

[40] *Id.* at 248, 219 N.E.2d at 601, 273 N.Y.S.2d at 225 (dissenting opinion).

[41] 18 N.Y.2d 603, 219 N.E.2d 196, 272 N.Y.S.2d 374 (1966) (memorandum decision).

addicts, approached the appellant in a restaurant and asked him to step outside. The policeman stated: "you know what I am looking for." Thereupon, the appellant reached into his pocket, and the policeman put his hand into the appellant's pocket intercepting appellant's hand, and found narcotics packets therein in a metal tinfoil wrapper. A motion to suppress the evidence was denied in the lower court and affirmed on appeal in a memorandum decision.[42] Judge Fuld dissented and voted to reverse for the reasons stated in his dissenting opinion in *People v. Peters.* Judge Van Voorhis, in dissent, focused his attack on that portion of the statute which permits police officers to retain as evidence "contraband" other than a weapon seized pursuant to a frisk. He reasoned that since "the power to frisk is practically unlimited, inasmuch as [it] . . . depends to a large extent upon the subjective operations of the mind of the officer," [43] it is inherently subject to abuse. However, the fact that a procedure is subject to abuse, does not preclude the possibility that it might still be reasonable. The frisk, he continued, is a reasonable exception to the "probable cause" rule, but only insofar as it can be justified as a precautionary measure rather than as a search. Apparently, to insure that the frisk remains a precautionary measure, Judge Van Voorhis believes that the officer should not be tempted to proceed with his frisk once he is satisfied that the suspect is not armed. Thus, if an officer knows that any evidence seized pursuant to his frisk will be admissible in court, he will be tempted to overstep the constitutional restrictions inherent in "stop and frisk," and make a general search of the person. In concluding, Judge Van Voorhis stated that the statute was unreasonable in that it placed a premium on abuse of the power to frisk, and undermined the public policy announced in *Mapp v. Ohio.*

The instant case and its companion, *Sibron,* mark an extension of the stop and frisk rule as announced in *Rivera.* In *Rivera,* the removal of the weapon from the suspect's pocket was justified on the ground that the officer had "probable cause" to make an arrest when he felt the hard object in the course of the frisk. The intrusion into the pocket was not part of the frisk based on reasonable suspicion, but was a search based on "probable cause" for arrest. In the *Peters* case, however, the Court considered the invasion of the suspect's clothing as an integral part of the frisk based on reasonable suspicion, and not as a search justified by "probable cause." The "probable cause" for arrest did not arise

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[42] People v. Sibron, 18 N.Y.2d 603, 219 N.E.2d 196, 272 N.Y.S.2d 374 (1966) (memorandum decision).

[43] *Id.* at 605, 219 N.E.2d at 197, 272 N.Y.S.2d at 376.

until the officer had removed the hard object from the suspect's person and examined it more closely. Although the Court adhered to the definition of a frisk as the patting of the exterior of the clothing, it nevertheless countenanced the further invasion on less than "probable cause." The decision in the *Sibron* case also indicates that the Court viewed the frisk as something more than a mere patting of the outer garments. In that case, the officer put his hand into the suspect's pocket without first having felt for the presence of weapons. The prosecution admitted that at the time of the intrusion the officer did not have probable cause for arrest. Thus, the silence of the Court implies that such an intrusion is part of the frisk and thus justified on mere reasonable suspicion.

Therefore, the statute, as construed, permits an extensive frisk of the suspect's interior clothing and the seizure of any articles unlawfully possessed. The conduct authorized by the statute appears to be only loosely circumscribed. According to *Sibron,* a preliminary "patting" is not necessary. A policeman acting under reasonable suspicion may immediately withdraw the contents of the suspect's pockets. According to *Peters,* the policeman may thereafter closely examine the contents of anything revealed, to the point of opening sealed packages in the search for a weapon. Although the statute authorizes a frisk as a precautionary measure, the Court in *Peters* condoned the further intrusion into the suspect's effects after the danger has been eliminated by "disarming" the suspect. Apparently, there is no requirement of a continuing suspicion of personal danger to justify the continuing intrusion. As long as the officer is able to satisfy the court that his conduct was initially motivated by a reasonable suspicion of personal danger, the evidence will be admitted.

By holding admissible all evidence seized during a "frisk" on "reasonable suspicion," the Court in the instant case has contributed to the realization of the worst fears of the opponents of the "Stop and Frisk" law. The very concept of "stop and frisk" presupposes that there is, in each case, a line between a frisk and a search. But the Court, as clearly evidenced in *Sibron* and *Peters,* has allowed that line to be crossed without "probable cause," and has left the door ajar for abuse. By going beyond the purpose of the frisk, *i.e.,* to insure the officer's safety, we may well be providing a pretext for making a general search of the person without "probable cause," because knowledge that all evidence found during a "stop and frisk" will most likely be admissible might prove an incentive to frisk all "suspicious looking" persons in the hope that something unlawful will be discovered. Even the strict upholding of the standard of "reasonable suspicion" suggested by the majority in *Peters* is not precaution enough against the dangers of "dragnet" procedures. In order to safeguard our fourth amendment guarantees the pro-

phylactic as well as the curative measures of the judicial process are needed.

There is good reason for the constitutional requirement of "probable cause" for search and seizure by law enforcement officials. "Requiring more would unduly hamper law enforcement. *To allow less would be to leave law-abiding citizens at the mercy of the officer's whim or caprice.*" [44] This thought must be kept in mind in any attempt to balance our society's interest in law enforcement against its constitutional guaranty of privacy. It is submitted that the reasonableness of the frisk on "reasonable suspicion," when seen in the light of the constitutional policy espoused in *Mapp,* depends on its being distinguishable from a search based on "probable cause." The decision of the majority in the instant case has made that distinction more apparent than real. Initially, as Judge Van Voorhis pointed out, the frisk rests on uncertain ground. If we accept it at all, we accept it as an exception to traditional "probable cause" requirements in order that the police may protect their own lives. But as an exception it must be strictly circumscribed. The confiscation provision of the "stop and frisk" statute, as interpreted by the Court in *Peters* and *Sibron,* authorizes conduct clearly beyond that which was approved in *People v. Rivera.* It is suggested that this interpretation is not likely to withstand the test of constitutional reasonableness.[45] In fact, to allow such confiscation, and to admit such evidence is to circumvent the *Mapp* exclusionary rule, thereby undermining the constitutional guarantees of the fourth amendment.

CRIMINAL LAW — USE OF INCRIMINATING CONFESSION OF CODEFENDANT IN JOINT TRIAL HELD GROUND FOR REVERSAL AS AN ABUSE OF TRIAL COURT'S DISCRETION AND VIOLATION OF NON-CONFESSOR'S CONFRONTATION RIGHT. — At a joint trial, a signed, post-arraignment confession of one defendant was admitted as corroborative evidence of a codefendant's testimony, despite non-confessing defendants' objections and motions for severance. The names of the non-confessing defendants had been deleted from the confession, and the jury was emphatically instructed, before and after its admission, that the confession was admissible only against the confessor. In reversing the convictions of the non-confessing defendants, the Court of Appeals for the Second Circuit

[44] Brinegar v. United States, 338 U.S. 160, 176 (1949). (Emphasis added.)
[45] See 50 CORNELL L.Q. 529 (1964), for a discussion which also suggests that the limitations on "stop and frisk" must be drawn at the *Rivera* holding.