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The sections analyzed are two of the more significant revisions in the estate area. However, there were also many other changes adopted by the Legislature such as those dealing with intestate distribution,⁷³ the settlement of small estates without formal administration,⁷⁴ simplification of probate practice,⁷⁵ and the payment of legal fees of an attorney-fiduciary prior to the settlement of account.⁷⁶ One authority has called these present changes the most significant legislation in the estate area since the 1930's.⁷⁷



THE "NO-KNOCK" AND "STOP AND FRISK" PROVISIONS OF THE NEW YORK CODE OF CRIMINAL PROCEDURE

Recently, in response to a message from Governor Rockefeller¹ urging favorable action on proposals submitted by the Combined Council of Law Enforcement Officials,² the New York Legislature enacted into law two statutes of major import concerning criminal procedure. These acts, commonly called "No-Knock"³ and "Stop and Frisk,"⁴ have been met with both commendation and criticism in the press.⁵

The purpose of this note is to discuss the factors which prompted the passage of such legislation, the probable effect of the provisions upon the field of criminal procedure, and the various constitutional issues which the acts present.

THE "NO-KNOCK" BILL

The "No-Knock" provision amends New York's Code of Criminal Procedure by permitting a police officer, in executing

⁷³ N.Y. DECED. EST. LAW § 83.

⁷⁴ N.Y. SURR. CT. ACT § 137.

⁷⁵ N.Y. SURR. CT. ACT §§ 140-42, 146, 153.

⁷⁶ N.Y. SURR. CT. ACT § 231-b. For a comprehensive analysis of these changes and many others, see SECOND REP.

⁷⁷ Arenson, *1963 Legislation Affecting Law of Trusts and Estates*, 9 N.Y.L.F. 439 (1963).

¹ 1964 N.Y. LEG. DOC. NO. 1, GOVERNOR'S MESSAGES TO THE LEGISLATURE, Crime and Criminal Justice 14-15.

² The Council is composed of the major law enforcement officials of the State of New York, including, among others, the Attorney General, and the New York State District Attorneys' Association.

³ N.Y. CODE CRIM. PROC. § 799 (effective July 1, 1964).

⁴ N.Y. CODE CRIM. PROC. § 180-a (effective July 1, 1964).

⁵ See, e.g., Time, March 20, 1964, p. 48; N.Y. Times, March 9, 1964, p. 8, col. 1.

a search warrant, to forcibly enter a building without prior notice of authority and purpose. However, such forcible entry may be effected only upon the direction of a magistrate who must first be satisfied by proof under oath that the "property sought may be easily and quickly destroyed or disposed of," or that the searching officer's life or person would be endangered by such notice.⁶

Prior to this amendment the officer was required to announce his authority and purpose and demand admission regardless of the danger or the nature of the property. If admission were refused, the officer could then use force to gain entrance. However, because the object of a search is often readily disposable contraband, such as narcotics or policy slips, any notice prior to entry will invariably frustrate the purpose of the search.⁷ In addition to the loss of evidence, an announcement of the policeman's presence jeopardizes his life since the occupant, being forewarned, has an opportunity to arm himself and resist.⁸ Dissatisfaction with such serious deficiencies in the law culminated in the enactment of the "No-Knock" provision under consideration.

An examination of any search statute must necessarily involve a consideration of the mandates of the fourth amendment. Its prohibition against unreasonable search and seizure is expressed by the maxim that every man's home is his castle.⁹ Similar provisions embodied in the constitutions and statutes of the several states serve to reinforce and further safeguard against infringement of this fundamental right of privacy.¹⁰ These provisions govern the procedures to be followed in acquiring a warrant as well as its content and manner of execution. For a better understanding

⁶ The new provision provides that "the officer may break open an outer or inner door or window of a building . . . (b) without notice of his authority and purpose, if the judge . . . issuing the warrant has inserted a direction therein that the officer executing it shall not be required to give such notice. The judge . . . may so direct only upon proof under oath, to his satisfaction, that the property sought may be easily and quickly destroyed or disposed of, or that danger to the life or limb of the officer or another may result, if such notice were to be given."

⁷ "It is common knowledge that contraband narcotics worth many thousands of dollars, and evidence of illegal gambling activities are frequently flushed down toilets and even burned upon the approach of the police." Memorandum of the New York State Combined Council of Law Enforcement Officials to the New York State Legislature in Relation to the Execution of Search Warrants (1964).

⁸ *Ibid.*

⁹ CORNELIUS, *THE LAW OF SEARCH AND SEIZURES* 12 (1926). In commenting on this maxim, an Assistant District Attorney of Kings County, has remarked that "a man's home is his castle if he uses it as a prince should—but should he be permitted to use it as a fortress to the detriment of his neighbor?" Interview With Mr. E. Golden, Assistant District Attorney of Kings County, in New York City, March 19, 1964.

¹⁰ N.Y. CONST. art. I, § 12 is typical of the state provisions.

of the "No-Knock" statute, an examination of the procedural safeguards surrounding it is warranted.

Acquiring a Warrant

Procedure

Under both the present and future law in New York, a police officer, desiring a warrant, is required to file an application with a judge who presides over a court of competent jurisdiction. The judge, before issuing a warrant, must examine the affiant under oath and take his deposition in writing. He must then decide whether the constitutional requirement of probable cause has been met. If the facts and circumstances so presented would cause a reasonable and prudent man to believe that an offense has been, or is being committed, probable cause has been established.¹¹ When a search warrant is issued without probable cause, the search is per se unreasonable;¹² it is not made reasonable even though it uncovers contraband, "fruits" or instrumentalities of crime.¹³ Finally, it must be emphasized that it is the judge who must decide whether sufficient probable cause exists—not the police officer.¹⁴ In deciding whether to issue the warrant, the judge must weigh society's right to combat crime against the fundamental right of privacy. Thus, our laws have placed an impartial and detached magistrate between the officer and the search, thereby providing a built-in deterrent to an unreasonable intrusion upon the individual's privacy.¹⁵

¹¹ *Brinegar v. United States*, 338 U.S. 160, 175-76 (1949). "In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Ibid.*

In order to execute a search warrant at night, a police officer must show, to the judge's satisfaction, why a daytime search would be unsuccessful. *People v. Carminati*, 236 N.Y.S.2d 921, 922 (Suffolk County Ct. 1962). See N.Y. CODE CRIM. PROC. § 801.

¹² Sobel, *A Comment on The Law of Search and Seizure*, THE PLEADER 28 (Kings County Criminal Bar Ass'n 1961).

¹³ *McDonald v. United States*, 335 U.S. 451 (1948); see *Byars v. United States*, 273 U.S. 28 (1927); *People v. DeVasto*, 198 App. Div. 620, 190 N.Y. Supp. 816 (2d Dep't 1921).

¹⁴ *Jones v. United States*, 362 U.S. 257, 273 (1960) (dissenting opinion). "Though the police are honest and their aims worthy, history shows they are not appropriate guardians of the privacy which the Fourth Amendment protects." *Ibid.*

¹⁵ For cases in which the judge held that there was insufficient cause to issue the warrant see, e.g., *Borrego v. State*, 62 So. 2d 43, 45-47 (Fla. 1952); *Emberton v. Commonwealth*, 269 S.W.2d 206 (Ky. 1954).

Content

A further protection afforded the individual by the fourth amendment is that the warrant must describe the place to be searched and the articles to be seized with particularity. The failure to meet these requirements will result in the warrant being declared invalid.¹⁶

Sufficient particularity of location is present if the warrant identifies the premises to be searched in a manner that will enable the officer executing the warrant to locate them with reasonable effort.¹⁷ However, it is not essential that either the owner or the occupant of the building be named in the warrant.¹⁸ It is clear, therefore, that because the police officer's function is ministerial, the location of the search must not be left to his discretion, nor may he exceed the directions contained in the warrant.¹⁹ The warrant must also specify and describe the property to be seized with sufficient certainty to make it "identifiable."²⁰ In *Marron v. United States*,²¹ the United States Supreme Court stated that:

The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.²²

However, the "fruits" of a crime, criminal instrumentalities and property, the possession of which is itself a crime, may be seized as incidental to the search even though such items are not specified in the warrant.²³ If the foregoing requirements are not met or the search is made without a warrant, the officer may be subjected to civil and criminal liability.²⁴ The evidence seized in such a search is inadmissible.²⁵ Furthermore, even if all the

¹⁶ *McGinnis v. United States*, 227 F.2d 598 (1st Cir. 1955); *United States v. Hinton*, 219 F.2d 324 (7th Cir. 1955).

¹⁷ *Fine v. United States*, 207 F.2d 324 (6th Cir. 1953), *cert. denied*, 346 U.S. 923 (1954).

¹⁸ *Dixon v. United States*, 211 F.2d 547, 549 (5th Cir. 1954).

¹⁹ *In re* No. 191 Front Street, 5 F.2d 282, 285 (2d Cir. 1924).

²⁰ 1 VARON, SEARCHES, SEIZURES AND IMMUNITIES 291 (1961).

²¹ 275 U.S. 192 (1927).

²² *Id.* at 196.

²³ *Harris v. United States*, 331 U.S. 145, 154 (1947); *People v. Manzi*, 38 Misc. 2d 114, 117, 237 N.Y.S.2d 738, 741 (Sup. Ct. 1963).

²⁴ Although both the New York and United States legislatures have enacted statutes imposing criminal liability in certain circumstances they have been advanced in only a very few cases. See FED. CODE CRIM. P. §§ 2234-35; N.Y. CODE CRIM. PROC. §§ 811-12; N.Y. PEN. LAW §§ 1786, 1847.

²⁵ *Mapp v. Ohio*, 367 U.S. 643 (1961). Since a warrant which does not fulfill the procedural requirements is "unreasonable," evidence obtained under its order would be inadmissible.

above procedural requirements are fulfilled, but the methods used in executing the warrant amount to "conduct that shocks the conscience," the evidence so obtained will also be excluded.²⁶

Constitutionality of New Amendment

As has been noted, the new provision gives the officer, upon judicial direction, the right to enter forcibly without notice in executing a warrant. The decision in *Mapp v. Ohio*²⁷ is relevant to a discussion of this provision since it held that evidence obtained by a state in violation of the fourth amendment was unconstitutionally seized and inadmissible in the state courts by virtue of the fourteenth amendment. This exclusionary rule announced in *Mapp* applies not only to the physical evidence illegally obtained, but also to the testimony of officials based upon their observations made during the course of the illegal search.²⁸ It is clear, therefore, that if the new statute authorizes an "unreasonable search and seizure," it must necessarily follow that the statute is unconstitutional, and evidence obtained pursuant thereto is inadmissible.

Research has not revealed a single state or federal statute sanctioning a forcible entry without notice. However, an early Connecticut decision²⁹ and numerous cases in California³⁰ have judicially engrafted exceptions to the traditional notice requirement in their states. In addition, the United States Supreme Court has recently indicated that the notice requirement may be dispensed with in certain circumstances.³¹

Over 140 years ago the Connecticut Supreme Court of Errors recognized that exceptional circumstances could justify an entry into a home without notice.³² After first announcing the traditional rule that notice must be given before entry is effected, the court went on to reason that if the officer had announced his presence, his life would have been seriously endangered. The court stated that "it would be a palpable perversion of a sound rule to extend the benefit of it to a man . . . who waited only for a demand,

²⁶ *Rochin v. California*, 342 U.S. 165, 172 (1952). The conduct of the police which was deemed "shocking" was the physical overpowering of the defendant and the forced application of a stomach pump to extricate narcotics which he had swallowed.

²⁷ *Supra* note 25.

²⁸ *Williams v. United States*, 263 F.2d 487, 489 (D.C. Cir. 1959). As has been aptly stated by Judge Cardozo, often "the criminal is to go free because the constable has blundered." *People v. Defore*, 242 N.Y. 13, 21, 150 N.E. 585, 587, *cert. denied*, 270 U.S. 657 (1926).

²⁹ *Read v. Case*, 4 Conn. 166 (1822).

³⁰ *E.g.*, *People v. Hammond*, 54 Cal. 2d 846, 357 P.2d 289 (1960); *People v. Maddox*, 46 Cal. 2d 301, 294 P.2d 6, *cert. denied*, 352 U.S. 858 (1956); *People v. Miller*, 162 Cal. App. 96, 328 P.2d 506 (1958).

³¹ *Ker v. California*, 374 U.S. 23, 39 (1963).

³² *Read v. Case*, *supra* note 29.

to wreak . . . [upon the officer] the most brutal and unhallowed vengeance."³³

In California, both the arrest³⁴ and search³⁵ statutes require that notice of authority and purpose, followed by a demand for admission be made before the police can forcibly enter. Notwithstanding these provisions its courts have held that forcible entries made without notice are legal, and the evidence obtained thereby admissible, when "exigent circumstances" exist.³⁶ Thus, in *People v. Miller*,³⁷ officers armed with an arrest warrant, forcibly entered the defendant's home without prior notice, arrested the defendant and seized evidence of narcotics. The court held that the entrance was lawful and the evidence so obtained admissible, reasoning that where technical compliance would probably permit the destruction of incriminating evidence such compliance is not required.³⁸ Similarly, in *People v. Hammond*,³⁹ officers forcibly entered the defendant's home without notice and placed him under arrest. In justifying the entry and upholding defendant's conviction, the court concluded that "the law does not demand a strict compliance with the provisions of . . . [the statute] in every case."⁴⁰ Compliance was excused because the officers had probable cause to believe that if "they informed the defendant of their presence and demanded admission before breaking into the premises, he [defendant] might attempt to dispose of the narcotics . . . or might attempt to obtain and use his gun."⁴¹

³³ *Id.* at 170.

³⁴ "[A] peace officer may break open the door or window of the house in which the person to be arrested is . . . after having demanded admittance and explained the purpose for which admittance is desired." CAL. PEN. CODE § 844 (West 1956).

³⁵ "The officer may break open any outer or inner door or window of a house or any part of a house, or anything therein, to execute a warrant, is, after notice of his authority and purpose, he is refused admittance." CAL. PEN. CODE § 1531 (West 1956).

³⁶ The exigencies recognized in California are (1) an increase in the officer's peril, and (2) the possibility of frustrating the purpose of his presence by such notice. *People v. Maddox*, *supra* note 30, at 306, 294 P.2d at 9. It should be noted that six years prior to *Mapp* California adopted the exclusionary rule in *People v. Cahan*, 44 Cal. 2d 434, 282 P.2d 905 (1955).

³⁷ *Supra* note 30.

³⁸ *People v. Miller*, *supra* note 30, at 98, 328 P.2d at 507.

³⁹ *Supra* note 30.

⁴⁰ *People v. Hammond*, *supra* note 30, at 854, 357 P.2d at 294.

⁴¹ *Ibid.* In *People v. Maddox*, the court stated that "suspects have no constitutional right to destroy or dispose of evidence, and no basic constitutional guarantees are violated because an officer succeeds in getting to a place where he is entitled to be more quickly than he would had he complied . . ." *Supra* note 30, at 306, 294 P.2d at 9. See FED. CODE CRIM. P. § 2232, making it a federal crime to dispose of goods in order to prevent their seizure.

The constitutionality of the California position was tested in the United States Supreme Court in *Ker v. California*.⁴² Although prior to this case there had been numerous search and seizure cases concerning the notice requirement, the argument that exigent circumstances could excuse literal compliance had apparently never been advanced in the United States Supreme Court. In *Ker*, the defendant moved to suppress the evidence seized, contending that because the officers had entered his home without notice, the search was unreasonable and the evidence obtained thereby inadmissible. The Court noted that the California courts had, by judicial construction, determined that the notice requirement of their statute was not absolute when, as here, exigent circumstances were present. In examining this construction in light of the fourth amendment, the Court upheld its constitutionality and remarked that the states were not precluded by *Mapp* from establishing workable standards of search and seizure "to meet 'the practical demands of effective criminal investigation and law enforcement'" as long as those standards complied with the commands of the fourth amendment.⁴³ The majority concluded that, considering the exigent circumstances, "the officer's method of entry, sanctioned by the law of California, was not unreasonable under the standards of the Fourth Amendment as applied to the States through the Fourteenth Amendment."⁴⁴

The New York provision permitting forcible entry, without notice in specified "exigent circumstances," is clearly more protective of individual rights than the California provision, with its judicially engrafted exception, examined in *Ker*. In California, it is the executing police officer who makes the determination regarding the existence of exigent circumstances. Under the new provision in New York it is a detached *magistrate* who must be convinced that such circumstances actually exist. Since the California procedure has successfully withstood constitutional attack, it is not unreasonable to assume that New York's new amendment, with substantially greater safeguards against fourth amendment infringement, will likewise be held constitutional.

THE "STOP AND FRISK" LAW

Section 180-a of the Code of Criminal Procedure, commonly referred to as the "Stop and Frisk Law," authorizes a police officer to stop a person in a public place, demand that he identify himself and explain his actions if the officer "reasonably suspects" that such person has committed, is committing, or is about to

⁴² 374 U.S. 23 (1963).

⁴³ *Id.* at 34.

⁴⁴ *Id.* at 40-41. (Emphasis added.)

commit a felony or serious misdemeanor.⁴⁵ If during such questioning, the officer "reasonably suspects" that his life or limb is in danger, he may also search that person for dangerous weapons. Any article uncovered by the officer, the possession of which may be a crime, is subject to immediate confiscation. After the search the policeman must either return the article, if lawfully possessed, or arrest the suspect.⁴⁶

Circumstances Surrounding Enactment

Prior to the enactment of this statute, which becomes effective July 1, 1964, there was some doubt whether an officer in New York could detain a suspect for questioning if he did not have an arrest warrant and there were no grounds for arrest.⁴⁷ It was, however, patently clear that grounds for arrest had to precede a search made without a warrant unless the search was consented to.⁴⁸ The grounds for arrest were limited by statute to four major situations: (1) where a crime was committed or attempted in the officer's presence or where he has reasonable grounds for believing that a crime is being committed in his presence; (2) where the person arrested had committed a felony, although not in the officer's presence; (3) where a felony had in fact been committed, and the officer had reasonable cause for believing the person to be arrested was the felon; and, (4) where the officer had reasonable cause to believe a felony had been committed and that the person to be arrested was the felon, though it should later appear that no felony had been committed, or, if committed, that the person arrested had not committed it.⁴⁹ An arrest made

⁴⁵ N.Y. CODE CRIM. PROC. § 180-a(1).

⁴⁶ N.Y. CODE CRIM. PROC. § 180-a(2). Although the statute is commonly referred to as the "Stop and Frisk Law" it authorizes a more intensive investigation than that usually associated with a "frisk." For a case distinguishing a "frisk" from a "search" see *Kalwin Business Men's Ass'n, Inc. v. McLaughlin*, 126 Misc. 698, 701, 214 N.Y. Supp. 99, 102 (Sup. Ct.), *rev'd on other grounds*, 216 App. Div. 6, 214 N.Y. Supp. 507 (2d Dep't 1926).

⁴⁷ For cases indicating that police cannot detain a suspect where grounds for arrest do not exist, see *Arnold v. State*, 255 App. Div. 422, 425, 8 N.Y.S.2d 28, 30 (3d Dep't 1938), *rev'd on other grounds*, 280 N.Y. 326, 20 N.E.2d 774 (1939); *People v. Tinston*, 6 Misc. 2d 485, 163 N.Y.S.2d 554 (Magis. Ct. 1957). *Contra*, *People v. Entrialgo*, 19 App. Div. 2d 509, 245 N.Y.S.2d 850 (2d Dep't 1963). New York defines 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. For a delineation of the grounds for arrest when no warrant has been issued, see note 49 *infra*.

⁴⁸ *E.g.*, *People v. Loria*, 10 N.Y.2d 368, 179 N.E.2d 478, 223 N.Y.S.2d 462 (1961); *People v. Chiagles*, 237 N.Y. 193, 142 N.E. 583 (1923).

⁴⁹ N.Y. CODE CRIM. PROC. § 177. Prior to 1958, the law required that a felony had in fact have been committed, but as a result of an amendment that year, it is now sufficient if the police officer had "probable cause" to

on any of the foregoing grounds also gives the officer the right to search the arrested party.⁵⁰

Although police in New York have always thought that the grounds for arrest and search were overly restrictive,⁵¹ their objections were somewhat mollified by the fact that any incriminating evidence obtained through a search made incident to an unlawful arrest had been held to be admissible on trial.⁵² However, since the decision of the United States Supreme Court in *Mapp v. Ohio*, the New York Court of Appeals has indicated that such evidence would now be inadmissible.⁵³ As a result, law enforcement officials argue that they have been seriously handcuffed at the expense of the public's safety.⁵⁴ To enable them to fulfill their sworn duty, they petitioned the Legislature to enact laws authorizing them to detain, question, and search suspicious persons on what they consider more realistic grounds than the present law allows.⁵⁵ These efforts culminated in the enactment of the "Stop and Frisk" statute. Under this law, the police may

believe the crime to be a felony, although it is later found that it actually was a misdemeanor or even no crime at all. N.Y. CODE CRIM. PROC. § 177(4). "Reasonable cause" as used in § 177 of the New York Code of Criminal Procedure is a synonym for the term "probable cause" used in the fourth amendment. Sobel, *A Comment on The Law of Search and Seizure*, THE PLEADER 28 (Kings County Criminal Bar Ass'n 1961).

These provisions are essentially a codification of the common law of arrest. PAPERNO & GOLDSTEIN, CRIMINAL PROCEDURE IN NEW YORK §§ 2-3 (1960).

⁵⁰ *People v. Loria*, *supra* note 48.

⁵¹ Memorandum of the New York State Combined Council Of Law Enforcement Officials to the New York State Legislature In Relation to Temporary Questioning and Search for Weapons (1964).

⁵² Prior to *Mapp v. Ohio*, the Court of Appeals had rejected adoption of the exclusionary rule on four principal occasions. *People v. Richter's Jewelers, Inc.*, 291 N.Y. 161, 51 N.E.2d 690 (1943); *People v. Defore*, 242 N.Y. 13, 150 N.E. 585, *cert. denied*, 270 U.S. 657 (1926); *People v. Chiagles*, *supra* note 48; *People v. Adams*, 176 N.Y. 351, 68 N.E. 636 (1903), *aff'd*, 192 U.S. 585 (1904).

⁵³ *People v. Caliente*, 12 N.Y.2d 89, 187 N.E.2d 550, 236 N.Y.S.2d 945 (1962) (dictum); see *People v. Lombardi*, 18 App. Div. 2d 177, 239 N.Y.S.2d 161 (2d Dep't 1963); *People v. Rivera*, 38 Misc. 2d 586, 238 N.Y.S.2d 620 (Sup. Ct. 1963). For the judicial procedures involved in suppressing evidence obtained as a result of an illegal search and seizure see N.Y. CODE CRIM. PROC. §§ 813-c, 813-d, 813-e.

⁵⁴ "For the first twelve months of the exclusionary ruling, narcotics convictions in New York County—where New York's drug problem is heaviest—were down 38.5%. . . . During the exclusionary rulings first year, policy cases in the New York City criminal courts dropped more than 35%." COMBINED COUNCIL OF LAW ENFORCEMENT OFFICIALS, LET YOUR POLICE-POLICE! 4 (1963). See Sobel, *A Comment on The Law of Search and Seizure*, THE PLEADER 2-3 (Kings County Criminal Bar Ass'n 1961).

⁵⁵ Memorandum of the New York State Combined Council Of Law Enforcement Officials to the New York State Legislature In Relation to Temporary Questioning and Search for Weapons (1964).

detain and search a person on the ground that the officer reasonably suspects that a crime has been, is being, or is about to be committed, regardless of whether there is cause for arrest.

Constitutional Questions

By its nature, the "Stop and Frisk" legislation brings into conflict society's need for order and security and its desire to maintain individual privacy and liberty. Traditionally the primary constitutional prerequisite for police infringement of personal freedom has been "probable cause" for believing that a crime is being or has been committed.⁵⁶ Thus, the following questions bearing on the validity of the statute are raised. First, is the activity authorized by the statute, in fact, an arrest? If so, is the standard employed, namely, "reasonable suspicion," a constitutional yardstick? Secondly, even if the statute's provisions are held to be valid because they do not authorize that quantum of personal restraint necessary to constitute an arrest, does it necessarily follow that a search can be made incident to the temporary stopping and questioning which the statute authorizes?

If the statute's provisions constitute an arrest, the standard employed, "reasonable suspicion," must be equivalent to "probable cause" or the statute will be held unconstitutional. On the other hand, even though the authorized detention is construed to be something less than an arrest, the statutory standard, "reasonable suspicion," may still be deemed wanting.

American case law clearly indicates that "probable cause" is something more than common rumor, suspicion, or even a showing of strong reason to suspect.⁵⁷ In one of its most recent pronouncements the United States Supreme Court stated that:

the lawfulness of the arrest without warrant . . . must be based upon probable cause, which exists "where the facts and circumstances within [the officers'] knowledge . . . [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed."⁵⁸

While the standard to be met is a stringent one, "probable cause" has been found to exist⁵⁹ even though the officer acts upon evidence

⁵⁶ U.S. CONST. amend. IV. *Henry v. United States*, 361 U.S. 98, 100-02 (1959); *Brinegar v. United States*, 338 U.S. 160, 164 (1949).

⁵⁷ *Henry v. United States*, 361 U.S. 98, 101 (1959); *Brinegar v. United States*, 338 U.S. 160, 175 (1949); *People v. O'Neill*, 11 N.Y.2d 148, 153, 182 N.E.2d 95, 98, 227 N.Y.S.2d 416, 420 (1962).

⁵⁸ *Ker v. California*, 374 U.S. 23, 34-35 (1963).

⁵⁹ *Brinegar v. United States*, 338 U.S. 160, 172-73, 175 (1949); *People v. Francis*, 31 Misc. 2d 503, 504, 221 N.Y.S.2d 864, 865 (N.Y. County Ct. 1961).

insufficient to convict the accused. The test of "probable cause" has been justified as

affording the best compromise that has been found for accommodating these often opposing interests [right of privacy against 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.⁶⁰

Although the need for "probable cause" to arrest as well as its meaning have been made clear, the Supreme Court has not yet decided whether the stopping and questioning of suspicious persons constitutes an arrest.⁶¹ Consequently, it is not at all apparent which standard the Court would apply assuming it finds that a stopping and questioning does not require the application of the standard of "probable cause."

The New York State Legislature, aware that any statute enacted by it authorizing an arrest on grounds less than "probable cause" would be found unconstitutional, has carefully labeled the activity set forth in the statute as a "stopping for temporary questioning" and the grounds necessary for it as "reasonable suspicion." "Reasonable suspicion" was intended to be something less than "probable cause," although exactly what it connotes remains an open question.⁶² Since the constitution requires "probable cause" for an arrest, it must follow that if the activity sanctioned by the statute is tantamount to an arrest, then the statute is unconstitutional. In this connection, it has been argued that when a suspect is stopped and required to identify himself and explain

⁶⁰ *Brinegar v. United States*, 338 U.S. 160, 176 (1949).

⁶¹ In a recent case, *Rios v. United States*, 364 U.S. 253 (1960), the government urged that the Court recognize the right to question suspicious persons. Remington, *The Law Relating To "On The Street" Detention, Questioning And Frisking Of Suspected Persons And Police Arrest Privileges In General*, 51 J. CRIM. L., C. & P.S. 386, 390 (1960). However, the Court declined to discuss the question and sent the case back to the trial court. "[T]he relative dearth of authority in point can be explained by the fact that few litigants have ever seriously contended that it was illegal for an officer to stop and question a person unless he had 'probable cause' for a formal arrest." *United States v. Bonanno*, 180 F. Supp. 71, 78 (S.D.N.Y. 1960).

⁶² See Leagre, *The Fourth Amendment and the Law of Arrest*, 54 J. CRIM. L., C. & P.S., 393, 413 (1963); Foote, *The Fourth Amendment: Obstacle Or Necessity In The Law of Arrest?*, 51 J. CRIM. L., C. & P.S. 402, 402-03 (1960). To illustrate the confusion surrounding the use of phrases such as "reasonable suspicion" and "reasonable ground to suspect," see *DeSalvatore v. State*, 52 Del. 550, 163 A.2d 244 (1960). There the court interpreted the Uniform Arrest Act's provision of "reasonable ground to suspect" as equivalent to "probable cause," thereby emasculating the result intended by the statute.

his actions, he is actually being placed under arrest.⁶³ This view is based on the belief that the activity sanctioned by the statute, rather than the nomenclature applied, determines whether an arrest has been made. The proponents of this position would determine whether the statute's provisions result in an actual restraint of the person. If it does authorize such a restraint, there has been an arrest.⁶⁴ Lord Justice Devlin has stated:

The police have no power to detain anyone unless they charge him with a specified crime and arrest him accordingly. Arrest and imprisonment are in law the same thing. *Any form of physical restraint is an arrest* and imprisonment is only a continuing arrest. If an arrest is unjustified, it is wrongful in law and is known as false imprisonment. The police have no power whatever to detain anyone on suspicion or for the purpose of questioning him.⁶⁵

If the United States Supreme Court decides that the "stop" provision of the statute authorizes an arrest, the statute will unquestionably be declared unconstitutional as sanctioning an arrest on less than "probable cause." It then follows that the second section, permitting searches where "probable cause" is also lacking, is likewise unconstitutional. On the other hand, even if the Court finds the "stopping and questioning" section constitutional, it may still hold the search provision unconstitutional. For it does not necessarily follow that because a stopping and questioning on less than "probable cause" is allowed, that a search incident thereto will also be tolerated. In fact, it is well-accepted that the fourth amendment will not allow a search on less than probable cause.⁶⁶

Another distinct possibility is that the statute will be held unconstitutional because of its vagueness.⁶⁷ The statute does not define "temporary questioning" or mention how long this "temporary questioning" may continue. Neither does it indicate how extensive an inquiry into the suspect's actions will be permitted. The law permits a stopping and questioning of one *about to commit* a

⁶³ United States v. Scott, 149 F. Supp. 837 (D.D.C. 1957). "Any restraint of liberty is an arrest," People v. Esposito, 118 Misc. 867, 872, 194 N.Y. Supp. 326, 332 (Spec. Sess. 1922) (memorandum decision); Limbeck v. Gerry, 15 Misc. 663, 39 N.Y. Supp. 595 (Sup. Ct. 1896). See generally Foote, *Safeguards in the Law of Arrest*, 52 Nw. U.L. Rev. 16 (1957); Waite, *The Law of Arrest*, 24 TEXAS L. REV. 279 (1945).

⁶⁴ Foote, *The Fourth Amendment: Obstacle Or Necessity In The Law Of Arrest?*, 51 J. CRIM. L., C. & P.S. 402, 402-08 (1960).

⁶⁵ DEVLIN, *The Criminal Prosecution In England* 68 (1960) (Emphasis added.) The New York Legislature may have subconsciously realized the semantical nature of its distinction since the new statute has been placed in that section of the Code of Criminal Procedure entitled: "Arrest by an Officer, without a Warrant." N.Y. CODE CRIM. PROC. ch. IV.

⁶⁶ See text accompanying notes 11-13 *supra*.

⁶⁷ Cf. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952).

felony or serious misdemeanor. This term presents the problem of whether an officer may stop a person whom he believes is *about to commit* a crime. The courts may well invalidate this provision as authorizing police investigation in the absence of any overt criminal act. The statute would here seem to authorize a prior restraint upon personal liberty. Perhaps the most important, and most unclear portion of the statute, is the establishment of "reasonable suspicion" as the standard to be met rather than the traditional, judicially-tested standard of "probable cause." It has been cogently stated that "if probable cause is no longer to be the test . . . where is the line to be drawn short of indiscriminate police detention on hunch?"⁶⁸

The basic position of the opponents of the statute was succinctly stated by Mr. Justice Jackson:

It is said that if such arrests and searches [based on less than probable cause] cannot be made, law enforcement will be more difficult and uncertain. But, the forefathers, after consulting the lessons of history, designed our constitution to place obstacles in the way of a too permeating police surveillance, which they seemed to think was a greater danger to a free people than the escape of some criminals from punishment.⁶⁹

Others have suggested that there are other less objectionable and even more effective approaches to efficient law enforcement.⁷⁰

Similar Provisions in Other States

Other states have also recognized police entreaties for legislation allowing them to question and search suspects in situations where less than the traditional ground of "probable cause" exists. Three states, Delaware, New Hampshire and Rhode Island, have adopted the provisions of the Uniform Arrest Act suggested by the Interstate Commission on Crime.⁷¹ This act authorizes the stopping of persons when the officer has "reasonable grounds" to suspect that a person⁷² is committing, has committed or is about to commit a crime. Such a stopping is not considered to be an arrest, but merely a "detention" which could continue for as long as two hours, so as to allow further investigation. During this

⁶⁸ Foote, *The Fourth Amendment: Obstacle Or Necessity In The Law Of Arrest?*, 51 J. CRIM. L., C. & P.S. 402, 407 (1960).

⁶⁹ United States v. De Re, 332 U.S. 581, 595 (1948).

⁷⁰ Foote, *The Fourth Amendment: Obstacle Or Necessity In The Law Of Arrest?*, 51 J. CRIM. L., C. & P.S. 402, 405-06 (1960).

⁷¹ Remington, *The Law Relating To "On The Street" Detention, Questioning And Frisking Of Suspected Persons And Police Privileges In General* 51 J. CRIM. L., C. & P.S. 386 (1960); DEL. CODE ANN. titl. 11, §§ 1902-03 (1958); N.H. REV. STAT. ANN. §§ 594.2-594.3 (1960); R.I. GEN. LAWS ANN. tit. 12, ch. 7, §§ 1-2 (1956).

⁷² UNIFORM ARREST ACT § 2. See Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315 (1942).

period the suspect can also be searched for dangerous weapons and contraband. If the investigation determines that a crime has not been committed, the suspect is released and his detention is not recorded, thereby hopefully eliminating the possibility of damage to his reputation.⁷³ As a corollary, if the officer carries out the detention in accordance with the statute, he becomes immune from civil and criminal suit. The few cases which have considered the statute have held the provision permitting a detention constitutional.⁷⁴ However, the section which authorizes a search for weapons incident to the detention has not yet been construed in any of the states which have adopted the Uniform Arrest Act.

A number of other states have also enacted legislation permitting police to stop and question suspicious persons on somewhat similar grounds.⁷⁵ Still other states, notably California, have authorized such activity by judicial decision rather than by statute.⁷⁶ Those courts which have permitted stopping and questioning based on varying degrees of suspicion have, in addition, usually countenanced a search of such suspects where police believe it to be necessary for their safety.⁷⁷

CONCLUSION

While there is sharp disagreement as to the validity of both of the statutes discussed, their advocates, as well as their opponents, agree that effective suppression of crime is an essential goal of society. The means by which this goal is to be achieved, however, divides the opposing positions. The controversy primarily revolves around the weight to be accorded to civil liberties on the one side, and police efficiency on the other. By elevating the right of privacy to an absolute, less effective law enforcement is certainly foreseeable. By extending the latitude of police power too far, abuses are equally possible. A balance or middle-ground satisfactory to all must be struck. While the "No-Knock" provision appears to contain sufficient safeguards against constitutional infringement so as to be classified as occupying the middle-ground, the "Stop and Frisk" provision does not, and seems likely to succumb to constitutional attack. Both statutes, however, will certainly be the subject of careful scrutiny by the courts in the future.

⁷³ *Id.* at 322.

⁷⁴ *Cannon v. State*, 168 A.2d 108 (Del. 1961); *De Salvatore v. State*, *supra* note 62; *Kavanagh v. Stenhouse*, 174 A.2d 560 (R.I. 1961), *appeal dismissed*, 368 U.S. 516 (1962).

⁷⁵ HAWAII REV. LAWS tit. 30, ch. 255, §§ 4-5 (1955); MASS. ANN. LAWS ch. 41, § 98 (1961).

⁷⁶ *E.g.*, *Gisske v. Sander*, 9 Cal. App. 13, 98 Pac. 43 (1908); *People v. Hennenman*, 367 Ill. 151, 10 N.E.2d 649 (1937); *State v. Hatfield*, 112 W. Va. 424, 164 S.E. 518 (1932).

⁷⁷ *E.g.*, *People v. Martin*, 46 Cal. 2d 106, 293 P.2d 52 (1956); *Gisske v. Sander*, *supra* note 76.