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The Art of Frisking

Joseph G. Cook

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*JOSEPH G. COOK**

I. INTRODUCTION

THE effectiveness of a system of law enforcement is manifested as significantly in its success in preventing criminal behavior as in its ability to apprehend and convict offenders. To the extent a law enforcement officer can intercept contemplated criminal activity before it reaches fruition, society has benefited.[1] To sanction such preventive action, however, entails an accommodation of fourth amendment protections to permit intrusions upon personal security under circumstances short of probable cause to arrest.

The power to temporarily detain individuals suspected of engaging in criminal activity was accorded constitutional legitimacy in *Terry v. Ohio*.[2] Beyond the authority to temporarily detain,[3] the Court in *Terry* recognized that the circumstances confronting the officer at the time could provide justification for a cursory pat-down, or "frisk" for weapons. Again, such official conduct does not require probable cause in the traditional sense and, whatever may be said regarding the insignificance of a limited field detention, a frisk cannot so easily be dismissed as a "petty indignity"[4] undeserving of constitutional scrutiny.[5]

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* Professor of Law, University of Tennessee. Professor Cook received his B.A. and J.D. from the University of Alabama, where he was a member of the editorial board of the Law Review, and his LL.M. from Yale Law School.

1. For example, while the defendant in Terry v. Ohio, 392 U.S. 1 (1968), was arrested and convicted for the illegal possession of a concealed weapon, assuming the officers apprehensions were correct, an armed robbery was prevented.

2. 392 U.S. 1 (1968).

3. See Cook, Varieties of Detention and the Fourth Amendment, 23 Ala. L. Rev. 287 (1971); LaFave, "Street Encounters" and the Constitution: Terry, Sibron, Peters, and Beyond, 67 Mich. L. Rev. 40 (1968).

4. 392 U.S. at 17. The Court quoted from Priar & Martin, Searching and Disarming Criminals, 45 J. Crim. L.C. & P.S. 481 (1954): "'[T]he officer must feel with sensitive fingers every portion of the prisoner's body. A thorough search must be made of the prisoner's arms and armpits, waistline and back, the groin and area about the testicles, and entire surface of the legs down to the feet.'" 392 U.S. at 17 n.13.

5. "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." Id. at 17 (footnote omitted).

Constitutional concern, however, is not limited to the immediate invasion of personal integrity but further attaches to the snowballing effect which has typically been the result in virtually every case involving frisking which reaches the appellate level. By establishing that degree of suspicion constitutionally mandated, an officer is entitled to temporarily detain a suspect. If he may reasonably fear for his own safety, a superficial pat-down for weapons may be carried out. If the pat-down reasonably leads the officer to believe the suspect possesses a deadly weapon, he has probable cause to arrest for such possession. If he can make a legal arrest, a thorough search of the person of the arrestee is permissible.[6]

This article focuses upon the developing standards of constitutional reasonableness in the practice of frisking. For purposes of analysis the discussion examines the basic constitutional standard fostered by *Terry*, the problems concerned with the decision to initiate a frisk, and the propriety of subsequent actions by the officer once the frisk is carried out.

II. THE *Terry* CONSTITUTIONAL STANDARD

The employment of frisking as an investigative tool did not, of course, begin with *Terry* but had been recognized by the common law[7] and occasionally codified.[8] Nevertheless, for the technique to receive endorsement by the Supreme Court inevitably had a profound impact. Not only was all doubt removed from the minds of law enforcement officers and their advisors in regard to the admissibility of evidence secured as a result of such practices, but more important, as the spate of post-*Terry* decisions concerning frisking demonstrated, appellate courts were provided with a basis for presumptive legitimacy in field detention cases, allowing them to explore with greater particularity the varied factual patterns to which *Terry* does not provide clear responses.

In *Terry* a plainclothes detective was patrolling a downtown area of Cleveland when his attention was attracted by two men standing on a corner.[9] After observing their movements for ten or twelve minutes,

6. See Chimel v. California, 395 U.S. 752, 762-63 (1969).

7. See L. Tiffany, D. McIntyre, Jr. & D. Rotenberg, Detection of Crime 45-48 (1967); Stern, Stop and Frisk: An Historical Answer to a Modern Problem, 58 J. Crim. L.C. & P.S. 532 (1967).

8. See, e.g., Ill. Ann. Stat. ch. 38, § 108-1.01 (Smith-Hurd 1970); La. Code Crim. Pro. Ann. art. 215.1 (West Supp. 1972); N.Y. Crim. Proc. Law § 140.50 (McKinney 1971).

9. The Court accepted with equanimity the testimony of the officer that he merely sensed that the two were up to no good. Noting that the officer had thirty-nine years experience as a policeman, the Court left no doubt that it would honor such experience and expertise in appraising the reasonableness of the conclusions and actions of an officer. 392 U.S. at 5.

including their peering into a store window several times and consulting a third party, the officer became convinced that the men were planning a robbery and decided to investigate the matter further. He identified himself and asked the suspects their names. Receiving a mumbled response, the officer grabbed the petitioner, spun him around, placed him between himself and the other two suspects, and patted down the outside of his clothing, detecting what he took to be a gun in the breast pocket of the petitioner's overcoat. The officer then reached inside the pocket but was unable to remove the weapon. He removed the petitioner's overcoat and found a .38 caliber revolver in the pocket. The petitioner was convicted of carrying a concealed weapon.[10] In upholding the frisk as reasonable, the Court was not content to distinguish such methods from a full-blown search.[11] Considering the problem within the context of the fourth amendment, the question remained whether the conduct of the officer under the circumstances was reasonable.[12] It did not follow that because the officer has reason to briefly detain the suspect under suspicious circumstances, the authority to frisk was an automatic concomitant thereof. As stated by the Court: "[T]he 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."[13] Applying this standard to the facts, the Court concluded that the action taken by the officer was reasonable.[14]

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10. State v. Terry, 5 Ohio App. 2d 122, 214 N.E.2d 114 (1966).

11. "[I]t 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.'" 392 U.S. at 16.

12. "[I]t 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?" Id. at 21-22 (citations omitted).

13. Id. at 27 (citations omitted). Cf. Harlan, J., concurring: "Where such a stop is reasonable . . . the right to frisk must be immediate and automatic if the reason for the stop is, as here, an articulable suspicion of a crime of violence. . . . There is no reason why an officer, rightfully but forcibly confronting a person suspected of a serious crime, should have to ask one question and take the risk that the answer might be a bullet." Id. at 33. See also United States v. Humphrey, 409 F.2d 1055 (10th Cir. 1969); People v. Collins, 1 Cal. 3d 658, 463 P.2d 403, 83 Cal. Rptr. 179 (1970); People v. Griffith, 19 Cal. App. 3d 948, 97 Cal. Rptr. 367 (Dist. Ct. App. 1971); People v. Adam, 1 Cal. App. 3d 486, 81 Cal. Rptr. 738 (Dist. Ct. App. 1969); People v. Mack, 26 N.Y.2d 311, 258 N.E.2d 703, 310 N.Y.S.2d 292, cert. denied, 400 U.S 960 (1970); Commonwealth v. Berrios, 437 Pa. 338, 263 A.2d 342 (1970); Commonwealth v. Hicks, 434 Pa. 153, 253 A.2d 276 (1969).

14. "At the time he seized petitioner and searched him for weapons, Officer McFadden had reasonable grounds to believe that petitioner was armed and dangerous, and it was necessary for the protection of himself and others to take swift measures to discover the true facts and neutralize the threat of harm if it materialized." 392 U.S. at 30.

The power approved by *Terry* is a carefully circumscribed power and may not be interpreted as a general license for personal searches. Its limitations were made abundantly clear in *Sibron v. New York*,[15] decided the same day as *Terry*.[16] In *Sibron* the officer, having observed the suspect conversing with several known narcotics addicts, approached him and said: " 'You know what I am after.' "[17] At this point, according to the officer, Sibron " 'mumbled something and reached into his pocket.' "[18] Simultaneously the officer reached into the same pocket and came out with several envelopes of heroin. Lacking probable cause to make an arrest, the Court held that the action of the officer constituted an illegal search rather than a frisk, and therefore the evidence was inadmissible. As the officer did not contend that when Sibron put his hand in his pocket he feared that he was going for a weapon, the response was viewed as a search for narcotics, which was not reasonable under the circumstances.[19]

The immediate impact of *Terry* has been a forthright recognition of the constitutional authority to frisk under appropriate circumstances.[20] Nevertheless, the constitutional underpinnings of the doctrine are most fragile, and dissimilar factual situations must be approached with circumspection.

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15. 392 U.S. 40 (1968).

16. A companion case, Peters v. New York, was also decided in the same opinion. There the Court found probable cause for arrest and an incidental search, and thus the power to frisk was not of significance. Sibron and Peters both involved the New York stop-and-frisk law (now N.Y. Crim. Proc. Law § 140.50 (McKinney 1971)) but the Court avoided any consideration of the constitutionality of the statute.

17. 392 U.S. at 45.

18. Id.

19. "The police officer is not entitled to seize and search every person whom he sees on the street or of whom he makes inquiries. Before he places a hand on the person of a citizen in search of anything, he must have constitutionally adequate, reasonable grounds for doing so. In the case of the self-protective search for weapons, he must be able to point to particular facts from which he reasonably inferred that the individual was armed and dangerous." 392 U.S. at 64 (citation omitted). See LaFave, "Street Encounters" and the Constitution: Terry, Sibron, Peters, and Beyond, 67 Mich. L. Rev. 40, 89 (1968).

20. See, e.g., United States v. Ware, 315 F. Supp. 1333 (W.D. Okla. 1970); People v. Tarkington, 273 Cal. App. 2d 466, 78 Cal. Rptr. 149 (Dist. Ct. App. 1969); State v. Williams, 157 Conn. 114, 249 A.2d 245 (1968), cert. denied, 395 U.S. 927 (1969); Modesto v. State, 258 A.2d 287 (Del. Super. Ct. 1969); Jones v. United States, 260 A.2d 674 (D.C. Ct. App. 1970); Alexander v. State, 225 Ga. 358, 168 S.E.2d 315 (1969); People v. Tassone, 41 Ill. 2d 7, 241 N.E.2d 419 (1968), cert. denied, 394 U.S. 965 (1969); Hayes v. Commonwealth, 458 S.W.2d 3 (Ky. 1970); Cleveland v. State, 8 Md. App. 204, 259 A.2d 73 (1969); Commonwealth v. Matthews, 355 Mass. 378, 244 N.E.2d 908 (1969); People v. Ramos, 17 Mich. App. 515, 170 N.W.2d 189 (1969); Johnson v. State, 464 P.2d 465 (Nev. 1970); People v. Joslin, 32 App. Div. 2d 859, 301 N.Y.S.2d 212 (3d Dep't 1969); Carter v. State, 445 S.W.2d 747 (Tex. Crim. App. 1969); State v. Henneke, 470 P.2d 176 (Wash. 1970).

III. Initiating the Frisk

A. *Identifying the Suspect*

In justifying a pat-down search, as in other instances of fourth amendment intrusions, reasonableness does not turn upon whether the officer's beliefs were borne out. Thus, if probable cause is objectively present at the time an arrest is consummated, should it subsequently be determined that the arrestee was in no way connected with the subject of the arrest, the arrest is still legal, and should otherwise incriminating evidence be divulged in the process, its subsequent use is constitutionally permissible.[21] Similarly, the reasonableness of a pat-down does not turn upon whether a weapon was actually discovered. If sufficient reasons are present to warrant a frisk, its fruitlessness is immaterial to the validity of an arrest which is the end result of other fortuitous occurrences.[22]

A more perplexing problem is presented, however, when an officer has adequate grounds for the frisk of an individual, but he is unable to single out who it is. This improbable dilemma confronted the officers in *Gaskins v. United States*,[23] where a cab driver hailed them and reported that he had just observed " 'a guy up the street tuck a gun inside his belt.' "[24] The officers proceeded in the direction indicated and found three men walking together, any one of whom could have been the culprit. No one else was on the street. All three parties were patted down, and incriminating evidence was found on each.[25] In upholding the action of the officers, the court reasoned that there were but two options open to them: "(a) let the three pass in the night because [they were] not told which one of the three had a gun and therefore may have lacked legal authority to search any of them, or (b) stop the three and determine which, if any, was carrying a weapon."[26] Given these alternatives, the court concluded that the action taken was not unreasonable.[27]

While the issue did not arise in the case, an additional complication could result from a consecutive, as opposed to a concurrent, pat-down of the three suspects. If the gun alluded to by the taxi driver had been revealed by the first frisk, the question arises as to whether a further frisk

21. The author has discussed cases in which this issue has arisen in Cook, Probable Cause to Arrest, 24 Vand. L. Rev. 317, 319-21 (1971).

22. See, e.g., text accompanying notes 71-85 infra.

23. 262 A.2d 810 (D.C. Ct. App. 1970).

24. Id. at 811.

25. One of the suspects had a pistol, the second a knife, and the third narcotics paraphernalia. Id.

26. Id.

27. Id. at 812. See also United States v. Frye, 271 A.2d 788 (D.C. Ct. App. 1970).

of the remaining parties would be unreasonable. Should three officers be present, a simultaneous frisk of the three would seem the safest and most reasonable approach.[28] It is doubtful that reasonableness should hinge on the availability of law enforcement forces. Furthermore, where three individuals are identified as a group and a weapon is discovered in the possession of one of them, there would appear to be a reasonable apprehension on the part of the officer that the suspect's compatriots might also be armed.[29]

B. *The Sequence of Events*

The juxtaposition of *Terry* and *Sibron* suggests that for stop and frisk tactics to be constitutionally permissible the prosecution must be able to demonstrate a step-by-step escalation of reasonable belief on the part of the investigating officer culminating in a seizure of evidence.[30] The authority given does not lend itself to shortcuts. For example, in *United States v. Cunningham*[31] the prosecution contended that while an arrest and a search occurred, the court need not concern itself with the question of probable cause. The prosecution reasoned that had the officer at the outset merely detained the suspect, the circumstances were such that a frisk would have been justified. A frisk would have disclosed a concealed weapon, at which point an arrest and search would have been reasonable under the authority of *Terry*. Thus, it was argued, the fact that the officer bypassed the preliminary steps was immaterial. The court found such an after-the-fact rationalization unacceptable, relying upon the traditional principle that a search cannot be legitimized by its results.[32]

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28. Cf. Warden v. Hayden, 387 U.S. 294 (1968), where officers simultaneously searched three levels of a residence for the suspect and weapons. The seizures were held incident to the arrest, without inquiry as to the actual temporal sequence, since there was probable cause to arrest at the time of entry.

29. See United States v. Berryhill, 445 F.2d 1189 (9th Cir. 1971), where the court stated: "We think that Terry recognizes and common sense dictates that the legality of such a limited intrusion into a citizen's personal privacy extends to a criminal's companions at the time of arrest. It is inconceivable that a peace officer effecting a lawful arrest of an occupant of a vehicle must expose himself to a shot in the back from defendant's associate because he cannot, on the spot, make the nice distinction between whether the other is a companion in crime or a social acquaintance. All companions of the arrestee within the immediate vicinity, capable of accomplishing a harmful assault on the officer, are constitutionally subjected to the cursory 'pat-down' reasonably necessary to give assurance that they are unarmed." Id. at 1193.

30. See text accompanying notes 15-19 supra. See also People v. Lee, 48 Ill. 2d 272, 269 N.E.2d 488 (1971).

31. 424 F.2d 942 (D.C. Cir.), cert. denied, 399 U.S. 914 (1970).

32. Id. at 943. See United States v. Di Re, 332 U.S. 581, 595 (1948). See also People v. Rice, 259 Cal. App. 2d 399, 66 Cal. Rptr. 246 (Dist. Ct. App. 1968).

However, an inconsistent result was reached in *People v. Baker*.[33] The manager of a bowling alley informed an officer that an attendant had observed a patron place packets of white powder and a pistol in a handbag which had been deposited in a locker at the bowling alley. He further advised him that he had personally examined the contents of the locker and could confirm the attendant's report. Additional officers were sent to the bowling alley, the contents of the locker examined by them, the pistol removed and the remaining items returned to the locker. About a half hour later, the defendant opened the locker, removed the handbag, and was arrested as he attempted to leave. He was immediately searched, and a pistol was recovered from his waistband. The court conceded that the prior search of the locker by the officers was unreasonable under the fourth amendment.[34] The defendant had a reasonable expectation of privacy in the locker,[35] which was improperly invaded by the search. Therefore, the search was prima facie illegal, and probable cause for the arrest was a fruit of the illegal search and likewise would appear to be constitutionally intolerable. The same would hold true as to all evidence which was obtained incident to the arrest. However, the initial observations of the attendant, and the independent search of the manager did not raise constitutional problems, as it did not entail governmental action.[36] This information, if given to the officers, would have been sufficient for them to detain the defendant after he removed the contents of the locker and subject him to a *Terry*-frisk. Had this been done, it would have disclosed the second pistol in the defendant's waistband. At this point, the officers would have had probable cause to arrest the defendant and carry out an incident search, including a search of the handbag. Thus, the ultimate result would be factually identical to the actual outcome of this case. The arrest and search was therefore not tainted by the prior illegal search. The result in this case would be problematical had there not been a second pistol found on the person of the suspect. To sustain the police activity, the court would either have had to extend the scope of the frisk to include the handbag, or give effect to an alternative theory the court suggested, *i.e.*, that the reliable report of a pistol in the locker created a sufficient danger to justify a warrantless search.[37] In either instance, the judicially tolerated intrusion would appear to go beyond prevailing constitutional standards.[38]

33. 12 Cal. App. 3d 826, 90 Cal. Rptr. 508 (Dist. Ct. App. 1970).

34. Id. at 833-34, 90 Cal. Rptr. at 514-15.

35. See Katz v. United States, 389 U.S. 347 (1967).

36. See Burdeau v. McDowell, 256 U.S. 465 (1921).

37. 12 Cal. App. 3d at 837-39, 90 Cal. Rptr. at 515-16.

38. See generally People v. Roach, 15 Cal. App. 3d 628, 93 Cal. Rptr. 354 (Dist. Ct App. 1971).

IV. The Product of the Frisk

A. *Tactile Sensations Produced by the Pat-Down*

It will be a rare case in which, in the process of a pat-down, an officer will not come upon some object or objects secreted in the apparel of the suspect. Obviously not all sensed objects create reasonable suspicion of the presence of a weapon. Thus, an object shaped like a wallet detected in a hip pocket or a breast coat pocket is more than likely just that. Similarly, writing instruments may be anticipated in shirt pockets, and coins and key containers in trouser pockets. Absent special circumstances, the sensing of such objects should not be cause for increased apprehensiveness on the part of the officer. Thus, in *People v. Bueno*[39] the removal of some keys and a gold ring from the pocket of a suspect was found unwarranted. However, the seizure of a cigarette lighter was found reasonable in *Taylor v. Superior Court*[40] because it "could be used in a doubled up fist as a punch or thrown at the officer or used to burn the officer or the police unit."[41] The nature of the clothing worn by the suspect may increase the difficulty in ascertaining the identity of a felt object, a factor which the court may consider in determining reasonableness.[42]

It would seem clear that the detection of any "bulge" in the clothing of the suspect is not adequate justification for an arrest and incident search.[43] It is conceivable, however, that in the process of frisking, the officer may detect proof of the commission of an offense other than the possession of a dangerous weapon. For example, because of the close proximity of the officer to the suspect, he might detect the unmistakable odor of marijuana. If coupled with this the officer feels what from his experience he believes to be a familiar container for marijuana, there would appear to be an arguable case of probable cause to arrest.[44]

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39. 475 P.2d 702 (Colo. 1970).

40. 275 Cal. App. 2d 146, 79 Cal. Rptr. 677 (Dist. Ct. App. 1969).

41. Id. at 150, 79 Cal. Rptr. at 680.

42. People v. Watson, 12 Cal. App. 3d 130, 90 Cal. Rptr. 483 (Dist. Ct. App. 1970) (long-stemmed smoking pipe reasonably suspected to be a weapon when felt within a jacket made of heavy material).

43. See, e.g., State v. Anonymous, 6 Conn. Cir. 583, 280 A.2d 816 (1971).

44. People v. Rice, 259 Cal. App. 2d 399, 402 n.1, 66 Cal. Rptr. 246, 248 n.1 (Dist. Ct. App. 1968). The detection of glass in a pocket may reasonably be feared. People v. Garcia, 274 Cal. App. 2d 100, 78 Cal. Rptr. 775 (Dist. Ct. App. 1969); cf. People v. Gonzales, 17 Cal. App. 3d 848, 95 Cal. Rptr. 291 (Dist. Ct. App. 1971), where the officer detected a bulge which was comparable to cellophane bags of narcotics found on arrestees earlier the same night. The court held that since the prior arrests had been illegal, the officer could not rely upon that experience in evaluating the identity of the bulge sensed on the present suspect.

Cases involving the nature of the "bulge" have been most prevalent in California. In *People v. Armenta*[45] the defendant was stopped by officers after he had allegedly committed several traffic violations. After giving the officer his driver's license upon request, the defendant appeared to be hiding something. The officer requested that he get out of the car, at which time the odor of alcohol was detected, and the officer decided to administer a sobriety test. At this point he noticed a bulge in the defendant's trousers just beneath the belt. A pat-down was commenced, and upon reaching the bulge the officer inquired as to what it was. The defendant thereupon shoved the officer back and started to place his hand within his trousers. The officer prevented this and again asked what the bulge was. Again the defendant forcibly resisted, and the officer reached into the trousers and retrieved two containers of heroin wrapped in paper. The defendant argued that the bulge was made by a "soft object," and that only the discovery of a "hard object" could justify an intrusive search. The court rejected the distinction as too simplistic, musing that by this argument "a rubber water pistol loaded with carbolic acid or some other liquid, which if used by a suspect could permanently blind an officer, should be protected from a 'pat down search' because it is 'soft' and not 'hard.' "[46]

The *Armenta* decision was repudiated by the Supreme Court of California in *People v. Collins*,[47] where the court held that "[f]eeling a soft object in a suspect's pocket during a pat-down, absent unusual circumstances, does not warrant an officer's intrusion into a suspect's pocket to retrieve the object."[48] The court continued:

> To permit officers to exceed the scope of a lawful pat-down whenever they feel a soft object relying upon mere speculation that the object might be a razor blade concealed in a handkerchief, a "sap," or any other atypical weapon would be to hold that possession of any object, including a wallet, invites a plenary search of an individual's person.[49]

The court concluded it could not "condone fanciful speculations such as that indulged in by *Armenta* . . . ."[50] In the present case the court would not abide the argument that a package of loosely packed marijuana could

45. 268 Cal. App. 2d 248, 73 Cal. Rptr. 819 (Dist. Ct. App. 1968).

46. Id. at 251, 73 Cal. Rptr. at 821. The court, had it wished, could have avoided the issue of the reasonableness of the pat-down by holding simply that the probable cause to arrest the suspect for traffic violations justified a search of his person.

47. 1 Cal. 3d 658, 463 P.2d 403, 83 Cal. Rptr. 179 (1970).

48. Id. at 662, 463 P.2d at 406, 83 Cal. Rptr. at 182.

49. Id. at 663, 463 P.2d at 406, 83 Cal. Rptr. at 182.

50. Id., 463 P.2d at 407, 83 Cal. Rptr. at 183. But cf. People v. Crump, 14 Cal. App. 3d 547, 92 Cal. Rptr. 379 (Dist. Ct. App. 1971).

reasonably be suspected to be a weapon.[51] An inconsistent result appears to have been reached in a Wisconsin decision, *Ervin v. State*,[52] where a packet of marijuana was found in the suspect's waistband, "not an unusual hiding place for gun or knife."[53]

Notwithstanding *Collins*, incredible decisions continue to spring up in California, a particularly interesting one being *People v. Atmore*.[54] Considering the defendant to be a suspect in a murder case, the officer was carrying out a cursory search for weapons when the defendant abruptly grabbed his upper jacket pocket. The officer moved the hand away and felt a round cylindrical object which he took to be a 12 gauge shotgun shell. He thereupon reached into the pocket and removed the object, which was a lipstick container. In his grasp was also a marijuana cigarette. In order to sustain the legality of the seizure of the marijuana cigarette, it was necessary to demonstrate that the seizure of the lipstick was reasonable. Accepting the contention of the officer that he believed the object to be a shotgun shell, the question remained what danger an isolated shell would pose to the officer. The court noted the testimony of the officer that a shotgun which could accommodate the shell could be as short as twenty inches, and that such a weapon could have been concealed beneath the defendant's jacket. This conclusion, however, is not in itself a satisfactory explanation, as the shell would still not pose a danger until placed in the chamber of the weapon. Presumably, if the defendant was also harboring a shotgun this would be revealed before the completion of the pat-down. Sensing the weakness in the argument, the court further submitted that the shell could have been detonated by any sharp object, and while this might seem a somewhat tenuous possibility, the officer thought he might be coping with a desperate man, one who had recently committed a murder. Thus the court concluded: "If he was the murder suspect, he might want to explode the shell even in a way which might entail considerable personal risk to himself, so long as he might escape in the ensuing confusion."[55] The fortuitous grasping of the marijuana cigarette was not an unreasonable or surprising result,[56] and therefore the seizure was reasonable.

51. See also United States v. Gonzalez, 319 F. Supp. 563 (D. Conn. 1970) (the court ignored the fact that here there had been an arrest rather than a mere stop); Morel v. Superior Ct., 10 Cal. App. 3d 913, 89 Cal. Rptr. 297 (Dist. Ct. App. 1970).

52. 41 Wis. 2d 194, 163 N.W.2d 207 (1968).

53. Id. at 204, 163 N.W.2d at 212.

54. 13 Cal. App. 3d 244, 91 Cal. Rptr. 311 (Dist. Ct. App. 1970).

55. Id. at 247, 91 Cal. Rptr. at 314.

56. "We have all done the same thing when fumbling for keys or coins." Id. at 248, 91 Cal. Rptr. at 314. See also People v. Anthony, 7 Cal. App. 3d 751, 86 Cal. Rptr. 767 (Dist. Ct. App. 1970), where the removal of bullets felt in the defendant's jacket pocket was found to be reasonable.

B. *Intensity of the Examination*

Assuming the frisk produces sufficient reason to believe the suspect is concealing a weapon, the possibility remains that upon removal the object will prove to be ostensibly innocuous. At this point the reasonableness of any further action of the officer is critical. A more intensive examination of the item or items discovered would appear to be a relatively minor invasion of privacy when compared to what has already transpired. Still, the sole justification for the frisk is self-protection, and that end has been accomplished. In *Taylor v. Superior Court*[57] the defendant was stopped for a traffic violation and directed by the officer to empty his pockets,[58] revealing a cigarette lighter. Upon request, the defendant handed the lighter to the officer who opened it and discovered a usable quantity of hashish. The court found this further examination reasonable because the officer was properly concerned with the possibility that the lighter was a container for razor blades.[59] A comparable result was reached in *State v. Campbell*[60] where a bulge turned out to be a large envelope, within which the officer discovered illegal lottery slips. In sustaining the examination of the contents of the envelope, the court conceded the possibility of the presence of weapons.[61] Again in *People v. Weitzer*,[62] in the process of a frisk, the officer felt a protruding object in the suspect's pants pocket which did not appear to be a weapon. He asked the suspect what it was, to which the latter responded that it was a letter he had forgotten to mail. As the officer knew it was clearly not that, he removed it from the pocket

57. 275 Cal. App. 2d 146, 79 Cal. Rptr. 677 (Dist. Ct. App. 1969).

58. This, of course, exceeds the scope of authority per Terry, but since an arrest had been made, a search of the suspect was permissible. However, as the subject of the arrest was an automobile mechanical violation, the search was only justifiable for the purpose of discovering weapons, so the decision to examine the interior of the lighter is analogous to the decision to reach within the garments of the suspect following a Terry pat-down.

59. Given the possibility, it remains arguable whether razor blades secreted within a cigarette lighter pose an immediate threat to the officer. See State v. Woodford, 26 Ohio Misc. 51, 57-58, 269 N.E.2d 143, 148, 55 Ohio Op. 2d 174, 178 (Shaker Hts. Mun. Ct. 1971) ("The arresting officer stated that his reason for searching the hat was because he had previous experiences with prisoners secreting razor blades in their hats. We do not doubt that possibility, but cannot agree that possession of a usual type of razor blade would constitute possession of a weapon; whether carried in one's hat or other apparel. If such were the case, on frequent occasions those of us who do not subscribe to the fashion of wearing beards, might find ourselves under arrest for carrying a package of 'concealed weapons' on our way from the neighborhood drugstore or supermarket.").

60. 53 N.J. 230, 250 A.2d 1 (1969).

61. "It might well have contained a weapon, such as a thin knife or blade . . . ." Id. at 238, 250 A.2d at 5.

62. 269 Cal. App. 2d 274, 75 Cal. Rptr. 318 (Dist. Ct. App. 1969).

and found, inside an envelope, a matchbox containing marijuana. The court found the search and seizure reasonable.[63]

A variation of this problem arose in *United States v. Dowling*.[64] If an officer in good faith believes that the suspect has a weapon in his possession, but upon reaching the pocket can tell without going further that he was mistaken, is a removal of the contents of the pocket justified? In *Dowling*, the officers were told by an observer that an individual wearing a long black overcoat had a gun in his pocket and had gone down a nearby alley. A person wearing a long black overcoat was confronted in the alley, and in an ensuing pat-down one of the officers came upon a bulge in a pocket and said: "I think I've got the gun."[65] He then reached into the pocket and retrieved a three-by-five pad, numbers slips, a pencil, a piece of carbon paper, and some currency. The suspect was then arrested for possession of the numbers slips. Initially, a question may be raised as to whether these objects could reasonably be mistaken for a gun in the pat-down. It may be suggested that the expectation of the officer that the suspect was armed should be considered in evaluating the reasonableness of his conclusion. Nevertheless, once he reached within the pocket, it became patently obvious that no pistol was to be found. The court, however, was not inclined to sub-divide the stages in the actions of the officer this minutely. Once it was determined that reaching within the pocket was justified, whatever was located therein could properly be removed.[66]

C. *Frustrating the Frisk*

When circumstances are adequate to warrant a frisk for the determination of the presence of weapons, any effort on the part of the suspect to frustrate the accomplishment of the pat-down may be countered by reasonable actions on the part of the officer. In *People v. Woods*[67] the

63. "The falsehood, coupled with the unusualness of finding a matchbox wrapped in a crumpled envelope, reasonably created the impression that the matchbox contained something that the defendant wished to conceal. The curiosity of a reasonable man, and, more certainly, the professional curiosity of a police officer, would properly be aroused. It was not unreasonable for the officer to pursue the investigation which had taken a new turn because of the defendant's attempted concealment. It is well established that furtive conduct evidenced by a body movement indicating that some object is being concealed in a vehicle which is the subject of a traffic arrest will justify a search of that portion of the vehicle where it appeared that the object was hidden." Id. at 292, 75 Cal. Rptr. at 330.

64. 271 A.2d 406 (D.C. Ct. App. 1970).

65. Id. at 407 (footnote omitted).

66. Id. at 408.

67. 6 Cal. App. 3d 832, 86 Cal. Rptr. 264 (Dist. Ct. App. 1970).

suspect had his left hand concealed in a jacket pocket when the officer approached. The officer placed his hand on the suspect's hand and asked what he had in his pocket. When he failed to respond, the officer pulled the suspect's hand out of the pocket. The hand was empty, but the pocket was left standing open, and by shining his flashlight in it, the officer observed a quantity of marijuana, for the possession of which the defendant was arrested. The court found the officer's conduct reasonable under the circumstances.[68]

A unique problem was presented in *Modesto v. State*[69] where, after a chase, an automobile was stopped for speeding and the defendant, one of two riders in the vehicle, was asked to get out. In the process, he removed a trench coat he was wearing and dropped it on the seat behind him. This impressed the officer as being unnatural as it was a cold night. He grabbed the coat and found a pistol on the seat beneath it. The court held that the seizure of the pistol was within the range of conduct permitted by *Terry*.[70]

D. *Incriminating Statements*

The removal of items from the apparel of the suspect may be justified by incriminating statements made during the pat-down. In patting down the suspect in *People v. Todd*[71] the officer came upon an unidentified bulge in his rear pocket. At this point the suspect exclaimed: "You cannot search me without a warrant even if I have a gun."[72] The officer thereupon retrieved the object which turned out to be a cigarete box containing illegal narcotics. The court found that the reaction of the suspect raised the officer's reasonable apprehensiveness to a point which would justify the removal of the suspected bulge.[73] Similarly, in *People v. Leos*,[74] in the process of a pat-down the officer noticed a large bulge in the suspect's rear pants pocket. Before he proceeded to examine it, the suspect said: "You got me. It's my weed."[75]Recognizing this as an admission to the

68. Query, would a comparable continuum of events have led to a different result in Sibron? See text accompanying notes 15-19 supra. See also People v. Superior Ct., 15 Cal. App. 3d 806, 94 Cal. Rptr. 728 (Dist. Ct. App. 1971); State v. Dennis, 113 N.J. Super. 292, 273 A.2d 612 (App. Div. 1971); Almendarez v. State, 460 S.W.2d 921 (Tex. Crim. App. 1970), cert. denied, 402 U.S. 974 (1971).

69. 258 A.2d 287 (Del. Super Ct. 1969).

70. "A person cannot avoid such a search of his clothing by removing his clothing when it necessarily remains in the general vicinity where he is to remain." Id. at 288.

71. 2 Cal. App. 3d 389, 82 Cal. Rptr. 574 (Dist. Ct. App. 1969).

72. Id. at 392, 82 Cal. Rptr. at 576.

73. Id. at 393-94, 82 Cal. Rptr. at 577. Cf. Amacher v. Superior Ct., 1 Cal. App. 3d 150, 81 Cal. Rptr. 558 (Dist. Ct. App. 1969).

74. 265 Cal. App. 2d 822, 71 Cal. Rptr. 614 (Dist. Ct. App. 1968).

75. Id. at 824, 71 Cal. Rptr. at 615.

possession of marijuana, the court found the arrest and incident search reasonable.[76]

Finally, in *People v. Hubbard*,[77] an officer in the process of a legitimate pat-down came upon what he suspected to be capsules in the pockets of the suspect. Thereupon the officer asked him if he had any pills in his pocket, and the suspect responded: "They're reds. They belong to my mother."[78] Then, upon the officer's request, the suspect gave him the pills. The court found that the conduct of the officer was reasonable, and that the statement provided probable cause for an arrest and an incident search.

Hubbard is distinguishable from the previously discussed decisions, and therefore of more questionable constitutional validity, because the incriminating statement was not spontaneous but prompted by interrogation, without prior *Miranda* warnings[79] or any indication that the suspect was not obliged to answer the question.[80]Certainly without the incriminating response there would have been an inadequate basis for an arrest. The same problem was potentially present in *People v. Adam*[81] where, during a pat-down, the officer detected "what appeared to be hand-rolled cigarettes"[82] in the suspect's shirt pocket. The officer asked the suspect what was in his pocket to which he replied: "Papers."[83] The officer commented that the "papers" were all rolled up and then asked how many "sticks of weed" the suspect had, to which the latter responded, "Four."[84] He was then arrested and the marijuana cigarettes were removed from

76. Id. at 825, 71 Cal. Rptr. at 615. See generally United States ex rel. Moya v. Zelker, 329 F. Supp. 120 (S.D.N.Y. 1971).

77. 9 Cal. App. 3d 827, 88 Cal. Rptr. 411 (Dist. Ct. App. 1970).

78. Id. at 829, 88 Cal. Rptr. at 413.

79. Miranda requires that prior to interrogation, a person in police custody must be informed that he has the right to remain silent, that anything he says might be used against him in court, that he may consult a lawyer and have him present during the interrogation, and that a lawyer will be appointed to represent him if he is unable to afford one. Miranda v. Arizona, 384 U.S. 436, 467-73 (1966).

80. It is not here suggested that Miranda warnings are required in the typical field detention situation, even though a form of interrogation may occur. Nevertheless, where the question is accusatory rather than merely inquiring, certainly the Escobedo "focus of attention on the accused" level of suspicion has been reached. See Escobedo v. Illinois, 378 U.S. 478, 490, 492 (1964). While the suspect has "an absolute right to remain silent," and therefore probable cause to arrest could not be grounded on the exercise of the right, in the present case the officer capitalized on the ignorance of the defendant of his privilege to not respond and effectively induced a confession.

81. 1 Cal. App. 3d 486, 81 Cal. Rptr. 738 (Dist. Ct. App. 1969).

82. Id. at 488, 81 Cal. Rptr. at 738.

83. Id.

84. Id.

his pocket.[85] The appellate court found an absence of facts which would warrant a pat-down; thus it was unnecessary to reach the question whether the officer had gone beyond the legitimate scope of such a procedure had it been justified.

V. Conclusion

Clearly, as the *Sibron* decision so graphically illustrated, if the authority to frisk is employed as a subterfuge to carry out a search, the evidence is seized in violation of the fourth amendment.[86] However, *Terry* and *Sibron* remain the only Supreme Court decisions which provide guidance on the constitutional limitations on frisking.[87] The bulk of decisions herein discussed lie somewhere between or without those holdings and an absence of consistency would appear inevitable for the near future. Just as our notions of probable cause to arrest have received increased clarity with each Supreme Court decision evaluating a distinctive factual context, the stop-and-frisk problem is likewise now lodged within the fluctuating reasonableness standards of the fourth amendment. Cases factually distinguishable from those categorically ruled upon by the Court will fare differently, just as reasonable men may differ.

The authority to frisk is unquestionably a significant intrusion on the personal liberty and privacy of those subjected to it—a fact clearly acknowledged in *Terry*.[88] At the same time, the Court recognized that to hold in-the-field confrontations under circumstances short of probable cause to be violative of the fourth amendment would be a wholly unrealistic and intolerable result.[89] Having reasoned that far, a superficial search solely for the protection of the life and safety of the officer could hardly be denied. The Court took judicial notice of the potential for abuse

85. Id., 81 Cal. Rptr. 738-39.

86. See, e.g., Williams v. Adams, 441 F.2d 394 (2d Cir. 1971); United States v. Collins, 439 F.2d 610 (D.C. Cir. 1971); United States v. McIntyre, 304 F. Supp. 1244 (E.D. La. 1969); United States v. Hostetter, 295 F. Supp. 1312 (D. Del. 1969); Cunha v. Superior Ct., 2 Cal. 3d 352, 466 P.2d 704, 85 Cal. Rptr. 160 (1970); Irwin v. Superior Ct., 1 Cal. 3d 423, 462 P.2d 12, 82 Cal. Rptr. 484 (1969); People v. Mosher, 1 Cal. 3d 379, 461 P.2d 659, 82 Cal. Rptr. 379 (1969); People v. Thomas, 16 Cal. App. 3d 231, 93 Cal. Rptr. 877 (Dist. Ct. App. 1971); People v. Hana, 7 Cal. App. 3d 664, 86 Cal. Rptr. 721 (Dist. Ct. App. 1970); Amacher v. Superior Ct., 1 Cal. App. 3d 150, 81 Cal. Rptr. 558 (Dist. Ct. App. 1969); Byrd v. Superior Ct., 268 Cal. App. 2d 495, 73 Cal. Rptr. 880 (Dist. Ct. App. 1968); People v. Britton, 264 Cal. App. 2d 711, 70 Cal. Rptr. 586 (Dist. Ct. App. 1968); People v. Navran, 483 P.2d 228 (Colo. 1971).

87. In Morales v. New York, 396 U.S. 102, 104-05 (1969), the Court noted that Terry had not authorized stationhouse detentions. No frisking problem was presented.

88. 392 U.S. at 16-17.

89. Id. at 15.

that such an authority contained and conceded that to a large extent such abuse would remain beyond the purview of the courts.[90] The precise analysis of the continuum of events in both the *Terry* and *Sibron* cases provides a clear indication that the Court expects this investigative tool to be employed circumspectly, and any expansive employment of the power is likely to be met with judicial rebuke.

90. Id. at 13-15.