

Stop, Question and Frisk: What the Law Says About Your Rights

**A Drug
Policy
Alliance
release.**

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May 2011

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Executive Summary

Over the last five years, we've seen increased media attention and public debate about the New York City Police Department practice of "stop-and-frisk". Often missing from this debate is the Constitution – specifically the Fourth Amendment, and what the Supreme Court has said about how it applies to stops, frisks and searches.

Between 2005 and 2010, the NYPD made over three million stops and (if we assume the same frisk-rate for 2010 as took place in previous years) these stops resulted in about 1.55 million frisks. About 94 percent of the stops did not result in arrests. Nearly 85 percent of those stopped were black and Latino. That means that there were a shade less than three million stops in instances where there was not enough evidence to support an arrest or a search warrant -- and the vast majority of those stopped were people of color.

Are these stops legal? Are the frisks that accompany about half the stops legal? What are the legal standards governing a stop? A frisk? Are they the same? What does the Fourth Amendment say about such practices? What rights do New Yorkers have when they come into contact with the police?

The Constitution and subsequent rulings by the Supreme Court set clear standards governing the police practices of stopping and frisking a person. But all too often in media reports and public debates, stops and frisks, which require different legal thresholds, are conflated into a single practice of "stop-and-frisk," as though legal thresholds governing both are the same. They are not. It is critically important to understand that different legal standards govern the practices of stops and frisks.

A police officer may *stop* individuals on the street to question them, and, in general, police may do this to anyone at any time. Unless there are specific facts sufficient to justify the officer's suspicion that a crime is, has been, or may about to be committed, the person stopped has a right to ignore the officer's questions and walk away. But if the officer does not allow the person to leave, this is called, as one Supreme Court Justice put it, a "forcible stop."

A *pat-down frisk* is a limited search subject to the requirements of the Fourth Amendment. It involves a police officer patting down an individual's outer clothing, and only his outer clothing, if and only if,

pursuant to a lawful forcible stop, the officer has a reasonable suspicion that the individual stopped is armed and dangerous. **This is the only legal justification for a pat-down frisk.**

A *full search*, in which the person stopped is required to empty his pockets, or where an officer puts his hands in an individual's pockets or otherwise goes beyond the pat-down of outer clothing for the purposes of determining whether there is a weapon, requires probable cause – that is, enough evidence to justify an arrest.

This document seeks to describe these legal standards in greater detail by providing the reader with the following:

- Historical background of the Fourth Amendment
- A thorough definition of "stop" and "frisk"
- A summary of Supreme Court cases establishing and affirming the legal standards governing stop, question and frisks by the police
- Critical questions about the legality of NYPD's practice of stop-and-frisk

The legal standards described in this issue brief apply nationwide, regardless of what local city or state laws may say. However, this inquiry focuses on New York City due to the fact that over the last ten years, an astronomical number of New Yorkers have been stopped and frisked by the NYPD. As the number of stops and frisks have increased dramatically, so too have the arrests for marijuana possession. Despite the fact that marijuana possession was decriminalized in New York in 1977, marijuana possession is now the number one arrest in New York City. More than 50,000 people were arrested for marijuana possession in 2010 alone, comprising one out of every seven arrests (15 percent). We contend that many of these arrests are the result of illegal searches or false charges.

The better New Yorkers – and all Americans – understand, exercise and defend our rights under the Constitution, the more effective our democracy and the more accountable its public servants will be – including the police. A more effective democracy and more accountable public servants – especially the police – would make New York City a better place for all. It is our hope that this issue brief contributes towards that end.

A Little Contextual History

In colonial America, British officers had the legal authority to search anyone they pleased, whenever they pleased, under what was called Writs of Assistance. Such general searches were widespread in the colonies, perhaps as widespread as the epidemic of stop and frisk in minority neighborhoods is and for a number of years has been in New York City.

These general searches were deeply resented by the early Americans; indeed, some historians believe that the anger over these searches was the primary factor in igniting the American Revolution. And our second President, John Adams, a participant in the Revolution, certainly thought so. As he wrote looking back nearly six decades after one of the first, unsuccessful, court challenges in 1761 to the Writs of Assistance: “Then and there was the first scene of the First Act of Opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born.”

Once the Revolution was won, the new nation moved swiftly to legally limit the powers of search and seizure, and establish a Constitutional right, not amendable by statute, to guarantee that Americans would be free from unreasonable searches and secure in their persons and in their homes against the kind of general searches engaged in by British officers under colonial rule.

The Fourth Amendment to the Constitution was a direct outgrowth of the resentment most of the early Americans felt about the practice of general searches, without specific reasons to justify them. Today, the value of the Fourth Amendment may seem distant and abstract to most Americans, but to the early Americans, intrusive and discretionary general searches were a matter of frequent and bitter experience – as they are today in most black and Latino communities.

Here is what the Fourth Amendment says:

“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.”

What this meant, and still means, is that cops may not, as the British officers did, search people at will.

Searches can only be conducted if there is probable cause to believe that a crime is, has been, or is about to be committed, and such belief must be based on specific facts, not just hunches. And when the police do search pursuant to a warrant, the warrant must “particularly [describe] the place to be searched, and the person or things to be seized.”

In practice, what this means is that in order to get a warrant, cops must pretty much know what they are looking for, be able to describe it and where it is, and under oath say why they know what they know and how they know it. Moreover, normally, police officers seeking the authority to search do not get to decide on the sufficiency of their evidence; that is decided by a judge who must issue a warrant based on such evidence.

In many cases, however, including street confrontations between cops and individuals, there is no time to go to court and seek a warrant; in such cases the same standard of probable cause – evidence conforming to what the Fourth Amendment requires – nonetheless applies. And if the police breach this standard – if they search someone without sufficient evidence to constitute probable cause under the Fourth Amendment – then such evidence cannot be used at trial: it is excluded from the trial, hence known as the exclusionary rule.

This rule was established by the Supreme Court back in 1914 as the only viable method for remedying illegal searches, in a case called *Weeks v. United States*. In this case, the police entered the home of one Fremont Weeks, without a warrant, and seized papers which were then used to convict him of transporting lottery tickets through the mail. On appeal, the Supreme Court ruled unanimously that this violated the Fourth Amendment, and that to permit such illegally seized evidence to be used as evidence to convict Weeks would mean that the protection of the Fourth Amendment and the right to be secure against such searches and seizures would be of no value.

However, in those days and from its inception, the Bill of Rights only applied to the actions of federal officials. Thus for most of our history, the rights and protections we take for granted today against state and local officials as well, did not in fact exist as enforceable rights, unless state laws protected such rights. After the Civil War, the Fourteenth Amendment seemed to incorporate the Bill of Rights and apply its protections against state and local officials, but an 1873 decision by the Supreme Court undercut that. It was not until the 1960s – less than 50 years ago – that one by one the various elements of the

Bill of Rights were held, through the Fourteenth Amendment, to protect people against the actions of state and local officials. In 1961, in a case called *Mapp v. Ohio*, the Supreme Court applied the exclusionary rule, first established against federal officials in 1914 in the *Weeks* case, to state and local officials as well.

But the practice of stop and frisk - where cops didn't enter someone's home but rather confronted people on the street and engaged in a pat-down of their outer clothing - became common, and the question of whether such a frisk was the kind of intrusive search the Fourth Amendment was intended to limit and if so how, became unavoidable. In 1968, this question was addressed and decided by the U.S. Supreme Court in two cases decided on the same day: *Terry v. Ohio* and *Sibron v. New York*.

Stops, Questions, Pat-Down Frisks and Full Searches: What Are the Differences?

Before explaining in detail what the *Terry* and *Sibron* cases decided about pat-down frisks, and what subsequent cases decided about the police power to stop and question individuals, it may be useful to explain the meaning of a few terms used in this discussion and to summarize current law regarding them.

Stops and Questions: "Stops" refers to the practice of police officers stopping individuals on the street to question them. In general, police may do this to anyone at any time. But unless and until the police officer tells an individual he or she may not leave, a person stopped is free not to answer questions and to leave. As Supreme Court Justice Harlan said in his opinion in *Terry*, ordinarily and unless there are specific facts sufficient to justify the officer's suspicion that a crime is, has been or may about to be committed, the person stopped has a right to ignore the officer's questions and walk away. But if the individual may not leave, this is called, as Justice Harlan put it, a "forcible stop."

This is why, when stopped, it is always advisable to ask the police officer politely whether you are free to leave or not. If you are restrained from leaving, you should not resist. But at some point, if the stop is more than brief, you should ask whether you are being arrested. This is because more evidence is required to arrest someone than to stop them for questioning.

"Reasonable suspicion" of criminal activity, which legally justifies a forcible stop, requires fewer facts than "probable cause," which is necessary to legally justify an

arrest. While this difference is difficult to quantify, reasonable suspicion requires some articulable facts to support the officer's suspicion; it is more than an unarticulated "hunch;" and even if a forcible stop is legally justified under this standard, it may only be brief and only for the purpose of asking questions related to the particular suspicion.

It is therefore important to remember that a police officer may subject you to a forcible stop only if he has reasonable suspicion, based on specific facts, that you are or may be involved in criminal activity. The police officer may then detain you briefly and ask you questions related to his particular suspicion.

Pat-Down Frisks and Full Searches: A pat-down frisk is a limited search subject to the requirements of the Fourth Amendment. It involves a police officer patting down an individual's outer clothing, and only his outer clothing, if and only if, pursuant to a lawful forcible stop, the officer has a reasonable suspicion that the individual stopped is armed and dangerous. *This is the only legal justification for a pat-down frisk.*

Reasonable suspicion of any other crime is enough to stop and question an individual, but it is not enough to frisk him. For that, reasonable suspicion that the person is armed and dangerous is required. And again, reasonable suspicion that the stopped individual is armed and dangerous must be based on specific, articulable facts, and not just on an unarticulated hunch. For example, something like a visible bulge that indicates a weapon can constitute a fact that justifies a pat-down frisk, but it doesn't have to be limited to a visible bulge. And if during the pat-down of outer clothing, the officer feels something that reasonably indicates a weapon, he may reach inside to remove it and see what it is. What he may not legally do is manipulate something during the frisk to see if it is pliable, thus generating additional reason to search more fully for something other than a weapon. Pat-downs of outer clothing, or a frisk, are legally justified only upon reasonable suspicion of a weapon.

A full search, in which the person stopped is required to empty his pockets, or where an officer puts his hands in an individual's pockets or otherwise goes beyond the pat-down of outer clothing for the purposes of determining whether there is a weapon, requires probable cause - that is, enough evidence to justify an arrest.

What *Terry* and *Sibron* Decided

In street encounters between police officers and individuals, the police may perceive what they regard as suspicious behavior, worthy of investigation. At this juncture, they do not have enough evidence to justify an arrest or a full search; in other words, there is no probable cause, under the Fourth Amendment, to permit them to detain someone or fully search them. But they may have a reasonable suspicion that something is going on that warrants further investigation. (Assume they are not merely engaged in harassment, whether racially targeted or not; that is always illegal and unjustified; assume they have legitimate suspicion, based on specific, articulable facts, and decide to stop an individual and ask questions.) What may they do?

Terry v. Ohio: First of all, in *Terry*, the Court rejected the idea that a police officer could unreasonably stop an individual for questioning so long as he didn't arrest him and bring him to the station house. "It must be recognized," ruled the Court, "that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." The Fourth Amendment governs such "seizures," ruled the Court, even if a formal arrest does not take place.

What this means is that under *Terry*, a cop may stop you and ask you questions, but you are free to walk away without answering unless he detains you. Once he detains you, the Fourth Amendment applies, and imposes evidentiary standards that must be satisfied to make the stop legal. In other words, there has to be some specific, articulable reason to justify the intrusion of stopping and detaining someone for questioning; it cannot be just a hunch, or even a good faith hunch. Here is what the *Terry* Court said on this subject:

"In justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.... Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction.... And simple 'good faith on the part of the arresting officer is not enough.' . . . If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their

persons, houses, papers, and effects,' only in the discretion of the police."

And that would result in precisely the situation the colonists faced against the British officers, a situation that resulted in the Fourth Amendment, which was specifically designed to avoid such a result. Thus the Court went on to say:

"This demand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence."

But if a hunch was not enough to stop someone for questioning, the Court in this case did not say how much was enough: the question of how much specific evidence is required for the officer to seize and detain a person and interrogate him, if there isn't enough evidence (probable cause) to justify an arrest was not explicitly answered in *Terry* because in that case there was no "stop and question" that was separable from the frisk; they occurred virtually simultaneously. So the Court ruled only on the question of how much evidence was required to frisk someone on the street, if there wasn't enough evidence to warrant a formal arrest or a full-blown search (contents of pockets, etc.). The legal basis for a forcible stop, as discussed above, was developed by the Supreme Court in subsequent cases.

At the time *Terry* was being litigated, some had suggested that a pat-down of an individual's outer clothing – a frisk – should not be considered a search at all within the meaning of the Fourth Amendment. The *Terry* Court firmly rejected that suggestion:

"...it is nothing less than sheer torture of the English language to suggest that a careful exploration of the outer surfaces of a person's clothing all over his or her body in an attempt to find weapons is not a 'search.' Moreover, it is simply fantastic to urge that such a procedure performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised, is a 'petty indignity.' It is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly."

At this point, the Court considered how – not whether – the Fourth Amendment should govern how much of a search the police officer could conduct if there was not enough evidence to justify an arrest or a search warrant. In deciding this question, the Court was mindful of the police officer's safety in such situations, as well as the

right of an individual on the street to avoid police intrusion in the absence of sufficient specific evidence to justify it.

In balancing these competing interests, the Court allowed a very limited search for a very limited reason – the detection of concealed weapons – even if there wasn’t enough evidence to justify a search warrant. Evidence sufficient to justify a search warrant is called “probable cause.” But the Court in *Terry* allowed a frisk – a pat-down of outer clothing – upon less evidence, upon “reasonable suspicion” that there was a concealed weapon that might endanger the officer. This “reasonable suspicion” that the person was carrying a concealed weapon had to be based on specific, reasonable facts – such as a tell-tale bulge – and not merely on a hunch. And the only legitimate purpose for such a frisk, in the absence of probable cause, was to protect the officer against a concealed weapon.

The Court said:

“...we cannot blind ourselves to the need for law enforcement officers to protect themselves and other prospective victims of violence in situations where they may lack probable cause for an arrest. When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm.... [But] it must be limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby... Our evaluation of the proper balance that has to be struck in this type of case leads us to conclude that there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime.... And in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or "hunch," but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience.”

What *Terry* means, therefore, is that in the absence of probable cause – that is, in the absence of enough evidence to justify an arrest or a search warrant issued by a court – a police officer may frisk someone, once he

has been legally and forcibly stopped, only if the officer has good and specific reasons to suspect a concealed weapon. What the officer may not legally do is frisk someone because he “suspects” a crime other than the possession of a concealed weapon. And he certainly may not legally frisk someone, much less search their pockets, for a small amount of marijuana, which could not possibly be mistaken for a weapon, and which in any case is not a crime in New York if it remains concealed and weighs 25 grams or less.

Sibron v. New York: As if to underscore the limitation of the legal authority to frisk announced in *Terry*, the Supreme Court on the same day decided a similar case, *Sibron v. New York*. In that case, a police officer observed a man, Nelson Sibron, from a distance speaking to a group of people he knew to be drug addicts, first on the street and then in a restaurant. The officer testified that he overheard nothing specific in the conversation, nor did he see anything pass between Sibron and the people with whom he was speaking. As the Court said, for all the officer knew, they might have been talking about the World Series. Nonetheless, the officer went into the restaurant, came out with Sibron, said “You know what I’m after,” and put his hand in Sibron’s pocket, finding an envelope with heroin in it. The police officer also testified that he did not apprehend any danger, nor was his initial search limited to a frisk of the outer clothing of Sibron due to any reason to suspect his possession of a weapon. And in fact there was no weapon.

Sibron was ultimately convicted of the unlawful possession of heroin, and the conviction was upheld by The New York Court of Appeals on the basis of a New York statute that authorized police officers to stop any person in a public place “whom he reasonably suspects is committing, has committed or is about to commit a felony” or other specified offenses “and may demand of him his name, address and an explanation of his actions.” The NY statute also provided that, once the officer has stopped a person for such questioning, if he “reasonably suspects that he is in danger of life or limb, he may search such person for a dangerous weapon.” The statute does not specify whether such a search must initially be limited to a frisk – an external pat-down of external clothing – or what evidence must exist to support the officer’s suspicion.

The Supreme Court declined to rule on the constitutionality in general of the New York statute. It ruled instead that, even if the search of Sibron was authorized by the NY statute, the question was whether

it was permissible under the Fourth Amendment. The Court ruled that it was not, and reversed Sibron's conviction.

As in *Terry*, the Court did not rule on whether the stop itself violated the Fourth Amendment, because as in *Terry*, it did not have sufficient facts to determine what happened in the restaurant, whether Sibron accompanied the officer outside voluntarily or under coercion or whether, therefore, there was a "seizure" by the officer within the meaning of the Fourth Amendment.

Thus, in both *Terry* and *Sibron*, the question of whether reasonable suspicion of a crime is constitutionally enough to stop an individual from walking away, or whether evidence sufficient to constitute probable cause is required was not decided. This means that the constitutional authority under *Terry* and *Sibron* to stop, detain and question an individual involuntarily was not resolved by these cases. (This authority – to forcibly stop someone and question him upon reasonable suspicion of a crime – was provided in later cases.)

What was resolved in *Terry* and *Sibron* – and has never been changed – was the constitutionality of the officer's authority to search an individual who has been stopped, when there is less than probable cause – that is, less evidence than would be required to justify an arrest or a judicial search warrant.

In *Sibron*, the Court ruled that probable cause was required to have searched Sibron; that there was nothing close to probable cause in that case; and that therefore the search – the officer thrusting his hand into Sibron's pocket and finding heroin – was unconstitutional. Sibron's conviction was therefore reversed by the Supreme Court.

In *Terry*, on the other hand, where there were articulable facts to support a reasonable suspicion of a concealed weapon, a limited pat-down of external clothing for the limited purpose of protecting the police officer was permitted upon less than probable cause, that is, upon less evidence than would be required to arrest a person or justify a search warrant.

What these two cases, decided by the Supreme Court as companion cases on the same day, mean is that no matter what the New York statute (or any other state statute) may say and authorize, the Fourth Amendment to the Constitution does not permit full-scale searches – e.g., the officer putting his hands in an individual's

pockets – unless there is probable cause—enough evidence to justify an arrest or a judicial search warrant. The Fourth Amendment does permit a frisk, a limited pat-down of external clothing, but only to protect the safety of the police officer in circumstances where the individual has been subjected to a legal, forcible stop and where there is articulable, specific facts – like, for example, a visible bulge – to support a reasonable suspicion of a concealed weapon. Such frisks are not constitutionally permitted merely upon reasonable suspicion of any other crime, much less the concealed possession of less than 25 grams (7/8 of an ounce) of marijuana, which in NY state is not even a crime.

Supreme Court Cases after *Terry* and *Sibron*

When may a police officer stop an individual and require him or her to answer questions?: Even though *Terry* and *Sibron* explicitly declined to decide whether a police officer could constitutionally stop, detain and interrogate someone briefly, upon less evidence than would justify an arrest, many subsequent decisions have made it clear that they can, and that reasonable suspicion (less evidence than would justify an arrest) that a crime was being committed, was about to be committed or had been committed is sufficient for the police to forcibly stop individuals briefly to ask them questions specifically related to their reasonable suspicion.

However, even under the doctrine of reasonable suspicion, cops may not stop, detain and require people to answer questions, even briefly, without some articulated, objective reason, some level of evidence to justify the intrusion, "something more," as Chief Justice Rehnquist said, "than an inchoate and unparticularized suspicion or 'hunch'." (*U. S. v. Sokolow*, 1989)

Other cases have made and established the same point. In *United States v. Brignoni-Ponce* (1975), for example, the Supreme Court ruled that the U.S. Border Patrol could not stop a vehicle near the Mexican border even just to question its occupants about their citizenship and immigration status, when the only ground for suspicion was the occupants' apparent Mexican ancestry, or when the stops were made randomly. They could constitutionally stop them and ask such questions only if they were aware of specific articulable facts that could reasonably warrant their suspicion that the vehicles contain aliens who may be in the country illegally. And even then, they could conduct no further searches without either consent, enough evidence to justify an arrest or, under *Terry*, a frisk if there was a basis to suspect a concealed weapon. The Court has also ruled

that unless there is specific evidence to justify a reasonable suspicion, the person stopped can walk away and need not answer any question. “He may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds.” (*Florida v. Royer*, 1983).

Of course, a police officer may approach any individual and ask anything. But as long as the individual is free to walk away and not answer, no “seizure” has taken place within the bounds of the Fourth Amendment. But the minute the officer, by force or show of authority, detains the individual and requires an answer, the Fourth Amendment applies, and requires, even for this limited purpose, reasonable suspicion of a crime, which is to say, specific, articulable facts to support the suspicion. And even under those circumstances, a frisk requires reasonable suspicion of a concealed weapon.

As the Supreme Court said in *United States v. Mendenhall* (1980):

“We adhere to the view that a person is ‘seized’ only when, by means of physical force or a show of authority, his freedom of movement is restrained. Only when such restraint is imposed is there any foundation whatever for invoking constitutional safeguards. The purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry, but ‘to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.’ As long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person’s liberty or privacy as would under the Constitution require some particularized and objective justification.”

(The catch here is that the cops are not required to tell individuals this; most young people stopped on the street don’t know it; and the cops often trick them into “consenting.” That is why it is advisable for the person asked to inquire – politely, always politely – whether he is free to leave or is being detained for questioning. And it is also advisable when stopped to make it clear, again politely, not with belligerence, that you do not consent to a search.)

Thus it is now the law that when a cop stops someone on less evidence than would justify an arrest, and asks them a question – and the individual is not free to leave without answering the question – then the stop is constitutional only if the officer has specific, articulable

facts to support a suspicion that the person is involved in a crime that has been committed, is being committed or is about to be committed. An inchoate hunch is not enough. Talking to known drug users or dealers is not enough. “Hanging out” is not enough. Entering and exiting a bodega that the cops know to be selling drugs, without more, is not enough.

When may a police officer search someone on the street?: Under *Terry* and *Sibron*, even if police officers have constitutionally stopped someone to question him or her, they may not fully search the person – that is require them to empty their pockets or thrust their own hands into the individual’s pockets – unless they have enough evidence to legally arrest them or to justify a judicial search warrant. That amount of evidence is called probable cause.

If the officer does not have probable cause and even if he has enough evidence to justify reasonable suspicion of a crime, and therefore to briefly stop and interrogate the individual, he can legally frisk him or her, that is, do a pat-down of external clothing, only if he has good reason to believe that he is in danger from a concealed weapon. This means he has to see a bulge or have other good reason to suspect a weapon that might place him in danger during the stop – articulable facts to support his suspicion of a concealed weapon, in order to legally frisk the individual.

Although there have been many Supreme Court cases after *Terry*, none has reduced this standard; indeed, it has been affirmed and re-affirmed repeatedly.

For example, in *Minnesota v. Dickerson*, decided in 1993, 25 years after *Terry*, the Supreme Court reviewed the legal basis for a frisk under *Terry*, when there was not enough evidence to justify an arrest or a search warrant. Here is what Justice White said in *Dickerson*, writing for the Court:

“*Terry v. Ohio* (1968) ... held that ‘[w]hen an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others,’ the officer may conduct a pat-down search ‘to determine whether the person is in fact carrying a weapon. The purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence’ Rather, a protective search – permitted without a warrant and on the basis of reasonable suspicion less than probable cause – must be strictly ‘limited to that which is

necessary for the discovery of weapons which might be used to harm the officer or others nearby.' If the protective search goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under Terry and its fruits will be suppressed. *Sibron v. New York* (1968). These principles were settled 25 years ago when, on the same day, the Court announced its decisions in *Terry and Sibron*."

These principles remain settled today, and any police practice that diverges from these principles is illegal.

Applying These Principles to What We Know about Stop-and-Frisk in New York City

Are the stops and interrogations apart from the frisks legal?: In 2005, according to official police reports, there were nearly 400,000 stops, resulting in 19,000 arrests. Thus in most of the stops – about 96 percent – the cops stopped people with not enough evidence to arrest them or search them, that is, without probable cause. This pattern continued in 2006, 2007, 2008 and 2009. In 2010, there were a record number of stops – over 600,000. Between 2005 - 2010, there were over three million stops, with about 94 percent not resulting in a summons or arrests. That means that there were a shade less than three million stops in instances where there was not enough evidence to support an arrest or a search warrant.

Under the applicable law described above, what articulable facts supporting the cops "reasonable suspicion" of a crime justified these stops? The reason cited most often in the police reports – nearly half – was "furtive movements." Without more, it is likely that such reasons violate the Supreme Court standards described above. Nearly another 20 percent cited the reason as "other." This is clearly not what the Supreme Court meant when it required "specific, articulated facts" supporting the officer's suspicion. Thus in about two-thirds of all these stops, the police reports themselves strongly indicate a legally insufficient reason to justify the stops. In virtually all the rest of the reported stops – nearly 30 percent – the reason for the stop is cited as "casing a victim or a location." But without more detail – the kind of detail that would clearly be required if any of these cases got to court – it is impossible to tell how many of these 30 percent were legal. It is suggestive, however, to note that only about six percent of all the stops resulted in arrests, indicating some huge overestimation by the police of reasonably suspicious circumstances.

But even without this 30 percent, the police reports themselves call into question the legality of two-thirds of the reported stops.

Are the frisks that accompany the stops legal?:

According to the official police reports, between 2005 – 2009, about half of the stops also included frisks. Assuming approximately the same percentage of the more than 600,000 stops reported in 2010, that's nearly one and a half million frisks in the six years span of 2005 - 2010. In 2009, 762 guns were found – about one quarter of one per cent of the number of frisks.

In one particular minority neighborhood, according to an analysis by *The New York Times* based on police reports, there were 52,000 stops between January 2006 and March 2010; only 25 guns were recovered. Assuming the same percentage of frisks to stops of about 50 percent that exists citywide, that means approximately 26,000 frisks in this neighborhood, with a yield of only 25 guns --, less than one-tenth of one per cent!

Whether we are talking about one-quarter of one per cent or one-tenth of one per cent, it is clear that virtually none of the frisks are producing guns. Indeed, somewhere between 99.75 percent and 99.9 percent of the frisks do not produce guns. But if the law permits frisks only if the police have specific, articulable reasons – like a tell-tale bulge or other good reason – to suspect a concealed weapon, how can virtually 100 percent of all frisks turn up no weapon? Either the police are stunningly incompetent, or they are conducting hundreds of thousands of illegal frisks, 90 percent of them against Blacks and Latinos. Over a million and a half frisks in the last four years, most of them illegal and most of them against people of color.

Conclusion

Stop-and-frisk is a widely used police practice in New York City, so it's important to understand that the factual thresholds for legal stops and legal frisks are not one and the same. Stops, frisks, and full searches are governed very clearly by different legal standards. Are the majority of stops and frisks as currently conducted by the NYPD, legal? Under the applicable law described here, the answer to that question should be abundantly clear.

Where is the Mayor on this scandal? Why isn't the Police Commissioner being held accountable for this epidemic of police lawlessness?

About Ira Glasser

Ira Glasser is President of the Drug Policy Alliance Board of Directors. He served as the executive director of the New York Civil Liberties Union from 1970 until 1978, when he was selected as national executive director of the NYCLU's parent group, the American Civil Liberties Union. He served in that capacity for 23 years until his retirement in mid-2001. Mr. Glasser is the co-author of *Doing Good: The Limits of Benevolence* and the author of *Visions of Liberty: The Bill of Rights for All Americans*.

About the Drug Policy Alliance

The Drug Policy Alliance is the leading organization in the United States promoting alternatives to the drug war. We envision a just society in which the use and regulation of drugs are grounded in science, compassion, health, and human rights; in which people are no longer punished for what they put into their own bodies but only for crimes committed against others; and in which the fears, prejudices and punitive prohibitions of today are no more. Our mission is to advance those policies and attitudes that best reduce the harms of both drug misuse and drug prohibition, and to promote the sovereignty of individuals over their minds and bodies.

About This Issue Brief

The Drug Policy Alliance published this issue brief as part of our campaign to end the marijuana arrest crusade in New York City. Since 1996, the NYPD has made more than 535,000 arrests for possessing small amounts of marijuana. In 2010 alone, 50,383 people were arrested for simple marijuana possession, comprising nearly 15 percent of all arrests in the city, making it the leading charge for arrest. Most of those arrested are handcuffed, placed in a police car, booked at the station, held in jail for up to 24 hours (sometimes longer), and then arraigned before a judge. Nearly 70 percent of those arrested are under 30 years old. Nearly 86 percent are black and Latino, even though government surveys demonstrate that white people use marijuana at higher rates. On average, nearly 140 people are arrested every day for marijuana possession in New York City, making the Big Apple the "Marijuana Arrest Capital of the World."

These arrests are extremely expensive, marked by racial bias, and more often than not are the result of illegal searches or mischarging by the police. Additionally, these arrests violate the spirit and intent of New York's marijuana possession laws: In 1977, the New York State Legislature passed the *Marijuana Reform Act of 1977*; possession of 25 grams or less of marijuana was

decriminalized – that is, it was made a violation, with the first offense punishable by a \$100 fine, rather than arrest and jail. The Legislature's intent was made clear in the new law: "Arrests, criminal prosecutions, and criminal penalties are inappropriate for people who possess small quantities of marijuana (sic) for personal use. Every year, this process needlessly scars thousands of lives and waste millions of dollars in law enforcement resources, while detracting from the prosecution of serious crime."

A word about "consensual" searches: Most of these arrests are the result of trickery, illegal searches, or false charges. Research shows that most people arrested for marijuana possession are not smoking in public, but simply have a small amount in their pocket, purse, or backpack. Possessing a small amount of marijuana in one's pocket or bag is a legal violation, but not a criminal offense. Often, when police stop and question a person, they do not have legal grounds to search but they tell the person to "empty your pockets" or "open your bag." Many people comply with the officer's request – even though they are not legally required to do so. Sometimes cops also say, or imply, that if the person stopped empties his pockets it will go easier on him, and the person may comply when there is no legal basis for doing so. These may later be called "consensual" searches because the person emptied his pockets or his knapsack "voluntarily." But no one is required to consent to such a search; if the police have legal grounds to search, they'll search; if they do not, it is advisable to make it clear – politely, always politely – that you do not consent to a search. This is important because under New York State law, if a person pulls marijuana from his pocket or bag, it makes the marijuana "open to public view," and therefore a crime. The police then arrest the person for this offense. If you have a small amount (less than 25 grams) of marijuana in your pocket or bag, and the police have no legal grounds to search you, leave it there; do not take it out.

For additional resources and information about marijuana arrests in New York City and efforts to reform our nation's drug policies, please visit our website: www.drugpolicy.org.

10 Rules for Dealing with the Police

For more "know your rights" information and materials, we strongly recommend the short video, *10 Rules for Dealing with the Police*. The video is an excellent resource and tool for communities, students and parents, schools, elected officials, and anyone interested in understanding the law and their rights during a police encounter. Find the video at www.flexyourrights.org.