ARREST UNDER THE NEW KANSAS CRIMINAL CODE

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If and when an arrest has occurred is important to both citizen and lawyer. To the citizen arrested, an arrest means a loss of freedom, a damaged reputation, and an arrest record, in most cases unexpungable though the arrest be illegal. The timing and occurrence of an arrest are important to the criminal lawyer whenever the validity of that arrest is challenged by a motion to suppress evidence pursuant to the exclusionary rule, under which any evidence obtained by unconstitutional methods is inadmissible in criminal prosecutions.

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The development of the exclusionary rule, the current controversy over its efficacy and desirability, and the various substitutes proposed, have all been analyzed elsewhere. For the purposes of this article, the crucial point is that evidence seized in a search incident to an unlawful arrest or detention will be excluded at trial. Thus, the exclusionary rule supplies the prize—the exclusion or admissibility of prosecution evidence—that makes the contest over the legality of an arrest of more than academic importance.

In 1970, a new Kansas Criminal Code, touching on virtually every aspect of the criminal process, became effective. This article will focus on those sections of the new Code specifically authorizing the stopping of citizens. In the course of this discussion, the definition of “arrest,” as well as the circumstances under which the new Code permits a person to be either arrested or stopped and frisked will be considered.

I. The Definition of “Arrest”

The instances in which a seizure of the person may be constitutionally valid fall generally into three categories: (1) an arrest with a warrant that has been issued by a magistrate upon a showing that there is probable cause to believe that the suspect has committed or is committing a crime; (2) an arrest under circumstances where the police officer, although lacking a warrant, has probable cause to believe that a crime has been or is being committed; and (3) a detention, not amounting to an arrest, based upon a reasonable suspicion (as distinguished from probable cause to believe) that criminal activity is occurring. Identification of the type of seizure involved in a particular case is of primary significance. If there was an arrest, the prosecution must establish that probable cause existed prior to the time the warrant issued or, if there was no warrant, then prior to the arrest itself. If probable

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3 For purposes of this article, “seizure” means any restraint of a person’s liberty. “Arrests” and “stops” are separate categories of seizures.
4 The standard against which all seizures must be measured is the fourth amendment to the United States Constitution which provides: “The right of the person 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.”
5 There is a possible fourth category: detentions without reasonable grounds. Roadblocks where all cars on a particular road are stopped for investigative purposes belong in this category. No warrant or probable cause exists and rarely is a particular car stopped because it, more than others, arouses suspicion. The Supreme Court has not dealt directly with the roadblock problem, but dicta in some opinions indicate that the practice may be unconstitutional. The Court said in Carroll v. United States, 267 U.S. 132, 153-54 (1925): “It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully using the highways to the inconvenience and the indignity of such a search.” See also Brinegar v. United States, 338 U.S. 160, 177 (1949). Some state courts, however, have held roadblocks valid. State v. Hatfield, 112 W.Va. 424, 426-27, 164 S.E. 518, 519 (1932); Kagel v. Brugger, 19 Wn. 2d 1, 4, 119 N.W.2d 394, 596 (1963). See Cook, Varieties of Detention and the Fourth Amendment, 23 Ala. L. Rev. 287, 307-12 (1971); ALI Model Code of Pre-Arraignment Procedure § 110.2(2) (Official Draft No. 1 May 17, 1972) [Hereinafter cited as Model Pre-Arraignment Code]. The recent case of State v. Frizzell, 207 Kan. 393, 485 P.2d 160 (1971), is not in point. Officers there were stopping vehicles in order to check operators’ licenses by authority of Kan. Stat. Ann. § 8-244 (1964). The validity of a roadblock used to apprehend a fleeing suspect was not in issue.
cause cannot be shown, the arrest is illegal, and any evidence acquired as a result is inadmissible against the defendant.\(^6\) If the detention was merely for investigative purposes rather than arrest, a showing of probable cause is not necessary.

Since the term "arrest" does not appear in the Constitution\(^7\) and has never been adequately defined in any Supreme Court decision,\(^8\) one must look to statutes and lower court opinions to determine if an arrest has occurred.\(^9\) The Kansas Code of Criminal Procedure, consistent with the common law and prior Kansas law,\(^10\) defines "arrest" as "the taking of a person into custody in order that he may be forthcoming to answer for the commission of a crime."\(^11\) This emphasis upon the intention of the arresting officer has been accepted by some courts; these courts require a showing that the officer intended to bring the suspect in for booking and arraignment.\(^12\) But the majority and better view is that an arrest can occur regardless of the officer's intention.\(^13\) Practically speaking, the officer will assert control over the suspect sufficient to indicate that the citizen is in custody if he actually intends to make an arrest.\(^14\) The circumstances that will, under the majority rule, establish an arrest irrespective of an officer's contrary intent, are unclear. Accordingly, the courts following the majority rule have identified two further con-

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\(^7\) Of course, the word "seizure" in the fourth amendment encompasses arrests.

\(^8\) The Court, however, came very close to providing an adequate definition in Terry v. Ohio, 392 U.S. 1, 10-12 (1968).

\(^9\) As one court has so aptly observed:

It is axiomatic that before a finding can be made that there has been an illegal arrest, a showing must be made that there has been an arrest. Thus, an immediate problem of definition arises. Joined to that problem, is the danger, that the defining process will cast an air of deceptive simplicity over the broader task actually faced by the Court. One must never forget that this is a decision on the rights of individuals and the duties of government, and not an abstract exercise in definition. In dealing with words that is always a temptation to allow them to become separated from their objective correlates in the everyday world, and to treat them as if they have, or ought to have, one single simple meaning, unaffected by the contexts in which they occur and divorced from the world of things and events which give them their content and justification.

"Arrest" is just such a word, not only because it is necessarily unspecific and descriptive of complex, often extended processes, but because in different contexts it describes different processes, each of which has built up, in both legal and common parlance, sharply divergent emotional connotations. United States v. Bonanno, 180 F. Supp. 71, 77 (S.D.N.Y. 1960).


\(^12\) United States v. Bonanno, 180 F. Supp. 71, 77 (S.D.N.Y. 1960). Some seem to have taken the position that an arrest is not consummated until the suspect is taken to the stationhouse. W. LaFaye, Arrest 4 (F. Remington ed. 1965). See also the discussion dealing with stops on less than probable cause, infra. Also, see Model Pre-Arraignment Code, supra note 5, at § 110.2 and Commentary at 13, 110, 113, 130.


\(^14\) It should be noted that custody may be established either by physical restraint or by submission to a manifestation reasonably understood as an assertion of control. Coleman v. United States, 295 F.2d 555, 563 (D.C. Cir. 1961).
considerations: (1) the degree of restraint imposed upon the suspect's liberty and (2) the suspect's reasonable understanding of the situation.

The leading case dealing with the restraint necessary to constitute an arrest is Henry v. United States. Federal officers, after receiving a report that a man named Pierotti was involved in a theft of whiskey from a Chicago terminal, saw Pierotti and the defendant, Henry, picking up cartons at a residence and loading them into a car parked in an alley. The officers followed the car for some distance and then stopped it. As the officers approached the suspect's car, they heard Henry tell Pierotti to make a false statement about just joining him; they also observed that the cartons in the back seat were addressed to an out-of-state company. A search revealed that the cartons contained stolen radios. Agreeing with the government that an arrest had occurred at the moment the officers stopped the car and restricted the suspects' liberty of movement, the Supreme Court concluded that, since probable cause did not exist at that time, the evidence obtained in the search should have been excluded.

Read literally, Henry appears to have held that any confrontation between an officer and a suspect constitutes an arrest. But that certainly is not the law. In Rios v. United States, which was decided one year later, police officers on a routine patrol, who were not investigating any particular case, began, for some reason not apparent from the record, following a taxi in which the defendant was riding. After the taxi stopped at an intersection, the officers left their car and approached it from opposite sides. When one officer identified himself, the suspect panicked, dropping a recognizable package of heroin to the floor of the taxi, and attempted to flee, but was subdued in a nearby alley. The prosecution maintained that no arrest had occurred until after the heroin was dropped and that the officers had approached the taxi only for routine investigation. The defendant, on the other hand, argued that the appearance of the officers at the car door was an arrest and that because there was no probable cause to arrest prior to that time, the arrest was illegal and that any evidence obtained thereafter should have been excluded. While the Supreme Court agreed that the case turned upon the time of arrest, it refused to apply Henry "literally" and remanded the case to the district court to determine when the arrest took place.

Consequently, lower courts considering the question of the restraint necessary for an arrest have been left to develop the law on a case-by-case basis. Some courts have held that almost any restriction of liberty is an arrest;
others have required more. Although there is no problem when the suspect is physically restrained and is told that he is under arrest, there is general agreement that an arrest can occur without physical force.

When the officer's conduct does not make clear that an arrest is intended, the courts have turned to the suspect's understanding. While there is no requirement that the officer explicitly tell the suspect that he is under arrest, some courts have held that there is no arrest until he has been told if the suspect does not know or have reason to know he is in custody. The general rule is that a suspect is under arrest if a reasonable man confronted with the same circumstances would know or reasonably believe that he is in custody and is not free to go.

The Kansas Supreme Court has never thoroughly dealt with the problem of when an arrest occurs, but did consider it briefly in State v. Wood. There the Rice County Sheriff received a telephone call from his dispatcher indicating that officers were to be on the look-out for a two-tone, blue Pontiac with one tail light missing. The dispatcher stated that the Ellinwood police, who had reported that one occupant had attempted to pass a check taken in a recent burglary, wanted the car stopped. The sheriff stopped the wanted car after radioing for assistance. A search of the defendant by another officer, who arrived a short time later, turned up several numbered checks which were subsequently introduced into evidence. At trial, the sheriff testified that he considered an arrest to have occurred when he stopped the car and gave directions to defendant "to stay within the vicinity of the car and to keep his hands where he [the sheriff] could see them." The Kansas Supreme Court ruled

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19 See, e.g., Dupree v. United States, 380 F.2d 233 (8th Cir. 1967); Moore v. United States, 296 F.2d 519 (5th Cir. 1961); State v. Berry, 450 S.W.2d 212 (Mo. 1970).
21 Also see cases cited in notes 13 & 14, supra.
23 Schindler v. Michaud, 411 F.2d 80 (10th Cir.), cert. denied, 396 U.S. 956 (1969). In Yam Sang Kwai v. Immigration and Naturalization Service, 411 F.2d 683 (D.C. Cir.), cert. denied, 396 U.S. 877 (1969), the surrounding of petitioner's restaurant without his knowledge was not an arrest. But in Government of Virginia v. Quinones, 301 F. Supp. 246, 249 (D.V.I. 1969) it was held that two suspects were under arrest at the police station even though unconscious and unaware that they had been placed in custody. The two cases may be reconciled on the ground that in Quinones, defendants were unable to become aware. See generally Cook, Subjective Attitudes of Arrestee as Affecting Occurrence of Arrest, 19 Kan. L. Rev. 173 (1971). It is also true that an arrest is invariably found where the suspect has been transported to a stationhouse. See Seals v. United States, 325 F.2d 1006 (D.C. Cir. 1963); Kelley v. United States, 298 F.2d 310 (D.C. Cir. 1961).
24 United States v. Rodgers, 246 F. Supp. 405 (E.D. Mo. 1965); United States v. Cortez, 425 F.2d 453, 457 (6th Cir.), cert. denied, 400 U.S. 906 (1970). Thus, a person is not arrested merely because a customs official takes a seat opposite him on an international train. United States v. Grandi, 424 F.2d 399 (2d Cir. 1970). And an order from a police officer to remain seated is not an arrest even if the suspect believes he is in custody. United States v. McKethan, 247 F. Supp. 324 (D.D.C. 1965). It should be noted that there is some debate on this point. Because the fourth amendment protects every man, even the suspect who unreasonably believes he has been arrested, it has been argued that if the suspect believes subjectively that he is in custody, he must be considered in custody. Of course, even if courts apply the subjective test, the trier of fact is unlikely to credit the defendant's testimony supporting an unreasonable belief. See Abrams, Constitutional Limitations of Detention for Investigation, 52 Iowa L. Rev. 1093, 1104 (1967).
26 Id. at 783, 378 P.2d at 540.
that an arrest had occurred at that time. Though no general rule was articulated, the inference is that the sheriff’s orders effectively restrained the defendant’s freedom of movement\textsuperscript{28} and that this indicated that the officer intended an arrest.

In sum, the answer to the question of whether an arrest has occurred depends upon the facts of a given case. Three factors which are generally considered significant are: (1) the intent of the officer, (2) the restraint of liberty involved, and (3) the reasonable understanding of the citizen. The extent to which the traditional concept of arrest has been eroded by the recent “stop and frisk” Supreme Court case of Adams v. Williams\textsuperscript{27} is unclear.

II. THE CIRCUMSTANCES UNDER WHICH A KANSAS LAW ENFORCEMENT OFFICER IS AUTHORIZED TO MAKE An ARREST

To determine whether an arrest is valid, the law enforcement officer’s\textsuperscript{28} actions must be measured against the fourth amendment\textsuperscript{29} and the United States Supreme Court cases construing it. Therefore, before specifically considering the new Kansas Criminal Code section on arrests, the relevant Supreme Court cases will be analyzed. Since all arrests are either pursuant to a warrant or without a warrant, this section of the article will be divided into two categories.\textsuperscript{30}

A. ARRESTS PERSUANT TO AN ARREST WARRANT

1. In General

Generally, an officer must possess a warrant\textsuperscript{31} issued by a magistrate\textsuperscript{32} who has concluded that the complaint establishes probable cause to believe that a


\textsuperscript{29} See 407 U.S. 143 (1972). For a discussion of the problems created by this case, see text accompanying notes 203-26, supra.

\textsuperscript{30} The Kansas Criminal Code defines a law enforcement officer to be “any person who by virtue of his office or public employment is vested by law with a duty to maintain public order or to make arrests for [crimes].” Kan. Stat. Ann. § 22-2202(11) (Supp. 1971).

\textsuperscript{31} Of course, the officer’s actions must also satisfy the requirements of Section 15 of the Kansas Bill of Rights which is essentially similar to the fourth amendment and Kan. Stat. Ann. § 22-2401 (Supp. 1971). Like the fourth amendment, the statute and the state constitution both use the words “probable cause” without defining them.

\textsuperscript{32} The new Code, in Kan. Stat. Ann. § 22-2401 (Supp. 1971), authorizes a Kansas law enforcement officer to make an arrest in five different situations: (1) when the officer has an arrest warrant; (2) when the officer has probable cause to believe that an arrest warrant has been issued in Kansas or in another state; (3) when the person to be arrested has committed or is committing any crime in the officer’s view; (4) when the officer has probable cause to believe the person to be arrested is committing or has committed a felony; and (5) when the officer has probable cause to believe that the person is committing or has committed a misdemeanor and that unless the person is arrested immediately such person will not be apprehended or evidence will be destroyed or the person may injure himself or others or damage property. A private person is also authorized to make arrests. Kan. Stat. Ann. § 22-2403 (Supp. 1971).

\textsuperscript{33} ‘Magistrate’ means an officer having power to issue a warrant for the arrest of a person charged with a crime and includes: (a) The justices of the supreme court; (b) The judges of district courts; (c) Judges of courts exercising limited criminal jurisdiction under the laws of the state of Kansas.” Kan. Stat. Ann. § 22-2202(12) (Supp. 1971).
crime has been committed by the person named. The landmark case considering the content of the complaint is *Giordenello v. United States.*\(^3\) Giordenello was arrested pursuant to a federal warrant. The complaint\(^4\) upon which the warrant was based merely stated that Giordenello had committed a crime on a particular day.\(^5\) The Court held that the complaint did not set forth a sufficient factual foundation to enable the magistrate to make the finding of probable cause necessary for the issuance of an arrest warrant.\(^6\) Mr. Justice Harlan, writing for the majority, concluded that both Rule 4(a) of the Federal Rules of Criminal Procedure\(^7\) and the fourth amendment require the magistrate, not the complainant (who will normally be a person involved in the "competitive enterprise of ferreting out crime"\(^8\)), to judge for himself the persuasiveness of the facts alleged in the complaint. According to Justice Harlan, the magistrate cannot accept without question the complainant's mere conclusion that the person to be arrested committed the crime. Therefore, the Court concluded that the complaint did not provide a sufficient basis from which a "neutral and detached"\(^9\) magistrate could make an independent determination of probable cause.

The United States Supreme Court again considered the issue of what factual

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\(^4\) "The undersigned complainant [Finley] being duly sworn states: That on or about January 26, 1956, at Houston, Texas in the Southern District of Texas, Veto Giordenello did receive, conceal, etc., narcotic drugs, to-wit: heroin hydrochloride with knowledge of unlawful importation; in violation of Section 174, Title 21, United States Code.

And the complainant further states that he believes that ....... ....... are material witnesses in relation to this charge." 357 U.S. at 481.

\(^5\) Petitioner attacked the arrest warrant on two grounds: (1) that the complaint on which the warrant was issued was inadequate because the complainant relied solely on hearsay information rather than on personal knowledge, and (2) that, in any event, the complaint only stated the elements of the crime but did not set forth any facts. Id. at 484. The Court did not have to reach the hearsay issue because it accepted Giordenello's second argument. It is now clear that a warrant may be based on hearsay. See *Jones v. United States*, 362 U.S. 257 (1960) as construed by *Aguilar v. United States*, 378 U.S. 108 (1964) and its progeny.

\(^6\) Although the Court found the arrest warrant invalid, it did state that on re-trial the Government could seek to justify the arrest on the ground that was a valid warrantless arrest. 357 U.S. at 488. Compare *Giordenello* with State v. Addington, 205 Kan. 640, 472 P.2d 225 (1970).

This position may be attacked on the ground that it encourages the police not to seek a warrant and make full disclosure to the magistrate. If the arrest produces incriminating evidence, it is difficult to believe that hindsight will not affect the determination of the validity of the arrest. Yet, even though the Court has indicated a preference for arrest warrants, Beck v. Ohio, 379 U.S. 89 (1964), an arrest has never been held to be illegal simply because there had been time to obtain a warrant. See *Ker v. California*, 374 U.S. 23 (1963). There are, however, some cases which suggest that a magistrate's determination should be given greater weight than a policeman's when probable cause determinations are reviewed. See United States v. Ventura, 380 U.S. 102 (1965); *Wong Sun v. United States*, 371 U.S. 471, 473-82 (1963); *Travis v. United States*, 362 F.2d 477, 480 (9th Cir. 1966). Finally, it seems settled now that searches are treated differently. See generally *Vale v. Louisiana*, 399 U.S. 30 (1970).

\(^7\) Fed. R. Crim. P. 4(a) provides: "If it appears from the complaint, or an affidavit or affidavits filed with the complaint, that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for arrest . . . shall issue . . . ." Compare with the fourth amendment language of "[W]arrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing . . . the person or things to be seized," and section 15 of the Kansas Bill of Rights which contains this language of the fourth amendment, Kan. Const. Bill of Rights § 15.

Any doubt that *Giordenello* was based on the fourth amendment was laid to rest by the Court in *Aguilar v. Texas*, 378 U.S. 108, 112 n.3 (1964), where it held that *Giordenello* was based on the fourth amendment, therefore making the principles of *Giordenello* applicable to the states via the fourteenth amendment.

\(^8\) 357 U.S. at 486.

\(^9\) Id. quoting Johnson v. United States, 333 U.S. 10, 14 (1948).
information the complaint must contain in In re United States and concluded:

A complaint must provide a foundation for [the judgment that resort to further criminal process is justified]. It must provide the affiant's answer to the magistrate's hypothetical question, "What makes you think that the defendant committed the offense charged?" This does not reflect a requirement that the [magistrate] ignore the credibility of the complaining witness . . . . It simply requires that enough information be presented to the [magistrate] to enable him to make the judgment that the charges are not capricious and are sufficiently supported to justify bringing into play the further steps of the criminal process.41

Thus, it is clear that the complaint must contain more than a mere statement of the elements of the crime and the unsupported conclusions of the complainant. The magistrate must have sufficient facts from which a reasonable man would conclude that the person to be arrested probably has committed a crime.42

The determination of whether the complaint establishes probable cause, like any question of fact, involves the credibility and weight of the evidence. When the complaint or affidavit is based on personal knowledge and the affiant appears before the magistrate, the credibility issue should be no problem. In many cases, however, the affiant will not have direct personal knowledge of all of the circumstances on which the complaint is based. It is then crucial to evaluate the sources of his information to determine if they are credible. Although a complaint may be premised entirely upon hearsay, the requirements of Aguilar v. United States,43 Spinelli v. United States,44 and United States v. Harris,45 which are considered in Part B(1)(ii) of this section, infra, must be satisfied.

2. The Kansas Situation

The requirements for the issuance of an arrest warrant in Kansas46 are set out in Kan. Stat. Ann. section 22-2302,47 which provides: "If the magistrate

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40 381 U.S. 214 (1965).
41 Id. at 224-25.
42 Essentially the same standards of probable cause for warrantless arrests are to be applied by the magistrate. See the general discussion of probable cause for warrantless arrests in this article. Moreover, it seems clear that the "probable cause" needed to issue a warrant would satisfy the tests' application to warrantless felony arrests. See Whiteley v. Warden, 401 U.S. 560 (1971); Beck v. Ohio, 379 U.S. 89, 96 (1964).
45 403 U.S. 573 (1971).
46 For a discussion of how Kansas warrants have been issued in the past see LaFave, supra note 12, at 31-32. For a discussion of prior law see Wilson, supra note 10, at 5-9.
47 This section changed Kansas law by allowing a summons to issue when requested by the county attorney. A summons is defined to be "a written order issued by a magistrate directing that a person appear before a designated court at a stated time and place and answer to charges pending against him." Kan. Stat. Ann. § 22-2202(16) (Supp. 1971). The only difference between a warrant and a summons is that the person named will not be taken into custody; instead he is requested to appear. If the person named in a summons does not appear, a warrant will issue. Execution of the arrest warrant is governed by Kan. Stat. Ann. § 22-2305 (Supp. 1971) which is essentially Fed. R. Crim. P. 4(c).

In Kansas, any objection to the court's personal jurisdiction over a criminal defendant, based upon technical defects in an arrest warrant or its issuance, is waived upon posting an appearance bond. State v.Addington, 203 Kan. 640, 472 P.2d 229 (1970). The pertinent rationale was provided in State v.
finds from the complaint or from an affidavit or affidavits filed with the complaint or from other evidence that there is probable cause to believe both that a crime has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue.”

Normally, the warrant will be issued solely on the basis of a complaint filed with the magistrate. In such a case the complaint, which may be made by any person who has knowledge of the facts, must allege facts sufficient (1) to establish that a crime has occurred in the particular county and (2) to convince a reasonable man that the named suspect committed it. It must be positively verified, i.e. the facts must be positively sworn to—words to the effect of “on the information and belief” are insufficient for the issuance

Munson, 111 Kan. 318, 206 P. 749 (1922), where the defendant argued that his arrest warrant was invalid because the information upon which it was issued had not been properly verified. The Court held that the warrant functioned to detain the defendant only until he voluntarily gave bond. Thereafter, he was no longer held by virtue of the warrant, and his motion to quash was of no consequence. This rule has now apparently been codified in KAN. STAT. ANN. § 22-2305 (Supp. 1971).

It is important to understand, however, that this rule applies to personal jurisdiction based upon defective warrant procedure but, of course, not to the admissibility of evidence. State v. Theus, 207 Kan. 571, 485 P.2d 1327 (1971). Where evidence is obtained as a result of an invalid arrest, a motion to suppress may be entertained as late as the trial stage. KAN. STAT. ANN. § 22-3216(3) (Supp. 1971).

Execution of the arrest warrant is governed by § 22-2305 which is essentially Rule 4(c) of the Federal Rules of Criminal Procedure. Kansas law now provides that the warrant may be issued to any law enforcement officer and may be executed by a law enforcement officer who is not named in the warrant and may be served anywhere in the state. Allowing the officer to serve it anywhere in the state may be a change in the law. Compare Wilson, supra note 10, at 7, with KAN. STAT. ANN. § 22-2305 (Supp. 1971). It should be noted that the territorial limitations governing search warrants are apparently narrower. See KAN. STAT. ANN. § 22-2305. Section 22-2305 also provides that the officer executing the warrant need not have it in his possession at the time of arrest but must show it to the defendant upon request as soon as possible. Finally, the arrest warrant must now state the amount of the appearance bond if there is to be one. For other sections dealing with making arrests, see KAN. STAT. ANN. §§ 22-2404 to -2408, and 21-3215 to -3216 (Supp. 1971).

48 KAN. STAT. ANN. § 22-2302 (Supp. 1971). Although the normal way to get an arrest warrant issued is to file a complaint or a complaint and affidavits, a warrant may be issued upon an indictment or information, KAN. STAT. ANN. § 22-2303 (Supp. 1971), or upon a complaint plus testimony from an inquisition, KAN. STAT. ANN. § 22-3103 (Supp. 1971). These situations satisfy not only the probable cause requirement but also the positive verification requirement of Kansas law.


50 Subsection (2) of KAN. STAT. ANN. 22-3261 (Supp. 1971) provides that a:

Complaint . . . shall be a plain and concise written statement of the essential facts constituting the crime charged, which complaint, information or indictment, drawn in the language of the statute, shall be deemed sufficient . . . . A complaint shall be signed by some person with knowledge of the facts. . . . The complaint, information or indictment shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged to have violated. . . . Also see KAN. STAT. ANN. § 22-2202(6) (Supp. 1971) which defines a complaint to mean “a written statement under oath of the essential facts constituting a crime.”

As is indicated in KAN. STAT. ANN. § 22-3201(2) (Supp. 1971), the complaint may be signed by any person with knowledge of the facts. It has been suggested that it is better to have the injured party sign the complaint because this may assure the signator’s future cooperation. See Wilson, supra note 10, at 7. However, it is clear that, as is often the case, the county attorney may sign and verify the complaint.

52 In this regard, the definition of the complaint, which is found in KAN. STAT. ANN. § 22-3201(2) (Supp. 1971), seems incompatible with this view and presents a problem because it provides in part: “The complaint . . . shall be a plain and concise written statement of the essential facts constituting the crime charged, which complaint, information or indictment, drawn in the language of the statute, shall be deemed sufficient . . . .”

If the language “drawn in the language of the statute, shall be deemed sufficient” was intended to permit a warrant to be issued on a complaint not setting forth the essential facts which lead the complainant to conclude that a crime had been committed and the defendant committed it, evidence obtained as a result of the arrest is clearly suppressible. Whiteley v. Warden, 401 U.S. 560, 564-66 (1971); Jaben v. United States, 381 U.S. 214 (1965); Giordenello v. United States, 357 U.S. 480 (1958).
of a warrant. Furthermore, although a John Doe complaint and a warrant which does not specifically name the defendant may issue, a particular person must be involved and a description of this person must be included in the warrant so that he can be identified with reasonable certainty.

Although generally the magistrate’s determination will be made on the basis of the complaint, section 22-2302 also provides that it may be based upon a complaint and affidavits, upon affidavits alone, or upon “other evidence.” This section differs from the version which was recommended by the Kansas Judicial Council. The Council’s version, patterned after Rule 4(a) of the Federal Rules of Criminal Procedure, provided that the magistrate must make his probable cause determination from the complaint, from the affidavits, or from the complaint and affidavits. The significance of the legislature’s inclusion of the words “other evidence” is not clear. These words may refer exclusively to tangible evidence. The use of such evidence presents no real problem—especially if made a matter of permanent record. Even absent such recordation, the use of tangible evidence is not subject to the same range of possible abuses as unrecorded oral testimony.

There are at least two arguments that “other evidence” includes oral testimony. First, section 22-2302’s predecessor, section 62-602, apparently required that the entire complaint, including oral testimony of the complainant and any witness produced by him, be reduced to writing. Such a requirement is conspicuous by its absence from the present statute. To conclude that this language difference is of no significance and that “other evidence,” which certainly can be read to include oral testimony, must still be made part of a permanent record is hardly tenable. Additionally, the “other evidence” language should be interpreted in light of the requirements of section 22-2502. Although this latter section concerns the requirements for the issuance of a search warrant, the probable cause determinations involved are essentially the same. The language of section 22-2302 is clearly different from section 22-2502 in that the former specifically refers to types of writing (complaints and affidavits) prior to the mention of “other evidence” while the latter merely speaks of the issuance of a search warrant upon a “written statement.” Therefore,

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*This requirement does not apply to an information.
*It should be noted that it is possible the legislature intended “other evidence” to mean only tangible evidence. This seems unlikely, however, because warrants are normally not based on tangible evidence.
*KAN. STAT. ANN. § 22-2502 (Supp. 1971) which provides that “[u]pon the written statement of any person under oath or affirmation which states facts sufficient to show probable cause . . .” (emphasis added) may be construed in at least two ways. One possibility is that “written statement” means that the search warrant can be issued only upon affidavits. The other position is that the magistrate can issue a warrant on the basis of oral testimony which is contemporaneously recorded. With respect to the argument that this “written statement” requirement may be satisfied by oral testimony given under oath before the magistrate contemporaneous with (or immediately prior to) issuance of the warrant so long as that testimony is then recorded, a comparison of the language of the present statute with its predecessor, KAN. STAT. ANN. § 62-1830 (1964) is instructive. The latter provided in pertinent part that “[a] warrant shall issue upon affidavit or upon oral testimony given under oath and
one may logically conclude that section 22-2302 permits the state to resort to after-the-fact testimony (testimony given at the hearing on the motion to suppress which relates to what was said, but not written down, at the time the warrant was issued) in addition to written evidence of the proceedings before the magistrate in responding to a challenge to an arrest warrant's validity. Shorn of statutory protection, a defendant will find no solace in the fourth amendment so long as the original testimony was sworn to under oath because "neither the Federal nor State constitutions require that the facts establishing probable cause before the magistrate be reduced to writing . . . as a necessary prerequisite for the valid issuance of an arrest warrant."69 However, though after-the-fact justification is neither proscribed by section 22-2302 nor violative of the fourth amendment, it does present other problems.

When the validity of the arrest warrant is attacked by a motion to suppress evidence on the theory that the complaint did not provide a sufficient basis for the issuance of the warrant,66 the state has three alternative ways of showing that the arrest warrant was validly issued: (1) an official transcript of the proceedings before the magistrate, (2) the testimony or affidavit of the complainant as to his statements before the magistrate, and (3) the testimony or affidavit of the magistrate himself. Although the official transcript is obviously the best method, many Kansas counties apparently do not transcribe these proceedings. The other two alternatives present a procedural due process problem which can easily be avoided by the use of a transcript and should be. The failure to require a contemporaneous record of the proceedings before the magistrate results in a "swearing contest" as to what occurred, not a meaningful review of the magistrate's actions. Since the prosecuting attorney and the police officer-complainant are the only interested parties present before the magistrate, a defendant has no reliable way of determining what evidence was presented to the magistrate. The use of oral testimony which is taken at the hearing on the motion to suppress evidence and after-the-fact affidavits which are filed in response to the defendant's objections invites perjury that is arguably beyond attack because defense counsel has no record with which to contradict the responses made during cross-examination by the prosecution witnesses. Even if no perjury is committed, after-the-fact testimony suffers


67 It should be understood that when the police have acted with a warrant the issue at the motion to suppress hearing is whether the magistrate acted properly, not whether the police did. See Jones v. United States, 362 U.S. 257 (1960).
from the inherent limitations of human memory. To avoid possible injustice courts, as a bare minimum, should be bound only by a permanent, contemporaneous record.\(^{61}\) Is it ever possible for a defendant who seeks to determine if his fourth amendment rights have been violated to secure a fair hearing if a contemporaneous record was not made?\(^{62}\)

Despite the problems raised by the use of the term “other evidence” in section 22-2302,\(^{63}\) it is clear that Giordenello v. United States\(^{64}\) and its progeny clearly require that the complaint, the affidavits or the “other evidence” must furnish a sufficient factual basis upon which the magistrate can make an independent determination of probable cause. And the Kansas Supreme Court has clearly applied this approach when evidence is seized incident to an arrest pursuant to an invalid arrest warrant.\(^{65}\)

Inadequate complaints can be obviated by drafting form complaints cover-


\(^{62}\) The Supreme Court of Wisconsin has long held:

It is an anomaly in judicial procedure to attempt to review the judicial act of a magistrate issuing a search warrant upon a record made up wholly or partially by oral testimony taken in the reviewing court long after the search warrant was issued. Judicial action must be reviewed upon the record made at or before the time that the judicial act was performed. The validity of judicial action cannot be made to depend upon the facts recalled by fallible human memory at a time somewhat removed from that when the judicial determination was made. This record of the facts presented to the magistrate need take no particular form. The record may consist of the sworn complaint, of affidavits, or of sworn testimony taken in shorthand and later filed, or of testimony reduced to longhand and filed, or of a combination of all these forms of proof. The form is immaterial. The essential thing is that proof be reduced to permanent form . . . and made a part of the record, which . . . may be transmitted to the reviewing court. Gledowski v. State, 196 Wis. 265, 271-72, 220 N.W. 227, 230 (1928).

This language was cited approvingly by Justice Brennan, who was joined by Justice Marshall in dissenting from the denial of certiorari in Christofferson v. Washington, 393 U.S. 1090, 1091 (1969). Also see State v. Waltcott, 72 Wash. 2d 959, 970-71, 435 P.2d 994, 1002-03 (1967) (dissenting opinion).

For federal cases rejecting the argument that an insufficient complaint can be rescued by affidavits of the judge who issued the warrant, or by the district attorney who applied for the warrant, see United States v. Sterling, 369 F.2d 799, 802 n.2 (1966); Rosencrantz v. United States, 356 F.2d 310 (1966); United States v. Birrell, 242 F. Supp. 191 (1965).

The Kansas Supreme Court, while holding that a complaint had to be in writing, in the case of State v. Goetz, 65 Kan. 125, 130, 69 P. 187, 189 (1902), made the following observation relevant to the use of oral statements: "It would not do to hold that a citizen's liberty may be taken from him and his character aspersed by a criminal proceeding depending upon the fleeting and unstable foundation of an oral statement made to a magistrate." Cf. State v. McMillin, 206 Kan. 3, 476 P.2d 612 (1970).

\(^{63}\) See text accompanying notes 56-62, infra.

\(^{64}\) 357 U.S. 480 (1958).


It is important to note that the Kansas Supreme Court in the very recent case of State v. Lamb, 209 Kan. 453, 497 P.2d 275 (1972) relied upon warrantless arrest cases in upholding a search warrant. For a more thorough discussion of Lamb, see text accompanying notes 122-28, infra.
ing every substantive crime in the state of Kansas, to be provided to police departments and to county attorneys. A suggested form is set out below.66

B. Arrests Without a Warrant

The fourth amendment to the United States Constitution67 prohibits the issuance of a search or an arrest warrant without probable cause. It also prohibits all unreasonable governmental searches and seizures (including arrest). However, viewing the language alone, it is not clear whether the framers of the Constitution intended all searches and all seizures which are made without a warrant to be unreasonable, or whether a warrantless search and seizure based upon probable cause was considered reasonable. Although the precise intent of the framers may not be clear, the Supreme Court has clearly sanctioned warrantless arrests for felonies.68 The Kansas legislature has followed this lead.

A Kansas law enforcement officer is empowered to arrest for any crime if he possesses a warrant. In addition, he may under the new Code arrest without a warrant if: (1) he has probable cause to believe that a warrant for a person's arrest has been issued, either in this state or in another; (2) a crime is committed in his view; (3) he has probable cause to believe that a felony is being committed or has been committed by a particular citizen; or (4) he has

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State of Kansas

in the _________________ Court

v.

_______________________________ County, Kansas

_______________________________

Defendant

COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT IN HIS CAPACITY AS MAGISTRATE OF THE STATE OF KANSAS:

In the NAME AND BY AUTHORITY OF THE STATE OF KANSAS

I, _________________, the undersigned complainant, being duly sworn, on my oath make the following statements:

(a) I have reason to believe and do believe and hereby charge the following facts are true. That on or about _________________, 19____, in _________________ County, Kansas, and before the filing of the complaint, the above named Defendant did (set out the elements of the statute):

(b) Some of the circumstances showing probable cause exists for my belief that the facts stated above are true as follows:

(If nonpersonal knowledge have the source of the information set forth, the basis for believing the source is reliable, and how the source obtained the information.)

/s/______________________________________________________________

If the county attorney is to be the complainant, the same form would be sufficient. If it is to be someone else, the line stating "in the name and by authority . . ." would be deleted.

One of the main functions of this proposed form is to force the complainant to articulate the reasons and basis for his belief that the named individual has in fact committed a crime. The more facts provided, the better. If an informant is involved, include in the complaint or affidavit a detailed statement of the facts. If possible, also indicate (1) that the informant said he had gained his information personally, (2) that the informer had been used before and (3) that he had previously given reliable information dealing with the same type of crime. For cases dealing with these questions, see section II(B)(1)(ii)(a) of this article and United States v. Santiago, 424 F.2d 1047 (5th Cir. 1970) (past reliability); United States v. Malo, 417 F.2d 1242 (2d Cir. 1969) (past reliability); United States v. Vigo, 413 F.2d 691 (5th Cir. 1969) (past reliability); McCready v. Sigler, 406 F.2d 1264 (8th Cir. 1969); United States v. Mitchell, 299 F. Supp. 1395 (W.D. Mo. 1969) (past reliability); State v. Braun, 209 Kan. 181, 182-85, 495 P.2d 1002-04 (1972).

66 The fourth amendment is quoted in note 4 supra.
probable cause to believe that a particular person has committed a misdemeanor and that such person may cause injury to himself or others, may damage property, or may flee unless immediately arrested.

1. Warrantless Arrests for a Felony

Section 22-2401(c), which codifies prior case law, authorizes a warrantless arrest when the officer has probable cause to believe that the suspect has committed a felony. Since the new statute requires "probable cause," that phrase must be defined. It is interesting to note that since Kansas did not have the exclusionary rule prior to Mapp v. Ohio, there are few Kansas cases dealing with this issue prior to Mapp. For a general discussion of the concept and a discussion of many cases concerning probable cause determinations, see Cook, Probable Cause to Arrest, 24 Vand. L. Rev. 317 (1971).

Any consideration of the concept of probable cause would be incomplete without noting the American Law Institute's position. The ALI has opted for the expression "reasonable cause" rather than "probable cause."

"Reasonable cause to believe" means a basis for belief in the existence of facts which, in view of the circumstances under and the purpose for which the standard is applied, is substantially objective and sufficient to satisfy applicable constitutional requirements. An arrest shall not be deemed to have been made on insufficient cause hereunder solely on the ground that the officer is unable to determine the particular crime which may have been committed. Model Pre-Arraignment Code, supra note 5 at § 120.1(2).

The discussion of "reasonable cause" in the commentary accompanying the model code provides in part: The Meaning of Reasonable Cause. Of the several formulations of the standard of belief necessary for an arrest, the draft adopts reasonable cause. This formulation seems better than "probable cause," with its implication that guilt must be more probable than not. Although "probable cause" is the term used in the fourth amendment to describe the basis for the issuance of a warrant, the Reporters believe that it is inappropriate to use that term in a modern statute. The word "probable" in an earlier time meant that which was capable of being proved or worthy of belief, and was not linked to more recent notions of probabilities measured mathematically. "Reasonable cause," or its analogue, "reasonable ground," is the term used by statutes in every United States jurisdiction defining the authority to arrest without a warrant. In the arrest cases "reasonable cause" appears to be the more usual term.

Constitutional "mere suspicion." Subsection (2) equates reasonable cause with a substantial objective basis for believing that the person to be arrested has committed a crime. Although this definition of reasonable cause is not much more specific than the term itself, it does serve to bring into prominence two contrasting aspects of the concept of reasonable cause that clearly emerge from a review of the authorities in all United States jurisdictions; first, that unlike "mere suspicion," reasonable cause is a substantial and objective basis for action; and second, that reasonable cause does not require that a person's guilt be more probable than not before he may be arrested.

If a single operative theme may be thought to run through the decisions, it is that the reasonable cause standard requires some substantial, concrete basis for the officer's belief that the person arrested is guilty of crime, a basis which an be considered and evaluated by an objective third person. This theme emerges most strikingly by the contrast which is usually made between reasonable cause and "mere suspicion," that is, an intuition or guess which is so personal and insubstantial that it cannot be articulated or offered for objective scrutiny. Since this emphasis compels the arresting officer to make a judgment which he can later justify to a third person, it provides an assurance against arbitrary or harassing resort to the arrest power.

Rejection of the more-probable-than-not standard. The decision to arrest without a warrant is a decision typically made in the field, and under emergency or confused circumstances. It is the conception of the Code that the purpose of this decision is to take a person into custody so that the determination can be made whether or not to charge the arrested person with crime. To require that guilt be more probable than not at the time of arrest is to require at the beginning of the process the degree of certainty which is appropriate to its conclusion . . . .

An arrest standard more stringent than reasonable cause would, to be sure, provide increased assurance against interferences by the police with the liberty of innocent persons. It is the Reporters' belief, however, that society would and should be unwilling to pay the price in less efficient crime prevention and prosecution which this assurance would entail. If the "more probable than not" standard were adopted and taken seriously, many arrests made, for instance, on the basis of a victim's or a witness's description would be illegal. The description which a victim gives of an assailant will very rarely justify an officer in believing that a person who appears to correspond to that description is more probably than not guilty of the assault. To approach this degree of certainty, the victim needs an opportunity to identify the suspect, perhaps even in the carefully controlled context of a lineup. If, however, such a description is not sufficient basis for arrest, an officer in the field must allow the suspect to disappear, and allow to disappear with him the
Probable cause is a pliant concept; its existence depends on the facts and circumstances of a particular case. The United States Supreme Court has stated that "'[t]he substance of all definitions of 'probable cause' is a reasonable ground for a belief of guilt.'"71 While evidence sufficient to establish guilt beyond a reasonable doubt is not required, a mere suspicion, however strong, on the part of the officer is insufficient to establish probable cause.72 The standard test is whether the arresting officer had enough information to permit a reasonable and prudent man to conclude that a crime had been committed and that the person arrested committed it.78 A finding of probable cause turns upon "the practical considerations of everyday life upon which reasonable and prudent men, not legal technicians, act."74

While it is a relatively simple matter to make general statements about probable cause, it is far from easy to deal with specific cases. A particular case will probably present two questions: (1) Did the facts and circumstances known to the officer at the time of the arrest justify him in concluding that the arrestee had committed, or was committing, a felony? and (2) How did the officer obtain the information upon which he based this conclusion? This second question is critical when hearsay information is involved, since an officer's belief as to the suspect's guilt may be based upon: (1) personal knowledge; (2) a combination of personal knowledge and hearsay information; (3) hearsay information obtained from an informant; or (4) hearsay information secured from a victim of or a witness to a felony.

(i) Personal Knowledge of the Officer as a Basis for Establishing Probable Cause

Although most Supreme Court cases dealing with probable cause for either an arrest or a search have involved hearsay information, the police often rely upon facts within their personal knowledge. The leading Supreme Court arrest cases dealing with probable cause based upon the officer's personal knowledge are Henry v. United States75 and Peters v. New York.76

While the Court in Henry77 concluded that the arrest had occurred when the officers stopped the car and that there were insufficient facts to show more than suspicion at that time, it appears likely that the officers would have had sufficient information to make a valid arrest when they saw the cartons bearing out-of-state addresses and overheard the "invitation" to make the false

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76 392 U.S. 40 (1968).
77 The facts of Henry appear in text accompanying note 15, supra.
statement. In Peters a police officer, who was in his apartment, heard a noise outside his door. He looked through a peephole into the hallway and observed two men tiptoeing to the stairway. The officer, who had lived in the building for twelve years, did not recognize either of the men as tenants. He opened his apartment door, entered the hallway, and slammed the door loudly behind him, which precipitated a hasty flight by the two men. The officer, who was not in uniform, gave chase and arrested them. The Court, in holding that there was a probable cause, concluded:

It is difficult to conceive of stronger grounds for an arrest, short of actual eyewitness observation of criminal activity. As the trial court explicitly recognized, deliberately furtive actions and flight at the approach of strangers or law enforcement officers are strong indications of mens rea, and when coupled with specific knowledge on the part of the officer relating the suspect to the evidence of crime, they are proper factors to be considered in the decision to make an arrest.

When reviewing the officer’s decision to arrest, many courts take into account the officer’s experience and knowledge of the suspect’s record, the suspect’s inconsistent responses to questions, the suspect’s flight from the scene, and the fact that the area where the crime occurred and the suspect was found is a high crime area. Because probable cause in these cases must be based solely upon suspicious conduct observed by the police, each case will turn on its facts.

(ii) Hearsay as a Basis for Establishing Probable Cause

(a) Informants. In cases where hearsay information is essential to establish probable cause, the source of the hearsay becomes significant. The most important Supreme Court decisions on the use of informers are Draper v. United States, Beck v. Ohio, Aguilar v. United States, Spinelli v. United States.

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See 361 U.S. at 104-6 (Clark, J., dissenting).


The American Law Institute has confronted this problem and in its Model Code of Pre-Arraignment Procedures has provided:

. . . In determining whether reasonable cause exists to justify an arrest under this section, a law enforcement officer may take into account all information that a prudent officer would judge relevant to the likelihood that a crime has been committed and that a person to be arrested has committed it, including information derived from any expert knowledge which the officer in fact possesses and information received from an informant whom it is reasonable under the circumstances to credit, whether or not at the time of making the arrest the officer knows the informant’s identity. Model Pre-Arraignment Code, supra note 5, at § 120.1.


and *United States v. Harris.* In *Draper,* a federal narcotics agent had been
told by a paid informer that Draper was selling heroin in the city and that
he had gone to Chicago to purchase heroin and would be returning by train
on one of two days. In addition, the informant, after providing a detailed
physical description of Draper, stated that he would be carrying a tan zipper
bag and that he habitually walked very rapidly. Acting upon this information,
the agent went to the train station on the second of the two days and observed
a man who was wearing the clothing and who possessed the physical attributes
described by the informant. The man, who was carrying a tan zipper bag,
left the train and started walking very rapidly toward the station exit. The
officer, at this point, arrested Draper and searched him, finding two envelopes
containing heroin. Draper moved to suppress the heroin on the ground that
the search and seizure were unlawful. The issue, as framed by the Court, was
whether the knowledge of the above facts and circumstances gave the officer
probable cause to believe that a narcotics violation was being committed. The
Court upheld the arrest and search on the ground that the arresting officer,
who had personally verified all of the informant's tip except Draper's possession
of heroin, could then reasonably believe the unverified portion of the tip.
In grappling with the probable cause problem, the Court observed:

“In dealing with probable cause . . . 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 . . . .” Probable cause exists where “the facts and circumstances within [the
arresting officers'] knowledge and of which they had reasonably trustworthy in-
formation [are] sufficient in themselves to warrant a man of reasonable caution in
the belief that” an offense has been or is being committed.

The Court was again faced with the problem of an informant's hearsay in
*Beck v. Ohio.* Beck, a known gambler, was arrested on the basis of un-
specified "information" and "reports." Finding nothing during a search of the
vehicle in which Beck was riding, the police took Beck to the station where
a search of his person produced betting slips which were used to convict him
of a gambling violation. In overturning the conviction, the Supreme Court
held that the officers did not have probable cause to make the arrest and that
the evidence seized in the search should, therefore, have been excluded. Applying
the reasonable man test set forth in *Draper,* the Court concluded that not

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87 403 U.S. 573 (1971).
88 Mr. Justice Douglas disagreed with the majority and concluded that the officers did not have reason-
able grounds to believe that a crime had been committed or was being committed because they had no
personal knowledge of the facts and therefore had no basis for obtaining an arrest warrant. The officers
did not know the basis for the informant's conclusion nor had they attempted to find out; they had
proceeded solely on the informant's word. This, according to Justice Douglas, was not enough to satisfy
the fourth amendment. Moreover, although he felt that warrantless arrest must be permitted to protect
the public safety, the exception must be a narrow one. Here the officers had had time to obtain a warrant;
if they had sought one they would not have been able to obtain it.
89 358 U.S. at 313 (citations omitted) (quoting from Brinegar v. United States, 338 U.S. 160, 175
(1949) and Carroll v. United States, 267 U.S. 132, 162 (1925)).
91 See text accompanying note 89, supra.
only did the record fail to show that the officer had sufficient personal knowledge, it did not establish that the informer had related sufficient information. In reaching this result, the Court made several interesting observations. First, it distinguished Draper on the ground that in Draper the informer had provided detailed information such as Draper’s address, an exhaustive physical description, and a particular place and time where Draper could be found, while in Beck the tip or tips were so “insubstantial” as to afford no basis for corroboration, leaving the officers without objective support for their belief that Beck was engaged in criminal activity. Arguably, this distinction could be read to mean that particularity, rather than being a requirement in addition to a detailed averment of the informer’s reliability, is, in some instances at least, a substitute for proof of reliability. Without developing this distinction, the Court went on to state: “Whether or not the requirements of reliability and particularity of the information on which the officer may act are more stringent where an arrest warrant is absent, they surely cannot be less stringent than where an arrest warrant is obtained. Otherwise, a principal incentive now existing for the procurement of arrest warrants would be destroyed.” Therefore, since the warrant standard was applicable, the record was insufficient because it did not satisfy the standards enunciated in Aguilar. Thus, it seems clear that whenever an informer’s information is essential to the probable cause determination, whether a search or an arrest is involved, the record must at least satisfy the Aguilar requirements.

Aguilar and its progeny must be examined because they are applicable to both warrantless arrests and arrest warrants. In Aguilar, the Court for the first time attempted to specify the information necessary to show probable cause when an affidavit is based on an informer’s tip. Although it found the Aguilar affidavit inadequate, the Court recognized that an affidavit could be based totally upon hearsay. It concluded, however, that to withstand attack under the fourth amendment the affidavit must contain: (1) “Some of the underlying circumstances” upon which the informer based his conclusions and (2) “Some of the underlying circumstances from which the officer concluded that the informer, whose identity need not be disclosed . . . was ‘credible’ or his information ‘reliable’.” The Aguilar affidavit was insufficient because it left the magistrate without sufficient facts to make an independent determination of probable cause.

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60 This particularity plus partial corroboration equals reliability theory was glossed over by the Court in its subsequent remarks, apparently laid to rest in Aguilar (see text accompanying notes 94-97, infra), apparently resuscitated in Spinelli (see text accompanying note 98, infra), and left in uncertain but probably viable straits by United States v. Harris, 403 U.S. 573 (1971).
63 The affidavit on which the search warrant was issued provided in part: “Affiants have received reliable information from a credible person and do believe that heroin, marijuana, barbiturates and other narcotics and narcotic paraphernalia are being kept at the above described premises for the purpose of sale and use contrary to the provisions of the law.” 378 U.S. at 109.
64 Id. at 114.
65 Id.
Spinelli v. United States\(^9\) decided some five years later, reaffirmed Aguilar and extended its application. In Spinelli, the Court was faced with an affidavit which contained both an informant’s tip and information gathered by agents of the F.B.I. concerning Spinelli’s reputation and activities. Writing for the majority, Mr. Justice Harlan noted that since the informant’s tip was essential to the establishment of probable cause, the affidavit must be measured against the precise Aguilar standard and not the “totality of the circumstances” test urged by the government. More specifically, the Court held that the tip must first be measured against the Aguilar standard to determine its probative value. If it does not satisfy the two-pronged test, then the other allegations in the affidavit tending to corroborate the tip should be considered; the tip and the corroboration taken together must, however, still satisfy Aguilar. Focusing on the tip, Justice Harlan concluded that the affidavit contained insufficient facts to support the affiant’s conclusion that the informant was “reliable” and insufficient facts for the magistrate to determine how the informer obtained his information, e.g., through personal knowledge or rumor.\(^9\) In discussing how the informer had obtained his information, the Court seemed to indicate that the affidavit might have been acceptable if it had alleged personal knowledge on the part of the informer. However, a more persuasive view of the opinion is that if personal knowledge is alleged, the informant must provide information as detailed as that given in Draper.

After finding the tip inadequate under Aguilar, the tip plus the results of the F.B.I.’s independent investigation were considered. Even this combination was not sufficient to support an inference that the informant was trustworthy and that his information about Spinelli had been obtained in a reliable way. For example, the informant might merely have overheard a casual rumor at a bar. Again, Draper was used as a benchmark. Mr. Justice Harlan also held that Spinelli’s past criminal record should be given no weight when considering allegations that are otherwise insufficient.

Recently, the Court in United States v. Harris\(^10\) was confronted with an affidavit similar to that in Spinelli. The affidavit stated that a “prudent” person had, under oath, told the affiant, a federal tax investigator, that he had purchased illegal whiskey at Harris’s house over an extended period of time, including purchases made within the previous two weeks. The unidentified informant also stated, allegedly from personal knowledge, that illegal whiskey had been consumed and stored in an outbuilding located 50 yards from Harris’s house. Although the affidavit contained neither facts indicating that the informer had given reliable information in the past nor other evidence establishing his reliability, the tip was somewhat corroborated by the affiant’s statements that Harris was a known trafficker in illegal whiskey and “that he had received numerous information [sic] from all types of persons as to

\(^9\) 393 U.S. at 415-19.
\(^10\) 403 U.S. 573 (1971).
his activities.” The affiant also averred that another officer had, within the prior four years, found the defendant in possession of illegal whiskey. In a three-part opinion, no part of which commanded a majority, Mr. Chief Justice Burger held the affidavit sufficient to establish probable cause. In part one of the opinion, he implicitly held that the tip need not be measured against the two-pronged Aguilar test for probative value. Rather, the standard of the pre-Aguilar case of Jones v. United States which provided that the affidavit must be judged as a whole to determine whether there is a “substantial basis” for finding probable cause was utilized. Applying this “substantial basis” test, Chief Justice Burger concluded that the informant’s detailed statement of his personal observations, when coupled with the affiant’s knowledge of Harris’s reputation and the informant’s willingness to make self-incriminating statements, provided the basis from which the magistrate could reasonably issue a warrant. However, the Jones affidavit does not necessarily provide the support Chief Justice Burger sought to elicit from it for the Jones affidavit was specifically found by the Court in Aguilar to satisfy the two-pronged Aguilar test. Thus, although the words “substantial basis” were indeed used by the Court in Jones, it is possible that Chief Justice Burger’s definition of “substantial” is less strict than that of the Jones Court.

The second part of Justice Burger’s opinion, which two other Justices joined, dealt with the affiant’s failure to set forth specific information to show the reliability of the informant. Such information—usually consisting of evidence that the informant had been reliable in the past—was said to be unnecessary because the affiant officer had personal knowledge of Harris’s bad reputation. More specifically, the Court stated: “We cannot conclude that a policeman’s knowledge of a suspect’s reputation—something that policemen frequently know ... is not a ‘practical consideration of everyday life’ upon which an officer (or a magistrate) may properly rely in assessing the reliability of an informant’s tip.” This section of the opinion, therefore, rejected the Spinelli statement that evidence of a suspect’s reputation is to be given no weight when considering allegations which are otherwise insufficient. The Aguilar requirement that the affidavit provide the magistrate some underlying circumstances establishing the unnamed informant’s reliability was not satisfied, because the magistrate was given no evidence other than the affiant’s statement that the unnamed informant was “prudent.” The other part of the Aguilar standard, however, seems to have been satisfied since the in-

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101 Justice Stewart joined Part I of the opinion and in the judgment. Justice White agreed with Part III and concurred in the judgment on the ground that the affidavit as a whole was sufficient. Justice Black joined the opinion but noted that he would go further and overrule Spinelli. Justice Blackmun joined the opinion and judgment and indicated that he was on the panel which held the Spinelli affidavit sufficient.


103 378 U.S. at 114 n.5 (1964).

104 403 U.S. 573, 580-83 (1971).

105 Id. at 583.

106 See United States v. Flanagan, 423 F.2d 745 (5th Cir. 1970) (held “reliable, credible and trustworthy citizens” not sufficient).
formant's detailed description of the defendant's criminal activity which was based on his personal knowledge would establish probable cause if the tip could be believed.

In the third part of his opinion, Chief Justice Burger, although indicating that there should be no absolute rule, concluded that the informant's willingness to give self-incriminating statements provided an additional basis for finding the tip reliable. This part of the opinion, concurred in by only four justices, was criticized by the late Justice Harlan in his dissenting opinion on the grounds that (1) the Government had not even raised this possibility and had provided no factual information for Chief Justice Burger to base his conclusion on and (2) this theory would encourage the government to prefer criminal informants over law abiding informants who are more reliable.

Although it is beyond the scope of this article to analyze Harris in any comprehensive fashion, a few general observations are in order. The Court's opinion provides no specific guidelines for officers or attorneys drafting affidavits. Further, the fate of Spinelli is far from clear since the Harris affidavit is strikingly similar to the one struck down there—and yet Justice Burger refrained (apparently purposefully) from overruling Spinelli. Moreover, the second part of the opinion raises many questions. What is meant by a bad reputation? Must the suspect have been convicted of the same crime which is involved in the affidavit? Will suspicion satisfy the requirement? What function will the magistrate serve in determining whether a citizen's privacy should be invaded, when the affidavit recites only an informant's tip and a policeman's statement that the suspect has a bad reputation?

In conclusion, when an informant's hearsay information is essential to the probable cause determination, the source of that information is important. While Harris arguably confuses the already difficult Aguilar-Spinelli problem, these three cases must be considered whenever a warrant is sought, or a warrantless arrest is made, on the basis of an informant's information.

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108 403 U.S. at 586-601.
109 For an excellent discussion of the case, see Note, 85 Harv. L. Rev. 1, 53-64 (1971).
111 If this problem should arise, the position taken by the ALI Model Code of Pre-Arraignment Procedure § 55290.4 should be considered. This draft provides that if the defendant contests the truthfulness of the testimony at a motion to suppress hearing, the informant's identity must be disclosed unless (a) the evidence sought to be suppressed was seized by authority of a search warrant [and the informant testified in person before the issuing authority], or (b) there is substantial corroboration of the informant's existence and reliability, independent of the testimony, with respect to such existence and reliability, of the person to whom the information was given, and the judge hearing the motion finds that the issue of reasonable cause can be fairly determined without such disclosure. For purposes of such finding the judge may in his discretion require the prosecution, in camera, to disclose to him the identity of the informant, or produce the informant for questioning. If the judge does so require, the information or testimony so obtained shall be kept securely under seal and, in the event of an appeal from the judge's disposition of the motion, transmitted to the appellate court.
For commentary, see Model Pre-Arraignment Code, supra note 5, at 227-30.
112 In considering warrantless arrests where an informant's hearsay is involved, the position of the ALI should again be considered. See notes 70 and 80 supra.
Finally, even though it is risky to generalize about the facts necessary to satisfy these “tests,” it seems the requirements of probable cause are met if an officer provides a sworn statement (1) that the informant had relied upon certain facts (the officer’s description of these facts should be as detailed as possible), (2) that the informant had given these facts to him personally, (3) that the informant had told him that the facts related were based on personal observations, and (4) that the informer had frequently provided him with accurate information concerning similar crimes on prior occasions.\textsuperscript{112}

(b) \textit{Information from an Alleged Victim or Witness to a Crime}. While the informant’s information will normally concern either a future or an ongoing crime, the victim or witness will usually provide information about past criminal conduct. The question that arises in the latter situation is not the reliability of the information, but the sufficiency of the description given by the witness or victim to justify an arrest. Although the Supreme Court has never articulated guidelines for determining when such a description is sufficient to establish probable cause, several other courts have considered this issue.\textsuperscript{113} The Court of Appeals for the District of Columbia established a test in \textit{Pendergrast v. United States}.\textsuperscript{114} In that case, a man named Ussery told the police that he had been assaulted and robbed; this story was corroborated by his bloody face. He identified Pendergrast and, in response to stiff questioning, steadfastly maintained that Pendergrast was the man who had attacked him. In concluding that probable cause existed, the court held:

\begin{quote}
[P]robable cause is established where (a) the victim of an offense (1) communicates to the arresting officer information affording credible grounds for belief that the offense was committed and (2) unequivocally identifies the accused as the perpetrator, and (b) materially impeaching circumstances are lacking.\textsuperscript{115}
\end{quote}

Generally, the victim of a crime is considered more reliable than an informant for two reasons. First, the facts related to the police by the victim are clearly based upon personal observation rather than upon hearsay. Second, the testimony of a victim is less likely to be colored by self-interest than that of an informant.

One recurring question in the victim or witness identification cases is the specificity necessary to establish probable cause as to identity. In the \textit{Pendergrast} case, this problem did not exist inasmuch as the victim identified the defendant by name.\textsuperscript{116} However, a serious problem arises when only a general description is provided. Although it need not completely and accurately describe the defendant, the description must afford at least some reason to suspect the defendant’s guilt. The sufficiency of the description is generally determined...
on a case-by-case basis from the totality of the circumstances. This approach is well illustrated by Shorey v. Warden\textsuperscript{117} and Brown v. United States.\textsuperscript{118} In Shorey a seventy-seven year old woman had been raped in her home. She could neither name her assailant nor give his age. However, she stated that he was black, had been wearing a white shirt and tan pants, and had a strap on his wrist. The police also knew that the victim had bled profusely. Having earlier picked up a "peeping tom" in the general vicinity, they decided to question him. When Shorey voluntarily admitted them to his home, the officers saw a white shirt and grey pants, both stained with blood, and noticed that the accused had a strap on his wrist. This, according to the court, was sufficient to establish probable cause as to the identity of the accused despite the minimal description given by the victim.

In Brown the assailant had been described as a heavily built black man, 5'5'' tall, who was wearing a brown jacket and a cream colored straw hat and who was driving a 1954 maroon Ford. This description was held to establish probable cause to arrest even though the person arrested was 5'11'' tall, was wearing blue clothing and a felt hat, and was driving a 1952 Ford.\textsuperscript{119} In reaching this conclusion the Court of Appeals for the District of Columbia stated:

> These discrepancies, which can be the result of a victim's excitement or poor visibility or of the suspect's change in clothes did not destroy the ascertainment made on the basis of an accurate portion of identification which was by itself enough to constitute probable cause. . . . That the information came from an unknown victim of the crime did not preclude the policeman's having probable cause to arrest appellant on the basis of it. Although the police could not here judge the reliability of the information on the basis of past experience with the informant, compare Draper v. United States, the victim's report has the virtue of being based on personal observation, a factor stressed in Aguilar v. Texas, and is less likely to be colored by self-interest than that of an informant.\textsuperscript{120}

In sum, three factors seem to be necessary to establish probable cause on the basis of a victim's information: (1) The victim must give the officer enough facts to provide a reasonable ground to believe that the offense was committed. (2) The victim must give the officer a description sufficient to enable him to reasonably conclude that the accused is the person sought. (3) There must be no circumstances materially impeaching the credibility of the victim.

(iii) The Kansas Rule

Section 22-2401(c)(1), which simply codifies existing law, authorizes a warrantless arrest for a felony if the officer has probable cause. The normal test for determining the validity of a warrantless arrest is: "[T]he facts and circumstances known to the officer [must] justify a prudent man's believing

\textsuperscript{117} 401 F.2d 474 (4th Cir. 1968).
\textsuperscript{118} 365 F.2d 976 (D.C. Cir. 1966).
\textsuperscript{119} For a Kansas case dealing with the problem of the sufficiency of a description see State v. Kelly, 203 Kan. 360; 454 P.2d 501 (1969).
\textsuperscript{120} 365 F.2d at 978-79. Also see Bailey v. United States, 389 F.2d 305 (D.C. Cir. 1967).
that at or before the time of arrest the person to be arrested has committed a felony."121 The Kansas Supreme Court has recently cast some doubt on the viability of this standard. In upholding the issuance of a search warrant in State v. Lamb,122 the court relied upon several United States Supreme Court warrantless arrest cases and observed:

Probable cause to arrest refers to that quantum of evidence which would lead a prudent man to believe that the offense has been committed. It is not necessary that the evidence giving rise to such probable cause be sufficient to prove guilt beyond a reasonable doubt, nor must it be sufficient to prove that guilt is more probable than not. It is only necessary that the information led a reasonable officer to believe that guilt is more than a possibility, and it is well established that the belief may be predicated in part upon hearsay information. The quantum of information which constitutes probable cause to arrest must be measured by the facts of the particular case.

Probable cause exists where the facts and circumstances within the arresting officer's knowledge and of which they had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.123

The use of the words "more than a possibility" rather than "more probable than not" may indicate that a new and arguably less stringent standard has been adopted. If this is the case, it still seems that the officer, whether he is making a warrantless arrest or seeking an arrest warrant, will be required to point to objective facts124 which would lead a reasonable man to conclude that a crime had occurred. This conclusion is supported not only by the Lamb court's reliance upon Henry and Draper but also by its use of the classical language of Carroll v. United States.124a Moreover, it appears that each case will turn on its own peculiar facts; therefore, the magistrate still must determine if


123 Id. at 467, 497 P.2d at 286-87 (citations omitted).

124a Some examples of objective facts would be flight at the sight of the officer, evasive answers to questions, inconsistent answers to questions, unreasonable explanations, resemblance to an eyewitness description and the fact that the suspect is found near the scene of the crime.

One police training manual has said:

[P]robable cause for belief of guilt is arrived at by the officer by the same thought processes used by other rational human beings in arriving at conclusions in daily life. It is the sensible conclusion to be drawn from a combination of facts known to the officer at the time of the arrest. . . .

Probable cause for arrest is made like mulligan stew. The courts allow the officer to throw in the pot almost any fact whatsoever which a reasonable mind would consider as offering some indication of guilt. When he has assembled enough of these facts and has brought them into the right relationship with each other, he has probable cause. The only exception to this is evidence which has been illegally obtained. This is poison which will ruin the "stew" which is probable cause. The Law of Arrest, Search and Seizure 25 (Metropolitan Police Department, Washington, D.C. 1971).

124 267 U.S. 132 (1925). The Kansas Supreme Court, in Lamb, summarized the holding in Carroll by stating: "Probable cause exists where the facts and circumstances within the arresting officers' knowledge and of which they had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." 209 Kan. at 467, 497 P.2d at 287.
the officer has presented sufficient objective facts to justify the seizure of a citizen. As a result, this test may not have changed current practice. If the court is moving away from the "more probable than not" standard—if that has, in fact, been the test—an arguably more workable and less confusing standard is the American Law Institute's formula of "reasonable cause" which also rejects the "more probable than not" standard. This formula avoids any confusion of the arrest standard with the "reasonable suspicion" standard of the "stop and frisk" law. In any event, if the court has adopted a different test, the burial of the traditional standard deserves more than a summary treatment. The court should thoroughly justify its adoption of a standard which has apparently never been specifically espoused by the United States Supreme Court. In fact, only very recently, in Adams v. Williams, the United States Supreme Court talked of probabilities.

Notwithstanding Lamb, it is instructive to focus on two recent Kansas cases, State v. Kelly and State v. Dearman. In Kelly, a patrolman, at 3:02 a.m., heard a radio dispatch that an armed motel robbery had occurred at about 2:40 a.m. This dispatch stated that the night clerk had reported that two black males, one dressed in a yellow shirt and a yellow straw hat and the other in a black shirt and a black hat, thought to be in a 1966 Chevrolet, had been involved. The officer then observed three black men in a 1965 Mustang stopped at a traffic light about three miles from the motel. The driver wore a black hat, the front seat passenger a yellow shirt, and the rear seat passenger a black shirt. The officer stopped the car and asked the suspects for identification. When the man in the yellow shirt stepped out of the car to show his papers, the officer noticed a yellow straw hat under the seat. At that time, he told the men that they could not leave and then radioed for assistance. Soon another officer arrived and formally placed the suspects under arrest after a consent search of the men produced a large quantity of coins. The car was then searched; more money and two shotguns were found in the rear seat. The court ruled that an arrest had occurred prior to the arrival of the second officer. The legality of the arrest, however, was upheld on the ground that the first officer was justified in believing, at the time he stopped their car, that the suspects had committed the robbery. The radio report, together with the first officer's observations of the car moving away from the direction of the motel during early morning hours, was sufficient to establish probable cause for an arrest. The discovery of the straw hat was considered unnecessary. One of the cases cited to support this reasoning was Terry v. Ohio. However,
in view of the holding that probable cause for an arrest existed, *Terry* was wholly inapposite.\(^{182}\)

In *Dearman*, Officer Dando heard a radio pick-up order for Loyd and Dearman who had been implicated in an armed robbery and who were driving a blue 1956 Chevrolet. On the basis of this order, Dando stopped a Chevrolet in which defendant was riding. Officer Dando escorted Loyd, the driver of the car, to the patrol car to examine his driver’s license and to radio for assistance. The defendant, Dearman, was left alone in the car. Two detectives arrived and placed both suspects under arrest. A subsequent search of the car revealed a coat and pistol that had been used in the robbery. The court held that the evidence had been seized incident to a lawful arrest and was properly admitted. The arrest occurred when the detectives arrived; prior to that time, the defendant had not been detained by Officer Dando. This holding appears to conflict with *Kelly*. The two cases are reconcilable only on the basis of a factual distinction of dubious validity. The *Kelly* court did not specifically state that an arrest had occurred when the defendant’s car was stopped. It merely held that probable cause existed at that time. All the court said was that an arrest took place prior to the arrival of the second officer. Quite possibly, the *Kelly* court felt that an arrest had occurred when the first officer ordered the men to remain where they were. The *Dearman* court’s view that the defendant was not arrested when his car was stopped and the driver was escorted away was unrealistic, but clearly Officer Dando did not specifically tell Dearman that he could not leave. No such statement was made until the two detectives arrived and formally took both suspects into custody.

If this is the distinction relied upon, the Kansas court’s perception of the law of arrest, as applied in these cases, may be incorrect. As other decisions, discussed in Part I of this article, have suggested, positive words indicating that a person is not free to walk away are not generally necessary for an arrest. Moreover, the court’s reliance on *Terry*, in both *Dearman* and *Kelly*, is questionable. Officer Dando was said to have stopped the suspect’s car for investigative purposes. But, he clearly had at that time as much probable cause for arrest as the detectives who arrived later. He could legitimately rely on the radio pick-up order which was based upon positive identification and which consequently constituted probable cause.\(^{183}\) The court’s reliance upon *Terry* would appear to have been misplaced, because *Terry* involved a brief detention and a limited search based upon something less than probable cause. Moreover, *Terry* did not reach the issue of whether a stop on less than probable cause was reasonable.\(^{184}\)

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\(^{182}\) See discussion of *Terry* in section III of this article on Investigative Detention.


\(^{184}\) See notes 196 and 197 *infra*. Whiteley v. Warden, 401 U.S. 560, 568 (1971); State v. Dearman, 203 Kan. 94, 453 P.2d 7, *cert. denied*, 396 U.S. 895 (1969). It is also clear that an official communiqué, based on facts which establish probable cause to believe the person to be arrested has committed a felony, can justify the warrantless arrest by an officer who has no personal knowledge of the facts giving rise to probable cause. *Id.*
2. Arrests Based Upon a Belief that a Warrant Exists

Another type of warrantless arrest is authorized by subsection 22-2401(b). If an officer has probable cause to believe that an arrest warrant has been issued, he may make an arrest even though he has not personally seen the warrant and does not have other valid grounds for making the arrest. While the statute does not define "probable cause," it seems fair to assume that the legislature used that phrase as a term of art. If so, the same standards developed by the courts to determine if an officer has probable cause to believe that a suspect has committed a crime can be used to determine if an officer has probable cause to believe that an arrest warrant has been issued. Clearly subsection 22-2401(b) is satisfied if the officer learns of the existence of the warrant through an official communique, such as a teletype message or a dispatcher pick-up order, and the communique is in fact based on a valid warrant. If the warrant is in fact defective, the reasonable belief of the arresting officers that the warrant was valid will not sustain a warrantless arrest. Speaking to this point, the United States Supreme Court in *Whiteley v. Warden* observed:

We do not of course question that the Laramie police were entitled to act on the strength of the radio bulletin. Certainly police officers called upon to aid other officers in executing arrest warrants are entitled to assume that the officers requesting aid offered the magistrate the information requisite to support an independent judicial assessment of probable cause. Where, however, the contrary turns out to be true, an otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer to rely on fellow officers to make the arrest.

When the officer has probable cause to believe that a warrant has been issued but in fact no warrant exists, a valid arrest can be made only if the arresting officer has an independent basis for the arrest. Thus, this subsection is constitutionally sound so long as the arresting officer acts pursuant to an official message or order and that message is based on a valid warrant.

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186 Id. This is also true if the dispatcher did not have probable cause to justify a warrantless arrest. *Cf. Hill v. California*, 401 U.S. 797, 802-05 (1970).


188 Id. at 568.

189 Two conclusions, drawn by two different courts, should be considered when dealing with the whole problem of communications. The Fifth Circuit Court of Appeals has stated: "The police department of a large metropolis does not and cannot operate on a segmented basis with each officer acting separately and independently of each other and detached from the central headquarters. There must be cooperation, co-ordination and direction, with some central control and exchange of information." *Miller v. United States*, 356 F.2d 63, 67 (5th Cir. 1966).

The Court of Appeals for the District of Columbia made some interesting observations about probable cause and the collective knowledge of the police department in *Smith v. United States*, 358 F.2d 833 (D.C. Cir. 1966). Specifically the court, per then Judge Burger, said:

...[T]his Court has... decided that probable cause is to be evaluated by the courts on the basis of the collective information of the police rather than that of only the officer who performs the act of arresting... Certainly two or three government agents together could go before the Commissioner to procure a warrant on the sum of their information and once that warrant is issued, none of them need participate in the actual arrest.

The knowledge or information of the arresting officer at the time of arrest is relevant only where an arrest is predicated on that officer's personal observations and information concerning the criminal act. The correct test is whether a warrant if sought could have been obtained by law enforcement agency application which disclosed its corporate information, not whether any one particular officer could have obtained it on what information he individually possessed. *Id.* at 835.
The language of subsection 22-2401(b) presents a statutory construction problem since it is unclear if the legislature intended this subsection to apply only to warrants charging felonies. The statute permits an officer to make an arrest if: “He has probable cause to believe that a warrant for the person’s arrest has been issued in this state or in another jurisdiction for a felony committed therein; . . .”\textsuperscript{139} The ambiguity results from the placement of the prepositional phrase “for a felony committed therein”; the question is whether this phrase only applies to out-of-state warrants. Clearly the warrant from another jurisdiction must involve a felony. However, it may be argued that by using the words “a warrant . . . issued in this state,” and “a felony committed therein” the legislature intended to authorize a Kansas officer to make a warrantless arrest of a person who has been named in a Kansas warrant charging either a misdemeanor or a felony. The argument is that “a warrant” can be read to include a misdemeanor warrant and “therein” obviously does not mean “herein.” Two leading Kansas legal scholars apparently believe this was not the intent of the legislature and that the subsection is limited only to felonies irrespective of the jurisdiction issuing the warrant.\textsuperscript{140} Restriction of this subsection to felonies would be consistent with this state’s policy of narrowly limiting warrantless arrest for misdemeanors.\textsuperscript{141} Prior to July 1, 1970, a warrantless arrest for a misdemeanor committed out of the presence of the arresting officer would have been invalid. However, section 22-2401(c) of the new Code has significantly changed the law of arrest by allowing a misdemeanor arrest in specified “emergency” situations if the arresting officer has probable cause to believe that a misdemeanor is being committed or has been committed. This loosening of previous restrictions on warrantless misdemeanor arrests arguably indicates that the legislature may also have intended to permit a Kansas officer to make a warrantless arrest for either a misdemeanor or a felony when he possesses probable cause to believe that a Kansas warrant has been issued. In any event, the legislature should clarify subsection 22-2401(b).

If, in fact, misdemeanors are included, it should consider whether this is consistent with Section 15 of the Kansas Bill of Rights.\textsuperscript{142} If the legislature wishes to limit this subsection to felonies, it might redraft the statute in the following manner: “He has probable cause to believe that a valid arrest warrant, charging the person to be arrested with a felony, has been issued in this state or in another jurisdiction.”

3. Arrests for a Misdemeanor

Section 22-2401 of the new Criminal Code provides that an officer may arrest for a misdemeanor (a) when he possesses a warrant, (b) when the misdemeanor

\textsuperscript{141} See In Re Kellam, 55 Kan. 700, 41 P. 960 (1895).
\textsuperscript{142} Id. See the discussion of this case in the text accompanying notes 159-63, infra.
has been committed in his view, or (c) when he has probable cause to believe that a misdemeanor has been or is being committed and that evidence will be permanently lost, the suspect will flee, injury may result to the suspect or others, or property will be damaged unless the arrest is made immediately.

Before discussing warrantless arrests for misdemeanors, one point has to be made about any arrest for a misdemeanor pursuant to a warrant. The same probable cause standards for the issuance of a felony warrant are applicable to the misdemeanor warrant; therefore, the discussion in Section II A of this article is relevant to the misdemeanor area as well.

(i) The In-Presence Test

At early common law, a citizen could be arrested without a warrant for a misdemeanor only if that misdemeanor involved a breach of the peace in the officer's presence. Today the generally accepted view is broader and allows the officer to arrest for any misdemeanor committed in his presence. Although jurisdictions differ considerably in their definitions of "in-presence" and determine most cases on their peculiar facts, a few valid generalizations can be made. Normally, the arrest for a misdemeanor will occur after the officer has observed the arrestee commit an act which constitutes a misdemeanor. However, it is generally held that the in-presence test is satisfied if the officer witnesses the violation through any of his five senses—touch, smell, sight, taste, or hearing. It is also said that before a valid arrest can be made the officer must not only "perceive" the offense but must have reasonable grounds to believe at the time of the perception that a crime is being committed in his presence. A mere suspicion, a hunch, or a good guess by the officer will not justify an arrest even if it produces contraband.

Two examples may be helpful in understanding the in-presence test. Suppose that a citizen who is carrying a concealed weapon meets and passes an officer. Unless the officer is made aware of the crime either by an actual observation of the weapon or by some other method (such as seeing a telltale bulge in a pocket), an offense has not been committed in the officer's presence. On the other hand, an officer may make a valid arrest if he hears screams from inside a house, rushes in, and finds A calmly reading a magazine and B lying on the couch with a swollen eye and many facial cuts. Since the offense has been perceived by one of the officer's senses, hearing, the in-presence test is satisfied if the officer has reasonable grounds to believe that a crime was being committed.

Arguably, this would not satisfy the "in-view" standard now used in section

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148 See, e.g., State v. Paulick, 277 Minn. 140, 151 N.W.2d 591 (1967); Caulk v. Municipal Court, 243 A.2d 707 (Del. 1968); White v. Simpson, 28 Wis. 2d 590, 137 N.W.2d 391 (1963).
22-2401(d), for the suspected offense did not occur in the officer's view. Finally, many courts have held that the officer need not observe all the elements of the crime. Rather, the observation of one or more parts of a continuing offense is sufficient.\footnote{148}

Prior to the adoption of the new Criminal Code, the Kansas Supreme Court had frequently considered the requirements for warrantless misdemeanor arrests.\footnote{149} The most recent case thoroughly analyzing the problem is State v. Cook.\footnote{150} An officer in a helicopter observed Cook's car and determined that he was speeding. While keeping the car in sight at all times, the officer in the helicopter directed Ward, another officer who was stationed on the ground, to stop Cook. On appeal from his speeding conviction, Cook asserted that Ward's arrest was illegal because no unlawful act had been committed in that officer's presence. The court rejected his claim. The court found that the offense was committed in Ward's presence since the latter, while receiving the information from the helicopter, had Cook's car in view for a distance of one half mile although he could not judge the speed from his vantage point. The court, without articulating what it meant, noted that common sense required that this arrest be upheld in these circumstances. Relying on other state cases, the court then concluded that: (1) The officer may rely on senses other than his sight.\footnote{181} (2) He need not be absolutely certain that an offense has been committed in his presence, but he must have reasonable grounds to believe that an offense has been committed in his presence. (3) He need only perceive one or more of a series of acts which constitute part of a continuing offense.\footnote{152} It could be persuasively argued that


\footnote{151} This seems to be inconsistent with State v. Merrifield, 180 Kan. 267, 303 P.2d 155 (1956). The court there stated: "The law is well settled in this state that in order for an officer to make a valid arrest without a warrant . . . [for] a misdemeanor, the offense must have taken place in the officer's view and presence." Id. at 270, 303 P.2d at 158 (emphasis added).

\footnote{152} Specifically the court stated:

The conclusion we have reached is not wholly devoid of support. In Cave v. Cooley, 48 N.M. 478, 152 P.2d 886 (1944), the Court laid down this rule: "A crime is 'committed in presence of an officer when facts and circumstances occurring within his observation, in connection with what, under circumstances, may be considered as common knowledge, give him probable cause to believe or reasonable grounds to suspect that such is the case.'"

The Supreme Court of West Virginia in the case of State v. Lutz, 85 W.Va. 330, 101 S.E. 434 (1919) held: "An offense . . . can be said to be committed in the presence of an officer only when he sees it with his own eyes, or sees one or more of a series of acts constituting [the] offense, and is aided by his other senses or by information as to the others, when it may be said that the offense was committed in his presence."

Although the foregoing cases are not identical with the instant action from a factual standpoint, the viewpoints expressed are comparable, and the language employed is persuasive.

A somewhat analogous situation was discussed in Commonwealth v. McDermott, 347 Mass. 246, 197 N.E.2d 668, where an arrest was made, not by the officer who had witnessed gambling operations, but by two others who later went with him to the scene. The court said that in such
Cook justifies a warrantless misdemeanor arrest based on a pick-up order by a central police office. The Cook court’s ostensible reliance on the fact that Ward had Cook’s car in sight while he was communicating with his fellow officers in the helicopter will not support its in-presence assertion. Ward merely saw a car on the highway; he did not see or perceive any element of a continuing offense. The court, in effect, held that in-presence includes a misdemeanor which is committed out of the officer’s presence if the officer has probable cause to believe that a misdemeanor has been committed.183 However, the officer should certainly have no greater power than that conferred by section 22-2401(c)(2).

While its conclusions are broad enough to have general application, Cook involved a traffic offense which is not a normal misdemeanor, and its holding may arguably be limited to its facts. Cook may in any event be irrelevant today, save to traffic offenses, because section 22-2401(d) uses the phrase “in view.” Arguably “in view” is a stricter standard than in-presence and requires that acts be seen by the officer. However, since it is now possible under the new Criminal Code to make a warrantless misdemeanor arrest, the only difficult case will be when the officer cannot show the defendant would have fled or evidence would have been lost, etc., unless an immediate arrest was made as provided by section 22-2401(c)(2)(i) and (ii).

Although there is no specific indication that the legislature intended to establish two different standards for determining if an arrest for a misdemeanor is valid, it appears that two standards do in fact exist. Law enforcement officers are empowered under the new Criminal Code to arrest a person for any crime committed in their view. And under section 8-5, 130 they are authorized to arrest without a warrant for traffic violations which occur “in their presence.”184 Arguably, this difference in language means that there is a more demanding standard for arrest under the Criminal Code than there is under section 8-5, 130. In addition, since section 22-2102 provides that the Criminal Code will

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183 Normally the in-view or in-presence test cannot be satisfied if the officer did not personally perceive the facts.
184 In State v. Cook, 194 Kan. 495, 498, 399 P.2d 835, 837 (1965) the Kansas court in discussing traffic arrests pursuant to Kan. Stat. Ann. § 8-5, 130 (Supp. 1971) stated: “... an arrest of the defendant was effected at the time he was stopped, was issued the ticket, and agreed to appear. Not only are the terms 'arrested person' and 'arresting officer' used throughout the statutes § 8-5, 130, but a person arrested must take the affirmative action of giving his written promise to appear in order to secure his release. The language employed unmistakably indicates to us that the legislature intended that action by an officer in conformity with the procedures outlined in the act should constitute an arrest.” Id. Again, it should be noted that traffic stops seem to be treated differently than crimes under the Criminal Code. See Kan. Stat. Ann. § 22-2202(3) (Supp. 1971), which defines arrest to mean “the taking of a person into custody in order that he may be forthcoming to answer for the commission of a crime. The giving of a notice to appear is not an arrest.” Also note id. at § 22-2408(6) which provides that “the procedures prescribed by this section shall not apply to the detention or arrest of any person for the violation of any laws regulating traffic on the highways of this state, and the provisions of K.S.A. 1969 Supp. 8-5, 127a to 8-5, 127e, inclusive, and 8-5, 129a and any acts mandatory thereof, shall govern such procedures.” No mention is made of Kan. Stat. Ann. § 8-5, 130 (Supp. 1971).
govern all criminal cases “except where a different procedure is specifically provided by law” it may be argued that the probable cause standard applied in section 22-2401(c)(2) is not applicable to traffic violations because these are treated specifically and the in-presentation test, is the only standard mentioned in section 8-5, 130. Finally, the in view test or the in-presentation test, if that was the test prior to July 1, 1970, is much less significant today than it was prior to the enactment of section 22-2401(c)(2) which authorizes a warrantless misdemeanor arrest by the law enforcement officer in limited “emergency” circumstances. Under this new section the offense may occur out of the officer’s view or presence. 188

(ii) Arrests for Misdemeanors Based Upon Probable Cause

The new Criminal Code, 22-2401(c)(2), provides that an officer may arrest for a misdemeanor when he has probable cause to believe that a misdemeanor has been or is being committed and that evidence will be permanently lost, the person will be able to flee, injury may result to the suspect or to other, or property will be damaged unless the arrest is made immediately. This section has substantially changed Kansas law and marks a departure from the majority rule.

At common law, a warrantless arrest for a felony was lawful when the officer had “reasonable grounds” (probable cause) to believe that a felony had been committed and that the person to be arrested had committed it. In contrast, an officer could not at common law make a warrantless arrest for a misdemeanor, unless the misdemeanor had occurred in his presence. This rule, still followed in some states, has been criticized because the warrant requirement in misdemeanor situations imposes delay which permits flight or further injury to property or persons. However, warrantless arrests have historically been considered the exception rather than the rule. Warrantless arrests for felonies have only been allowed on the theory that prompt arrests are needed to protect the public from serious danger. 189 This exception for felonies has been held to be clearly consistent with the reasonableness clause of the fourth amendment. 190 Whether warrantless arrest for any misdemeanor, irrespective of its degree of “seriousness,” will be held to be reasonable is not clear.

In view of a Kansas Supreme Court opinion in the old case of In Re Kellam, 188 section 22-2401(c)(2) 190 may be subjected to a strong state constitu-

188 It is interesting to note that an officer may also arrest for a felony committed in his view but it is of little significance because he can always fall back on the probable cause theory.
189 See Draper v. United States, 358 U.S. 307, 315-17 (1958) (dissenting opinion). Also see note 36, supra.
188 See cases cited in note 68, supra.

55 Kan. 700, 41 P. 960 (1895). For cases following the in-view principle enunciated in Kellam, see cases cited in note 149, supra.
190 The Kansas statute apparently follows the lead of states like Nebraska. See Neb. Stat. Ann. § 29-404.02 (Supp. 1967). Also see Wis. Stat. § 954.03(1) (1965) which authorizes arrests for misdemeanors without a warrant when an officer has probable cause to believe that the misdemeanor has been committed and that the person will flee unless immediately apprehended. Louisiana also has a statute that allows for an arrest for a misdemeanor on probable cause grounds when the alleged crime is
tional attack. In that case, a police chief who was acting without personal knowledge but upon what he considered reliable hearsay arrested Kellam for a misdemeanor. The arrest was made without a warrant pursuant to a city ordinance and state statute which provided:

The city marshall or any policeman shall at all times have power to make or order an arrest upon view of an offense being committed, or upon reasonable suspicion that an offense has been committed, with or without process, for any offense against the laws of the state or of the ordinances of the city, and to bring the offender for trial before the proper officer of the city . . . .\textsuperscript{160}

The Court explicitly held that the state statute, which authorized warrantless arrests for minor or petty offenses committed out of the presence of the officer, violated section 15 of the Kansas Bill of Rights.\textsuperscript{161} Specifically, the court stated:

The liberties of the people do not rest upon so uncertain and insecure a basis as the surmise or conjecture of an officer that some petty offense has been committed. In § 15 of the Bill of Rights it is ordained that “the right of the people to be secure in their persons and property against unreasonable searches and seizures shall be inviolate,” etc. This provision guarantees protection against unreasonable arrests, and when it was placed in the Constitution, and in fact ever since that time, an arrest for a minor offense without a warrant, and not in the view of the officer, was deemed to be unreasonable and unlawful.\textsuperscript{162}

In addition the court condemned the Kellam arrest on the ground that it had been based on mere suspicion and hearsay.\textsuperscript{163}

Even if the Kansas Supreme Court interprets Kellam as holding that an arrest for a minor offense committed out of the officer’s presence is unconstitutional, section 22-2401(c)(2) might be constitutional.\textsuperscript{164} The statute is arguably compatible with Kellam if the word “misdemeanor” in the statute is not construed in the generic sense, but is limited to non-petty offenses.


\textsuperscript{160} 55 Kan. at 701, 41 P. 960 (1895). Acting pursuant to this statute, the city had promulgated a city ordinance paraphrased by the court in the following manner:

The city has enacted an ordinance which provides that policemen may arrest, with or without warrant, all persons found in the act of violating a law or ordinance, or any manner disturbing the peace and good order of the city or any of its inhabitants.

It also authorizes them to arrest all persons found under suspicious circumstances, who cannot give a good account of themselves. Id. at 701, 41 P. at 960-61.

\textsuperscript{161} Kan. Const. Bill of Rights § 15 provides: “The right of the people to be secure in their persons and property against unreasonable searches and seizures, shall be inviolate; and no warrant shall issue but on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons or property to be seized.”

\textsuperscript{162} In Re Kellam, 55 Kan. 700, 701, 41 P. 960, 961 (1895).

\textsuperscript{163} In two cases decided after Kellam, the Supreme Court cited that case for the proposition that the Kansas constitution prohibits arbitrary arrests and seemed to equate arbitrariness with the use of hearsay information. See State v. Bowen, 118 Kan. 31, 234 P. 46, 47 (1925); State v. Dietz, 59 Kan. 576, 583, 53 P. 870, 873 (1898).

\textsuperscript{164} The United States Supreme Court has apparently never specifically dealt with the issue of whether warrantless arrests for misdemeanors based on probable cause are reasonable. However, the Court has mentioned the in-presence test in at least two cases. Johnson v. United States, 333 U.S. 10, 15 n.5 (1948); Carroll v. United States, 267 U.S. 132, 150-58 (1925). For excellent discussion of Carroll’s application to the law of arrest, see Bohlen & Shulman, Arrest Without a Warrant, 75 U. Pa. L. Rev. 485, 485-92 (1927).
“Non-petty” could be defined as (1) crimes that carry a possible sentence of greater than six months or (2) Class A misdemeanors. In short, subsection 22-2401(c)(2) could be saved, without directly overruling *Kellam*, by limiting the subsection’s application. Absent this limitation by judicial construction, the statute may still be constitutional, for an arrest under this subsection is arguably “reasonable.” The statute requires not only that the officer have probable cause to believe that a misdemeanor has been committed, but also that he be able to show that unless the arrest was made immediately, the person would have fled, etc. Moreover, the statute is cloaked with the presumption of constitutionality. And, as a policy matter, it may well be that this statute only recognizes what has been occurring. No doubt, it is best to recognize reality and thus be able to exert some control over the situation.

If the statute is upheld, its inherent limitations may restrain abuse. The officer’s actions must still be measured against the probable cause standards used in felony cases. In addition, the officer must be able to show that the arrestee would have fled, evidence would have been lost, or the arrestee would have injured himself or others if the arrest had not been made immediately. Courts should strictly construe the latter requirements in order to be consistent with this state’s tradition of allowing warrantless misdemeanor arrests only in limited circumstances. When minor offenses outside of these limited circumstances are involved, the public’s safety will not be endangered by the delay required for the officer to procure a warrant.

C. THE RIGHT TO RESIST UNLAWFUL ARRESTS

This section of the present article would be incomplete without a brief discussion of the new Kansas statute which purports to deny citizens the right to use force in resisting arrest where the citizen who is arrested believes the arrest to be unlawful. Although a separate article could be written about this topic, a few points should be made. Cases which involve resistance to arrest have caused the Kansas Supreme Court considerable difficulty in the past. The legislature may have attempted to remedy the situation with the enact-

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39 At least one state court has concluded that a warrantless arrest for a misdemeanor committed out of the officer’s presence is permissible if it is necessary to protect the public. Commonwealth v. Marcum, 135 Ky. 1, 122 S.W. 215 (1909).

40 The cases of Prell v. McDonald, 7 Kan. 426 (1871); State v. Dietz, 59 Kan. 576, 53 P. 870 (1889); Hill v. Day, 168 Kan. 604, 215 P.2d 219 (1950); State v. Merrifield, 180 Kan. 267, 270, 303 P.2d 155, 158 (1956) should be compared. One author has concluded:

Because of the court’s failure on each occasion to recognize and refer to its prior, apparently contrary decisions and to distinguish its present holding, it is impossible to reconcile these four cases. The only possible explanation is that probable cause is sufficient if the arrest is later challenged by a false arrest action (if not for all misdemeanors, at least for breaches of the peace), but that the in-presence requirement remains where the question of arrest power arises in the context of an action involving use of force by the officer or resistance by the arrestee. LaFave, *Arrest* 231 (1965).
ment of section 21-3217. This section provides that a person may not use force to resist any arrest when the person arrested knows that the arrest is being made by a law enforcement officer or by a private person who is acting at an officer's direction. The rationale behind the new law is given in the Judicial Council note which accompanies the section. Society's interest in avoiding violence is said to outweigh the danger of temporary submission to an unlawful arrest. Thus, section 21-3217 proposes to overrule State v. Bowen, which had recognized a right to resist an unlawful arrest.

Section 21-3217 may be viewed as complementing those sections of the Kansas Criminal Code which authorize an officer to use reasonable force in making an arrest pursuant to an invalid warrant absent knowledge by the officer that the warrant is invalid. Consequently, the officer may use force in effecting an unlawful arrest, and the person arrested may not, according to section 21-3217, use force to resist. A more difficult case arises when an officer uses reasonable force to make a warrantless arrest in the mistaken belief that probable cause exists. No section purports to give the police such authority. Still, section 21-3217 draws no distinction between unlawful arrests with or without an invalid warrant.

An officer's use of excessive force presents still other questions. Excessive force is, of course, always unlawful irrespective of the validity of the arrest absent excessive force. Accordingly, a citizen should in such a case be within his rights in using force to protect himself. However, section 21-3217 may be construed to preclude a citizen from resisting even excessive force if that force is wielded by a recognizable officer or by one under his command. Another possible construction of the section is that the legislature did not intend the statute to affect situations where excessive force is involved. The Kansas court might read section 21-3217 in conjunction with the Code's general self-defense section and conclude that an exception to the literal language of section 21-3217 should be recognized because excessive force may never be used lawfully. Therefore, a defendant charged with assaulting a police officer should be able, at a minimum, to have the jury consider the excessive force

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Section 21-3217. Use of force in resisting arrest.
A person is not authorized to use force to resist an arrest which he knows is being made either by a law enforcement officer or by a private person summoned and directed by a law enforcement officer to make the arrest, even if the person arrested believes that the arrest is unlawful.

It is important to note that this section only deals with arrests and therefore by its own language does not affect stops under § 22-2402, the so-called stop and frisk statute.


171 This apparent inconsistency is avoided by the section concerning arrests by private persons. Kan. Stat. Ann. § 21-3216 (Supp. 1971). There, as in § 3217, no distinction is drawn between types of unlawful arrest. A private person summoned by an officer to assist in making an arrest which is unlawful, whether with or without a warrant, is justified in the use of reasonable force. And the arrested person who knows that the arrest is being made at an officer's direction may not use force to resist.


173 By a parity of reasoning, the general self-defense section should also be applicable when an officer uses reasonable force in making a warrantless arrest in the mistaken belief that probable cause exists. As mentioned, the Code does not purport to authorize such action. The officer's use of force is, therefore, unlawful and the citizen should be able to resist.
issue to determine if the defendant’s actions were reasonable under the circumstances.\textsuperscript{174}

Section 21-3217 was adapted from section 7-7 of the Illinois Criminal Code which makes criminal the use of force to resist even an unlawful arrest by an officer and which provides accompanying penalties.\textsuperscript{175} The Kansas statute, however, appears in the portion of the Code concerning principles of criminal liability and not in the article on crimes against the person. As no penalty is specified in section 21-3217, and violation is not declared to be a felony or a misdemeanor, the sentencing provisions of sections 21-4501(f) and 21-4502(d), which specify the penalties for the various classifications of misdemeanors and felonies, cannot apply. However a person who resists an arrest and strikes an officer can be charged with either assault and/or battery of a law enforcement officer\textsuperscript{176} or obstructing legal process.\textsuperscript{177} Thus, the section’s only effect on Kansas law appears to be the abrogation of the right to self-defense as a defense to an assault charge arising out of a forcible arrest.\textsuperscript{178}

Section 21-3217 may be subject to constitutional challenge. Both the fourth amendment, which is applicable to the states through the fourteenth, and section 15 of the Kansas Bill of Rights protect the individual against unreasonable seizures. Since an arrest is a seizure of the person, an unlawful arrest which is based upon an invalid warrant or is made without probable cause violates both state and federal constitutional rights. Given an unconstitutional arrest, the question is whether the self-help remedy has a constitutional basis. That is, may a state limit by statute the individual’s ability to resist unconstitutional action?

An analogy may be drawn from civil disobedience cases in which the United States Supreme Court has often held that officers’ orders need not be followed if they violate the Constitution. For example, \textit{Wright v. Georgia}\textsuperscript{179} held that black youths who had refused to leave a segregated playground could not be convicted of breaching the peace. \textit{Wright} was cited, but was not thought controlling, by the California Supreme Court when it considered the constitutionality of a statute similar to section 21-3217.\textsuperscript{180} The California Court upheld the statute by reasoning as follows: Since the individual can use only reasonable force to resist, he cannot possibly avoid an unlawful arrest by

\begin{footnotesize}
\begin{itemize}
  \item[174] The Kansas Code provides: \textit{Use of force in defense of a person.} A person is justified in the use of force against an aggressor when and to the extent it appears to him and he reasonably believes that such conduct is necessary to defend himself or another against such aggressor’s imminent use of unlawful force. \textit{Kan. Stat. Ann.} § 21-3211 (Supp. 1971).
  \item[175] See Committee Comments following the text and ILL. CRIM. CODE, ch. 38, §§ 1-7(j).
  \item[179] 373 U.S. 284 (1962).
\end{itemize}
\end{footnotesize}
officers equipped with modern weaponry. Consequently self-help is an ineffective remedy, and its elimination, therefore, does not deprive the individual of constitutional protection.

Section 21-3217 may also be challenged as sanctioning a deprivation of liberty without due process of law. The theory is entrapment; a person cannot be guilty of a crime if his conduct is induced by a public officer.\textsuperscript{181} It may be argued that an officer who makes an unlawful arrest induces the person arrested to resist. Clearly, no criminal intent on the part of the person arrested was present before the officer appeared. The officer’s illegal act alone induced the resistance, and no criminal activity would have occurred absent the confrontation with the officer. These are the generally accepted elements of the entrapment defense. The Supreme Court has indicated that the entrapment defense has a constitutional basis in the due process clause of the fourteenth amendment.\textsuperscript{182}

The Kansas court has yet to deal with section 21-3217, but the Illinois Supreme Court has considered section 7-7 on a number of occasions. In \textit{People v. Birnbaum},\textsuperscript{183} a conviction for obstructing police officers was affirmed without a determination of the validity of section 7-7. Later in \textit{People v. Jackson}\textsuperscript{184} the court agreed with the State’s contention that, pursuant to section 7-7, the defendant had no right to push an officer away despite his belief that the arrest was unlawful. Thus, the court tacitly decided the constitutional issue.

The United States Supreme Court had an opportunity to decide the question in \textit{Wainwright v. City of New Orleans}.\textsuperscript{185} There a Tulane University law student who, in the arresting officers’ judgment, fit the description of a murder suspect, was stopped late at night and asked to identify himself. The officers also asked that the student expose his arm to permit a search for a tattoo that the suspect allegedly had. Failing to comply with the officers’ requests, he was arrested, frisked, and taken to the police station. As a result of a scuffle, the student was charged with assaulting the officers. A majority of the Court dismissed the writ, complaining that the record and oral argument did not adequately frame the issues. There was also some feeling that probable cause for the arrest may have existed. In dissent, Mr. Chief Justice Warren suggested, but did not decide, that a right to resist unlawful arrest exists as an aspect of self-defense, an idea “deeply rooted in our jurisprudence.”\textsuperscript{186} Also dissenting, Mr. Justice Douglas cited the civil disobedience cases and stated that “the principle that a citizen can defy an unconstitutional act is deep in our system.” \textit{Wainwright} reminded Justice Douglas of \textit{Terry}. He thought that a person may now be “seized” and whisked to the station.

\textsuperscript{183} 41 Ill. 2d 426, 243 N.E.2d 244, cert. denied, 398 U.S. 956 (1968).
\textsuperscript{184} 266 N.E.2d 475 (Ill. App. 1970).
\textsuperscript{185} 392 U.S. 598 (1968).
\textsuperscript{186} Id. at 608 (Warren, C.J., dissenting).
house for questioning and identification simply because he resembles a suspect. In fact, he was so upset that he concluded: "I fear that with Terry and with Wainwright we have forsaken the Western tradition and taken a long step toward the oppressive police practices not only of Communist regimes but of modern Iran, 'democratic' Formosa, and Franco Spain, with which we are now even more closely allied." 187

III. THE LEGALITY OF INVESTIGATIVE DETentions

A. TERRY v. OHIO: Questions Unanswered

Although the concept of arrest and the standards of probable cause are very important to the criminal process, police practices have, on the streets, if not in the courtroom, been at odds with the probable cause requirement. Police have routinely employed "stop and frisk" and "field interrogation" tactics, never conceiving these confrontations to be arrests. The constitutional bounds of these practices have not been clearly defined. 188

Recently, a number of states, including Kansas, 189 have enacted statutes which authorize "stop and frisk" and "field interrogation" practices. New York was one of the first states to act, and its statute, 190 which is essentially the same as that of Kansas, 191 has generated an enormous volume of legal writing. 192 To date, no Supreme Court decision has considered its constitutionality, but the Court has considered the question of field detention in Terry v. Ohio 193 and Adams v. Williams. 194 Williams has answered some of the

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188 LaFave, Street Encounters and the Constitution: Terry, Sibron, Peters and Beyond, 67 MICH. L. REV. 40 (1968) [hereinafter cited as LaFave]. This article along with the Model Code and commentary provide an excellent discussion of most of the issues involved and a research aid. See note 5, supra.
189 KAN. STAT. ANN. § 22-2402 (Supp. 1971).
191 The Kansas Stop and Frisk Statute provides:
(1) Without making an arrest, a law enforcement officer may stop any person in a public place whom he reasonably suspects is committing; has committed or is about to commit a crime and may demand of him his name, address and an explanation of his actions.
(2) When a law enforcement officer has stopped a person for questioning pursuant to this section and reasonably suspects that his personal safety requires it, he may search such person for firearms or other dangerous weapons. If the law enforcement officer finds a firearm or weapon, or other thing, the possession of which may be a crime or evidence of crime, he may take and keep it until the completion of the questioning, at which time he shall either return it, if lawfully possessed, or arrest such person.
193 392 U.S. 1 (1968). On the same day that Terry was handed down, the Supreme Court decided two companion cases which directly involved the New York stop and frisk act and which illustrated an application of the Terry holding. In Sibron v. New York, 392 U.S. 40 (1968), a uniformed officer had observed the defendant meeting and talking with known narcotic addicts in a restaurant over a period of eight hours. The officer then approached the suspect and ordered him outside. When the suspect reached into his pocket, the officer also reached in, retrieving several small packages of heroin. The defendant's motion to suppress this evidence was denied, and he pleaded guilty to possession of narcotics. The New York Court of Appeals affirmed on the basis of the New York statute, § 180-a, but the United States Supreme Court reversed. The majority held the search violated the fourth amendment because there was no showing that the officer had reasonable grounds to believe that Sibron was armed and dangerous. In any event, the Court noted that the search went beyond patting down outer garments. Not only was

questions left open by *Terry*, but it has left several significant questions unanswered. In light of their importance to an understanding of the Kansas stop and frisk statute and to the law of arrest generally, *Terry* and *Williams* will be dealt with in some detail.

In *Terry*, a plainclothes detective, McFadden, who was assigned to patrol in downtown Cleveland for shoplifters and pickpockets observed two men peering into a store window. After a few minutes, they walked up the street to the corner where they paused to talk. Then the two men began taking turns walking past the same store window, pausing each time to look in. The ritual continued until each man had walked past the window five or six times. At one point they stopped to confer with a third man on the corner. After he moved off, the original two suspects continued their observations of the store for a few minutes and left to join the third man some distance away. The officer, by this time, had become suspicious. He thought that the men might be considering a daylight robbery of the store and that they might, consequently, be armed. When the three were together again, he approached them and identified himself. The detective asked the men for their names and, after receiving only mumbled responses, grabbed one of them, Terry, spun him around so that he faced the other two, Chilton and Katz, and patted down the outside of his clothing. The detective felt a pistol in the left breast pocket, but was unable to remove it. Thereupon, he ordered all three men into a nearby store. Inside, he removed Terry’s coat and took possession of the pistol. He then patted down the outer clothing of the other men. He found a pistol in Chilton’s pocket and removed it. Feeling nothing during the pat-down of Katz, the detective did not reach inside his outer clothing. Terry and Chilton were charged with carrying concealed weapons.

At the outset, the Supreme Court limited its consideration to: “[W]hether it is always unreasonable for a policeman to seize a person and subject him to a limited search for weapons unless there is probable cause for an arrest.”105 The Court ruled the limited search lawful, and the evidence admissible. However, it is important to note that the opinion did not set out any general guidelines by which police officers can determine the constitutionality of their

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105 392 U.S. at 15.
investigative practices. Indeed, the Court went to considerable lengths to avoid painting with a broad brush:

We merely hold today that where a police officer observes unusual conduct which leads him reasonably to conclude in the light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own and others’ safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.\footnote{\textsuperscript{106}}

A number of significant aspects of the \emph{Terry} opinion are relevant here. First, the Court rejected the suggestion that the fourth amendment applies only to arrests and full-blown searches and not to stops and frisks. The Court emphasized that when an officer “accosts an individual and restrains his freedom to walk away,”\footnote{\textsuperscript{107}} the fourth amendment is applicable. So too, even a pat-down frisk of a suspect’s outer garments is a search within the meaning of the Constitution. Thus, the Court’s holding was not that the fourth amendment was inapplicable, but that it allowed the procedure followed by the police officer. Importantly, however, the Court held that the test was whether the frisk was reasonable and not whether probable cause existed to support the search and seizure.\footnote{\textsuperscript{108}}

Second, the Court avoided directly deciding whether an officer may detain an individual for investigative purposes without probable cause. Specifically, the Court stated:

\begin{quote}
We thus decide nothing today concerning the constitutional propriety of an investigative “seizure” upon less than probable cause for purposes of “detention” and/or interrogation.\footnote{\textsuperscript{109}} The crux of this case, however, is not the propriety of officer McFadden’s taking steps to investigate petitioner’s suspicious behavior, but rather, whether there was justification for McFadden’s invasion of Terry’s personal security by searching him for weapons in the course of that investigation.\footnote{\textsuperscript{110}}
\end{quote}

Thus, the majority opinion was confined to a determination of whether Mc-
Fadden had acted reasonably in conducting the limited search after he had seized Terry. However, Mr. Justice Harlan in his concurring opinion pointed out that the subsequent search could be justified only if the initial forcible stop was lawful.\textsuperscript{201} He believed that implicit in the majority opinion was the conclusion that the stop was justified. In his view, the detective could not search the suspects for his own protection if he had contributed to the dangerous situation by making an unlawful stop.\textsuperscript{202} Apparently, Mr. Justice Douglas also believed that the majority had in fact upheld the physical seizure of Terry upon less than probable cause. In his dissent he warned that the Court was giving the police the power to conduct seizures and searches that even a magistrate could not authorize.\textsuperscript{203}

B. Adams v. Williams: Questions Still Unanswered

The propriety of “stops” on less than probable cause was resolved in Adams v. Williams,\textsuperscript{204} when Mr. Justice Rehnquist, who was writing for a six-member majority, expressly held that “a brief stop of a suspicious individual . . . may be most reasonable in light of the facts known to the officer at the time.”\textsuperscript{205} In Williams a police sergeant had been patrolling in a high crime area of Bridgeport, Connecticut, during early morning hours. An informant, who remained anonymous throughout the litigation, approached the officer’s car and stated that Williams, who was then seated in a car on the other side of the street, was carrying narcotics and was wearing a gun at his waist. The officer crossed the street, tapped on the car window, and asked Williams to open the door. When, instead, Williams rolled down the window, the officer immediately reached down and removed a loaded revolver from Williams’s waistband. No actual pat-down of the suspect’s outer clothing was conducted prior to the seizure of the revolver, even though it was conceded that the gun was not visible to the officer standing outside the car. The Supreme Court upheld Williams’s convictions for carrying a concealed weapon and for possessing the narcotics that were found in a search incident to his arrest for the firearms offense. The Court held that the limited search for the gun was justified under Terry as necessary for the officer’s protection. When he found the weapon precisely where the informant had said that it would be, the officer had probable cause to believe that the suspect had no lawful reason for possessing the pistol. Therefore, the firearms arrest was valid.

Unfortunately, the Court in Williams merely approved the practice of the stop upon less than probable cause, and did not thoroughly deal with the complex questions raised by its holding. The majority, without any real explanation, read Terry to say that an officer has authority, even without a statute

\textsuperscript{201} Id. at 32 (Harlan, J., concurring).
\textsuperscript{202} Id. at 31-34.
\textsuperscript{203} Id. at 36 (Douglas, J., dissenting). The Court has repeatedly held that the same standard of probable cause is applicable to magistrates issuing warrants and to officers making warrantless arrests. For the Court’s most recent statement, see Whiteley v. Warden, 401 U.S. 560, 566 (1971).
\textsuperscript{204} 407 U.S. 143 (1972).
\textsuperscript{205} Id. at 146.
such as that in Kansas, to insist upon an encounter with a citizen although there is no probable cause to believe that a crime has been committed.\textsuperscript{200} Certainly, a more searching examination of the far-reaching constitutional questions only partially answered by \textit{Terry} was warranted.

The \textit{Williams} Court might have adopted the theory that, regardless of the majority's disclaimer in \textit{Terry},\textsuperscript{207} a holding that the initial stop was constitutional was logically necessary to support the legality of the frisk in that case. That reading would find support in Mr. Justice Harlan's concurring opinion in \textit{Terry}.\textsuperscript{208} Accordingly, \textit{Terry} could be treated as having implicitly decided the question. In the alternative, Mr. Justice Rehnquist might have stated that it was necessary to decide the question left open by \textit{Terry}, \textit{i.e.} whether an officer may stop a citizen without probable cause. The balancing test, which was employed by Mr. Chief Justice Warren to determine if the "frisk" in \textit{Terry} was valid, would be an appropriate test: "It is necessary first to focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen, for there is 'no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails.'"\textsuperscript{209} Thus, the intrusion upon individual liberty resulting from the "stop" in \textit{Williams} might have been balanced against the officer's need to detain his suspect for investigative purposes.

Both \textit{Williams} and \textit{Terry} recognized an exception to the usual constitutional requirement of probable cause in the very limited context of certain brief street encounters. Officers are now permitted to investigate unusual activity which reasonably appears to present a dangerous situation, particularly if their aim is to \textit{prevent} the commission of a serious, violent crime.\textsuperscript{210} In another situation which lacks the same sense of urgency, the traditional

\textsuperscript{200} Not even the dissenters dealt adequately with this point. Indeed, Mr. Justice Marshall's dissent began by saying that \textit{Terry} was the first case which "squarely held that police officers may, under appropriate circumstances, stop and frisk persons suspected of criminal activity even though there is less than probable cause for an arrest," a remarkable statement in light of \textit{Terry}'s footnote 16. Nevertheless, Justice Marshall more adequately discussed the issues presented than did the majority. In conclusion, he candidly admitted that he now wished he had dissented with Justice Douglas in \textit{Terry}. "It seems that the delicate balance that \textit{Terry} struck was simply too delicate, too susceptible to the 'hydraulic pressures' of the day." 407 U.S. at 153, 162 (Marshall, J., dissenting) (emphasis added).

\textsuperscript{207} See notes 199-200, supra.

\textsuperscript{208} 392 U.S. at 21.

\textsuperscript{209} Justice White may also have concluded that the majority had implicitly decided this issue. Certainly Justices Harlan and White expressed views on the seizure issue. Also see Mr. Justice Douglas's concurring opinion in \textit{Peters v. New York}, 392 U.S. 40, 69 (1967).

\textsuperscript{210} The Court in \textit{Terry} dealt with a situation characterized by a sense of immediacy. The police officer was attempting to prevent the commission of a crime. There was no question of criminal activity already completed, leaving time for extensive investigation. The officer suspected \textit{Terry} of preparing for immediate action. Moreover, the particular crime feared was quite serious: daylight armed robbery, possibly endangering a number of lives as well as property. The pat-down search grew out of an immediate concern for the safety of the officer and bystanders. The prevention of harm aspect in \textit{Williams} was not so pronounced, but, perhaps significantly, Justice Rehnquist suggested that an informant's warning of a specific \textit{impending} crime is a proper cause for an investigative stop. Thus, following \textit{Williams} and \textit{Terry}, courts may well limit the application of \textit{Terry} to cases where only crime \textit{prevention} is involved, or where there is evidence that immediate action is necessary. The nature of the criminal activity suspected may also be important. Certainly public safety is better served by preventing a robbery than by apprehending a person for narcotics possession. The police might be allowed more authority in the former cases. Also see note 250 infra.
probable cause standard might be applied. The authority to conduct a pat-down search in an investigative detention situation derives from the officer's need to take prophylactic action when he reasonably believes that a suspect may be dangerous to either the officer or bystanders. Such a reading of *Terry* would explain the Court's hesitancy to disturb the relative certainty of the probable cause standard. Mr. Justice Rehnquist's opinion in *Williams* said nothing to the contrary and may, in fact, have supported the conclusion that a pat-down is justified only on a prevention of harm theory. Clearly the officer there was presented with a potentially dangerous situation. He was told that Williams was sitting in a waiting car and was wearing a pistol during the early morning hours in a high crime area. These circumstances justified a momentary stop. Under this interpretation, the requirement that probable cause must exist before a citizen can be detained remains the rule. However, *Terry* impliedly and *Williams* expressly recognized an exception when police officers observe persons conducting themselves in such a way as to support a reasonable conclusion that criminal activity is afoot. It was in such a situation that the police officer approached and detained *Terry*, Chilton, and Katz. In discussing the pat-down, the *Terry* Court indicated that the need for a search must be balanced against the resulting invasion of privacy. Significantly, neither opinion said that the balancing test will be applied to the initial stop, the forced encounter. However, if that is the test, its application to forcible stops should be strict in order to prevent the dilution of constitutional standards.²¹¹

The *Terry* standard for determining when an officer is justified in conducting a pat-down search might also have been used to determine the propriety of "stops."

[1]n 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. . . .²¹²

The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger. . . .²¹³

[W]here a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous. . . .²¹⁴

The *Terry* holding was not framed in the language of the New York or Kansas statutes, both of which allow a stop or frisk on an officer's reasonable suspicion that a crime has been committed.²¹⁵ Although failing to employ the precise term "reasonable suspicion" Mr. Justice Rehnquist came very close in *Williams*; for example, he said that a brief stop of a suspicious individual may be most reasonable. Still, Connecticut had no stop and frisk statute at the time

²¹² 328 U.S. at 21.
²¹³ Id. at 27.
²¹⁴ Id. at 30.
²¹⁵ See discussion of the crime prevention aspects of *Terry*, supra note 210 and infra note 250.
of Williams's offense. Accordingly, the Court did not reach the question of the constitutionality of such statutes written in "reasonable suspicion" terms. The Supreme Court appears unwilling to provide a standard description of the constitutional requirements for an investigative detention or a limited, pat-down search for weapons. The Terry Court upheld a frisk when the officer observed "unusual conduct which lead him 'reasonably to conclude in the light of his experience that criminal activity may be afoot.'" And in Williams it was said that it may be "most reasonable" to stop a "suspicious individual in order to determine his identity" or to obtain "more information." Whether these tests amount to "reasonable suspicion" remains to be seen as the law develops on a case-by-case basis.

If the Court determines that a verbal formulation describing the sufficiency of the evidence necessary for an investigative stop should be developed, it might follow the course urged by one leading criminal law scholar. Despite claims that "reasonable grounds to believe" (probable cause to believe that a crime has been committed) and "reasonable grounds to suspect" are indistinguishable, Professor LaFave believes that different standards for arrest and non-arrest seizures can be developed. He has suggested that, if the arrest standard requires that it be more probable than not that the suspect has committed or is committing a crime, an investigative detention may require only a substantial possibility that the suspect has committed, is committing, or is planning an offense. It is interesting to compare Professor LaFave's suggestion with the Kansas court's language in State v. Lamb where the more probable than not standard was apparently rejected and probable cause was said to mean "more than a possibility." How does this formulation differ from Professor LaFave's? More importantly, how does the Lamb definition of probable cause differ from the reasonable suspicion standard of the Kansas stop and frisk statute?

Professor LaFave has also indicated that reports from known but untested or from anonymous informants, while insufficient to constitute probable cause for an arrest, may support an investigatory detention. The Williams majority apparently agreed because it allowed the officer to justify his acts on the basis of an unnamed informant's tip which had been given to him personally. Moreover, although there was evidence that the informant had previously given the officer information about homosexual conduct at a nearby railroad station and that the officer knew him, the previous tip was apparently never verified, and the informant's reliability was never established in any other

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217. See 392 U.S. at 30.
218. 407 U.S. at 146.
221. LaFave, supra note 188, at 76-78.
222. Mr. Justice Rehnquist also mentioned that an investigative stop was proper "when the victim of a street crime seeks immediate police aid and gives a description of his assailant." 407 U.S. at 147.
substantial way. However, the Court indicated that the same result would not have been reached if there had merely been an anonymous phone call.

Williams significantly extended Terry which had held that an officer might act on the basis of his personal observations. Later, if his actions are questioned, he must be able to describe facts which, taken with rational inferences, will justify the challenged intrusion. No such after-the-fact testimony was possible in Williams because the officer acted solely upon the unverified tip of an unnamed informant. The crux of the matter was stated by Judge Friendly in his dissent from the earlier second circuit decision in Williams: “The informer was unnamed, he was not shown to have been reliable with respect to guns or narcotics, and he gave no information which demonstrated personal knowledge or—what is worse—could not readily have been manufactured by the officer after the event.”

The informer might have been fabricated by the officer in order to justify his actions. As a result, after Williams, the police may stop and search a citizen who is simply sitting in an automobile on a certain street at an unusual hour. Moreover, Williams will serve as a guide for police across the country. Undoubtedly, stops will increase. Some confrontations will lead to criminal prosecution, but many entirely innocent persons will probably be subjected to humiliating police practices. As Mr. Justice Marshall lamented, “Today’s decision invokes the spectre of a society in which innocent citizens may be stopped, searched and arrested at the whim of police officers who have only the slightest suspicion of improper conduct.”

Because the Court did not articulate a specific standard for determining when a person may be stopped on less than probable cause, Williams is probably only the first of a long line of cases that will attempt to define the facts that will satisfy the reasonableness clause of the fourth amendment.

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223 Mr. Justice Marshall’s dissent revealed this information. The majority was satisfied with merely distinguishing this informant from an anonymous caller. See id. at 146 and 157 (Marshall, J., dissenting).
224 407 U.S. at 146.
225 436 F.2d at 38 (2d Cir. 1970) (Friendly, J., dissenting) (emphasis added). This was Justice Brennan’s dissent in Williams, 407 U.S. at 151.
226 407 U.S. at 162.
227 Although this article was intended only to discuss the situations in which seizures of the person (arrest or investigative detention) may be constitutional, a brief comment about the searches approved in Terry and Williams is appropriate here, because Mr. Justice Rehnquist’s opinion has, at best, obscured the law even more than did that of Mr. Chief Justice Warren in Terry. As mentioned, Terry authorized a search only where the officer could reasonably conclude that the suspect might be armed and dangerous. This conclusion was to be independent of any suspicion which led to the initial encounter. Even then the search was to be “carefully limited” to the suspect’s “outer clothing.” Once the officer in Terry felt a bulge he could reasonably believe was a weapon, he was justified in reaching beneath that clothing to seize the weapon. In stark contrast, the officer in Williams conducted no such frisk. On the basis of the informant’s tip alone, he reached directly into the suspect’s waistband and retrieved a pistol he could not have seen or felt first. It is possible that a preliminary pat-down frisk would have revealed a bulge leading to a seizure as in Terry, and it is also possible that the pistol was not covered by Williams’ clothing at all but by the curvature of his body. In the latter case the gun would have been revealed had Williams followed instructions and opened the car door. In any event, Justice Rehnquist carefully avoided use of the Terry phrase “limited search of the outer clothing,” and authorized instead a “limited search” which extended at the outset to unseen portions of the suspect’s body or clothing.

It also must be noted that Justice Rehnquist upheld the search of the car as incident to a lawful arrest, citing Carroll v. United States, 267 U.S. 132 (1925), which required a showing that the officer had probable cause to believe the car contained contraband. It may be that Justice Rehnquist meant that the arrest established probable cause but he did not say so. Instead, he talked in terms of a search incident to a lawful arrest which should be governed by Chimel v. California, 395 U.S. 752 (1969), not Carroll.
C. Post-Terry, Pre-Williams Cases: Some Guidance

Prior to Williams, several of the federal courts of appeals and some state courts had confronted the issue of when a non-arrest seizure is valid.\footnote{Prior to Williams, Supreme Court cases since Sibron and Peters had shed little light on the unanswered questions of Terry. In Davis v. Mississippi, 394 U.S. 721 (1969), the Court ruled that fingerprint evidence should have been excluded where defendant had been detained overnight after a dragnet pick-up. There was no showing of probable cause; the police had only a set of fingerprints and a general description of the rape victim’s assailant. In its opinion, the Court included the following footnote which may have instructive value: “[W]hen the police have the right to request citizens to (voluntarily) answer questions concerning unsolved crimes they have no right to compel them to answer.” Id. at 727 n.6. On the basis of that language, the argument was later made in Morales v. New York, 396 U.S. 102 (1969), that pre-arrest questioning at the police station was unconstitutional. There New York had admitted into evidence a confession obtained after extensive “investigative” questioning pursuant to § 180-a. For want of a sufficient record, the Supreme Court, in a per curiam opinion, did not reach the question of the “legality of custodial questioning on less than probable cause for a full-fledged arrest.” Id. at 106.}

The District of Columbia Circuit confronted the issue in Young v. United States.\footnote{The Kansas Court has followed the distinction, discussed in Miranda v. Arizona, 384 U.S. 436, 477-79 (1966), between custodial interrogation and general on-the-scene questioning. Routine questions posed by investigating officers before any restraint is imposed upon defendant’s liberty do not amount to custodial interrogation and therefore are not subject to the Miranda rule. State v. Phpippen, 207 Kan. 224, 229, 485 P.2d 336, 340 (1971). The distinction was further applied in State v. Frizzel, 207 Kan. 393, 485 P.2d 106 (1971), where an officer began general questioning after stopping the defendant’s car for a license check. It was not clear in Frizzel that the defendant’s liberty to move had been substantially restrained when the on-the-scene (not custodial) questions were asked. See also State v. Broadus, 206 Kan. 766, 481 P.2d 1006 (1971) where spontaneous statements by the defendant at the scene of the crime were admissible even though made without Miranda warnings. For a proposal concerning the Miranda warnings when a person is stopped on less than probable cause, see Model Pre-Arraignment Code, supra note 5, § 110.2(5). Note to § 110.2 at 13-14 and Commentary on § 110.2 at 125-28. Also see LaFave, supra note 188, at 95-106.}

There officers observed that a car, which was occupied by the defendant and four others, had been parked for some time in front of a bank. They saw this car make a U-turn and follow a delivery truck that had just left the bank. Their suspicions aroused, the officers attempted to follow the car but lost it. They inquired and learned that the delivery truck was overdue at its destination. A description of the car was broadcast and, shortly thereafter, the car was stopped. An officer claimed that as he approached the front of the car he saw the barrel of a shotgun under the front seat. At this point, the occupants were ordered out of the car, and a sawed-off shotgun was obtained from under the seat. The occupants were arrested for carrying the shotgun without a permit.\footnote{E.g., Swiatek v. United States, 450 F.2d 985, 988-89 (7th Cir. 1971); United States v. Nicholas, 448 F.2d 622 (8th Cir. 1971); United States v. Madrid, 445 F.2d 827 (9th Cir. 1971); White v. United States, 444 F.2d 724 (10th Cir. 1971); Young v. United States, 435 F.2d 405 (D.C. Cir. 1970).}

In upholding the stopping of the car and the detention of the occupants for brief questioning, the court made some interesting observations. First, it

\footnote{The occupants of the car were later identified as having committed a robbery. Their conviction for that robbery was the basis of the appeal. The validity of the stop was attacked because it had produced the evidence used to convict them of the armed robbery.}
noted that the *Terry* Court had held that an officer is authorized to frisk someone when he “observes unusual conduct which leads him reasonably to conclude in the light of his experience that criminal activity may be afoot and the person with whom he is dealing may be armed and presently dangerous.” The court recognized that *Terry* had not specifically considered the seizure issue but indicated that a finding that the stop was warranted was implicit in and necessary to the *Terry* holding. Judge Leventhal concluded that a frisk involves a greater invasion of personal liberty than does a brief detention for the purpose of asking a few questions. Therefore, the government’s burden in order to support a stop should not be any greater than that necessary to sustain a subsequent frisk. The court found the stop reasonable because of the occupants’ actions at the bank, their sudden U-turn, and the truck’s failure to arrive on time.

In response to the argument that this holding would give the police absolute discretion to stop a car on the pretext of wanting to see a driver’s license or registration, the court stated:

> We are not fairly confronted with any such issue. Stops as well as arrests must satisfy the Fourth Amendment requirement of reasonable cause commensurate with the extent of the official intrusion. If the defendant challenges evidence as the fruit of an illegal seizure, the government must come forward with “specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant that intrusion.”

The court stressed its concern for the safety of the officers; the possible crime involved was armed robbery. Applying essentially the *Young* test, the Eighth Circuit reached a different result in another automobile case. Here, police officers, who were on routine patrol, had observed a Cadillac possessing Nevada plates parked in front of a pool hall in a black neighborhood at 11 p.m. After several minutes the officers observed the defendant leave the pool hall and join another black male in the car. On the basis of this information, the officers decided to investigate. Upon arriving at the car, one of the officers flashed his badge and ordered the defendant to roll down the window. As the window was being lowered, the officer smelled what he believed to be the odor of burned marijuana. The occupants of the car were arrested for violation of the Missouri narcotics laws, and the car was searched. Stolen cashier’s checks were found in the trunk. The court held the checks inadmissible since the officers did not have a reasonable basis upon which to stop the defendants for questioning.

Some state courts have also considered this same investigative detention issue. Post-*Terry* New York decisions have held that the New York statute is consistent with the fourth amendment. These cases have generally adopted the aforementioned balancing test, which requires a reasonable suspicion that

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282 435 F.2d at 408.
283 *Id.* at 408-09.
284 United States v. Nicholas, 448 F.2d 622 (8th Cir. 1971).
criminal activity may be afoot. In *People v. Mack* two officers were told by other uniformed officers that three burglaries had been committed in the area that day. Two men, described only generally, had been seen in the vicinity of the burglaries. Soon after, the officers observed the defendant and another man, both of whom matched these general descriptions, enter and leave two apartment buildings within a matter of minutes. At a third building the officers approached the suspects and identified themselves. One officer patted down the defendant’s outer garments, felt a bulge, and then seized a hidden pistol. The New York Court of Appeals ruled the stop and frisk lawful under section 180-a, New York’s then current stop and frisk statute, and constitutional under *Terry.* The court noted that the reasonable suspicion which allowed the defendant to be stopped did not necessarily validate the frisk. The latter required an independent reasonable suspicion of danger. Because the suspected criminal activity was possibly violent (burglary), the court found the officer’s suspicion of danger sufficient to sustain the pat-down search.

In another New York case, an unknown man told an officer that one of two men walking away was armed with a pistol. Without warning, the officer embraced the suspect in a bear hug and directed him to move into a nearby hallway. There he felt for and removed a pistol from the suspect’s belt. Ruling the pistol inadmissible, the court held that the officer’s action went beyond not only *Terry* but also the bounds of section 180-a.

In *Stone v. People* the Colorado Supreme Court also considered a case which involved the seizure of a person on less than probable cause. There, a state agent who had received information from an informer that Stone was a heroin user and was selling marijuana and heroin placed the defendant under surveillance for the alleged purpose of determining the defendant’s residence. During this surveillance, the agent observed the defendant park, emerge from his car, and begin to leave the area. The agent told Stone to “hold it” and then asked him for his driver’s license. Simultaneously, the agent noticed fresh needle marks on Stone’s arm. Stone was then told that he was under arrest. A subsequent search of his car revealed a capsule of heroin. Stone contended unsuccessfully that the heroin was the product of an illegal detention. Prior to setting forth the standards for determining the reasonableness of a seizure on less than probable cause, the court held that a seizure of the person had occurred when the officer told the defendant to “hold it.” It reasoned that most people, when told by an officer to stop, will stop and that many will believe they are not free to go.

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287 State v. Davis, 462 S.W.2d 798 (Mo. 1970) apparently accepted this view. *Davis* is consistent with State v. Witherspoon, 460 S.W.2d 281 (Mo. 1970) where an officer searched a car trunk after stopping a traffic offender. There was no showing that the officer’s safety was endangered by anything in the trunk; therefore, burglary tools found there were inadmissible in a felony prosecution.
289 485 P.2d 495 (Colo. 1971).
The general standards enunciated for deciding when a citizen may be detained for questioning were: "(1) the officer must have a reasonable suspicion that the individual has committed, or is about to commit, a crime; (2) the purpose of the detention must be reasonable; and (3) the character of the detention must be reasonable when considered in light of the purpose." The court indicated that future guidelines involving different factual situations would be forthcoming since each case would be considered individually. Applying these general standards, the court found the detention to be reasonable on the grounds: (1) that the officer reasonably suspected the defendant had committed or was about to commit a crime; (2) that obtaining of the defendant's address was reasonably material to the officer's duties; and (3) that the purpose of the inspection of the license was to obtain Stone's address.

D. The Kansas "Stop and Frisk" Statute

Until July 1, 1970, Kansas law did not affirmatively sanction the detention of suspects for any purpose on less than probable cause. This was changed by the two part "stop and frisk" statute. Since the two parts of the statute present different problems, they will be considered separately. Subsection (1) authorizes an officer to stop and question a citizen when he "reasonably suspects" that the citizen "is committing, has committed or is about to commit a crime," and presents several interesting problems. Although the United States Supreme Court has never passed on the constitutionality of a stop and frisk statute—in fact, it specifically refused to do so in *Peters v. New York* and *Sibron v. New York*—the *Williams* holding appears to provide a constitutional basis for these statutes. However, each statute and the stops which are made pursuant to it must comply with the reasonableness requirement of the fourth amendment.

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1972] ARREST UNDER THE NEW KANSAS CRIMINAL CODE 733

The specific language of the Court was:

We go to the following extent here: when an officer reasonably suspects that the person has committed a crime or is about to commit a crime and the officer has not identified the person he legally may stop him to question him about his identity. If ascertainment on the part of an officer of a person's address is reasonably material to the duties being performed by that officer, and if there is the reasonable suspicion just mentioned, the officer may detain the individual for the purpose of questioning as to his address. Since the purpose here of inspection of the driver's license was to obtain the defendant's address, we regard this request as no more intrusive than verbal questions concerning the address. We are of the view, therefore, that Mulnix remained within the permissible Stone area and did not violate defendant's Fourth Amendment rights. *Id.*

The Kansas "stop and frisk" statute provides:

(1) Without making an arrest, a law enforcement officer may stop any person in a public place whom he reasonably suspects is committing, has committed or is about to commit a crime and may demand of him his name, address and an explanation of his actions.

(2) When a law enforcement officer has stopped a person for questioning pursuant to this section and reasonably suspects that his personal safety requires it, he may search such person for firearms or other dangerous weapons. If the law enforcement officer finds a firearm or weapon, or other thing, the possession of which may be a crime or evidence of crime, he may take and keep it until the completion of the questioning, at which time he shall either return it, if lawfully possessed, or arrest such person.


*Id.* See note 193, supra.
1. The Stop

A determination of the reasonableness of a stop under subsection (1) involves at least three significant issues: (1) What restraint of liberty constitutes an investigative stop, as opposed to an arrest? (2) What standard is to be applied to determine if the officer has sufficient grounds to stop a citizen? (3) What type of crime must be suspected before a stop is justified?

(i) “Stops” Distinguished from “Arrests”

Clearly a police officer has the right, as does any citizen, to address others on the street. Neither an arrest nor an investigative stop occurs when an officer merely approaches a person in order to ask him questions. In such a situation, the fourth amendment simply does not apply, for there has been no detention. Terry makes equally clear, however, that a seizure does occur and the fourth amendment is applicable when an officer “accosts an individual and restrains his freedom to walk away.” Accordingly, if an officer restrains a person (either immediately after stopping him or after the citizen has declined to answer questions), a seizure has been effected. The restraint need not involve physical contact but may take the form of gestures or spoken commands.

Once a seizure of the person has been established, the difficult task of distinguishing between the two types of seizure, arrests and investigative stops, must be undertaken. The majority view has been that an arrest occurs when the suspect’s liberty to move is restrained in any significant way and he reasonably believes that he is in custody and is not free to go. A specific intent on the part of the officer to charge the suspect with an offense and the taking of the suspect to the police station have been mentioned as elements of, but have never been uniformly considered necessary to, an arrest. How, then, does the restraint constituting an arrest differ from that constituting an investigative stop? Although no simple answer is possible, a number of points may legitimately be made. First, Terry and Williams, by upholding restraints of liberty upon less than probable cause, may have dramatically changed the law of arrest by making an intent to take the suspect to the stationhouse to be charged with an offense an essential element of an arrest. Or, it may be that the Court went further and intended that an arrest occurs only upon the actual taking of the citizen to the police station. At a minimum, it appears that a restraint which reasonably leads the suspect to believe that he is not free to go is an investigative stop, not an arrest, if the officer has no present intent to bring formal charges. Such a detention may be constitutional even though probable cause does not exist. Second, the difference between an arrest and a stop may lie in the duration of the restraint. The arrest cases have

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244 392 U.S. at 16.
245 See text accompanying notes 3-27, supra.
246 Id.
247 See W. LaFAVE, supra note 12, at 4; Model Pre-Arraignment Code Commentary, at 13, 110, 113 and 130.
defined the occurrence of an arrest as a moment in time, even though the suspect remains in custody from that point forward, at least until he posts bond. In contrast, the "investigative stop" cases have emphasized that the right to detain for investigative purposes is strictly limited; consequently, the period of detention must be brief. If, within a few minutes, the officer has not gained sufficient evidence to establish probable cause for an arrest, the restraint must be lifted. Third, Williams and the state statutes authorize investigative detentions when criminal activity is anticipated. Thus, while an arrest has always required probable cause to believe that the suspect is committing or has committed a crime, an investigative stop may be valid if the officer reasonably concludes that the suspect is about to commit an offense. The cases and statutes specifically recognize that a person may be stopped even though a crime has not occurred, and it may be that non-arrest stops will, in the main, be restricted to this kind of circumstance.

(ii) The Evidence Necessary to Justify a Stop

The second significant question presented by subsection (1) concerns the evidentiary standard to be applied in the investigative stop situation. The drafters of the Kansas statute authorized a stop if the officer reasonably suspects a person is committing, has committed or is about to commit a crime. This standard clearly permits the seizure of a person upon less than probable cause, but the meaning of "reasonable suspicion" is far from clear. Although "reasonable suspicion" is admittedly vague, it is arguably no more vague than the probable cause test for arrest. Thus, the Kansas Supreme Court will have to develop the definition of "reasonable suspicion" on a case-by-case basis.248

248 It is interesting to note what the training manual of the Metropolitan Police Department of the District of Columbia has to say about stops on reasonable suspicion.

Stopping citizens is a sensitive matter, and the only justification for it is to protect the public. It is therefore imperative that high standards of discretion and courtesy be maintained at all times. Officers must be concerned for the rights of all citizens, and shall exercise care not to infringe on the protection of the Fourth Amendment. The exercise of this authority (stop and frisk) must always be based on the sincere conviction that reasonable suspicion exists.

Under no circumstances will such stops and frisks be used to harass citizens.

B. Reasonable Suspicion:
1. Reasonable suspicion is more than a hunch or intuition. At the same time, it is less than probable cause. In addition, the officer must be able to describe specific facts that would convince a court that a man of reasonable caution would believe that the stop and frisk was appropriate.

It is a combination of factors which merit the sound and objective suspicion of the officer.

2. Factors to consider in determining reasonable suspicion:
   a. Whether the person fits the description of someone wanted by the police.
   b. The general conduct, demeanor, and gait of the person, including attempt at flight when the officer is seen or recognized.
   c. The officer's personal knowledge of the person's character and background.
   d. What the person is carrying.
   e. How the individual is dressed, including any bulges under his clothing.
   f. The time of day or night.
   g. The geography of the area and the section of the city.
   h. Any previous information received.
   i. The nearness in place and/or time of the subject to known or reported criminal activity.
   j. Any overhead conversation.
   k. Whether the person is alone or in a group, or whether an entire group is involved in the suspicious activity.
And, notwithstanding Justice Harlan's belief that the *Terry* standard of reasonableness was more vague than the "reasonable suspicion" test, it seems that the standard applied in *Terry* must serve as the benchmark here. Several courts have already so held.  

(iii) The Types of Crimes that Will Justify a Stop

Any departure from the well-accepted probable cause standard should be as limited as possible. Therefore, another factor which should be considered when determining if a stop is reasonable is the seriousness of the crime involved. At present, Kansas law provides that a citizen may be stopped for the investigation of *any* crime. Clearly, an officer is remiss if he does not investigate a situation which reasonably appears to him to indicate that some serious crime such as armed robbery, destruction of property, or violence against a person is imminent. Because society's interest in preventing and detecting such crime is great, the officer, rather than permitting a serious crime to occur or allowing evidence to disappear, thereby exposing the public to substantial risks, should be able to make an investigative stop and briefly detain the suspects or possible witnesses. Although the seizure of a person constitutes a serious encroachment upon individual freedom which should only be allowed in very limited circumstances, society's interests on balance justify this intrusion when a serious and possibly violent crime is involved. Both of the cases in which the Supreme Court has approved an officer's actions based upon less than probable cause have involved suspected violent crimes.

Although the majority in *Terry* did not reach the issue of when seizures on less than probable cause are permissible, its language suggests that an exception to the probable cause standard will be limited to situations where violent crimes are suspected. This limitation appears to be compatible with Justice Harlan's concurring opinion in *Terry*. Since *Williams* involved the possibility of violent crime, it too can be read to support this limitation. The language of the *Williams* opinion, however, was broad enough to permit detentions for the purpose of investigating any crime. One eminent circuit judge, Judge Friendly, recently made some observations which are germane to the issue of the types of crimes that justify a stop on less than probable cause.

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**THIS LIST IS NOT ALL-INCLUSIVE**

Any of the above factors may also be elements in establishing probable cause. The Law of Arrest, Search and Seizure, *supra* note 124, at 32-33.

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See cases cited in note 229 *supra*.

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The Supreme Court has never indicated whether the evaluation of a seizure on less than probable cause should be affected by the fact that the purpose of the intervention is to prevent the commission of a crime rather than detect it. See *Williams* v. Adams, 436 F.2d 37-38 (Friendly, J., dissenting). See *LaFave, supra* note 188, at 66.

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See Model Pre-Arraignment Code § 110.2. Note that the Model Code only authorizes a twenty-minute stop. Also see note 248 *supra*.

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The informant also told the officer that Williams was carrying narcotics.

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The Court carefully restricted its exception to the probable cause requirement to a situation where the officer or nearby people were in physical danger.

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392 U.S. 1, 33 (1968) (Harlan, J., concurring).

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407 U.S. at 146.
His dissenting opinion in *Williams v. Adams* apparently persuaded the Second Circuit to reconsider *en banc* the earlier decision by a panel of the circuit and influenced Mr. Justice Brennan to dissent from the Supreme Court's subsequent decision in that case. In that dissent, Friendly stated:

[I] have the gravest hesitancy in extending *Terry* to crimes like the possession of narcotics. . . . There is much danger that, instead of the stop being the object and the protective frisk an incident thereto, the reverse will be true. . . .

It [*Terry*] was meant for the serious cases of imminent danger or of harm recently perpetrated to persons or property, not the conventional ones of possessory offenses. If it is to be extended to the latter at all, this should be only where observation by the officer himself or well authenticated information shows "that criminal activity may be afoot."257

The American Law Institute’s commentary to its Model Pre-Arraignment Code section on investigative stops, it should be noted, provides:

The argument against the stop cannot rest, it would seem, on a demonstration that there are no situations where a legitimate law enforcement need can only be met by such an authority. Rather, the case against the stop must depend on the costs which granting such an authority imposes.

There are two different sorts of costs associated with the stop. First, there is the imposition upon innocent persons even when the police stay within the terms of the authority granted. Such imposition is an evil in itself, and may lead as well to the further evil of resentment against the police and civil authority in general. Second, there is the danger that the stop is susceptible of abuse. It may be used not for its authorized purpose but to harass persons to whom the police may be hostile or about whom they feel a generalized suspicion or apprehension—e.g., youth, unconventionally attired persons, Negroes in white areas, whites in Negro areas. And the stop and frisk carry the special potential that they may be used to circumvent constitutional restrictions on search and seizure by providing a pretext to search for narcotics and gambling slips. The danger of abuse is argued to be particularly serious, since the stop must be predicated on a more permissive standard than arrest thus making it more difficult to confine the authority to proper cases and to ascertain after the fact whether an abuse has indeed taken place.258

The Institute’s Model Code of Pre-Arraignment Procedure259 offers a specific proposal that may well eliminate many of the potential abuses. This proposal provides, in part, that a coercive260 investigative stop261 may be made in limited circumstances for misdemeanors or for felonies involving danger of forcible injury to persons or of appropriation of or damage to property.262

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256 436 F.2d 30, 37 (2d Cir. 1970) (Friendly, J., dissenting).
257 Id. at 38-39.
258 Model Pre-Arraignment Code § 110.2, Comment at 113-114 (footnotes omitted).
260 The Model Code provides that the officer may use only non-deadly force to consummate the stop. Model Pre-Arraignment Code § 110.2(3).
261 The Model Code seems to define arrest as a removal of the suspect from the field to the station-house. Model Pre-Arraignment Code Commentary at 110 and 113.
262 Section 110.2 of the Model Pre-Arraignment Code provides:

1. Cases in Which Stop Is Authorized. A law enforcement officer, lawfully present in any place, may, in the following circumstances, order a person to remain in the officer’s presence near
and that in any case where a stop on less than probable cause is authorized, the person can be detained on the street no more than twenty minutes. The first Tentative Draft provided, as does the present Kansas statute, that a person could be stopped on reasonable suspicion for any crime, including minor offenses such as loitering and vagrancy. Because this provision was thought to be constitutionally suspect and easily abused, the American Law Institute’s Model Code was amended. The commentary to the present section explains that: “[V]ice, narcotics and gambling offenses, as well as many minor crimes are removed from the scope of the stop, and the occasions for abuse presented in respect to those crimes reduced.”

Any exception to the requirement of probable cause must be carefully limited because the courts have consistently held that only a compelling justification will permit an infringement upon a person’s liberty. The Supreme Court recently reiterated this position by strongly denouncing an investigative arrest. Further, stops for misdemeanors or less than probable cause appear to be inconsistent with treatment in Kansas of warrantless arrests for misdemeanors. Yet it may be better for the courts to recognize what is a common occurrence and to provide guidelines for the police which will be strictly enforced. In any event the present Kansas statute is too broad. Either the Kansas legislature should restrict the definition of crimes in section 22-2402 (possibly by adopting the American Law Institute’s approach) or the Kansas Supreme Court should narrowly interpret the present statute.

2. After the Stop

Assuming that an officer is justified in stopping a person, it must still be

such place for such period as is reasonably necessary for the accomplishment of the purposes authorized in this subsection, but in no case for more than twenty minutes:

(a) Persons in suspicious circumstances relating to certain misdemeanors and felonies.

(i) Such person is observed in circumstances such that the officer reasonably suspects that he has just committed, is committing, or is about to commit a misdemeanor or felony, involving danger of forcible injury to persons or of appropriation of or damage to property, and

(ii) such action is reasonably necessary to obtain or verify the identification of such person, to obtain or verify an account of such person’s presence or conduct, or to determine whether to arrest such person.

(b) Witnesses near scene of certain misdemeanors and felonies.

(i) The officer has reasonable cause to believe that a misdemeanor or felony, involving danger of forcible injury to persons of appropriation of or damage to property, has just been committed near the place where he finds such person, and

(ii) the officer has reasonable cause to believe that such person has knowledge of material aid in the investigation of such crime, and

(iii) such action is reasonably necessary to obtain or verify the identification of such person, or to obtain an account of such crime.

(c) Suspects sought for certain previously committed felonies.

(i) The officer has reasonable cause to believe that a felony involving danger of forcible injury to persons of or appropriation of or damage to property has been committed, and

(ii) he reasonably suspects such person may have committed it, and

(iii) such action is reasonably necessary to obtain or verify the identification of such person for the purpose of determining whether to arrest him for such felony. Id.

Also see Id. commentary at 9-14, 99-128.

Interestingly enough, former §180-a N.Y. Code, the basis of the Kansas statute, also limited investigative stops to felonies or serious misdemeanors. Presently, the New York law, §140.50 (McKinney Supp. 1971), applies only where felonies or class A misdemeanors are reasonably suspected.

Model Pre-Arraignment Code, §110.2, Comment at 10.

determined what may be required of the individual and in what circumstances he may be frisked. Subsection 22-2402(1) provides that the "officer may demand of him [the person stopped] his name, address and an explanation of his actions."265 It is not clear what the legislature intended by the word "demand."266 That term may be defined as "to ask for authoritatively" or "to require to come" or "a command."267 If it means either of the latter, two problems arise. Not only is there no penalty prescribed in the Criminal Code for a refusal to answer, there is no Supreme Court case upholding such a power to require answers. In fact, Justice White in a concurring opinion in Terry observed:

There is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets. Absent special circumstances, the person approached may not be detained or frisked but may refuse to cooperate and go his way. However, given the proper circumstances, such as those in this case, it seems to me the person may be briefly detained against his will while pertinent questions are directed to him. Of course, the person stopped is not obligated to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest, although it may alert the officer to the need for continued observation.268

The American Law Institute has also concluded that a citizen is not legally obliged to cooperate with the police. However, in all probability, most citizens believe that they must respond when questioned by a uniformed officer.269

Subsection (2) which authorizes the search of a suspect when the officer reasonably believes that his personal safety requires it also presents several interesting issues. First, assuming that the officer reasonably suspects an individual is committing, has committed or is about to commit a crime, when does he have the right to frisk? May he automatically frisk when a person is justifiably stopped or does he need other evidence to justify the belief that the person is presently armed and dangerous?270 The New York statute, which was used as a pattern for the Kansas statute, has been interpreted so that:

Where . . . the officer confronts an individual whom he reasonably suspects has committed, is committing or is about to commit such a serious and violent crime as robbery or, as in the instant case, burglary, then it is our opinion that suspicion not only justifies the detention but also the frisk, thus making it unnecessary to particularize an independent source for the belief of danger.271

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266 Note that this explanation may raise Miranda problems. See note 228 supra. It is also clear that failure to explain one's presence on a street, for example, may no longer justify an arrest for vagrancy because § 21-4108 (vagrancy) is probably unconstitutional in view of Papachristou v. City of Jacksonville, 405 U.S. 156 (1972).

267 WEBSTER'S COLLEGIATE DICTIONARY 219 (7th ed. 1967).

268 Terry v. Ohio, 392 U.S. 1 at 34 (White, J., concurring). Also see Davis v. Mississippi, 394 U.S. 721, 727 n.6 (1969).

269 MODEL PRE-ARRAIGNMENT CODE, supra note 5, Commentary on § 110.1 at 100.

270 For a general discussion of frisks, see e.g., Chevigny, Police Abuses in Connection with the Law of Search and Seizure, 5 CRIM. L. BULL. 3 (1969); LaFave, supra note 139, at 84-89; Player, Warrantless Searches and Seizures, 5 Ga. L. REV. 269 (1971).

The New York court’s view was premised upon Justice Harlan’s concurring opinion in *Terry* which advocated that the right to frisk is automatic if an officer is justified in making a forcible stop. The majority in both *Terry* and *Sibron v. New York* rejected this approach (as did Judge Fuld in his dissent in the New York case) and concluded that there must be an independent justification. In adopting the approach of the *Terry* majority the American Law Institute has stated:

Subsection (4) authorizes an officer who has lawfully stopped a person to search that person for a dangerous weapon if he has some reasonable objective basis for believing that the officer’s or another’s safety requires him to make a search. The requirement is intended to preclude routine frisking in association with all stops or even some classes of stops. There must be something about the particular person or his circumstances which leads to the belief that a frisk is warranted: e.g. a characteristic bulge, or conduct—as in the *Terry* case—which suggests that the person is about to commit an armed robbery.

The Kansas statute, although not using the term “independent ground,” authorizes a frisk only when a person is stopped and the officer reasonably suspects he is in danger. The legislature did not specifically provide that the right to frisk automatically flows from a justifiable stop. Therefore, it appears that to support a frisk in Kansas there must be an independent ground for the belief that the person stopped is armed and presently dangerous. As a practical matter, the actions of the defendant will probably give rise to a reasonable belief that he is armed and dangerous whenever a serious crime such as robbery, assault with a dangerous weapon, or burglary is suspected.

Since the Kansas and the American Law Institute (ALI) standards seem to be the same, the ALI formulation should be adopted by the Kansas courts. Should the Kansas court interpret its statute as has New York, however, the frisk would be automatic only in those situations where the suspected crime is highly dangerous, a fact which in itself gives rise to a reasonable belief that the person is armed and presently dangerous to the officer or others. Finally,

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272 Before he [the officer] places a hand on the person of a citizen in search of anything he must have constitutionally adequate, reasonable grounds for doing so. The California Supreme Court very recently applied this rule in *People v. Simon*, 101 Cal. Rptr. 837, 496 P.2d 1205 (1972).
274 *Model Pre-Arraignment Code, supra note 5*, Commentary on § 110.2(5) at 119 (footnote omitted). See also *id.*, § 110.2(4) at 7-8.
275 In discussing when a person may be frisked, a federal district court judge observed:
A reviewing court must: (1) determine the objective evidence then available to the law enforcement officer and (2) decide what level of probability existed that the individual was armed and about to engage in dangerous conduct; it must then rule whether that level of probability justified the “frisk” in light of (3) the manner in which the frisk was conducted as bearing on the resentment it might justifiably arouse in the person frisked (assuming he is not about to engage in criminal conduct) and the community and (4) the risk to the officer and the community of not disarming the individual at once.

it must be remembered that in New York\(^277\) and under the ALI approach, stops are limited to certain types of crimes.

It cannot be over-emphasized that *Terry* did not authorize a complete search even when the officer had reason to fear for his personal safety. It upheld only a pat-down of the outer clothing and the removal of a gun discovered during the pat-down.\(^278\) The American Law Institute has recently adopted the narrow *Terry* standard by approving a draft which restricts the search to an external patting down of the suspect's clothing.\(^279\)

The second sentence of subsection 22-2402(2) which permits the officer to seize any "firearm or weapon or other thing" presents another possible problem. Although seizures of weapons are clearly within the holding of *Terry*, seizures of "other things" are not. *Before the officer is justified in seizing any object, he must reasonably conclude (1) that he is in danger and (2) that the object which he felt during the pat-down is a weapon.*\(^280\) Since the officer may well be working under great stress and because weapons come in all shapes and sizes and can be hidden anywhere, it seems legitimate to allow the officer some latitude in judging whether the object that he felt was a weapon. However, the admissibility of evidence, other than weapons, discovered in the course of a weapons search is a separate question. Since the search is conducted for the officer's protection, the best rule would require the exclusion of such evidence. As Judge Friendly has suggested, a rule admitting evidence other than weapons might lead officers to make the search the reason for the initial stop; *Terry* can be read to support Judge Friendly's view that such a police procedure is improper.\(^281\) To avoid controversy as to what objects felt during a pat-down can be thought to be weapons and to eliminate any contention that the officer was really searching for drugs and not weapons, *Terry* could be extended to allow a complete search for weapons when the officer reasonably believes that the person he has legitimately stopped might be armed. Any contraband other than weapons could be confiscated but could not be used as evidence.\(^282\) This construction is consistent with the *Terry* rationale of protecting the officer. The ALI, however, has adopted a different approach. Because the Institute believed that possible abuses were substantially removed by limiting stops to serious crimes, its adopted draft promulgated no special rule as to the admissibility of non-weapons discovered during a justifiable pat-down.\(^288\)

\(^{277}\) See note 262 supra.

\(^{278}\) See note 277 supra.

\(^{279}\) Model Pre-Arraignment Code, § 110.2(4).

\(^{280}\) See Model Pre-Arraignment Code, supra note 5, § 110.2(4).
E. Recent Kansas Cases

Although the Kansas Supreme Court has, as of this writing, not construed section 22-2402, two cases give at least some indication of the court's interpretation of Terry. In State v. Bell, the defendant had just left his car when he was stopped by an officer who had been "staking out" his home. As soon as the officer identified himself, the defendant drew what appeared to be a pistol from his coat pocket. The officer drew his own gun and ordered the defendant to drop his pistol. The defendant tossed the pistol through the open car door onto the back seat where it could be seen by the officer. The officer then retrieved the gun from the back seat of the car. During this entire affair, the defendant's female companion remained in the front seat of the car. The court cited Terry to support its conclusion that it was "reasonable and necessary for the protection of the officer to take swift measures to recover the pistol from the automobile and neutralize the threat of harm it posed." Unless the court felt that the occupant of the front seat posed a threat, its reliance on Terry was misplaced. There was no substantial danger; Bell was being held at gunpoint and had already dropped the pistol. The officer, however, had probable cause to arrest Bell for carrying a concealed deadly weapon. Depending upon how far the defendant was from the car, the seizure of the gun might have been upheld as incident to that arrest. The search might also have been justified by Chambers v. Maroney or upon the "plain view" doctrine because the officer saw the contraband through the window of the car. The plain view test, however, would require the officer to have had a right to arrest Bell or, at the very least, a right to be in the position from which he saw the gun, and to have had no prior knowledge that Bell possessed a concealed weapon.

Another recent Kansas case indicates that the court has rejected Judge Friendly's view that Terry should not be extended to drug possession cases. In State v. Thomas, state highway patrolmen had stopped the defendant's car when they observed it weaving at a high rate of speed on an interstate highway. The defendant consented to a search of the car for an "open bottle." In the course of the consent search, the officers discovered an empty revolver holster in the glove department. The officers then performed a pat-down search of the defendant and his passenger. One officer felt a "lump" beneath the defendant's pant leg and removed a "hard round object which was a rolled

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285 Id. at 384, 469 P.2d at 452.
287 399 U.S. 42 (1970). This case upheld a warrantless search at the station house of a car which had been brought to the police station after the arrest of the occupants. The car was searched because it was believed to have been involved in a robbery. This case has been reconsidered and refined in Coolidge v. New Hampshire, 403 U.S. 443 (1971).
289 Id.
up manila envelope,” which was subsequently found to contain marijuana. No weapons were found on either suspect’s person, but a rifle and shotgun were discovered in the trunk. The court held the marijuana admissible in a subsequent prosecution for its possession. *Sibron v. New York* was distinguished on the ground that the officer in that case could not reasonably have inferred that Sibron was armed and dangerous. The Kansas officers, on the other hand, had found the empty holster and could, the court noted, conduct a “reasonable self-protective search” to see if the defendant had a weapon “which the officer had probable cause to believe he had.” The court emphasized that the search was restricted to methods appropriate to the discovery of the item sought—a gun. The officer used only a pat-down procedure and did not reach into pockets or beneath the defendant’s undergarments until he felt something that might have been a weapon.

The use of the term probable cause and the emphasis upon the scope of a search for weapons seem to some extent contradictory. Presumably the search was not performed incident to an arrest for speeding or reckless driving. If there was probable cause for an arrest or search apart from the traffic offenses, it could only have arisen as a result of finding the empty holster. If the court meant to say that the discovery of the holster created probable cause to arrest for possession of marijuana or even for the concealment of a weapon, the constitutional standard has been stretched to new lengths. And, if the court believed that probable cause for an arrest or search existed, why did it feel constrained to say that the search was limited to “what was appropriate” to the discovery of weapons? In any event, a search incident to a lawful arrest cannot exceed the limits imposed by *Chimel v. California.* The court probably found, not that the officers had probable cause, but that they could reasonably have concluded that the defendant might be armed. The citation to *Terry* suggests that the court viewed the situation as an investigative detention and a limited pat-down search for weapons based upon a reasonable fear that the officers’ safety was endangered.

The *Thomas* opinion concluded that: “Items seized by an officer lawfully searching for purposes of self-protection or for fruits of another crime, may be retained and used in the appropriate criminal prosecution.” In support

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205 Kan. at 444, 469 P.2d at 281 (emphasis added).

Id.

Chimel v. California, 395 U.S. 752 (1969); United States v. Robinson, 447 F.2d 1215 (D.C. Cir. 1971); United States v. Humphrey, 409 F.2d 1055 (10th Cir. 1969). See People v. Miller, 101 Cal. Rptr. 860, 496 P.2d 1228 (1972) (search of an automobile incident to an arrest on a traffic warrant held invalid); People v. Simon, 101 Cal. Rptr. 837, 496 P.2d 1205 (1972) (in the absence of special circumstances showing that a minor traffic offender might be armed, the officer may not frisk or search the violator).

The distinction between “probable cause” and a “reasonable conclusion that criminal activity may be afoot” is, of course, basic. The former is a term of art describing the evidence constitutionally necessary for the issuance of a warrant, for a warrantless arrest or for a full search. The Court in *Terry v. Ohio* clearly did not believe probable cause existed for either the detention or pat-down search. The limited search was upheld upon something less than probable cause.

205 Kan. at 444, 469 P.2d at 280.
of this conclusion the court cited Peters v. New York,\textsuperscript{287} but reliance upon that case was surely misplaced. The search in Peters was justified as incident to a lawful arrest, not an investigative detention.\textsuperscript{288} Nor can Terry be read to support the Thomas conclusion. The pat-down search there was limited to an intrusion reasonably designed to discover weapons.\textsuperscript{289} Nothing was said about the fruits of another crime. Even if the officers in Thomas were justified in removing the envelope when they thought it might be a weapon, they clearly exceeded the scope of the weapons search by opening the envelope after they had determined that the suspects were unarmed. Terry upheld a limited exception to the traditional probable cause requirement in order to protect the investigating officer from possible danger. It did not authorize searches for contraband other than weapons.\textsuperscript{290} Recently the Supreme Court of Minnesota recognized this when it held that once the officer saw that the object that he had felt during a frisk was a corn cob pipe, he was obligated to return it and search no more.\textsuperscript{291}

\begin{footnotesize}
\textsuperscript{287} 392 U.S. 40 (1968).
\textsuperscript{288} Id. at 66.
\textsuperscript{289} 392 U.S. at 29.
\textsuperscript{290} In two recent cases, one decided before and the other after Terry, other evidence found during pat-down searches for weapons was ruled inadmissible. In State v. Campbell, 97 N.J. Super. 435, 235 A.2d 235 (1967) an envelope removed from a suspect's person during a frisk for weapons could not be opened. The officer's authority to search ended when he asccertained that the suspect was unarmed. Similarly, State v. Anonymous, 6 Conn. Cir. 583, 280 A.2d 816 (1971), held that an officer who had detained the defendant for investigative purposes could pat-down his outer clothing in an attempt to discover weapons. But when he felt only a small package which could not reasonably have been a weapon he had no authority to remove it from the defendant's pocket.

Given a valid Terry pat-down search and the lawful removal of the vial thought at first to be a weapon, it may be argued that the capsules were found inadvertently and should be admissible pursuant to the "plain view" doctrine. See Coolidge v. New Hampshire, 403 U.S. 443 (1971). It is doubtful that the Terry Court would have gone so far. Forced to recognize the dangers inherent in street encounters with suspected felons, the Court allowed the weapons search. But significantly, no broader rule was announced. Particularly in view of the reservations expressed by Judge Friendly, see text accompanying note 257, supra. Terry must be read as limiting the items which may be seized and used as evidence to weapons in a self-protective pat-down search.

\textsuperscript{290} See State v. Gannaway, 191 N.W.2d 555 (Minn. 1971).
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