THE LAW

CRIMINAL JUSTICE

Frisk & Find

One warm July afternoon in 1964, off-duty New York City Policeman Samuel Lasky heard a noise outside his apartment door in suburban Mount Vernon. Two strangers were tiptoeing down the hall. Lasky hurriedly grabbed his pistol and managed to collar one, John F. Peters, who protested that he was merely visiting a married girl friend in the building. Not impressed, Lasky frisked Peters and felt something that "could have been a knife." What Lasky actually found was an envelope containing burglar's tools—for possession of which Peters was duly convicted.

Most citizens would surely agree that Patrolman Lasky was the model of an alert, courageous cop in action. Civil-libertarians, however, were quick to ask whether his search violated Peters' constitutional rights. In a decision written by Judge Kenneth Keating, the New York Court of Appeals has just answered that question with a resounding no. It affirmed Peters' conviction and declared that Lasky deserves "our highest praise."

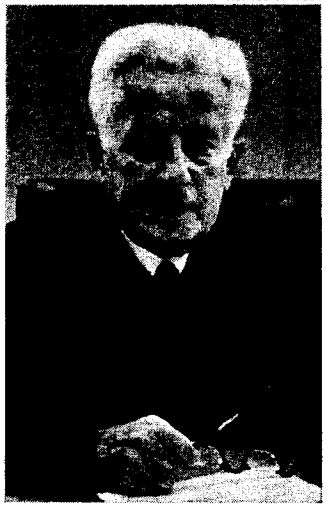
Beyond that, by a vote of 5 to 2, the court specifically upheld New York's controversial "stop and frisk" law, which empowers a policeman not only to "pat down" a suspect for concealed weapons in any public place, but also to seize "any other" illegal objects that he finds in the process.

Bullet for an Answer. The legislators who wrote New York's stop-and-frisk law in 1964 held that big-city police clearly need authority to stop and question anyone whom they "reasonably suspect" of committing or being about to commit a felony or serious misdemeanor. They justified the frisk on grounds of elemental safety. As the New York Court of Appeals put it in a key 1964 case (*People* v. *Rivera*): "The answer to the question propounded by the policeman may be a bullet."

Ironically, what may yet shoot down the frisk law is the fact that the new high-state-court decision affirms the power of police to seize not only weapons but also anything else "the possession of which may constitute a crime." In the Peters case, dissenting Judge Stanley H. Fuld protested that the Fourth Amendment guarantee against "unreasonable searches and seizures" now means that any search made without the authority of a warrant is "reasonable only if conducted as incident to a lawful arrest" based on probable cause—something Patrolman Lasky admittedly did not have until after his frisk produced not a weapon but burglar's tools.

In a companion case, dissenting Judge John Van Voorhis protested that the policeman involved was only "allegedly" frisking for a weapon when he discovered a supply of heroin in the defendant's pockets. "Without probable cause," said Van Voorhis, "the frisk discovered the heroin, then the heroin served as a basis for arrest, which, in turn, was claimed to justify the search which disclosed it." Judge Van Voorhis insisted that a frisk should be tightly limited to its only legitimate purpose: "To discover and seize dangerous weapons." If it becomes "a general search of the person" in patent violation of the Fourth Amendment, warned Van Voorhis, "we shall have progressed a considerable distance toward the police state."

ALFRED STATLER



JUDGE KEATING
Enough to be reasonably suspect.

Rewritten Rules. Carrying on the argument, the American Civil Liberties Union plans to help appeal the Peters decision to the U.S. Supreme Court, which has yet to rule on stop-and-frisk. If the court takes the case, the key issue may well be whether a person stopped for questioning and frisking is actually under arrest—for it is only lawful arrest, with or without a warrant, that carries with it the right to make a search "incident" to that arrest. Without grounds for arrest, police cannot simply search a person and then use whatever evidence they happen to find. In short, a search cannot be justified by its fruits alone. Yet stop-and-frisk laws may authorize just that.

BURNS BROTHERS

JUDGE FULD
Only on probable cause.

To bypass this problem, many courts have simply declared that a stop is not an arrest and a frisk is not a search, thus enabling police to act on "reasonable suspicion" rather than the stricter standard of probable cause. All this seems to assume that an arrest begins only with some sort of formal announcement. By contrast, some courts view arrest as the first "actual restraint" that stops a person from doing whatever he pleases—a definition that may well bar searches made on mere "suspicion."

The Supreme Court may have handed down a hint of its own attitude in last month's *Miranda* v. *Arizona* decision, which affirmed the rights to silence and to counsel as soon as a person is "deprived of his freedom of action in any way." On the other hand, defenders of stop-and-frisk laws see the court leaning their "reasonable" way because it declared in 1963 (*Ker* v. *California*): "The states are not precluded from developing workable rules to meet the practical demands of effective criminal investigation and law enforcement in the states, provided that those rules do not violate the constitutional proscription of unreasonable searches and seizures."

IMMIGRATION

The Case of the Elusive Euphemism

When he filled out the application forms for U.S. citizenship in 1963, Canadian-born Clive M. Boutilier, 32, reported that he had once been arrested for a homosexual act, but the charges were dismissed. Pressed for more details, the Manhattan building-maintenance man, who had been living in the U.S. for eight years, revealed his assorted relations with both sexes since the age of 14. As a result, Boutilier was ordered deported. Reason: the 1952 Immigration Act bars any alien with a "psychopathic personality."

Using psychiatrists' statements that he has no such thing, Boutilier took his case to the U.S. Court of Appeals for the Second Circuit. Last week that court, in a 2-1 decision, rejected Boutilier's appeal on the ground that "psychopathic personality" legally means what Congress was too circumspect to say, "No homosexuals allowed."

Judge Irving R. Kaufman traced the euphemism to the Public Health Service, which devised it as an admittedly

ALFRED STATLER

JUDGE KAUFMAN

JUDGE MOORE

What Congress was too bashful to say.

"vague and indefinite" rubric covering Congress' intent to bar "homosexuals and other sex perverts." However medically imprecise, said Kaufman, the phrase became "a legal term of art" that clearly barred Boutilier as "a homosexual long before leaving Canada," and authorized his deportation even if he had lived "a life of impeccable morality" in the U.S. Ruled Kaufman: "It is not our function to sit in judgment on Congress' wisdom in enacting the law." In dissent, Judge Leonard P. Moore called "psychopathic personality" an unconstitutionally vague term that immigration officials blindly applied to Boutilier without even giving him a medical examination.

Kaufman's opinion is in direct conflict with two decisions by the U.S. Court of Appeals for the Ninth Circuit in San Francisco, which has ruled that section of the immigration law "void for vagueness" in its application to homosexuals. Since the Supreme Court generally agrees to referee circuit conflicts, it may now take its own reading of the elusive euphemism.

CONSTITUTIONAL LAW

Ginzburg as Precedent

There was little question about the quality of the movies that Robert A. Klor intended to produce. In 1964, he hired a couple of models named Candy Bunch and Lori Lorianne to "star" in two films, each of which depicted a single nude woman in poses that the Los Angeles prosecutor described as "invitations to sexual activity." After playing their parts, Candy and Lori became suspicious about Klor's plans for the films, and they called the cops. Three officers entered Klor's home under authority of an arrest warrant charging him with an overdue parking ticket, then asked to see his "lewd" films. Klor willingly displayed his motion pictures, but wisely stated: "These are not ready for distribution through the mail. They need to be edited."

Despite that disclaimer and the fact that police were unable to prove that he had ever before peddled smut, Klor was convicted of violating a state law banning the distribution of obscene matter. Had he actually done so?

Conduct, Not Content. The evidence failed to show that he had even planned to, ruled California's highest court as it reversed Klor's conviction. Basing its reasoning in large part on the Supreme Court decision affirming *Eros* Publisher Ralph Ginzburg's five-year federal sentence for sending obscene matter through the mails, the California Supreme Court held that obscenity cases should turn more on the objective conduct of the defendant than on a judge or jury's subjective opinion about the content of his product.*

Whether or not Klor's films were really obscene, said the court, the California anti-smut law does not forbid "mere preparation of obscene materials." Instead, it penalizes "dissemination or intended dissemination." Not only had the prosecution failed to prove that Klor intended to distribute his unedited films in their allegedly obscene form, but worse, said the State Supreme Court, the trial judge had misconstrued the law and wrongly "communicated to the jury the idea that it need not find 'an intention to distribute' if it concluded that defendant had prepared the materials."

The court called this construction "a gratuitous unconstitutional reach" that might well encourage lower courts to penalize "matter produced solely for the personal enjoyment of the creator." Construing *Ginzburg*, the court stressed: "No constitutionally punishable conduct appears in the case of an individual who prepares material for his own use" or who "intends to purge the material of any objectionable element before distributing or exhibiting it." To hold otherwise, the court said, "would pose grave technical difficulty for the unconventional artist" and "tend to suppress experimental productions that might become, in finished form, constitutionally protected communication."

* An argument that Ginzburg himself has finally turned to. Last week a U.S. appellate court stayed his sentence for two months to allow him to hone a new appeal claiming he was not personally responsible for trying to mail his products from such "titillating" addresses as Intercourse, Pa. As Ginzburg now tells it, the mailing company he hired devised that ploy without his knowledge.

LIABILITY

Fasten Your Seat Belt

After duly noting that auto accidents kill 50,000 Americans a year, safety experts generally agree that the use of seat belts would save 10% of those lives and reduce serious injuries by one-third. Convinced by the grim statistics, legislators have made seat belts mandatory on new cars in 32 states and the District of Columbia. Still, studies show that motorists are unimpressed; they fail to buckle their belts 50% of the time. Now the law is beginning to develop a powerful persuader: failure to use a seat belt may well bar recovery in a personal-injury suit.

Unfortunately for Mrs. Kathleen Busick of Milwaukee, she set something of a legal precedent as she inched her family's brand-new Chevrolet cautiously along an icy street. She braked to a stop behind a bus; Electrical Engineer Bruno R. Budner's car skidded into hers from the rear. Claiming assorted injuries as a result of the collision, Mrs. Busick sued Budner for $30,000.

When the case came to trial, it seemed a routine personal-injury suit. It took on a new aspect when Budner cited a state law that requires all new Wisconsin cars to be equipped with two seat belts. Though her new car was duly belted, Mrs. Busick herself was admittedly unbelted at the time of the accident. As a result, the judge instructed the jury to consider whether Mrs. Busick was guilty of contributory negligence by virtue of having ignored a handy safety device that might have prevented her injuries.

Common law imposes on every person a duty to exercise "ordinary care" for his or her own safety. Such care is defined as what "the great mass of mankind" would ordinarily exercise in the same or similar circumstances. And in most states, juries are normally instructed that a plaintiff who fails to take such precautions may not collect; the plaintiff's negligence means the defendant gets off scot-free, which seems to be just what happened in Milwaukee. Once the jury received its instructions, it absolved Budner and withheld all damages for Mrs. Busick.