

Attachment 1



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Policing Legally: Investigative Encounters with the Public



WHY IS IT IMPORTANT FOR POLICE OFFICERS TO KNOW THE MATERIAL IN THIS CHAPTER?

As a police officer you will have enormous responsibility to enforce the law, to give people orders and instructions that help to serve the community, to maintain order, and to protect the constitutional rights of citizens. Before beginning training, you took an “Oath of Office” during which you promised to uphold the Constitution of the United States, as well as the Constitution of New York, and pledged to faithfully discharge your duties as a New York City Police Officer. The Fourth Amendment, which protects individuals from unreasonable searches and seizures, is one of the most important imperatives of your job as a police officer. You should keep this in mind at all times while you are discharging your duties. Interactions with citizens are varied. While more often than not these interactions take the form of friendly salutations, sometime interactions end in a life and death struggle with an armed perpetrator. Your ability and authority to interact and, at times, intrude on an individual’s liberty will depend largely upon your knowledge of the law and Department regulations, as well as an understanding of your environment and members of the community.

In this chapter you will learn about the degree to which you can intrude upon an individual’s liberty when you have less than probable cause to arrest. What is also important to be aware of is the role such interactions play in our overall goal to protect and serve the people of the City of New York. An investigative encounter, for the purposes of this chapter, is a police interaction with a member of the public/civilian for a law enforcement or investigative purpose. New York State has established the types or levels of such encounters and the authority of the police at each level, consistent with federal constitutional standards. This chapter describes these encounter levels and the authority of the police at each level.

You will learn about the ability of an officer to stop and detain a person to determine whether he or she may have committed a felony or Penal Law misdemeanor [known as a “Terry stop”], and that there are legal limitations on when this tool can be used. The utilization of Terry stops is legal and recognized as an essential instrument to achieve the Department’s mission of providing a safe environment for all. However, police officers must be vigilant, and be mindful that there are circumstances under which a stop would be unlawful. Terry stops must always comport with the United States Constitution, as well as the New York State Constitution, and should not be utilized as a simple deterrent to future crime. Moreover, this chapter should not be interpreted to discourage an officer from engaging in voluntary, consensual conversations with members of the public. Members of the service are encouraged to develop positive relationships in the communities they serve. Such positive interactions with the community foster trust and understanding, which will in turn enhance public safety and officer safety.

Later in this chapter, and throughout the course of your training, you will learn about proper police conduct during investigations, including the most serious police



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intrusions involving the use of force and your authority to deprive people of their freedom. At all times, police conduct and action must be constitutional within the confines of both the United States Constitution and New York State laws. This section will illustrate how you can conduct effective field investigations by interacting with citizens. You will learn how to detect crime, protect your safety and a citizen's right to be free from *unreasonable* government intrusion.

CONSTITUTIONAL CONSIDERATIONS

As you will learn, arrest and full search situations must be based on a standard of proof, or level of information, known as *probable cause*. Suppose, however, you are merely performing routine patrol and a brief encounter or interaction with a citizen makes you somewhat suspicious. Although unsure that a crime was committed, what, if anything, may you do? May you question the person? Detain the person? Use force? Search the person or their belongings? If so, to what extent may you interfere with their right to be free from police intrusion? Before any of these questions can be answered, you must have an understanding of a citizen's constitutional rights, the effects of improper police action, and how the law allows officers to conduct investigations without violating citizens' rights.

The Fourth Amendment

The Fourth Amendment to the U.S. Constitution provides: "*The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall issue, but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.*" Thus, the Fourth Amendment applies to searches and seizures of property and persons. Its purpose is to guarantee against unreasonable governmental intrusions. The large majority of Fourth Amendment issues that arise are based on the reasonableness of searches and seizures. Article I, Section 12 of the New York State Constitution also prohibits unreasonable searches and seizures.

The Exclusionary Rule

In an effort to deter unlawful or improper police conduct, the U.S. Supreme Court created the Exclusionary Rule (*Weeks v. U.S.*, 1914). The Exclusionary Rule was applied to the states in 1961 in the case of *Mapp. v. Ohio*. Basically the rule provides that evidence obtained by violating the defendant's Fourth Amendment rights may not be introduced at trial by the prosecution for the purpose of providing proof of the defendant's guilt. The "suppressed," or inadmissible, evidence limits the prosecution's ability to obtain a conviction. Additionally, and importantly, improper police activity can result in disciplinary action, or civil and or criminal liability upon the officer.



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U.S. SUPREME COURT DECISION IN *TERRY v. OHIO* (1968)

There are situations where officers, in the interest of investigating crime, are permitted to act on less than probable cause. In the landmark case of *Terry v. Ohio*, the U.S. Supreme Court, for the first time, addressed the issue of a seizure and a search of a suspect on less than probable cause, and found that where an officer had reasonable suspicion that a person was committing, had committed or was about to commit a crime, and that the person was presently armed and dangerous, a stop and frisk were consistent with the Fourth Amendment.

Facts: McFadden, an experienced plainclothes officer on a foot patrol in a commercial area, observed two men in the process of “casing” a store. He watched both men walk, sometimes alone other times together, to the front of the store. On each trip, they looked inside and around, and then left the area. He then saw the men confer with a third man who joined the first two as they walked toward the store. The men repeated the routine several times. McFadden then approached them, identified himself and requested an explanation. When one of them responded incoherently, McFadden spun one man around and patted down his overcoat, felt a pistol and removed it. The defendant, Terry, was later convicted of carrying a concealed weapon.

Question for the Court: Is it always unreasonable for a police officer to seize a person and subject him to a limited search for weapons unless there is probable cause for an arrest?

Court’s answer: No. While the Court held that the stop of Terry amounted to a seizure – though only a brief one - and that the frisk was, in fact, a search - though not a full search - within the meaning of the Fourth Amendment, the Court rejected the notion that probable cause was required for McFadden’s actions and held the gun to be admissible evidence against Terry.

Analysis. In its decision, the Court reasoned that McFadden’s stop was proper under the circumstances because the Court believed it would have been “poor police work” for an officer of McFadden’s experience to witness the particular behavior and not attempt to investigate further. Therefore, the test was not whether McFadden had probable cause, but whether his conduct was reasonable under the Fourth Amendment. The Court developed a new test of reasonableness in a situation in which a person is subjected to a brief seizure and frisk. A key ruling in *Terry* concerns the limited exterior “pat down,” or “frisk.” The Court held that the frisk was reasonable since it was based on two important factors: (1) McFadden justifiably feared that the men were armed and his safety was in jeopardy, as it was reasonable for him to suspect that a daylight robbery likely would involve the use of weapons; and (2) it was not a full search but instead was a limited exterior “pat down” of Terry’s clothing for a hard object.



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Stop and Frisk Law

Terry is a significant case because it marked the Supreme Court's approval of stop and frisk when the officer did not have probable cause for an arrest. In its conclusion, the Court noted that where an officer, in light of his experience, reasonably suspects that criminal activity is taking place, he or she may investigate and make reasonable inquiries. The Court further held that where an officer observes:

"that the persons with whom he is dealing may be armed and presently dangerous and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others to conduct a carefully limited search of the outer clothing in an attempt to discover weapons which might be used to assault him."

Following *Terry*, New York State adopted its own standards, or guidelines, for permissible police activity during investigative encounters with citizens consistent with the Supreme Court's ruling in *Terry*. The New York State Court of Appeals' decision in *People v. DeBour* created the standard by which all investigative encounters in New York are assessed.

THE NEW YORK STANDARD: *PEOPLE V. DeBOUR* (1976)

People v. DeBour is an important case for many reasons. The case outlines four levels of police encounters and defines the amount of information an officer must have for each level. In creating the four-tiered analysis, the New York Court in *DeBour* expanded on *Terry*, which dealt with the narrow issue of a possible crime in progress, as compared to *DeBour*, which as you will see, began as a simple request for information. The Court went beyond what the Supreme Court addressed in *Terry*, which held that an encounter that results in an actual "stop" or detention is entitled to Fourth Amendment protection. In New York, under *DeBour*, there are additional restrictions placed upon encounters between the police and the public in situations that do not rise to the level of a *Terry* stop. Thus, *DeBour* created a more restrictive interpretation of a police officer's authority to confront and question citizens.

Facts. At 0015 hours, two police officers assigned to a foot-post were patrolling a deserted residential street in Brooklyn when they noticed someone walking in their direction. The area was notable for a high incidence of narcotics-related activity. As the solitary figure came within 40 feet of the officers, he crossed the street. The officers followed and waited for the man to reach them. When he did, one of the officers asked him what he was doing in the neighborhood. The man, later identified as DeBour, nervously replied that he had just parked his car and was walking home. The officer then asked DeBour for identification. As



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DeBour answered that he had none, the officer noticed a waist-high bulge in DeBour's jacket. The officer asked DeBour to unzip his jacket and when he complied, the officer noticed a revolver in his waistband. DeBour was arrested and charged with possession of the firearm.

Question for the Court: May a police officer approach a private citizen to request information without having any concrete indication of the citizen's involvement in criminal activity?

Court's answer: Yes. Although the Court found that the officers did not have any indication of criminal activity, it held that the officers did have an objective credible reason for the initial approach. The Court explained that the subsequent questions were only intended to elicit information as a result of the defendant's evasive actions and the subsequent observation of the bulge in the waistband. Thus, the intrusion was minimal and "reasonably limited in scope and intensity" and thereby constitutionally valid.

Analysis: The Court noted that the Fourth Amendment protects against unreasonable searches and seizures by the government. Further, the Court confirmed that any approach by police, whether it amounts to a seizure or not, is a violation of the Constitution if it is based on whim, caprice, arbitrariness, or a desire to harass. In this case, however, the Court reasoned that DeBour was not "seized" within the meaning of the Fourth Amendment, but merely approached and questioned in a non-threatening manner. DeBour's attempt to avoid the officers in a high crime area late in the evening justified the approach. Moreover, his failure to produce identification coupled with the suspicious bulge necessitated further inquiry. Thus, the police officer's actions were reasonable based on the amount of information known to them.

The Effect of *People v. DeBour*

The Court in *DeBour* went on to establish the four-tiered analysis that dictates the permissible level of police intrusion. Although the New York State Court of Appeals agreed with the U.S Supreme Court in *Terry* that, "there is nothing in the Constitution which prevents a police officer from addressing questions to anyone in the streets," it cautioned that an officer must have at least an objective credible reason for intrusions that affect a person's liberty.

Therefore, as a police officer, your authority to confront, request information, stop or search will be based on your ability to articulate a legally recognized level of knowledge. They are as follows:

Level 1: Request for Information (Objective, Credible Reason)

Level 2: Common Law Right of Inquiry (Founded Suspicion of Criminal Activity)



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Level 3: *Terry* Stop and Possible Frisk (Individualized, Reasonable Suspicion of Felony or Penal Law Misdemeanor)

Level 4: Arrest (Probable Cause)

LEVELS OF ENCOUNTERS

As you have already learned, the manner in which we interact with citizens is greatly influenced by our perception of people, places, and events. In addition, you have also learned that perception itself is a product of our attitudes, our physical and psychological states, the environment, and our expectations. As police officers, you must keep in mind that the perception of the police by the public, and thus *their* behavior, is swayed by the same factors. Remember that these interactions are an intrusion into the lives of the citizens who are affected by them.

Therefore, the manner in which we police – and interact – is a direct product of our training, rules, regulations, and perception. No interaction is more significant legally, administratively, and morally than those encounters initiated for purposes of investigation. This section focuses on such interactions and on the limits of your authority given various *levels of knowledge*.

What are Levels of Knowledge?

Case law has carved out various standards and criteria by which police conduct is measured. Police interactions with citizens largely are viewed as governmental intrusion into people's interests in liberty, privacy and property. Courts have created guidelines that dictate the extent to which a police officer can impose on a citizen's freedom. Simply put, *levels of knowledge* are the amounts of information that the courts have held will justify certain kinds of police conduct. Typically, the more information or suspicion a police officer has about the likelihood of a person's criminal involvement, the greater the level of intrusion the courts allow. Moreover, investigative encounters are fluid situations in which one event or observation can escalate the encounter from one level to another.

LEVEL 1: REQUEST FOR INFORMATION

The request for information is an encounter between a civilian and a uniformed member of the service conducted for the purpose of requesting information from the citizen. In a Level 1 encounter, an officer can approach to request information when there is "some ***objective credible reason*** for that interference which is not necessarily indicative of criminality." The intrusion cannot be based on whim, caprice, curiosity, bias, or a desire to harass. The Court made distinctions between two types of requests for information: public service and law enforcement.



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Public Service. In this function, officers are given more latitude to ask questions. This includes situations where an officer may be looking for the parents of a lost child, investigating an accident, or helping someone in distress.

Law Enforcement Function. This is a more restrictive standard and the extent and type of questions allowed will depend on the circumstances of the encounter, the manner and intensity of the interference, and the reasons for the approach. The questions must **not** be threatening or accusatory, and the person is free to leave and free to refuse to answer some or all questions.

Types of Questions

The Court emphasized that under either approach, the objective is to gather information and not to “focus on the citizen as a potential suspect in a criminal investigation.” Officers may, therefore, ask a person non-accusatory questions as long as the questions would not cause a reasonable person to believe that she is suspected of some wrongdoing. For example, the officer may ask for a person’s name, address and destination if those questions are related to the objective, credible reason for the approach and if the questions are asked in a non-accusatory manner. During a Level 1 encounter, an individual may refuse to answer questions, answer only some questions, or walk away. Refusing to answer questions, providing innocuous answers to questions, or walking away does not raise the level of suspicion or provide a basis to issue a summons or make an arrest, and the individual may not be detained. However, answers that are clearly false can escalate the encounter. During a Level 1 encounter, an officer may not create a situation (either by words or actions) where a reasonable person would not feel free to walk away.

Example: A detective observed the defendant purchase a holster for a firearm. While such a purchase is not criminal, it did furnish a sufficient basis for inquiry by the detective. *People v. Samuels* (1980)

Example: Defendant was observed at 0445 hours carrying two large garbage bags filled with bulky items in a burglary prone area. These circumstances justified the officer’s initial approach for inquiry. *People v. Williamson* (1985)

Example: The officer had an articulable reason for speaking to the defendant, a possible witness to a kidnapping, who was observed walking away from the scene. *People v. Hopkins* (1980)

Example: A crowd of people stood around defendant’s open trunk examining clothing and shoes that still had the original store tags. As the officer approached, the defendant slammed the trunk closed and the crowd began to disperse. This was an objectively credible reason for a Level 1 inquiry. *People v. Wallace* (1986)



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Verbal Requests

The Court of Appeals ruled that an officer's request to stop ("Excuse me, may I speak with you?") so that the officer may approach, is permissible as long as it is done in order to get the attention of someone who is unaware that the officer wishes to speak to him or her and the request is **general** and **non-threatening**. However, if the request and questions would lead a reasonable person to conclude that he or she is not free to terminate the encounter, then the request alone amounts to a Level 3 stop. Remember, an officer may inform the person he or she is free to leave, but is not required to do so. If asked by the citizen whether he or she is free to leave, the officer must answer truthfully and advise the citizen that he or she may do so.

Permission to Search

Because a Level 1 inquiry is based on an "objective credible reason" and is not necessarily indicative of criminality, the police may not ask for permission to search at this level.

Right to Walk or Run Away

Although the police are permitted to request information, a citizen has the right not to answer the police. The refusal, in itself, does not permit further action by police. In fact, a citizen can walk or even run away, and, **without indication of criminal activity, an officer may not pursue**. However, a police officer can still keep the person under surveillance as long as the officer does not significantly interfere with the person's liberty.

LEVEL 2: COMMON LAW RIGHT OF INQUIRY

A Level 2 inquiry is an encounter between a civilian and a uniformed member of the service conducted for the purpose of asking the civilian pointed or accusatory questions because the police officer has a "**founded suspicion that criminal activity is afoot**." The officer must be able to express why he or she thought that **suspicious** or **unusual activity indicative of criminality** was taking place. Similar to a Level 1 encounter, during a Level 2 encounter an individual may refuse to answer questions, answer only some questions, or walk away, and the individual may not be detained. An officer may inform the person he or she is free to leave, but is not required to do so. If asked by the citizen whether he or she is free to leave, the officer must answer truthfully and advise the citizen that he or she may do so. Moreover, the officer may not create a situation (either by words or actions) where a reasonable person would not feel free to walk away; that would turn a Level 2 encounter into a Level 3 Terry stop.

Criminal Activity Afoot



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Courts have defined this term to mean that there is a “*present indication of criminality based on **observable conduct** or **reliable hearsay** information.*” It cannot be based on a hunch, or “gut feeling.”

Example: A radio run from an anonymous source furnishing a description of three men selling drugs at a particular area, combined with their observations of individuals matching the description, gave officers the right to conduct a common-law inquiry of persons matching the description from the radio run. *People v. Erazo* (1994).

Types of Questions

This level results in a wider scope and more intense level of questioning because the encounter ***focuses on the citizen as a possible suspect of a particular crime.*** The officer’s questions can be ***pointed, invasive, and accusatory*** in nature and can be intended to elicit an incriminating response. The officer, however, may not touch the person, display a weapon, or act in a threatening manner.

Permission to Search

Consent to search, if given, must be provided voluntarily, that is, without any coercion or duress. The request for consent should be conveyed as just that - a request - and not an order, and you should be mindful that even if an officer acts in good faith, courts can infer duress by other circumstances, such as an officer displaying a weapon, a large number of officers surrounding the person when consent is sought, or the manner in which the individual is approached, such as with lights and sirens.

Refusal to Answer or Flight of Suspect

While police can ask for explanations and answers, a citizen has no obligation to cooperate. A citizen’s silence cannot be used as a reason to escalate the encounter into a more intrusive one. Innocuous answers to questions, without further indication of criminal involvement, will not justify additional questioning. However, answers that are clearly false can escalate the encounter.

If a confronted citizen walks away without answering, the officer may not pursue without reasonable suspicion that a felony or Penal Law misdemeanor has been, is being, or is about to be committed. However, flight, combined with other specific circumstances indicating that the suspect may be engaged in criminal activity, could provide the predicate necessary to justify pursuit and a Level 3 stop. Remember, if the commands and questions would lead a reasonable person to conclude that he or she is not free to terminate the encounter, then the commands alone amount to a Level 3 stop.

Example: Uniformed police officers responded to a radio run of an individual selling drugs at a location. The radio dispatcher provided a description of the person’s race, gender and clothing. The officers knew that the location was known for narcotics sales.



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Upon arrival, the officers observed an individual who matched the radio description. The officers' observations, coupled with the individual's immediate flight, then raised the police officer's level of suspicion to reasonable suspicion, thus justifying the officer's pursuit. *People v. Bora* (1994)

Example: Uniformed police officers patrolling in a marked vehicle approached a location known for drug activity. The officers saw a group of men talking on the corner and one of the officers recognized several of the men as having been arrested previously for drug transactions at the same location. One of the men had an unidentified large bulge in his right jacket pocket and when he saw the officers approach, he turned and began to walk away. He ignored the officer's call to come to their vehicle and ran when the officer exited the vehicle. "While the police may have had an objective credible reason to approach defendant to request information--having observed him in a 'known narcotics location' with an unidentified bulge in the pocket of his jacket--those circumstances, taken together with defendant's flight, could not justify the significantly greater intrusion of police pursuit." This knowledge did not amount to reasonable suspicion to pursue. *People v. Holmes* (1993)

Difference between Level 1 and Level 2

Even courts agree that the difference between the first two levels is subtle. In the first level, the officer must have an objective credible reason to *ask for information*. In the second level, the officer must have information that indicates criminal activity and his or her *questions are related to the possible criminal activity*. Therefore, innocuous (i.e., harmless, innocent) behavior may justify a Level 1 approach, but not a Level 2 encounter.

Some individuals may feel as if their personal liberty is intruded upon and they are not free to leave whenever they have any interaction with a police officer. This should not be the case. Officers should remember that during Level 1 and Level 2 encounters, an individual may refuse to answer questions, answer only some questions, or walk away. During Level 1 and Level 2 encounters, the officer may inform the individual that he is free to leave. While officers are not required to inform individuals that they are free to leave during Level 1 and Level 2 encounters, if an individual asks the officer if he or she is free to go, the officer must inform the individual that he or she is free to leave. The officer may not detain an individual in a Level 1 or Level 2 encounter.

Example: Uniformed officers responded to a report of an assault in progress inside of an apartment building. Upon arrival, the officers observed an individual exiting the building carrying a shopping bag. The officers approached him to ask if he knew about the assault and for his assistance getting into the building. Upon seeing the officers, the individual ran and while running discarded the shopping bag. The officers chased after him, and ultimately recovered the shopping bag, which contained contraband. The contraband was suppressed because the officers merely had an objective credible



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reason, seeking information about a crime, to approach the individual and request information—a Level 1 encounter. At a Level 1 encounter an individual may walk or even run away from the police. Note that if an officer were to chase an individual who fled a Level 1 encounter, catch that individual and conduct a frisk, evidence or contraband uncovered during the frisk would also be suppressed. *People v. Murrell* (2008).

Example: Officers assigned to a precinct burglary RMP saw an individual carrying an object similar in size to a stereo component or VCR. The object was wrapped in a sweat suit. In the officers' experience, items carried in that manner were usually covered in order to conceal them. The officers' observations, along with their investigation into a rash of burglaries in that area, permitted them to exercise their common law right of inquiry. *People v. D'Agostino* (1999).

Officer should note that events and observations at Level 1 or Level 2 encounters can elevate the encounter to a Level 3 stop.

LEVEL 3: TERRY STOP (Individualized Reasonable Suspicion)

The third level of permissible police intrusion is the right to **forcibly stop** a citizen. A Level 3 stop is also known as a "Terry stop." A stop occurs any time a reasonable person would not feel free to disregard the officer and walk away. Under this level, an officer may forcibly stop and detain a person when they have **reasonable suspicion** that the person has committed, is committing, or is about to commit any **felony** or a **Penal Law misdemeanor**. The officer may detain the person for a reasonable amount of time in order to **confirm or dispel** the officer's suspicion, and may conduct a **frisk** of the individual when the police officer reasonably suspects that **the person stopped is armed and dangerous**. The frisk must be strictly limited to a running of the hands or pat-down over the outside of a person's clothing, feeling for weapons that could harm the police officer or others nearby. A frisk may not be conducted to discover evidence or the proceeds or instrumentalities of a crime, or other contraband such as drugs. Most importantly, the fact that a police officer has a legal right to stop someone does not mean that he or she automatically has the right to frisk that person.

ELEMENTS OF A LEVEL 3 STOP

N.Y.S. Criminal Procedure Law §140.50

Section 140.50 of the New York State Criminal Procedure Law entitled, "Temporary Questioning of Persons in Public Places; Search for Weapons" reads, in part, as follows:

Subdivision (1) " a police officer may stop a person in a public place located within the **geographical area** of such officer's employment when



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he ***reasonably suspects*** that such person is committing, has committed or is about to commit either (a) a **felony** or (b) a **misdemeanor** defined in the Penal Law, and ***may demand*** of him his ***name, address, and an explanation*** of his conduct.”

NOTE: Your authority to conduct a stop, question and frisk exists whether you are on-duty or off-duty. **However, as a recruit officer, you are not much different from the day before you were sworn in to the Department. You have not been trained as a police officer; you have not been equipped as a police officer; and you have not had any practice or experience as a police officer. Thus, the limits on your discretion are simple: DO NOT BECOME INVOLVED IN ANY INCIDENT THAT REQUIRES POLICE ACTION, SKILLS, OR EQUIPMENT BEYOND YOUR TRAINING OR CAPABILITIES. Instead, you can assist in police matters by using your observational skills, obtaining descriptions, and reading wanted posters.** For further information on reporting an emergency, criminal activity or unusual occurrence, consult the Police Student’s Guide (Introduction to the NYPD), Recruit Officer Handbook and Patrol Guide procedures 212-32 and 212-34.

In the third level of police intrusion, a police officer has the right to forcibly stop and investigate a person suspected of criminal activity. Thus, a constitutionally valid stop, question, and possible frisk consist of the following elements:

1. ***Reasonable suspicion that a person is committing, has committed or is about to commit a felony or a Penal Law misdemeanor,***
2. A ***stop*** and ***detention*** of a person;
3. ***Reasonable force*** may be used;
4. Takes place within the officer’s ***geographical area of employment*** (“GAOE”);
5. The officer may ***frisk*** when there is reasonable suspicion that the person is armed and dangerous;
6. The officer conducts ***questioning*** regarding the crime;
7. Investigation lasts a reasonable amount of ***time***.

Reasonable Suspicion - Defined

The Court of Appeals has defined reasonable suspicion as the “*quantum of knowledge sufficient to induce an ordinarily prudent and cautious man under the circumstances to believe criminal activity is at hand.*” Additionally, the U.S. Supreme Court requires that an officer have a “*particularized and objective basis for suspecting*” the person of criminal conduct. The officer must be able to articulate specific facts establishing justification for the stop; hunches or gut feelings are not sufficient. This is an objective standard requiring police officers to point to specific facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion on a citizen’s liberty interest. In addition the reasonable suspicion must be individualized.



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That is, the officer must have grounds to reasonably suspect the specific person being stopped of criminal wrongdoing.

FACTORS THAT MAY LEAD TO REASONABLE SUSPICION

It is simple for an officer to know that he or she needs to have reasonable suspicion before conducting a forcible stop. However, it can be difficult to understand exactly when you actually have reasonable suspicion. Because determining reasonable suspicion requires a case-by-case factual analysis, no judge, manual, or course could ever list every single scenario in which you would or would not have reasonable suspicion. Therefore, an officer must be able to articulate specific facts that led to reasonable suspicion.

Listed below are a few common factors that may give an officer reasonable suspicion.

1. Information from an Identified Individual

Detailed information from an identified individual may provide a basis for reasonable suspicion. An identified individual may be a person who provides a call-back number, or someone whose credibility the officers have had an opportunity to assess, or a known informant.

Reasonable suspicion cannot be based solely on anonymous information. Therefore, if an officer receives information from Communications Division (job from central dispatcher) about a suspect, and the identity of the caller is not known and/or the caller gave no contact number, the officer will only have the authority to conduct a Level 2 common law right of inquiry at this point. (*Exceptions to the rule*: anonymous call of a man with a bomb or an anonymous call of an intoxicated driver).

In order for the officer to reach reasonable suspicion in “anonymous call” situations, an officer will need corroboration of information that would tend to show the reliability of the informant. The following would qualify as additional information: the officer observes the subject take specific actions that the caller predicted; the officer observes actions consistent with criminal activity; or the informant gave the information to the officer in person.

2. Suspicious or Evasive Behavior

Suspicious or evasive behavior, sometimes referred to as “furtive movement,” including “telltale” signs of a particular crime, can contribute to facts observed by the officer that leads to reasonable suspicion. Generally, evasive behavior by itself will not lead an officer to reasonable suspicion. It must be coupled with more specific information that links the behavior to a specific type of crime, such as casing a victim or location, acting as a lookout, or actions indicative of concealing or possessing a



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weapon. The officer must be able to articulate something *specific about the suspicious nature of the movement*. The officer's training, experience, and/or expertise in identifying that type of crime or peculiarities of a specific area are often taken into account in these situations.

Example: A person pushing a bag up his sleeve when he saw police officers, and subsequently secreting the bag in his pants when the police officers approached him, was highly suspicious behavior where the person is located in a narcotics trafficking area and the officer recognized the person from a recent investigation concerning narcotics trafficking. *People v. Lynah* (2008).

Example: A police officer investigating a reported fight between two individuals with handguns was informed that the men involved had just walked into a nearby market. The police officer immediately responded to the market, at which point an individual matching the description stepped into and attempted to push past the officer. The individual moving his hands quickly toward his waistband as a police officer pulled him aside for questioning as a part of the investigation was behavior that gave the officer reasonable suspicion and formed the basis for the frisk. *People v. Curry* (2011).

It is important to note that certain behaviors may be indicative of particular crimes. Trained and experienced officers may make observations of certain behaviors that, coupled with other factors, may be indicative of certain crimes. For example, telltale signs and hallmarks of narcotics transactions, at a known narcotics location, may mean nothing to a civilian, but may provide a police officer with reasonable suspicion.

3. Resemblance to the Suspect of a Crime

The police are justified in conducting a forcible stop on a person who bears a strong resemblance to a known person who is wanted for a crime. An individual can be approached but may not be stopped merely because he meets a vague or generalized description. There must be *further indicia of reliability*, such as a detailed description from an identified caller that includes identifying characteristics beyond just race, age, and gender.

4. Flight

Flight, combined with other specific circumstances indicating that the suspect may be engaged in criminal activity, can provide the predicate necessary to justify pursuit and a stop. Similar to anonymous information, flight alone cannot serve as the basis for reasonable suspicion. The police cannot start chasing a person merely because the person started running when he or she saw the police. In fact, at Level 1 and Level 2 encounters, individuals may ignore the officer and walk away without giving the officer cause to detain them. However, there are certain circumstances when flight may be considered an escalating factor that may authorize an officer's stop of a suspect.



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Example: Officers performing anti-crime patrol responded to a radio run of a robbery in progress, arrived at the location and observed two individuals. The individuals began to walk away while repeatedly looking over their shoulders at a marked police car. As the officers left their car, the individuals quickened their pace, and continued to look over their shoulders. An officer overheard one of the individuals say “[t]he cops are here.” The individuals then began to run. These circumstances provided the officers with reasonable suspicion. *People v. Esquilin* (1997).

Some additional factors that could contribute to reasonable suspicion are listed below. Whether any of these factors contribute to reasonable suspicion will depend on the circumstances of the encounter and the specific information the officer has.

- The demeanor of the individual.
- The gait and manner of the individual.
- Knowledge the officer may have of the individual’s background.
- What the individual is carrying.
- Manner of dress of suspect, including suspicious bulges in clothing.
- Time of day or night.
- Overheard conversation of the individual.
- Specific information about the location.
- Information received from third parties.
- Proximity to scene of recent crime.

It is important to note that each individual factor alone may not constitute reasonable suspicion. For example, presence in an area with high rates of crime, standing alone, is an insufficient basis for a stop or a frisk, although it may contribute to reasonable suspicion. Moreover, a “high crime area” cannot be defined too broadly, such as encompassing an entire precinct or borough.

Examples of reasonable suspicion:

- Suspect fitting a detailed description from an identified caller.
- A person looking into car windows in the middle of the night holding a wire coat hanger.
- A person exiting an apartment window.
- A person on a fire escape at night holding a large bag.

THE STOP

As previously noted, the issue of investigatory stops based on less than probable cause was first addressed by the United States Supreme Court in the landmark case of *Terry v. Ohio* and, as a result, some courts refer to such encounters as a “Terry Stop.” It is important to remember that a stop is a significant interruption in a person’s liberty and amounts to a limited seizure. However, the Court in *Terry* held that this type of



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investigative stop was reasonable under the Fourth Amendment on the basis of less than probable cause.

A stop may only be conducted when an officer has *individualized, reasonable suspicion that the subject is committing, has committed, or is about to commit a crime*. The New York State Legislature has limited the term crime, for purposes of a stop, to mean a felony or a Penal Law misdemeanor (CPL § 140.50(1)). A police officer must be able to articulate facts that establish reasonable suspicion for making the stop. Absent reasonable suspicion, an officer may not stop a citizen simply for purposes of deterring crime.

A forcible stop may take many different forms. It can be constructive in nature or it could be an actual physical stop. Surrounding a suspect, blocking his or her path with an RMP, giving certain verbal commands or ordering a motorist to pull over with the use of turret lights are all examples of constructive stops. Physically subduing suspects by grabbing or holding them would be an actual stop. The test is whether a reasonable person would conclude that he or she is not free to leave. Remember, a stop occurs whenever *a reasonable person would not feel free to disregard the officer and walk away*.

It is important for officers to understand that, in the eyes of the law, they may be stopping people even though they do not physically touch them. Officers must also understand that only the minimum amount of force necessary may be used in achieving their objective. Do not handcuff the suspect unless you reasonably suspect that he or she is armed or unless another extraordinary element of danger is present, such as the suspect is in a dark alley or the officer is alone with multiple suspects.

Pursuit vs. Surveillance

The New York State Court of Appeals has determined that pursuing a person amounts to a “seizure.” As was previously discussed, police can only use this amount of intrusion when they have reasonable suspicion. On the other hand, no level of proof is needed for an officer to simply conduct surveillance so long as the surveillance is unobtrusive and doesn’t restrict the subject’s freedom of movement.

Geographical Area of Employment

A police officer’s geographical area of employment (“G.A.O.E.”) consists of the county, city, town or village that employs him or her. If the local government functions in more than one county, the geographical area of employment of a police officer employed by the local government extends throughout all such counties; for example, a **New York City police officer's** geographical area of employment is made up of the **five counties – or boroughs - of New York City**: Manhattan, Brooklyn, Queens, Staten Island, and the Bronx.



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A New York City police officer, therefore, may **only** conduct a stop, question, and possible frisk within the five boroughs of New York City - your G.A.O.E. Although you have arrest powers throughout New York State, arrests are based on probable cause; *New York City police officers are not authorized to conduct stops on less than probable cause outside the City of New York.*

Length of Time

The duration of the stop and question must be **reasonable** under the circumstances. There is no set limit on how long an officer can detain a person for the purpose of conducting an investigation. The Court of Appeals only mentions "brief" time limits for the police to accomplish their goals. This means that the officer must act reasonably and diligently, and not use the stop to "wait out" a suspect. A longer detention will be upheld in situations where officers transport a subject to a victim for identification purposes, while only a brief detention is authorized to receive information over the radio to confirm a description. As the detention lengthens, officers are required to show more knowledge of the suspect's involvement in criminal activity to justify the encounter. If probable cause to arrest does not exist, the officer should release the individual immediately after completing the investigation. When an officer releases an individual, the officer should, absent exigent circumstances, provide the individual with an explanation for the stop, question and/or frisk encounter. A "*What is a Stop, Question and Frisk Encounter?*" (PD344-111) tear off information card, should be offered to the stopped individual.

THE QUESTIONING

The officer may question the subject to the extent necessary to **confirm or dispel** his or her suspicion and determine whether there is probable cause to make an arrest. The questions, therefore, may be pointed and accusatory and directly related to the reason for the stop, and can be for pedigree information regarding the subject. Courts have held that as long as the questioning does not go beyond the reason for the stop, *Miranda* advisements (that a person who is not free to leave has the right to be silent and to counsel) are not required. (For a further discussion on *Miranda*, refer to the chapter on *Interrogation and Identification*.)

THE POSSIBLE FRISK

A frisk is a protective measure. In order to conduct a frisk, a *police officer must reasonably suspect that the person stopped is armed and dangerous.* (*Terry v. Ohio*). The frisk must be strictly limited to a running of the hands or pat-down of the outside of a person's clothing, feeling for weapons that could harm the police officer or others nearby. A frisk is not authorized to discover evidence or the proceeds or instrumentalities of a crime, such as drugs. And, a frisk does not automatically follow a legally authorized stop.



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Armed and Dangerous. The officer must be able to articulate that he or she reasonably suspected that the individual committed, was committing or was about to commit a felony or Penal Law misdemeanor and additionally, that he or she reasonably suspected that the person was armed and dangerous. Reasonable suspicion that a person is armed and dangerous may arise from the officer's observations or the facts and circumstances of the encounter. Below are examples in which the officer may lawfully frisk:

Observing a Weapon. An officer may frisk a suspect if he or she observes something on the person that the officer reasonably suspects is a weapon. An example of this is a bulge in the shape of a firearm in, or near, the waistband. At this point, the officer may conduct a frisk of the area where the officer believed the weapon to be to ensure his or her safety and remove the weapon and place the subject under arrest.

Other Information Regarding a Weapon. A frisk also may be conducted when the person stopped admits possessing a weapon, or if the officer has information that the suspect may be carrying a weapon, such as statements from a victim or witness that the suspect has a weapon.

Reasonable Suspicion of a Violent Crime. If an officer has reasonable suspicion that the subject has committed, is committing, or is about to commit a violent crime, such as murder, assault, kidnapping, rape, robbery, or burglary, the officer may conduct a frisk to determine if the person is armed with a weapon. An officer need not articulate independent facts of a weapon, only facts regarding a violent crime.

- ***Frisk of a Portable Container.*** An officer may not "frisk" or search a person's bag or other item of personal property unless the officer has reasonable suspicion that the person is armed and dangerous and the bag or item of personal property could contain a weapon and is within the person's reach. If the bag or item is soft, the officer may frisk by squeezing the container, and may open it only if he or she feels what he or she believes may be a weapon. If the container is solid and unlocked, the officer may open it to determine whether it contains a weapon. Note that the procedures outlined in this subsection do not apply to "checkpoint" type searches in subway stations.

NOTE: There is no requirement to question a suspect prior to an authorized, lawful frisk.

NOTE: Even if an officer does not have reasonable suspicion that an individual is armed and dangerous, there are tactics for officer safety that an officer may take short of a frisk when the officer perceives his safety is at risk.



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These include ordering the individual to take his hands out of his pockets, grabbing the person's hands if the circumstances suggest the person may be grabbing a weapon, or if the individual refuses to remove his hands from his pockets, forcibly removing the person's hands from his pockets.

THE POSSIBLE SEARCH

If an officer reasonably suspects that an object felt in a suspect's clothing during a frisk is a weapon, the officer may take appropriate and necessary action to examine the object and protect himself. This includes removing the object from the clothing of the stopped person. If an officer feels something in the suspect's clothing that is clearly not a weapon, the officer may not search for or remove that item. If the officer feels something and does not know what it is but it is clearly not a weapon, he may not search for or remove it.

DIFFERENCE BETWEEN FRISK AND SEARCH

A search is the placing of hands inside a pocket or other interior part of clothing or possessions. A search, in the context of a frisk, is ONLY permitted to remove the object that the officer felt during the frisk and reasonably suspects to be a weapon based on his or her frisk. During a Terry stop/Level 3 encounter, the officer may ask for permission to search, but **may not compel** a person to submit to a search of their person or belongings. The consent, if given, must be provided voluntarily.

LEVEL 4: ARREST (Probable Cause)

The fourth and final level of police intrusion is the arrest stage. An arrest involves the **seizure** of a suspected criminal offender. The purpose for the arrest is to bring the suspect before the appropriate court to answer charges against the person.

The police officer must be able to articulate facts that support a finding of **probable cause**. Probable cause is a legally recognized standard of proof because it results in a significant interference of the person's liberty and is the initial stage of a criminal prosecution that may result in incarceration.

Probable cause consists of facts and circumstances within the arresting officer's knowledge, and of which he or she has reasonably trustworthy information, that would warrant a person of reasonable caution to believe that an offense is being or has been committed and that the person to be arrested committed it. This area will be discussed in greater detail in the chapter on *Authority to Arrest*.



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SPECIAL CONCERNS RELATING TO INVESTIGATORY ENCOUNTERS

Racial Profiling

Racial profiling is defined as a decision to initiate police action against a person that is motivated even in part by the person's race, color, ethnicity, or national origin. In the context of stop, question and possible frisk, race may only be considered where the stop is based on a specific and reliable suspect description that includes not just race, age and gender, but other identifying characteristics or information. Individuals *may not be targeted for stops and frisks because they are members of a racial or ethnic group that appears more frequently in local crime suspect data*. When an officer carries out a stop based on reasonable suspicion that a person fits such a description, race may be considered, just as a police officer may consider height or hair color. When a stop is not based on a specific suspect description, however, race may not be used at all as a motivation or justification for the stop.

Conducting stops in an unbiased manner fosters and strengthens relationships between police officers and members of the community, and inspires confidence in and support for policing efforts.

General Business Law

Ordinarily, if a civilian detained a person against that person's will, the civilian could be charged with false imprisonment and/or assault. However, §218 of the General Business Law provides an affirmative defense for merchants or persons acting on behalf of merchants. According to this section, a merchant or a merchant's agent is allowed to detain a person providing the following criteria are met:

1. The person must have been detained on the premises or in the immediate vicinity of the premises of the retail mercantile establishment.
2. The merchant or agent must have had reasonable grounds to believe that the subject committed or attempted to commit a larceny of the merchant's merchandise.
3. The person must have been detained for a reasonable amount of time for investigation or questioning.

For the purposes of this section, *reasonable cause to believe* means knowledge that a person has concealed possession of stolen merchandise. A *reasonable time* is the time necessary to permit the person detained to make a statement or to refuse to make a statement and the time necessary to examine witnesses and store records. In addition to civilians, such as security guards, §218 of the General Business Law also pertains to police and peace officers acting pursuant to their official duties.



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Policing Legally: Investigative Encounters with the Public PREPARATION OF DEPARTMENT FORM: "STOP REPORT"

There are many possible outcomes of an investigatory Level 3 stop of a person based on reasonable suspicion. For instance, the officer may develop probable cause and place the suspect under arrest, or the officer's investigation may not lead to probable cause and the individual may be released while the officer continues to search for the perpetrator of a crime. In any case, it is important to **record** all of the narrative details that convinced the officer to stop a suspect. This is because the courts closely scrutinize all incidents that lead to an arrest or to the seizure of contraband or evidence. Failure to accurately record details would mean that an officer would have to rely only on memory while testifying in court. This is why officers are mandated to record all information regarding a Level 3 Terry stop in two places: the Stop Question, and Frisk Report Worksheet ("Stop Report")(PD344-151A) and a narrative of the stop in their Activity Log.

Patrol Guide section 212-11, "Stop and Frisk" states that a member of the service will prepare a Stop Report for EACH person stopped. Patrol Guide Section 212-08, "Activity Logs" states that an officer must make an entry in their Activity Log for all assignments received and all tasks performed. So in ALL investigative encounters between an officer and a civilian in which a reasonable civilian would not feel free to leave, a Stop Report must be prepared and an Activity Log entry must be made.

Stop Report

The Stop Report is one important mechanism for recording the circumstances surrounding a stop and any subsequent frisk or search that you perform. Documenting the events as precisely as possible is extremely important as one or two seemingly innocuous facts could change the nature of an encounter and, therefore, your authority to stop a suspect. The Stop Report contains checkboxes that are meant to provide a general overview of the circumstances of the stop. Fill out all applicable data fields correctly. You must also provide a narrative description of the basis for your reasonable suspicion for the stop in the officer's Activity Log as discussed below.

If the person stopped refuses to identify himself (and there is no reason to take summary action), check off "REFUSED" in the appropriate space of the Stop Report. Allow the suspect to depart only after completing the investigation and only if the investigation does not establish probable cause to arrest the suspect. Request a patrol supervisor to respond and to confirm the refusal, review the Stop Report, and the action taken. Do not detain the individual while awaiting arrival of patrol supervisor if the investigation is completed and there is no probable cause to arrest the person.

Remember: A Stop Report is prepared only when an officer has conducted a Level 3 investigative encounter (Terry stop) with a civilian in which a reasonable civilian would not feel free to leave and where the officer did not already have probable cause



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to arrest the civilian at the outset of the encounter. Should an investigative encounter start out at probable cause (for example, a complainant points out a perpetrator from a past crime), it would be incorrect to prepare a Stop Report in this case. A Stop Report is also not required for a Level 1 or Level 2 encounter. However, though an encounter may begin at Level 1 or Level 2, it is possible for the encounter to become a Level 3 stop in which the civilian no longer feels free to leave. If this happens, then a Stop Report is prepared. This includes preparing a Stop Report when an officer has probable cause to arrest an individual that developed during the Level 3 Terry stop.

Activity Logs

Your Activity Log entry is the other important part of documenting the basis for the stop. In every situation in which a Stop Report is prepared, Activity Log entries must be made. All pertinent details regarding the encounter, especially the specific facts that formed the basis for the officer's reasonable suspicion, must be recorded. A good Activity Log entry will help refresh your memory about an incident weeks, months or even years later.

The following is a brief list of facts and questions you should consider when writing the narrative in your Activity Log about any stops and any frisks/searches you conduct.

- How did I come across this incident – Department radio or a pick-up?
- What first drew my attention to this suspect or individual – was it his/her clothing description or something else?
- Did the individual engage in any suspicious movements that may be associated with a particular type of crime that is prevalent at this location?
- What were the lighting and weather conditions?
- How far away was the suspect or individual when you first observed him/her?
- What was the suspect's reaction when he/she first noticed the police? Did the suspect make any statements?
- Were there any witnesses?
- What information did the witnesses provide? How did this information help you?

Remember, this is not an exhaustive list; however, these questions are helpful in completing narrative descriptions in your Activity Log Entries. Properly prepared Activity Logs are an important part of good police work.

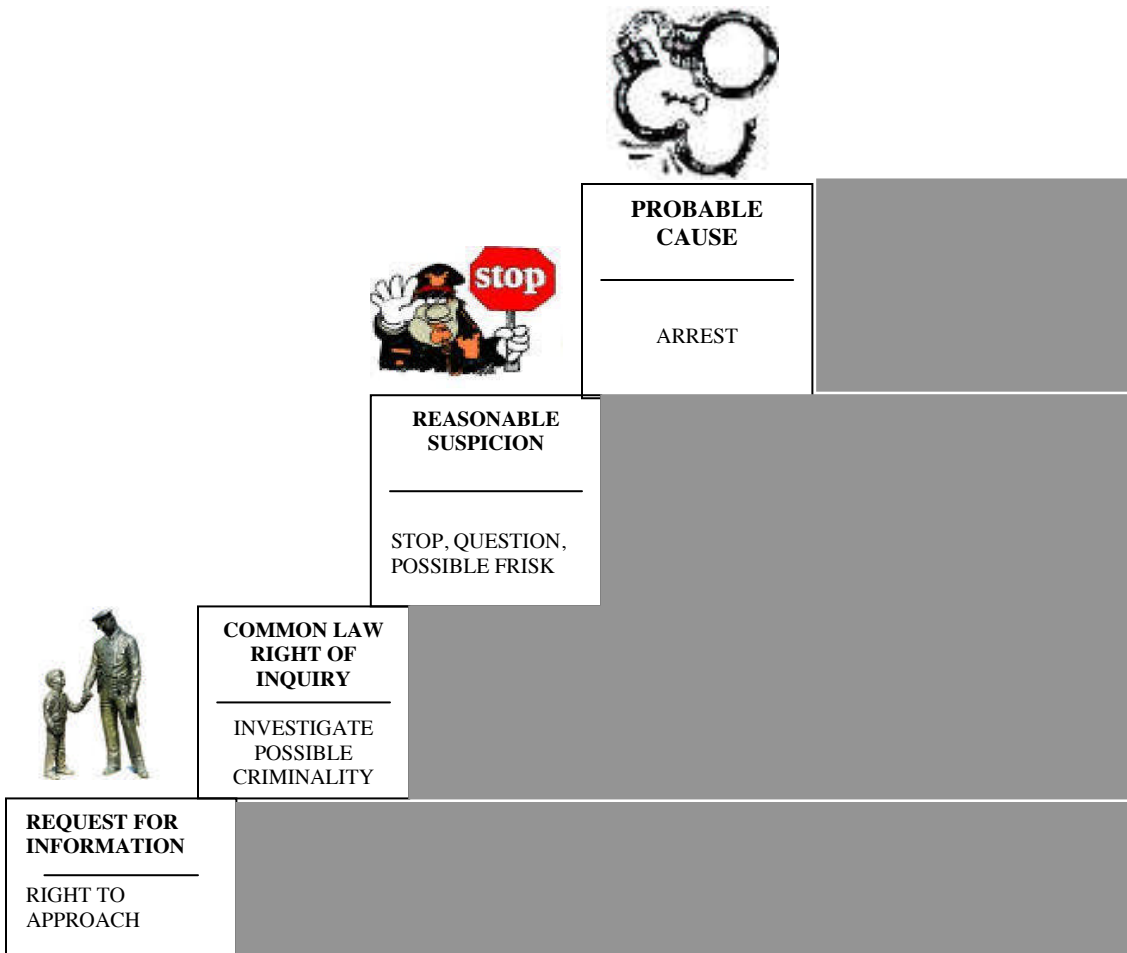


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LEVELS OF KNOWLEDGE



TYPE OF ENCOUNTER	LEVEL OF KNOWLEDGE REQUIRED	NATURE AND EXTENT OF PERMISSIBLE QUESTIONING	AUTHORITY TO SEARCH	FORCE AND DETENTION
I. Request for Information	An objective, credible reason to approach. Suspicion of criminality is not required. However, the member of the service must be able to articulate a basis beyond mere whim and caprice.	Non-accusatory questions concerning the reason for the approach.	At this level of suspicion, there is no basis to search. A request for consent to search a bag, pocketbook, luggage, or other item of personal property is improper.	Force may not be used to detain a subject at this level of suspicion. The subject is free to walk away from the member of the service if they so desire. They need not answer questions.
II. Common-Law Inquiry	A founded suspicion that criminality is afoot. This could be triggered by false responses to questions posed during the request for information, as well as observations by the MOS.	MOS may conduct more extensive questioning. Accusatory-type (guilt-seeking) questions may be asked.	A subject may be asked to consent to the search of an item of personal property. This consent must be voluntary on the subject's part.	Force may not be used to detain a subject at this level of suspicion. The subject is free to leave if they desire. They need not answer questions.

<p>III. Stop, Question, And Possible Frisk</p>	<p>An officer has <i>individualized, reasonable suspicion that the subject is committing, has committed, or is about to commit a crime</i>. The New York State Legislature has limited the term crime, for purposes of a stop, to mean a felony or a misdemeanor in the Penal Law. (CPL § 140.50(1)). Reasonable suspicion exists when the information known to the MOS is of such weight and persuasiveness as to make the MOS reasonably suspect criminality.</p>	<p>The MOS may stop the subject, ask for their name and address, an explanation of conduct, and detain them while an expeditious investigation is conducted to determine if there is probable cause to arrest the subject.</p>	<p>In addition to the consent search described above, the MOS may frisk the subject for a deadly weapon or any instrument or article readily capable of causing serious physical injury, and of a sort not ordinarily carried in public places by law-abiding persons, if the MOS reasonably suspects the person is armed and dangerous.</p>	<p>A stop occurs whenever a <i>reasonable person would not feel free to disregard the officer and walk away</i>. An MOS is permitted to use reasonable force to stop and question a subject. The type and amount of physical force used must be objectively reasonable under the circumstances facing the MOS.</p>
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<p>IV. Arrest</p>	<p>Probable cause to believe that (a) an offense was committed and (b) that the subject arrested committed it. Probable cause requires the existence of facts and circumstances which when viewed together would lead a reasonable person possessing the expertise of the arresting officer to conclude that an offense has been committed.</p>	<p>An MOS may engage in constitutionally permissible custodial interrogation (i.e., <i>Miranda</i> waiver must be lawfully obtained. <i>Miranda</i> waiver is not required to obtain pedigree information).</p>	<p>“Search incident to arrest” (i.e., a search of a subject conducted immediately after the arrest to secure weapons, prevent evidence destruction) “Inventory,” etc.</p>	<p>An MOS is permitted to use reasonable force to arrest and detain a subject.</p>
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