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STOP AND FRISK: "SAY IT LIKE IT IS"

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In this article District Attorney Younger presents a penetrating analysis of the social and constitutional issues involved in the police investigative procedure of "stop and frisk".

Out of the dialogue currently being waged concerning powers and limitations in relation to police activity, there has emerged one concept which I believe should have the support of both schools of thought—the law enforcement oriented individual as well as the civil libertarian.

I support the basic concept[1] of the American Law Institute's so-called "stop and frisk" proposal[2] as the practical solution to some problems of law enforcement as well as an advantage to some innocent citizens in their dealings with the police.

"Say it like it is." This admonition, frequently used by teenagers, suggests that the younger generation questions our ability to describe things as they are rather than as we think they are or as they should be. The more articles I read relating to "stop and frisk" the more I am inclined to agree with the teenagers.

Every night in many cities throughout our land a police officer will have the following experience, with variations:

At 2:00 a.m. a man will attempt to hold up a filling station, grapple with and fatally shoot one of two attendants, lose his revolver in the struggle, run to an automobile parked nearby, and take off alone in what the second filling station attendant describes as a light Chevrolet coupe, 1964 or 1965 vintage. The gunman will be described as a young Caucasian wearing a dark hat. This much will go over the police radio and all units will be alerted. Five minutes later, two miles away from the filling station a police car responding to the call and heading toward the station will pass a light 1964 Chevrolet coupe going in the opposite direction at a legal speed. The driver will be a Caucasian in a dark hat, in his middle or late twenties. The police car will make an abrupt U-turn and stop the Chevrolet. The officer will approach and talk to the driver. The driver will show a driver's license identifying him as a resident of a town two hundred miles away in the same state. The car registration will be in his name. He will explain that he has been visiting friends and is on his way home. The officer will explain that there has just been a holdup-murder a few miles away; that the stopped car and driver match generally the description given by a witness; that the witness is just a few moments away; that the officer admits there is nothing unusual about a Caucasian in a dark hat driving a light 1964 Chevrolet coupe down a street at two o'clock in the morning, and, in all probability, that the man stopped is completely innocent of any involvement. However, the officer will say that in view of the seriousness of the offense and the remote possibility that the driver was involved, the driver is requested to wait for five to ten minutes while a radio call is made and the witness brought over for possible identification.

The officer would presumably contend that he has made the foregoing explanation in a polite and friendly manner. From the driver's viewpoint, the officer presumably appeared rude and officious. In any event, the driver will refuse to cooperate and will say, in effect, "Arrest me or get out of my way." This reaction is certainly consistent with guilt. Unfortunately, the reaction is also consistent with innocence. Many people under these circumstances will refuse to cooperate. Possibly the driver received a traffic ticket a few weeks earlier and was still mad. Maybe he believes, along with some students of the law, that we dare not yield an inch to police authority—that to do so is to give a mile.

The officer, in the absence of any "stop and frisk" authority, can either arrest the driver on suspicion of robbery-murder or release him. It is

[1] While I support the basic concept of the ALI proposal, I am not in accord with the text of all its provisions. For example, I submit that an arbitary time limit of twenty minutes is unrealistic. I favor the approach of the California courts in applying a test of reasonableness to each fact situation.

[2] ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 2.02. The proposal appears in the appendix to this paper, p. 300.

too bad there are no other alternatives. It is too bad the driver does not cooperate. It is too bad that the officer could not find some suspicious circumstances which clearly gave him authority to arrest without a warrant. It is too bad that the driver did not turn out to be a well-known local citizen who could always be located later if necessary. It would be a shame to arrest an innocent man for robbery-murder and leave him permanently scarred with a very serious arrest record (even though he is released two hours later, after being mugged and printed, when the witness comes to the station, looks at him and says, "He is not the man."). It also would be a terrible thing to let him go if, in fact, he was the robber-murderer.

This article is designed to give certain practical reasons why reasonable persons, not unduly burdened by suspicions of or animosity toward policemen, should support the concept of "stop and frisk." It also seeks to provide a sound legal argument for the constitutional acceptance of "stop and frisk."

To establish a frame of reference, I undertake here to list a set of facts or premises which I believe to be uncontroverted:

1. The stopping of persons on the street for questioning and investigation has for some time been a recognized police practice.

2. The questioning of persons on the street under suspicious circumstances is a valuable police technique and has contributed to the prevention and solution of crime.

3. The impact of *Mapp v. Ohio*[3] and the exclusionary rule have created some confusion and question concerning the validity of this technique.

4. Police patrol units in metropolitan cities are designed to prevent crime as well as to solve crime, and they necessarily operate differently than the units which perform follow-up investigation.

5. There are many persons validly arrested and booked who are in fact innocent and whose innocence is established by follow-up investigation.

6. Most policemen are conscientious, honest and interested in effectively preventing and solving crime and protecting the public, and these "good" policemen are not interested in arresting or harassing citizens simply for the sake of harassment.

7. There are some policemen now who do harass or arrest persons simply for the sake of harassment.

8. In this country crime is increasing at a substantial, if not alarming, rate and it is important that we do all that we reasonably and constitutionally can to improve the efficiency of our law enforcement agencies.

[3] 367 U.S. 643 (1961).

In California police officers have been given substantially the same "stop and frisk" authority by appellate court decisions as would be granted legislatively in those states adopting the ALI proposals. The decisional law of the State of California authorizes *some* compulsory detention police procedures. The following is a capsule statement of the California law:[4]

A police officer may detain and question a person when the circumstances are such as would indicate to a reasonable man in like position that such a course of conduct is necessary to the proper discharge of his duties. This includes stopping pedestrians or motorists on the streets for questioning. Temporary detention for questioning permits reasonable investigation without necessarily making an arrest. There must be reasonable grounds to justify the officer to detain and question. In the absence of such reasonable grounds for detention (which may fall short of probable cause to make an arrest) any evidence obtained incidental to the unlawful detention is inadmissible. Where the circumstances warrant it, officers may request a suspect to alight from a car for questioning or to submit to a superficial search for concealed weapons. In the event of a recently reported crime in the neighborhood, the police officer may take a reasonably detained suspect to the scene of the crime for further investigation.[5] In light of our experience both in the field and in the courts, we can discuss this subject, hopefully, both objectively and with some degree of expertise.

The problem concerning "stop and frisk" can be simply stated as follows:

If an officer observes a person on the street under circumstances which would indicate to a reason-

[4] Numerous California cases deal with various aspects of the right to stop, detain and conduct a cursory search for weapons. The following cases are representative: People v. One 1960 Cadillac Coupe, 62 Cal.2d 92, 396 P.2d 706 (1964); People v. Mickelson, 59 Cal.2d 448, 380 P.2d 658 (1963); People v. Hanamoto 44 Cal. Rptr. 153 (1965); People v. Koelzer, 34 Cal. Rptr. 718 (1963); Hood v. Superior Court, 33 Cal. Rptr. 782 (1963); People v. Gibson, 33 Cal. Rptr. 775 (1963).

[5] People v. Parham, 60 Cal.2d 378, 384 P.2d 1001 (1963); People v. Hanamoto and People v. Koelzer, *supra* note 4. It would appear that the police under appropriate circumstances could take a person to the scene of a crime without arresting him and even without his consent. See People v. Mickelson and People v. Gibson, *supra* note 4.

able man (with the training and expertise of the officer) that investigation is indicated, shall the officer have the power to stop that person, detain him for questioning and, if necessary as a protection, conduct a cursory search for weapons?

If, as a result of such stopping and questioning, the officer develops facts which constitute probable cause justifying an arrest and search, should any evidence which this full-blown search discloses be ruled inadmissible if the facts which prompted the initial stopping did not themselves rise to the dignity of probable cause for an arrest, although they were sufficient, in the mind of a reasonable man, to constitute probable cause for the initial stopping?

Those who believe that police conduct should always be severely limited contend that the officer in the above situation should have two alternatives:

1. To simply ignore the individual and take no action; or,

2. Arrest him if there is probable cause existing to support such arrest.

They argue that the third alternative of permitting a limited stopping, detaining and frisking would lead to abuse and harassment. I believe it would have just the reverse effect.

To afford the police this third alternative would result in the release without booking of many persons who might otherwise be arrested.

The officer who would harass and abuse is doing so now; the conscientious officer is not. If a policeman wants to roust someone, he wants to give that someone the full treatment. This policeman will make an arrest based upon his false (but almost impossible to disprove) claim that the suspect matched the description given in a recently reported crime. Then he will mug and book the suspect and keep him in custody for as long as possible. Granting the conscientious officer this additional alternative will not increase the excesses of the officer who is already abusing the powers of his office.

As a matter of fact, the existence of the third alternative would help to more easily identify the officer who is interested in harassment; his failing to take advantage of the alternative offered to him would result in his continuing to make full-blown, baseless arrests.

In other words, the officer who would engage in the abuse which many citizens fear does not need the "stop and frisk" authorization to do so. He can justify his activities under present law and even support them with perjured testimony where necessary. To grant the additional alternative, as embraced in the "stop and frisk" concept, can only help the conscientious officer to protect the community against criminal violence, and at the same time result in benefits to honest, law-abiding citizens who find themselves in circumstances which attract police attention.

Justice Theodore Souris, of the Supreme Court of Michigan, recently wrote an article appearing in this Journal concerning the constitutional validity of "stop and frisk" practices.[6] His position is that any compulsory detention, in the absence of probable cause to arrest, violates the fourth amendment and renders inadmissible any evidence which is the product of the detention. His arguments are particularly directed to the first tentative draft of the American Law Institute's Model Code of Pre-Arraignment Procedure, but I take them to represent the thinking of those persons who oppose giving police any authority to stop and question persons on the street unless grounds exist for a valid arrest. The ALI draft proposal is summarized by him as authorizing:

> . . . an officer to stop persons in "suspicious circumstances," and to detain them for 20 minutes, during which time they may be questioned and searched or, as defined by the draftsmen's commentary accompanying the proposal, frisked, for dangerous weapons. The officer is further authorized to use reasonable force, less than deadly, to obtain these objectives.[7]

Criticism of the draft proposal rests upon several grounds, principally among which are the following: (1) Compulsory detentions are not indispensably needed for effective police activity; (2) all detentions are arrests within the meaning of the Fourth Amendment; (3) *Henry v. United States*[8] holds that since a detention is an arrest, probable cause for an arrest is required in order to detain; and (4) both arrests and detentions of persons constitute seizures which must be based upon the same standard of probable cause in order to be reasonable.

Justice Souris' article is valuable as a point of departure and indicates those opinions held by

[6] Souris, *Stop and Frisk or Arrest and Search—The Use and Misuse of Euphemism*, 57 J. CRIM. L., C. & P.S. 251–264 (1966).

[7] *Id.* at 253.

[8] 361 U.S. 98 (1959).

persons of similar persuasion which pre-dispose their rejection of the ALI draft proposal or any similar proposals. It is surely obvious that objections to the ALI draft proposal are equally (if not more) applicable to California decisional law.

The approach of this article, then, is to express my opinions concerning those fundamental principles which pre-dispose me to accept California decisional law and "stop and frisk" as sound.

An opponent of compulsory detentions can make no more serious error than to assume that proponents of a specific proposal authorizing some detentions are proponents of unfettered police power. I am one of those who believe that there should be constitutional and judicial restraints on law enforcement. So the difference between the opponents and myself does not involve that position. On the other hand, all reasonable people must believe, as I do, that there are circumstances when individual interests in liberty and privacy must yield to the interests of society in the enforcement of criminal law.

I regret to say that Justice Souris, despite his repeated appeals for dispassionate discussion, evidences in his article grave doubts about whether the proponents of "stop and frisk" proposals do *really* value personal liberty or privacy *vis-a-vis* law enforcement powers.

I certainly accept the intellectual and moral integrity of those who disagree with my position and submit that persons with equal integrity and devotion to constitutional principles can conscientiously and earnestly support the concepts of "stop and frisk" legislation. Indeed, the eminent persons who comprise the President's Commission on Law Enforcement and Administration of Justice recommend just such legislation.[9]

In discussing the constitutional issues, I need do no more than call attention to the two key provisions of the fourth amendment, a prohibition against "unreasonable searches and seizures" and the requirement that warrants be based on probable cause.

I agree with the Supreme Court's position in *Rabinowitz v. United States:*[10]

> It is unreasonable searches that are prohibited by the Fourth Amendment. . . . It was recognized by the framers of the Constitution that there were reasonable searches for which no warrant was required. . . . The mandate of the Fourth Amendment is that the People shall be secure against unreasonable searches.[11]

Although no warrant may issue unless supported by probable cause, warrantless searches and seizures are tested by their reasonableness, a test which often encompasses the concept of probable cause, but is not solely limited to that concept. For purposes of this article, however, it is only necessary to consider that aspect of reasonableness which encompasses probable cause, since the key to the right to stop and detain is probable cause to stop and detain.

Justice Souris, relying upon *Henry v. United States*,[12] concluded that a detention is unreasonable unless there exists probable cause for an arrest. This, then, is the crux of our difference. Is the detention constitutionally unreasonable because an arrest itself was not legally permissible, even though a reasonable man would conclude (aside from the question of constitutionality) that under the circumstances known to the officer a mere detention was warranted?

Suffice it to say, the result of the *Henry* case could have been reached on a non-constitutional basis. But beyond that, with *stare decisis* having of late been reduced to a judicial relic, there is no reason why the court could not find constitutional reasonableness in a well-drawn "stop and frisk" statute, or for that matter in the well-written decisions of the California courts. The fluid concept of constitutional reasonableness is to some extent indicated by *Miranda v. Arizona.*[13] Although this case may have created a plethora of problems outside the scope of this article, insofar as it constitutionally draws distinctions between investigation and interrogation, it offers hope for the constitutionality of "stop and frisk."

In *Miranda* the Supreme Court of the United States distinguished between the questioning of a citizen for purposes of investigation which would not require the admonitions imposed by that decision and the questioning of a person during

[9] A Report by the President's Commission on Law Enforcement and Administration of Justice, THE CHALLENGE OF CRIME IN A FREE SOCIETY 94-95 (1967).

[10] 339 U.S. 56 (1950).

[11] 339 U.S. at 60, 65.

[12] 361 U.S. 98 (1959). *Henry* implicitly turned upon the construction of "arrest" in 18 U.S.C. § 3052, which provides the statutory basis for arrests by F.B.I. agents. See Miller v. United States, 357 U.S. 301 (1959) and comments concerning that case in Ker v. California, 374 U.S. 23, 38-39 and 53 (1963), by Justices Clark and Brennan, respectively. See also Rios v. United States, 364 U.S. 253, 261-262 (1960).

[13] 384 U.S. 436 (1966).

"custodial interrogation" which would require such admonitions.[14] Thus the court clearly distinguishes between interrogation and investigation.

Interrogation is designed to obtain information of an incriminatory nature which would implicate a person in a crime that has already been committed, whereas investigation is designed to determine what has occurred which may as a by-product implicate someone in a crime but is not designed nor undertaken for that purpose.

In short, the Court permits objectively gathering facts but prohibits compelling incriminating statements unless certain admonitions are given. Thus the conduct of a police officer may be constitutionally proper when engaged in for one purpose, but not when the same type of conduct is engaged in for a different purpose. Similarly, it is to be hoped that probable cause for detention which eventually leads to probable cause for an arrest and a seizure may make that seizure constitutionally permissible if the initial stopping was made for purposes of questioning, although such a stopping would be constitutionally impermissible if done for the purpose of an arrest. *Miranda* is an example, therefore, of the Supreme Court interpreting the Constitution in a manner which takes into account significant distinctions, i.e., between investigation and interrogation. The distinction between an informal detention and a formal arrest should also be of similar constitutional significance.

I am not ready to concede that because *Wolf v. Colorado*[15] and *Mapp v. Ohio*[16] have said that the Fourth Amendment and its enforcement by way of the exclusionary rule is applicable to the states through the Fourteenth Amendment, previous notions of due process have lost their vitality. I believe that there is still room for the states to adopt reasonable variations from federal standards without doing violence to due process.

Indeed, this is made quite explicit by the distinctions drawn in *Ker v. California*.[17] I believe the following are accurate statements of the Court's opinion: (1) Doctrines and standards interpretive of the Fourth Amendment are equally applicable to federal and state governments; (2) the Fourth Amendment does not preclude the development of state laws relating to arrests, searches, and seizures which differ from federal laws, provided that the constitutionality of state laws is determined by the standards imposed by the Fourth Amendment; (3) principles of admissibility of evidence in federal criminal trials which are derived solely from the exercise of the Supreme Court's supervisory authority over the administration of criminal justice in federal courts and not interpretive of the Constitution do not apply to the states. And, as evidenced by the separate opinions of Justices Clark and Brennan, eight of the justices agree that when state law is not violative of the Federal Constitution, the Court will look to state law in gauging the validity of an arrest under the Fourth Amendment.[18]

More recently, I find encouragement in *McCray v. Illinois*,[19] wherein the Court upheld a state procedure which had a direct bearing upon the validity of a search and seizure. In *McCray* the Supreme Court sustained the validity of a search and seizure based upon information received by the police from a reliable informant whose identity the prosecution refused to disclose. The Court held that the Constitution does not compel the states to abolish the well-established informer's privilege, long familiar to the law of evidence, in a situation where the informer's information supplies the probable cause upon which an arrest and search were made, where it was clear that the information, if believed and relied upon, established the reasonableness of the arrest and search as required by the Fourth Amendment.

When all is said and done, it will be the interpretations of the justices which will resolve the question, and not any particular language which can be found in the Constitution itself.

In this context, the very practical considerations which I have referred to in connection with "stop and frisk" could and should be persuasive in the "balancing" process. It does not follow in my opinion that courts are constitutionally commanded to reject evidence taken in a search based on probable cause to arrest just because the facts establishing that probable cause were developed

[14] 384 U.S. at 477-478.
[15] 338 U.S. 25 (1949).
[16] 367 U.S. 643 (1961).
[17] 374 U.S. 23, 31 (1963). The Court's opinion, written by Justice Clark, had the concurrence of seven other justices with reference to the standard by which state searches and seizures must be evaluated. Separate opinions applying that standard were written by Justices Clark and Brennan, each of which was concurred in by three other justices. Justice Harlan wrote a separate opinion concurring in the result.

[18] See also Rios v. United States, 364 U.S. 253, 261-262 (1960), and cases cited therein.
[19] ___ U.S. ___, 87 Sup.Ct. 1056, 18 L.Ed. 2d 62 (1967).

after an officer stopped a person and questioned him under circumstances at first constituting only probable cause to detain.

It appears to me that the applicability of the "balancing test" in the construction of constitutional provisions is a potential subject of misunderstanding.

We can all agree, at least *arguendo*, that whatever it is that a constitutional provision protects, any governmental action which allegedly violated the Constitution cannot be justified merely on the ground that it is necessary or desirable for the common good. The common good of the body politic requires official conformity to constitutional commands. This is, I think, a sufficient refutation of the idea that it is proper for law enforcement officers to ignore the Constitution in order to enforce criminal law. Justice Souris contends, however, that the balancing test may not licitly be used in the construction of the Fourth Amendment. This contention itself must rest upon the principle that the balancing test may not be properly used in the construction of *any* constitutional provision protecting a substantial right.

The balancing test has often been used in constitutional interpretation, even where First Amendment rights are involved. And its language—"Congress shall make no law abridging the freedom of speech, or of the press"[20]—is more absolute in its tenor than the language of the Fourth Amendment. Nevertheless, the Court has interpreted what is meant by "freedom of speech" and "freedom of the press." A balancing process has been used in concluding that those terms do not include intentional libel,[21] intentional slander, obscenity[22] or falsely shouting "fire" in a crowded theater.[23]

Is it any more unreasonable to say that a person may not walk in a dark alley at 2 a.m. in a neighborhood where there has been a number of burglaries or robberies, without being willing to identify himself and briefly answer the patrolman's questions concerning the purpose of the stroll. To describe conduct as unreasonable is a value judgment, not a statement of objective fact. It is true that once a search is determined to be unreasonable under the Fourth Amendment, the interests of law enforcement can never justify violations of that guarantee. But, in judging whether particular types of searches and seizures are reasonable, surely the interest of society in effective law enforcement must be weighed against other interests (i.e., the interest of privacy and liberty). Those rights protected by the Fourth Amendment are, in my opinion, "discovered" only by a balancing process entailing a comparative evaluation of the respective weights of many ostensibly conflicting values and interests. As such evaluation requires complex analysis of many factors and circumstances, no simple test can be defined to automatically resolve delicate or novel constitutional issues. As the Supreme Court well said in *Rabinowitz v. United States*:[24]

> What is a reasonable search is not to be determined by any fixed formula. The Constitution does not define what are "unreasonable" searches and, regrettably, in our discipline we have no ready litmus-paper test. The recurring questions of the reasonableness of searches must find resolution in the facts and circumstances of each case.[25]

Thus, merely to show that a particular police practice is or is not reasonably necessary is not determinative of any constitutional issue arising under the Fourth Amendment. On the other hand, the value and necessity of a particular practice can and should be a factor in the balancing process.

The applicability of the balancing test to the Fourth Amendment cannot be summarily dismissed in view of the very qualified language of that provision.

In arguing against the ALI draft proposal, Justice Souris protests that:

> There can be no doubt who would bear the brunt of this new power; it would be those members of our cities' minority groups—those citizens who frequently are excoriated for holding in contempt the processes of a legal system which traditionally has treated them with contempt if not outright abuse.[26]

If authority to "stop and frisk" is judicially limited to its reasonable exercise, *abuses* of such authority are not legalized. It is the absence of rules authorizing reasonable "stop and frisk" practices which increases the likelihood of abuse of power. That is why members of minority groups who are really knowledgeable concerning police practices support the "stop and frisk" concept.

[20] U.S. CONST. amend. I.
[21] N.Y. Times v. Sullivan, 376 U.S. 254 (1964); Garrison v. Louisiana, 379 U.S. 64 (1964).
[22] Roth v. United States, 354 U.S. 476 (1957).
[23] Schenck v. United States, 249 U.S. 47, 52 (1919).
[24] 339 U.S. 56.
[25] 339 U.S. at 63.
[26] Souris, *supra* note 6, at 256.

If a stop and frisk procedure is judged unreasonable because it may be abused, there is no police procedure which should not be judged unreasonable upon the same ground. In evaluating the "reasonableness" of a police procedure, the nature and magnitude as well as the potential frequency of abuses of the power in question must be weighed, together with all other relevant factors.

Moreover, members of minority groups have a right to be free from criminal activity as well as from police misconduct. If a police procedure is dangerous because it presents a danger to political liberty, it is likewise true that absence of reasonable police power presents a danger of lawlessness.

Many objections to "stop and frisk" proposals are grounded on the claim that judicial restraints already imposed have been attended with progressively good results. Therefore, it is either said or implied, further limitations on police powers will be attended with similarly good results. This exemplifies what is known as the fallacy of extrapolation. The mere fact that changes in a certain direction have been usually attended with good results does not mean that further changes will never reach a point when the bad results outweigh the good results.

Is it possible that the invasion of liberty or privacy involved by a temporary detention and, if warranted, frisking of a motorist or pedestrian can be reasonable if the standard is less than probable cause to arrest? Some standard is necessary in order to minimize abuse or harassment. On the other hand, to require the standard of probable cause to arrest may defeat the purposes of detention.

The purpose of a detention is to question a person when an officer has "reasonable cause to investigate" whether a crime has been committed or will soon be committed. Police have a clear responsibility to prevent crime as well as to apprehend violators. They serve a deterrent purpose fully as important as their responsibility to ferret out criminals. Surely citizens expect the police to investigate suspicious circumstances in their neighborhood that may fall short of probable cause to arrest. Children are entitled to the law's protection against idlers, loafers, and vagrants who lurk about the schoolhouse and public toilets. May police not question an elderly man who wanders through a public park offering children candy and urging them to come visit him? Are people free to prowl through a wholesale warehouse district on a hot summer night attired in sneakers and gloves without interference? When a car is found parked in an alley behind a closed business establishment during early morning hours, the more reasonable hypothesis in some circumstances is not that those in the car have committed a burglary, but that they are going to commit a burglary. The mere fact that such a car is stopped, the occupants identified, questioned, and detained while a check is made as to whether a burglary has taken place, will have a deterrent effect. Yet it may be that stopping the vehicle and questioning the occupants will reveal that their presence in the alley is with an innocent purpose.

The Supreme Court's language in *Hoffa v. United States*[27] is of interest even though the Court was dealing with a completely different fact situation:

> The police are not required to guess at their peril the precise moment at which they have probable cause to arrest a suspect, risking a violation of the Fourth Amendment if they act too soon, and a violation of the Sixth Amendment if they wait too long.[28]

In explaining the rule of temporary detention, the California Supreme Court expressed its belief that:

> It strikes a balance between a person's interest in immunity from police interference and the community's interest in law enforcement. It wards off pressure to equate reasonable cause to investigate with reasonable cause to arrest, thus protecting the innocent from the risk of arrest when no more than reasonable investigation is justified.[29]

When we discuss "reasonable cause to investigate," we are speaking of circumstances that justify an officer's inference that a crime has been or shortly will be committed which is substantially more probable than *any* one of the possible explanations of the circumstances consistent with innocence. As indicated above by the holdup-murder case example, the authority to detain based upon a standard of reasonable cause to investigate serves to protect the innocent against the risk of having an unnecessary arrest record. If there is no authority to reasonably detain an uncooperative suspect, the officer is faced with the

[27] 385 U.S. 293.
[28] 385 U.S. at 310.
[29] People v. Mickelson, 59 Cal.2d at 452, 380 P.2d at 660.

limited choice of either releasing or arresting the person who blandly announces he will not remain voluntarily. It is, in my opinion, unrealistic to suppose that an officer will not "stretch"—albeit, in good faith—to find probable cause to arrest a person whose conduct warrants further investigation and whose departure would frustrate the investigation.

Those who oppose any compulsory detention based upon a standard of less than probable cause argue that detention does involve interference with the liberty of the person detained. He is interrupted in his liberty of movement. He is inconvenienced, because detention takes time. He may well be embarrassed if he is frisked for weapons. His feeling of dignity is offended by the detention and, perhaps, frisking. Such interference with his liberty and privacy, it is said, is so substantial as to require the standard of probable cause to arrest.

Such an argument discloses that the critic has failed to distinguish among various types of searches and seizures. Such failure to differentiate among the varying degrees, kinds and characteristics of searches and seizures must inevitably lead to an automatic condemnation of compulsory detention.

Yet even the most zealous opponent of "stop and frisk" proposals must agree that detention of a motorist or pedestrian for a short period of time and (if warranted) a frisk for weapons constitutes much less of an invasion of liberty and privacy than is involved in forcibly taking a suspect to a police station, searching through his clothing, or opening the trunk of his vehicle.

A power to stop and question motorists and pedestrians would be unreasonable if it were absolute. But such power is not advocated. The power is only advocated when the officer has reasonable cause to investigate whether a crime has been, is, or will soon be committed.

Finally, those of us who seek to justify the position that some "stop and frisk" procedures are *reasonable* do so on the ground that such reasonableness is countenanced by standards provided by the Fourth Amendment. Because the due process of law clause of the Fourteenth Amendment operates to apply the Fourth Amendment to the states, the standards of reasonableness in judging the constitutionality of state "stop and frisk" rules are to be found in the Fourth Amendment and in those notions of fundamental fairness characterized as due process. Among a number of factors to be weighed in deciding the reasonableness and fundamental fairness of compulsory detention is the fact that some reasonable and responsible citizens do approve of it. Thus, the California Supreme Court,[30] as well as the appellate courts[31] or legislatures[32] of several sister states, find compulsory detention reasonable and consistent with the Fourth Amendment and the due process clause of the Fourteenth Amendment. The ALI draftsmen of the tentative model proposal and the President's Commission of Law Enforcement and Administration of Justice have recommended statutes, with adequate safeguards, authorizing "stop and frisk" practices. Certainly the opponents of all "stop and frisk" rules cannot dismiss the opinions of such groups for the same reasons they assert in rejecting similar proposals when advanced by law enforcement agencies. The general consensus of the public is also a factor to be considered in what is fundamentally fair.

We hire police to protect us against burglars, robbers and the like. It is a job we cannot do for ourselves. We all know that there are persons against whom we need that protection.

I can understand why a criminal would not want to be stopped and questioned. But I find it hard to understand the thinking of an honest, law-abiding citizen who resents being stopped or questioned under circumstances which clearly indicate that a policeman is trying to do the very job that the general public expects and, in fact, demands of him. For my own part, I sleep more soundly at night when I know that there is a patrol unit in the neighborhood which will investigate strangers in the area under suspicious circumstances.

APPENDIX

THE AMERICAN LAW INSTITUTE'S MODEL CODE OF CRIMINAL PROCEDURE— SECTION 2.02

Section 2.02. Stopping of Persons.

(1) *Stopping of Persons Having Knowledge of Crime.* A law enforcement officer lawfully present

[30] It is noteworthy that in California, a highly industrialized, urbanized and populated state, the state supreme court accepted the concept of "stop and frisk" while at the same time demonstrating, prior to Mapp v. Ohio, *supra*, note 16, a sensitive concern for individual rights in the area of search and seizure. See People v. Cahan, 44 Cal.2d 434, 282 P.2d 905 (1955).

[31] For example, State v. Terry, 5 Ohio App.2d 122, 214 N.E. 2d 114 (1966); Goss v. State, 390 P.2d 220 (Alaska 1964).

[32] For example, 11 DEL. CODE, ch. 19, §§ 1902, 1903 (1953); N.H. REV. STAT., ch. 594, §§ 594:2, 594:3 (1955); N.Y. CODE OF CRIM. PROC., ch. 86, § 180-a (1964); R.I. GEN. LAWS, ch. 7, §§ 12-7-1, 12-7-2 (1956).

in any place may, if he has reasonable cause to believe that a felony or misdemeanor has been committed and that any person has knowledge which may be of material aid to the investigation thereof, order such person to remain in or near such place in the officer's presence for a period of not more than twenty minutes.

(2) *Stopping of Persons in Suspicious Circumstances.* A law enforcement officer lawfully present in any place may, if a person is observed in circumstances which suggest that he has committed or is about to commit a felony or misdemeanor, and such action is reasonably necessary to enable the officer to determine the lawfulness of that person's conduct, order that person to remain in or near such place in the officer's presence for a period of not more than twenty minutes.

(3) *Action to Be Taken During Period of Stop.* A law enforcement officer may require a person to remain in his presence pursuant to subsection (1) or (2) of this section only insofar as such action is reasonably necessary to

(a) obtain the identification of such person;

(b) verify by readily available information an identification of such person;

(c) request cooperation pursuant to and subject to the limitations of Section 2.01; or

(d) verify by readily available information any account of his presence or conduct or other information given by such person.

(4) *Use of Force.* In order to exercise the authority conferred in subsections (1) and (2) of this section, a law enforcement officer may use such force, other than deadly force, as is reasonably necessary to stop any person or vehicle or to cause any person to remain in the officer's presence.

(5) *Search for Dangerous Weapons.* A law enforcement officer who has stopped or ordered any person to remain in his presence pursuant to this section may, if he reasonably believes that his safety so requires, search such person and his immediate surroundings, but only to the extent necessary to discover any dangerous weapons which may on that occasion be used against the officer.

(6) *Action to Be Taken After Period of Stop.* Unless an officer acting hereunder arrests a person during the time he is authorized by subsections (1) and (2) of this section to require such person to remain in his presence, he shall, at the end of such time, inform such person that he is free to go.

(7) *Records Relating to Persons Stopped.* A law enforcement officer, who has ordered any person to remain in his presence pursuant to this section, shall with reasonable promptness thereafter prepare and sign a report setting forth the name and address of such person; the place, time and purpose of the stop; the names of additional officers and other persons present; whether the person stopped objected thereto; whether force was used and, if so, the degree and circumstances thereof; and whether the person stopped was searched and, if so, a description of all items seized and their disposition.

(8) *Limitations to Prevent Abuse.* The authority to stop persons granted in subsections (1) and (2) of this section may not be used solely to aid in the investigation or prevention of the following crimes:

(a) any misdemeanor the maximum penalty for which does not include a sentence of imprisonment of more than thirty days;

(b) loitering;

(c) vagrancy;

(d) . . . [Note: There should be added to this list those felonies and misdemeanors, in connection with which the stop authority is unnecessary, or creates an undue risk of abuse or harassment, such as ordinances requiring permits for public parades or gatherings.]

Note on Section 2.02

This section authorizes a brief period of on-the-spot detention of suspects and witnesses, and the use of non-deadly force to effect such detention, where there is reasonable cause to believe that a felony or misdemeanor has been committed. It also authorizes such detention of persons found in suspicious circumstances. The officer may not take the detained person from the place where he is found. This detention is authorized only if it is necessary to accomplish the law enforcement purposes specified in subsection (3), and only for the period necessary to accomplish them. In no case may the detention exceed twenty minutes. The purposes specified in subsection (3) are: obtaining and verifying the identification of a person who might otherwise become unavailable, requesting such person to cooperate, and verifying information given by such person. The express limitation of the authority to cases where it is necessary for these purposes is intended to prevent the use of the authority for purposes of harassment. Subsection (3) (c) makes clear that there is no authority to compel cooperation. Cooperation may only be sought pursuant to Section 2.01, with its attendant safeguards. At the expiration of the twenty min-

utes, the officer must inform the detained person that he is free to go.

In response to concerns expressed by members of the Advisory Committee, the Reporters have sought to be as precise and restrictive in stating the ground for the exercise of this authority as is consistent with the purposes to be served. The authority in subsection (1), which applies to any person—witness or suspect—may only be exercised if the officer has reasonable cause to believe that a felony or misdemeanor has been committed and that the person stopped has significant knowledge thereof. Subsection (2), which applies only to cases where a person is observed in circumstances which suggest his involvement in the commission of a crime, refers to the situation in which the need for the inquiry arises precisely because the officer suspects but does not have reasonable cause to believe that such a crime has been committed. It is, however, limited to situations where a brief on-the-spot detention is necessary to prevent the disappearance of the suspect. And, by the applicability of Section 2.01, an officer is forbidden falsely to imply an obligation to cooperate with him, and pursuant to Section 2.01 (2), where the officer engages in sustained questioning, he must warn such person that there is no obligation to respond.

The authority to detain briefly on less than the reasonable cause justifying an arrest is granted because there are situations in which an officer may thereby determine whether he should arrest a person, possibly a dangerous offender, who might otherwise disappear. As applied to witnesses, this authorization is intended to meet the need in an emergency (*e.g.*, after a shooting in the presence of a number of persons) to "freeze" the situation while the officer makes his initial evaluation and obtains the names and addresses of possible witnesses. Further, in the confused circumstances often following a crime of violence, it may not be possible to tell at once whether a particular person at or near the scene is a suspect or a witness. The grant of such an authority, both less drastic than an arrest and justified on a lesser probability of guilt, should also serve to forestall a too ready and oppressive recourse to formal arrest.

The authorization of a lesser restriction on liberty than an arrest and therefore a restriction more easily justified, has precedent in legislation such as the New York "Stop and Frisk" law and Uniform Arrest Act. This section goes beyond these provisions in its application to witnesses as well as suspects, but is otherwise more precisely delimited and explicit in setting out the circumstances to which it applies and providing safeguards during the period of detention.

In jurisdictions having no statutory grants of power to stop in the absence of probable cause, the decisions are divided on the validity of such a power; but no court has invalidated a statutory grant of such an authority. The United States Supreme Court has not spoken definitively on the subject.

Detention under this section is not called an arrest, since in the draft "arrest" is used in the conventional sense to authorize the far more onerous interference of removal to a police station and eventually to court. But, inasmuch as this section authorizes a "seizure" of the person, it must be reasonable if it is to satisfy the requirements of the Fourth Amendment. The precedents in existing law for such a provision and the safeguards by which it is accompanied in this Code lead the Reporters to believe that this provision does not authorize an unreasonable seizure of the person, and thus does not violate the Fourth Amendment.

Subsection (5) authorizes a limited search of the person and immediate surroundings of the person detained, because an authorization to detain without an authority to conduct such a limited search would expose the officer to an unjustifiable risk of attack by persons armed with concealed weapons. The question of the admissibility of any evidence discovered on such a search will be considered in connection with the drafting of the search and seizure provisions.

Subsection (8) is designed to minimize the possibility that a police officer may use this section to justify harassment or abuse. By this subsection the authority is made inapplicable to minor offenses, and to offenses such as loitering and vagrancy. The section should also be made inapplicable to offenses such as parading without a permit, where this authority would serve no serious law enforcement function and would present a risk of harassment or abuse.

It is also contemplated that when the penalty provisions of the Code are drafted, severe penalties will be imposed in cases where the stop authority is used for purposes of harassment.