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## Stop and Frisk in California

Harvey E. Henderson Jr.

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# NOTES

## STOP AND FRISK IN CALIFORNIA

The recent civil disturbances in several of the large cities in California and the periodic demands of some citizens to restore law and order to the streets has focused attention on some of the more routine activities of police officers. One of these activities is the stopping, detaining and occasional "frisking" of suspects under circumstances which would not justify the officer in making a technical arrest. This note will attempt to define the California law relating to these activities.

At common law and under early English statutes, the night watchman in a village could stop an unfamiliar person on the street and detain him until morning, at which time he would be arrested if a crime had been discovered or released if there were no further grounds for detention.<sup>1</sup> Thus, the doctrine which permits an officer to stop and detain a person on grounds less than those necessary to justify a technical arrest is not new.

More recently, several states, feeling the need for a modern rule which allows this type of temporary detention, have passed statutes which were intended to grant a police officer just such a power. For example, section 2 of the Uniform Arrest Act allows an officer to stop any person whom he reasonably suspects is committing, has committed, or is about to commit a crime, and under certain circumstances detain him up to two hours.<sup>2</sup> Also, section 3 allows the officer to conduct a search for weapons if he reasonably believes himself to be in danger.<sup>3</sup> The uniform act was adopted in New Hampshire<sup>4</sup> and Rhode Island<sup>5</sup> in 1941 and Delaware<sup>6</sup> in 1951. The New York legislature in 1964 passed a statute, commonly referred to as the Stop and Frisk Law, which is similar to these sections of the uniform act.<sup>7</sup> This statute also authorizes a temporary detention, or "stop," on grounds of "reasonable suspicion" and a "search" for weapons if the officer reasonably believes himself to be in danger.<sup>8</sup> The passage of this act produced a good deal of controversy, both as to the policy behind it and as to its constitutionality.<sup>9</sup> However, in July of 1966, the New York Court of Appeals upheld the statute in *People v. Peters*.<sup>10</sup>

<sup>1</sup> 2 HAWKINS, PLEAS OF THE CROWN 128-29 (8th ed. 1824).

<sup>2</sup> See Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315, 320-21 (1942).

<sup>3</sup> See *Id.* at 325.

<sup>4</sup> N.H. REV. STAT. ANN. §§ 594:1-23 (1955).

<sup>5</sup> R.I. GEN. LAWS ANN. §§ 12-7-1-17 (1956).

<sup>6</sup> DEL. CODE ANN. tit. 11, §§ 1901-12 (1953).

<sup>7</sup> N.Y. CODE CRIM. PROC. § 180-a (McKinney 1966 Supp.).

<sup>8</sup> The New York statute does not, however, provide for a two hour detention of the person stopped.

<sup>9</sup> See, e.g., Kuh, *Reflections on New York's "Stop and Frisk" Law and its Claimed Unconstitutionality*, 56 J. CRIM. L., C. & P.S. 32 (1965); Ronayne, *The Right to Investigate and New York's "Stop and Frisk" Law*, 33 FORDHAM L. REV. 211 (1964); Schoenfeld, *The "Stop and Frisk" Law is Unconstitutional*, 17 SYRACUSE L. REV. 627 (1966); Siegel, *The New York "Frisk" and "Knock-nol" Statutes: Are They Constitutional?*, 30 BROOKLYN L. REV. 274 (1964); 78 HARV. L. REV. 473 (1964); 38 ST. JOHN'S L. REV. 392 (1964).

<sup>10</sup> 18 N.Y.2d 238, 273 N.Y.S.2d 217, 219 N.E.2d 595 (1966). It is interesting to

The *Peters* court mentioned almost incidentally that other states, most notably California, had developed the same type of rule by judicial decision and without the benefit of a statute.<sup>11</sup> This reference to California law leads to an inquiry into what the California law is regarding the power of the police to stop and frisk on grounds less than those necessary to justify a full arrest.

### *Background*

It is not within the scope of this note to deal in any great detail with the constitutional problems involved in a stop and frisk rule,<sup>12</sup> but it would no doubt be of some value to review at least the broad constitutional outline within which any stop and frisk rule must operate.

Under the fourth amendment to the United States Constitution, which applies to the states through the due process clause of the Fourteenth Amendment,<sup>13</sup> and under similar provisions of various state constitutions,<sup>14</sup> a search in the absence of a warrant is legal only with the consent of the person searched,<sup>15</sup> or when incident to a lawful arrest.<sup>16</sup> Also, an officer may make an arrest without a warrant only when a crime has been committed in his presence,<sup>17</sup> or when he has probable cause to believe that the person arrested is guilty of a felony.<sup>18</sup> Thus, when an officer has no warrant, and the person has refused to consent, a search may be conducted only as incident to a legal arrest.

There would be no doubt that the New York statute or any court-made stop and frisk rule would be valid if it allowed the stop and the incidental frisk only on grounds sufficient to satisfy the constitutional requirement of probable cause to arrest. However, the theory behind any stop and frisk law is to allow a stop and a frisk on grounds considerably less than that of probable cause. The New York court upheld its statute by distinguishing between a "stop and frisk" on one hand and an "arrest and search" on the other.<sup>19</sup> A "stop" is only a brief detention for a short period of time,<sup>20</sup> and a "frisk" is merely a cursory search of the outer clothing.<sup>21</sup> Since a "stop and frisk" is something short of a full "arrest and search," it may be justified on the statutory requirement of "reasonable suspicion," i.e. grounds of less than full probable cause for an arrest.<sup>22</sup>

note that the New York court in *People v. Rivera*, 14 N.Y.2d 441, 252 N.Y.S.2d 458, 201 N.E.2d 32, *cert. denied*, 379 U.S. 978 (1964), had already virtually upheld the rule embodied in the statute before it had even taken effect.

<sup>11</sup> 18 N.Y.2d at 247, 273 N.Y.S.2d at 224-25, 219 N.E.2d at 600.

<sup>12</sup> Other writers have covered the constitutional problems. See note 9 *supra*.

<sup>13</sup> *Mapp v. Ohio*, 367 U.S. 643 (1961).

<sup>14</sup> See, e.g., CAL. CONST. art. 1, § 19.

<sup>15</sup> E.g., *Abel v. United States*, 362 U.S. 217, 241 (1959); *Campbell v. United States*, 151 F.2d 605 (6th Cir. 1945).

<sup>16</sup> E.g., *Harris v. United States*, 331 U.S. 145, 150-51 (1947); *Agnello v. United States*, 269 U.S. 20 (1925).

<sup>17</sup> E.g., *Marron v. United States*, 275 U.S. 192 (1927); *Papani v. United States*, 84 F.2d 160 (9th Cir. 1936) (dictum).

<sup>18</sup> E.g., *Carroll v. United States*, 267 U.S. 132 (1925); *Papani v. United States*, *supra* note 17 (dictum).

<sup>19</sup> *People v. Peters*, 18 N.Y.2d 238, 273 N.Y.S.2d 217, 219 N.E.2d 595 (1966).

<sup>20</sup> *Id.* at 244, 273 N.Y.S.2d at 222, 219 N.E.2d at 598.

<sup>21</sup> *Id.* at 245, 273 N.Y.S.2d at 223, 219 N.E.2d at 599.

<sup>22</sup> *Id.* at 246-47, 273 N.Y.S.2d 224, 219 N.E.2d at 600.

Given this constitutional background and the New York rationale, the details of the California court-adopted rule can be examined. For the purpose of analysis, the rule has been divided into two component parts: (1) the stop; and (2) the frisk.

### *The Stop*

The power of a police officer to temporarily detain a person on grounds of less than probable cause for an arrest was judicially recognized in California as early as 1908 in *Gisske v. Sanders*.<sup>23</sup> In that case the court said:

A police officer has a right to make inquiry in a proper manner of anyone upon the public streets at a late hour as to his identity and the occasion of his presence, if the surroundings are such as to indicate to a reasonable man that the public safety demands such identification.<sup>24</sup>

There were few cases until 1955, when the California Supreme Court held evidence obtained by an illegal search and seizure to be inadmissible.<sup>25</sup> Since 1955, the legality of temporary detentions has been the issue on appeal numerous times, but the most often quoted statement of the rule appeared in *People v. Ellsworth*:<sup>26</sup>

The courts of this state consistently have adhered to the proposition that a police officer may question a person outdoors at night when the circumstances are such as would indicate to a reasonable man in a like position that such a course is necessary to the discharge of his duties [citations].<sup>27</sup>

This seems to be the generally accepted statement of the rule,<sup>28</sup> although it has appeared in other cases with slightly different wording.<sup>29</sup>

This rule is so well established that the courts seldom bother to give detailed reasons for its existence. However, when it is discussed, the rationale usually given is that to allow the police to investigate on grounds of less than probable cause "strikes a balance between a person's interest in immunity from police interference and the community's interest in law enforcement."<sup>30</sup> The rule allows temporary detentions without relaxing the requirements necessary for a full arrest, and also in some cases it protects innocent persons from the embarrassment of an arrest when only an investigation is necessary.<sup>31</sup> However, underlying the rule seems to be a feeling on the part of the courts that without the ability to detain

<sup>23</sup> 9 Cal. App. 13, 98 Pac. 43 (1908).

<sup>24</sup> *Id.* at 16-17, 98 Pac. at 45.

<sup>25</sup> *People v. Cahan*, 44 Cal. 2d 434, 282 P.2d 905 (1955).

<sup>26</sup> 190 Cal. App. 2d 844, 12 Cal. Rptr. 433 (1961).

<sup>27</sup> *Id.* at 846, 12 Cal. Rptr. at 435.

<sup>28</sup> See, e.g., *People v. Currier*, 232 Cal. App. 2d 103, 106, 42 Cal. Rptr. 562, 564 (1965); *People v. Davis*, 222 Cal. App. 2d 75, 78, 34 Cal. Rptr. 796, 797 (1963); *People v. Hilliard*, 221 Cal. App. 2d 719, 723, 34 Cal. Rptr. 809, 811 (1963); *People v. Alcalá*, 204 Cal. App. 2d 15, 19, 22 Cal. Rptr. 31, 34, *cert. denied*, 371 U.S. 937 (1962); *People v. Beverly*, 200 Cal. App. 2d 119, 125, 19 Cal. Rptr. 67, 71 (1962); *People v. Porter*, 196 Cal. App. 2d 684, 686, 16 Cal. Rptr. 886, 887 (1961).

<sup>29</sup> See, e.g., *People v. Mickelson*, 59 Cal. 2d 448, 450, 30 Cal. Rptr. 18, 20, 380 P.2d 658, 660 (1963); *People v. Nichols*, 196 Cal. App. 2d 223, 228, 16 Cal. Rptr. 328, 331 (1961).

<sup>30</sup> *People v. Mickelson*, 59 Cal. 2d at 452, 30 Cal. Rptr. at 20, 380 P.2d at 660.

<sup>31</sup> *Ibid.*

persons legally for a reasonable time, the police duty of investigation would be seriously hampered, particularly in relation to the prevention of crime.<sup>32</sup>

As noted above, the most common statement of the rule provides that an officer may stop and question a person who is "outdoors at night."<sup>33</sup> From this it might be inferred that if the person detained were indoors or if the stop were made in the daytime, it would be illegal. However, this is not necessarily the case. It is true that most of the cases involve circumstances occurring "outdoors at night," but there is little hesitancy to extend the rule when circumstances require it.

There are cases where the stop was made in the daytime,<sup>34</sup> and in most of them the court failed to even discuss this fact. However, in *People v. One 1958 Chevrolet*,<sup>35</sup> the court held that under the facts of the case the time of day was immaterial, although it recognized that the rule is usually stated in terms of detentions at night.<sup>36</sup> The *Chevrolet* case involved highly suspicious circumstances,<sup>37</sup> and the court concluded that this was sufficient, even though it was not at night.

In *People v. Machel*,<sup>38</sup> the court dealt directly with the problem of whether the power to temporarily detain should be extended to stops made indoors and concluded that it should.<sup>39</sup> The court noted that indoor detentions often involve additional factual ingredients, such as whether the person detained is the owner of the property, a licensee, or an invitee.<sup>40</sup> The court also observed that the constitutional problem of invasion of privacy seems to be "sharpened" when the detention is indoors.<sup>41</sup> For these reasons, the *Machel* court refused to hold that the stop rule as applied outdoors is per se operative indoors, but rather that it only applies when the circumstances are sufficiently suspicious to overcome the fact that the person detained is indoors.<sup>42</sup>

Therefore, although it may be inferred from statements in several cases that the right to stop is only applicable outdoors and at night,<sup>43</sup> in practice the lack

<sup>32</sup> See, e.g., *People v. Blodgett*, 46 Cal. 2d 114, 293 P.2d 57 (1956); *People v. Martin*, 46 Cal. 2d 106, 293 P.2d 52 (1956); *People v. Simon*, 45 Cal. 2d 645, 290 P.2d 531 (1955); *People v. McVey*, 243 A.C.A. 215, 52 Cal. Rptr. 269 (1966); *People v. Machel*, 234 Cal. App. 2d 37, 44 Cal. Rptr. 126, cert. denied, 382 U.S. 839 (1965); *Gisske v. Sanders*, 9 Cal. App. 13, 98 Pac. 43 (1908).

<sup>33</sup> Note 26 *supra* and accompanying text.

<sup>34</sup> *People v. Martinez*, 228 Cal. App. 2d 739, 39 Cal. Rptr. 839 (1964); *People v. Davis*, 188 Cal. App. 2d 718, 10 Cal. Rptr. 610 (1961); *People v. One 1958 Chevrolet*, 179 Cal. App. 2d 604, 4 Cal. Rptr. 128 (1960); *People v. King*, 175 Cal. App. 2d 386, 346 P.2d 235 (1959).

<sup>35</sup> 179 Cal. App. 2d 604, 4 Cal. Rptr. 128 (1960).

<sup>36</sup> *Id.* at 611, 4 Cal. Rptr. at 133.

<sup>37</sup> The defendant was observed seated in a parked car at a spot where children from a nearby school crossed the street on their way home. It was almost time for the school to let out, and the officers had been sent specifically to investigate recent child molestations at that same place.

<sup>38</sup> 234 Cal. App. 2d 37, 44 Cal. Rptr. 126, cert. denied, 382 U.S. 839 (1965).

<sup>39</sup> *Id.* at 46, 44 Cal. Rptr. at 132. *Accord*, *People v. Cove*, 228 Cal. App. 2d 466, 39 Cal. Rptr. 535 (1964); *People v. Sanchez*, 191 Cal. App. 2d 783, 12 Cal. Rptr. 906 (1961).

<sup>40</sup> *People v. Machel*, *supra* note 39, at 44, 44 Cal. Rptr. at 131.

<sup>41</sup> *Ibid.*

<sup>42</sup> *Id.* at 46, 44 Cal. Rptr. at 132.

<sup>43</sup> Cases cited note 28 *supra* and accompanying text.

of either of these factors has apparently never been held to make the stop illegal. Furthermore, in theory there is no reason why it should. If the rationale behind the stop rule is to aid the police in their investigatory duties<sup>44</sup> and to strike a balance between the individual's right of privacy and the community's interest in police protection,<sup>45</sup> there seems to be no reason for arbitrarily confining the power to stop to situations occurring out-of-doors and at night. More logically, the time of day and the place of detention should be factors considered along with all the other circumstances in determining whether the officer had sufficient grounds to justify the stop. However, this has not been clearly stated in any case.<sup>46</sup>

Exactly what circumstances are sufficient to justify a temporary detention? There is no doubt that the stop rule is intended to apply, and does in fact apply, under circumstances short of those necessary to establish probable cause to arrest.<sup>47</sup> However, it is also obvious that an officer cannot be allowed to simply stop any person arbitrarily; there must be some suspicious circumstances.<sup>48</sup> The determination of whether a temporary detention is justified is made by the court, but each case must be decided in light of the facts and circumstances as they appeared to the officer at the time he made the stop.<sup>49</sup> In practice the rule has been applied in varying fact situations ranging from highly suspicious<sup>50</sup> to only slightly suspicious,<sup>51</sup> but in every case there are some extraordinary or unusual circumstances which the court uses to justify the detention.

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<sup>44</sup> See cases cited note 32 *supra*.

<sup>45</sup> See cases cited note 30 *supra*.

<sup>46</sup> However, in *People v. One 1960 Cadillac Coupe*, 62 Cal. 2d 92, 41 Cal. Rptr. 290, 396 P.2d 706 (1964) the supreme court, in dictum, stated the rule without mentioning either factor, although the stop was made in the afternoon.

<sup>47</sup> This has been expressly stated in several cases; e.g., *People v. Mickelson*, 59 Cal. 2d 448, 450, 30 Cal. Rptr. 18, 20, 380 P.2d 658, 660 (1963); *People v. Rogers*, 241 A.C.A. 478, 481, 50 Cal. Rptr. 559, 560 (1966); *People v. Hanamoto*, 234 Cal. App. 2d 6, 11, 44 Cal. Rptr. 153, 157 (1965); *People v. Mosco*, 214 Cal. App. 2d 581, 584-85, 29 Cal. Rptr. 644, 646 (1963).

<sup>48</sup> *People v. One 1960 Cadillac Coupe*, 62 Cal. 2d 92, 41 Cal. Rptr. 290, 396 P.2d 706 (1964); *People v. Cowman*, 223 Cal. App. 2d 109, 35 Cal. Rptr. 528 (1963); *Hood v. Superior Court*, 220 Cal. App. 2d 242, 33 Cal. Rptr. 782 (1963); *People v. Schraier*, 141 Cal. App. 2d 600, 297 P.2d 81 (1956).

<sup>49</sup> *People v. Simon*, 45 Cal. 2d 645, 290 P.2d 531 (1955); *People v. Hilliard*, 221 Cal. App. 2d 719, 34 Cal. Rptr. 809 (1963); *People v. Evans*, 175 Cal. App. 2d 274, 345 P.2d 947 (1959); *People v. Wiley*, 162 Cal. App. 2d 836, 328 P.2d 823 (1958).

<sup>50</sup> In *People v. Lovio*, 222 Cal. App. 2d 79, 34 Cal. Rptr. 747 (1963) persons standing around a car at 4 a.m. ran in different directions when a police car shined its headlights on them. See also, *People v. Rogers*, 241 A.C.A. 478, 50 Cal. Rptr. 559 (1966); *People v. Ruhman*, 224 Cal. App. 2d 284, 36 Cal. Rptr. 493 (1964); *People v. Beverly*, 200 Cal. App. 2d 119, 19 Cal. Rptr. 67 (1962); *People v. Nichols*, 196 Cal. App. 2d 223, 16 Cal. Rptr. 328 (1961); *People v. Lewis*, 187 Cal. App. 2d 373, 9 Cal. Rptr. 659 (1960).

<sup>51</sup> In *People v. Porter*, 196 Cal. App. 2d 684, 16 Cal. Rptr. 886 (1961) the defendant was observed driving alone at 3 a.m., then about twenty-five minutes later, driving in the opposite direction with a passenger. See also, *People v. Blodgett*, 46 Cal. 2d 114, 293 P.2d 57 (1956); *People v. Davis*, 222 Cal. App. 2d 75, 34 Cal. Rptr. 796 (1963); *People v. Gibson*, 220 Cal. App. 2d 15, 33 Cal. Rptr. 775 (1963); *People v. Anguano*, 198 Cal. App. 2d 426, 18 Cal. Rptr. 132 (1961); *People v. Davis*, 188 Cal. App. 2d 718, 10 Cal. Rptr. 610 (1961).

In certain recurring fact situations, the courts are more inclined to find sufficient justification for a temporary detention. For example, if officers observe persons sitting in a parked car late at night, this circumstance alone seems to be considered sufficient grounds to justify an investigation.<sup>52</sup>

The courts are also inclined to justify a temporary detention where some prior knowledge of the officer makes ordinary circumstances seem sufficiently suspicious. For example, temporary detentions have been upheld: where officers are in the process of investigating a recently committed crime;<sup>53</sup> where officers have received a "tip" that a crime is being committed;<sup>54</sup> where officers have recognized a person as a prior offender;<sup>55</sup> and where the defendant is seen frequenting premises under surveillance for suspected criminal activity.<sup>56</sup> Unlike the cases involving persons in parked cars at night, these factors alone do not seem to be considered sufficient,<sup>57</sup> but they do lend weight to the conclusion that there were sufficient grounds for a temporary detention.<sup>58</sup>

To summarize, the California courts have adopted a fairly broad rule allowing temporary detention by police officers on grounds of less than probable cause to arrest. Although an officer may not detain a person arbitrarily, he has the power to stop a suspect when the circumstances are such that a reasonable man would believe an investigation is necessary to the proper discharge of the officer's duty. This standard of "proper discharge of duty" would seem to require less proof than that imposed by the New York Stop and Frisk statute,<sup>59</sup> which allows a stop only where reasonable suspicion exists that the person is committing, has committed, or is about to commit a felony or specified misdemeanor. Also, the California police officer apparently is not limited in the exercise of this power to detentions out of doors at night,<sup>60</sup> so long as the circumstances are still sufficiently suspicious to justify the stop.

<sup>52</sup> *E.g.*, *People v. Martin*, 46 Cal. 2d 106, 293 P.2d 52 (1956); *People v. McGlory*, 226 Cal. App. 2d 762, 32 Cal. Rptr. 373 (1964); *People v. Mosco*, 214 Cal. App. 2d 581, 29 Cal. Rptr. 644 (1963); *People v. Ellsworth*, 190 Cal. App. 2d 844, 12 Cal. Rptr. 433 (1961); *People v. Murphy*, 173 Cal. App. 2d 367, 343 P.2d 273 (1959). This is particularly true in a "lover's lane" area, *People v. Martin, supra*; *People v. Ellsworth, supra*.

<sup>53</sup> *People v. Garrett*, 238 Cal. App. 2d 324, 47 Cal. Rptr. 731 (1965); *People v. Hanamoto*, 234 Cal. App. 2d 6, 44 Cal. Rptr. 153 (1965); *People v. Gibson*, 220 Cal. App. 2d 15, 33 Cal. Rptr. 775 (1963); *People v. McLame*, 204 Cal. App. 2d 96, 22 Cal. Rptr. 72 (1962); *People v. King*, 175 Cal. App. 2d 386, 346 P.2d 235 (1959).

<sup>54</sup> *People v. Currier*, 232 Cal. App. 2d 103, 42 Cal. Rptr. 562 (1965); *People v. Anushevitz*, 183 Cal. App. 2d 752, 6 Cal. Rptr. 785 (1960).

<sup>55</sup> *People v. Williams*, 220 Cal. App. 2d 108, 33 Cal. Rptr. 765 (1963); *People v. Sanchez*, 191 Cal. App. 2d 783, 12 Cal. Rptr. 906 (1961).

<sup>56</sup> *People v. Martinez*, 228 Cal. App. 2d 739, 39 Cal. Rptr. 839 (1964); *People v. Davis*, 188 Cal. App. 2d 718, 10 Cal. Rptr. 610 (1961).

<sup>57</sup> In *People v. Schraier*, 141 Cal. App. 2d 600, 297 P.2d 81 (1956) the court said that the mere fact that the defendant visited a house under surveillance was not enough to justify the officer's actions.

<sup>58</sup> A combination of two or more of these factors has been held sufficient to justify a detention. *People v. Currier*, 232 Cal. App. 2d 103, 42 Cal. Rptr. 562 (1965) (anonymous tip and recognition as prior offender).

<sup>59</sup> N.Y. CODE CRIM. PROC. § 180-a (McKinney 1966 Supp.).

<sup>60</sup> The New York statute states that an officer may only stop persons "abroad in a public place." N.Y. CODE CRIM. PROC. § 180-a (McKinney 1966 Supp.).

### *The Frisk*

Once the power to stop has been justified, the California courts do not hesitate to declare that the officer has the right to make some sort of incidental search.<sup>61</sup> The first problem encountered in attempting to state the "frisk" rule is a semantic one. Many of the cases refer merely to the power to "search" as incident to a stop.<sup>62</sup> The use of this term throws serious doubt on the validity of the rule since a full "search" is only justifiable as incident to a legal arrest.<sup>63</sup> The stop rule, by definition, applies in situations falling short of those necessary to justify an arrest; therefore the courts should use some different term in referring to the type of search permissible as incident to a temporary detention, or "stop." Recent decisions seem to have recognized this, and terms such as "superficial search,"<sup>64</sup> "cursory search,"<sup>65</sup> and "patting down"<sup>66</sup> have frequently been used.

The reason for allowing the police officer to frisk a person whom he has stopped is usually stated in terms of the need to balance the individual's right to be free from police interference and the police officer's interest in self protection.<sup>67</sup>

We cannot believe that any citizen who might be subjected to this minor indignity during a police investigation resulting from his unusual conduct would ever seriously seek to equate this limited invasion of his privacy and the need of law enforcement officers to protect themselves from the unexpected murderous assaults that regrettably occur all too frequently during the performance of their duties.<sup>68</sup>

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<sup>61</sup> *People v. Garrett*, 238 Cal. App. 2d 324, 47 Cal. Rptr. 731 (1965); *People v. Machel*, 234 Cal. App. 2d 37, 44 Cal. Rptr. 126, *cert. denied*, 382 U.S. 839 (1965); *People v. Martinez*, 228 Cal. App. 2d 245, 39 Cal. Rptr. 526 (1964); *People v. Koelzer*, 222 Cal. App. 2d 20, 34 Cal. Rptr. 718 (1963); *People v. Gibson*, 220 Cal. App. 2d 15, 33 Cal. Rptr. 775 (1963); *People v. Lewis*, 187 Cal. App. 2d 373, 9 Cal. Rptr. 659 (1960); *People v. One 1958 Chevrolet*, 179 Cal. App. 2d 604, 4 Cal. Rptr. 128 (1960); *People v. Jones*, 176 Cal. App. 2d 265, 1 Cal. Rptr. 210 (1959). There are numerous other cases in which the statement is dictum either because there was no frisk or because the frisk did not reveal anything that was later admitted into evidence. *E.g.*, *People v. Mickelson*, 59 Cal. 2d 448, 30 Cal. Rptr. 18, 380 P.2d 658 (1963); *People v. Martin*, 46 Cal. 2d 106, 293 P.2d 52 (1956).

<sup>62</sup> *E.g.*, *People v. Martin*, 46 Cal. 2d 106, 293 P.2d 52 (1956); *People v. Jimenez*, 143 Cal. App. 2d 671, 300 P.2d 68 (1956); *Gisske v. Sanders*, 9 Cal. App. 13, 98 Pac. 43 (1908). The New York statute also uses the term "search." N.Y. CODE CRIM. PROC. § 180-a (McKinney 1966 Supp.).

<sup>63</sup> Cases cited note 16 *supra*.

<sup>64</sup> *E.g.*, *People v. Mickelson*, 59 Cal. 2d 448, 450, 30 Cal. Rptr. 18, 20, 380 P.2d 658, 660 (1963).

<sup>65</sup> *E.g.*, *People v. Martinez*, 228 Cal. App. 2d 245, 247, 39 Cal. Rptr. 526, 528 (1964).

<sup>66</sup> *E.g.*, *People v. Garrett*, 238 Cal. App. 2d 324, 325, 47 Cal. Rptr. 731, 732 (1965).

<sup>67</sup> *E.g.*, *People v. Garrett*, *supra* note 66, at 327, 47 Cal. Rptr. at 733; *People v. Koelzer*, 222 Cal. App. 2d 20, 27, 34 Cal. Rptr. 718, 722 (1963); *People v. One 1958 Chevrolet*, 179 Cal. App. 2d 604, 611, 4 Cal. Rptr. 128, 133 (1960); *People v. Mickelson*, 59 Cal. 2d 448, 450, 30 Cal. Rptr. 18, 20, 380 P.2d 658, 660 (1963) (dictum); *People v. Randal*, 226 Cal. App. 2d 105, 108, 37 Cal. Rptr. 809, 812 (1964) (dictum).

<sup>68</sup> *People v. Randal*, 226 Cal. App. 2d 105, 108, 37 Cal. Rptr. 809, 812, (1964) (dictum).

The frisk rule in California is stated by the supreme court in *People v. Mickelson*:<sup>69</sup>

If the circumstances warrant it, [the officer] may in self-protection request a suspect to alight from an automobile or to submit to a superficial search for concealed weapons.<sup>70</sup>

This statement is similar to the rule set forth in the New York Stop and Frisk Law<sup>71</sup> and is consistent with its theoretical basis: the self-protection of the officer. The problem, however, is that the California District Courts of Appeal have had difficulty applying it with consistency.

For example, the *Mickelson* court said that an officer may frisk only when "circumstances warrant it."<sup>72</sup> This raises the query of whether there must be some circumstances, in addition to those sufficient to justify the stop, which indicate danger to the officer before he may frisk. However, there are apparently no cases in which a court has held a frisk to be illegal (or even indicated in dictum that one would be illegal) on the ground that the officer had no reason to suspect that he was in any way in danger. In fact, several courts refer to the frisk as a "routine weapons search."<sup>73</sup> This leads to the conclusion that many officers frisk, as a matter of routine, any person stopped and indicates that in practice the courts consider the rule to be somewhat broader than that stated in *Mickelson*. Apparently any time an officer is confronted with circumstances sufficient to justify stopping a person, these circumstances are also sufficient to justify a frisk.<sup>74</sup> It should be noted, however, that this has apparently never been expressly stated by a court and does not preclude the possibility that in an unusual case an officer might not be justified in frisking a person even though he would be justified in stopping him.

The most difficult problem encountered in the frisk cases is the permissible extent of the search. In this area the California cases reflect considerable confusion.<sup>75</sup> Since a full search is justified only as incident to a legal arrest,<sup>76</sup> a frisk

<sup>69</sup> 59 Cal. 2d 448, 30 Cal. Rptr. 18, 380 P.2d 658 (1963) (dictum). There are similar statements in other cases. E.g., *People v. Jones*, 176 Cal. App. 2d 265, 1 Cal. Rptr. 210 (1959); *People v. Simon*, 45 Cal. 2d 645, 290 P.2d 531 (1955) (dictum).

<sup>70</sup> 59 Cal. 2d at 450, 30 Cal. Rptr. at 20, 380 P.2d at 660 (dictum). As noted in this quotation, the California courts have broadened their frisk rule to apply to situations where an officer orders persons out of a stopped car. E.g., *People v. Blodgett*, 46 Cal. 2d 114, 293 P.2d 57 (1956); *People v. Martin*, 46 Cal. 2d 106, 293 P.2d 52 (1956); *People v. Martinez*, 228 Cal. App. 2d 739, 39 Cal. Rptr. 839 (1964) (dictum); *People v. Davis*, 222 Cal. App. 2d 75, 34 Cal. Rptr. 796 (1963); *People v. Jimenez*, 143 Cal. App. 2d 671, 300 P.2d 68 (1956). However in *People v. Davis*, 188 Cal. App. 2d 718, 10 Cal. Rptr. 610 (1961) the officer did not order the persons out of the car, but rather to "keep your hands in sight" and then opened the car door.

<sup>71</sup> N.Y. CODE CRIM. PROC. § 180-a (McKinney 1966 Supp.).

<sup>72</sup> 59 Cal. 2d 448, 450, 30 Cal. Rptr. 18, 20, 380 P.2d 658, 660 (1963) (dictum).

<sup>73</sup> E.g., *People v. Garrett*, 238 Cal. App. 2d 324, 325, 47 Cal. Rptr. 731, 732 (1965); *People v. One 1958 Chevrolet*, 179 Cal. App. 2d 604, 607, 4 Cal. Rptr. 128, 131 (1960).<sup>1</sup>

<sup>74</sup> See, e.g., *People v. Machel*, 234 Cal. App. 2d 37, 44 Cal. Rptr. 126, cert. denied, 382 U.S. 839 (1965); *People v. McGlory*, 226 Cal. App. 2d 762, 32 Cal. Rptr. 373 (1964); *People v. Martinez*, 228 Cal. App. 2d 245, 39 Cal. Rptr. 526 (1964) (dictum).

<sup>75</sup> Compare *People v. Martinez*, 228 Cal. App. 2d 245, 39 Cal. Rptr. 526 (1964), with *People v. One 1958 Chevrolet*, 179 Cal. App. 2d 604, 4 Cal. Rptr. 128 (1960).

as incidental to a stop should be defined by the courts as something less than a full search.<sup>77</sup> However, many of the California cases have failed to make this distinction, and apparently several have allowed rather extensive searches without a showing of probable cause to arrest.<sup>78</sup>

The courts should keep in mind that the power to frisk is granted to the officer primarily as a means of self-protection,<sup>79</sup> not for obtaining evidence. Of course, if the officer discovers contraband while conducting a *legal* frisk he is not required to ignore it<sup>80</sup> since he then has probable cause to arrest because the person is committing an offense in his presence. The difficult problem is determining what constitutes a *legal* frisk.

The prevailing rule seems to be that on grounds of less than probable cause to arrest, an officer may only run his hands over (or pat down) the suspect's outer clothing,<sup>81</sup> and without additional grounds he may not conduct a more extensive search,<sup>82</sup> such as reaching into the suspect's pockets or inside his coat. Similarly, he may order suspects out of a car, but he may not search it without probable cause.<sup>83</sup>

This interpretation of the rule, although not expressly stated by the courts, is specific enough to give the officer a fairly clear idea of how far he may extend the frisk and at the same time distinguishes the frisk from a full search. This rule also satisfies the need for protection of the officer from surprise attack. Furthermore, although the officer may not make a complete search originally, facts arising during the frisk, or as a result of the frisk, may, under the circumstances, constitute probable cause to arrest. This in turn would justify a more extensive

<sup>76</sup> Cases cited note 16 *supra*.

<sup>77</sup> This is the approach of the New York courts. *People v. Peters*, 18 N.Y.2d 238, 273 N.Y.S.2d 217, 219 N.E.2d 595 (1966); *People v. Rivera*, 14 N.Y.2d 441, 252 N.Y.S.2d 453, 201 N.E.2d 32, *cert. denied*, 379 U.S. 978 (1964).

<sup>78</sup> See, e.g., *People v. Koelzer*, 222 Cal. App. 2d 20, 34 Cal. Rptr. 718 (1963); *People v. One 1958 Chevrolet*, 179 Cal. App. 2d 604, 4 Cal. Rptr. 128 (1960); *People v. Gibson*, 220 Cal. App. 2d 15, 33 Cal. Rptr. 775 (1963) (*dictum*). There may be doubts as to the constitutionality of the searches allowed in these cases. However, there are California cases which do make the distinction between a search as incidental to an arrest and a frisk as incidental to a stop. See, e.g., *People v. Garrett*, 238 Cal. App. 2d 324, 47 Cal. Rptr. 731 (1965); *People v. Machel*, 234 Cal. App. 2d 37, 44 Cal. Rptr. 126, *cert. denied*, 382 U.S. 839 (1965); *People v. Martines*, 228 Cal. App. 2d 245, 39 Cal. Rptr. 526 (1964); *People v. Lewis*, 187 Cal. App. 2d 373, 9 Cal. Rptr. 659 (1960); *People v. Jones*, 176 Cal. App. 2d 265, 1 Cal. Rptr. 210 (1959).

<sup>79</sup> See cases cited note 67 *supra*.

<sup>80</sup> See, e.g., *People v. Blodgett*, 46 Cal. 2d 114, 293 P.2d 57 (1956); *People v. Martin*, 46 Cal. 2d 106, 293 P.2d 52 (1956); *People v. Garrett*, 238 Cal. App. 2d 324, 47 Cal. Rptr. 731 (1965); *People v. McGlory*, 226 Cal. App. 2d 762, 32 Cal. Rptr. 373 (1964).

<sup>81</sup> E.g., *People v. Martines*, 228 Cal. App. 2d 245, 39 Cal. Rptr. 526 (1964); *People v. Jones*, 176 Cal. App. 2d 265, 1 Cal. Rptr. 210 (1959); *People v. Simon*, 45 Cal. 2d 645, 290 P.2d 531 (1955) (*dictum*).

<sup>82</sup> *People v. Machel*, 234 Cal. App. 2d 37, 44 Cal. Rptr. 126, *cert. denied*, 382 U.S. 839 (1965); *People v. Martines*, 228 Cal. App. 2d 245, 39 Cal. Rptr. 526 (1964). See *People v. Lewis*, 187 Cal. App. 2d 373, 9 Cal. Rptr. 659 (1960); *People v. Jones*, 176 Cal. App. 2d 265, 1 Cal. Rptr. 210 (1959).

<sup>83</sup> *People v. Mickelson*, 59 Cal. 2d 448, 30 Cal. Rptr. 18, 380 P.2d 658 (1963). See *People v. Jimenez*, 143 Cal. App. 2d 671, 300 P.2d 68 (1956).

search, such as reaching into pockets.<sup>84</sup> For example, if the officer, after stopping the person under sufficiently suspicious circumstances, conducts a frisk and feels what he reasonably believes to be a revolver in the suspect's pocket, this would constitute probable cause to arrest for possession of a concealed weapon, and the officer could then make a full search.<sup>85</sup> Anything found as a result of this search would be admissible as evidence.<sup>86</sup> However, in each case it must appear to the court that there were sufficient grounds to constitute probable cause to arrest at the time the officer made the more extensive search.<sup>87</sup>

Unfortunately, the frisk rule is not clearly set out in any case, and as previously pointed out there are several cases that allow what seems to be a full search as incident to the temporary detention.<sup>88</sup> The need for clarification by the supreme court is apparent.

To summarize, the California courts have adopted a fairly broad frisk rule. The New York Stop and Frisk Law authorizes a frisk only when the officer reasonably suspects that he is in danger.<sup>89</sup> This implies that there must be some grounds in addition to those required to make the stop. In California, however, the courts seem to conclude that an officer is justified in frisking any person if the officer has sufficient grounds to stop him in the first place. The frisk is fairly limited in scope; it appears that most courts will only allow the officer to run his hands over the suspect's outer clothing,<sup>90</sup> although there apparently is a split of authority since some courts allow a more extensive search.

<sup>84</sup> *People v. Lewis*, 187 Cal. App. 2d 373, 9 Cal. Rptr. 659 (1960); *People v. Machel*, 234 Cal. App. 2d 37, 44 Cal. Rptr. 126, *cert. denied*, 382 U.S. 839 (1965) (dictum); *People v. Martines*, 228 Cal. App. 2d 245, 39 Cal. Rptr. 526 (1964) (dictum). See *People v. Jones*, 176 Cal. App. 2d 265, 1 Cal. Rptr. 210 (1959).

<sup>85</sup> If probable cause exists, an officer is justified in making a search at that time. It is not necessary for the formal arrest to precede the search. *People v. Torres*, 56 Cal. 2d 864, 17 Cal. Rptr. 495, 366 P.2d 823, *cert. denied*, 369 U.S. 838 (1961); *People v. Hammond*, 54 Cal. 2d 846, 9 Cal. Rptr. 233, 357 P.2d 289 (1960).

<sup>86</sup> A full search may be justified even though the officer when conducting a frisk does not feel what appears to be a weapon. For example in *People v. Machel*, 234 Cal. App. 2d 37, 44 Cal. Rptr. 126, *cert. denied*, 382 U.S. 839 (1965) an officer during a narcotic investigation stopped the defendant, whom he knew to be a narcotic user. Upon frisking, the officer felt what appeared to be a single cigarette in the defendant's pants pocket. The defendant became extremely nervous and the officer removed a marijuana cigarette. The court concluded that in light of the circumstances, the officer, when he felt the cigarette, then had probable cause to believe that it was marijuana and thus was justified in making a more extensive search. See also *People v. Garrett*, 238 Cal. App. 2d 324, 47 Cal. Rptr. 731 (1965).

<sup>87</sup> In *People v. Martines*, 228 Cal. App. 2d 245, 39 Cal. Rptr. 526 (1964) an officer patrolling a "high frequency burglary area" late at night stopped the defendant in an unlighted alley. Upon frisking the defendant, he felt a small hard object in the defendant's pocket. He reached into the pocket and removed a small combination nail file-pocket knife and a package containing marijuana cigarettes. The conviction of possession of marijuana was reversed, the court finding that the officer did not have sufficient grounds to justify reaching into the pocket.

<sup>88</sup> See note 78 *supra*.

<sup>89</sup> N.Y. CODE CRIM. PROC. § 180-a (McKinney 1966 Supp.).

<sup>90</sup> This seems to be the approach that will be adopted under the New York statute cited note 89 *supra* although at the present time there are not sufficient cases to draw a