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All Along the Watchtower: Arbitrary Detention and the Police Function

ALL ALONG THE WATCHTOWER: ARBITRARY DETENTION AND THE POLICE FUNCTION©

BY ALAN YOUNG*

I. INTRODUCTION

Next to execution, the power to detain individuals is the most invasive power that the state possesses. A deprivation of liberty is non-compensable and unjust deprivations shatter our tenuous sense of autonomy and self-determination. Certain forms of detention, such as post-conviction imprisonment and pre-conviction arrest, have gained acceptance and legitimacy. But these

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forms do not exhaust the coercive arsenal of the state. Although the Canadian state, by design or fortuity, has not been plagued by institutionalized official abduction and dragnet detention of political dissidents, the state does possess a mechanism for wide-scale detention. In the name of law enforcement, we have given officials wide powers to restrict and suspend the liberty of individuals.

The common law wisdom proclaims that the state is not permitted to detain individuals against their will save and except for a proper arrest that is premised upon reasonable and probable grounds of criminal activity. This wisdom is reflected in, and strengthened by, the guarantee against arbitrary detention in the *Canadian Charter of Rights and Freedoms.*[1] Nonetheless, it is naive to believe that the state will restrict itself only to such non-invasive investigative procedures until such time as it acquires the requisite grounds to effect a proper arrest. Of necessity, the state will employ liberty-restraining practices of low visibility that manage to escape public and judicial scrutiny. In particular, the practice of brief investigative detention is carried out on a daily basis with little or no accountability. The police power to restrain liberty when the requisite grounds to effect an arrest are lacking is not a power that is recognized or accepted in the common law world; however, investigative detention is part and parcel of the routine activities of all police forces.

On 1 May 1986, Rene Grafe was stopped by the police while walking on a street in downtown Kitchener because one officer felt that there was "something not quite kosher."[2] When requested to provide proper identification, the suspect gave the officers the name and address of his brother in order to prevent the discovery of the existence of a warrant that had been issued with respect to an unpaid fine. Later in the evening, the officers discovered the misidentification and charged Rene Grafe with fraudulent personation. In his defence, Grafe invoked the *Charter*;[3] however,

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[1] Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

[2] *R.* v. *Grafe* (1987), 22 O.A.C. 280 at 281 (C.A.) [hereinafter *Grafe*].

[3] In particular, Mr. Grafe claimed that his liberty had been deprived in a manner not in accord with the principles of fundamental justice, section 7, and that he had been arbitrarily

the Court of Appeal summarily dismissed this claim because the interaction with the police did not amount to the type of detention that triggers the protection of various *Charter* rights:

> The *Charter* does not seek to insulate all members of society from all contact with constituted authority, no matter how trivial the contact may be. When one considers the full range of contacts in modern society between state and citizen that which took place between the respondent and Constables Kalan and Waite on the first occasion, cannot be characterized otherwise than as innocuous. Its occurrence was not an invasion of any of the respondent's *Charter* rights.[4]

Although this case may have reached the correct result, one must recognize that the decision to insulate this police-citizen interaction from *Charter* scrutiny masks a number of critical questions. First, on what basis and for what reasons did the police decide to intrude? Was Grafe stopped because of his racial characteristics? Or was he stopped because of his youth or his perceived membership in a certain socio-economic class? Secondly, assuming that the stop was undertaken on the basis of neutral criteria, under what authority were the police acting? Did the police have the authority to insist that Grafe remain present during their questioning? Would Grafe have been permitted to refuse identifying himself without attracting further legal sanction?

A clear and principled basis for the exercise of state authority must be established in light of the fact that "street encounters between citizens and police officers are incredibly rich in diversity."[5] If the legislature continues to disregard the questions that arise out of these encounters, then it is incumbent upon the courts to structure the citizen-police relationship through its interpretation of the words "arbitrary detention." At the heart of the concept of arbitrary detention of any kind is the notion that state officials should not be able to exercise full unbridled discretion in their decisions to suspend liberty. Justice La Forest recently had occasion to comment upon the dangers of low-visibility grants of discretionary power:

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detained, section 9.

[4] *Supra*, note 2 at 286.

[5] *Terry* v. *Ohio* 392 U.S. 1 at 13 (1968) [hereinafter *Terry*].

> There is another cause for concern in granting such a vague discretion. It is unlikely to be used as much against the economically favoured or powerful as against the disadvantaged. As Professor Paul Weiler has stated, "abuses of police power will rarely affect respectable members of the middle classes," but will instead "focus upon the poor and on the marginal, minority groups."[6]

Discretion is the hallmark of individualized justice but it contains the seeds of an inequity. All too often discretion is exercised in a manner not consonant with the goals and spirit of valid legislative objectives. The legitimate goal of protecting national security became a form of juridical genocide for Japanese-Canadians during the second world war.[7] The legitimate goal of law enforcement could easily become a form of autocratic harassment of minority groups. Legal control quickly becomes a more all-embracing form of social control when official discretion is left unmonitored. People who are surprised at the increasing racial tension being exposed in Canadian society[8] have failed to realize that "police are formative actors in the determination of national character."[9]

This paper will explore some of the broader questions raised by investigative detention. To this end we will detail current approaches to investigative detention, as employed in Canada and other jurisdictions, with a view to establishing a principled approach to the right to be free from arbitrary detention. In Part II of the paper we will explore the Canadian experience with judicial regulation of police powers of detention. In a nutshell, it is submitted that the judiciary has been powerlessly ineffective in providing a principled boundary for the exercise of this power. The judiciary cannot regulate a power they claim does not exist. In Part

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[6] *R.* v. *Landry* (1986), 25 C.C.C. (3d) 1 at 30 (S.C.C.).

[7] In 1988, the Government of Canada agreed to award $291 million to Japanese Canadians wrongfully incarcerated during the war. See W. Walker, "Japanese Canadians Win Apology to 'Cleanse Past'" *The Toronto Star* (23 September 1988) 1.

[8] See R. James & L. Papp, "Passions Flare as Blacks, Police Confront Racism" *The Toronto Star*, (15 January 1989) 1; R. James, "Police Tally of 'Crimes by Blacks' Draws Fire" *The Toronto Star* (17 February 1989) 1; and A. Story & J. Byer, "Stop Collecting Race Statistics Police Told" *The Toronto Star* (18 February 1989) 1.

[9] D.H. Bayley, *Patterns of Policing: A Comparative International Perspective* (New Brunswick, N.J.: Rutgers University Press, 1985) at 198.

III of the paper, the claim will be advanced that investigative detention is a legitimate police power, and that efforts must be made to ensure that this power does not blossom into a form of panoptic surveillance. This can only be achieved if the police are properly trained and instructed to exercise the power of brief, investigative detention in response to suspicious indicia of criminal activity that is not based upon the personal characteristics of the targeted individual.

Freedom from arbitrary detention should mean more than protection from official caprice because the notion of capricious state action is far too underinclusive to capture the real dangers presented by detention for investigatory purposes. State intrusion in the name of law enforcement has a tendency to expand into social control of groups perceived to be deviant or marginalized. It has been noted that "the history of street powers ... demonstrates that the traditional practices of law enforcement on the streets have had very little connection with crime *per se* and a great deal to do with social control of the urban populace."[10] The freedom from arbitrary detention in section 9 of the *Charter* must be construed so as to account for this potential danger. Without a proper animating distinction between social control and law enforcement, the right found in section 9 will only be applied to the most egregious examples of unjustified intrusion. Meanwhile the daily interactions between state and citizen will be left to the unmonitored and unreviewable discretion of law enforcement officials. The history of policing has revealed a slow and gradual increase in state powers of intrusion but this increase has not been accompanied by legislative attempts to regulate these powers.

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[10] M. Brogden, "Stopping the People – Crime Control Versus Social Control" in J. Baxter & L. Koffman, eds, *Police: The Constitution and the Community* (Abingdon, England: Professional Books, 1985) at 106.

II. POLICE POWERS OF DETENTION IN CANADA

A. *The Police Function*

The evolution of the police function in society displays a constant shifting of emphasis amongst various objectives. The police serve the community through three interrelated objectives: law enforcement, peace-keeping or order maintenance, and social services.[11] In contemporary times, the law enforcement function of the police has been the most emphasized, even though it may not consume most of the police's time.[12] Attempting to foster an image of professional specialization, the police have created an image of the expert crime-fighter, and have downplayed the significant time and expense invested in their more mundane service functions. Despite the public's willing acceptance of the image of the police as skilled investigators armed with a wide array of forensic tests, it is far more likely that members of the public will interact with the police when these officials are carrying out their peace-keeping or service functions.

Virtually all members of the public have had some encounter with the police in the context of the peace-keeping task of highway management. While many may feel inconvenienced in being stopped, most accept this intrusion as part of the scheme of licensing accompanying the use of automobiles. A more contentious encounter between police and members of the public is the questioning of persons on the streets or in their homes. This form of encounter may be premised upon the police function of law enforcement or of peace-keeping and, despite an individual's desire to cooperate with the police, the individual may be disturbed by the encounter because he or she does not know why the questioning is taking place.

Historically, the office of constable strongly emphasized a peace-keeping function and, to that end, public officials were

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[11] S. Cohen, "Invasion of Privacy: Police and Electronic Surveillance in Canada" (1982) 27 McGill L.J. 619 at 620-25; also see Bayley, *supra*, note 9 at 103-59.

[12] R. Ericson, *Reproducing Order: A Study of Police Patrol Work* (Toronto: University of Toronto Press, 1982) at 5.

empowered to stop and question any suspicious person.[13] Throughout the history of the common law, statutes had "empowered the night-watch of each town to detain suspicious night-walkers until the morning at which time the watchman would either release the suspect or arrest him if grounds for arrest were discovered."[14] These peace-keeping powers never generated much controversy; however, it must be remembered that prior to 1830 policing in England was largely a private or collective function.[15]

Until the creation of a public police force in England in 1830, the "apparently unshakable British dogma that police spelt tyranny"[16] was a simple reflection of the fact that the first official police force created in Europe in the seventeenth century was seen as a continental spy system. The police in France employed extensive surveillance as a mechanism for order maintenance and the common perspective was that "in France the citizen is free to do what he likes — under police supervision."[17] The advocates of a public police force in Britain had to reassure their opponents that the British institution would not be involved in constant surveillance, infiltration, identity requests, and regulation of all aspects of citizens' lives.

The pledge to avert tyrannical public policing was to be secured by the rule of law. Legal control of policing was an attractive alternative to the highly-centralized and politicized French police because "Englishmen had long maintained faith in the rule of

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[13] L. Stern, "Stop and Frisk: An Historical Answer to a Modern Problem" (1967) 58 J. Crim. L.C. & P.S. 532; and M. Brogden & A. Brogden, "From Henry III to Liverpool 8: The Unity of Police Street Powers" (1984) 12 Int. J. Soc. L. 3

[14] Stern, *ibid.* at 532.

[15] Police as an institutionalized, state organization did not exist prior to 1830. Initially, policing was undertaken as a community response and then as a matter of private initiative: S. Spitzer & A. Scull, "Social Control in Historical Perspective: From Private to Public Responses to Crime" in D.F. Greenberg, ed., *Corrections and Punishment* (Beverley Hills, Calif.: Sage Publications, 1977). With the creation of a public police force more attention was drawn to the implications of vesting these state officials with extensive peace-keeping or order-maintenance powers.

[16] W.R. Miller, "Police and the State: A Comparative Perspective" (1986) Am. B. Found. Res. J. 339 at 343.

[17] *Ibid.* at 341.

law, and the commissioners made the police into agents of the law, rather than of the political party in question."[18] The proper role of policing centred upon the manners in which the function of law enforcement could be made too subservient to rule of law concerns. Forgotten in the debate, as public attention was diverted to the broader implications of constraining police law enforcement activity, was the intrusive peacekeeping function that was exercised through detention and questioning of suspicious persons.

Once the police attained a spectre of professionalism, with the end of the era of the "keystone cop," attention was once again drawn to police activities that were not directly concerned with law enforcement. In light of the ever-increasing crime rate of this century, theorists of police reform began to turn to the importance of "aggressive preventive patrol." The dominant theorists in the late 1950s saw great benefits in the ancient constabulary practice of stopping and questioning suspicious persons.[19] O.W. Wilson gave recognition to the virtues of field interrogation:

> The officer lessens opportunity for misconduct by the observation and supervision of persons and things during his routine movement from one point to another on his beat, especially when he gives particular attention to areas in which incidents calling for police service most frequently occur. Street interrogations of persons whose appearance and actions arouse the suspicion of alert patrolmen are important tasks in preventive patrol.[20]

Increased reliance upon aggressive preventive patrol has not significantly assisted in the stated goal of reducing crime[21] yet it had a substantial impact upon police-community relations. It has been noted that "the field interrogation ... probably contributes negatively to police-public relationships more than any other policing

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[18] *Ibid.* at 343.

[19] See the discussion in W. Mertons, "The Fourth Amendment and the Control of Police Discretion" (1984) 17 Mich. J.L. Reform 551 at 569-74.

[20] O.W. Wilson, *Police Administration*, 2d ed. (New York: McGraw-Hill, 1963) at 238.

[21] R. Bogomolny, "Street Patrol: The Decision to Stop a Citizen" (1976) 12 Crim. L. Bull. 544 at 550-53, 567-74; and Ericson, *supra*, note 12 at 6. It has been noted that the empirical evidence concerning the impact of investigatory stops on criminal activity suggests that only a small percentage of stops – probably less than two percent – results in arrest": G. Dix, "Nonarrest Investigatory Detentions in Search and Seizure Law" (1985) 5 Duke L.J. 849 at 875.

technique.[22] The institutionalization of the ancient constabulary function of peace-keeping through investigative detention resulted in the expansion of police powers, the prioritization of discretion, and a widening sphere of social control. David Bayley has accurately described the transformation of the modern police officer:

> In the nineteenth century prevention was achieved by capturing, punishing, and warning. With the twentieth century, crime prevention became less passive, not only a reaction to crimes that had already occurred. Police began to stress solving problems before crime grew out of them. Special units were developed to work with potentially wayward persons, such as juveniles, parolees, repeat offenders, emotionally disturbed, unemployed, minorities, abused children, and violent families.[23]

This expansion of police presence and power had a deleterious impact upon community relations primarily because it is no longer grounded in the peace-keeping and service functions of the police. James Q. Wilson describes this original service function by stating that "police officers were originally watchmen whose task it was to walk their rounds and maintain order in the streets ... [and] ... to maintain order meant everything from removing obstruction on streets to keeping pigs from running loose, to chasing footpads and quelling riots."[24] This original mandate to maintain the peace has been modified to account for the increased salience of the police functions of law-enforcement and crime-prevention. However, the law had always provided the police with ample power to maintain peace in the community through their powers to arrest or detain for breach of peace, or for the offence of causing a disturbance, and it is therefore likely that the introduction of aggressive patrol practices has little to do with keeping the peace and is more properly seen as a generalized form of social control designed to combat the perceived increase in crime.

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[22] J. Lohman & G. Misner, *Field Surveys IV: The Police and the Community* (Washington: U.S. Government Printing Office, 1966) at 142.

[23] D. Bayley, "Police Function, Structure and Control in Western Europe and North America: Comparative and Historical Studies" in N. Morris & M. Tonry, eds, *Crime and Justice*, vol. 1 (Chicago: University of Chicago Press, 1979) at 117.

[24] J.Q. Wilson, *Varieties of Police Behavior: The Management of Law and Order in Eight Communities* (Cambridge, Mass.: Harvard University Press, 1968) at 31.

Increasing the presence of the police in the community has been justified as necessary to curb the burgeoning crime rate. Politicians and police speak of the ongoing war against crime, and the resultant fear and insecurity that plagues the public has allowed the police to firmly entrench their power to intrude. Moreover, by characterizing police-citizen street encounters as incidences of law-enforcement, the police are able to legitimate the intrusion by claiming to be "ministerial agents applying unambiguous, unequivocal rules to clear-cut cases."[25] Nothing could be further from the truth. These encounters are low-visibility interactions governed by the discretion of the cop on the beat.

More significantly, the transformation of peace-keeping and social services encounters into law enforcement transactions encourages antagonistic and adversarial interactions between police and citizens. Law enforcement fosters an us-them world view in which the targets of intrusive action are seen as a "dangerous class"[26] that lives in a relationship of implacable hostility with conventional citizenry. This assumption of an irreconcilable conflict of interest between police and members of the public leads to an increased use of force in the street encounters. Far from being a benign intrusion to ensure peace on the street, the modern street encounter that is premised upon law enforcement is primarily an attempt by the police to assert their authority and maintain order by ensuring compliance with their command:

> To handle his beat and the situations and disputes that develop on it, the patrolman must assert his authority ... By authority the patrolman means the right to ask questions, get information, and have his orders obeyed ... The patrolmen observed for this study almost always acted, and said later they had acted, in such a way as to show immediately "who was boss."[27]

The increased coercive presence of the police in the community might be justifiable if conducted in an even-handed and

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[25] *Ibid.* at 67-68.

[26] A. Silver, "The Demand for Order in Civil Society: A Review of Some Themes in the History of Urban Crime, Police and Riot" in D. Bordua, ed., *The Police: Six Sociological Essays* (New York: Wiley, 1967).

[27] E. Bittner, *The Functions of Police in Modern Society: A Review of Background Factors, Current Practices and Possible Role Models* (Cambridge, Mass.: Oelgeschlage, Gunn & Hain, 1979) at 32-33.

non-discriminatory fashion; however, it is now beyond debate that police discretion is often exercised on a racial and class basis.[28] The police exercise their discretion in a manner that targets those who appear out of place, and this determination is premised upon race and socio-economic status. It is said that "officers look for and employ status cues to determine what action they should take; in this sense, 'police activity is as much directed to who a person is as to what he does.'"[29] While the more privileged class in society generally applauds more aggressive and intrusive law enforcement, other members of society are constantly exposed to needless state intrusion:

> So long as criminal law enforcement is paramount in the conception of the police task it will influence everything done. For example, heavy patrol surveillance of minority neighborhoods and of their inhabitants can be interpreted as pre-emptive crime prevention, even though it may be perceived as intolerably intrusive, oppressive, unjust, even racially biased, by the population exposed to it.[30]

When the police were more actively engaged in service and peace-keeping activities their interaction with citizens may have been more harmonious; however, "removal of these welfare functions caused the police to focus more on crime control and contacts with the urban poor became more distant and adversarial than in the past."[31]

In the United States, the 1960s spawned a crisis in legitimacy with respect to the police, and theorists and reformers began to take a serious look at the dangers of unbridled police discretion and its

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[28] As R. Harper noted in "Has the Replacement of Probable Cause with Reasonable Suspicion Resulted in the Creation of the Best of All Possible Worlds" (1988) 22 Akron L. Rev. 13 at 38: "Research suggests that while the police do tend to detain and arrest blacks at a higher rate than they do whites with whom they come in contact, it is probable that race, in itself, is not the explanatory factor. It is more likely that poverty and low socio-economic status, with which race tends to be associated, figure importantly into the police detention and arrest decision. It is thus in poorer neighbourhoods, where the police presence is likely to be greater, where the citizens' demeanour toward the police may be interpreted as offensive, and where the people with whom the police interact generally lack resources and other indicia of social power, that the police are less likely to refrain from stopping citizens for investigation." See also S. Johnson, "Race and the Decision to Detain a Suspect" (1983) 93 Yale L.J. 214.

[29] Ericson, *supra*, note 12 at 17.

[30] R. Rumbaut & E. Bittner, "Changing Conception of the Police Role: A Sociological Review" in *Crime and Justice*, vol. 1, *supra*, note 23 at 246.

[31] Miller, *supra*, note 16 at 347.

impact upon police-community relationships.[32] The President's Commission on Law Enforcement and Administration of Justice[33] addressed some of the problems created by aggressive patrol and by field interrogation. The Commission recommended that state legislatures and police departments place restrictions and control on the practice by:

> (a) limiting them to circumstances when an officer has reason to believe that a person is about to commit or has committed a crime;
> (b) prohibiting such stops for vagrancy and similar offences;
> (c) insisting on an objective basis for the stop, and not on race, youth, or poverty;
> (d) imposing temporal limits, allowing only the time necessary to accomplish the legitimate purposes of the stop;
> (e) requiring the police to treat stopped persons civilly;
> (f) permitting a search in the course of field interrogation "only if [the officer] has reason to believe his safety or the safety of others so requires;" and
> (g) instituting record keeping procedures.[34]

Many state legislatures have adopted schemes that place some controls on police field interrogations, and the United States Supreme Court has had a number of opportunities to address the constitutional limitations that govern investigative detention.[35] In Canada, the practice of briefly detaining and interrogating suspicious persons has not been formally recognized as an existing practice. Report after report on the police and their powers start from the assumption that the only power that the police have to interfere with liberty is the power of arrest upon reasonable and probable grounds. Accordingly, the only issue of contention has been the officer's use of force to effect an arrest.[36] The *Ouimet Report* noted

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[32] Rumbaut & Bittner, *supra*, note 30 at 241-50.

[33] U.S. President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: The Police* 183-86 (1967) [hereinafter President's Commission].

[34] This summary of the recommendations of the President's Commission, *ibid.*, is taken from Mertons, *supra*, note 19 at 573-77.

[35] See, *infra*, the accompanying text at notes 136-45.

[36] For example, *Task Force on Policing in Ontario: Report to the Solicitor-General* (Toronto: Ministry of the Solicitor-General, 1974) at 30; W. Kelly & N. Kelly, *Policing in Canada* (Toronto: MacMillan, 1976) at 133-83; and *Report of the Canadian Committee on Correction: Toward Unity: Criminal Justice and Corrections* (Ottawa: Queen's Printer, 31 March 1969) (Chair: R. Ouimet) at 39-62 [hereinafter *Ouimet Report*].

that, though a power of investigative detention upon reasonable suspicion exists in the United States, such a power need not be created in Canada due to the adequacy of current arrest powers.[37] It is ironic that the report speaks of no need to authorize and codify a power of detention short of arrest as this very power is exercised on a discretionary basis each and every day.

Canadian jurists have not been insensitive to the dangers of police discretion and they have recognized that "every police force should adopt a policy of providing control and direction of the use of discretion and should ensure that it is applied equitably and with good judgment."[38] The problem is that we have yet to recognize that vast discretionary powers are exercised by the police that do not ever crystallize into a formal arrest or the laying of a charge. A study into the adequacy of current police training illustrates that 72.8 per cent of officers perform the task of "check suspicious persons" at least once a day and that over half of these officers found their training to be deficient with respect to this activity.[39] Without formal recognition by the legislatures or courts that detention short of arrest is a mainstay of aggressive patrol practice, it will be impossible to ever construct a regime of rules and regulations to protect us from the excesses of poor exercises of discretion.

B. *The Need to Regulate Powers of Detention*

When a police officer in his or her service or peace-keeping function approaches an individual to ask questions, the nature of the interaction and questioning should not be overly confrontational and

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[37] *Ibid.* at 56-57.

[38] Kelly, *supra*, note 36 at 207.

[39] C. Shearing & P. Stenning, *Police Training in Ontario: An Evaluation of Recruit and Supervisory Courses* (Toronto: Centre of Criminology, University of Toronto, 1980) at 41. The term "check suspicious person" is the author's. It is unclear what type of intrusion is contemplated by the term "check."

intrusive. The inquiry will usually concern questions as to the well-being of the individual or offers of assistance. Some may be wary of this paternalistic intrusion, but most people do not perceive an officer's service and peace-keeping activities as engaging any constitutional improprieties. On the other hand, when an officer initiates an encounter for purposes of law enforcement or prevention, the interaction, by definition, must be more confrontational. In fact, despite the wide variety of these encounters, one can be certain that the officer's inquiries will always revolve around four questions: (1) What are you doing here?; (2) Where are you going?; (3) Where are you coming from?; and (4) Would you provide me with some identification?

Questions concerning an individual's comings and goings are a common aspect of all social interaction, though, admittedly, it would be surprising for a stranger to ask for this information. However, a request to provide formal identification beyond one's name is not an accepted feature of social interaction, and it is essentially an exercise of authority. Whether it would constitute a detention, as defined in the next section of the paper, is problematic,[40] and this difficulty in characterization is compounded by the reluctance of both the judiciary and Parliament to address the legal significance of a request for identification. There is no statutory requirement for a citizen to provide proper identification, except in the context of being stopped while driving a vehicle,[41] and the judiciary has not imposed any obligations upon citizens to provide identification except in the context of a lawful arrest.[42]

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[40] *Grafe*, *supra*, note 2; and *Re L.M.L.* (1985), 66 A.R. 132 (Alta Prov. Ct).

[41] For example, *Highway Traffic Act*, R.S.O. 1980, c. 198, ss 19(1), 30(a) & 189(a).

[42] In *Moore* v. *R.*, [1979] 1 S.C.R. 195, the Supreme Court of Canada imposed an obligation to provide identification when arrested for a minor offence because police officers must release the name of the individual if, *inter alia*, the offender's identity is not an issue. This intrusion of an individual's right to disregard the inquiries of police officers has been criticized; however, the obligation to provide identification does not have significant implications on an individual's liberty and privacy interests because the individual is already in a situation in which the state can legally effect a deprivation of liberty through arrest. In fact, the obligation spares the individual a greater loss of liberty.

When an officer is not empowered to arrest, yet has suspicions that require the officer to request identification, the courts respond by parroting the unrealistic common law wisdom that

> it is quite clear that though every citizen has a moral duty or, if you like, a social duty to assist the police, there is no legal duty to that effect and indeed the whole basis of the common law is that right of the individual to refuse to answer questions put to him by persons in authority.[43]

This common law right resounds with the symbolism of liberal political thought; however, in practice, the exercise of the right is costly. Those who exercise the right are bound to be arrested for obstruction and are then forced to vindicate their right in the context of defending themselves against a criminal charge.

In *R.* v. *Guthrie*,[44] a woman was stopped and a demand was made that she provide identification. The stop was made close to the parking lot of the Calgary Police Association, because of earlier break-ins of police vehicles. The woman refused to identify herself, and she was then arrested for obstruction. Initially expressing an interest in seeing the system work, her interest waned as she was being escorted to the detention centre. She then relented and provided identification. The Court of Appeal ultimately vindicated her right to refuse to cooperate, but one must remember that she paid for this right by being unlawfully detained at the outset by the police and by having to absorb the time and expense of a trial and appeal.

Canadian jurists continue to avoid facing the reality of street encounters by insisting that the police can only invade an individual's privacy and liberty on a probable cause to arrest or search. This position reflects the state of the law, yet, it fails to take into account the fact that despite the absence of authorization, police officers will make demanding inquiries upon suspicion or intuitive hunches. Occasionally, the courts will reprimand the police for an unauthorized intrusion, but this review is limited to the rare cases in which an individual, like Ms. Guthrie, has the gumption to challenge police practice. Despite the assertion that detention for

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[43] *Rice* v. *Connolly*, [1966] 2 All E.R. 649 at 652 (Q.B.). The court quashed a conviction for obstruction based on an individual's refusal to give his full name and address to the police.

[44] (1982), 28 C.R. (3d) 395 (Alta C.A.).

investigative purposes is unlawful, the practice continues unabated. In fact, the common law position facilitates investigatory detention because the ascription of illegality places the practice beyond the pale of regulation.

The need for regulation of encounters between the police and the public does not lead ineluctably to the consideration of identity cards and a requirement of production upon demand. The use of identity cards as a means of achieving social control is a controversial political issue that is not easily resolved. During the revolution, France became the "land of the documented citizen: the passport and identity card (even the words themselves) originated in France,"[45] and, as discussed earlier, the creation of the first public police force in England could only attain legitimacy by promising to avoid the excesses of French policing. It was this documented citizen that the British sought to avoid when establishing their own police force. Many people are still of the view that identity cards are "merely Big Brother's foot in the door,"[46] but it must be recognized that regulation of police-citizen encounters need not necessitate the introduction of this drastic step.

Regulation does not tilt the scale in favour of facilitation of policing; it simply subjects a practice of low-visibility to various constraints. The purpose of regulation is to ensure that the police do not overstep their authority and convert voluntary cooperation into coerced assistance and to ensure that the police do not abuse their liberty to make inquiries by acting indiscriminately or discriminatorily.

The benefits and shortcomings of regulating street encounters are well illustrated by the tortuous history of Manuel Gomez's challenge to police practice in the District of Columbia. Fourteen years of litigation[47] was spawned by Gomez's indignation at being

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[45] Miller, *supra*, note 16 at 342.

[46] J. Angley, *Identity Cards: The Major Issues*, (Barton, A.C.T.: Dept. of the Parliamentary Library, 1985) the Parliament of the Commonwealth of Australia, Legislative Research Service: Current Issues Brief Number 1, 1985-86 at 15. This report merely outlined the arguments pro and con of introducing identity cards in Australia without making recommendations.

[47] *Gomez* v. *Layton* 394 F.2d 764 (1968) [hereinafter *Layton*]; *Gomez* v. *Wilson*

stopped by police. On two occasions, Manuel Gomez, an hispanic, was stopped while taking a late-night stroll:

> On the first occasion the police filled out a "vagrancy observation" form and warned appellant that if he was seen in the area again he would be arrested. On the second occasion, appellant was questioned by five police officers, who demanded to see his identification, asked whether he was a homosexual and whether he used marijuana, and had him remove his jacket and roll up his sleeves. Questioning ceased when appellant said he wished to speak to a lawyer, but the police filled out another vagrancy form and again warned him that further observations would lead to an arrest.[48]

This abusive exercise of authority rarely comes to public attention because the citizen is usually relieved to emerge from the encounter without being charged with a criminal offence. Gomez refused to fade into the background and he sought a declaration that this police practice was unconstitutional.

The stopping of Gomez in 1968 was authorized by a vagrancy statute then in force. This statute was ultimately struck down as being unconstitutional because, as we will discuss later in the paper, vagrancy statutes are notoriously vague. When the police lost their major mechanism for intrusion through the vagrancy statute, they did not make the false claim that they would no longer be engaged in the practice of investigatory stopping. Instead, the police created a series of regulations that addressed the issue when a stop was permissable and how the stop was to be conducted.

In 1973, the police promulgated General Order 304.10 for the purpose of establishing procedures "governing police-citizen 'contacts', stops, frisks and motor vehicle spot checks."[49] The police

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430 F.2d 495 (1970); *Gomez* v. *Wilson* 477 F.2d 411 (1973); *Gomez* v. *Turner* 672 F.2d 134 (1982) [hereinafter *Turner*]. For a discussion, see M. Murphy, "Encounters of a Brief Kind: On Arbitrariness and Police Demands for Identification" (1986) 1 Ariz. St. L.J. 207.

[48] *Layton*, *ibid.* at 765.

[49] The terms of the Order are found in *Turner*, *supra*, note 47 at 137-38. The General Order is a directive issued by the Metropolitan Police Department of the District of Columbia which sets out policy and procedures. The regulations divided interactions into "contacts" and "stops." A contact was defined as a "face-to-face communication with an individual under circumstances in which he is free to leave." The contact could be initiated when an officer reasonably believed that investigation was justified, and was not limited by a requirement of probable cause or reasonable suspicion. A contact was not justified if an individual was just "hanging around" or loitering. The regulations directed that officers be as "restrained and courteous" as possible, and it proscribed the use of force, frisking, or searching. A "stop" was

undertook to structure and constrain their own exercise of discretion, and, in order to facilitate meaningful regulation and supervision, the police were required to fill out a form for every contact and stop made. The form listed the citizen's identity and the officer's reasons for initiating the encounter.

This process of compiling a written record permits the public and the courts to oversee the process to ensure that the police are not engaged in systemic violations of the *Constitution*. In the District of Columbia, the written records revealed that of all persons approached by the police 80 per cent were non-white, 91 per cent were male, and 66 per cent were between the ages of sixteen and twenty-nine.[50] In addition, a review of reports indicated that 39.2 per cent of "stops" were unconstitutional because they lacked the justification of an articulable and objective suspicion.[51]

The benefits of regulation are clear. The practice becomes more predictable and more reviewable. The shortcomings are also clear. Despite the collection of cogent evidence of indiscriminate and discriminatory stoppings, there is no evidence to suggest that these systemic problems are being addressed in any meaningful way. Regulation has lifted the practices out of the shadows, but public awareness does not guarantee reform.

Kenneth Davis has contended that the basic means of controlling discretionary power is to confine, structure, and check the power.[52] Street encounters in Canada are not subject to any of these forms of regulation, and the police have little or no incentive to voluntarily undertake a project of self-regulation. What needs to

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defined as a "temporary detention of a person for the purpose of determining whether probable cause exists to arrest that person." A stop could only be initiated upon reasonable suspicion, and once initiated, the officer was entitled to use force to effect the brief detention.

[50] Murphy, *supra*, note 47 at 236.

[51] *Ibid.* at 237.

[52] K. Davis, *Discretionary Justice: A Preliminary Report* (Baton Rouge: Louisiana State University Press, 1969) at 55: "structuring includes plans, policy statements, and rules, as well as open findings, open rules and open precedents ... Checking includes both administrative and judicial supervision and review ... By confining is meant the fixing of boundaries, and keeping discretion within them. The ideal, of course, is to put all necessary discretionary power within the boundaries, to put all unnecessary power outside the boundaries, and to draw clean lines. The ideal is seldom realized, and many of the failures are rather miserable ones, for they frequently result in unavoidable injustice."

be explored is whether the judiciary, through their development of the jurisprudence relating to arbitrary detention, are able to goad the police toward self-regulation. If the concept of arbitrary detention is not subject to rigorous judicial scrutiny, then the police have little incentive to develop policies and procedures relating to street detention.

It is difficult to gauge the extent of the problems arising from street detentions that are currently unmonitored by the judiciary; however, some sense of the magnitude of the problems can be gained from an examination of the complaints that have been processed by the Public Complaints Commissioner in Toronto.[53] As indicated in the chart below, it is apparent that police brutality, although the most notorious, is not the most prevalent complaint. A majority of complaints arise out of street encounters conducted without restraint and civility.

Table 1
Public Complaints

TYPE OF COMPLAINT	1982	1983	1984	1985	1986
Incident occurring on the street	51.6%	52.4%	51.9%	48.3%	50.9%
Incident involving incivility, harassment, verbal abuse, or threat	78%	76.3%	69.9%	62.1%	56.6%
Incident during criminal investigation	26.1%	34.3%	29.2%	30.2%	25.2%
Incident during an interrogation or during a request for identification	6.4%	4.4%	2.3%	0.8%	1.6%
Incident where complainant was not charged	66.2%	69.2%	70.3%	66.2%	64.9%

Of great significance is the fact that the vast majority of complaints do not give rise to further criminal proceedings. This is precisely why street encounters are a practice of low-visibility. If the

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[53] *Annual Report of the Office of the Public Complaints Commissioner and the Police Complaints Board* (Toronto: The Office, 1982-86).

judiciary is committed to the supervision and control of intrusive police practice, then it must realize that this objective can only be accomplished by dealing with cases that manage to rise to the surface in a manner that will have an impact upon all the other cases that remain in the shadows. The Court must probe beyond the narrow interests of the litigants and construct rules and principles to provide guidance. If the rules and principles are short-sighted or impractical, then the shortcoming of judicial lawmaking may finally goad the legislature into action. If nothing is done by the judiciary, whether positive or negative, then it is likely that nothing will also be done by the political institutions that are best-suited for reform of police practice. To date, the judicial response to issues relating to detention has been restrained.

C. *Detention in Canadian Law*

The right not to be arbitrarily detained is semantically clear, but conceptually problematic. Powers of detention have been legislatively created in a number of contexts that are unrelated to the criminal process, including quarantine and involuntary commitment,[54] but within the criminal process, with the exception of the procedures relating to breathalyser testing, we find that virtually all deprivations of liberty are premised upon a power to arrest for past, present, and future commission of offences.

With respect to police powers the conventional wisdom has always been that, unless the police are "armed with express authority to justify their actions,"[55] police intrusion upon rights is deemed to be illegal. The requisite express authority can be found either in statute or at common law. In recent years this conventional wisdom has undergone some modification with the introduction of an "ancillary powers" doctrine — a device relied upon by the judiciary to create new powers based upon the inference that the power is

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[54] For a catalogue of existing powers outside the criminal process, see Canada, *Arrest* (Working Paper 41) (Ottawa: Law Reform Commission of Canada, 1985) at 16-26, 137-43.

[55] *R.* v. *Colet* (1981), 57 C.C.C. (2d) 105 at 111 (S.C.C.).

reasonably necessary to effect a duty.[56] However, the historical legitimacy of the position that state power must be expressly authorized still continues to influence decision-making.

In the context of the *Charter*, the Supreme Court of Canada has constitutionalized the requirement of an express grant of power with respect to the right to be free from unreasonable search and seizure. The Court has stated that "a search will be reasonable if it is authorized by law";[57] thus legality becomes a prerequisite for constitutional compliance. A similar model of constitutionality has not been invoked with respect to arbitrary detention; the courts do not require proof that the detention be authorized by law. This lowered threshold of constitutionality cannot flow from an argument that arbitrary exercises of power are interpreted more liberally than unreasonable exercises of power. Rather, the omission of a requirement of legality from the concept of arbitrary detention is simply a practical reflection of the fact that lawmakers have refused to address the issue of authority to detain, as they have done with respect to powers of arrest and search.[58]

Notwithstanding the absence of express authority, police powers of detention for investigative purposes have been retroactively legitimated by the judiciary except when the Court concludes that the detention has been arbitrarily exercised. However, even this judicial disapproval of arbitrary police powers to detain for investigative purposes only pertains to intrusive actions that meet the Court's definition of detention. As in *Grafe*, some intrusions are considered unworthy of constitutional protection. Without a legislative foundation as a starting point for analysis, the

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[56] For example, *R.* v. *Dedman* (1985), 20 C.C.C. (3d) 97 (S.C.C.). A useful analysis of the shift in judicial attitude towards the creation of police powers can be found in R. Ways, "The Law of Police Authority: The McDonald Commission and the McLeod Report" (1985) 9 Dalhousie L.R. 683.

[57] *R.* v. *Collins* (1987), 56 C.R. (3d) 193 (S.C.C.).

[58] In fact, the original wording of section 9 of the *Charter* reflected a concern for legality and authorized power. In the proposed resolution of October, 1980, *The Canadian Constitution 1980: Proposed Resolution Respecting the Constitution of Canada* (Ottawa: Publications Canada, 1980) at 15, section 9 read: "Everyone has the right not to be detained or imprisoned except on grounds, and in accordance with procedures, established by law." This wording was rejected, probably based on fears that present powers of police detention would not meet its test.

courts have undertaken to construct a typology of state intrusions characterized as detention.

Much of the caselaw that has struggled with defining the level of intrusion necessary to constitute detention involve motor vehicle stops. Despite the obvious problems of commensurability, the courts have not distinguished between the legal status of a driver and the legal status of an individual walking on the street. The Supreme Court of Canada rejected the pre-*Charter* jurisprudence that defined detention as requiring "some form of compulsory restraint,"[59] and replaced it with a functional test more in tune with the reality of police-citizen interactions. In *R.* v. *Therens*,[60] the Supreme Court of Canada had to resolve whether a motorist who has been given a breathalyser demand is detained notwithstanding the absence of compulsory or physical restraint. In an insightful comment that set the tone for developing the new test of detention, Justice Le Dain remarked:

> In my opinion, it is not realistic, as a general rule, to regard compliance with a demand or direction by a police officer as truly voluntary, in the sense that the citizen feels that he or she has the choice to obey or not, even when there is in fact a lack of statutory or common law authority for the demand or direction and therefore an absence of criminal liability for failure to comply with it. Most citizens are not aware of the precise limits of police authority.[61]

Accordingly, the Court developed a threefold test for determining when a police-citizen encounter constitutes detention. Detention occurs when there is (1) "a deprivation of liberty by physical constraint,"[62] (2) "criminal liability for failure to comply with a demand or direction of a police officer,"[63] or (3) "psychological compulsion in the form of a reasonable perception of suspension of freedom of choice."[64] The first scenario is a reaffirmation of the pre-*Charter* test and it applies to the obvious instances of detention

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[59] This earlier test is taken from *R.* v. *Chromiak*, [1980] 1 S.C.R. 471 at 478-79.

[60] (1985), 45 C.R. (3d) 97 (S.C.C.).

[61] *Ibid.* at 125.

[62] *Ibid.* at 124.

[63] *Ibid.* at 125.

[64] *Ibid.* at 125-26.

that are tantamount to being taken into custody. The second scenario is currently limited to breathalyser procedures in which the police are statutorily empowered to demand breath or blood samples. The third scenario of psychological compulsion is the one that will apply to police-citizen interactions that are ambiguous due to the absence of legislative authority for the intrusion.

The moment at which an interaction is converted into a detention is critical. Then the citizen can invoke *Charter* protection against arbitrary detention as well as the *Charter* requirement of being informed of one's right to consult counsel. When a state official is carrying out investigatory procedures that are authorized by legislation, *when* detention occurred will most likely be determined by an assessment of the severity of the state intrusion.[65]

Tying the concept of detention into the level of intrusiveness is a simple exercise that usually produces determinate and predictable results. However, the type of interactions that occur between citizens on the street and police officers carrying out investigative tasks do not present distinct levels of intrusiveness. The line dividing constitutionally-protected interactions and those deemed inconsequential by the courts is not clear-cut and it turns upon a weighing of numerous factors in an attempt to determine if the individual has a reasonable perception that his or her liberty is being suspended. The Ontario Court of Appeal has provided a catalogue of relevant factors that may assist a court in determining if detention exists and this wide-ranging inquiry underscores the indeterminacy of the assessment:

> (1) the precise language used by the police and whether the accused was given a choice;

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[65] For example, Customs and Immigration officials are empowered to question all individuals arriving in Canada. Chief Justice Dickson assessed the legal relationship between the individual arriving in Canada and the state official in *R.* v. *Simmons* (1988), 66 C.R. (3d) 297 at 313 (S.C.C.). He asserted that there are three distinct types of interactions that range: (1) from routine questioning which every traveller undergoes at a port of entry, accompanied in some cases by a search of baggage and perhaps a pat or frisk of outer clothing, (2) from the strip or skin search conducted in a private room, after a secondary examination and with the permission of a customs officer in authority, and (3) from body cavity search with the aid of medical doctors, to x-rays, to emetics, and to other highly intrusive means. The "routine questioning" scenario does not amount to detention, but the other, more intrusive interactions cross the threshold.

(2) whether the accused came to the station unescorted by the police;
(3) whether the accused was free to leave at the completion of the interaction; and
(4) the stage of the investigation; such as did the police already suspect that the accused was the perpetrator or were they still at the stage of a generalized investigation.
(5) the nature of the questioning; was it confrontational or of a general nature;
(6) the subjective belief of the accused, including consideration of the intellectual and emotional level of the individual, as to his or her freedom to leave;[66]

The balancing of these various factors have led courts to conclude that no detention exists when the police request attendance at the station,[67] when the police question an individual at his or her home,[68] or when the individual attends at the police station accompanied by a lawyer, friend, or family.[69] Even though these examples are instances of less intrusive police activity, the question remains open to question if the "balancing of factors" approach adequately measures reasonable perception of suspension of freedom of choice. Justice Le Dain's premise that it is unrealistic to regard compliance with the police as "truly voluntary" must not be forgotten. Any interaction between police and citizen is an exercise of state authority and most citizens, not being aware of their rights, will assume they must remain in the custody of the police until they are told to leave.[70]

If most citizens feel compelled to cooperate with the police[71] by remaining in police custody until dismissed, then virtually every

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[66] *R.* v. *Moran* (1987), 36 C.C.C (3d) 225 at 258-59 (Ont. C.A.).

[67] *R.* v. *Bazinet* (1986), 25 C.C.C. (3d) 273 (Ont. C.A.) [hereinafter *Bazinet*].

[68] *R.* v. *Esposito* (1985), 24 C.C.C. (3d) 88 (Ont. C.A.).

[69] *R.* v. *Smith* (1986), 25 C.C.C. (3d) 361 (Man. C.A.) [hereinafter *Smith*]; and *R.* v. *Hicks* (1988), 42 C.C.C. (3d) 394 (Ont. C.A.).

[70] For a discussion of the nature of police-citizen interactions and of the fact that citizens rarely exercise their right to disregard the police, see C. Reich, "Police Questioning of Law Abiding Citizens" (1965-66) 75 Yale L.J. 1161, and R. Ayers & J. Griffiths, "A Postscript to the Miranda Project" (1967) 77 Yale L.J. 300.

[71] As one commentator said: "[I]t is not meaningful in practice to attempt to distinguish between field interrogation with consent and that which takes place without consent. In high crime-areas, particularly, persons who stop and answer police questions do so for a variety of reasons, including a willingness to cooperate with police, a fear of police, a belief that a refusal to cooperate will result in arrest, or a combination of all three": L. Tiffany, D. McIntyre & D. Rotenberg, *Detection of Crime: Stopping and Questioning, Search and Seizure,*

encounter, whether innocuous or overbearing, would trigger a reasonable perception of being detained. It appears that the courts do not employ a reasonable person test that is empirically-based, but rather they employ a normative concept of reasonableness based on an assessment of when an individual *should* believe that he or she is being detained.

The American treatment of this issue reveals a similar normative approach.[72] Three categories of police-citizen encounters are recognized in American law: "communications between police and citizens involving no coercion or detention and therefore without the compass of the fourth amendment, brief 'seizures' that must be supported by reasonable suspicion, and full-scale arrests that must be supported by probable cause."[73] In order to trigger constitutional safeguards there must be a seizure of the person and in 1980 the U.S. Supreme Court clarified the standard by distinguishing between the seizure and no-seizure categories.

Sylvia Mendenhall was stopped at the Detroit airport by two Drug Enforcement agents because her conduct was characteristic of drug couriers.[74] The agents asked her to produce identification and an airline ticket, and as a result of a discrepancy between the names listed on her driver's licence and on the airline ticket, the agents further investigated until a search revealed that she was in possession of heroin. The U.S. Supreme Court needed to decide if the initial stopping and questioning amounted to a seizure that required an objective justification. In deciding that this encounter fell into the no-seizure category, it was stated:

> We conclude that a person has been "seized" within the meaning of the fourth amendment only if, in view of all the circumstances surrounding the incident, a

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Encourage and Entrapment (Boston: Little, Brown, 1967) at 17.

[72] The American Constitution does not contain a provision securing a right against arbitrary detention; therefore, the courts deal with police-citizen encounters in the context of the Fourth Amendment: U.S. Const. Amend. IV [hereinafter Fourth Amendment]. In Canada, the courts determine whether the individual was arbitrarily detained; the American courts determine whether there was an "unreasonable seizure."

[73] *U.S.* v. *Berry*, 670 F.2d 583 at 591 (1982).

[74] *U.S.* v. *Mendenhall*, 446 U.S. 544 at 547 (1980). The officers testified that the accused's behavior fit the drug courier profile.

> reasonable person would have believed that he was not free to leave. Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled ... In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of the person.[75]

In essence, the concept of restricting detention or seizure is an attempt to capture state activity that the Court believes sufficiently intrusive to require judicial scrutiny. Reasonable individuals may feel compelled to cooperate with the requests or demands of police officers, however, the mere fact that officers are able to induce compliance by virtue of their perceived authority is not sufficient to command judicial review. The Court will only intervene "if the officer adds to those inherent pressures by engaging in conduct significantly beyond that accepted in social intercourse," and it will not intervene if "the policeman, even in making inquiries a private citizen would not, has otherwise conducted himself in a manner which would be perceived as a non-offensive contact if it occurred between two ordinary citizens."[76]

By ignoring the inherent pressures that an officer can bring to bear simply by virtue of his or her position, the threshold determination of whether or not a detention or seizure has occurred becomes an abstraction. This abstraction fails to reflect the reality of power. While the courts debate whether the police officer was too overbearing, or the citizen was too easily intimidated, the reality is that the police will exercise whatever power is necessary to effect

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[75] *Ibid.* at 554-55. As in Canada, the American conception of the reasonable person is not empirically-based. This is clearly indicated by the U.S. Supreme Court in their application of the *Mendenhall* test in a subsequent case that challenged the practice of immigration officers in conducting "surveys" of factories in search of illegal aliens: *I.N.S.* v. *Delgado*, 466 U.S. 210 (1984). The factory survey consisted of armed officers being positioned near the exits to question employees. The court held that the stationing of officers at exits did not lead individuals to believe that they would be detained although those who tried to flee or evade questioning were ultimately detained.

[76] W. Lafave, "'Seizures' Typology: Classifying Detentions of the Person to Resolve Warrant, Grounds, and Search Issues" (1984) 17 Mich. J.L. Reform 417. For further discussion of this article and the no-seizure rule, see E. Butterfoss, "Bright Line Seizures: The Need for Clarity in Determining When Fourth Amendment Activity Begins" (1988) 79 J. Crim. L. & Criminology 437.

their objective. If the police have reason to believe, whether justified or not, that an individual can assist in an investigation, they will request or demand that the individual speak with them. Whether or not the questioning takes place at the individual's home, in the officer's patrol car, or at the station, the police will not allow the individual to leave until they are satisfied that they will not be able to obtain valuable information. This is clearly borne out by cases in which the courts have considered the admissibility of incriminating statements made during an encounter that the Court characterized as a detention. In these cases, the police held individuals in detention for anywhere between two hours and a full day[77] – the individual being detained as long as required in order to secure a confession or until it appears that a confession is unlikely to materialize.

These cases are only the tip of the iceberg. The fact that the police will suspend the liberty of individuals for lengthy periods of time only comes to light in cases in which the individual ultimately confesses and a prosecution is then initiated. In these cases the individual may be entitled to a remedy of exclusion of evidence; however, if the individual does not confess and a trial is therefore not commenced, the lengthy detention will never be the subject of judicial review for arbitrary detention. Unless the individual complains, which is unlikely, there will be no remedy for the constitutional violation.

D. *Arbitrary Detention*

Once an encounter between police and citizen crosses the threshold that distinguishes innocuous contact from detention, the right not to be arbitrarily detained is triggered. This right has a dual purpose in that it serves to protect against deprivations of liberty (detention) and impairment of an individual's security interest (arbitrary). The threshold determination that an encounter constitutes a detention ensures that the protections of the *Charter*

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[77] *R.* v. *Nugent* (1988), 42 C.C.C. (3d) 431 (N.S.C.A.) (all day detention); *R.* v. *Soares* (1987), 34 C.C.C. (3d) 403 (Ont. C.A.) (three hour detention); *Bazinet*, *supra*, note 67 (two hour detention); and *R.* v. *Smith*, *supra*, note 69 (three hour detention).

are not trivialized by being applied to state conduct that is of minimal intrusiveness; however, once the deprivation of liberty is significant enough to warrant review, the Court is then required to assess whether the individual's security interest was impaired arbitrarily. Arbitrary state action produces a subjective, intrusive effect.[78] It creates an atmosphere of vulnerability and powerlessness, as the individual is left guessing as to why he or she has been intruded upon. Arbitrary intervention by the state induces a state of insecurity as the right to be left alone becomes precariously grounded upon unpredictable state action.

To date, there have been noticeably few cases that discuss the meaning of arbitrary detention and the courts have displayed a marked reluctance to provide a definitive approach to the concept of arbitrariness. In fact, whenever possible, the courts avoid deciding the issue of whether an arbitrary detention is present, preferring to dispose of any constitutional issues by reference to other provisions of the *Charter*. In 1987, the Supreme Court of Canada had the opportunity of deciding whether the seven year minimum sentence prescribed for the offence of importation of narcotics constituted arbitrary detention; however, the Court refused to deal with this issue preferring to dispose of the case on the basis of section 12 of the *Charter*, cruel and unusual punishment.[79]

A few months later, the Court had another opportunity. It was argued that the provisions of the *Criminal Code of Canada*[80] dealing with dangerous offenders constituted arbitrary detention and therefore were unconstitutional.[81] The process of designating an offender as dangerous was based upon inherently unreliable psychiatric evidence. There were also no guidelines to structure a prosecutor's unfettered discretion as to when to make a dangerous offender application. The Court was reluctant to establish the parameters of the right stating that "this Court has not yet

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[78] Murphy, *supra*, note 47 at 211.

[79] *R.* v. *Smith*, [1987] 1 S.C.R. 1045.

[80] *Criminal Code of Canada*, R.S.C. 1985, c. C-46, ss 752-762 [hereinafter *Criminal Code*].

[81] *R.* v. *Lyons*, [1987] 2 S.C.R. 309 [hereinafter *Lyons*]. These provisions allow for an indeterminate sentence on an accused previously convicted of a crime of "serious personal injury" who poses a threat of future violence.

pronounced on the scope and meaning of the words 'arbitrarily detained and imprisoned' and I do not think this would be an appropriate case to do so."[82] Without much discussion the Court ultimately held that the provisions do not violate the right to be free from arbitrary detention on the basis that

> even giving the word "arbitrary" its broadest signification, it is readily apparent that not only is the incarceration statutorily authorized, but that the legislation narrowly defines a class of offenders with respect to whom it may properly be invoked, and prescribes quite specifically the conditions under which an offender may be classed as dangerous. If these criteria are themselves unconstitutional, it is because they otherwise fail adequately to safeguard the liberty of the individual, not because they are arbitrary.[83]

This holding suggests that, regardless of the substantive content of the right, the *Charter* will not be violated if the detention is prescribed or authorized by law. This is a misleading impression because the only aspect of arbitrary detention that has, to date, achieved a judicial consensus is that a detention that is authorized may still be arbitrary, depending upon the criteria contained in the legislation.[84] Legislatively-prescribed detention does not insulate the conduct from a challenge of arbitrariness. It is also clear that legislative authorization is not a constitutional prerequisite for a detention to survive challenge upon the basis of arbitrariness.

Most of the cases which have struggled with defining the parameters of arbitrary detention have taken place in the context of motor vehicle stops which meet the judicial definition of a detention. In most provinces the police are empowered by statute to stop vehicles and request the ownership and insurance documents from the driver.[85] The stopping of vehicles may be authorized for

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[82] *Ibid.* at 346.

[83] *Ibid.* at 347.

[84] *R.* v. *Konechny* (1983), 10 C.C.C. (3d) 233 at 242 (B.C.C.A.); *Lyons*, *supra*, note 81 at 347; *Thwaites* v. *Health Sciences Centre* (1988), 51 Man. R. (2d) 196 at 202 (C.A.) [hereinafter *Thwaites*]; and *R.* v. *Cayer* (1988), 66 C.R. (3d) 30 at 43 (Ont. C.A.).

[85] For example, the *Highway Traffic Act*, R.S.O. 1980, c. 198, s. 189a(1), provides: "A police officer, in the lawful execution of his duties and responsibilities, may require the driver of a motor vehicle to stop and the driver of a motor vehicle, when signalled or requested to stop by a police officer who is readily identifiable as such, shall immediately come to a safe stop."

regulatory purposes, yet its significance transcends this limited purpose because:

> [T]he police claim that their powers to direct and stop traffic, to check on licences and insurance, are essential if they are to catch the motorized criminal and most criminals nowadays, like most other people, travel by car. Organized crime in particular depends heavily upon the succession of stolen vehicles.[86]

In recent years, the police have found that random stops and spot-check stops of vehicles are particularly useful for the detection of impaired driving. In 1985, The Supreme Court of Canada decided that spotchecks pursuant to the R.I.D.E. program[87] were a justified exercise of police powers, notwithstanding the fact that the program had not been authorized by legislation.[88] The Court employed the "ancillary powers" doctrine to uphold the program of random stops at a spot-check on the basis that the power was a reasonable and necessary adjunct to the duty imposed upon the police to ensure safety upon the roads. In addition, the Court believed that the intrusion occasioned by the exercise of power was limited and that the well advertised nature of the program reduced any anxiety or insecurity experienced by drivers who had been stopped.

This case only decided that random vehicle stops by the police were authorized at common law by the ancillary powers doctrine. The Court did not decide whether the random nature of the detention violated the *Charter*. This latter issue spawned numerous inconsistent appellate decisions that eventually crystallized into a relatively clear exposition of the nature of arbitrary detention.[89] One Court noted that "the essence of arbitrariness is capriciousness in, and the lack of a reasoned foundation for, the interference with the right that is at the centre of both section 8

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[86] L. Radzinowicz & J. King, *The Growth of Crime: The International Experience* (New York: Basic Books, 1977) at 166.

[87] R.I.D.E. (reduce impaired driving everywhere) is a program of organized roadblocks where the police randomly stop vehicles for the detection of impaired drivers.

[88] *R.* v. *Dedman*, [1985] 2 S.C.R. 2.

[89] *R.* v. *Neufeld* (1985), 22 C.C.C. (3d) 65 (Man. C.A.); *R.* v. *Rackow* (1986), 30 C.C.C. (3d) 250 (Alta C.A.); *R.* v. *Doucette* (1986), 33 C.C.C. (3d) 547 (N.S.C.A.); *R.* v. *Iron* (1987), 55 C.R. (3d) 289 (Sask. C.A.); and *R.* v. *Ladouceur* (1987), 57 C.R. (3d) 45 (Ont. C.A.).

and section 9: the right to be left alone."[90] Another court described arbitrariness as a spectrum of attitude ranging from whimsical to despotic:

> Thus, on the one hand, the term arbitrary has the connotation merely of being "dependent upon the will or pleasure," or being "left to one's judgment or choice" or being "at the discretion or option of anyone," while, on the other hand it has also has a more odious meaning of "capriciousness," of being "based on a notion or whim," of being "despotic."[91]

In order to bring the provision in Ontario that allows for stopping of vehicles up to constitutional muster, the Court of Appeal read down the provision so that it could only apply if the police are conducting an organized roadblock in which all cars are stopped or when the police stop an individual driver for some "articulable cause." However, the Supreme Court of Canada allowed the provision to stand and thus legitimated the stopping of vehicles without cause, whether by organized spotchecks[92] or by roving and random stops.[93]

The Supreme Court held that the provision permitted and authorized arbitrary detention because "there were no criteria for the selection of the drivers to be stopped and subjected to the spot check procedure."[94] The absence of any guiding criteria was objectionable because it left the selection of drivers "in the absolute discretion of the police officer."[95] Notwithstanding the finding of arbitrariness, the Court went on to uphold the provision as a reasonable limitation of the right pursuant to section 1 of the *Charter*.[96] Voluminous statistical data was presented to show that random vehicle stops were an effective and needed law enforcement

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[90] *Iron*, *ibid.* at 311.

[91] *R.* v. *Ladouceur*, *supra*, note 89 at 64.

[92] *R.* v. *Hufsky* (1988), 63 C.R. (3d) 14 (S.C.C.) [hereinafter *Hufsky*].

[93] *R.* v. *Ladouceur*, [1990] 1 S.C.R. 1257 [hereinafter *Ladouceur*].

[94] *Ibid.* at 18.

[95] *Ibid.* at 23.

[96] Section 1 reads: "*The Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

mechanism to curb the increasing traffic fatalities produced by impaired drivers and unlicensed drivers.

A similar approach to arbitrariness is found in the decision of the Manitoba Court of Appeal in which the Court struck down provisions in the *Mental Health Act*[97] allowing for involuntary commitment.[98] The *Act* provided that a magistrate could compel an individual to submit to medical examination "where any person ... is suspected or believed to be in need of examination and treatment in a psychiatric facility." Similarly, an order requiring involuntary commitment could be issued upon a showing that "a person should be confined as a patient at a psychiatric facility." The Court contended that the relevant question was whether "the legislation that authorizes detention sufficiently defines the persons who may be subject to the legislation, and the circumstances under which they may be compulsorily detained."[99] The Court found that the legislation failed to adequately specify the relevant guiding criteria needed to rescue the provisions from a finding of arbitrariness but unlike the approach of the Supreme Court of Canada with respect to random vehicle stops, the Court would not uphold the legislation as a reasonable limit under section 1 because the "impugned provisions lacked objective criteria."[100]

The upshot of these cases is that arbitrariness is found in state action that is capricious, despotic, or simply ungoverned by principled criteria. This approach to defining arbitrariness is thus ineffective because it replaces the term arbitrary with other synonyms without instantiating the concept. The essence of arbitrariness may be the absence of guiding criteria, yet the Court is reluctant to suggest what form of guidance should be offered to the police. One may contend that the necessary criteria can only be provided by the legislature, and in terms of considerations of institutional competence, this contention has much force. However,

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[97] R.S.M. 1970, c. M-110.

[98] *Thwaites*, *supra*, note 84.

[99] *Ibid.* at 201.

[100] *Ibid.* at 205.

while we wait for legislators to overcome their legislative inertia,[101] the court should fill the void by issuing tentative guidelines.

The failure to develop the concept of arbitrariness beyond mere rhetorical pronouncements does little to guard against arbitrary conduct in the future.[102] Arbitrariness is the absence of reasoned decision-making. The right to be free from arbitrary detention is a command to the police to apply their experience, expertise, and reasoning to ensure that deprivations of liberty are not based upon whims and prejudices. For example, the B.C. County Court stayed a prosecution for the offence of soliciting because the police detained the accused overnight based only on a departmental policy and not upon any consideration of whether the detention was required in accordance with section 452 of the *Criminal Code*.[103] The judge contended that an arrest or detention "should be based on reasons relating specifically to that individual,"[104] and that the fettering of discretion by reliance upon departmental policy constituted arbitrary detention.

One might accordingly conclude that individualized decision-making is a prerequisite for non-arbitrary detention; however, the decision of the B.C. County Court is the exception. Numerous courts have held that overnight detention based on departmental policy does not violate the *Charter*.[105] To understand why some courts do

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[101] For a discussion of the concept of legislative inertia and its impact on the judicial function, see G. Calabresi, *A Common Law for the Age of Statutes* (Cambridge, Mass.: Harvard University Press, 1982); H. Friendly, "The Gap in Lawmaking – Judges Who Can't and Legislators Who Won't" (1963) 63 Colum. L. Rev. 787; and G. Gilmore, "On Statutory Obsolescence" (1967), 39 Colo. L. Rev. 411.

[102] For example, the decision of the Supreme Court of Canada that random vehicle stops are arbitrary, but none the less constitute a reasonable limit, is a decision oblivious to the broader implication of the ruling. The stops were a reasonable limit because of the importance of curbing impaired driving. Presumably, a random stop is only justified if the police stop a vehicle to check the driver's sobriety. Without showing articulable reasons the police can randomly stop a vehicle for any reason and then assert that the stop was to check sobriety.

[103] *R.* v. *Pithart* (1987), 34 C.C.C. (3d) 150 (B.C. Co. Ct) [hereinafter *Pithart*].

[104] *Ibid.* at 160.

[105] *R.* v. *Cayer* (1988), 66 C.R. (3d) 30 (Ont. C.A.); *R.* v. *Macintosh* (1984), 29 M.V.R. 50 (B.C.C.A.); *R.* v. *Pahovitz* (1987), 59 C.R. (3d) 396 (Sask. C.A.); and *R.* v. *Kassam* (18 February 1987), (B.C. Prov. Ct) [unreported]. The latter is cited in *Pithart*, *supra*, note 103

not require the police to individualize their decisions, the broader considerations animating the concept of arbitrary detention must be explored.

The cases dealing with random vehicle stops expose the danger sought to be controlled through section 9 of the *Charter*. In their disapproval of random vehicle stops, the Ontario Court of Appeal wisely points out that an intrusion that is not based upon some articulable cause

> gives a discretion so wide that police officers can use it to choose the younger driver over the older, the less sartorially acceptable over the more sartorially respectable, the owner of an older or cheaper car over the one who drives a more expensive or a more commonly-driven car, even a person obviously visible as being a minority group over one who is clearly of the majority.[106]

The problem with police activity that is not a product of deliberation and principled reasoning is that the police may exercise their discretion in a discriminatory fashion.

This fear of discrimination posing as discretion lies at the heart of the U.S. Supreme Court's decision to strike down random vehicle stops.[107] The Court would not permit random stops, but suggested that "questioning of all oncoming traffic at a road-block type stop"[108] may be a constitutionally permissible alternative.[109] In

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at 159 and in *R.* v. *Sieben* (1989), 51 C.C.C. (3d) 343 (Alta C.A.).

[106] *R.* v. *Ladouceur*, *supra*, note 89 at 71. However, the Supreme Court of Canada in *Ladouceur*, *supra*, note 93 at 25, failed to recognize the dangers of discriminatory law enforcement arising from police activity ungoverned by criteria. Upholding the roving and random vehicle stop as a reasonable limitation under section 1 the Court noted: "Finally, it must be shown that the routine check does not so severely trench upon the s. 9 right so as to outweigh the legislative objective. The concern at this stage is the perceived potential for abuse of this power by law enforcement officials. In my opinion, these fears are unfounded. There are mechanisms already in place which prevent abuse. Officers can stop persons only for legal reasons, in this case reasons related to driving a car such as checking the driver's licence and insurance, the sobriety of the driver and the mechanical fitness of the vehicle. Once stopped the only questions that may justifiably be asked are those related to driving offences." Though the Court correctly noted that the police may only stop for a limited objective, nothing prevents the police stopping drivers in a discriminatory or offensive manner.

[107] *Delaware* v. *Prouse*, 99 S. Ct 1391 (1979).

[108] *Ibid.* at 1401. In fact, the U.S. Supreme Court recently upheld a roadblock scheme which stopped all drivers in the absence of any articulable suspicion: *Michigan Department of State Police* v. *Sitz*, 110 S. Ct 2481 (1990) [hereinafter *Michigan Department*].

dissent, Justice Rehnquist was puzzled by the Court's disapproval of the marginally intrusive stop and its approval of the more intrusive roadblock and he quipped that the Court has elevated the old adage that "misery loves company" to constitutional proportions. What is absent in this sarcastic rejoinder is the realization that, although a roadblock may cause greater inconvenience and it may impact upon more innocent drivers, it reduces the possibility of discrimination to a bare minimum. Similarly, overnight detention at the police station in accordance with a blanket policy may result in the unjustifiable detentions of some, but the policy ensures that the decision to detain cannot be premised upon the individual's racial, socio-economic, or ethnic characteristics. Thus, arbitrary detention relates not only to indiscriminate state intrusion, but also to discriminatory intrusion.

Turning from vehicle stops to street encounters, we find an astonishing paucity of reported case law. In the three leading cases to date,[110] the courts have struggled with the problem of the proper police response where there is a suspicion of criminality but no reasonable and probable grounds. The *Duguay* case illustrates the dilemma. In that case, the police were investigating a break and enter and it came to their attention that a number of youths were in an adjacent backyard at the time of the burglary, and, prior to the break and enter, they had asked the homeowner-victim where he kept his dog during his absence from the house. These facts casted a suspicion upon the youths, and the officer would have been remiss

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[109] Whether roadblocks are unconstitutional has generated a great deal of controversy in the United States. To decrease the discretion exercised by police, the legislatures must construct criteria that account for: "(1) the availability of less intrusive means for combating the problem; (2) the degree of effectiveness of the procedure; (3) the degree of discretion left to the officer in the field; (4) the standards set by superior officers; (5) the degree of fear or anxiety generated by the mode of operation; (6) the average length of time each motorist is detained; (7) the maintenance of safety conditions; (8) the advance warning to the public; (9) the physical factors surrounding the location, type and method of operation; (10) the advance warning to the individual approaching motorist; (11) the location designated for the roadblock; and (12) the time and duration of the roadblock": L. Giaquinto, "Designing Constitutional Sobriety Roadblocks: A Comparative Study using the Model in *Fury* v. *City of Seattle* and *State* v. *Deskins*" (1988) 24 Willamette L. Rev. 129 at 149.

[110] *R.* v. *Duguay* (1985), 18 C.C.C. (3d) 289 (Ont. C.A.), aff'd 1 S.C.R. 93 [hereinafter *Duguay*]; *R.* v. *Brown* (1987), 33 C.C.C. (3d) 54 (N.S.S.C.); *R.* v. *Spence* (1988), 51 Man. R. (2d) 142 (Man. C.A.).

in failing to follow up this slim lead. Unfortunately, the officer went to the extreme of taking the youths into custody claiming that the youths were arrested "to determine whether they actually did it or not."[111]

The Ontario Court of Appeal excluded the youths' confessions because the police had acted arbitrarily in taking the youths into custody. The Court reasoned that an arrest must be based upon reasonable and probable grounds, and that the arrest was unauthorized because the officers lacked this requisite degree of suspicion of guilt. However, the Court continued by asserting that arbitrariness is not to be equated with lack of authority and that an arbitrary or capricious detention will only be found upon an entire absence of reasonable grounds. The Court did not stipulate what lesser standard of suspicion would suffice to allow the police to detain an individual. They simply concluded that the police "had neither grounds nor an honest belief that they had the necessary grounds."[112]

The dissent both in the Court of Appeal and in the Supreme Court of Canada focused upon the suspicions that motivated the police. This suspicion surely did not justify the exercise of a power of arrest, but it may justify some lesser investigatory intrusion. Unfortunately, the decision of the majority contains a contradictory direction for the police that casts doubt upon the propriety of brief investigatory detention. Even though the Court held that reasonable and probable grounds are not the defining feature of a non-arbitrary detention, thus laying the foundation for a brief detention based upon a lesser standard, the Court went on to articulate an "improper purpose" test for arbitrariness. The Court stated that "the arrest or detention was arbitrary, being for quite an improper purpose — namely to assist in an investigation."[113] Under this improper purpose analysis it appears that a deprivation of liberty in the context of law enforcement can only be carried out to facilitate an inevitable prosecution. Liberty cannot be impaired simply to aid the

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111 *Duguay, ibid.* at 295-99.

112 *Ibid.* at 297.

113 *Ibid.* at 296.

police in investigating an offence that may or may not lead to charges against the detained individual.

The upshot of both the driving and street encounter cases is that the concept of arbitrariness embodies two relatively independent tests: the test of adequate criteria and the test of improper purpose. These tests may lend themselves to mechanical and straightforward application, yet they promise more than they can deliver. The test of adequate criteria is deficient because the courts never give any indication of what would constitute a constitutionally-acceptable criteria. The test of improper purpose is simply unrealistic because it fails to take into account the need for and common practice of investigatory detention. As a starting point, these two tests are acceptable, but they need to be reformulated so as to serve as effective safeguards against arbitrary detention.

III. UNDERSTANDING POLICE POWERS OF DETENTION

A. *Investigative Detention*

In Canadian law an arrest represents a justifiable intrusion upon liberty that occurs at the end of an investigation. The arrest power is premised upon reasonable and probable grounds, as is the power to initiate proceedings by "the laying [of] an information."[114] Accordingly, the arrest must be considered the final stage in the investigatory process because at this stage the police are presumably in possession of sufficient grounds to commence criminal proceedings. However, it must be recognized that being in possession of reasonable and probable grounds does not guarantee conviction at trial because the trial proceeds upon the more exacting burden of reasonable doubt. In some, if not most, cases the police need to obtain the confirming evidence of a confession to guarantee success at trial. The confession is the "queen of the evidentiary

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[114] *Criminal Code*, *supra*, note 80, s. 504.

chessboard,"[115] and the police welcome every opportunity that is provided for its capture.

Although the police exercise their power of arrest at the completion of the investigation, they are given twenty-four hours, or longer if the twenty-four hours is impracticable, before which they must bring the suspect before a judicial officer. Surely, this period of time is more than ample for the booking of a suspect, and in the remaining time before appearance in court, the police have an ideal opportunity to consolidate their case through the obtaining of a confession. There is no specific authorization for the police to employ this time for interrogation, and despite the rhetoric of the right against self-incrimination the police seize the opportunity to obtain a confession.

In seeming disregard of actual practice, the courts claim that our law does not recognize an arrest for questioning,[116] and that police officers do not have "the right to detain somebody for the purposes of getting them to help with their enquiries."[117] In 1984 the House of Lords rationalized this divorce between theory and practice by holding that the police are not acting improperly if their sole reason for arresting an individual is to facilitate interrogation.[118] They contended that "the arrest for the purpose of using the detention to dispel or confirm the reasonable suspicion by questioning the suspect [is] well established as one of the primary purposes of detention upon arrest."[119] Although the English law on arrest is less exacting than the Canadian law, for in England a lawful arrest is premised upon reasonable suspicion and not upon reasonable and probable grounds, there is little reason to question the applicability of the holding of the House of Lords to Canadian law. The upshot is that a deprivation of liberty through arrest can

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[115] H.R. Uviller, "Evidence From the Mind of the Criminal Suspect: A Reconsideration of the Current Rules of Access and Restraint" (1987) 87 Colum. L. Rev. 1137 at 1139.

[116] *R.* v. *Reeves* (1985), 70 N.S.R. (2d) 165 at 167 (N.S. Prov. Ct).

[117] *R.* v. *Lemsatef*, [1977] 2 All E.R. 835 at 839 (C.A.).

[118] *Holgate-Mohammed* v. *Duke*, [1984] 1 All E.R. 1054 (H.L.), aff'd [1983] 3 All E.R. 526 (C.A.).

[119] *Ibid.* at 1059.

be premised upon the need to interrogate the suspect if, and only if, the arrest is otherwise lawful in that the police must possess sufficient grounds to exercise the power to arrest.[120]

This qualification that an investigative detention must follow an otherwise valid arrest explains the Ontario Court of Appeal's claim in the *Duguay* case that the police acted upon an improper purpose in arresting the youths to facilitate their investigation. The police had exceeded the limits of their power in taking the youths in a police cruiser to the station because this constituted a constructive arrest[121] and because reasonable and probable grounds were lacking. However, it is misleading if the Court is suggesting that the police are precluded from taking any action absent reasonable and probable grounds to arrest. In light of the information received by the police, they would have been derelict in their duty if they simply disregarded any further investigative action. Their error was that they subjected the accused to a full-scale deprivation of liberty instead of taking a less-intrusive investigatory course of action.

Unfortunately, the Ontario Court of Appeal appears to place the police on the horns of a dilemma by claiming that a detention is arbitrary if it is premised upon a need to assist the investigation. Surely, the police must not be forced into an all or nothing situation of either exercising a power of arrest or leaving the suspects alone? Whether or not the Court approves, the police will in most cases exercise a power of investigatory detention that is subject to ill-defined limits. The courts must recognize the reality of investigatory detention and begin the process of regulating the practice so that street detentions do not end up being non-stationhouse incommunicado arrests.

Investigatory detention has a well-established historical pedigree in continental European and in socialist legal jurisdictions. The powers found in these jurisdictions may exceed acceptable bounds for Canadian law enforcement; however, they are worth

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120 Similarly, the Supreme Court of Canada recently held that police could conduct a lineup after a valid arrest and that an arrest does not become unlawful if exercised with an investigatory purpose in mind: *R.* v. *Storrey*, [1990] 1 S.C.R. 241.

121 See *Dunaway* v. *New York*, 442 U.S. 200 (1979), for an analogous case of constructive arrest.

noting. In France, the police are empowered to detain in custody persons who can help them with their inquiries. This period of detention *garde à vue* may last for twenty-four hours subject to a twenty-four hour extension that may be granted by the procureur.[122] In addition, the police have extensive powers of identity control in which they are allowed to detain anyone for up to four hours to verify the identity of an individual.[123] Similar powers are found in other jurisdictions with variations with respect to the length of permissible detention. For example, Scotland permits detention for up to six hours; Ireland permits detention for up to twenty hours, and the Soviet Union and China permit detention for up to seventy-two hours.[124]

By providing explicit authorization for the practice of investigatory detention, the legislatures are able to construct safeguards which may include the keeping of detailed registers, the provision of medical examinations, the notification of counsel, family, or friends, and various official warnings to inform the suspect of the reason for the detention, and the right to remain silent. The potential for abuse is not eliminated[125] yet it is no small achievement for law enforcement officials to be compelled to transform a low-visibility practice into one of official regulation with stated limitations. The movement from secrecy to official

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[122] The power to detain is considerably broader for flagrant offences, (that is, those recently committed) than for ordinary preliminary inquiry. Also, the extensions of the *garde à vue* are longer for narcotics trafficking and for matters of national security. For more detail, see *The French Code of Criminal Procedure*, rev'd ed., trans. G.L. Kock & R.S. Trage (Littleton, Colo.: F.B. Rothman, 1988) ss 53-78; K.W. Lidstone & T.L. Early, "Questioning Freedom: Detention for Questioning in France, Scotland and England" (1982) 31 Int'l & Comp. L.Q. 488; B.L. Ingraham, *The Structure of Criminal Procedure: Laws and Practice of the Soviet Union, China and the United States* (New York: Greenwood Press, 1987) at 62-63.

[123] *The French Code of Criminal Procedure*, *ibid.*, ss 78-1 to 78-5; and Lidstone & Early, *ibid.* at 495-96.

[124] Lidstone & Early, *ibid.* at 497-99; Ingraham, *supra*, note 122 at 63-65; and D. Walsh, "The Impact of Antisubversive Laws on the Police Powers and Practices in Ireland: The Silent Erosion of Individual Freedom" (1989) 62 Temple L.R. 1099.

[125] In the Soviet Union, persons may be held for months under exceptional powers without the ordinary safeguards provided for the usual 72 hour detention: Ingraham, *supra*, note 122 at 63. In addition, many have criticized the French *garde à vue*, sometimes referring to it as "legitmate torture": see W. Pakter, "Exclusionary Rules in France, Germany and Italy" (1985) 9 Hastings Int'l & Comp. L. Rev. 1 at 13.

recognition and control is best illustrated by developments in England in the past decade.

Despite the common law abhorrence of investigatory detention, the British are not strangers to the practice. In response to terrorist attacks by the Irish Republican Army, the British constructed a draconian scheme of detention without charge that was upheld by the European Court of Human Rights;[126] however, the Court was careful to suggest that this legislation should be restricted to terrorist activity. Britain has not heeded this warning and in 1984, the *Police and Criminal Evidence Act*[127] authorized an elaborate scheme of investigatory detention. This legislation was a product of the concern expressed by the Royal Commission on Criminal Procedure that existing provisions for interrogation and investigation upon arrest were uncertain and subject to manipulation.[128] It had been noted that "arrested persons were frequently detained for indefinite periods without notification of the grounds for detention."[129]

Sections 34 to 45 of the new legislation permit detention without charge after the police have arrested an individual upon reasonable suspicion. For serious arrestable offences, this detention may last for thirty-six hours without judicial review and then further extensions by the Court may be obtained for a period not exceeding ninety-six hours in total. Several safeguards were established in the legislation including a requirement of authorization and review by senior police officials, preparation of written detention records, and notification to suspects of the reasons for detention. In addition the *Act* requires the promulgation of a Code of Practice which, like the

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[126] *Ireland* v. *U.K.* (1978), Eur. Court H.R. Ser. A, No. 25, 2 E.H.R.R. 25; *McVeigh, O'Neill and Evans* v. *U.K.* (Nos 8022/77, 8025/77, 8027/77) (1981), 5 E.H.R.R. 71.

[127] (U.K.), 1984, c. 60, s. 66.

[128] U.K., Royal Commission on Criminal Procedure: A Consultative Memorandum by Sir Phillips (London: H.M.S.O., 1981) paras. 3.96 - 3.107 [hereinafter *Royal Commission on Criminal Procedure*]. See also E.B. Glicksman, "Reform of English Criminal Procedure – Fact or Fiction?" (1986) 15 Anglo-Am. L. Rev. 1 at 2.

[129] Glicksman, *ibid.*

previous *Judge's Rules*,[130] provides guidance to the police. The current Code of Practice contains rules and regulations with respect to: (1) the right to have concerned individuals informed of the individual's detention; (2) special provisions for mentally handicapped and blind suspects; (3) the right to have a solicitor present during questioning; (4) conditions of detention including stipulation of rest and eating periods; (5) provision of medical examination upon request; and (6) cautions to inform the suspect of his or her right to remain silent.

It should be noted that many of these rules are in essence non-enforceable, and, in fact, the Code of Practice allows the police to suspend many of the significant safeguards in cases of perceived emergency. Nevertheless, the British have taken a practice previously ungoverned and unruly and subjected it to rigorous scrutiny.[131] The legislative schemes in France, Scotland, the Soviet Union, and Britain all permit stationhouse detention upon less than probable cause, and it may be that this onerous form of detention has no place in Canadian criminal process. However, it must be recognized that investigatory detention refers not only to these full-scale deprivations; but it also encompasses briefer and less intrusive street detentions for investigatory purposes.

Legitimate investigatory detention is permitted in the United States, and a review of some of the procedures authorized by various states may give us some indication of the scope and function of street detention. In 1939, the *Uniform Arrest Act*[132] was promulgated and adopted by some states. It recommended that the police be empowered to stop and question an individual for whom the officer had reasonable grounds to suspect is committing, has committed, or is about to commit an offence. Any person who fails

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[130] The *Judge's Rules* were guidelines developed by the judges on the King's Bench in 1912. They were amended in 1918 and in 1964. See the *Judges' Rules and Administrative Directions to the Police*, Home Office, Circular No. 31, App. A (1964).

[131] However, it appears that stationhouse detention is becoming routine. In the first half of 1986, 391 applications were made to the court to authorize pre-charge detention and only eight were refused: J. Clegg, "Warrants of Further Detention" (1988) 132 Solic. J. 278.

[132] For example: *Uniform Arrest Act*, 941 N.H. Laws 1941 ch. 982; 1941 R.I. Pub. L. ch. 163. See also S. Warner, "*The Uniform Arrest Act*" (1942) 28 Va. L. Rev. 315 at 318-19, for the test of the *Act*.

to properly identify himself or herself or to properly "explain his actions" may be further detained, but the total period of detention under this provision should not exceed two hours.

The constitutionality of a power of detention on less than probable cause was not reviewed until the seminal case of *Terry* in 1968.[133] In that case, an officer suspected that a group of individuals were casing a bank. The officer approached the individuals on the street, conducted a frisk of the outer clothing, and discovered the accused in possession of a weapon. In determining the admissibility of the discovered weapon, the Supreme Court of the United States held that officers must be permitted to stop and frisk suspected felons in circumstances in which probable cause is lacking. They stated that:

> Where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or other's safety, he is entitled for the protection of himself or others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.[134]

The decision in *Terry* was considered a reasonable and practical compromise to the daily dangers faced by officers patrolling the street; however, the original protective and preventive rationale for the compromise was forgotten and the *Terry* decision has spawned a doctrine of brief investigative detention upon reasonable and articulable suspicion.[135] The power to briefly detain and possibly frisk an individual has expanded far beyond the investigation of dangerous felonies that are imminent. The Supreme Court of the United States has approved investigative stops for possessory offences and for offences committed some time in the past.[136] The

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[133] *Supra*, note 5.

[134] *Ibid.* at 30.

[135] M. Lippman, "Stop and Frisk: The Triumph of Law Enforcement Over Private Rights" (1988) 24 Crim. L. Bull. 24; and C. Wiseman, "The Reasonableness of the Investigative Detention: An 'Ad Hoc' Constitutional Test" (1984) 67 Marq. L. Rev. 641.

[136] *Adams* v. *Williams*, 407 U.S. 143 (1972); and *U.S.* v. *Hensley*, 469 U.S. 221 (1985).

malleability of the doctrine is evident in the expanding list of offences to which it applies and, further, the indefiniteness of the notion of brief or temporary has allowed the courts to apply the doctrine to encounters far removed from the volatile circumstances found in *Terry*.

In dealing with detentions that range from twenty minutes[137] to ninety minutes,[138] the Court has said that "our cases impose no rigid time limitation on stops as in *Terry*,"[139] but that "the brevity of the invasion ... is an important factor in determining whether the seizure is so minimally intrusive as to be justifiable on reasonable suspicion."[140] Unable to construct a bright-line limitation upon investigative detention, the Court settled for the balancing test of "least intrusive means" that requires the reviewing court to ask whether the "police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly."[141] Although the courts have been unable to provide detailed limits to the power of investigatory detention, the very fact they have recognized the power and subjected it to constitutional scrutiny has prompted many state legislatures to enact enabling legislation.[142]

Unfortunately, the current legislation in many states is elliptical and vague; however, these legislative schemes at least attempt to place concrete limits upon the exercise of the power. First, some states place limits upon the type of offences that allow for investigative street detention.[143] Secondly, the legislation may

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[137] *U.S.* v. *Sharpe*, 105 S. Ct 1568 (1985) [hereinafter *Sharpe*].

[138] *U.S.* v. *Place*, 462 U.S. 696 (1983) [hereinafter *Place*].

[139] *Sharpe*, *supra*, note 137 at 1575.

[140] *Place*, *supra*, note 138 at 709.

[141] *Sharpe*, *supra*, note 137 at 1575.

[142] For relevant state legislation, see Dix, *supra*, note 21 at 862-63. For a detailed and insightful example of recommended legislation, see J. Lajota, *Project on Law Enforcement Policy and Rulemaking, Model Rules Stop and Frisk* (Washington, D.C.: Police Foundation, 1974). This proposal covers what constitutes reasonable suspicion to justify a stop, what warnings to be given to stopped suspects, the effect of a refusal to cooperate, and the procedures and safeguards to employ during a frisk.

[143] For example, *The American Law Institute, The Model Code of Pre-Arraignment Procedure* (1975) [hereinafter *The Model Code of Pre-Arraignment Procedure*] requires that the

prescribe the permissible length of an investigatory detention.[144] Thirdly, the legislation may specify the permitted location for the questioning and whether the suspect may be moved from the location at which he or she was stopped.[145] Fourthly, the legislation may prescribe a series of admonitions or warnings to apprise the suspect of his or her rights and legal status during questioning.[146] Finally, the legislation may detail the amount of force that can be used by an officer to effect a detention.[147] It should also be noted that some states have enacted provisions that allow the police to obtain judicial orders or warrants to compel a suspect to attend at a designated location for various non-testimonial identification procedures.[148]

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offence be one "involving danger of forcible injury to persons or of appropriation of or damage to property": section 110.2(1)(c). Virginia requires that the offence be a felony or criminal possession of a concealed weapon: Va. Code Ann. § 19.2-83 (1990). See also Dix, *supra*, note 21 at 870-71.

144 For example, *The Model Code of Pre-Arraignment Procedure*, *ibid.* states that a detention may not last longer than twenty minutes: section 110.2 (5)(a)(ii). Arkansas permits fifteen minutes: Ark. Stat. Ann. § 43-429(a) (1977). Montana permits thirty minutes: Mont. Code Ann. § 46-5-402(4) (1983). Delaware permits two hours: Del. Code Ann. tit. 11 § 1902(c) (1979). New Hampshire permits 4 hours: N.H. Rev. Stat. Ann. § 594:2 (1974). See also Dix, *supra*, note 21 at 885-86.

145 For example, Florida legislation states that the detention "shall not extend beyond the place where it was first effected or the immediate vicinity thereof": Fla. Stat. Ann. § 901.151(3) (1985). Wisconsin requires the detention to be "in the vicinity where the person was stopped": Wis. Stat. Ann. § 968.24 (1985). In Virginia, the police must "detain a person in a public place": Va. Code Ann. § 19.2 - 83 (1990). See also Dix, *supra*, note 21 at 896-97.

146 For example, *The Model Code of Pre-Arraignment Procedure*, *supra*, note 146, requires that the suspect be told that he or she will be released after twenty minutes and that there is no legal obligation to answer questions: sections 110.2(5)(a)(ii) and 110.1(2). The Montana legislation requires the officer to identify himself or herself as an officer and to inform the suspect that the stop is not an arrest but a temporary detention and that upon completion of the investigation the person will be released unless arrested: Mont. Code. Ann. § 46-5-402(3) (1983). See also Dix, *supra*, note 21 at 900-901.

147 Most statutes are silent or allow the use of any reasonably necessary force short of, or including, deadly force: Dix, *supra*, note 21 at 902-3.

148 N.C. Gen. Stat. § 15A-271 to 15A-280 (1978); Ariz. Rev. Stat. Ann. § 13-3905 (1978). In Canada, a dearth of authority on the permissible powers to compel investigative tests prompted the Law Reform Commission to recommend a series of enabling rules: Law Reform Commission of Canada, *Investigative Tests* (Working Paper 34) (Ottawa: The Commission, 1984).

In conclusion, it appears that investigative detention is commonly part of the arsenal of police powers in many jurisdictions. Once recognized it can be regulated. Canadian courts should not deem a detention to be arbitrary simply on the basis that it was exercised for an investigatory purpose. Rather, the courts should acknowledge the need for investigatory detention and then commence to articulate the standards and criteria that distinguish an arbitrary detention from a legitimate detention short of arrest.

B. *Probable Cause, Profiles, and the Poor Law*

The characterization of a stop or detention as arbitrary should have little to do with the investigatory intentions of the state official. As the Supreme Court of Canada has noted,[149] it is the absence of governing criteria that makes the detention constitutionally suspect. However, one must question whether a criterion which is itself arbitrary or irrational, would pass constitutional muster. For example, in the context of vehicle stops it is arguable that the Supreme Court of Canada would have still found random vehicle stops to be violative of section 9 of the *Charter* even if a criterion such as stopping every third blue car was in operation. The direction to stop every third blue car does eliminate the danger of discriminatory stops, but it does not address the related danger of indiscriminate intrusion. The third blue car criterion is neutral, yet its lack of relation to the commission of any offence makes this criterion as arbitrary as the complete absence of criteria.

In equating non-arbitrariness with the presence of governing criteria, the Court must have had in mind criteria that are somehow connected with the objective of preventing or detecting crime. Traditionally, the law has never required detailed criteria for intrusion, but rather has been content to capture the spirit of regulated intrusion by the general formula of reasonable and probable grounds. The general rule of thumb is that "the state's interest in detecting and preventing crime begins to prevail over the

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[149] *Hufsky*, *supra*, note 92.

individual's interest in being left alone at the point where credibly-based probability replaces suspicion."[150] This reference to credibly-based probability is the essence of the Supreme Court of Canada's objective criterion for a reasonable search under section 8 of the *Charter*. However, section 9 of the *Charter* does not proscribe unreasonable detentions but only arbitrary ones and, by definition, the objective criterion must be somewhat relaxed in this context.

In order to avoid an attribution of arbitrary conduct, the state official must be operating under a set of criteria that, at minimum, bears some relationship to a reasonable suspicion of crime but not necessarily to a credibly-based probability of crime.[151] The structural relationship between sections 8 and 9 of the *Charter* ineluctably leads to the adoption of the American position on seizures of the person: a full-scale arrest (a seizure) must be supported by probable cause,[152] whereas a temporary stop (a detention) need only be supported by a reasonable and articulable suspicion.[153] Unfortunately, the clarity and simplicity of this two-tiered structure is undercut by the inherent vagueness of formulas such as "reasonable and probable grounds" and "reasonable suspicion."

The police may acquire information or leads in one of two ways. First, they may directly observe activity from which they can draw inferences of criminal activity. Secondly, they may receive information from individuals concerning observed criminal activity. In the latter situation, the police are entitled to act if the informant

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[150] *Hunter* v. *Southam*, [1984] 2 S.C.R. 145 at 167.

[151] This appears to be the premise of the Ontario Court of Appeal in *Duguay*, *supra*, note 109. The premise remains implicit because the majority mistakenly assumed that the detention was arbitrarily exercised for investigatory purposes.

[152] The Ontario Court of Appeal correctly pointed out that the American standard of "probable cause" is synonymous with the Canadian standard of "reasonable and probable cause": *R.* v. *Debot* (1986), 30 C.C.C. (3d) 207 at 219 (Ont. C.A.), aff'd (1989), 73 C.R. (3d) 129 (S.C.C.) [hereinafter *Debot*].

[153] However, the recent decision of the U.S. Supreme Court in *Michigan Department*, *supra*, note 108, suggests that minimally intrusive seizures do not need reasonable suspicion if the state has a pressing interest for the detention.

and his or her information is trustworthy and reliable.[154] The acquisition of information from informants will not be discussed further because most street encounters arise from spontaneous and direct observation by the state official whereas the informant scenario, though problematic in many regards, usually occurs in a more relaxed and reflective setting that allows the officer to consult with other officers before acting. Accordingly, we will assess the practical implementation of the criteria of probable cause or reasonable suspicion in the context of the officer directly observing conduct on the streets.

In this scenario the variety of suspicious facts and circumstances police may witness is nearly infinite, but most fall into one of four categories:[155] (1) conduct resembling crime; (2) conduct that appears to reflect consciousness of guilt; (3) characteristics of the actor; and (4) the environment in which the actor is observed.[156] An officer must take these facts and circumstances and perform the unenviable intellectual exercise of determining whether these facts amount to sufficient grounds for intrusion. It has been said that probable cause is established where "the facts within their [the officer's] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offence has been, or is being, committed."[157] The standard is no more than an exhortation to caution and as Justice La Forest of the Supreme Court of Canada said: "the expression [reasonable and probable cause], no doubt, comprises something more than mere surmise, but determining with any useful measure of precision what it means beyond that poses intractable problems both for the police and the courts."[158]

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[154] For the relevant standard of evaluating informants' tips, see *R.* v. *Pastro* (1988), 42 C.C.C. (3d) 485 (Sask. C.A.) and *Debot, supra*, note 152.

[155] Johnson, *supra*, note 28 at 218.

[156] Johnson, *ibid.* at 218-23, discusses the content of these factors.

[157] *Brinegar* v. *U.S.*, 338 U.S. 160 at 175-76 (1949).

[158] *R.* v. *Landry* (1986), 25 C.C.C. (3d) 1 at 26 (S.C.C.) [hereinafter *Landry*].

The intractable problem of defining reasonable and probable grounds has led the courts to declare that "probable cause is a fluid concept"[159] and that "the standard to be met is one of reasonable probability,"[160] without any further indication of how the officer can instantiate "the vagueness of the proposed test."[161] Ultimately, the courts defer to the experience or expertise of the officer as "a trained officer draws inferences and makes deductions ... inferences and deductions that might well elude an untrained person."[162] Probable cause may be the threshold criterion for legitimate state intrusion, but it is a standard that defies rational evaluation.

Knowing the difficulties inherent in the application of the probable cause standard, one can safely assume that the more relaxed standard of "reasonable suspicion" will attack even graver problems of definition. The most elaborate portrait of this standard that the U.S. Supreme Court has been able to draw is as follows:

> Terms like "articulable reasons" and "founded suspicion" are not self-defining; they fall short of providing clear guidelines dispositive of the myriad factual situations that arise. But the essence of all that has been written is that the totality of the circumstances – the whole picture – must be taken into account. Based upon that whole picture the detaining officer must have a particularized and objective basis for suspecting the particular person stopped of criminal activity ... Finally, the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.[163]

Probable cause and reasonable suspicion refer to distinctive modes of evaluating facts and circumstances as observed on the street. Probable cause may be a reference to a preponderance of evidence, either a more probable than not standard or merely a

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[159] *Illinois* v. *Gates*, 103A S. Ct. 2317 at 2329 (1983) [hereinafter *Gates*].

[160] *Debot, supra*, note 152 at 219.

[161] *Landry, supra*, note 158 at 25.

[162] *U.S.* v. *Cortez*, 449 U.S. 411 at 418 (1981).

[163] *Ibid.* at 417-18. British judges have stated that suspicion is a state of conjecture or surmise in absence of proof and that it arises at or near the starting point of an investigation of which the obtaining of *prima facie* proof is the end: *Hussien* v. *Chong Fook Kam*, [1969] 3 All E.R. 1626 (P.C.). However, the English pronouncements provide little help because they "still use such terms as 'reasonable suspicion,' 'reasonable and probable cause,' and 'reasonable and probable cause for suspicion' interchangeably": J. Grano, "Probable Cause and Common Sense: A Reply to the Critics of *Illinois* v. *Gates*" (1984) 17 Mich. J.L. Reform 465 at 488.

substantial possibility standard.[164] Whatever standard is chosen for probable cause, the term reasonable suspicion triggers a less exacting standard. Professor Lafave claims that in the American experience street stops require a substantial possibility of guilt, whereas an arrest is not permitted unless guilt is more probable than not.[165] The nature and intrusiveness of the investigatory activity determines the standard of certainty of guilt that must be met before the officer can exercise his or her authority.

Establishing distinctive and abstract standards of evaluation for probable cause and for reasonable suspicion does not assist the officer on the street in determining the legitimate point of intrusion. Accordingly, attempts have been made to flesh out the factors that should be considered in weighing whether or not this point of intrusion has been reached.[166] It has been recognized that not all factors must be left to the subjective weighing of the officer; and that "when common factors recur across cases, the possibility arises that policy decisions can be made about their place in a probable cause or reasonable suspicion equation."[167] A stated policy mandates a presumptive weighing of certain factors that have been shown to have predictive capabilities.

A stated policy for determining probable cause or reasonable suspicion is commonly found in the creation of law enforcement profiles of criminality. The best-known profile is that of the notorious drug courier profile though many other profiles are in use.[168] Savage critiques have been made of the drug courier

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[164] Grano, *ibid.*, argues that the courts employ the substantial possibility standard in applying probable cause.

[165] W.R. Lafave, "'Street Encounters' and the Constitution: *Terry*, *Sibron*, *Peters*, and Beyond" (1968) 67 Mich. L. Rev. 40 at 57, 73-74.

[166] See the detailed list of factors in the *Project on Law Enforcement Policy and Rulemaking*, *supra*, note 143 at 30-32.

[167] J. Acker, "Social Sciences and the Criminal Law: The Fourth Amendment, Probable Cause and Reasonable Suspicion" (1987) 23 Crim. L. Bull. 49 at 52.

[168] In the U.S., there are hijacking profiles, drug smuggling vessel profiles, stolen car profiles, stolen truck profiles, alimentary-canal profiles, battering parent profiles, poacher profiles, and serial killer profiles: C. Becton, "The Drug Courier Profile: 'All Seems Infected that Th' Infected Spy, As All Looks Yellow to the Jaundic'd Eye'" (1987) 65 N.C.L. Rev. 417 at 423-25.

profile[169] as it is ineffective,[170] irrational, and incoherent. It is incoherent because most extant profiles list every conceivable factor, whether contradictory or mutually exclusive.

Although the drug courier profile in Canada remains hidden from public view,[171] it is clear that it suffers from the same flaws as the American of being overinclusive and incoherent as does the American profile. An examination of a 1983 Canadian Customs Intelligence Profile reveals that the following factors will attract official attention:

> breaks in eye contact when being questioned, dilation of the pupils, rapid blinking or side to side movement of the eyes, tenseness in the lips or licking of the lips, loss of facial colour, arching of the eyebrows, yawning, lowering of the head and pulling in the chin, pulsing of the carotid artery in the neck, bobbing of the adams apple, visible perspiration, tilting the body forward, turning the body away from the officer, rigidity or stiffness of the body, pointing away from body with the hands, putting a hand near the mouth while speaking, touching or rubbing the nose while speaking, playing with their clothing or jewellery, closing of the hands, patting or ruffling the hair, pulling on an ear, scratching, shifting weight from one foot to the other, tapping the foot, shuffling the feet, flexing the knees, loss of coordination or lack of precision in movements ...[172]

Many other factors relating to ticket and passport information and appearance are listed and the profile notes that "the officer must note reactions in clusters, that is several indicators of stress being present." The upshot is that this profile could apply to each and every person travelling through a Canadian airport, or, alternatively, it could only narrowly apply to a traveller manifesting the symptoms of rabies.

The project of trying to construct a list of factors to be weighed in determining probable cause or reasonable suspicion is

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[169] For example, Becton, *ibid.*; and P. Greenberg, "Drug Courier Profiles, *Mendenhall* and *Reid*: Analysing Police Intrusions on Less than Probable Cause" (1981) 19 Am. Crim. L. Rev. 49.

[170] As one might expect, the number of false positives are high. According to one study, the drug courier profile is effective in thirty percent of the cases, thus seven out of ten people were exposed to a needless intrusion: Murphy, *supra*, note 47 at 239-40.

[171] An exception is *R.* v. *Gladstone* (1985), 22 C.C.C. (3d) 151 (B.C.C.A.) at 168-69, which reproduced a portion of the profile.

[172] I do not believe this is a public document – it came into my possession by happenstance.

doomed to failure. No listing of factors can adequately capture the "totality of circumstance" approach required by the courts.[173] Despite admonitions from the courts that the approach to probable cause is one of practical common-sense, it must be borne in mind that an exhortation to common-sense can never produce a clearly definable set of factors that constitute probable cause or reasonable suspicion. The British Royal Commission on Criminal Procedure recognized the futility of trying to capture "practical reason" in a formula in their rejection of a recommendation to codify the content of their accepted criterion of reasonable suspicion:

> [W]e acknowledge the risk that the criterion [reasonable suspicion] could be loosely interpreted, and have considered the possibility of trying to find some agreed upon standards which could form the grounds of reasonable suspicion and could be set out in statute or code of practice ... "[W]e have concluded that the variety of circumstances that would be covered makes this impracticable."[174]

The inability to codify and instantiate the standard for legitimate state intervention does not mean that the courts must be content with, and restricted to, a *post hoc* evaluation of a police officer's purported grounds for intrusion. Practical reasoning can take one of two forms.[175] The first form, the balance of reasons, requires the decision-maker to take into account all relevant reasons and then act in accordance with the determination of which reasons are to be afforded the greatest weight. This is the form of practical reasoning that is assumed to lie at the heart of the probable cause determination. This is also the form of reasoning that defies codification. A second form of practical reasoning, called exclusionary reasoning, employs second-order reasons that pre-empt the balance of reasons approach; that is, one is acting in accordance with an exclusionary reason if one has a pre-determined reason to forgo the usual balancing and weighing of all relevant reasons. A

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[173] This approach was coined in *Gates*, *supra*, note 159, and adopted by the Ontario Court of Appeal in *Debot*, *supra*, note 153, and *Church of Scientology* v. *R.* (1987), 31 C.C.C. (3d) 449.

[174] *Royal Commission on Criminal Procedure*, *supra*, note 129, paras. 3.24-3.25.

[175] The following analysis is drawn from J. Raz, "Reasons for Action, Decision, and Norms" in J. Raz, ed., *Practical Reasoning* (Oxford: Oxford University Press, 1978). Practical reasoning may comprise more than two distinct cognitive processes; however, Raz's two-tiered analysis is sufficient for this paper.

person usually decides whether or not to make a financial investment based upon a careful balance of reason. This same individual, however, may operate under a rule of thumb not to invest money if sick, intoxicated, or heavily in debt. These rules of thumb are exclusionary reasons that operate by bypassing the usual balance of reasons.

It may be that effective and meaningful regulation of the concept of probable cause or reasonable suspicion may require recognition of the determinative role played by exclusionary reasons. In this context the articulation of exclusionary reasons must be grounded in an appreciation of the mischief or evil that a constitutional proscription against arbitrary detention is designed to prevent. It is easy to say that the the right is designed to prevent indiscriminate and discriminatory intrusions, but a true understanding of this objective only emerges when we examine the historical record.

This record can provide us with concrete examples of arbitrary state practice that must be prevented from recurring. Much can be gained from an examination of the historical treatment of vagrants under the early *poor laws* and under more recent vagrancy statutes. These laws operated by allowing the police to exercise a power of detention that was directed at an entire social class, regardless of any particularized suspicion of criminality. It is submitted that probable cause or reasonable suspicion should be constrained by using exclusionary reasoning that would prevent the re-emergence of a vagrancy-type approach to law enforcement.

In Hawkins's *Pleas of the Crown*,[176] the author lists six factors justifying an arrest upon reasonable suspicion. In addition to well accepted factors such as "being found in such circumstances as induce a strong presumption of guilt" and "the behaving of one's self in such a manner as betrays a consciousness of guilt," Hawkins includes as a relevant factor "the living of an idle, vagrant, and disorderly life, without having any visible means to support it."[177] This unusual reference reflects the entrenched common law practice

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[176] W. Hawkins, *Pleas of the Crown* 1716-1721 (London: Professional Books, 1973).

[177] This summary of Hawkins's list of factors is taken from: J. Weber, "The Birth of Probable Cause" (1982) 11 Anglo-Am. L. Rev. 155 at 162.

of law enforcement that was directed at a supposedly-distinct social class, commonly referred to as vagrants.

The vagrancy concept in English law originated as the punitive side of the *poor laws* and its attempt to ameliorate the social blight of indigence.[178] The vagrancy concept developed in three distinct stages.[179] The initial stage, from 1349 to 1547, addressed the problems created by the breakdown of feudal structures by confining labourers to stated places of residence and to fixed wages. Accordingly, wandering or vagrancy became a crime, as the vagrant was viewed as a runaway slave. The economic objectives of the first stage eventually gave way to the objective of preventing criminal activity. In the second stage, from 1547 to 1824, the vagrant was seen as a probable criminal because idleness was perceived to be a root cause of criminal activity. The vagrant was no longer simply an individual who appeared indigent and homeless, but included a whole range of social actors deemed to be living on the fringes of criminality. In the late sixteenth century, the list of legislatively-deemed vagrants included persons "feigning to have knowledge in physiognomy, palmistry, or other crafty science[;] ... all fencers, bearwards, common players and minstrels; all jugglers, tinkers and petty chapmen[;] ... and all persons pretending themselves to be Egyptians."[180] As absurd as this list may appear to modern sensibilities, the so-called "vagrants problem" was a solemn and brutal affair with the state administering whippings and brandings to those caught within the vagrant net.

The final stage in the vagrancy story began with the enactment of the *Vagrancy Act of 1824*.[181] Since the enactment of this legislation there has been an attempt to move away from *status*

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178 For an account of the various facets of the poor law, see L. Radzinowicz, *A History of the English Criminal Law and Its Administration From 1750*, vol. 4 (London: Stevens, 1968) c. 1 & 2.

179 This three-tiered historical overview is summarized in G. Dubin & R. Robinson, "The Vagrancy Concept Reconsidered: Problems and Abuses of Status Criminality" (1962) 37 N.Y.U.L. Rev. 102 at 104-8. The authors rely upon J.F. Stephen, *A History of the Criminal Law of England*, vol. 3 (London: MacMillan, 1883) at 266-75.

180 Stephen, *ibid.* at 272.

181 (U.K.) 5 Geo. 4, c. 83.

criminality to *conduct* criminality. The legislation created three classes of vagrants: (1) idle and disorderly persons, (2) rogues and vagrants, and (3) incorrigible rogues with each classification being premised upon the commission of a designated act. The courts were careful to ensure that vagrancy was seen as nothing more than a nonsubstantive appellation and that the legislation would operate so as to only capture specific designated conduct.[182] This movement away from the status criminality is still underway and is reflected in various contemporary legislative reforms. For example, in Canada, the enactment of the *Young Offenders Act*[183] was in part prompted by growing discontent with the previous regime in which a youth could be classified as a juvenile delinquent based upon status conditions such as immorality or incorrigibility.[184]

The earlier stage of vagrancy as status criminality came under attack because of its apparent inconsistency with developing principles of substantive criminal law. This inconsistency is summarized as follows:

> The second basic theoretical distinction between conduct criminality and status criminality is that the latter requires no evidence of actual causation. Recognition of the element of causation is limited to a presumption that the necessary certainty of cause and effect exists in the relationship between the status group and the anticipated future criminal conduct. This presumption does not conform to the basic proposition that there must be some "rational connection between the fact proved and the ultimate fact presumed." Status criminality substitutes suspicion causation for actual causation. Suspicion causation does not require that "degree of certainty, regularity, uniformity and predicability" necessary to demonstrate a causal relation. Until one who has assumed a proscribed status has in fact engaged in criminal conduct, the law at most can make only a qualified guess as to whether a member of the status group is a potential criminal. Under these circumstances, sanctions are meaningless.[185]

Many American states have vagrancy statutes and in the early constitutional challenges to these statutes the primary concern that led to invalidation was the substantive claim stated above. In

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[182] For example, *Ledwith* v. *Roberts* (1936), [1937] 1 K.B. 232 (C.A.).

[183] R.S.C. 1985, c. Y-1.

[184] For a brief history of the reform, see R. Fox, "The Treatment of Juveniles in Canadian Criminal Law," in A.N. Doob & E.L. Greenspan, eds, *Perspectives in Criminal Law* (Aurora, Ont.: Canada Law Book, 1985) at 149-85.

[185] Dubin & Robinson, *supra*, note 179 at 118-19.

1939, the U.S. Supreme Court struck down a statute that penalized "any person not engaged in any lawful occupation, known to be a member of a gang of two or more persons."[186] The Court found the statute violative of the due process clause[187] of the Fourteenth Amendment because of its inherent vagueness and the fact that "the challenged provision condemns no act or omission."[188] The U.S. Supreme Court later invalidated a Florida vagrancy ordinance that captured many of the same social actors who had been deemed to be vagrants under sixteenth century English law.[189] Unlike the earlier decision, the Court seemed less concerned with the theoretical problems of substantive law and more concerned with the procedural implications of a vagrancy law.

The Court commented that wandering, loafing, and loitering may be indicia of criminal activity but they are also "historically part of the amenities of life" and "have been in part responsible for giving our people the feeling of independence and self-confidence."[190] The problem with the vagrancy ordinance has little to do with the status of criminality, but rather its vagueness "encourages arbitrary and erratic arrests and convictions."[191] Substantive defects in a criminal offence may have procedural implications and in this scenario the vague attribution of criminality to individuals of a designated status leads to an overly-broad grant of discretionary power to law enforcement officials:

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[186] *Lanzetta* v. *New Jersey*, 306 U.S. 451 at 456 (1939).

[187] U.S. Const. Amend. XIV [hereinafter Fourteenth Amendment].

[188] *Ibid.* at 458.

[189] *Papachristou* v. *Jacksonville*, 405 U.S. 156 (1972) [hereinafter *Papachristou*]. The ordinance provided: "Rogues and vagabonds, or dissolute persons who go about begging, common gamblers, persons who use juggling or unlawful games or plays, common drunkards, common night walkers, thieves, pilferers or pickpockets, traders in stolen property, lewd, wanton and lascivious persons, keepers of gambling places, common railers and brawlers, persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, disorderly persons, persons neglecting all lawful business and habitually spending their time by frequenting houses of ill fame, gaming houses, or places where alcoholic beverages are sold or served, persons able to work but habitually living upon the earnings of their wives or minor children shall be deemed vagrants."

[190] *Ibid.* at 164.

[191] *Ibid.* at 162.

> Those generally implicated by the imprecise terms of the ordinance – poor people, nonconformists, dissenters, idlers – may be required to comport themselves according to the life style deemed appropriate by the Jacksonville police and the courts. Where, as here, there are no standards governing the exercise of the discretion granted by the ordinance, the scheme permits and encourages arbitrary and discriminatory enforcement of the law. It furnishes a convenient tool for "harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure" ... It results in a regime in which the poor and the unpopular are permitted to "stand on a public sidewalk ... only at the whim of any police officer."[192]

This history of vagrancy law in Canada reflects a similar concern with arbitrary law enforcement resulting from status-based designations that lead to arbitrary law enforcement. The first Criminal Code of 1892 contained a vagrancy offence[193] that was similar to the conduct-oriented formulation of the English *Vagrancy Act of 1824*; however, various amendments culminated in a subsection that proscribed innocuous activities such as wandering and indigence:

> 164. (1) Every one commits vagrancy who
> (a) not having any apparent means of support is found wandering abroad or trespassing and does not, when required, justify his presence in a place where he is found.[194]

In 1972, the vagrancy concept was for the most part repealed and replaced by a provision proscribing soliciting for the purpose of prostitution.[195] The decision to replace the status offence of an unjustified presence with a conduct offence of solicitation was largely premised upon the procedural implications of the substantive defect of vagueness. In introducing the amending Bill, it was noted that "the vagueness of section 164 allows selective and discriminatory enforcement against just such a minority without any proof of particular harm ... [and that] it has now become an anachronistic

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[192] *Ibid.* at 170. See also, *Kolender* v. *Lawson*, 103 S. Ct 1855 (1983), for a similar approach to a California statute.

[193] *Criminal Code of Canada*, S.C. 1892, c. 29, s. 207.

[194] *Criminal Code of Canada*, S.C. 1953-54, c. 51, s. 164.

[195] *Criminal Law Amendment Act*, S.C. 1972, c. 13.

survival of a past age, unjustified in principle, and abusive in application."[196]

Historically, the approach to crime prevention consisted of the building of "nets making easy the roundup of so-called undesirables."[197] Dragnet arrests of social outcasts was the procedural form of choice. The *Criminal Code* provision allowing for the issue of a special search warrant for bawdy houses still reflects this anachronistic procedural form.[198] This provision allows for the issuance of a search warrant merely upon a written report of an officer and the warrant authorizes the seizure of all persons found in the bawdy house. These "found-ins" are to be taken to a Justice of the Peace for the purpose of a compulsory examination under oath.[199] The Law Reform Commission of Canada has noted that:

> [This] warrant is traceable to a number of measures instituted in the mid-eighteenth century to deal with the "wandering poor" and regulate activities thought to inspire criminal tendencies ... These were essentially arrest warrants; persons rounded up in the search were brought before justices and examined as to their means of livelihood.[200]

This dragnet approach to crime prevention was the subject of constant criticism that began in the eighteenth century. It has been noted that "Hale made clear that a general warrant upon a complaint of robbery 'to apprehend all persons suspected' was void."[201] It is also commonly understood that the Fourth Amendment prohibition against unreasonable search and seizure was

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[196] Canada, H.C., *Debates*, at 6646-47 (11 June 1971). See also comments by Minister of Justice, Canada, H.C., *Debates*, at 1699 (27-28 April 1972): "Here we have an offence which has been applied differently to the rich and to the poor of society and we move against this difference in application."

[197] *Papachristou*, *supra*, note 189 at 171.

[198] Section 199 of the *Criminal Code*, *supra*, note 80, formerly section 181, was struck down because it violated section 8 of the *Charter*: *Re Vella* (1984), 14 C.C.C. (3d) 513 (Ont. H.C.).

[199] The compulsory examination was repealed: S.C. 1980-81-82, c. 125, s. 12.

[200] Law Reform Commission of Canada, *Police Powers: Search and Seizure in Criminal Law Enforcement* (Working Paper 30) (Ottawa: The Commission, 1983) at 59.

[201] Grano, *supra*, note 163 at 482.

a response to the mischief of general warrants and writs of assistance,[202] but it must be remembered that most general search warrants contained authorization for a general dragnet form of arrest.[203] Accordingly, the eighteenth century cases that condemned the general search warrant implicitly deprecated the general dragnet arrest warrant. Both these warrants are equally objectionable in that they bestow unbridled discretion upon law enforcement officials.

The history of the Fourth Amendment indicates that a requirement of reasonableness was imposed to guard against indiscriminate intrusions. The danger of indiscriminate intrusion was to be averted by the requirement that state officials have probable cause of reasonable suspicion of criminality before intruding. However, the historical record is only complete when one takes into account the ebb and flow of vagrancy law. This part of the historical record tells us that although a probable cause requirement may have been developed to curtail indiscriminate intrusion, it must be supplemented by the requirement that probable cause was directed to suspicious activity and not to the attributes or status of the person. Status-based intrusions give rise to a separate evil – that of discriminatory intrusion. Therefore, a complete picture of the historical record suggests that the reasonableness requirement should safeguard against indiscriminate intrusion and the non-arbitrary requirement should supplement the protection by safeguarding against discriminatory law enforcement. Properly understood, the right to be free from arbitrary detention is not only a right that secures freedom from irrational and capricious intrusion, but is also a safeguard to ensure that police-community relations do not become divisive because of policing decisions to target individuals who do not fit into the majority mainstream mould.

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[202] J. Landynski, *Search and Seizure in the Supreme Court: A Study in Constitutional Interpretation* (Baltimore: John Hopkins Press, 1966); N. Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* (Baltimore: The John Hopkins Press, 1937).

[203] For example, *Money* v. *Leach* (1765) 97 E.R. 1075 (K.B.).

C. *The Police Function Revisited*

Freedom from arbitrary intrusion can only be achieved if state officials are barred from intruding in the absence of a specific suspicion of criminal activity. Preventive police action should not be allowed when it is motivated by a suspicion of criminal activity solely, or primarily, based upon the personal attributes of the target. The enforcement of law should be construed literally and narrowly and should not be expanded into a practice of "seizure of social parasites."[204] Law enforcement may incidentally affect the ordering of social relations, but its primary purpose should not be the social control of marginalized individuals.

The past 150 years has seen a movement away from an authorized regime of control and surveillance of vagrants and others perceived as social undesirables; however, the legislatively-authorized practice of social control may have been repealed only to be replaced by the covert substitute of aggressive preventive patrol. The state will not readily abandon its reliance upon policing as a form of social control, and notwithstanding the movement away from overt social control in Anglo-American jurisdictions, it can be seen that continental European states still retain many vestiges of police control of marginalized individuals. In France we see the strengthening of identity control legislation.[205] In Italy we find extensive surveillance and control of ex-prisoners and vagabonds.[206] In fact, Article 5(1)(e) of the *European Convention on Human Rights*[207] recognizes the continuing state practice of social control of the marginalized by authorizing deprivations of liberty through the lawful detention of vagrants.[208]

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[204] Radzinowicz, *supra*, note 178 at 87.

[205] Lidstone & Early, *supra*, note 122 at 495-96.

[206] For a discussion of the extensive control of ex-cons in Italy, see S. Glueck, *Continental Police Practice in the Formative Years* (Springfield, Ill.: Thomas, 1974) at 35-38.

[207] The Council of Europe, *European Convention on Human Rights: Collected Texts*, (The Netherlands: Martnus Nijhoff, 1987) at 6.

[208] For an interesting case in which the European Court of Human Rights limited the ability of the Italian state to place a suspected mafia member in exile on an island, see *Guzzardi* v. *Italy* (1980), Eur. Court H.R. Ser. A., No. 39, 3 E.H.R.R. 333. The Court

The Anglo-American system of law enforcement operates upon assumptions that may be different from the European approach. Although it may be honoured more in its breach, we have espoused a principle in which "general police intervention should be tied to proscriptions upon conduct rather than to status and capacity. Our system of criminal justice is act-oriented."[209]

Accordingly, "arbitrary searches, seizures, arrests and detentions are in this light seen to be those predicated upon considerations which are not event-specific."[210] In order to respect privacy and dignity, and to prevent an overbearing and destructive state presence, Canada has chosen a system in which state intrusion must be event-specific rather than panoptic. The basic idea is that "intrusive police activity should not be diffuse and unfocused, or even generally (panoptically) focused. The principal assertion is that the police should not be permitted to roam at large with the power to conduct a wholesale inquisition in society."[211]

If the right to be free from arbitrary detention is rightfully perceived as a command to the police to honour the event-specific limitation on state intrusion, then it should have a noticeable impact upon the police function. The implicit effect of section 9 of the *Charter* is to favour reactive policing over proactive policing. It is clear that proactive mobilization of the police (that is, police action that is self-initiated and not in response to a complaint from a member of the public) provides the greatest opportunity for the police to undertake intrusions based upon the personal attributes of the individual.[212]

Preventive police activity such as a visible police presence or the cultivation of harmonious community relations would not be

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adopted a narrow interpretation of the term "vagrant" to avoid invoking the exception allowing for arbitrary detention of vagrants.

[209] Cohen, *supra*, note 11 at 637.

[210] *Ibid.* at 638.

[211] *Ibid.* at 639.

[212] For a discussion of empirical studies showing that proactive policing is usually targeted against persons of lower socio-economic status, see Ericson, *supra*, note 12 at 73-88, and P. Solomon, *Criminal Justice Policy: From Research to Reform* (Toronto: Butterworths, 1983) at 7-20.

affected by an expansive interpretation of section 9 of the *Charter*. However, proactive policing in the form of investigative stops should be dramatically curtailed because this practice borders upon social control of the marginalized. As Ericson has noted:

> Constant proactive stops are a not-so-subtle way of reminding marginal people of the "order of things." Here, symbolic authority is paramount: for this reason, demeanour becomes a very important variable. The person deemed "respectable-respectful" will nearly always avoid the full range of actions, while his opposite must endure personal and property searches, detention for the CPIC checks, and the possibility of minor charges as an "ordering device" ... In the jurisdiction we studied, the target is lower-class young persons ("pukers") who may be occasionally involved in drug and property-related offences and who appear to some to be offensive. Regardless of the community, some group will always be targeted.[213]

The Supreme Court of Canada has recently suggested that proactive policing must be restricted so as to ensure that individuals are not intruded upon solely because of their personal characteristics. In *R.* v. *Mack*,[214] the Court analyzed the most proactive type of police practice commonly known as entrapment. In approving the defence of entrapment when the police overstep the boundaries of legitimate law enforcement, the Court stated that entrapment will exist if the police target an individual without having a reasonable suspicion that the individual is already engaged in criminal activity. Accordingly, the Court found that entrapment arose where the police target an individual without reasonable suspicion. Accordingly, the Court has restricted undercover police infiltration so that it is event-specific and not a practice of "random virtue-testing."[215]

It may be argued that all the judiciary can do to prevent status-based proactive policing is to articulate an exclusionary

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[213] Ericson, *ibid.* at 200-201. For a critique of Ericson's view of policing as social control, see P. Russell, "The Political Theory of Contrology," in Doob & Greenspan, *supra*, note 184.

[214] (1989), 44 C.C.C. (3d) 513 (S.C.C.).

[215] *Ibid.* at 552. The Court also commented that an individual's "past criminal conduct is relevant only if it can be linked to other factors leading the police to a reasonable suspicion that the individual is engaged in a criminal activity." Although targetting based on prior criminality may not be as offensive as reliance upon personal characteristics, it still generates harassment and hampers the offender's re-integration into society. For a case in which a court reprimanded the police for launching a wiretap investigation based on criminal reputation, see *R.* v. *Arviv* (1987), 37 C.C.C. (3d) 369 (Ont. H.C.).

approach of practical reasoning[216] to the definition of probable cause and reasonable suspicion. A model definition of this approach can be found in the recently enacted British Code of Practice.[217] Annex B of the Code provides a five-part definition of reasonable grounds of suspicion which includes the following:

> 3. Reasonable suspicion cannot be supported on the basis simply of a higher than average chance that the person has committed or is committing an offence, for example because he belongs to a group within which offenders of a certain kind are relatively common, or because of a combination of factors such as these. For example, a person's colour of itself can never be a reasonable ground for suspicion. The mere fact alone that a person is carrying a particular kind of property or is dressed in certain way or has a certain hairstyle is likewise not of itself sufficient. Nor is the fact that a person is known to have a previous conviction for unlawful possession of an article.[218]

This type of restrictive definition of probable cause may serve a precatory purpose, but in itself, can do little to constrain the police. The judiciary can, and must, do more to restrict the police function to event-specific intrusions. Section 9 of the *Charter* must be construed and implemented in a manner that prevents panoptic intrusion and covert social control through policing. Anthony Amsterdam notes that "in an age where our shrinking privacy and liberty would otherwise be enjoyable only at the sufferance of expanding, militaristically organized bodies of professional police, the Fourth Amendment demands that an independent judiciary play a direct, strong role in their regulation."[219]

In the realm of politics and law reform, the constant chatter is about police-community relations and police hiring practice. Little is ever said or done about proper training and instruction with reference to street encounters. In December 1988, the Solicitor-General of Ontario established a Task Force to inquire into the mounting tension between the police and the visible minorities in

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[216] See, *supra*, note 175 and accompanying text for a discussion of this approach.

[217] *Police and Criminal Evidence Act* (U.K.), 1984, c. 60, s. 66; (Code of Practice) S.I. 1988/1200.

[218] U.K., Home Office, Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers (London: H.M.S.O., 1985).

[219] A. Amsterdam, "Perspectives on the Fourth Amendment" (1974) 58 Minn. L. Rev. 349 at 439.

Toronto.[220] Similar task forces had examined the issue in 1974, 1975, 1977, 1979, and 1980 and all of the reports suggested that increased hiring and promotion of visible minorities within the police force would placate the growing racial tension. The Task Force in 1988 realized that its predecessors had all recommended the same solution with no apparent success, yet, it also chose to flog the dead horse. In addition to its recommendation to increase minority hiring, the Task Force did speak of proper training in race relations; however, the form of race relations training is not specified, except for the abstract objective of changing "the various attitudes which produce racism in all of us."[221]

It is surprising and perhaps even insulting that law reform with respect to police-community relations remains stuck with the idea that more equitable employment practices and consciousness-raising training sessions will ameliorate police-community tensions. These goals are laudable but they can never be more than a "bandaid" because it is clear that street encounters between the public and the police are the prime breeding ground for distrust and hatred. If no attempt is made to structure and confine police discretion on the street, then there will always be the danger that minority groups will be needlessly harassed. The police need to be trained in the detection of criminal activity on the street that is based upon clues and indicia that are not status-based; they need to be trained on how to conduct street encounters with civility, and a monitoring system must be established to determine whether the training is having any impact. This type of reform is sorely needed, but it is this type of reform that the political players ignore because of its intrusiveness on the day to day functioning of the police.

When the legislative branch of government is caught in the deepest inertia, it may be legitimate for the judiciary to jump into the fray. The objective is for the judiciary to design rules and

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[220] *The Report of the Race Relations and Policing Task Force* (Toronto: The Task Force, 1989) (Chair: C. Lewis) at 1.

[221] *Ibid.* at 94. The proposed reform to the *Police Act* in Ontario – Bill 107, *An Act to Revise the Police Act and Amend the Law Relating to Police Services*, 2d Sess., 34th Leg. Ont., 1989, s. 48 – imposes an employment equity plan to eliminate systemic barriers to the recruitment and promotion of proscribed groups, but it does not provide for the training of officers for conducting investigatory detentions.

regulations that constrain and structure police discretion in the streets:

> There is a need for training more directly related to the important problems which the officer will face in the field – training which will instruct him on the limits of his formal authority, but will also inform him of the department's judgment as to what is the most desirable administrative practice to follow in exercising his authority. Carefully developed administrative policies would serve this important function.[222]

The judiciary may lack both the competence and the legitimacy to construct guidelines; however, "police rulemaking is unlikely to proceed very far without considerable nudging from the courts."[223] Judicial "nudging" can be accomplished in a number of ways.

First, the judiciary must relax standing requirements so as to allow police actions to be challenged by concerned citizens. Currently, any issues relating to arbitrary detention only arise in a piecemeal manner in the context of criminal trials; however, it has been noted that the low visibility practice of street detention rarely gives rise to a criminal charge. Accordingly, concerned individuals should have access to the judicial forum to challenge arbitrary police action which is not isolated but which has not culminated in criminal charges. For example, minority residents of Philadelphia brought an action to challenge alleged police misconduct. In the lower Court it was established that police misconduct was not "rare or isolated"[224] and the Court ordered that the police draft a comprehensive program for handling citizen complaints. The U.S. Supreme Court reversed this decision holding that the petitioners lacked the requisite personal stake in the outcome to establish standing because the petitioners could only complain about the possibility of *future* violations of their rights by a small minority of state officials. This restrictive approach to standing must not be followed in Canada if the judiciary are to have the opportunity to provide direction to

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[222] H. Goldstein, "Police Policy Formulation: A Proposal for Improving Police Performance" (1967) 65 Mich. L. Rev. 1123 at 1134.

[223] Amsterdam, *supra*, note 219 at 379; also see K. Davis, *Discretionary Justice: A Preliminary Inquiry* (Baton Rouge, Louisiana: State University Press, 1969) at 94-95.

[224] *Rizzo* v. *Goode*, 423 U.S. 362 at 383 (1975).

police officers and to induce departmental concern over street encounters.

Of course, the likelihood of class actions being brought by aggrieved residents, who do not face criminal charges, is slim. Therefore, the judiciary's prime opportunity to goad the police administration into promulgating guidelines will be found where criminal defendants raise issues relating to arbitrary detention. The courts must realize that when the opportunity presents itself they must approach constitutional adjudication so that their decisions "state or ought to state not rules for the passing hour, but principles for an expanding future."[225] If the goal is to construct a future in which most aspects of the police function are subject to reasonable constraints and to proper guidelines, the judiciary must extend themselves beyond their current approach to arbitrary detention. There is little precedential value in the *post hoc* determination of whether the police acted with reasonable cause in deciding to intrude. There is little guidance provided when the judiciary instruct the police that arbitrary means capricious or despotic and then send the officers back on the streets.

If the judiciary are to look beyond the narrow horizons of the individual cases, they must articulate rules that promote greater police accountability in the future. For example, if the police discover narcotics after approaching, questioning, and conducting a pat-down search of an individual on the street, the court could take the position that the fruits of the encounter will not be admissible unless the officer shows that he or she was acting pursuant to rules and regulations contained in a departmental policy. This prophylactic rule of exclusion would apply regardless of whether the officer was acting upon probable cause or reasonable suspicion. Blanket exclusion of all evidence obtained through unconstrained, discretionary decisions of the officer in the field should motivate police departments to take a serious look at the need for promulgating guidelines.

Alternatively, the judiciary could exclude evidence obtained through street encounters if the officer does not complete an

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[225] B. Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1963) at 83.

occurrence report to be prepared contemporaneously with the encounter. Most encounters that satisfy the threshold definition of detention include the activity of the officer conducting an identity check through the computer at the Canadian Police Information Centre,[226] and it would take little effort for the officer to provide the dispatcher with a brief indication of the grounds for the stop and the CPIC check. Contemporaneous reports serve two functions: (1) they prevent an officer from constructing a *post hoc* rationalization for the intrusion; and (2) they can be periodically reviewed by the police administration, independent review committees, or even the judiciary to determine whether a given officer is exercising his or her authority on the basis of personal attributes of the target. Without written occurrence reports the police will never be able to monitor if their training programs are having an impact.

The form and procedure for the completion of reports should not be dictated by the judiciary. Practical implementation of such a requirement must be designed by the police themselves; however, the judiciary can compel the introduction of this requirement through manipulation of the exclusionary rule. There is little doubt that the judiciary is uncomfortable with the role of "policing the police." and the Supreme Court of Canada has stated that the exclusionary rule is not designed to deter police misconduct.[227] However, judicial activism in monitoring police conduct is not designed to deter the police in the sense of punishing officers for misconduct — the correct perspective on the judicial function in overseeing police action is well-stated by Brennan J. of the U.S. Supreme Court:

> [T]he [exclusionary] rule operates to some extent to deter future misconduct by individual officers who have had evidence suppressed in their own cases. But what the Court overlooks is that the deterrence rationale for the rule is not designed to be, nor should it be thought of as, a form of "punishment" of individual police officers for their failures to obey the restraints imposed by the fourth amendment. Instead the chief deterrent function is its tendency to promote institutional

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[226] [Hereinafter CPIC]. See Ericson, *supra*, note 12 at 139-41, for empirical data describing police use of CPIC checks.

[227] *R.* v. *Collins*, [1987] 1 S.C.R. 265 at 280-81.

compliance with Fourth Amendment requirements on the part of law enforcement agencies generally.[228]

The *Charter* not only requires a fresh perspective on the police function, it necessitates a reformulation of the judicial function. The courts should no longer approach rights as the "protection of atomistic spheres of interest."[229] Rather, they should adopt a regulatory approach that views constitutional adjudication as a method of structuring state power to allow residents to reap the benefits of *Charter* protection.[230] *Charter* rights may incidentally benefit individual litigants, yet their essential benefit must be to ensure that the state remains within its constitutionally-limited authority. A *Charter* violation must be remedied not only to shield the individual from prejudice, arising from unconstitutional conduct, but also to force the state to comply with the prescriptions of the *Charter* in future cases.

IV. CONCLUSION

Arbitrary detention poses two dangers for the public: the threat of indiscriminate intrusion and the threat of discriminatory intrusion. In the area of criminal law enforcement, both the judiciary and the legislatures have turned a blind eye to the obvious dangers of investigatory street detention. They both claim that this practice does not exist, and being satisfied that their claim is accurate, they have avoided any attempts to regulate and control street encounters. In this paper it has been argued that it is time for the judiciary to intervene more actively in detention issues so as to coax the rule-makers, whether legislators or police administrators, into promulgating rules and regulations to guide the officer in the field.

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[228] *U.S.* v. *Leon*, 104 S. Ct. 3430 at 3442 (1983).

[229] Amsterdam, *supra*, note 219 at 367.

[230] See Amsterdam, *ibid.* at 367-72, for a discussion of the regulatory approach to the Fourth Amendment; and see A. Young, "Not Waiving but Drowning: A Look at Waiver and Collective Constitutional Rights in the Criminal Process" (1989) 53 Sask. L. Rev. 47, for a discussion of the implications of a regulatory approach.

The failure to address the twin dangers of arbitrary detention will eventually have disastrous repercussions as the relationships between police and minority residents deteriorate beyond repair. We may no longer have a *de jure* vagrancy law, but there is *de facto* targeting of minority citizens for intrusive police practice. Crime rates appear to escalate, people grow increasingly concerned about their security, and pressure mounts to further expand the ability of the police to intrude in the name of crime prevention. Without adequate regulatory control, the expansion of police powers is invariably exercised against members of the public who, by choice or by informal decree, remain outside the mainstream.

It has been noted that the modern trend is away from individualism as the organizing force of social control, and towards surveillance of whole categories of persons.[231] Just as the mass detention of Japanese-Canadians was seen as a rational response to the problem of internal security during wartime, the advocates of crime control and law and order see mass surveillance and the widening of the spheres of social control as the solution to the crime problem. In a small-scale society it may have been reasonable to adopt an "all along the watchtower" approach to crime prevention. In a large-scale industrial society, the police cannot and should not be mobilized to exercise a front line social control function.

When the police function is expanded to include a social control function, the dangers of indiscriminate and discriminatory intrusion are heightened. The right to be free from arbitrary detention has a role to play in regulating the police function, but this right as currently interpreted and implemented has had a negligible impact upon police practice. The fault lies not only with the police, but with those of us who fit comfortably into the mainstream with little to fear from intrusive police practice and thus remain complacent with the burgeoning growth of police power. It is the modern-day vagrant, the social outcast, who bears the burden of the strategic placement all along the watchtower of police officers without any guidance as to what it is they should be looking for.

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[231] T. Mathiesen, "The Future of Control Systems – the Case of Norway" (1980) 8 Int'l J. Soc. L. 148, as quoted in C. Shearing & P. Stenning, "From the Panopticon to Disney World: The Development of Discipline," in Doob & Greenspan, *supra*, note 184 at 335.