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Fourth Amendment Inquiries: When Officers Are Not Justified to Approach a Vehicle

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FOURTH AMENDMENT INQUIRIES: WHEN OFFICERS ARE NOT JUSTIFIED TO APPROACH A VEHICLE

SUPREME COURT OF NEW YORK APPELLATE DIVISION, SECOND DEPARTMENT

People v. Laviscount[1]
(decided April 23, 2014)

I. INTRODUCTION

The United States of America has become one of the most polarized countries, as events involving suspicious circumstances seem to be scrutinized more often. With the troubling occurrences in recent years involving police conduct, it is essential that the coverage and dialogues over such events continue. Both the New York and Federal courts will exclude evidence when it is obtained from an inappropriate search. Each system seeks to promote the same goal—protecting the public from arbitrary intrusions by the police, but at the same time encouraging good policing to defend against crime. This is true even though each system applies a different, but similar standard when evaluating police conduct.

This Case Note will analyze situations where an officer approaches and investigates an individual who is not engaging in unlawful conduct at the time of the inquiry. More specifically, the issue presented in *People v. Laviscount* was whether an officer was justified in soliciting information about an individual's whereabouts when parked in a remote area where a vehicle would not typically be located.[2]

[1] 984 N.Y.S.2d 394 (App. Div. 2d Dep't 2014).
[2] *Id.* at 396-97.

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II. FACTS

On November 7, 2008, at 2:45 a.m., Shamari Laviscount and a female passenger were legally parked in a remote area where a vehicle would not normally be parked.[3] Officer Michael Ranolde and his partner observed them and proceeded to drive alongside the defendant's vehicle.[4] Ranolde noticed Laviscount remove an object from his dashboard and toss it below his seat.[5] Based on their intuition, the officers exited their unmarked police car and advanced towards Laviscount's vehicle.[6] While questioning Laviscount, Ranolde witnessed him take off his gloves and throw them in the backseat.[7] Subsequently, Ranolde inspected the car with his flashlight, but he found nothing out of the ordinary.[8] Both the defendant and the female passenger, after being asked to exit their vehicle, complied with Ranolde's request and were escorted to the back of Laviscount's vehicle.[9] Ranolde verified the defendant's identification while his partner supervised the two potential suspects.[10] After further questioning, Ranolde flashed his light on the female passenger's black purse and observed what looked like the handle of a gun.[11] Ranolde immediately snatched the purse and confirmed the existence of a handgun.[12] Ranolde then instructed the defendant and the female passenger to remain still, but Laviscount denied that the gun was his and fled the scene.[13]

Laviscount was arrested shortly after his flight.[14] The police searched his car and recovered various suspicious items, in addition to the gun found in the female passenger's purse.[15] Laviscount was subsequently indicted for criminal possession of a weapon in the sec-

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[3] *Id.*

[4] *Id.* at 396.

[5] *Id.*

[6] *Laviscount*, 984 N.Y.S.2d at 396.

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Laviscount*, 984 N.Y.S.2d at 396.

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *See id.* ("A subsequent search of the defendant's car resulted in the seizure of a glove, a ski mask, and sunglasses. In addition, the gun and a bullet were recovered from the purse.").

ond degree.[16] Laviscount moved to suppress the physical evidence found at the scene, but the Supreme Court of Queens County denied his motion.[17] At trial, a jury convicted him of the charged crime.[18] The defendant appealed his conviction to the Appellate Division, Second Department, arguing that the lower court had erred in denying his motion to suppress the material evidence recovered during the search of his vehicle.[19]

III. THE COURT'S REASONING

In reversing Laviscount's conviction, the Appellate Division, Second Department relied on a four-level test announced by the New York Court of Appeals in *People v. De Bour*.[20] This test, commonly known as the *De Bour* test, established the level of inquiry that is appropriate for a police-initiated encounter and determined whether an officer has exceeded the bounds of his or her authority.[21] First, an officer has the authority to ask an individual for information only when "supported by an objective credible reason, not necessarily indicative of criminality."[22] Second, if the officer can provide a founded suspicion that the suspect is about to engage in criminal activity, then the officer can conduct a more exhaustive inquiry.[23] Third, a police officer is allowed to forcibly stop and confine the suspect if the officer has a reasonable suspicion that the accused "is committing, has committed, or is about to commit a crime."[24] Finally, the officer is empowered to place the suspect under arrest if supported by probable cause of criminal wrongdoing.[25]

When applying the *De Bour* test to the defendant in *Laviscount*, the court concluded that the officers were not justified in approaching the defendant's vehicle.[26] The court did not accept

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[16] *Laviscount*, 984 N.Y.S.2d at 395.

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.* at 395-96; *see also* People v. De Bour, 352 N.E.2d 562 (N.Y. 1976).

[21] *Laviscount*, 984 N.Y.S.2d at 396.

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Laviscount*, 984 N.Y.S.2d at 397; *see* People v. McIntosh, 755 N.E.2d 329, 331 (N.Y. 2001) (the first level of the *De Bour* test is triggered once an officer, in a police-initiated en-

Ranolde's rationale, finding that parking a vehicle in a remote area during the early morning hours does not provide an objective basis to inquire into the owner's whereabouts.[27] The court also rejected Ranolde's theory that his actions were warranted when the defendant tossed an object below his seat.[28] However, the court proceeded to analyze Ranolde's actions as if he had satisfied the first and second levels of *De Bour* and still found that no reasonable suspicion of criminal conduct had been present.[29] Ranolde did not uncover any criminal behavior when he flashed his light inside of Laviscount's vehicle.[30] Further, there had been no evidence that established that the defendant had committed a traffic violation, which could have justified the inquiry.[31] Thus, Ranolde and his partner were not permitted to approach the vehicle, let alone conduct an intrusive search.[32]

IV. THE FEDERAL APPROACH

A. The Landmark Opinion: *Terry v. Ohio*

Eight years prior to the *De Bour* decision, the Supreme Court of the United States decided *Terry v. Ohio*.[33] *Terry* is considered to be a turning point in Fourth Amendment jurisprudence and forms the basis of extensive analyses in both federal and state court opinions. The central dispute in *Terry* regarded the limits placed on a police of-

gagement, requests information about the individual or his or her intentions).

[27] *Laviscount*, 984 N.Y.S.2d at 397; *see* People v. Miles, 918 N.Y.S.2d 594, 595 (App. Div. 2d Dep't 2011) (holding that the officers did not have an objective, plausible justification to advance towards the vehicle, question the defendant, and use a flashlight to examine the vehicle, other than the fact that the vehicle was parked in an area known for narcotic and gang related occurrences).

[28] *Laviscount*, 984 N.Y.S.2d at 397.

[29] *Id.*

[30] *Id.*

[31] *Id.* at 396; *see* People v. Harrison, 443 N.E.2d 447, 477 (N.Y. 1982) (finding that "once a motor vehicle has been lawfully detained for a traffic violation, the police officers may order the driver to get out of the vehicle without violating the Fourth Amendment's proscription of unreasonable searches and seizures") (quoting Pennsylvania v. Mimms, 434 U.S. 106, 111 n.6 (1977)).

[32] *Laviscount*, 984 N.Y.S.2d at 397.

[33] 392 U.S. 1 (1968).

ficer when he or she is investigating suspicious activity.[34]

A jury convicted John Terry of carrying a concealed weapon, requiring him to spend a minimum of one year in prison.[35] According to the testimony of Officer Martin McFadden, around 2:30 p.m. on October 31, 1963, Terry and his friend repeatedly looked into a store window.[36] After observing Terry and his companion, McFadden believed the men were scoping out a place to rob and worried that they might be carrying a firearm.[37] After concluding that the circumstances provided a basis for his inquiry, McFadden approached the suspects, identified himself as a police officer and questioned them about their identity.[38] The suspects were not cooperative, and McFadden then proceeded to take hold of Terry and searched his clothing.[39] The officer found a pistol in Terry's coat pocket.[40] Terry was arrested, along with his friend, and both men were charged with carrying a concealed weapon.[41]

The Supreme Court held that an officer is empowered to approach, question, and even conduct a limited search of a suspect when the officer reasonably believes, based on an objective notion and only after identifying himself, that the suspect could be armed and presently dangerous.[42] In reaching this conclusion, however, the

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[34] *Id.* at 4; *see id.* at 9 (referring to the more narrow issue in *Terry*, which was "whether in all the circumstances of this on-the-street encounter, his right to personal security was violated by an unreasonable search and seizure").

[35] *Id.* at 4.

[36] *Id.* at 5-6.

> He saw one of the men leave the other one and walk southwest on Huron Road, past some stores. The man paused for a moment and looked in a store window, then walked on a short distance, turned around and walked back toward the corner, pausing once again to look in the same store window. He rejoined his companion at the corner, and the two conferred briefly. Then the second man went through the same series of motions, strolling down Huron Road, looking in the same window, walking on a short distance, turning back, peering in the store window, and returning to confer with the first man at the corner. The two men repeated this ritual alternatively between five and six times apiece—in all, roughly a dozen trips.

Terry, 392 U.S. at 6.

[37] *Id.*

[38] *Id.* at 6-7.

[39] *Id.* at 7.

[40] *Id.* McFadden also found a firearm on another suspect. *Terry*, 392 U.S. at 7.

[41] *Id.*

[42] *Id.* at 30.

Court had to determine "whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place."[43] This test was applicable when a citizen has been searched and seized, as illustrated when McFadden took hold of Terry and explored the exterior of his attire.[44]

When analyzing any justification for a police-initiated inquiry, the courts must weigh a suspect's freedoms against any governmental interest that empowered the officer to conduct an investigation in the first place.[45] An officer is warranted to approach a suspect if the circumstances indicate "specific and articulable facts which, taken with rational interferences from those facts, reasonably warrant the intrusion."[46] This inquiry must be based on an objective standard, which requires the officer to provide more than a hunch of criminal wrongdoing.[47] Assuming the officer is authorized to approach the suspect, the Court is required to evaluate the scope of the intrusion based on the totality of the circumstances.[48]

The Court in *Terry* acknowledged McFadden's strong interest in self-protection, especially in a situation where officers are required to make sudden decisions.[49] However, Terry's constitutional right to

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> We merely hold 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 others' safety, he is entitled for the protection of himself and 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.

Id.

[43] *Id.* at 20.

[44] *Terry*, 392 U.S. at 19. A person has been "seized" when his or her ability to leave is restrained and such person is restricted to the confines of the immediate vicinity. *Id.* at 16.

[45] *Id.* at 20-21.

[46] *Id.* at 21.

[47] *Id.* at 21. The appropriate standard is whether "the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action take was appropriate[.]" *Terry*, 392 U.S. at 21-22.

[48] *Id.* at 28-29.

[49] *Id.* at 28. "When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous . . . it would appear to be clearly unreasonable to deny the officer the power to take necessary measures . . .

be free from an intimidating and frightening experience must not be overlooked.[50] When balancing these competing interests, the Court concluded that McFadden's actions did not offend Terry's Fourth Amendment rights.[51] The officer's objective basis that the defendants were about to engage in criminal activity was justified after witnessing their suspicious coordinated approach to potentially rob the local store.[52] In addition, McFadden did not resort to intrusive measures when searching Terry.[53] The officer's search was limited in scope to Terry's outer clothing.[54]

B. High Crime Areas

When analyzing police conduct, "[a]n individual's presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime."[55] For example, in *United States v. Beck*,[56] the court held that two officers were not authorized to approach and inquire into the defendant's whereabouts when parked in a high crime area at 4:00 p.m.[57] Officer Spears and his partner were patrolling in a primarily African American community known for criminal activity when they came across the defendant's parked car.[58] The defendant and passenger, who were both African American, were seated in the vehicle with the engine running when the officers pulled up next to the vehicle and inquired as to their reasons for being in the neighborhood.[59] The patrolmen noticed the defendant discreetly pass an item to the passenger, and they parked their vehicle to investigate further.[60] As they were parking the vehicle, Spears noticed the driver

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to neutralize the threat of physical harm." *Id.* at 24.

[50] *Id.* at 24-25.

[51] *Terry*, 392 U.S. at 31.

[52] *Id.* at 28.

[53] *Id.* at 30.

[54] *Id.*

[55] Illinois v. Wardlow, 528 U.S. 119, 124 (2000).

[56] 602 F.2d 726 (5th Cir. 1979).

[57] *Id.* at 727, 729.

[58] *Id.* at 727. Officer Spears provided evidence that he had been familiar with every person in the local neighborhood based on his extensive experience. *Id.*

[59] *Id.* The officers testified that the two men were very nervous. *Beck*, 602 F.2d at 727.

[60] *Id.*

toss a "cigarette" onto the street.[61] The officers exited their vehicle and Spears observed the "cigarette" next to the defendant's vehicle.[62] Based on those observations, Spears told the men to exit the car and forced the defendant to sit in the police vehicle.[63] Spears recovered the cigarette, which contained marijuana.[64] The officers also found two syringes, one on the street and another in plain view in the vehicle, and a bag of marijuana.[65]

The court of appeals found that the officers lacked an objective basis to approach the defendant's vehicle in the first place.[66] The court acknowledged that the patrolmen had stopped and seized the vehicle, according to *Terry*, when stopping next to the car and preventing the men from leaving.[67] The encounter took place in a high crime neighborhood, but "[t]here [was] nothing inherently suspicious about two black men sitting in a parked car, with or without the engine running, on a street in a black neighborhood on a midsummer afternoon."[68] The defendant had neither violated any traffic law nor was there any reason to believe that the men were engaged or about to engage in criminal conduct.[69] The officers' mere hunch could not provide a basis to justify their actions.[70] Circumstances like those in *Beck* are insufficient to justify a search.

C. Furtive Movements

The federal courts have discussed the implications of when an individual nervously attempts to avoid an officer or conceal something from him or her.[71] The Supreme Court has stated that, "nerv-

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[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] *Beck*, 602 F.2d at 727.

[65] *Id.* Subsequently, the two men were placed under arrest. *Id.*

[66] *Id.* at 729.

[67] *Id.* at 728-29. The court stated that a "stop" occurs "whenever a police officer accosts an individual and restrains his freedom to walk away." *Beck*, 602 F.2d at 728 (quoting *Terry*, 392 U.S. at 16).

[68] *Id.* at 729.

[69] *Id.* The court stated "there was no evidence of recent crimes in the neighborhood, no reason to suspect that Beck or his passenger were wanted by the police, and no other reason to believe anything unusual was taking place." *Id.*

[70] *Id.*

[71] *See, e.g.*, United States v. Taylor, 511 F.3d 87, 89 (1st Cir. 2007) (intentionally and nervously attempting to hide a firearm from the officers in his vehicle); United States v.

ous, evasive behavior is a pertinent factor in determining reasonable suspicion."[72] However, these movements alone do not automatically indicate that criminal conduct is present.[73]

For instance, in *United States v. Spinner*,[74] the court concluded that the officers did not have a reasonable suspicion to conduct a search based on the defendant's nervous actions.[75] The defendant's vehicle had been stationed in an area where parking was not permitted and officers had recently made drug related arrests.[76] The officers approached the defendant, who was fidgeting in the back seat, and told him that he needed to move the vehicle.[77] At the same time, one of the patrolmen observed the defendant trying to hide an item in the center console and feared that he could have a weapon.[78] The defendant, at this point, acted nervously and denied that he had any weapons on his body or in the vehicle.[79] Nevertheless, after receiving consent to frisk the defendant and finding no weapons, the officers', without consent, searched the vehicle on a hunch that there was a concealed item that could potentially harm them.[80] One officer "noticed that there was a small drawer at the back of the center console all the way at the bottom which was partially open, just a small bit, maybe a quarter of an inch" when shining his flashlight into the defendant's vehicle.[81] The officers then found a firearm in the center console of the back seat and placed the defendant under arrest.[82]

Concluding that the officers' were not justified in searching the vehicle, the Circuit Court reasoned that the officers' fear that the defendant had been armed and dangerous lacked merit.[83] Even though the officers witnessed the defendant conceal an item into the

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Hart, 674 F.3d 33, 39 (1st Cir. 2012) (defendant bent over and cradled an object against his waistband); United States v. Davis, 726 F.3d 434, 437 (3d Cir. 2013) (two men making movements in a parked vehicle in connection with exchanging drugs).

[72] *Wardlow*, 528 U.S. at 124.

[73] *Id.*

[74] 475 F.3d 356 (D.C. Cir. 2007).

[75] *Id.* at 360.

[76] *Id.* at 357.

[77] *Id.*

[78] *Id.*

[79] *Spinner*, 475 F.3d at 357.

[80] *Id.*

[81] *Id.*

[82] *Id.*

[83] *Id.* at 359-60.

center console of the back seat, the defendant did not have any weapons on his body when he exited the vehicle and consented to be searched.[84] The fact that the defendant may have concealed an item into the console does not create a fear that he had control of a weapon.[85] The court acknowledged, in addition to the defendant's nervous behavior, that the officers' search could only be justified if another fact to support a reasonable suspicion had been present.[86] The court stated, "[w]ere nervous behavior alone enough to justify the search of a vehicle, the distinction between a stop and a search would lose all practical significance, as the stop would routinely—perhaps invariably—be followed by a search."[87] The officers were not warranted in searching the defendant's vehicle merely because he had acted nervously and made certain furtive movements.[88]

D. A Reasonable Suspicion Must Be Examined Based on the Entirety of the Circumstances

When establishing reasonable suspicion, federal courts require "that the totality of the circumstances—the whole picture—must be taken into account."[89] In *United States v. DeJear*,[90] the court found that the officers had a reasonable suspicion to investigate the defendant's car, which was parked in a private driveway.[91] Officer Morrison and three officers were patrolling in a high crime area when they noticed the defendant and two others seated in the vehicle.[92] After parking, Morrison observed the passenger seated in the backseat gripping a baseball bat.[93] Morrison approached the vehicle, causing the defendant to become nervous upon seeing him.[94] While looking at Morrison, the defendant stuffed "his hands—in the back part of the front seat towards the bottom . . . in a very erratic and nervous

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[84] *Spinner*, 475 F.3d at 359-60.
[85] *Id.* at 359
[86] *Id.*
[87] *Id.* at 360.
[88] *Id.*
[89] United States v. Cortez, 449 U.S. 411, 417 (1981).
[90] 552 F.3d 1196 (10th Cir. 2009).
[91] *Id.* at 1198, 1200-01.
[92] *Id.* at 1198.
[93] *Id.*
[94] *Id.*

state."[95] The officer immediately asked to see the defendant's hands, but the defendant would not comply.[96] The officer drew his gun and induced the defendant to finally comply with his request.[97] The officers searched the vehicle and discovered a firearm and marijuana.[98]

The Tenth Circuit concluded that Morrison had provided sufficient evidence to support his position that a reasonable suspicion existed to approach and detain the defendant when looking at the circumstances as a whole.[99] Morrison had approached the vehicle and witnessed the defendant attempt to conceal something.[100] Furthermore, the vehicle had been parked in a high crime area where the officer had previously observed gang members standing around.[101] Finally, the passenger in the backseat had been in possession of a baseball bat.[102] When taking all these facts into account, in addition to the defendant's nervous state, the court found Morrison's actions to be justified.[103]

Even though the federal courts have held that the presence of suspicious movements in a high crime area raises a reasonable suspicion, at least one recent case has indicated the opposite. In *United States v. Hill*,[104] the court held that the officers did not produce "specific articulable facts warranting reasonable suspicion of criminal activity" when they approached the defendant's parked vehicle.[105] The defendant and his girlfriend were parked in front of her apartment, which was located in a high crime area at 11:00 p.m.[106] Officers Burch and Fowler parked near the defendant's vehicle.[107] After the two suspects noticed the police car, the girlfriend exited the vehicle and quickly strolled to the apartment entrance.[108] Fowler approached

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[95] *DeJear*, 552 F.3d at 1198 (internal quotations omitted).
[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] *Id.* at 1200-201.
[100] *DeJear*, 552 F.3d at 1200.
[101] *Id.* at 1200-201.
[102] *Id.* at 1201.
[103] *Id.*
[104] 752 F.3d 1029 (5th Cir. 2014).
[105] *Id.* at 1038.
[106] *Id.* at 1030-031.
[107] *Id.*
[108] *Id.* at 1032. Officer Fowler testified that "[t]hey were sitting in a car; when we pulled up, she gets out and moves away quickly. I've seen it happen before in situations like this,

the vehicle and requested to speak with the defendant.[109] The defendant opened the driver's side door, and Fowler immediately asked, "[w]here's your gun?"[110] The defendant denied the existence of a firearm and could not produce a driver's license.[111] The defendant exited his vehicle at the officer's request, and Fowler proceeded to search him for weapons.[112] The officer found a gun and placed him under arrest.[113]

The court held that the encounter that took place in the high crime area and the girlfriend's nervous movements did not give rise to a plausible justification for the officers' actions.[114] The officers could not point to specific criminal activity where the encounter took place, but could only acknowledge that there had recently been homicides in the county.[115] Furthermore, the fact that the confrontation took place at a late hour on a Saturday night was not significant because "[n]o reasonable officer who happens upon a couple sitting in a car in an apartment complex parking lot on a weekend night would, without more, suspect criminal activity."[116] The girlfriend's quick exit and approach to the apartment did not give rise to a reasonable suspicion.[117] The officers only witnessed the suspects in the vehicle for a few seconds before she egressed.[118] Because the officers had no reason to suspect criminal activity when they approached the complex, her exit could have been for a multitude of reasons.[119] Based on the circumstances presented before the court, the officers lacked a reasonable suspicion.[120]

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and we have encountered narcotics in situations like that before." *Hill*, 752 F.3d at 1032 (internal quotations omitted).

[109] *Id.* at 1032.

[110] *Id.* (internal quotation ommitted).

[111] *Id.*

[112] *Id.*

[113] *Hill*, 752 F.3d at 1032.

[114] *Id.* at 1037-38.

[115] *Id.* at 1035.

[116] *Id.* at 1036.

[117] *Id.*

[118] *Hill*, 752 F.3d at 1037.

[119] *Id.* at 1037. The court stated, "she *could* have exited the car out of a desire to flee from the police; or, she could have simply exited the car because Hill drove her home, they finished saying their 'goodbyes,' and she was preparing to go inside." *Id.*

[120] *Id.* at 1038.

V. THE NEW YORK STATE APPROACH

A. *People v. De Bour*

In New York, every citizen has the "right to be left alone."[121] When an officer has an objective basis in concluding that the circumstances are ripe to take action, the subsequent events will be subjected to the proper safeguards.[122] This limitation is prescribed in *People v. De Bour*.[123] The central issue in this case was whether a law enforcement agent patrolling on a public street can legally confront a citizen, without a material indication that the individual has engaged in criminal activity, in an effort to request information.[124] Officer Kenneth Steck and his partner were patrolling on foot in Brooklyn, where they witnessed Louis De Bour walking down the street at 12:15 a.m.[125] When the officers were within forty feet of De Bour, he strangely crossed the street.[126] The officers followed De Bour, approached him and inquired into his reasons for being in the neighborhood.[127] After the defendant nervously answered the question, Steck requested identification, which the defendant could not produce.[128] Subsequently, Steck observed a protuberance near the bottom of De Bour's jacket.[129] The officer demanded that De Bour open up his jacket, and the defendant complied.[130] Steck discovered a loaded revolver and placed De Bour under arrest.[131]

Before the New York Court of Appeals, De Bour argued that he had been "seized" under the Fourth Amendment when the officers approached him and restricted his right to leave.[132] Invoking *People*

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[121] *De Bour*, 352 N.E.2d at 569.

[122] *See id.* at 575.

[123] *Id.*

[124] *Id.* at 565.

[125] *Id.*

[126] *De Bour*, 352 N.E.2d at 565.

[127] *Id.*

[128] *Id*. De Bour told the officers that he was on his way to his friend's home and had recently parked his vehicle. *Id.*

[129] *Id.*

[130] *De Bour*, 352 N.E.2d at 565.

[131] *Id.*

[132] *Id.* at 566. De Bour contended "that he was deprived of his freedom of movement by the obvious show of authority and the equally obvious display of force by virtue of his being

v. Cantor,[133] a Court of Appeals case decided one year earlier, De Bour contended that the officers' actions amounted to an unconstitutional seizure because they had no "founded suspicion predicated on specific articulable facts that criminal activity [was] afoot."[134] The prosecution, also relying on *Cantor*, asserted that the officers' actions were justified because De Bour had crossed the street in an area known for narcotics transactions in order to evade the police.[135] The Court of Appeals stated that the appropriate test for measuring the reasonableness of a search or seizure under *Cantor* "requires a weighing of the government's interest against the encroachment involved with respect to an individual's right to privacy and personal security."[136] When balancing these competing interests, a court must determine whether the officer was justified in initiating the inquiry, and whether the scope of the measures was proportionate to the circumstances.[137] The court explained that an officer is justified to investigate into criminal activity only if there is a founded suspicion that the suspect is engaging in criminal conduct.[138] Furthermore, an officer cannot validate his actions "by a subsequently acquired suspicion resulting from the stop."[139]

The court in *De Bour* held that the officers did not violate the defendant's constitutional rights because the inquiry had been justified from its inception and was appropriate in scope.[140] The court further concluded that De Bour had not been "seized" as defined in *Cantor*.[141] Steck and his partner were permitted to approach the defendant for the purpose of identification because the detention had been brief, aimed at preventing a potential narcotics transaction, and did not place the defendant in a frightening or humiliating position.[142]

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outnumbered by armed officers." *Id.*

[133] 324 N.E.2d 872, 876 (N.Y. 1975) (holding that the defendant had been "seized" when three officers surrounded him and restricted his ability to leave).

[134] *De Bour*, 352 N.E.2d at 566.

[135] *Id.*

[136] *Id.*

[137] *Id.*

[138] *Id.*

[139] *De Bour*, 352 N.E.2d at 566.

[140] *Id.* at 571.

[141] *Id.* at 567 ("[Defining] a seizure of the person for constitutional purposes to be a significant interruption with an individual's liberty of movement.") (citing *Cantor*, 324 N.E.2d at 876).

[142] *Id.* at 570.

De Bour had suspiciously crossed the street after midnight in an area commonly known for drug activity to avoid any interaction with the officers.[143] Additionally, Steck did not exceed his authority when asking De Bour to display what was inside of his jacket.[144] The officer believed the bulge to be a firearm, and this contention was in fact reasonable when taking into account the events as a whole.[145] Steck did not conduct an overly intrusive search, but rather asked the defendant to unzip his jacket and did not grab him until noticing the firearm.[146] Therefore, the search was not excessive in scope.[147]

More critical than the adjudication itself, *De Bour* provided a long lasting standard; reformed and expanded from *Cantor*.[148] This four-level police inquiry standard provides:

> The minimal intrusion of approaching to request information is permissible when there is some objective credible reason for that interference not necessarily indicative of criminality. The next degree, the common-law right to inquire, is activated by founded suspicion that criminal activity is afoot and permits a somewhat greater intrusion in that a policeman is entitled to interfere with a citizen to the extent necessary to gain explanatory information, but short of a forcible seizure. Where a police officer entertains a reasonable suspicion that a particular person has committed, is committing or is about to commit a felony or misdemeanor, the CPL authorizes a forcible stop and detention of that person. A corollary of the statutory right to temporarily detain for questioning is the authority to frisk if the officer reasonably suspects that he is in danger of physical injury by virtue of the detainee being armed. Finally a police officer may arrest and take into custody a person when he has probable cause to believe that person has committed a crime, or offense

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143 *Id.*
144 *De Bour*, 352 N.E.2d at 570.
145 *Id.*
146 *Id.*
147 *Id.* at 571.
148 *Id.*

in his presence.[149]

The court noted that this should be seen as a step-by-step analysis, and officers must only act on an objective notion when confronting a citizen in public.[150] Additionally, this test "directly correlates the degree of objective credible belief with the permissible scope of interference."[151] This inquiry, which is still the standard in New York, has been applied to countless situations.

B. An Objective Credible Reason Is Mandated when Approaching a Vehicle

The New York courts have decided numerous cases where an officer unjustifiably approaches a vehicle.[152] These cases are analyzed on the facts and circumstances of each specific encounter. For example, in *People v. Spencer*,[153] the court held that officers were not justified in pulling the defendant over pursuant to a report of an assault that occurred the day before.[154] The officers, who were accompanied by the complainant, patrolled the community looking for her boyfriend.[155] After driving with the officers for about five minutes, the complainant identified the defendant seated in a parked vehicle.[156] The defendant was her boyfriend's friend who may have had knowledge of the suspect's whereabouts.[157] As the defendant began to drive away, the officers turned on the police vehicle's lights and

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149 *De Bour*, 352 N.E.2d at 571.

150 *Id.* at 572.

151 *Id.*

152 *See* People v. Ocasio, 652 N.E.2d 907, 908 (N.Y. 1995) (finding that officers were justified to approach the defendant's vehicle when doing so on foot and not forcibly detaining the defendant by using the police vehicle's sirens); People v. Brown, 492 N.Y.S.2d 625, 626 (App. Div. 2d Dep't 1985) (holding that undercover officers in a high-crime neighborhood violated the defendant's rights when approaching the defendant's vehicle after witnessing a conversation between the defendant and a woman; the woman entered the car, and the defendant "made a series of sharp lurching movements backwards and forwards"); People v. Thomas, 792 N.Y.S.2d 472, 473-74 (App. Div. 1st Dep't 2005) (holding that an officer is authorized to approach and investigate the driver of a vehicle parked in front of a fire hydrant because only a licensed driver can be legally parked next to the still object).

153 646 N.E.2d 785 (N.Y. 1995).

154 *Id.* at 786, 790.

155 *Id.* 786.

156 *Id.* at 786-87.

157 *Id.*

pulled the defendant over.[158] The officers walked up to the vehicle and inspected the car's interior with their flashlights.[159] The officers noticed a translucent bag containing marijuana below the female passenger's seat.[160] The defendant and the female passenger exited the car at the request of the officers, and a subsequent search of the vehicle revealed a loaded firearm, in addition to the marijuana.[161]

The court found that the officers' initial decision to approach the defendant's vehicle was not supported by a specific, articulable basis.[162] The court made a critical distinction between the standards placed on an officer when forcibly stopping a vehicle and inquiring into a pedestrian's whereabouts.[163] This distinction is important due to the fact that he had been parked and began to drive away when the inquiry first occurred.[164] The court stated:

> Although the right to stop a vehicle is generally analogous to the right to stop a pedestrian, police/motorist encounters must be distinguished from police/pedestrian encounters when the police are operating on less than reasonable suspicion. This is because "the obvious impact of stopping the progress of an automobile is more intrusive than the minimal intrusion involved in stopping a pedestrian" and constitutes "at least a limited seizure subject to constitutional limitations," whereas the common-law right of inquiry—much less the right to request information—does not include the right to unlawfully seize.[165]

For constitutional purposes, a vehicle is effectively seized when an officer pulls the vehicle over.[166] Furthermore, the court reasoned that the officers were not justified in stopping the vehicle simply because the defendant could have knowledge of where the suspect might be,

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158 *Spencer*, 646 N.E.2d at 787.
159 *Id.*
160 *Id.*
161 *Id.*
162 *Id.* at 790.
163 *Spencer*, 646 N.E.2d at 787.
164 *Id.* at 786-87.
165 *Id.* at 787 (internal citations omitted).
166 *Id.*

especially when less invasive measures could be used.[167] The officers did not inquire into the defendant's whereabouts before the complainant identified him; but the officers could have gone to the defendant's home if they believed he had any knowledge of where the suspect could be.[168] The inquiry occurred almost two days after the assault had been reported.[169] Lastly, the defendant had not been approached because he was suspected of committing the assault, but rather to potentially provide information about the suspect's location.[170] Taking all of those considerations into account, the officers' actions were not justified.[171]

When an officer acts solely on a hunch of criminal wrongdoing, the New York courts have held that the encounter is unjust from its inception.[172] In *People v. Sobotker*,[173] the court held that the defendant had been unlawfully seized under the Fourth Amendment when the officers pulled the defendant's vehicle over because they "felt that a crime was about to be committed."[174] The two officers were parked in an illuminated area where multiple burglaries had recently taken place.[175] The plain clothed patrolmen witnessed the defendant's vehicle approach an intersection and oddly slow down near a local bar.[176] Similar to the first instance, the men looked over at another bar when at the stop sign.[177] Based on those events, the officers decided to forcibly pull the vehicle over.[178] After the defendant could not supply appropriate documents for the vehicle or identification, the officers searched the men.[179] The officer's found five bullets

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[167] *Id.* at 790.

[168] *Spencer*, 646 N.E.2d at 789.

[169] *Id.* at 789.

[170] *Id.* at 790.

[171] *Id.*

[172] *See* People v. Howard, 542 N.Y.S.2d 536, 540 (App. Div. 1st Dep't 1989) (stating that the defendant's presence in a "robbery prone" area can be considered when justifying a hunch, but standing alone does not justify the assertion). The court held that the officers had no objective reason to approach the defendant who had been standing on the street corner. *Id.*

[173] 373 N.E.2d 1218 (N.Y. 1978).

[174] *Id.* at 1220 (internal quotations omitted).

[175] *Id.* at 1219.

[176] *Id.* There had been a stop sign at the corner of the intersection; the vehicle's speed diminished to around five miles per hour, and the men looked briefly towards the local bar. *Id.*

[177] *Sobotker*, 373 N.E.2d at 1219.

[178] *Id.*

[179] *Id.*

on one of the passengers and a firearm in the vehicle.[180]

The Court of Appeals, in finding that the officers' hunch did not support any confirmation of wrongdoing, stated, "the seemingly innocuous act of the defendant and his companions in glancing at a bar, even if it could be argued that they were then driving through a 'high crime neighborhood,' did not reasonably denote criminal conduct."[181] When the men glanced at the second bar, they were properly stopped at a stop sign.[182] The court did recognize, however, that if the officers had been patient and waited for the events to unfold, then they might have lawfully uncovered criminal activity.[183] The fact that the officers acted, rather than waited, did not justify the finding that at least one of the men was armed because if "hindsight alone [were] to furnish the governing criteria, a vital constitutional safeguard of our personal security would soon be gone."[184]

C. Reasonable Suspicion of Criminality

Much like the federal courts, the Court of Appeals has examined cases for the purpose of determining whether or not an officer had a reasonable suspicion of criminal conduct to justify an inquiry.[185] It has been established that "[r]reasonable suspicion is the quantum of knowledge sufficient to induce an ordinarily prudent cautious man under the circumstances to believe criminal activity is at hand."[186] For instance, in *People v. May*,[187] the court held that the officers did not have a reasonable suspicion to suspect any criminal conduct.[188] The defendant and female passenger were sitting in the defendant's car, which was parked on an abandoned street in a high

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[180] *Id.* at 1219-220.

[181] *Id.* at 1220-221.

[182] *Sobotker*, 372 N.E.2d at 1221.

[183] *Id.* The court noted "the premature juncture at which the police did in fact act in this instance, they had come upon no fruit ready for harvesting." *Id.*

[184] *Id.*

[185] *See Harrison*, 443 N.E.2d at 452 (holding that the officers' lacked a reasonable suspicion because the defendant's rental car had been dirty); People v. Heston, 543 N.Y.S.2d 803, 804 (App. Div. 1st Dep't 1989) (finding a reasonable suspicion when an "officer then observed a rolled dollar bill in plain view on the floor of the vehicle. He testified that his experience informed him that rolled bills were used to ingest cocaine.").

[186] *Cantor*, 324 N.E.2d at 877.

[187] 609 N.E.2d 113 (N.Y. 1992).

[188] *Id.* at 115.

crime area.[189] At around 2:30 a.m., two officers drove behind the defendant's vehicle and proceeded to turn the vehicle's turret lights on.[190] As the defendant began to drive away, the officers commanded through the vehicle's loudspeaker that the defendant pull over.[191] After the defendant complied, the officers requested identification and questioned the defendant.[192] Subsequently, the officers learned, after running the license plate, that the car had been stolen and arrested the defendant.[193] A subsequent search revealed a finding of crack cocaine.[194]

In deciding to suppress the evidence, the Court of Appeals found that the officers had "seized" the defendant when "using red turret lights, a spotlight and a loudspeaker, [and] ordered the defendant to pull the car over . . . ."[195] Because a seizure had occurred, the only way for the stop to be acceptable was if a reasonable suspicion existed.[196] The court determined that the officers had no reasonable suspicion of criminal activity, other than the fact that the inquiry occurred on an abandoned street and in an area commonly known for criminal activity.[197] The defendant's conduct did not rise to the level of reasonable suspicion because the defendant was entitled "to be let alone" when he drove away from the officers.[198]

VI. TWO DIFFERENT, BUT SIMILAR STANDARDS

Both the *Terry* and *De Bour* approaches have substantially evolved over the last 50 years. In particular, the analysis of parked vehicles has provided the necessary safeguards for each and every citizen to live freely without arbitrary police intrusions.[199] These pro-

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189 *Id.* at 114.

190 *Id.*

191 *Id.*

192 *May*, 609 N.E.2d at 114.

193 *Id.*

194 *Id.*

195 *Id.*

196 *Id.* at 114-15.

197 *May*, 609 N.E.2d at 114-15.

198 *Id.* at 115. (internal quotations omitted).

199 *See, e.g.*, United States v. See, 574 F.3d 309, 311 (6th Cir. 2009) (finding that the officers lacked a reasonable suspicion to approach the defendant's parked vehicle located in a high crime area at 4:30 A.M.); People v. Morrison, 555 N.Y.S.2d 183, 184-85 (App. Div. 2d Dep't 1990) (stating that defendant's parked vehicle with the motor on in a neighborhood

tections were proven strong in *Laviscount* when the Appellate Division, Second Department vacated the defendant's conviction.[200] No evidence had been presented to the effect that Laviscount had been doing anything unlawful when seated in his parked car at a late hour; yet the officer arbitrarily decided to approach the defendant's vehicle based on nothing more than his gut feeling that criminal activity was occurring.[201] A car simply parked in a strange area is nothing more than that, a parked car in a strange area. However, when other factors are presented, as such were in *DeJear*, an officer could be justified to approach a suspect's vehicle.[202]

Had Laviscount's case been brought in federal court, the outcome might have been different. Rather than the inflexible and gradual approach established in *De Bour*, the *Terry* analysis might have provided a sufficient basis to convict Laviscount and uphold a conviction.[203] A federal court, looking at the circumstances as a whole, could have accepted the argument that a car parked at a late hour in a remote area with the driver engaging in skeptical movements provided reasonable suspicion of criminal conduct. The federal approach does not hinge on a step-by-step analysis. Rather than stopping the analysis at the initial approach as the court properly did in *Laviscount*, a federal court might have taken into account the defendant's actions when Ranolde pulled alongside Laviscount's vehicle.[204] The gradual New York approach did not take into consideration any of the defendant's actions after Ranolde pulled up next to the vehicle.[205] If his furtive movements were taken into account, the prosecutor could have had a stronger argument to convict Laviscount and uphold the verdict.[206]

VII. CONCLUSION

Police officers are scrutinized, after the fact, about the decisions they make or choose not to make. The courts are in place to

known for crime did not provide a reasonable suspicion to conduct a search and seizure).

[200] *See Laviscount*, 984 N.Y.S.2d at 397.

[201] *Id.*

[202] *See DeJear*, 552 F.3d 1196.

[203] *See Laviscount*, 984 N.Y.S.2d at 396-97.

[204] *Id.* at 396; *see Terry*, 392 U.S. 1; *De Bour*, 352 N.E.2d 562.

[205] *Laviscount*, 984 N.Y.S.2d at 396-97.

[206] *See id.* at 397.

retrospectively evaluate their conduct and determine whether they exceeded the bounds of their authority. However, each encounter must be assessed on a case-by-case basis. Officers are involved in situations where they must act quickly, but that does not exempt them from abiding by the appropriate safeguards. Nevertheless, police officer safety and judgment must be given its appropriate weight in these inquires due to the nature of their duty. In sum, the courts must continue to strike an appropriate balance between freedom and safety in order for citizens to feel comfortable when a police-initiated encounter occurs.

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