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Justification for Police Intrusions

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JUSTIFICATION FOR POLICE INTRUSIONS

SUPREME COURT OF NEW YORK APPELLATE DIVISION, FIRST DEPARTMENT

People v. Loretta[1]
(decided June 18, 2013)

I. INTRODUCTION

Delbart Loretta was convicted of criminal possession of a controlled substance in the fifth degree.[2] Loretta was observed placing an aluminum foil object in his pocket, which was subsequently determined to be drugs.[3] The Supreme Court of New York, Appellate Division, First Department, in denying Loretta's suppression motion, held that the police conduct "constituted a level-two common-law inquiry,"[4] based upon Loretta's nervous mannerisms, the fact that the stop was within a "drug-prone neighborhood," and Loretta's attempt to block the officers' view of his pocket.[5] Accompanying a lawful level two common law inquiry is the officers' right to "ask[ ] more pointed questions."[6] In other words, the officers may ask questions in an effort to "gain explanatory information."[7]

II. FACTUAL BACKGROUND

The arresting detective observed Loretta placing what the officer believed was drug packaging into his shirt pocket.[8] The detective, recognizing he was located within a "drug-prone neighborhood,"

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[1] People v. Loretta, 969 N.Y.S.2d 1 (App. Div. 1st Dep't 2013).
[2] *Id.* at 1.
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] People v. Kennebrew, 965 N.Y.S.2d 622, 624 (App. Div. 2d Dep't 2013).
[7] Tillie S. Mirman, *Search and Seizure: New York vs. Federal Approach*, 28 TOURO L. REV. 751, 757 (2012).
[8] *Loretta*, 969 N.Y.S.2d at 1.

had reason to believe that the aluminum foil object that Loretta placed into his shirt pocket was drug paraphernalia.[9] Two police officers surrounded Loretta, and the arresting detective approached him.[10] Loretta, upon the detective's approach, immediately began exhibiting nervous mannerisms.[11] It appeared that Loretta was also strategically using his hand to block the officers' view of the pocket in which he had placed the aluminum foil.[12] At this point, the detective, with great suspicion, told Loretta to stop moving his hand and asked him "if he had anything illegal or what he had in his pocket."[13] The officers found drugs in Loretta's possession, and he was later convicted of criminal possession of a controlled substance in the fifth degree.[14]

III. REASONING

The Fourth Amendment of the United States Constitution states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[15]

The New York Court of Appeals, in *People v. De Bour*,[16] interpreted the Fourth Amendment and established a four-tier method to determine the constitutionality of police encounters and confrontations.[17] With each successive level, the officers may legally increase the level of intensity of their intrusions.[18] As the levels progress, the require-

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[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Loretta*, 969 N.Y.S.2d at 1.
[14] *Id.*
[15] U.S. CONST. amend. IV.
[16] 352 N.E.2d 562 (N.Y. 1976).
[17] *Id.* at 571-72.
[18] *Id.*

ments the officers must fulfill become more stringent.[19]

In short, the court in *Loretta* held that the officers' conduct constituted a level-two inquiry.[20] The court reached its conclusion by distinguishing *People v. Garcia*.[21] In *Garcia*, three officers pulled over the defendant's vehicle after they observed a defect in the rear brake light.[22] In total, there were five occupants in the vehicle.[23] When the officers approached the vehicle, "the three passengers in the rear seats 'were a little furtive,' kept 'looking behind,' [] 'stiffened up,' . . . and 'acted nervous.' "[24] Following these observations, one of the officers asked the occupants if anyone in the vehicle had any weapons.[25] One of the occupants responded and presented a knife.[26] The officers then requested that the occupants exit the vehicle, and the occupants complied.[27] Following their exit, one of the officers spotted what he believed was "a gun or some sort of weapon" between the seats.[28] The officers then searched the entire vehicle and found another weapon in the trunk.[29] Subsequently, the weapons were determined to be only air-powered guns.[30]

The court in *Garcia* held that the defendant's conduct did not justify the actions the officer took under a level-two inquiry.[31] The court believed that nervous mannerisms were not uncommon upon a police stop.[32] In *Loretta*, however, the court found justification for a level-two inquiry by combining Loretta's nervous characteristics with more telling circumstances, such as his location within a drug prone neighborhood and his attempt to block the officers' sight of what was subsequently found to be drug packaging.[33]

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[19] *Id.* The requirements of each tier are discussed in detail later within this note. *See infra* section V.A.3.i.

[20] *Loretta*, 969 N.Y.S.2d at 1.

[21] *Id.* at 1-2; People v. Garcia, 983 N.E.2d 259, 260 (N.Y. 2012).

[22] *Garcia*, 983 N.E.2d at 260.

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Garcia*, 983 N.E.2d at 260.

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Garcia*, 983 N.E.2d at 263.

[33] *Loretta*, 969 N.Y.S.2d at 2.

IV. FEDERAL APPROACH

The Fourth Amendment of the United States Constitution protects persons against "unreasonable searches and seizures."[34] Typically, a search and seizure will violate the Fourth Amendment unless it is "based on probable cause and executed pursuant to a warrant."[35] The Supreme Court, however, has crafted certain exceptions to the probable cause and warrant requirement.[36]

A. *Terry v. Ohio*

In 1968, the Supreme Court, in *Terry v. Ohio*,[37] recognized that some encounters between officers and persons are not seizures.[38] A forcible seizure occurs when an officer confronts an individual and deprives him of his ability to walk away.[39] In *Terry*, Officer Martin McFadden observed two men, John Terry and Richard Chilton, standing on a street corner, acting in a way the officer believed was suspicious.[40] McFadden watched as Terry and Chilton walked back and forth, always on the same route, peering into a store window.[41] Terry and Chilton repeated this pattern multiple times.[42] Eventually, a third man, Katz, approached and had a brief conversation with both Terry and Chilton.[43] At this point, Officer McFadden suspected both men of "casing a job [for] a stick-up."[44] He proceeded to follow Terry and Chilton until they rejoined Katz a few blocks from the store.[45]

Officer McFadden approached all three men, identified himself, and asked for their names.[46] After the men "mumbled something," the officer patted Terry down and felt a pistol.[47] He then or-

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[34] U.S. CONST. amend. IV.

[35] *Warrantless Searches and Seizures* (*Warrantless I*), 41 GEO. L.J. ANN. REV. CRIM. PROC. 46 (2012).

[36] *Id.*

[37] 392 U.S. 1 (1968).

[38] *Id.* at 16.

[39] *Id.* at 16.

[40] *Id.* at 5.

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

[42] *Terry*, 392 U.S. at 6.

[43] *Id.*

[44] *Id.*

[45] *Id.*

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

[47] *Terry*, 392 U.S. at 7.

dered all three men into a nearby store, removed Terry's overcoat, and recovered the pistol.[48]

The Supreme Court, in *Terry*, held that government interests, such as "crime prevention and detection,"[49] justify "brief investigatory stops"[50] that are not seizures[51] and, therefore, are based on "less than probable cause."[52] "[P]olice can stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts that criminal activity 'may be afoot' . . . ."[53] Reasonable suspicion demands "something more than an inchoate and unparticularized suspicion or 'hunch,' but less than the level of suspicion required for probable cause."[54]

Generally, courts have required reasonable suspicion to be objectively reasonable.[55] Courts have been very lenient and typically defer "to the observations and conclusions of the police, reasoning that an experienced officer can infer criminal activity from conduct that may seem innocuous to a lay observer."[56] However, when a court does find it necessary to review reasonable suspicion determinations, it shall look at the "totality of the circumstances" to determine whether the officer had "particularized and objective basis" for suspecting criminal activity.[57] Even activities and circumstances that alone would not appear suspicious must be reviewed, as a combination of "innocent activities may cumulatively create reasonable suspicion."[58]

Along with investigatory stops, the Supreme Court, in *Terry*, also recognized the power of an officer to conduct a warrantless search.[59] Like investigatory stops, the Supreme Court found that government interests, such as "the need for law enforcement officers to protect themselves and other prospective victims of violence," jus-

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[48] *Id.*

[49] *Id.* at 22.

[50] *Warrantless I*, *supra* note 35, at 47.

[51] *Terry*, 392 U.S. at 8.

[52] *Warrantless I*, *supra* note 35, at 47.

[53] United States v. Sokolow, 490 U.S. 1, 7 (1989).

[54] *Id.* at 2.

[55] *Warrantless I*, *supra* note 35, at 48.

[56] *Id.* at 51-52.

[57] United States v. Cortez, 449 U.S. 411, 417 (1981).

[58] *Warrantless Searches and Seizures* (*Warrantless II*), 90 GEO. L.J. 1130, 1134-35 (2002).

[59] 2 Joseph G. Cook, *Constitutional Rights of the Accused* § 4:41 (3d 2013).

tify frisks absent probable cause.[60] Evidence found as a result of the frisk cannot be used to prove the existence of reasonable suspicion.[61]

Similar to the rule for investigatory stops, "[t]he standard for determining the need for a protective frisk is an objective one."[62] This is because courts believe that subjective beliefs "have too little substance to effectively guarantee protection of constitutional rights."[63] While an officer does not need to be certain that a person is armed or dangerous, a reasonably prudent person under the same circumstances should conclude, like the officer, "that his or her safety or that of others was in danger . . . ."[64] Because an officer's life is potentially at stake, courts have routinely kept the "test [for] sufficient suspicion" at a low threshold.[65]

V. NEW YORK STATE APPROACH

The New York State Constitution protects persons from "unreasonable searches and seizures."[66] The four-tier approach to evaluate police encounters with civilians,[67] established by the New York Court of Appeals, is a product of over forty years of case law.

A. New York's "Stop and Frisk" Law: How it Shaped New York's Current Search and Seizure Framework

The New York Stop and Frisk law became effective July 1, 1964.[68] Following its most recent amendment in 2010, the statute, titled "Temporary questioning of persons in public places; search for weapons," reads:

> 1. In addition to the authority provided by this article for making an arrest without a warrant, a police officer

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[60] *Terry*, 392 U.S. at 24.

[61] William E. Ringel, *Searches and Seizures Arrests and Confessions* § 13:34 (2d. 2013).

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] N.Y. CONST. art. I, § 12.

[67] *De Bour*, 352 N.E.2d at 571-72; People v. McIntosh, 755 N.E.2d 329, 331 (N.Y. 2004); People v. Hollman, 590 N.E.2d 204, 205-06 (N.Y. 1992).

[68] *Criminal Law—New York Authorizes Police to "Stop-and-Frisk" on Reasonable Suspicion—N.Y. Sess. Laws 1964, Ch. 86, § 2, N.Y. Code Crim. Proc. § 180(a).*, 78 HARV. L. REV. 473 (1964) [hereinafter *New York Authorizes Police*].

> may stop a person in a public place located within the geographical area of such officer's employment when he reasonably suspects that such person is committing, has committed or is about to commit either (a) a felony or (b) a misdemeanor defined in the penal law, and may demand of him his name, address and an explanation of his conduct. 2. [Irrelevant to this discussion; deals with court officers] 3. When upon stopping a person under circumstances prescribed in subdivisions one and two a police officer or court officer, as the case may be, reasonably suspects that he is in danger of physical injury, he may search such person for a deadly weapon or any instrument, article or substance readily capable of causing serious physical injury and of a sort not ordinarily carried in public places by law-abiding persons. If he finds such a weapon or instrument, or any other property possession of which he reasonably believes may constitute the commission of a crime, he may take it and keep it until the completion of the questioning, at which time he shall either return it, if lawfully possessed, or arrest such person. 4. [Irrelevant to this discussion; deals with storage and maintenance of data][69]

In short, the law permits a police officer to approach a person and ask investigatory questions when the officer has "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion."[70] Furthermore, a police officer "who 'reasonably suspects' that he is in 'danger of life or limb[,]' may search the suspect for a dangerous weapon."[71]

1. Passage of New York's Stop and Frisk Law

At the request of the New York City Police Department,[72] the stop and frisk bill was sponsored and submitted by the Mayor's Leg-

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[69] N.Y. CRIM. PROC. LAW § 140.50 (McKinney 2013).

[70] *Terry*, 392 U.S. at 21.

[71] *New York Authorizes Police*, *supra* note 68, at 473.

[72] John A. Ronayne, *The Right to Investigate and New York's "Stop and Frisk" Law*, 33 FORDHAM L. REV. 211, 212 (1964).

islative representative, Julius Volker.[73] The Bill was passed in 1964 because case law was filled with conflicting theories and conclusions as to whether an arrest was made or whether "the process of investigation was still underway."[74] One theory was that "[a]s soon as the defendant [believed] that his liberty [was] constrained, there [was] an arrest."[75] This theory led to a conflict between courts.[76] Some courts favored the police department, finding that at nearly all times, probable cause existed, justifying an arrest.[77] Other courts took a more conservative view, finding that in most instances, no probable cause existed, therefore, leading to illegal arrests[78] and suppression of evidence.[79]

The conflicting theory "recognize[d] the possibility of a period of investigation and indicate[d] that it is the operation of the arresting officer's mind which determine[d] whether there was a temporary detention or an arrest and the precise moment of the arrest."[80] As a result, this theory relied on an officer's subjective belief of probable cause based on the facts, circumstances, and situation.[81]

Although given less weight, a second reason for the passage of the bill was its presentation as a "measure [] necessary to prevent crime."[82] Volker stated, "the police are charged with the duty not on-

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[73] Dasha Kabakova, *The Lack of Accountability for the New York Police Department's Investigative Stops*, 10 CARDOZO PUB. L. POL'Y & ETHICS J. 539, 542 (2012).

[74] Ronayne, *supra* note 72, at 212.

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] *Id. See, e.g.*, People v. Moore, 183 N.E.2d 225, 226 (1962) (holding that the officer's observation of four men handing money to the defendant was not indicative of a crime being committed and therefore led to an illegal arrest); People v. O'Connor, 178 N.E. 762, 762 (1931) (holding that the arrest was made illegally because the officer had no right to search the prisoner, nor did the prisoner resist the officer or commit a crime).

[79] Kabavoka, *supra* note 73, at 542. *See, e.g.*, Mapp v. Ohio, 367 U.S. 643, 655 (1961) ("We hold that all evidence obtained by searches and seizures in violation of the Constitution is . . . inadmissible in a state court."); People v. Loria, 179 N.E.2d 478, 481 (1961) ("[The Fourth Amendment of the Constitution protects] against 'unreasonable governmental intrusion' into the privacy of a person's home, and any evidence discovered as a result of such an intrusion is now constitutionally tainted and inadmissible in a State court."); People v. Brown, 225 N.Y.S.2d 157, 160 (1962) (holding that the arrest of the defendant was illegal because the officer did not know that the defendant had committed a burglary, nor the commission of any felony, and therefore anything revealed by the search after the arrest may not be utilized against the defendant).

[80] Ronayne, *supra* note 72, at 212-13.

[81] *Id.* at 213.

[82] Kabavoka, *supra* note 73, at 543.

ly of arresting criminals, but, equally, if not more important, of preventing crime and preserving the peace."[83]

Predicting that the bill would draw scrutiny as potentially violating the Fourth Amendment, Volker argued that the bill required a "reasonable-man test."[84] In other words, Volker argued that the bill should avoid a constitutional challenge because the "detaining, questioning, and search" must be based on "reasonable grounds."[85] He further attempted to avoid a constitutional challenge by clarifying that the contemplated "average period of questioning a person would be no more than a few minutes."[86]

2. Early Challenges to New York's Stop and Frisk Law

During the Supreme Court's 1967 term, the Court heard three cases in which it considered "the extent to which police may 'seize' and 'search' persons without a warrant."[87] The first case, *Terry v. Ohio*, is discussed in detail in the above sections of this note.[88] *Sibron v. New York*,[89] and its companion case, *Peters v. New York*,[90] both failed to strike down New York's Stop and Frisk law.[91]

In *Sibron*, a police officer observed the defendant from 4:00 P.M. to midnight converse with "six or eight persons" who the officer knew from his previous experiences were narcotics addicts.[92] The officer then observed the defendant enter a restaurant, at which point the officer approached the defendant and told him to come outside.[93] The officer then said to the defendant, "You know what I am after."[94] The officer testified that the defendant "mumbled something and reached into his pocket."[95] At the same time, the officer "thrust his

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[83] *Id.*

[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] *Police Right to "Stop and Frisk,"* 82 HARV. L. REV. 178, 178 (1968) [hereinafter *Police Right*].

[88] *See supra* section IV.A.

[89] Sibron v. New York, 392 U.S. 40, 67-68 (1968).

[90] *Id.* (reversing in part, but failing to declare the stop and frisk law unconstitutional).

[91] Kabavoka, *supra* note 73, at 543-44.

[92] *Sibron*, 392 U.S. at 45.

[93] *Id.*

[94] *Id.*

[95] *Id.*

hand into the same pocket, discovering several glassine envelopes, which, it turned out, contained heroin."[96]

In *Peters*, an off duty officer, who was in his apartment that he had lived in for the past twelve years, heard a noise at his door.[97] When the officer looked through his peephole, he observed two men tiptoeing away from the alcove toward a stairway.[98] After calling the police, the officer, in regular clothing, gave chase.[99] The officer subsequently apprehended the defendant.[100] After patting down the defendant for weapons, the officer "discovered a hard object in his pocket."[101] When he removed the object, he found an envelope containing burglar's tools.[102] Both Sibron and Peters were convicted.[103]

The Supreme Court, pursuant to the Fourth Amendment, reversed Sibron's conviction, finding that the officer lacked "probable cause to make an arrest" and that the frisk violated the defendant's Fourth Amendment rights because the officer "did not have sufficient facts to warrant a belief that [the defendant] was armed and dangerous."[104] Significantly, the Court did not invalidate the officer's stop of the defendant, only the subsequent arrest.[105] The Court upheld the conviction in *Peters*, finding that the officer had probable cause to believe that a crime had been committed.[106]

Although the Supreme Court reversed the conviction in *Sibron*, it did so by applying only the Fourth Amendment.[107] The Court refused to rule on the constitutionality of the state stop and frisk law.[108] However, because the Supreme Court found that the stops "did not violate [the defendant's] Fourth Amendment rights, the Court effectively ruled that the law [wa]s not facially unconstitutional while leaving room to find it unconstitutionally applied in individual instances."[109]

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[96] *Id.*
[97] *Sibron*, 392 U.S. at 48.
[98] *Id.*
[99] *Id.* at 48-49.
[100] *Id.* at 49.
[101] *Id.*
[102] *Sibron*, 392 U.S. at 49.
[103] *Id.* at 44.
[104] *Police Right*, *supra* note 87, at 180-81.
[105] Kabavoka, *supra* note 73, at 544-45.
[106] *Police Right*, *supra* note 87, at 181.
[107] *Id.* at 180.
[108] *Id.*
[109] Kabavoka, *supra* note 73, at 544.

3. People v. De Bour*: Clarifying Street Encounters*

In 1976, the Court of Appeals, recognizing a level of police intrusion less invasive than an arrest requiring probable cause,[110] attempted to clarify the controversial stop and frisk law by putting into place a four-tier standard for determining if and when an officer can approach, inquire, ask accusatory questions, detain, frisk, and make an arrest.[111] The court developed each tier by evaluating the Supreme Court's decision in *Terry v. Ohio*[112] and by balancing two of society's competing interests: " 'the interest of individuals in living their lives free from governmental interference' and the 'nondelegable duty placed squarely on the shoulders of law enforcement officers to make the streets reasonably safe for us all.' "[113]

As previously discussed in this note, in *Terry*, the Supreme Court recognized that the Fourth Amendment not only applies to arrests, but also to a lower level of police intrusion: the stop and frisk.[114] Put more clearly, "the police can stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts that criminal activity 'may be afoot' even if the officer lacks probable cause" under the Fourth Amendment.[115]

As a result of *Terry*, many have wondered if lower levels of intrusions, such as an "officer's offer of assistance or initial approach and questioning of a citizen about his presence in an area" were subject to constitutional challenges, and if so, what was required before officers could engage in these non-forcible stops.[116] The Court of Appeals provided an answer in *De Bour*.

i. The Four Level Standard

The first level, the request for information, is the most flexible

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[110] Emily J. Sack, *Police Approaches and Inquiries on the Streets of New York: The Aftermath of* People v. De Bour, 66 N.Y.U. L. REV 512, 515 (1991).

[111] Kabavoka, *supra* note 73, at 544-45.

[112] *De Bour*, 352 N.E.2d at 575.

[113] Sack, *supra* note 110, at 512-13.

[114] *See supra* section IV.A; *Sokolow*, 490 U.S. at 7.

[115] *Sokolow*, 490 U.S. at 7.

[116] Sack, *supra* note 110, at 515.

standard.[117] An officer is permitted to approach and request information when "there is some objective credible reason for that interference not necessarily indicative of criminality."[118] The first level was based on the belief that the interest of the police, "their public service functions" to make and keep the streets reasonably safe, was of crucial importance.[119] It was further framed around the general right to "approach any other person and attempt to strike up a conversation."[120]

The second level, the common law right to inquire, as its name indicates, was recognized by the Court of Appeals prior to its decision in *De Bour*.[121] "[A] policeman is entitled to interfere with a citizen to the extent necessary to gain explanatory information"[122] when there is a "founded suspicion that criminal activity is afoot."[123] Absent from this level of intrusion is a forcible seizure.[124] A forcible seizure occurs when an officer confronts an individual and deprives him of his ability to walk away.[125] The common law right of inquiry was recognized and developed because the court believed that "commonsense"[126] and the overall issue of whether an officer's actions were reasonable demanded a level of inquiry that fell between the first level's limited right to approach and the third level's right to seize.[127]

The third level, stop and frisk, is a result of New York's stop and frisk statute.[128] "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 C[riminal]P[rocedure]L[aw] authorizes a forcible stop and detention of that person."[129] With the officer's right to forcibly stop and detain a person comes the

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[117] Gennaro Savastano, *Court of Appeals of New York:* People v. Moore, 23 TOURO L. REV. 323, 327 (2007).

[118] *De Bour*, 352 N.E.2d at 572.

[119] Kabavoka, *supra* note 73, at 545.

[120] *Id.*

[121] *Id.*

[122] *De Bour*, 352 N.E.2d at 572.

[123] *Id.*

[124] *Id.*

[125] *Terry*, 392 U.S. at 16.

[126] David Rudovsky & Lawrence Rosenthal, *The Constitutionality of Stop-and-Frisk in New York City*, 162 U. PA. L. REV. ONLINE 117, 119 (2013).

[127] Kabavoka, *supra* note 73, at 545-46.

[128] *De Bour*, 352 N.E.2d at 572.

[129] *Id.*

right to frisk, but only "if the officer reasonably suspects that he is in danger of physical injury by virtue of the detainee being armed."[130]

The fourth level, the power to arrest, is based on "probable cause."[131] An officer has the authority to make an arrest only when probable cause leads him to believe that a "person has committed a crime, or offense in his presence"; "probable cause" arises when the officer has knowledge of "facts and circumstances" that "warrant a prudent person" to believe the suspect is about to, is currently, or has committed an offense.[132]

B. Bolstering the Court's Decision in *People v. Loretta*

The court's decision in *Loretta* lacks detail. While the court was clear in its conclusion, its basis is confined to only a few sentences.[133] Specifically, the court's decision lacks clear reasoning as to why the defendant's conduct constituted a level-two, as opposed to a level-three encounter, and why the officer had probable cause to arrest the defendant.[134] The court likely found that the officers' conduct constituted a level-two encounter because reasonable suspicion cannot be generated based on "[i]nnocuous, or even equivocal behavior."[135] Nervous characteristics, as the defendant in *Loretta* displayed, are common when dealing with the police. Therefore, the court could have viewed the defendant's conduct as "innocuous" and concluded that reasonable suspicion did not arise.[136]

In New York, the First Department has ruled that an officer's suspicion that a defendant's bag contains drugs is worthy of a level-two encounter.[137] Furthermore, select New York courts have stated that a "tinfoil packet . . . may be deemed a 'hallmark' rather than merely a 'telltale sign' of criminal drug activity."[138] Specifically, the First Department has held that when an officer observes a defendant with a tinfoil packet, he has probable cause to arrest him.[139]

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130 *Id.*
131 *Id.*
132 *Id.*; Michigan v. DeFillippo, 443 U.S. 31, 37 (1979).
133 *Loretta*, 969 N.Y.S.2d at 2.
134 *Id.* at 1.
135 31 N.Y. JUR. 2D *Criminal Law: Procedure* § 135 (2013).
136 *Id.*
137 People v. Stevenson, 867 N.Y.S.2d 56 (App. Div. 1st Dep't 2013).
138 People v. Alexander, 640 N.Y.S.2d 28 (App. Div. 1st Dep't 1996).
139 People v. Scott-Heron, 783 N.Y.S.2d 368, 369 (App. Div. 1st Dep't 2004).

VI. NEW YORK'S STOP AND FRISK LAW: RACIAL PROFILING

A. Evidence of Racial Profiling?

In 1999, Amadou Diallo, an African immigrant, was shot forty-one times by four plain-clothed police officers.[140] The officers, who were white, approached Diallo because they "believed that he fit the description of a rapist."[141] The officers shot at Diallo after he reached for his wallet.[142]

All four of the officers were acquitted, and in response to public backlash, then-Attorney General Eliot Spitzer prepared a report documenting the New York Police Department's ("NYPD") stop and frisk practices in the context of racial profiling.[143] The report, which analyzed stops that occurred in 1998 and 1999, found "that blacks were more than six times more likely to be stopped than whites, and Hispanics were more than four times more likely to be stopped than whites."[144]

As Spitzer's report made clear, a higher rate of minority stops did not always demonstrate racial bias.[145] This is especially evident when some data show that minorities commit crimes more often.[146] However, the report further clarified that the correlation could not solely be explained by higher crime rates by minorities.[147] Using regression analysis, the report concluded, "blacks and Hispanics were significantly more likely than whites to be 'stopped' after controlling for race-specific precinct crime rates and precinct population composition by race."[148]

In 2006, the NYPD hired Research and Development ("RAND") in response to data that indicated 89% of stops involved

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[140] Kabavoka, *supra* note 73, at 560.

[141] *Id.*

[142] *Id.*

[143] *Id.* at 561.

[144] Bennett L. Gershman, *Use of Race in "Stop-and-Frisk": Stereotypical Beliefs Linger, but How Far Can the Police Go?*, 72-APR N.Y. ST. B.J. 42 (2000).

[145] *The New York City Police Department's "Stop & Frisk" Practices: A Report to the People of the State of New York from the Office of the Attorney General*, NEW YORK STATE OFFICE OF THE ATTORNEY GENERAL 93 (1999), *available at* http://www.oag.state.ny.us/sites/default/files/pdfs/bureaus/civil_rights/stp_frsk.pdf. [hereinafter *Stop and Frisk Practices: A Report*].

[146] *Id.* at ix.

[147] Kabavoka, *supra* note 73, at 562.

[148] *See Stop and Frisk Practices: A Report*, *supra* note 145, at 121.

nonwhites.[149] RAND is a "nonprofit institution that helps improve policy and decision making through research and analysis."[150] RAND was hired to determine "first, whether [the data] point[ed] to racial bias in police officers' decisions to stop particular pedestrians, and, further, whether [the data] indicate[d] that officers are particularly intrusive when stopping nonwhites."[151]

RAND's external-benchmarking analysis determined that "black pedestrians were stopped at a rate that [wa]s 20 to 30 percent lower than their representation in crime-suspect descriptions. Hispanic pedestrians were stopped disproportionately more, by 5 to 10 percent, than their representation among crime-suspect descriptions would predict."[152] Applying its least reliable benchmark test, RAND found "[b]lack pedestrians were stopped at a rate that [wa]s 50 percent greater than their representation in the residential census. The stop rate for Hispanic pedestrians equaled their residential census representation."[153]

RAND, however, warned that statistical analyses often "exaggerate racial disparities."[154] As a final conclusion, RAND found that its analysis did not eliminate racial disparities, but did indicate that the disparities are far lower than the raw data suggested.[155]

B. Current Challenges to New York's Stop and Frisk Law

In 2011, plaintiffs David Floyd and David Ourlicht brought a class action lawsuit against the City of New York, Police Commissioner Raymond Kelly, Mayor Michael Bloomberg, and New York City Police Officers, "alleging that defendants h[ad] implemented and sanctioned a policy, practice, and/or custom of unconstitutional stops and frisks by the NYPD on the basis of race and/or national

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[149] Greg Ridgeway, *Analysis of Racial Disparities in the New York Police Department's Stop, Question, and Frisk Practices*, RAND.ORG xi, http://www.rand.org/content/dam/rand/pubs/technical_reports/2007/RAND_TR534.sum.pdf (last visited May 2, 2014).

[150] *About the RAND Corporation*, RAND.ORG, http://www.rand.org/about.html (last visited May 2, 2014).

[151] Ridgeway, *supra* note 149.

[152] *Id.* at xii.

[153] *Id.* at xi.

[154] *Id.* at xiv.

[155] *Id.* at xi.

origin."[156]

In February of 2008, David Floyd, an African-American man, testified that while walking in his neighborhood, he passed a man, who Floyd believed was locked out of his home.[157] The man was also African-American.[158] Floyd's godmother owned the building, and as a result, Floyd was able to go upstairs and receive between seven and ten keys, which would potentially unlock the door and give the man access to his home.[159] Before Floyd could open the door, three NYPD officers approached Floyd and the tenant.[160] The officers asked Floyd and the tenant "what they were doing, told them to stop," and subsequently frisked them.[161] All three officers testified that they believed Floyd was committing a burglary.[162]

Approximately five months later, in June of 2008, David Ourlicht, an African-American man, was approached and searched by more than four police officers, after they had received a report of a man with a gun in the area.[163] Ourlicht had been sitting outside of a housing project in Harlem, New York.[164] When the officers finished searching the housing project, they approached Ourlicht and forced him to lie on the ground.[165] After Ourlicht had been lying on the ground for close to ten minutes, the officers asked him and the other men he was with for their names and identification.[166] The NYPD was not able to present any evidence that the police received a call or report of a gun in the area.[167] Nor was a gun ever recovered.[168] Ourlicht further alleged that all of the officers on the scene were white males.[169]

Judge Scheindlin held, in regard to the February 2008 incident, that "the officers were justified in their reasonable suspicion" to

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[156] Floyd v. City of New York (*Floyd I*), 813 F. Supp. 2d 417, 421 (S.D.N.Y. 2011), *on reconsideration*, 813 F. Supp. 2d 457 (S.D.N.Y. 2011).

[157] *Id.* at 424.

[158] *Id.*

[159] *Id.*

[160] *Id.*

[161] *Floyd I*, 813 F. Supp. 2d at 424.

[162] *Id.* at 424-25.

[163] *Id.* at 427.

[164] *Id.*

[165] *Id.*

[166] *Floyd I*, 813 F. Supp. 2d at 427.

[167] *Id.*

[168] *Id.*

[169] *Id.*

search Floyd.[170] Scheindlin believed that the combination of the officers' awareness of a "midday burglary pattern in the neighborhood," and Floyd and the tenant's nervous mannerisms "create[d] enough reasonable suspicion to justify the officers briefly detaining the men for an investigatory stop."[171] Furthermore, the frisk was justified because the officers had suspected the two men of committing the crime of burglary.[172] The frisk was also necessary to protect the safety of the officers.[173]

Following this decision, the plaintiffs filed a motion to reinstate Floyd's claims arising out of his February 2008 stop and frisk.[174] The motion was a result of new evidence put forward by the plaintiff that challenged the existence of a burglary pattern.[175] The court granted the plaintiffs' motion to reinstate Floyd's claim, holding that the existence of a burglary pattern was a genuine issue of material fact.[176] The court further denied the defendants' argument that even in the absence of a burglary pattern, "the officers nonetheless had reasonable suspicion to stop Floyd."[177]

In regard to the June 2008 incident, Judge Scheindlin denied the defendants' motion for summary judgment.[178] Judge Scheindlin held that "[t]he Fourth Amendment requires that officers must have reasonable *individualized* articulable suspicion that an individual is armed and dangerous before frisking him."[179] A general report of a gun, Judge Scheindlin stated, did not support reasonable individualized articulable suspicion "to stop and frisk any individual in the area."[180]

In August of 2013, approximately five years after the February and June incidents, Judge Scheindlin declared New York's stop and frisk policy unconstitutional because it violated the Fourth and Fourteenth Amendments.[181] Scheindlin found that individuals were

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[170] *Id.* at 443.
[171] *Floyd I*, 813 F. Supp. 2d at 443-44.
[172] *Id.* at 444.
[173] *Id.*
[174] *Id.* at 459.
[175] *Id.*
[176] *Floyd I*, 813 F. Supp. 2d at 459.
[177] *Id.* at 469.
[178] *Id.* at 444.
[179] *Id.* at 445.
[180] *Id.*
[181] Floyd v. City of New York (*Floyd II*), 959 F. Supp. 2d 540, 667 (S.D.N.Y. 2013), *ap-*

stopped because of their race and without any reasonable suspicion as required by *Terry v. Ohio*.[182] These determinations were made from a statistical analysis of close to 4.5 million stops in New York City from 2004 to 2012.[183]

In November of 2013, the United States Court of Appeals, Second Circuit, was forced to reassign the case to a different district court judge.[184] This decision was made after Judge Scheindlin made statements that the court believed compromised her impartiality.[185] Following the case's reassignment, the City of New York filed a motion seeking to vacate Scheindlin's decision in August of 2013.[186] This motion was denied.[187]

Bill de Blasio, the current democratic mayor of New York City, who assumed office in January of 2014, stated during his campaign, "he would drop objections to the decision, which had called for a monitor to oversee major changes to the police tactic."[188] However, in late December of 2013, de Blasio gave a scare to stop and frisk opposition activists when he appointed Bill Bratton, a stop and frisk supporter,[189] as the new police commissioner.[190] Feeling the heat, NYPD Union lawyers, in January of 2014, filed legal papers requesting that the Court of Appeals speed up its determination as to

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peal dismissed (Sept. 25, 2013).

[182] Vidisha Barua Worley, *Terry Stops: Reasonable Suspicion or Just a Hunch?*, 49 CRIM. L. BULL. 10 (2013).

[183] Rudovsky, *supra* note 126, at 118.

[184] Ligon v. City of New York (*Ligon I*), 736 F.3d 118, 121 (2d Cir. 2013).

[185] *Id.* In a proceeding involving another case, Scheindlin stated, "if you got proof of inappropriate racial profiling in a good constitutional case, why don't you bring a lawsuit? You can certainly mark it as related." Ligon v. City of New York, 538 F. App'x 101, 103 n.1 (2d Cir. 2013), *superseded in part*, 736 F.3d 118 (2d Cir. 2013), *vacated in part*, No. 13-3123-CV, 2014 WL 667358 (2d Cir. Feb. 21, 2014). She also added, "[w]hat I am trying to say, I am sure I am going to get in trouble for saying it, for $65 you can bring that lawsuit." *Id.* She later continued, "[a]nd as I said before, I would accept it as a related case, which the plaintiff has the power to designate." *Id.*

[186] Ligon v. City of New York (*Ligon II*), 736 F.3d 231, 232 (2d Cir. 2013).

[187] *Id.*

[188] Colleen Long & Larry Neumeister, *NYC's Appeal of Stop-And-Frisk Ruling Could Be Dropped If De Blasio Elected Mayor*, HUFFINGTON POST (Nov. 1, 2013, 9:32 AM), http://www.huffingtonpost.com/2013/11/01/stop-and-frisk-appeal-de-blasio-_n_4189961.html.

[189] Saki Knafo, *Bill Bratton, Stop-And-Frisk Architect, Takes Over Nation's Biggest Police Force*, HUFFINGTON POST (Jan. 23, 2014, 8:17 AM), http://www.huffingtonpost.com/2014/01/02/bill-bratton-sworn-in_n_4533202.html.

[190] David Goodman, *Bratton to Lead New York Police for Second Time*, N.Y. TIMES (Dec. 5, 2013), http://www.nytimes.com/2013/12/06/nyregion/william-bratton-new-york-city-police-commissioner.html.

whether Scheindlin's controversial decision would be struck down as a result of partiality.[191]

In late January of 2014, one month into his term as mayor of New York City, de Blasio agreed to withdraw the city's appeal of the Second Circuit's controversial decision.[192] As required by the Second Circuit, de Blasio agreed to the appointment of a monitor to foresee the necessary steps to end stop and frisk related discrimination.[193] The withdrawal was part of the mayor's "collective commitment to fix the fundamental problems that enabled stop-and-frisk to grow out of control and violate the rights of innocent New Yorkers."[194] It has yet to be seen if de Blasio will simply adhere to the Second Circuit's prescription or whether he will embrace the court's decision and take further steps that may help to put an end to discriminatory police practices.[195] For now, however, de Blasio must cope with five police unions, including the "Patrolmen's Benevolent Association and unions representing sergeants, captains, detectives and lieutenants," which have asked the Second Circuit to prevent withdrawal of the appeal.[196] The unions argued that the decision "would unfairly taint the integrity of the police force and re-write rules governing officer conduct."[197]

VII. CONCLUSION

While the federal and state approaches used to determine the justification for police conduct vary, both are used to ensure the safe-

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[191] Rich Calder, *NYPD union lawyers seek quicker stop-frisk appeal ruling***,** N.Y. POST (Jan. 2, 2014, 12:13 PM), http://nypost.com/2014/01/02/nypd-union-lawyers-seek-quicker-stop-frisk-appeal-ruling/.

[192] *Stop-And-Frisk Appeal Dropped By Mayor De Blasio*, HUFFINGTON POST (Jan. 31, 2014, 2:59 PM), http://www.huffingtonpost.com/2014/01/30/stop-and-frisk-appeal-dropped-mayor-de-blasio_n_4695930.html.

[193] Benjamin Weiser & Joseph Goldstein, *Mayor Says New York City Will Settle Suits on Stop-and-Frisk Tactics*, N.Y. TIMES (Jan. 30, 2014), http://www.nytimes.com/2014/01/31/nyregion/de-blasio-stop-and-frisk.html.

[194] *Id.*

[195] *Id.*

[196] John Riley, *Police unions act to pursue stop-and-frisk appeal*, NEWSDAY (Feb. 7, 2014, 3:48 PM), http://www.newsday.com/long-island/police-unions-act-to-pursue-stop-and-frisk-appeal-1.6981485.

[197] *NYC Police Unions File Motion To Intervene In Stop-And-Frisk Dispute: Unions Want To Continue Litigation If City Drops Appeal*, CBS NEW YORK (Nov. 7, 2013, 1:07 PM), http://newyork.cbslocal.com/2013/11/07/nyc-police-unions-file-motion-to-intervene-in-stop-and-frisk-dispute/.

ty of police officers. Furthermore, both standards appropriately balance the fundamental right of privacy with the necessary actions a police officer must take to protect and promote the safety of those they vowed to serve and protect. Although at times, issues arise regarding the constitutionality of some of the methods applied by various departments, cities, and states, an arbitrary line has to be drawn somewhere in order to efficiently balance both the privacy concerns of persons and the safety concerns of police officers.

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