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A PROSECUTOR'S PERSPECTIVE

HONORABLE MICHAEL R. JUVILER*

Thank you. It was a privilege thirty-one years ago to appear before the Justices whose clerks are here and with the distinguished lawyers whom you've just heard from, and it's a privilege to be on a panel with them now.

I'd like to take you back thirty-one years to the perspective of a litigator preparing for the Supreme Court, and then come back to the current perspective of a trial judge who has been applying the *Terry*¹ case and the cases decided after it.

It was a daunting task to defend the right of the police to stop and frisk persons abroad on the public streets on less than probable cause, and a daunting task to defend the validity of those actions taken under a New York State statute which recently had been enacted.² You must remember that at the time of the *Terry* argument, the exclusionary rule was very new in New York, in Ohio, and in many other states.³ There was no experience of any substance applying Fourth Amendment law in a state prosecutor's office. We were like second-year law students

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¹ *Terry v. Ohio*, 392 U.S. 1 (1968).

² Act of Mar. 2, 1964, ch. 86, sec. 2, § 180-a, 1964 N.Y. Laws 111 (codified at N.Y. CODE CRIM. PROC. § 180-a) (current version at N.Y. CRIM. PROC. LAW § 140.50 (McKinney 1992)) (authorizing a police officer or peace officer to stop any individual who the officer "reasonably suspects. . . is committing, has committed or is about to commit" a crime and to search that person if the officer "reasonably suspects that he is in danger of physical injury").

³ See *Mapp v. Ohio*, 367 U.S. 643 (1961) (holding that defendants' constitutional rights under the Fourth Amendment required that the exclusionary rule be applicable to the states); see also Jerry E. Norton, *The Exclusionary Rule Reconsidered: Restoring the Status Quo Ante*, 33 WAKE FOREST L. REV. 261 (1998) (discussing justification for the exclusionary rule); Timothy P. O'Neill, *Beyond Privacy, Beyond Probable Cause, Beyond the Fourth Amendment: New Strategies for Fighting Pretext Arrests*, 69 U. COLO. L. REV. 693, 730 n.58 (1998) (discussing *Mapp v. Ohio*).

preparing to argue a historic case before the Supreme Court. We had had no occasion to study in detail the law of search and seizure under the Fourth Amendment.

Three themes appeared to us as we prepared.

The first was that in the brief six years under the exclusionary rule, we had been trained and developed in a culture of probable cause. We knew from probable cause. We didn't know from reasonable suspicion. There was considerable skepticism in our office about our ability to properly uphold the new law. There was skepticism when the *Rivera*⁴ case, which Mr. Payne has referred to, was argued in our highest court in New York, and when the stop and frisk in that case, undertaken without authority of the statute, was upheld.⁵

The second theme that emerged in our preparation was the theme of race. It was as apparent in 1967 as it is now that street encounters between police officers and citizens are disproportionately burdensome to members of minority groups and have caused considerable resentment.⁶

The third problem that emerged was the problem of police credibility. What if Detective McFadden had testified in a New York court? Some Detective McFaddens would have said not only what the real Detective McFadden said, but also, "[w]ell, actually I also saw a bulge on Mr. Terry, and then there was a bulge on Mr. Chilton, and yes, I have had experience making arrests for persons casing stores." The dramatic increase in cases known as "dropsy" cases shortly after *Mapp v. Ohio*⁷ and its exclusionary rule was what gave rise to our concerns as officers of the court. Before *Mapp*, the gamblers or addicts would have the contraband in their mouths or on their persons, and this stuff was seized from the suspects' mouths or waistbands, but in 1961, after *Mapp*, the criminal community started much more than before to drop these items to the ground, abandoning them and

⁴ *People v. Rivera*, 201 N.E.2d 32 (N.Y. 1964).

⁵ *See id.* (holding that police officers have both a duty to prevent crime and a right to take reasonable precautions to avoid injury to themselves, and that a stop and frisk does not violate the constitutional prohibition against unreasonable searches).

⁶ *See generally*, Arthur H. Garrison, *Disproportionate Minority Arrest: A Note on What Has Been Said and How It Fits Together*, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 29 (1997).

⁷ 367 U.S. 643 (1961) (holding that any evidence obtained in an unconstitutional search and seizure is inadmissible in state court).

obviating probable cause.

Our first determination was to urge a theory of proportionality.⁸ At that time it was relatively simple: An officer needs less information and reliability of information to stop and frisk than to arrest, and there is a need to stop and frisk. We sought to document this in our written argument and in a long appendix to the brief.⁹ The strategy here was to write the obverse of Mr. Chief Justice Warren's opinion in the recent *Miranda*¹⁰ case, which was replete with examples from police training manuals and actual cases of the abuses of station-house interrogation. We tried to show by use of actual cases what Professor Amar refers to in his paper, to be presented later in this conference, as the good *Terry*—to show the need for the stop and the need for the frisk.¹¹

With respect to race, we spent nine pages in our brief addressing that problem. Our statistics on the application of the stop-and-frisk law were gathered from 1600 police reports required by the New York City Police Department for stops or frisks. They showed the disproportionate racial impact of those actions. One of the strengths of the *Terry* opinion is that it directly addresses the impact of its ruling on race relations.¹² It also points out, as we did in our brief, the limits of what the exclusionary rule can accomplish in this area.¹³

Now I'd like to stand here as a judge who for nineteen years in the trial court has been applying *Terry* and its subsequent cases, and to look back from that perspective.

After the *Terry* opinions were filed, we felt perhaps like the

⁸ Proportionality has been described as a reasonable balance between the severity of an act and the severity of the resulting response to the act, or alternatively, "let[ting] the punishment fit the crime." Stephen J. Morse, *Immaturity and Irresponsibility*, 88 J. CRIM. L. & CRIMINOLOGY 15, 24 (1997) (stating that a wrongdoer has a legitimate expectation that any punishment will be proportional to the wrong committed).

⁹ See Brief of District Attorney of New York County, Amicus Curiae, *Sibron v. New York*, 392 U.S. 40 (1968) (No. 67-63).

¹⁰ *Miranda v. Arizona*, 384 U.S. 436 (1966). In this landmark decision, the Supreme Court decided that standard methods of police interrogation created an atmosphere of intimidation and that no evidence obtained through custodial interrogation would be admissible unless the suspect was first apprised of his Fifth Amendment privilege against self-incrimination. See *id.* at 444-45.

¹¹ See Akhil Reed Amar, *Terry and Fourth Amendment First Principles*, 72 ST. JOHN'S L. REV. 1097 (1998).

¹² See *Terry v. Ohio*, 392 U.S. 1, 14-15 n.11 (1968).

¹³ See *id.* at 13-15.

makers of the hydrogen bomb. What had we created? What had we contributed to? Would this lead to further racial divisions, police abuse, police "testi-lying?" And so we addressed one of these problems shortly thereafter, in a case before our Court of Appeals which I urge you to read, *People v. Berrios*.¹⁴ We asked the Court of Appeals to put the burden of proof and persuasion on the prosecution at hearings on motions to suppress evidence that is obtained by warrantless searches and seizures.¹⁵ We lost that request by one vote.¹⁶ The federal standards of proof and persuasion, at least in the Second Circuit, appear to be different from ours in New York, and that may be an area for possible litigation for you lawyers.¹⁷

Thirty years after *Terry* we are in essentially the same situation in New York that we were in before *Mapp*: And, that is that the decisions of the federal courts under the Fourth Amendment are almost irrelevant to our work as state judges. That is because our highest court has developed rules under the New York State version of the Fourth Amendment that differ from the federal courts' interpretation of the federal Fourth Amendment and give greater rights to suspects and apply greater limitations on the police.¹⁸ Briefly, these are some ex-

¹⁴ 270 N.E.2d 709 (N.Y. 1971) (holding that the burden of proving the legality of a seizure would not shift to the prosecution in a warrantless search and seizure case).

¹⁵ See *id.* at 712.

¹⁶ See *id.* at 714-16 (Fuld, C.J., dissenting). In his dissent, Chief Judge Fuld noted that the risk of officers' fabricating testimony was not limited to traditional "dropsy" cases, i.e., where the arresting officer claims that the suspect dropped the seized evidence. See *id.* at 714. Rather, such a risk is generally present in the warrantless prosecution of narcotics and gambling cases. See *id.* at 715. Therefore, Fuld argued, the burden should shift to the prosecution to prove that the seizure did not violate the suspect's constitutional rights. See *id.* at 716.

¹⁷ See *United States v. Mapp*, 476 F.2d 67 (2d Cir. 1973) (holding that when a search is conducted without a warrant, the prosecution bears the burden of proving that the suspect voluntarily consented to the search or that the search was incident to an arrest and was necessary to ensure the officer's safety); *United States v. Bayless*, 921 F. Supp. 211 (S.D.N.Y. 1996) (holding that the prosecution has the burden of proving by a preponderance of the evidence that evidence gathered through a warrantless search and seizure is admissible).

¹⁸ See N.Y. CONST. art. I, § 12. For information on the evolution of the exclusionary rule in New York, see PETER J. GALIE, *THE NEW YORK STATE CONSTITUTION: A REFERENCE GUIDE* 59 (1991). Section 12 of New York's state constitution, adopted in 1938, mirrors the language of the Fourth Amendment to the United States Constitution. See *id.* New York legislators, however, refused to adopt an exclusionary rule during the 1938 convention. See *id.*; see also Robert M. Pitler, *Independent State Search and Seizure Constitutionalism: The New York State Court of*

amples:

With respect to proportionality, the New York Court of Appeals has defined three levels of police information and intrusion short of arrest,¹⁹ whereas in federal courts after *Terry* there is one level short of arrest, reasonable suspicion to stop and frisk.²⁰ A second example is that in New York a chase, a pursuit of a suspect, is a "seizure," and it requires reasonable suspicion.²¹ The Supreme Court has held that a pursuit is not a seizure and requires no level of information.²² A third important distinction is that in New York if the court finds that the stopping of a car for a traffic offense was a pretext for a criminal investigation, the evidence is suppressed.²³ The Supreme Court has said that if

Appeals Quest for Principled Decisionmaking, 62 BROOK. L. REV. 1, 86-94 (1996). After the Supreme Court decided *Mapp v. Ohio* in 1961, New York's Code of Criminal Procedure (current version at N.Y. CRIM. PROC. LAW § 710.20 (McKinney 1995)) was amended to provide the same protection as that afforded by the Fourth Amendment of the federal constitution. See *id.* at 105. In *People v. Bigelow*, 488 N.E.2d 451 (N.Y. 1985), the New York Court of Appeals recognized a constitutional basis to the exclusionary rule when it rejected the "Good Faith" exception allowed in *United States v. Leon*, 468 U.S. 897 (1984). See Pitler at 150-153.

¹⁹ See *People v. De Bour*, 352 N.E.2d 562 (N.Y. 1976). The Court of Appeals first defined the levels of police interference and their corresponding standards of belief in *De Bour*. See *id.* The lowest level is "approaching to request information[, which] is permissible when there is some objective credible reason for that interference not necessarily indicative of criminality." *Id.* at 571-72. If an officer has a "founded suspicion that criminal activity is afoot" the officer has the "common-law right to inquire," which is a level of interference slightly greater than the approach to request information yet "short of a forcible seizure." *Id.* at 572. The stop and frisk requires that the officer have a "reasonable suspicion." *Id.* In order to make an arrest, an officer must have "probable cause." *Id.* The court reaffirmed this gradation in *People v. Hollman*, recognizing that the distinction between an approach to request information and the common-law right of inquiry is a subtle one. See *People v. Hollman*, 590 N.E.2d 204, 209-10 (N.Y. 1992).

²⁰ See, e.g., *Florida v. Bostick*, 501 U.S. 429, 434 (1991) (holding that "mere police questioning does not constitute a seizure" and, therefore, does not require suspicion). But see *United States v. Cortez*, 449 U.S. 411, 417 (1981) (holding that "brief investigatory stops" constitute "seizures of the person" and "some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity").

²¹ See, e.g., *People v. Martinez*, 606 N.E.2d 951, 952 (N.Y. 1992) (determining that reasonable suspicion is required to justify pursuit for the purpose of detaining someone); *People v. Leung*, 497 N.E.2d 687, 688 (N.Y. 1986) (holding that the "objective credible reason" that justified the officers' approach was transformed into reasonable suspicion when the suspect fled, justifying the officers' pursuit of the suspect) (citation omitted). Cf. *People v. Howard*, 408 N.E.2d 908, 910 (N.Y. 1980) (dismissing the indictment and questioning the reasonableness of the pursuit, initiated when the defendant ran from the police when questioned).

²² See, e.g., *California v. Hodari D.*, 499 U.S. 621, 626 (1991) (finding that a seizure is an actual physical restraint and, therefore, a pursuit cannot be a seizure).

²³ See, e.g., *People v. David*, 636 N.Y.S.2d 374, 376-77 (App. Div. 1996); *People v.*

there was an objective basis to stop a motor vehicle for a traffic infraction, the motivation of the officer is not pertinent.²⁴

The problem of credibility of police witnesses has continued and, 31 years later, is now viewed by this speaker from the viewpoint of a trier of fact. My judicial colleagues and I have difficult jobs, because if we suppress the evidence incorrectly, we may be wrongly accusing one person, a police officer-witness, of perjury and may be letting a guilty person go free. The obverse is obvious—we may mistakenly accept false testimony and condone an unlawful search and seizure.

There is an aspect of street-encounter law that has not been mentioned in the papers that I've read that will be submitted in this wonderful conference. One of your speakers to come, Professor Amar, has suggested that juries in civil cases can enforce the *Terry* stop-and-frisk requirements—enforce the limitations on the police set forth in the *Terry* opinion.²⁵ I have found that juries in criminal trials have “enforced” those limitations when they are not an issue for the jury. They “enforce” them by rejecting police testimony relating to the substantive crime—such as possession of a gun or drugs—if they doubt the credibility of the testimony about how the evidence was obtained. After the O.J. Simpson criminal trial (does anyone remember that case?), I theorized that the jury was bothered by the testimony of the investigating officers that while they were climbing the fence and gathering evidence at the Simpson home, O.J. Simpson was not a suspect. That's an example of the trier of fact for the criminal charges carrying the fact-finding back to how the evidence was gathered. I have seen cases in my court in which, I have theorized, the jury rejected the criminal charges because it rejected the testimony on how the street encounter with the defendant took place, even though that did not directly cast doubt on whether, say, the alleged bulge in the defendant's coat really was the gun in evidence, People's Exhibit 1.

Ynoa, 636 N.Y.S.2d 888, 890-91 (App. Div. 1996), *appeal denied*, 666 N.E.2d 1075 (N.Y. 1996); *People v. Roundtree*, 651 N.Y.S.2d 615, 615-16 (App. Div. 1996), *appeal denied*, 681 N.E.2d 1318 (N.Y. 1997); *People v. James*, 630 N.Y.S.2d 176, 176-77 (App. Div. 1995); *People v. Llopis*, 509 N.Y.S.2d 135, 136 (App. Div. 1986). *But see* *People v. McCoy*, 657 N.Y.S.2d 437 (App. Div. 1997), *appeal denied*, 690 N.E.2d 498 (N.Y. 1997) (holding that although officer's stop of suspect for actual traffic violation was pretextual, the evidence would not be suppressed).

²⁴ See *Whren v. United States*, 517 U.S. 806, 810-14 (1996).

²⁵ See Amar, *supra* note 11.

I suggest that the exclusionary rule still is not a suitable device for preventing racial discrimination in street law enforcement. In my view, the most effective remedy has not been mentioned in the papers that are being submitted, because it's not within the scope of this conference. That is the vote. For members of groups who find that they are in their view victimized by over-aggressive police conduct, the greatest remedy is the ballot box.

