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Reconciling Divergent Rights: New York's Proposed *Police and Public Protection Act*

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In the United States the constitutional rights of individuals are set forth in the Constitution of the United States and in the constitutions of the states. The United States Constitution is the basic law of the land and creating the minimum protections afforded individuals. Each state is free to enact its own law as long as it does not diminish the rights of individuals under the federal constitution. The legislative bodies of the United States and each individual state have enacted statutes that constitute the criminal procedure law of that jurisdiction. These statutory schemes are similar since they are based upon the same constitutional principles. This article examines the model Police and Public Protection Act of New York, designed to amend and expand state criminal procedure law. The act has been introduced by New York's Governor George Pataki, and uses New York State Criminal Procedure Law, although it would serve as a model for most states.

INTRODUCTION

Although the search and seizure provisions of the United States Constitution (U.S. Const. Amend. IV) and the New York State Constitution (N.Y. Const. Art. I, Sec. 12) are virtually identical, the Court of Appeals (New York's highest court) has interpreted the state constitution's provisions more broadly than its federal counterpart. In New York, a typical "Terry" stop and frisk (*Terry v. Ohio* 1968), which the U.S. Su-

preme Court has held meets the federal constitutional standard, is treated with greater scrutiny by New York's high court. The state court, relying on state constitutional law, has enunciated a definition of "reasonableness" (the touchstone of all search and seizure analysis) that, in effect, makes some searches and seizures that would not violate the federal constitution unreasonable as a matter of state law.¹ Consequently, evidence has been suppressed in New York state courts that would be constitutionally admissible in federal court.

The phenomenon of divergent constitutional jurisprudence based on state constitutional grounds has increased in recent years,² especially after the U.S. Supreme Court's decision in *Michigan v. Long* (1983) which clearly articulated the standard for determining whether a state court decision rested on an adequate and independent ground.

In more recent years, the Supreme Court has reaffirmed this approach: "We believe that *Michigan v. Long* properly serves its purpose and should not be disturbed. Under it, state courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution" (*Arizona v. Evans* 1995).

Diversity of constitutional protections between the federal and state laws is not without problems, however. New York's governor, George Pataki, has bitterly complained about the Court of Appeals, beginning in a 1996 press conference: "In New York State, a body of court interpretations has arisen that handcuffs our police officers, that limits our prosecutors' ability to enforce the law adequately and makes it too often impossible to have a

¹Compare *People v. DeBour* (1976) with *Terry v. Ohio* (1968), discussed below.

²The Chief Justice of the Indiana Supreme Court has written an excellent introduction to this emerging trend. Randall T. Shepard, *The New Judicial Federalism: A New Generation: The Maturing Nature of State Constitution Jurisprudence*, 30 Val. U.L. Rev. 421 (1996).

fair trial. It has got to change."³ Pataki introduced in the New York State Assembly, the *Police and Public Protection Act*⁴ in an effort to bring the state's standard in line with the looser federal standard of reasonableness. The bill would amend the state's criminal procedure statutory law in a way that effectively adopts several standards from the U.S. Supreme Court's Fourth Amendment jurisprudence to the exclusion of standards that the New York Court of Appeals has held are embodied in the state constitution.

Some critics contend that the governor's proposal represents an all-out assault on the Fourth Amendment, and more particularly, the exclusionary rule.⁵ The proponents of the bill, on the contrary, contend that the proposed bill seeks a return to federally recognized standards that guarantee the rights of the accused and incorporate a reasonableness standard that protects law enforcement officers as well as the public at large.

This paper examines and explains the Governor's proposal, concluding that it is both prudent and constitutional. The second and third sections of the paper examine the federal constitutional standard and the origins and development of the state constitution's search and seizure provisions, respectively. The next section introduces and discusses the proposed legislation. Finally, the conclusion offers some thoughts on reasonableness and effective law enforcement.

³Clifford J. Levy, "Pataki is Seeking Curbing of Rights of Crime Suspects," *N.Y. Times*, Jan. 30, 1996, p. A1 (hereinafter *Crime Suspects*).

⁴S. Bill 6154, introduced October 13, 1999, by Senator Volker. The bill was originally proposed in Governor Pataki's State of the State address in 1996. See *Crime Suspects*, footnote 3.

⁵For example, Norman Siegal, Executive Director of the New York Civil Liberties Union, called the proposal "an attempt to demonize and undermine the independence of the Court of Appeals," and suspects that Pataki is trying "to chill [the Court of Appeals] for future interpretations." *Crime Suspects*, footnote 3, p. A1.

THE FEDERAL CONSTITUTION'S REASONABLENESS STANDARD

The U.S. Supreme Court predicates the reasonableness of a search and seizure on the Fourth Amendment.⁶ In the context of what is "reasonable" for a protective search by law enforcement officers, the Court defined the constitutional dimensions of "reasonableness" in *Terry v. Ohio* (1968).

In *Terry*, two defendants were observed behaving suspiciously by a police officer: they walked up and down the block, looked into a store window, and returned to their original position on the corner to confer. The officer noted that the duo repeated this ritual five or six times. When a third man appeared and proceeded to converse with the duo, the police officer suspected they were "casing a job." The officer decided to investigate; he approached the trio to inquire about their actions. One of the suspects mumbled something incoherent in response to the officer's inquiry, at which point the officer spun the defendant around and patted down the outside of his clothing. The officer felt a pistol in the defendant's overcoat, but he was initially unable to remove it. Finally, when the defendant was asked to remove his overcoat, the officer retrieved a .38 caliber revolver; a "pat down" of the other defendant yielded a second concealed weapon.

The defense motion to suppress the evidence on the ground that the search violated the Fourth Amendment was rejected at trial and the defendants were convicted. On appeal to the Supreme Court, the conviction was affirmed. The majority of the Court held that it would be unreasonable to deny the officer the power necessary to determine whether the person under suspi-

⁶See *Elkins v. United States* (1960): "what the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures."

cion is carrying a weapon. The Court proceeded to promulgate a reasonableness standard that protects law enforcement officers and the public at large—a standard that embodies the protections under the Fourth Amendment.¹

The admissibility of the fruits of an illegal search and seizure, more commonly known as the exclusionary rule, was established in *Weeks v. United* (1914),⁷ where the Supreme Court held that any evidence retrieved by means of an illegal search and seizure would be inadmissible in court. The Court's decision was instrumental in setting out the criteria to which federal law enforcement officials would adhere when effecting a search and seizure. Moreover, the resultant reaction to the exclusionary rule was the catalyst for the 1938 New York constitutional convention. Article I Sec. 12 of the state constitution enumerates the right against unreasonable searches and seizures, and is now the point of contention of judicial interpretation in modern day search and seizure adjudication in New York State.⁸

With the expanded application of the exclusionary rule came major developments in search and seizure law. The Warren Court, which tightened criminal procedural requirements for the federal and state governments, imposed more stringent Fourth Amendment standards and greatly curtailed exceptions to warrantless searches.⁹

More recently, however, the exclusionary rule has itself been scaled back. The Burger Court declined to expand application of the rule and refused to apply it to grand jury proceedings,¹⁰ un-

⁷The defendant was charged with using the mails to promote illegal gambling, and the evidence included letters seized from his home during a warrantless search. The Supreme Court suppressed the letters.

⁸Before the 1938 constitutional convention, New York was one of the few states without a state constitutional counterpart to the federal constitution's fourth amendment.

⁹See, e.g., *Warden v. Hayden* (1967), delineating a narrow exception for 'hot pursuit.'

¹⁰See *United States v. Calandra* (1974).

less the evidence was obtained in violation of the federal wire-tapping statute,¹¹ to cases where the Fourth Amendment infraction violated the rights of persons other than the accused,¹² or to cases where the police had a good-faith belief that their conduct was constitutional.¹³

Not only did the Burger Court refuse to expand the scope of the exclusionary rule, but also the justices (several of whom had questioned its underlying doctrine) began to gradually carve away at it. In *California v. Minjares* (1979), Justice Rehnquist, joined by Chief Justice Burger, explicitly called for the "wholesale reexamination" of the rule, and strongly suggested that its contemporary underpinnings were theoretically weak. Justice White, dissenting in *Stone v. Powell* (1976), explicitly endorsed modifying the exclusionary rule "so as to prevent its application in those may circumstances where the evidence at issue was seized by an officer acting in the good faith belief that his conduct comported with existing law and having reasonable grounds for this belief." Justice Powell, in *Schneckloth v. Bustamonte* (1973) advised against extending the rule to federal habeas corpus proceedings. In *Brewer v. Williams* (1977), Justice Powell went even further when he suggested that the rule should not be triggered by technical or inadvertent Fourth Amendment violations. Chief Justice Burger, concurring with the dissent in *Stone*, explicitly called for modifying the scope of the exclusionary rule. Finally, Justice Blackmun, in *Coolidge v. New Hampshire* (1971), advanced the view that the exclusionary rule was not a Fourth Amendment edict.

¹¹See *United States v. Genhard* (1972).

¹²See *Rakos v. Illinois* (1978). In order for a defendant to claim Fourth Amendment protection, he must show that he has standing by demonstrating that he had a reasonable expectation of privacy in the place or item seized.

¹³See *United States v. Leon* (1984).

With the Justices questioning the soundness of the exclusionary rule, it was inevitable that an exception to it would be established. A good-faith exception to the rule was announced in *United States v. Leon* (1984) and *Massachusetts v. Sheppard* (1984). In those cases, the Court held that the exclusionary rule could not be used to bar evidence gathered by officers acting in reasonable reliance on a search warrant issued by a neutral magistrate. The Court reasoned that because the primary purpose of the exclusionary rule is the deterrence of *police* misconduct, it need not apply to judicial officers issuing warrants. As the Court explained in *Leon*, "the Fourth Amendment contains no provision expressly precluding the use of evidence obtained in violation of its commands, and an examination of its origin and purpose makes clear that the use of fruits of past unlawful search and seizure works no new 'Fourth Amendment wrong.'" The Court went further by describing the exclusionary rule as a "judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." The good-faith exception was reaffirmed by the Supreme Court in *Arizona v. Evans* (1995), where an officer made an arrest pursuant that was erroneously entered by a court clerk on the police computer. "[B]ecause court clerks are not adjuncts to the law enforcement team engaged in the often competitive enterprise of ferreting out crime...they have no stake in the outcome of particular criminal prosecutions. The threat of exclusion of evidence could not be expected to deter such individuals from failing to inform police officials that a warrant had been quashed." Furthermore, "[I]f court employees were responsible for the erroneous computer record, the exclusion of evidence at trial would not sufficiently deter future errors so as to warrant such a severe sanction [as the exclusion of said evidence]." The court held that the suppression

of evidence because of clerical error on the part of those with no interest in the outcome of a police investigation undermines law enforcement.

At the same time that New York criminal procedure laws were more restrictive, the Supreme Court continued to expand the authority of the federal agents in order to ensure the public safety of society. This expansion included the automatic right of police officers with probable cause to inspect belongings found in a car that is capable of concealing the object of the search.¹⁴ Moreover, in *Minnesota v. Carter* (19xx), the Court revisited the issue of standing and held that a guest in the home of another could not object to the warrantless search of the home.¹⁵ The most interesting facet of this case is the method in which the law enforcement officers had obtained information about the defendants illegal drug trafficking: The officers were looking in an apartment window through the gaps in a closed Venetian blind. The Court chose to decide this case on standing, but it not clear how the Court would have decided if defendant otherwise did have standing.¹⁶ Based upon the court's earlier ruling in *Katz v. United States* (1967), the court would probably have upheld the search on the ground that anyone walking by could have observed the activities through the gaps in the blinds. Moreover, because of the commercial nature of the activity involved, the expectation of privacy was "different from, and less than, a similar expectation in a home" (*New York v. Burger* 1987).

¹⁴See *Wyoming v. Houghton* (1999).

¹⁵The defendant was bagging cocaine in his confederate's apartment and evidence indicated that the apartment was being used for business purposes as opposed to a "home." As a general proposition of standing, the Court determined that legitimate overnight guests in another's premises do have standing and a reasonable expectation of privacy.

¹⁶Justice Rehnquist speaking for the majority had observed "because we conclude that respondents had no legitimate expectation of privacy in the apartment, we need not decide whether the police officer's observations constituted a 'search.'"

NEW YORK STATE'S LAW

Origin of the State's Search and Seizure Prohibition

In New York State, Judge Cardozo of the Court of Appeals was highly critical of the Supreme Court's ruling in *Weeks* and the exclusion rule it recognized:

We must determine whether evidence of criminality, procured by an act of trespass, is to be rejected as incompetent for the misconduct of the trespasser. [T]he criminal is to go free because the constable blundered.... [I]n this State the immunity is the creature, not of the constitution, but of statute..... The Legislature, which created it, has acquiesced in the ruling of this court that prohibition of the search did not anathematize the evidence yielded through the search. If we had misread the statute or misconceived the public policy, a few words of amendment would have quickly set us right. The process of amendment is prompt and simple. [A] room is searched against the law, and the body of a murdered man is found. If the place of discovery may not be proved, the other circumstances may be insufficient to connect the defendant with the crime. The privacy of the home has been infringed and the murderer goes free. [W]e may not subject society to these dangers until the Legislature has spoken with a clearer voice. [T]he question is whether protection for the individual would not be gained at a disproportional loss of protection for society. On the one side is the social need that crime shall be repressed. On the other, the social need that laws not be flouted by the insolence of office. There are dangers in any choice. The rule of the *Adams* case strikes a balance between opposing interests. We must hold it to be law until those organs of governments by which a change of public policy is normally effected, shall give notice to the courts that the change has come to pass (*People v. DeFore* 1926).

In *People v. DeFore* (1926), the arresting officer entered the defendant's room and searched it after the defendant was in custody. The search yielded a bag containing a blackjack. Although the defendant was acquitted of larceny (the basis for the arrest in the first instance), he was subsequently indicted and convicted of illegal weapons possession based on the blackjack discovered in the post-arrest warrantless search. On appeal, the conviction was affirmed by the Court of Appeals. In a scathing opinion, Judge Cardozo declared that it would be a mistake to allow "the criminal [to go] free because the constable has blundered" and public welfare and safety concerns must override the illegality of the search. In essence, Cardozo stated that the evidence would not be suppressed unless the state legislature overrides the Court of Appeal's decision by constitutional amendment. In sum, he suggested that the lawmakers "fix" the problem by amending the New York State Constitution.

Cardozo's call for a state constitution convention, however, did not anticipate that the federal constitutional search and seizure prohibitions would become binding on the states in *Wolf v. Colorado* (1949).ⁱⁱ The issues addressed by the Court of Appeals in *DeFore* were pivotal in the arguments made by Thomas Dewey and others at the New York constitutional convention.

The debate in New York over search and seizure provisions began at the 1938 convention. Thomas E. Dewey, a Republican and a one-time federal and special state prosecutor was elected as District Attorney of New York County (Pitler 1996). Dewey was also a staunch opponent of an exclusionary rule and proposed judicial supervision of wiretapping.

The primary proponent of the new constitutional provisions was State Senator and Democratic majority leader John Dunnigan. Dunnigan's liberal proposal was three-tiered: first, it would replicate the language of the Fourth Amendment; second, it

brought the interception of telephone, telegraph, and other communications within the scope of New York's Constitution; third, it required the exclusion of evidence obtained in violation of these prohibitions.

In the end, the convention was able to agree on a compromise that became Article I Sec. 12 of the New York constitution. The language is identical to the federal constitution's search and seizure provision (U.S. Const. Amend. IV), with the addition of an extra paragraph addressing wiretapping. The exclusionary rule itself was not explicitly inserted into the text.

New York State's Standard

Because of the provisions of the New York State Constitution, the Court of Appeals expanded its interpretation of what a "protective search" and "reasonableness" entail. New York law departs from the *Terry* doctrine, and has its own guidelines for reasonableness in protective searches, first articulated in *People v. DeBour* (1976).

In *DeBour*, two police officers were on patrol around midnight on a street illuminated by ordinary street lamps, devoid of pedestrian traffic. They noticed a solitary figure (the defendant DeBour) across the street. When the officers stopped to inquire what he was doing in the neighborhood, the defendant nervously responded that he had "just parked his car and was on his way to visit a friend." When asked for identification, he said that he did not have any. Meanwhile, one of the officers noticed a slight waist-high bulge in his jacket. The officer asked the defendant to unzip his jacket; in so doing, the defendant revealed a revolver protruding from his waistband. The gun was removed, and DeBour was arrested for illegal possession of a weapon. The officer's testimony conflicted with the defendant's, and the trial court denied the defense motion to suppress, crediting the offi-

cer's testimony. The appellate division affirmed conviction (*People v. DeBour* 1975).¹⁷

On appeal to the Court of Appeals, *DeBour* was heard along with a similarly situated case, *People v. La Pene* (1976). The Court of Appeals affirmed the conviction in *DeBour*, but reversed the conviction in *La Pene*. The opinion of the court set the stage for the interpretation of the New York State Constitution and marked the beginning of a new standard for protective searches (Pitler 1996).

Judge Wachtler proceeded to enunciate a "reasonableness" standard—a four-tier system called the "sliding scale" approach (*People v. DeBour* 1975). On the first level, the minimal intrusion of an officer in approaching a citizen to request information is permissible when there is some objective credible reason for that interference not necessarily indicative of criminality. The next level, the common law right to inquire, requires that the inquiry must be activated by "a founded suspicion predicated on articulable facts that criminal activity is afoot."¹⁸ Wachtler maintained that an officer may interfere with a citizen only to gain explanatory information, with the encounter being short of a forcible seizure. The third degree of intrusion is the police officer's right to stop by force and detain an individual when the officer has a reasonable suspicion that the individual has committed, is committing, or is about to commit a felony or misdemeanor. In New York, this level is authorized by statute (McKinney 2000).¹⁸ The fourth and final level of intrusion is when a police officer arrests and takes into custody a person when there is probable cause to believe that person committed a crime in the officer's presence. These four levels represent "...the gradation

¹⁷*People v. DeBour*, 374 N.Y. S.2d. 241 (N.Y. App. Div. 2nd Dep't. 1975).

¹⁸This, of course, is the key statute that the Governor's proposal would significantly modify.

of permissible police authority with respect to encounters with citizens in public places and directly correlates the degree of objectively credible belief with the permissible scope of inference."

New York's "sliding scale" approach, unlike its federal counterpart which uses a three-tier system (*Terry v. Ohio* 1968), sets a much more difficult standard for police officers. The common law inquiry does not mandate that officers justify their actions on the belief that "criminal activity is afoot." Rather, officers are left to their own discretion to determine if further action is necessary on the contingency that they do not go beyond constitutional limitations. The court's decision shifted the determination of constitutional limitations to the judgment of the police officer.

The Court of Appeals has never overruled the standard set forth in *DeBour*. While many legal scholars consider the court's standard as too burdensome, the court, itself, has said that the standards enunciated in *DeBour* remain. In *People v. Finlayson* (1980), the court asserted that the standards enunciated in *DeBour* remain effective and necessary guidelines in determining the reasonableness of police actions when no warrant exists.^{iv}

Most recently, New York courts have sought to retain the basic standards of reasonableness in its constitutional dimensions, and yet criticize *DeBour* for its rigidity. In *People v. Hanson* (1998), the defense moved to suppress on the ground that the *Terry* stop violated the New York State Constitution. The motion to suppress was denied. In an interesting interpretation of the *DeBour* standard, the court allowed that *DeBour* should not be disturbed; however, the court added that police conduct which is "reasonable" is not to be confined by "an inflexible legal framework" and found that *DeBour* is flexible enough to make determinations based on the merits of each individual case.^v

THE POLICE AND PUBLIC PROTECTION ACT

The Governor's proposal seeks to eliminate the "second-guessing" that a police officer is faced with each time he seeks to question a citizen. Almost all other states, with the exception of New York, follow the traditional common law rules for encounters between police and the public as endorsed by the Supreme Court in *Terry*.

The proposed legislation is actually quite short: approximately a page and a half typewritten. In essence, it adds the following two substantive additions to the state's criminal procedure law.

First, it states that "when engaged in law enforcement duties, a police officer may approach a person in a public place located within the geographical area of such officer's employment when he has an objective, credible reason not necessarily indicative of criminality, and to the full extent possible under the Constitution of this state and the United States may ask such questions and take such other actions as the officer deems appropriate."

Second, and perhaps more substantively, the bills adds the following: "Notwithstanding any other provision of law, the court may not suppress evidence...on account of a violation of any right secured accorded by [the state constitution] unless the court finds after a hearing that the conduct constituting the violation was committed in bad faith and not in whole or in part for the purpose of protecting the actor or another person...." Clearly, the proposal effects a sea change in the Court of Appeals' jurisprudence in this area.

CONCLUSION

It is reasonable to conclude that with the Supreme Court's unequivocal adoption of a standard that leaves state courts to

their own devices, state judicial review in search and seizure cases will continue to be premised on antiquated, less-than-objective standards unless adequate legislation to the contrary is enacted. The governor's proposal would remedy out-dated and inconsistent common law requirements for law enforcement officials to follow. It is possible to protect the Fourth Amendment rights of the accused while simultaneously protecting the public and the police officers who enforce New York's laws. Police error is not tantamount to violating an accused rights because the Fourth Amendment prohibits *unreasonable* searches and seizures, and not all searches and seizures are unreasonable.¹⁹ New York may use its legislative powers, as enunciated by the U.S. Supreme Court, to restrict within limits allowed by the U.S. Constitution, search and seizure requirements in the state: the criminal may not go free because the constable has blundered.

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¹⁹See *Elkins v. United States* (1960): "what the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures."

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ENDNOTES

ⁱ “[I]n order to assess the reasonableness [of an officer’s] conduct as a general proposition, it is necessary to first focus upon the constitutionally protected interests of the private citizen, for there is no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails.” 392 U.S. at 20-21, citing *Camara v. Municipal Court* (1967) [internal quotation marks omitted]. “The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances. And in making that assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer warrant a man of reasonable caution in the belief that the action taken was appropriate? ...[T]he sole justification for the search in the present situation is the protection of the police officer and others nearby and therefore, must be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer etc.... the search in this case presents no serious problems in light of these standards.” [internal quotation marks omitted].

ⁱⁱ In *Wolf*, the Court concluded that the freedom from unreasonable search and seizure was an essential element in the concept of “ordered liberty,” which was applicable to the States through the Fourteenth Amendment. Justice Felix Frankfurter, writing for the Court, argued that “one’s privacy against arbitrary intrusion by the police was a fundamental Fourth Amendment guarantee.” While the decision in *Wolf* prohibited States from engaging in unreasonable search and seizures, it did not require application of the exclusionary rule in state prosecutions—this prohibition would be enunciated in *Mapp v. Ohio* (1961).

ⁱⁱⁱ Judge Wachtler speaking for the majority of the court stated: “Generally, in the performance of their public service functions, not related to criminal law enforcement, the police should be given wide latitude to approach individuals and request information.... However, when police officers are engaged in their criminal law enforcement function their ability to approach people involves other considerations and will be viewed and measured by an entirely different standard of reasonableness.... Unfortunately, there is scant appellate authority on this subject, even the majority of the Supreme Court in the *Terry* trilogy (*Terry v. Ohio* 1968) explicitly avoided resolving the constitutional propriety of an investigative confrontation.

^{iv} The court said “The Court of Appeals in *DeBour* identified four levels of police intrusion and the degree of knowledge and credible belief needed to justify each. It has now been suggested that recent pronouncements by the Supreme Court have affected, and perhaps undermined, some of the classifications enunciated in *DeBour*. Yet even if this point of view were correct—a proposition which is hardly free from doubt—the essential value of the *DeBour* holding would survive. *DeBour* did not attempt to establish an in-

flexible legal framework by which to measure police conduct. Encounters between citizens and the police in public places are of an endless variety with no two being precisely alike...Any attempt to catalogue them rigidly within four classifications would not only prove virtually impossible but might well present a true danger of substituting labels for liberties. DeBour makes no such attempt. Rather, its careful analysis provides needed and effective guidelines for determining the reasonableness, and therefore the constitutionality, of police action in given circumstances" [internal citations and quotations omitted].

^{iv}"Any legal scholar, and probably more than a few English teachers, could mount a sizeable argument that both counsels' amoebic arguments, of counsel themselves, not uncommon in the criminal courts of this State under similar circumstances, are themselves toxic byproducts of DeBour and its progeny. ...There are no bright lines separating various types of police activity. Determining whether a seizure occurs during a street encounter between the police and a private citizen involves analysis of the most subtle aspects of our constitutional guarantees" (citing *People v. Bora* 1994) [internal quotations and citations omitted].