STOPS, FRISKS, AND POLICE ENCOUNTERS: THE NEW YORK COURT OF APPEALS'S STRICT APPLICATION OF THE *DE BOUR* STANDARD

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I. INTRODUCTION

To preserve a safe society and keep crime at a minimum, it is well-settled in both federal and New York case law that, in some situations, police have the authority to question, detain, search, or arrest individuals. The search and seizure provisions of the New York State Constitution and the federal Constitution are identical:

> 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.[1]

However, the United States Supreme Court and the New York State Court of Appeals long ago began carving out differing interpretations of search and seizure rights and how broadly to extend those rights to private citizens. Both courts have sought to balance the need to maintain a safe society with the need to uphold the constitutional rights of its citizens, as search and seizure situations naturally lend themselves to a tension between law enforcement interests and an individual's privacy. The Court of Appeals has long recognized that the New York State Constitution provides more protection to citizens in search and seizure cases than the federal Constitution does.[2]

Since deciding *People v. De Bour*[3] in 1976, the Court of Appeals has maintained a strict construction and application of that

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[1] N.Y. CONST. art. I, § 12; U.S. CONST. amend. IV.

[2] *See infra* Part III.

[3] People v. De Bour, 352 N.E.2d 562 (N.Y. 1976).

standard, resisting attempts to allow courts more latitude in deciding police encounter cases through consideration of other factors.[4] In doing so, the court has developed a wide body of decisions interpreting the state constitution and state law, and expanded considerably the reservoir of independent state constitutional cases in New York. The *De Bour* test remains in effect just as strongly today as it was when first decided over thirty years ago, and the Court of Appeals continues to faithfully apply this standard when deciding cases based on street encounters between the police and private citizens.[5]

II. THE UNITED STATES SUPREME COURT STANDARD FOR STOPS AND FRISKS: *TERRY V. OHIO*

In *Terry v. Ohio*[6] in 1968, the United States Supreme Court enumerated the federal standard for briefly stopping and searching (commonly known as a "stop and frisk") individuals suspected by police of engaging in some criminality.[7] In that case, the on-street encounter between police and a private citizen, Terry, occurred when an officer on patrol duty observed Terry and another man walking down the sidewalk.[8] The men were walking back and forth and looking at a storefront window, eventually joined by a third man.[9] Despite the hour of 2:30pm, the officer became suspicious and began keeping a closer eye on Terry, concerned they were planning a robbery by "casing" the storefront window.[10] "Deciding that the situation was ripe for direct action,"[11] the officer approached the group and asked for their names, and then proceeded to physically grab Terry and pat him down.[12] He felt a pistol in Terry's front coat pocket, and the officer removed Terry's coat before patting down and arresting the other two men.[13] Terry was later convicted for carrying a concealed weapon.[14]

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[4] *See infra* Part IV.

[5] *See infra* Part IV.

[6] Terry v. Ohio, 392 U.S. 1 (1968).

[7] *Id.* at 4 ("This case presents serious questions concerning the role of the Fourth Amendment in the confrontation on the street between the citizen and the policeman investigating suspicious circumstances.").

[8] *Id.* at 5.

[9] *Id.* at 6.

[10] *Id.*

[11] *Id.*

[12] *Id.* at 6–7.

[13] *Id.* at 7.

[14] *Id.* at 4.

Chief Justice Warren wrote for the majority and framed the issue as whether, given all the circumstances, Terry's Fourth Amendment rights were violated by an unreasonable search and seizure.[15] Interestingly, he began this analysis by setting out the policy arguments for both those in favor of stopping and frisking suspicious persons and those concerned about the personal privacy of citizens.[16] Rejecting the "all-or-nothing" approach advocated by both sides, Chief Justice Warren focused on the reasonableness, in all circumstances, of the government's invasion of personal privacy, and to what extent that privacy was invaded.[17] The Court ultimately found that because the nature of the invasion of privacy was less than that of a full arrest, the cause or suspicion necessary for that lesser intrusion was something less than probable cause: reasonable suspicion of some kind of criminal activity.[18] The Court of Appeals would decide the same issue only four years later, in the now-infamous *De Bour* case.

III. THE NEW YORK STANDARD FOR STOPS, FRISKS, AND POLICE ENCOUNTERS: *PEOPLE V. DE BOUR*

Around midnight in October 1972, Louis De Bour was walking on the sidewalk toward two police officers, and when he crossed to the other side of the street the officers stopped him and asked "what he was doing in the neighborhood."[19] One of the officers then asked for identification and also noticed a suspicious bulge in De Bour's jacket.[20] When the officer asked De Bour to unzip the jacket, he spotted a gun tucked into his waistband.[21] De Bour was then arrested for possessing the firearm.[22] The entire encounter lasted only a few minutes.[23]

The trial court denied De Bour's motion to suppress the weapon and found the officer's testimony credible during the suppression hearing.[24] On appeal, De Bour argued that the stop was a seizure that violated his Fourth Amendment rights, because he was deprived of his freedom of movement and intimidated by the officers

[15] *Id.* at 4, 9.
[16] *Id.* at 10–12.
[17] *See id.* at 17–19.
[18] *See id.* at 26–27.
[19] People v. De Bour, 352 N.E.2d 562, 565 (N.Y. 1976).
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.*

surrounding him.[25] Judge Wachtler (who would later become the Chief Judge) analyzed the issues in this case using the primacy approach, relying first and almost exclusively on New York State case law.[26] He framed the issue as having two prongs: first, whether the initial encounter was lawful, and second, whether the actions taken were reasonable in scope, given the circumstances at the time.[27]

The court noted that the job of a police officer is "a multifaceted one."[28] Among their many duties, "the police in a democratic society are charged with the protection of constitutional rights, the maintenance of order, the control of pedestrian and vehicular traffic, the mediation of domestic and other noncriminal conflicts and supplying emergency help and assistance."[29] The court addressed the need to balance police conduct with individual rights by creating a standard that justifies police interference by requiring increasing levels of cause and suspicion. This is known as the *De Bour* standard—a four-tiered method set out by the Court of Appeals for evaluating police encounters. This standard requires New York courts to evaluate each step of a police encounter to ensure the conduct remained constitutional.[30]

Level I of *De Bour* requires an objective, credible reason to request information, "not necessarily indicative of [any] criminality."[31] The court explained that an inquiry at this level may include officers approaching private citizens to ask about the whereabouts of a lost child, or aid someone in distress.[32] Level II requires a founded suspicion that there is some criminality afoot before making any inquiries (known as the common law right of

[25] *Id.* at 566.

[26] *Id.* at 566–71; *see generally* Sinead McLoughlin, High Court Study, *Choosing A "Primacy" Approach: Chief Justice Christine M. Durham Advocating States Rights in Our Federalist System*, 65 ALB. L. REV. 1161, 1167–73 (2002) (discussing the background and use of the primacy approach).

[27] *De Bour*, 362 N.E.2d at 571 ("In evaluating the police action we must consider whether or not it was justified in its inception and whether or not it was reasonably related in scope to the circumstances which rendered its initiation permissible." (citation omitted)).

[28] *Id.* at 568.

[29] *Id.* (citations omitted).

[30] *See* People v. Duuvon, 571 N.E.2d 654, 659 (N.Y. 1991) (Titone, J., concurring) ("Under our system of judicial review, police-citizen street encounters must be treated as step-by-step processes, each phase of which must be individually assessed by a court acting in accordance with constitutional due process precepts. Indeed, that is precisely what our judicial role requires." (citing *De Bour*, 352 N.E.2d at 571–72)).

[31] *De Bour*, 352 N.E.2d at 571–72.

[32] *Id.* at 568–69.

inquiry).[33] At this level, police officers are acting in their role as law enforcement, attempting to gain information in order to ascertain whether a crime has been committed.[34] At both the first and second levels of *De Bour*, a citizen may refuse to answer an officer's questions and is under no obligation to remain there with the police.[35]

Level III requires reasonable suspicion before a stop or frisk.[36] This level specifically requires a reasonable suspicion that a particular person has committed a crime before engaging in a detention or pat-down.[37] Level IV requires probable cause that a person has committed a crime in order to arrest an individual.[38] Levels III and IV both correspond to federal standards that require reasonable suspicion or probable cause for a stop and frisk or arrest, respectively.[39] In establishing Levels I and II the court provided greater protections for citizens, by restraining police conduct beyond the requirements set by the United States Supreme Court.

Applying this framework, the court found the initial inquiry to be lawful, as the officers simply asked De Bour his identity as part of their duties as foot patrolmen.[40] The court also held that the pistol was properly seized, because in the context of the late night encounter, deserted street, and the defendant's crossing the street ahead of the officers, the inquiry into the waistband bulge was minimally intrusive and done for the reasonable purpose of officer safety.[41] The conviction against De Bour was affirmed.[42]

IV. THE STRICT APPLICATION OF *DE BOUR* BY THE COURT OF APPEALS

The New York State Court of Appeals has cited *De Bour* eighty-eight times since *De Bour* was decided in June 1976.[43] While the Court of Appeals is an appellate court, limited to questions of law,

[33] *Id.* at 572.

[34] *Id.*

[35] *See* People v. Holmes, 619 N.E.2d 396, 398 (N.Y. 1993) ("Flight alone, however, or even in conjunction with equivocal circumstances that might justify a police request for information, is insufficient to justify pursuit because an individual has a right 'to be let alone' and refuse to respond to police inquiry.").

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

[37] *Id.*

[38] *Id.*

[39] *See* Terry v. Ohio, 392 U.S. 1, 27 (1968).

[40] *De Bour*, 352 N.E.2d at 570.

[41] *Id.*

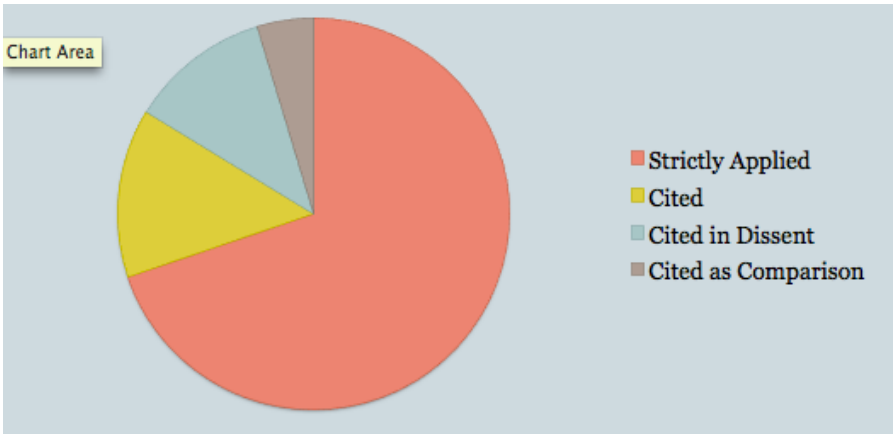
[42] *Id.* at 571.

[43] *See infra* Appendix A.

the court has noted that a *De Bour* analysis is a mixed question of law and fact and is beyond review as long as the record supports the finding.[44] Therefore, the majority of cases requiring a *De Bour* application that reached the Court of Appeals were affirmed if the record supported the decision made by the lower courts. However, the court still reviewed those cases and, if the record was inadequate to justify the result reached, engaged in its own *De Bour* analysis before remanding the case back to the lower court.

In fifty-five (62.5%) of those cases, the court strictly applied *De Bour* by analyzing what level of suspicion and police conduct was present in the case.[45] In thirteen cases (15%), the court simply cited to *De Bour* without engaging in a strict analysis, instead using *De Bour* to stand for a related proposition, such as an "individual's right 'to be free from an official interference by way of inquiry' is not absolute."[46] In fourteen cases (16%), only the dissenting opinion referred to *De Bour* at all.[47] In two cases (2%), only the concurring opinion cited to *De Bour*.[48] Finally, four cases (4.5%) cite to *De Bour* as a comparison to another kind of Fourth Amendment encounter.[49]

Application of the De Bour Standard by the New York Court of Appeals, 1976–2013



[44] People v. Roque, 780 N.E.2d 976, 978 (N.Y. 2002) ("The determination of whether the circumstances of a particular case rise to the level of reasonable suspicion is a mixed question of law and fact, beyond our review if the determination is supported by the record.").

[45] *See infra* Appendix A.

[46] *See infra* Appendix B; People v. Morales, 366 N.E.2d 248, 252 (1977) (quoting *De Bour*, 352 N.E.2d at 568).

[47] *See infra* Appendix C.

[48] *See infra* Appendix D.

[49] *See infra* Appendix E.

As evidenced by the breakdown of the eighty-eight *De Bour* standard cases decided between 1976 and 2013, the Court of Appeals engaged in a strict application of *De Bour* 62.5% of the time. This demonstrates the court's feeling that the *De Bour* standard is worthy of a continuing place in the body of New York State constitutional case law. As discussed in the rest of this article, their subsequent decisions support this through precise application, clarification, and faithful adherence to *De Bour*.

A. Early Application of De Bour

The first time the court heard a search and seizure case after deciding *De Bour* was in July 1976, in *People v. Lemmons*.[50] In *Lemmons*, a state trooper noticed a car driven by the defendant speeding down the highway and signaled for him to pull over.[51] After learning Lemmons' identity and that there was a warrant out for his arrest, the trooper removed him from the car and proceeded to ask the three passengers for their identities as well.[52] In doing so, he noticed a handgun in the car and all four individuals present were charged with criminal possession of a handgun.[53] Judge Jasen cited *De Bour* in holding that the trooper was justified in asking the names of the three passengers, since Lemmons had been caught speeding without a valid registration and with a warrant out for his arrest.[54] Although *De Bour* was cited, the specific level of police interaction relied on was not elaborated on.

Several years later, Judge Fuchsberg authored an opinion finding no probable cause for an arrest based on the fourth level of *De Bour*, and ordering a new trial.[55] The facts of *People v. Carrasquillo* involve a frazzled-looking pedestrian walking through Manhattan with a brown paper bag, spotted by an officer on patrol.[56] The police officer made eye contact with the pedestrian, Carrasquillo, and Carrasquillo then made a quick left turn.[57] Based on these observations, the officer pulled his car over and approached the

[50] People v. Lemmons, 354 N.E.2d 836 (N.Y. 1976).

[51] "Confronted with these facts, the officers were entitled, if not obligated, to ascertain the identity of his three traveling companions." *Id.* at 837–39.

[52] *Id.* at 838.

[53] *Id.*

[54] *Id.* at 839 (citing People v. De Bour, 352 N.E.2d 562, 568–69 (N.Y. 1976)).

[55] People v. Carrasquillo, 429 N.E.2d 775, 778–80 (N.Y. 1981) (citing *De Bour*, 352 N.E.2d at 567).

[56] *Id.* at 777.

[57] *Id.*

defendant to ask what was in the bag.[58] He replied that he was carrying, among other items, a Sylvania radio, which the officer determined was actually a Zenith brand radio.[59] Based on this misidentification of the radio brand, the officer took the defendant and bag to the police station, where he was booked for stolen property.[60]

Judge Fuchsberg analyzed each step of the subsequent encounter between Carrasquillo and the officer as Judge Wachtler did in *De Bour*, by looking first at the initial approach by police and next at the arrest itself.[61] The court found little justification for detaining the defendant, as there were no facts indicating a crime had been committed, was about to be committed, or that the defendant was involved in any criminal activity at all.[62] Judge Fuchsberg noted that "whether the defendant was more or less attentive to costume or coiffure, particularly in this day of variegated dress, did not sanction restraint on his liberty or privacy."[63] However, given the similarity to the circumstances in *De Bour* where it was reasonable to make an inquiry based on crossing the street to possibly avoid police, the court in this case found the initial approach by police satisfied the first level of *De Bour*.[64] However, the subsequent detainment and arrest failed to meet the fourth level of *De Bour* as there was no probable cause based on the specific circumstances of the case.[65]

The court engaged in a strict application of *De Bour*, referencing the standard and facts of the *De Bour* case several times in the decision.[66] The majority also referred to the levels of *De Bour* in their analysis, including the "bare informational inquiry" made by officers in both cases and the suspicion needed in order to do so.[67] In dissent, Judge Gabrielli argued not against the strict application of *De Bour* or how the levels of that standard were evaluated by the majority, but instead believed that based on the record, probable cause existed for an arrest.[68] He advocated for a "totality of the

[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] *Id.* at 777–78.
[63] *Id.* at 777.
[64] *See id.* at 778.
[65] *Id.* at 778–79.
[66] *See id.* at 777–78 (citing People v. De Bour, 352 N.E.2d 562, 567 (N.Y. 1976)).
[67] *Carrasquillo*, 429 N.E.2d at 778.
[68] *Id.* at 780–81 (Gabrielli, J., dissenting).

circumstances" approach that would factor in details apparently supporting the arrest as lawful.[69] However, the court specifically rejected this totality of the circumstances approach a few years later in *People v. Hicks*.[70]

B. Rejecting Additional Requirements for De Bour

In *Hicks*, the court confronted the question of whether police could, after a lawful stop (*De Bour* Levels I or II), bring a suspect to the scene of the crime for identification in the absence of probable cause.[71] In that case, two officers were on their way to a factory, the scene of a robbery committed by two black men driving a "green Pontiac."[72] The officers spotted two black men driving a grey Buick and pulled them over, suspecting they were the perpetrators.[73] The men were returning from work, which the officers knew was far from the scene of the crime.[74] Regardless, the two men were told they would be taken to the factory for identification and, if it was not a positive identification, they could then leave.[75] They were also stopped and frisked before leaving the scene.[76] The robbery victims identified the two men as the robbers and they were arrested, and police then uncovered the "fruits of the crime" during a subsequent search of their car.[77]

Using a dual sovereignty approach in her analysis, Judge Kaye began by pointing out that without reasonable suspicion for the stop and frisk, it would have violated both the state and federal Constitution.[78] The court found that the officers had credible, reasonable suspicions for the stop and frisk.[79] Therefore, Level III of this *De Bour* interaction was beyond the court's review, as the evidence on the record supported the credibility finding of the lower

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[69] *Id.*

[70] People v. Hicks, 500 N.E.2d 861, 867 (N.Y. 1986).

[71] *Id.* at 862.

[72] *Id.*

[73] *Id.*

[74] *Id.* at 862–63.

[75] *Id.* at 863.

[76] *Id.*

[77] *Id.*

[78] *Id. See generally* Paul H. Anderson & Julie A. Oseid, *A Decision Tree Takes Root in the Land of 10,000 Lakes: Minnesota's Approach to Protecting Individual Rights Under Both the United States and Minnesota Constitutions*, 70 ALB. L. REV. 865, 884 (2007) (describing the background of the dual sovereignty approach and its criticism); Kevin Blackwell, *State Constitutional Adjudication in A Footnote? A Critique of the Supreme Court of Louisiana's Decision in State v. Kennedy*, 71 ALB. L. REV. 1213, 1220–21 (2008) (same).

[79] *Hicks*, 500 N.E.2d at 863.

courts.[80]

However, the constitutionality of the subsequent trip to the scene of the crime still needed to be resolved.[81] Judge Kaye phrased this second issue as "whether an otherwise valid stop became invalid" when the police further detained and then removed the defendants.[82] Immediately, the court found there was no probable cause to support a level IV *De Bour* encounter and arrest.[83] Had there been probable cause, the analysis could have ended with that.[84] Because the actions of the police did not meet the requisite suspicion level of probable cause necessary to sustain Level IV of *De Bour*, the court turned to whether the trip to the scene of the crime was actually an arrest.[85] The court found that "[t]he nonarrest detention including transportation of defendant to the crime scene was within the bounds of a lawful investigatory stop."[86]

In so holding, Judge Kaye made sure to discuss the "gloss" added to *De Bour* by the Appellate Division, Fourth Department by way of a "totality of the circumstances" test.[87] She noted that the court had already rejected the totality of the circumstances test on state constitutional grounds in search and seizure cases, calling this test "inadequate[]" to protect the individual rights of New York State citizens.[88] For those reasons, the court rejected the totality of the circumstances gloss adopted by the Fourth Department, holding that the reasonable suspicion required by Level III of *De Bour* was constitutionally sufficient without adding such gloss.[89]

The *Hicks* opinion is an important one in the history of the application of the *De Bour* standard. The Appellate Division, Fourth Department had attempted to impose a broader standard on *De Bour* that would allow courts to take into account all the factors in play during a police encounter, rather than only those facts that correlated to levels of suspicion and the specific police conduct at issue. The Court of Appeals, through Judge Kaye, made it very clear that the court would not stand for such additions or "glosses" to the *De Bour* test they had laid out in 1976. In doing so, they

[80] *Id.*
[81] *Id.*
[82] *Id.*
[83] *Id.* at 864.
[84] *Id.* at 863.
[85] *Id.* at 864.
[86] *Id.* at 865.
[87] *Id.* at 867 (citing People v. Hicks, 550 N.Y.S.2d 449, 452 (App. Div. 1986)).
[88] *Hicks*, 500 N.E.2d at 867.
[89] *Id.*

demonstrated their desire to adhere strictly to *De Bour* in police encounter cases. The court firmly established a precedent for following *De Bour* without modifications, preferring to restrain judges and courts to look to levels of suspicion and the subsequent police conduct in these types of cases.

C. Clarifying De Bour

The Court of Appeals clarified their earlier holding in *De Bour* on several occasions, resolving splits in the appellate division and giving further guidance to police officers as to what constitutes permissible conduct under the New York State Constitution. These cases are notable not only in their explanations of finer points of the four-tiered *De Bour* test, but in the court's willingness to continue looking to *De Bour* as the standard, preferring to clarify that standard rather than setting out a new one or carving out exceptions.

The first of these clarification cases is *People v. Hollman*, decided jointly with *People v. Saunders*:[90]

> In the two cases before us, we revisit *De Bour* in order to clarify the difference between a request for information and the common-law right of inquiry. Because the two terms on their face are so close in meaning, the legal significance we intended each to have has become obscured. The result has been inconsistency in the evaluation of markedly similar police encounters.[91]

Chief Judge Wachtler, who had written the original *De Bour* decision, returned to the *De Bour* test in *Hollman* to set out the differences between the Level I request for information (based on a credible, objective reason) and the Level II common law right of inquiry (based on a founded suspicion of criminal activity).

In *Hollman*, a narcotics officer observed two men in a bus terminal, both carrying duffle bags and engaging in various suspicious movements together in the terminal.[92] After entering and then coming out of the rest room with their bags, the two men boarded a bus, placed their bags overhead on the luggage rack several feet away from the seats they eventually chose, and sat down in the rear of the bus.[93] The narcotics officer entered the bus,

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[90] People v. Hollman, 590 N.E.2d 204 (N.Y. 1992).
[91] *Id.* at 206.
[92] *Id.*
[93] *Id.*

followed by another officer.[94] The officers proceeded to ask the men where they were going, where they had checked their luggage, and whether the bags placed on the luggage rack belonged to them.[95] The officer also asked permission to search the duffle bags. The men denied owning the duffle bags, but they were arrested when a search of the bags revealed crack cocaine.[96]

The court expanded on the Level I request for information and reiterated that only an objective, credible reason is required on this level.[97] Chief Judge Wachtler gave several examples of permissive police conduct at this level, including questions "regarding . . . identity, address or destination."[98] A question like this should be a simple, non-threatening, brief request for information.[99] In this case, the initial question of where the men were headed would clearly fall under Level I of *De Bour*, and as the officer had a credible reason to ask, the standard is satisfied as to that conduct.

After the officers asked those basic questions that met Level I of *De Bour*, the court held that any further questions of a nature that would lead a citizen to believe they were suspected of some criminality and the center of the officers' investigation are no longer merely informative.[100] That line of questioning transforms the situation from the Level I threshold to Level II, the common law right of inquiry, and in doing so requires an additional level of suspicion be present: a "founded suspicion that criminality is afoot."[101] In *Hollman*, the request to search the duffle bags was held by the court to clearly fall under Level II, requiring an escalated level of suspicion from the original destination question.[102] Chief Judge Wachtler noted that when two narcotics officers are blocking the only exit off of a bus, no matter how "calm the[ir] tone . . . or . . . polite their phrasing," asking to search a duffle bag is intimidating enough to make the average person believe they were suspected to be guilty of some criminal activity.[103]

Based on the observations of the officers in *Hollman*, the court concluded that they had acted properly and in accordance with *De*

94 *Id.*
95 *Id.*
96 *Id.* at 206–07.
97 *Id.* at 206.
98 *Id.*
99 *Id.* at 209.
100 *Id.* at 210.
101 *Id.*
102 *Id.*
103 *Id.*

Bour.[104] The officer had an objective, credible reason to ask about the destination of the two men, and when they denied having luggage after the officer had viewed them carrying duffle bags inside the terminal for thirty minutes, they had the requisite founded suspicion that some criminality was afoot.[105] That suspicion permitted the officers to continue with more intrusive, pointed questions.[106]

Chief Judge Wachtler emphasized that the *Hollman* decision was shaped by the court's own precedent and its "commitment to deciding these cases in a manner that is consistent with *De Bour* and its progeny."[107] An accurate and stringent application of *De Bour* was clearly a high priority for the court and Chief Judge Wachtler, and their detailed analysis offered to clarify the differences between Levels I and II of *De Bour* is another example of their continued precise reading of that standard. *Hollman* clarified that the brevity of the police encounter and level of intimidation will help guide the analysis in determining whether Level I or II of *De Bour* was implicated. The court spoke of the "continued vitality of *De Bour*" and noted that while the United States Supreme Court had determined the Fourth Amendment is not implicated in approaches not amounting to seizures, the Court of Appeals preferred the sound state policy and state constitutional protections provided by *De Bour*.[108] Although Chief Judge Wachtler did discuss the common law roots of the rights outlined in *De Bour*, seeming to back away from the state constitutional mandate discussed in that decision, the opinion nevertheless embraced the principles that *De Bour* stood for.[109] Finally, the court concluded by noting *De Bour* had been the law in New York State since 1976, and despite the need to clarify that standard in *Hollman*, there was no reason to eliminate it entirely, as it continued to protect the individual rights of private citizens.[110]

The *Hollman* court was clearly concerned about preserving *De Bour* as the standard in New York. They showed this first through their strict and methodical application and analysis of *De Bour* to the facts of the case before them, and second by stating outright

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104 *Id.*
105 *Id.* at 210–11.
106 *Id.*
107 *Id.* at 209.
108 *Id.* at 212.
109 *Id.*
110 *Id.*

their desire to clarify *De Bour* in order to aide lower courts in applying it. If there had been any doubt about the vitality of that standard, it was put to rest in *Hollman* both implicitly and explicitly. Chief Judge Wachtler himself wrote an opinion in favor of *De Bour* almost twenty years after his initial opinion was authored. That period of time was certainly enough for any judge to possibly re-think an opinion or rule of law, but Chief Judge Wachtler firmly endorsed *De Bour* once again as the standard for New York police encounters.

D. De Bour *in Dissent*

In the almost forty years since *De Bour* was decided, the Court of Appeals has sometimes disagreed over the application of *De Bour* in specific instances. However, even in dissent, the discussion is about a disagreement over exactly how that test was applied—in other words, the dissent is not about how strictly to apply the standard, but rather an analysis that shows disagreement over the conclusions of the majority, based on the record before the court in a particular case. Judge Bellacosa vigorously dissented in two such cases: *People v. May*[111] and *People v. Holmes*.[112]

In *People v. May*, decided about ten months after *Hollman*, the defendant and a "female companion" were in a parked car, on an empty street in a high-crime area.[113] A police car pulled up behind them, and as the police car approached the defendant started his car and began driving away.[114] Officers used the patrol car loudspeaker to order the defendant to pull over, and asked for his identification.[115] They later determined the vehicle had been stolen.[116] After arresting the defendant for the stolen car, a search incident to arrest revealed vials of crack cocaine in his pockets.[117]

The majority held that a Level III interaction had occurred, as the police had the defendant stop driving and pull over, and therefore reasonable suspicion was necessary in order for the stop to be lawful.[118] Because at the time the police ordered the stop they only knew the defendant had been parked on a dark street, they had no

[111] People v. May, 609 N.E.2d 113 (N.Y. 1992).
[112] People v. Holmes, 619 N.E.2d 396 (N.Y. 1992).
[113] *May*, 609 N.E.2d at 114.
[114] *Id.*
[115] *Id.*
[116] *Id.*
[117] *Id.*
[118] *Id.* at 115.

suspicion of criminal activity, let alone reasonable suspicion.[119] Therefore, the stop was unlawful. Police could have followed the car, but detaining it and the defendant inside violated the standard set out in *De Bour*.[120]

Judge Bellacosa argued in his dissent that what had actually occurred was a Level II *De Bour* encounter, based on a founded suspicion of criminal activity that activated the common law right of inquiry.[121] He believed the order to pull the car over and the brief questioning that occurred "fell short of a forcible seizure."[122] Additionally, he noted that the majority's opinion would further muddy the line between the Level II common law right of inquiry and Level III stop.[123] The Level II right of inquiry had already been clarified by the court in *People v. Hollman*, and Judge Bellacosa feared a finding that the brief questioning in this case required reasonable suspicion would make it difficult to know when a situation called for Level II or Level III suspicion.[124]

In *People v. Holmes*, an officer patrolling in an area known for narcotics deals noticed a strange bulge in the defendant's jacket pocket, and asked him to come over.[125] The defendant, Holmes, began running and the officer gave chase.[126] Eventually, the officer caught Holmes and also picked up a plastic bag he had thrown while running that turned out to contain crack cocaine.[127]

The court's memorandum opinion[128] held that the officer had an objective, credible reason under Level I of *De Bour* to approach Holmes and request information, due to his presence in a high-crime area known for narcotics and the unidentified bulge in his jacket.[129] However, those Level I circumstances did not justify the pursuit of Holmes after he ran.[130] The court noted that many areas of New York City could be considered "high crime" areas, but that does not subject everyone in those locations to an assumption of

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119 *Id.*
120 *Id.*
121 *Id.* (Bellacosa, J., dissenting).
122 *Id.* at 116.
123 *Id.*
124 *Id.*
125 People v. Holmes, 619 N.E.2d 396, 397 (N.Y. 1993).
126 *Id.*
127 *Id.*
128 Including Chief Judge Kaye and Judges Simons, Titone, Hancock, and Smith. *See id.* at 400. Judge Bellacosa was the lone dissenter. *Id.*
129 *Id.* at 398.
130 *Id.*

criminality, even with an unidentified bulge in a jacket.[131] In fact, "[i]f these circumstances could combine with flight to justify pursuit, then in essence the right to inquire would be tantamount to the right to seize . . . . That is not, nor should it be, the law."[132]

Judge Bellacosa wrote a strongly-worded dissent almost twice as long as the memorandum opinion.[133] He believed Holmes' conviction should be affirmed, in large part because fleeing from an approaching police officer should not be "per se legally meaningless."[134] Judge Bellacosa explicitly stated that his frustration in this case stemmed from his agreement with the rest of the court that flight from police, combined with other specific circumstances indicating potentially criminal activity, provides the reasonable suspicion necessary to pursue an individual.[135] His disagreement was with the court's interpretation of the "other specific circumstances" present in the case, and the majority's interpretation of what situation presents Level II or III suspicion to allow more questioning or a brief detention.[136] This is a recurring theme in the court's application of the *De Bour* standard: the struggle to properly define each portion of an encounter while isolating the amount of suspicion corresponding to each stage.

E. De Bour *in the News Today*

De Bour has played a role in the New York City Police Department's (NYPD) stop and frisk policy being called into question today. Most recently, in *Floyd v. City of New York*,[137] four minority plaintiffs brought a class action suit in federal district court against the NYPD and New York City because of their experiences being stopped and frisked by the NYPD.[138] The trial began in March 2013 and lasted nine weeks.[139]

The plaintiffs alleged New York City's stop and frisk policy was unconstitutional, in violation of the Fourth Amendment of the federal Constitution.[140] In an earlier decision rendered after a dispute about the admissibility of a particular expert's opinion on

131 *Id.*
132 *Id.*
133 *See id.* at 398–400 (Bellacosa, J., dissenting).
134 *Id.* at 399.
135 *Id.*
136 *Id.*
137 Floyd v. City of New York, 959 F.2d 540, 556 (S.D.N.Y. 2013).
138 *See id.*
139 *Id.* at 557.
140 *Id.* at 556.

the policy, only the federal Constitution was mentioned.[141] In an Opinion and Order released by Judge Scheindlin pertaining to liability, the federal Constitution and federal Supreme Court cases are cited almost exclusively, particularly *Terry v. Ohio*.[142] However, Judge Scheindlin did note that *De Bour* is often more protective of civil liberties than the Fourth Amendment, although conduct that would violate the Fourth Amendment "remains unlawful."[143] The plaintiffs also alleged a violation of the Equal Protection Clause of the Fourteenth Amendment of the federal Constitution, based on the disparate amount of racial minorities stopped (approximately ninety percent are Latino or African American).[144] Ultimately, the court found that the plaintiffs' Fourth and Fourteenth Amendment rights had been violated and ordered broad injunctive remedies, including reform.[145] While procedural litigation in *Floyd* continued, including an order from the Second Circuit removing Judge Scheindlin from the case, the essence of the trial court's order for reform was not affected.[146]

The plaintiffs in *Floyd*, like the defendants in many *De Bour* criminal cases, were not seeking monetary relief. Instead, the class action sought systemic reforms of the City's stop and frisk policy.[147] In an Opinion and Order issued on remedy, Judge Scheindlin ordered remedies that included major changes in police training and supervision, a joint-remedial process for further reforms, and the appointment of an independent monitor to ensure compliance.[148] The main catalyst was the lack of reasonable suspicion present in many of the stops, and in the stops of the four minority plaintiffs bringing the class action suit. This decision was important, because

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[141] Floyd v. City of New York, 861 F.2d 274, 277 (S.D.N.Y. 2012). Police officers are permitted to briefly stop any individual, but only upon reasonable suspicion that he is committing a crime. The source of that limitation is the Fourth Amendment to the United States Constitution, which guarantees that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." *Id.* (quoting U.S. CONST. amend. IV). The Supreme Court has explained that this "inestimable right of personal security belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs." *Id.* (quoting Terry v. Ohio, 392 U.S. 1, 8–9 (1968)).

[142] *See Floyd*, 959 F.2d at 602–03.

[143] *Id.* at 569–70.

[144] *See id.* at 584.

[145] *Id.* at 667.

[146] Ligon v. City of New York, 736 F.3d 118 (2nd Cir. 2013). The court ordered the case to be remanded and a new judge randomly assigned, after noting that the appearance of Judge Scheindlin's impartiality had been compromised by various statements, including statements to the media. Id. at 121.

[147] *Floyd*, 959 F.2d at 556.

[148] *Id.* at 667.

although the state constitution provides New York citizens with greater rights than the federal Constitution does (such as for police questioning, found in Levels I and II of *De Bour*), the focus from the start of this case were protections provided by the federal Constitution. It remains to be seen if future cases alleging violations of police policies will focus on *De Bour*.

V. CONCLUSION

Throughout the years, the New York State Court of Appeals has continued to faithfully and strictly adhere to the *De Bour* standard adopted by the court in 1976. Through consistent application, rejection of additional requirements, clarification of the doctrine in subsequent decisions, and emphatic dissenting opinions, the court has not shied away from keeping *De Bour* as the standard that governs encounters between police and private citizens. Changing technology and police forces increasingly concerned about maintaining a safe environment for private citizens have ensured *De Bour* a relevant place in today's society, and the Court of Appeals will likely have many opportunities to continue to re-visit the *De Bour* standard in the future.

APPENDICES

A. STRICT APPLICATION: 55–62.5%

1. People v. Stewart, 359 N.E.2d 379, 381–83 (N.Y. 1976) (Wachtler, J.).
2. People v. Townes, 359 N.E.2d 402, 405 (N.Y. 1976) (Wachtler, J.).
3. *In re* Eugene J., 369 N.E.2d 764, 765 (N.Y. 1977) (mem.).
4. People v. Evans, 371 N.E.2d 528, 530 (N.Y. 1977) (Wachtler, J.).
5. Kwok T. v. Mauriello, 371 N.E.2d 814, 817 (N.Y. 1977) (Jasen, J.).
6. People v. Cruz, 373 N.E.2d 281, 282 (N.Y. 1977) (mem.).
7. People v. Sobotker, 373 N.E.2d 1218, 1220 (N.Y. 1978) (Fuchsberg, J.).
8. People v. Jennings, 385 N.E.2d 1045, 1046 (N.Y. 1978) (mem.).
9. People v. Havelka, 384 N.E.2d 1269, 1270–71 (N.Y. 1978) (Wachtler, J.); *id.* at 1277 (Cooke, J., dissenting).
10. People v. Meredith, 407 N.E.2d 402, 403 (N.Y. 1980) (mem.).
11. People v. Howard, 408 N.E.2d 908, n.2 912, 912–13 (N.Y. 1980) (Meyer, J.); *id.* at 915 (Jasen, J., dissenting).
12. People v. Benjamin, 414 N.E.2d 645, 647 (N.Y. 1980) (Wachtler, J.).
13. People v. Rogers, 421 N.E.2d 491, 492 (N.Y. 1981) (Wachtler, J.).
14. People v. Carrasquillo, 429 N.E.2d 775, 777–78 (N.Y. 1981) (Fuchsberg, J.).
15. People v. John BB, 438 N.E.2d 864, 867 (N.Y. 1982) (Wachtler, J.).
16. People v. Wilson, 441 N.E.2d 1103, 1104 (N.Y. 1982) (mem.).
17. People v. Harrison, 443 N.E.2d 447, 450–51 (N.Y. 1982) (Wachtler, J.); *id.* at 452–56 (Jasen, J., dissenting).
18. People v. Landy, 452 N.E.2d 1185, 1189 (N.Y. 1983) (Simons, J.)
19. People v. Milaski, 464 N.E.2d 472, 476 (N.Y. 1984) (Jones, J.).
20. People v. Leung, 497 N.E.2d 687, 688 (N.Y. 1986) (mem.).
21. People v. Mercado, 501 N.E.2d 27, 29 (N.Y. 1986) (mem.).
22. People v. Bronston, 501 N.E.2d 579, 580 (N.Y. 1986) (mem.).
23. People v. Mosley, 501 N.E.2d 580, 581 (N.Y. 1986) (mem.).

24. People v. McLaurin, 515 N.E.2d 904, 905–06 (N.Y. 1987) (mem.).
25. People v. Bennett, 519 N.E.2d 289, 291 (N.Y. 1987) (mem.).
26. People v. Salaman, 522 N.E.2d 1048, 1048–49 (N.Y. 1988) (mem.).
27. People v. Luna, 535 N.E.2d 1305, 1306 (N.Y. 1989) (Hancock, J.).
28. People v. Torres, 543 N.E.2d 61, 65 (N.Y. 1989) (Titone, J.); *id.* at 66–67 (Bellacosa, J., dissenting).
29. People v. Robinson, 543 N.E.2d 733, 734 (N.Y. 1989) (mem.)
30. *In re* James R., 559 N.E.2d 1273, 1273–74 (N.Y. 1990) (mem.)
31. People v. Hollman, 590 N.E.2d 204, 205–06, 208–09, 212–13 (N.Y. 1992) (Wachtler, C.J.).
32. *In re* Antoine W., 590 N.E.2d 233, 233 (N.Y. 1992) (mem.)
33. People v. Irizarry, 590 N.E.2d 234, 234 (N.Y. 1992) (mem.)
34. People v. Diaz, 605 N.E.2d 358, 358–59 (N.Y. 1992) (mem.).
35. People v. Martinez, 606 N.E.2d 951, 952 (N.Y. 1992) (Simons, C.J.).
36. People v. May, 609 N.E.2d 113, 115 (N.Y. 1992) (mem.); *id.* at 115–16 (Bellacosa, J., dissenting).
37. People v. Matienzo, 609 N.E.2d 138, 139 (N.Y. 1993) (mem.).
38. People v. Holmes, 619 N.E.2d 396, 397 (N.Y. 1993) (mem.); *id.* at 399 (Bellacosa, J., dissenting).
39. People v. Bora, 634 N.E.2d 168, 169–70 (N.Y. 1994) (Simons, J.).
40. People v. Reyes, 638 N.E.2d 961, 962 (N.Y. 1994) (mem.).
41. People v. Spencer, 646 N.E.2d 785, 787–88 (N.Y. 1995) (Ciparick, J.); *id.* at 794 (Levine, J., dissenting).
42. People v. Ocasio, 652 N.E.2d 907, 908–09 (N.Y. 1995) (mem.).
43. People v. Battaglia, 655 N.E.2d 169, 170–71 (N.Y. 1995) (mem.).
44. People v. Turriago, 681 N.E.2d 350, 351, 353–54 (N.Y. 1997) (Levine, J.).
45. People v. McIntosh, 755 N.E.2d 329, 330–33 (N.Y. 2001) (Graffeo, J.); *id.* at 334 (Smith, J., concurring).
46. People v. William II, 772 N.E.2d 1150, 1152 (N.Y. 2002) (Levine, J.).
47. People v. Roque, 780 N.E.2d 976, 977–78 (N.Y. 2002) (Cipatrick, J.).
48. People v. Pines, 782 N.E.2d 62, 63 (N.Y. 2002) (mem.).

49. People v. Moore, 847 N.E.2d 1141, 1142–44 (N.Y. 2006) (Kaye C.J.); *id.* at 1144 (Smith, J., dissenting).
50. *In re* Victor M., 876 N.E.2d 1187, 1189 (N.Y. 2007) (Smith, J.).
51. People v. Allen, 881 N.E.2d 214, 214 (N.Y. 2008) (mem.).
52. People v. Silvestry, 901 N.E.2d 756, 756 (N.Y. 2009) (mem.).
53. People v. Brannon, 949 N.E.2d 484, 486, 487–88 (N.Y. 2011) (Pigott, J.); *id.* at 489 (Jones, J., concurring in part and dissenting in part)
54. People v. Miranda, 974 N.E.2d 661, 662 (N.Y. 2012) (mem.).
55. People v. Garcia, 983 N.E.2d 259, 259–60, 261–63 (N.Y. 2012) (Ciparick, J.); *id.* at 263–65 (Smith, J., dissenting).

B. CITED: 13–15%

1. People v. Lemmons, 354 N.E.2d 836, 839 (N.Y. 1976) (Jasen, J.).
2. People v. Morales, 366 N.E.2d 248, 252 (N.Y. 1977) (Jasen, J.).
3. People v. Martin, 409 N.E.2d 1363, 1365 (N.Y. 1980) (mem.); *id.* at 1368 (Wachtler, J., dissenting).
4. People v. Santiago, 418 N.E.2d 668, 669 (N.Y. 1981) (mem.).
5. People v. Smith, 452 N.E.2d 1224, 1226–27 (N.Y. 1983) (Meyer, J.).
6. People v. Hicks, 500 N.E.2d 861, 867 (N.Y. 1986) (Kaye, J.).
7. *In re* Shannon B., 517 N.E.2d 203, 205 (N.Y. 1987) (Wachtler, C.J.)
8. People v. Ramirez-Portoreal, 666 N.E.2d 207, 210 (N.Y. 1996) (Simons, J.)
9. People v. Batista, 672 N.E.2d 581, 581 (N.Y. 1996) (Smith, J.).
10. People v. Wheeler, 811 N.E.2d 531, 532 (N.Y. 2004) (Ciparick, J.).
11. People v. Quinones, 906 N.E.2d 1033, 1035 (N.Y. 2009) (Jones, J.).
12. People v. Martin, 973 N.E.2d 179, 179 (N.Y. 2012) (mem.).
13. People v. Kevin W., 3 N.E.3d 1121 (N.Y. 2013) (Read, J.).

C. CITED IN DISSENT: 14–16%

1. People v. Singleton, 361 N.E.2d 1003, 1007 (N.Y. 1977) (Fuchsberg, J., dissenting).
2. People v. McLaurin, 374 N.E.2d 614, 614–15 (N.Y. 1978) (Fuchsberg, J., dissenting).
3. People v. Payton, 380 N.E.2d 224, 236 (N.Y. 1978) (Cooke, J., dissenting), *rev'd sub nom.* Payton v. New York, 445 U.S. 573 (1980).
4. People v. Marner, 393 N.E.2d 1036, 1038 (N.Y. 1979) (Jones, J., dissenting).
5. People v. Samuels, 409 N.E.2d 1368, 1371–72 (N.Y. 1980) (Fuchsberg, J., dissenting).
6. People v. Fripp, 447 N.E.2d 53, 53–54 (N.Y. 1983) (Fuchsberg, J., dissenting).
7. People v. Johnson, 474 N.E.2d 241, 243 (N.Y. 1984) (Jasen, J., dissenting).
8. *In re* Gregory M., 627 N.E.2d 500, 505 (N.Y. 1993) (Titone, J., dissenting).
9. People v. Washington, 654 N.E.2d 967, 971 (N.Y. 1995) (Titone, J., dissenting).
10. People v. Jensen, 654 N.E.2d 1237, 1242 (N.Y. 1995) (Titone, J., dissenting).
11. *In re* Muhammad F., 722 N.E.2d 45, 46 (N.Y. 1999) (Smith, J., dissenting).
12. People v. Devone, 931 N.E.2d 70, 75 n.* (N.Y. 2010) (Ciparick, J., dissenting).
13. People v. Ingram, 967 N.E.2d 695, 696 (N.Y. 2012) (Pigott, J., dissenting).
14. People v. Morris, 999 N.E.2d 160, 170 (N.Y. 2013) (Rivera, J., dissenting).

D. CITED IN CONCURRENCE: 2.2%

1. People v. Carney, 444 N.E.2d 26, 28–29, 31 (N.Y. 1982) (Fuchsberg, J., concurring).
2. People v. Duuvon, 571 N.E.2d 654, 659 (N.Y. 1991) (Titone, J., concurring).

E. COMPARED/STANDARD NOT MET (CF) 4–IN RELATION TO OTHER 4TH ISSUES 4.5%

1. People v. Huffman, 359 N.E.2d 353, 356 (N.Y. 1976) (Jasen, J.).
2. People v. Diaz, 362 N.E.2d 609, 609–10 (N.Y. 1977) (mem.).
3. People v. Anderson, 364 N.E.2d 1318, 1321 (N.Y. 1977) (Fuchsberg, J).
4. People v. Russ, 460 N.E.2d 1086, 1087–88 (N.Y. 1984) (mem.).