

Fall 2011

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Recommended Citation

Ron Bacigal, *A Brave New World of Stop and Frisk*, 18 Wash. & Lee J. Civ. Rts. & Soc. Just. 83 (2011-2012).

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A Brave New World of Stop and Frisk*

Ron Bacigal, J.D.†

We've heard a lot of statistics today, and while I don't want to denigrate empirical studies, I do want to remind you that there are lies, damn lies, and statistics. I would point you towards warring New York op-ed pieces, reacting differently to the same set of statistics. The editorials were prompted by the New York City Police Department's release of figures regarding "stop and frisk" incidents within New York City.¹ One opinion piece by Bob Herbert, titled, *The Shame of New York*,² (the title "hints" at his position) referred to the statistics as establishing the city's "degrading, unlawful, and outright racist stop-and-frisk policies."³ It noted that blacks are nine times more likely than whites to be stopped by the police, but no more likely than whites to be arrested as a result of the stop.⁴

Heather MacDonald wrote the counter-opinion piece in the *New York Times*, published some time earlier, entitled *Fighting Crime Where the Criminals Are*.⁵ This title invokes the famous line from the bank robber Willie Sutton, the Bonnie and Clyde of the fifties. He would rob a bank, they would put him in prison, he would escape, rob another bank and

* This Article derives from a transcript of a presentation given on Friday, March 18, 2011, at the Traffic and the War on Drugs Symposium, held by the Washington and Lee Journal of Civil Rights and Social Justice.

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1. CTR. FOR CONSTITUTIONAL RIGHTS, NYPD STOP-AND-FRISK STATISTICS 2009 AND 2010, http://www.ccrjustice.org/files/CCR_Stop_and_Frisk_Fact_Sheet.pdf (last visited November 6, 2011) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

2. See Bob Herbert, *The Shame of New York*, N.Y. TIMES, Oct. 30, 2010, at A23 (discussing New York's unlawful and racist stop-and-frisk policy); see also Charles M. Blow, *Escape from New York*, N.Y. TIMES, Mar. 19, 2011, at A23 (discussing "the hyper-aggressive police tactics that have resulted in a concerted and directed campaign of harassment against the black citizens of this city").

3. Herbert, *supra* note 2.

4. See *id.* (stating that the New York City Police Department's own statistics indicated that "[b]lacks were nine times more likely than whites to be stopped by the police, but no more likely than whites to be arrested as a result of the stops").

5. See Heather MacDonald, *Fighting Crime Where the Criminals Are*, N.Y. TIMES, June 26, 2010, at A19 (stating that allegations of racial bias ignore how much crime influences police department operations).

continue the pattern. This was the age when the FBI was just beginning to compile profiles of career criminals. The FBI asked Sutton: “Why do you rob banks?” His answer was: “Because that’s where the money is.” MacDonald put her variation on this theme by asserting that the police are conducting stop and frisk operations in ethnic neighborhoods because that’s where the crime is.⁶ Based on reports provided by victims, blacks committed sixty-six percent of all violent crime in New York City, including eighty percent of shootings and seventy-one percent of robberies.⁷

These editorials reacted to the same statistical report by putting two very different spins on the raw data. While it’s always helpful to compile empirical evidence, I suggest that we also need to look beyond the mere numbers. If you put aside anecdotal versions of encounters between minorities and police, the numbers themselves don’t reveal what those encounters actually looked like. One way to get beyond the cold statistics is to focus on the kind of specific facts that are becoming more readily available in our technologically advancing society. I was at a judicial conference at the University of Mississippi last week, and one of the participants pointed out that in today’s world, modern technology may enable us to precisely recreate factual occurrences unfiltered by post-hoc reconstructions of the events. At present, a court reviews a challenged stop and frisk by listening to witnesses testify as to their memory of what occurred. Most often the witnesses are limited to the suspect who was stopped and the officer who made the stop. Their testimony, like all testimony, has weaknesses ranging from outright perjury to less blatant “shading” of facts to make them more favorable to the witness with a stake in the proceedings. Aside from this tendency to shade the facts, what is particularly troublesome about reconstructing police-citizen encounters is that such encounters are very stressful for all participants. The suspect often feels threatened and harassed. The police officer often suspects that a crime is about to occur, and if a frisk takes place it is because the suspect is believed to be armed and dangerous to the officer, the public, or both.⁸ This

6. *See id.* (“Such stops happen more frequently in minority neighborhoods because that is where the vast majority of violent crime occurs—and thus where police presence is most intense.”).

7. *See id.* (“Based on reports filed by victims, blacks committed 66 percent of all violent crime in New York in 2009, including 80 percent of shootings and 71 percent of robberies.”).

8. *See generally* *Terry v. Ohio*, 392 U.S. 1, 30–31 (1968) (permitting a police officer to execute a reasonable search for weapons where the officer reasonably believes that his safety or that of others is in danger).

type of stressful situation is hardly conducive to a detached and objective recitation of what occurred.

Most of us, including police officers, react to threatening and stressful situations by trusting our instincts. Thus, when an officer is asked: “Why did you stop this person?” or “Why did you frisk this person?” the honest answer may be that my guts told me it was the right thing to do. But while police may admit to fellow officers that they acted on their instincts, they know they have to provide more of an explanation to a judge.⁹ So they tend to fall back on familiar language that the courts have accepted in prior cases. For example, they say that the suspect made “furtive gestures;”¹⁰ this encounter occurred in a “high crime area”¹¹ or this was a well-known “open-air drug market.”¹²

The solution to this stereotyping of the circumstances that prompted a police-citizen encounter may lie in bypassing a witness’ memory and credibility by invoking the cry of ESPN commentators—“Let’s go to the tapes.” If the NFL can use instant replay to monitor an official’s judgment, the courts can use videotapes to review a police officer’s judgment to engage in a stop and frisk. Videotaping has become so commonplace that, even if none of the suspects or bystanders on the street had a cell phone camera handy, we could make it routine procedure for police officers walking city streets to be equipped with a camera to record all they see and do. Everyone has seen the videotapes commonly used when police make a vehicle stop. Perhaps the most famous one, at least to lawyers, is the videotape in the *Hiibel*¹³ case, where the U.S. Supreme Court addressed the

9. See *id.* (holding that reasonable suspicion requires an officer to believe criminal activity is afoot and to believe the suspect is “armed and presently dangerous”).

10. See *U.S. v. Edmonds*, 240 F.3d 55, 60–61, 64 (D.C. Cir. 2001) (concluding a police officer had reasonable suspicion to conduct a *Terry* stop because of four factors, including “furtive gestures” by the defendant).

11. See *U.S. v. Singleton*, 360 F.App’x 444, 446 (4th Cir. 2010) (“[The defendant’s] presence in a high crime area carrying an unconcealed firearm, his wearing very casual clothes indicating he was not a security officer, and his nervous and evasive conduct when confronted by police officers, gave the officers reason to suspect [defendant] was involved in criminal activity.”).

12. See *U.S. v. Collins*, 272 F. App’x 219, 222 (4th Cir. 2007) (“[P]olice received an anonymous tip that an open air drug market was being conducted at the Park Avenue Shopping Center.”); *Brooks v. Price*, 121 F. App’x 961, 963 (3d Cir. 2005) (“[A] police officer. . . was patrolling a neighborhood in New Castle, Delaware, known to be an open-air drug market when he observed [appellant] in a car stopped in the middle of the road.”).

13. See *Hiibel v. Sixth Judicial Dist. Court of Nev., Humboldt Cnty.*, 542 U.S. 177, 191 (2004) (finding that the arrest of a *Terry* stop suspect for refusal to identify himself, in violation of Nevada law, did not violate Fourth Amendment prohibition against unreasonable searches and seizures, and that defendant’s conviction for refusal to identify

issue of police demanding identification from a motorist.¹⁴ While cameras in squad cars have become standard equipment, technology is at the point where we can equip officers on the beat with miniature video cameras in their badge or on their shoulder. It's not just James Bond or Batman who can have all those wonderful gadgets.

With a video record of what actually took place out there on the street, we don't have to worry about the defendant testifying one way about the facts and the police testifying the other way. Videotapes of police interrogation of suspects have proven to be devastating evidence when they are produced in court. When I teach my students about *Miranda*,¹⁵ I point out that statistics show that the confession rate has not declined since *Miranda* was decided.¹⁶ Students often look incredulous and ask, "Why would anyone confess after being given the *Miranda* warnings?" The answer can lie in form over substance because of the manner in which those *Miranda* warnings are delivered.

If the police calmly and carefully explained: "You have the right to remain silent, what you say can be used against you, so are you sure that you want to talk to us? And you can have a lawyer free of charge. Are you sure you don't want to talk to a lawyer before answering our questions?" If the warnings were given in this fashion, you probably wouldn't have as many confessions. But that is not the way *Miranda* warnings are typically given in the real world. Many police will give the warnings in a rapid fire staccato form with run on sentences that sound something like this: "You have the right to remain silent anything you say can and will be used against you in a court of law you have the right to an attorney if you cannot afford one, one will be appointed for you, why'd you do it scumbag?" When I suggest this kind of delivery to my students they often wonder if

himself did not violate his Fifth Amendment right against self-incrimination).

14. See *id.* at 188 (stating that a Nevada statute requiring identification is reasonable after balancing the intrusion on the individual's Fourth Amendment rights against the legitimate government interest); see also *flam767, Encounter Between Larry Hiibel and Nevada Highway Patrol*, YOUTUBE (May 2, 2007), <http://www.youtube.com/watch?v=APynGWWqD8Y> (last visited November 6, 2011) (showing a Nevada Highway Patrol Officer encountering a rancher and arresting him because he refuses to cooperate).

15. See *Miranda v. Arizona*, 384 U.S. 436, 445 (1966) (finding that statements obtained from defendants during "incommunicado interrogation in a police-dominated atmosphere, without full warning of constitutional rights" are inadmissible as a violation of the Fifth Amendment protection against self-incrimination).

16. See Yale Kamisar, *On the Fortieth Anniversary of the Miranda Case: Why We Need It, How We Got It—And What Happened to It*, 5 OHIO ST. J. CRIM. L. 163, 177 (2007) (stating that "there is wide agreement that *Miranda* has had a negligible impact on the confession rate").

I'm making it up in order to play Socratic games with them. I prove my point by playing an actual video of officers giving "rapid fire" *Miranda* warnings to a suspect in Richmond. When that tape was played in the courtroom, the judge viewing it asked: "Is [the officer] speaking in tongues?"¹⁷ So, "going to the tape" and viewing the actual interrogation bypasses the weaknesses inherent in police and suspect attempts to reconstruct what actually happened.

When video tapes are not available, the trial judge often has to decide whether he or she believes the officer's or the suspect's version of what occurred, and guess who usually wins the credibility battle? A victory for the officer is not only a result of the officer having more credibility; it is also a function of the officer having learned what the judge needs to hear in order to rule for the prosecution. Over the years I have watched the emergence of what is called "cop talk." For example, police rarely say the suspect got out of the car. They say he "exited" the vehicle. Police don't go to a scene to investigate, they "respond" to First and Broad Street. It makes you wonder if the police are carrying on a conversation with a street corner. But, in addition to this "cop talk" jargon, the police learn "lawyer talk" or "court talk." They know the proper buzz words to use, that is, the magic words that legally justify the officer's actions. As I mentioned earlier, they learn to invoke language that the courts have accepted in prior cases—for example: the suspect made "furtive gestures;" this was a "high crime area;" or an "open-air drug market."¹⁸

We were talking this morning about how police officers, if they are any good, never make the same mistake twice. It's more subtle than outright perjury, because most police are not consciously deciding to lie to the judge. But they learn what the courts are looking for, and the police aim to please. So the police can please the prosecutor and the judge by testifying that, "the stop occurred in a high crime area that operates as an open air drug market. The defendant is well known by the police and is under investigation for drug trafficking, and there were suspicious hand-to-hand transfers of objects and money." If you throw in enough of those buzz words, the court is likely to approve the officer's decision to conduct a stop and frisk.

17. See *Commonwealth v. Benjamin*, 507 S.E.2d 113, 115 (Va. Ct. App. 1998) ("The manner in which the detective read the statement to [the defendant] was so unintelligible that it was functionally equivalent to not reading to [the defendant] the *Miranda* rights.")

18. See *supra* text accompanying notes 10–12.

So far I've focused on how video tapes could eliminate some of the problems raised when police reconstruct the facts from the witness stand. But until such tapes are commonly available, we can at least ask that judges be a bit more skeptical about some of the testimony they hear and how they evaluate the legal sufficiency of the facts. A Fourth Circuit case decided recently, *United States v. Foster*,¹⁹ is a great example of how a more discerning judiciary can react to vague "cop talk" about suspicious criminal activity. Permit me to paraphrase what the officer recounted in *Foster*: I saw a young, black man sitting there in an SUV. As I walked toward the SUV, all of a sudden I saw another black man sit up in the passenger seat. I didn't know what he was doing but all of a sudden he popped up. I made eye contact with him and I realized that he had been previously arrested for something involving marijuana. When I made eye contact, the defendant began shifting around and "his arms went haywire."²⁰

Now your guess is as good as mine as to what "haywire" means, because the officer couldn't see the defendant's hands, he could only see the arms from the elbows up.²¹ The officer called into the Police Department and was told that the defendant had been "under investigation."²² They did not say why he was under investigation, but the officer assumed it was for "a drug related offense."²³ The officer radioed for assistance.²⁴ He and another officer watched the car for fifteen minutes, and, even though nothing had happened, the officers then "used their respective vehicles to block the SUV in," and approached the defendant with their guns drawn.²⁵

The trial court listened to this description of the encounter and decided that this was a legitimate stop because the police officers were dealing with a "drug-trafficker."²⁶ The Fourth Circuit went out of its way to say that the

19. See *United States v. Foster*, 634 F.3d 243, 249 (4th Cir. 2011) (stating that the "stop of Foster by Detective Ragland was not supported by articulable facts sufficient to provide reasonable suspicion").

20. *Id.* at 248.

21. *Id.* at 245.

22. *Id.*

23. See *id.* (stating that Detective Ragland called the drug unit supervisor after speaking with Foster).

24. See *id.* ("He also called Officer Macialek for assistance with a possible drug arrest.").

25. *Id.*

26. See *id.* at 245–46 (referring to Detective Ragland's knowledge of defendant's criminal history).

trial court's ruling was clear error.²⁷ All the officers knew was that there had been a prior arrest involving marijuana.²⁸ The officers did not know whether the defendant was convicted or whether he had been arrested for simply smoking a joint in public, which would hardly qualify him as a drug-trafficker. Note that this decision came from the Fourth Circuit, which is generally regarded as the most conservative circuit in the country. And they did not merely reverse the trial court, they went on to discuss the general nature of police officers' renditions of suspicious circumstances:

We also note our concern about the inclination of the Government toward using whatever facts are present, no matter how innocent, as an indicia of suspicious activity [A]n officer and the Government must do more than simply label a behavior as 'suspicious' in order to make it so [W]e find it particularly disingenuous of the Government to attempt to portray these arm movements as ominous Moreover, we are deeply troubled by the way in which the Government attempts to spin these largely mundane facts into a web of deception. . . . [T]he Government cannot rely upon post hoc rationalizations to validate those seizures that happened to turn up contraband.²⁹

This symposium is focusing on race and criminal justice, thus it is fitting that Judge Gregory, the first black man ever appointed to the Fourth Circuit, wrote the *Foster* opinion. Coincidence? Judge Gregory exemplifies the need for the judiciary to demand more than buzz words like "furtive gestures," "drug trafficker," or similarly vague and conclusory terms.

While the judiciary should follow Judge Gregory's lead, the defense bar can also play its part by challenging and testing a police officer's litany of cop talk. One other case that illustrates this point is a fairly recent Virginia case, *Cost v. Commonwealth*,³⁰ where the essence of the officer's testimony was that: "I patted this person down and I felt a number of pills

27. See *id.* at 246 n. 2 ("The district court clearly erred in finding that Detective Ragland had 'prior knowledge that Defendant was a drug-trafficker.'").

28. See *id.* at 246–47 (discussing the detective's knowledge of the defendant's criminal record).

29. *Id.* at 248–49; see also *United States v. Digiovanni*, 650 F.3d 498, 512 (4th Cir. 2011) (concluding that many of the facts relied upon by the officer "border[] on the absurd;" for example, the officer labeled two shirts hanging in the back of the car as "suspicious," because "non-drug traffickers would pack the shirts in a clothing bag").

30. See *Cost v. Commonwealth*, 657 S.E.2d 505, 509 (Va. 2008) (holding that there was no probable cause to believe that the capsules discovered in defendant's pockets during a pat-down were an illicit drug and that officer was, therefore, unjustified in seizing the capsules).

in his pocket which I recognized as heroin capsules.”³¹ In order to apply the Fourth Amendment’s “plain feel” doctrine,³² the officer had to be able to identify the seizable item (the heroin) simply by patting down the suspect’s outer clothing.³³ If he manipulated the object, even while it remained inside the pocket, this would have constituted, not a pat down, but a full search.³⁴ This officer testified at trial that he had “attended several narcotics classes,”³⁵ so he maintained that he recognized these capsules as heroin. Both the trial court and the Virginia Court of Appeals accepted that this “trained” officer could distinguish something like vitamin capsules from heroin capsules by simply patting down the suspect.³⁶ The Virginia Supreme Court, however, overturned the Court of Appeals and stated that: “[I]t is self-evident that if an item may just as well be a legal medication dispensed in capsule form or a capsule containing an illegal drug, its character as the latter cannot be readily apparent by feeling a suspect’s outer clothing that contains the item inside.”³⁷

So part of the problem in this case rests with an overly solicitous judiciary and part of the problem rests with defense counsel for letting the officer get away with his claims at trial. How could defense counsel allow the officer to assert that “I’ve attended several narcotics classes, so I know what heroin capsules feel like”?³⁸ This type of claim cries out for a cross examination that asks: “OK, officer. Take me through this. What is it in your drug training that developed your sense of touch to the point that you are able to discern by patting outer clothing whether what you’re touching

31. *Id.* at 506.

32. *See* *Minnesota v. Dickerson*, 508 U.S. 366, 375 (1993) (“[I]f an officer lawfully pats down a suspect’s outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect’s privacy beyond that already authorized by the officer’s search for weapons.”).

33. *See id.* (stating that when police feel an object, its identity must be immediately apparent).

34. *See id.* at 378 (stating that the officer determined the lump was contraband only after manipulating the contents of the pocket). The Supreme Court found that the lower court “was correct in holding that the police officer in this case overstepped the bounds of the ‘strictly circumscribed’ search for weapons allowed under *Terry*.” *Id.*

35. *Cost v. Commonwealth*, 638 S.E.2d 714, 716 (Va. Ct. App. 2006).

36. *See id.* at 719–20 (acknowledging that “feeling the capsules alone may not be sufficient probable cause,” but combined the pat down with the familiar “furtive gesture” rationale). The Virginia Supreme Court, however, stated that “We disagree with the Court of Appeals’ characterization of *Cost*’s actions as ‘furtive.’” *Cost v. Commonwealth*, 657 S.E.2d 505, 508 (Va. 2008).

37. *Cost*, 657 S.E.2d at 508.

38. *Cost*, 638 S.E.2d at 716.

is a vitamin pill or whether it's a heroin capsule?" If defense counsel had done their job and gotten that point across, then maybe the trial court would never have ruled the way it did. After you have graduated and find yourself litigating these types of issues, you need to challenge police who offer only vague descriptions of the suspect's suspicious conduct or of the officer's expertise in drug recognition. You need to push them hard about breaking their statements down and articulating the facts, free from the officer's conclusory characterization of those facts. The trial judge is entitled to a presentation of the precise facts—whether from a videotape or rigorous cross examination.

The last comment I have today about race and the use and misuse of stereotyping vagaries is to question whether the U. S. Supreme Court is being realistic in insisting that the Constitution, and specifically the Fourth Amendment, are colorblind. I want to look at the colorblind standard the Court utilizes when it defines a "seizure of a person" for Fourth Amendment purposes. The Court has developed three different tests for seizure of a person, but I want to focus on the one adopted in *United States v. Mendenhall*.³⁹ In that case the Court held that whether a person has been seized is an objective test of when a reasonably prudent person under the circumstances understands that he or she is not free to leave.⁴⁰ The Court stressed that this is an objective standard; courts are not to look at the subjective intent of the police officer nor are they to look at the intent or the state of mind of the citizen.⁴¹ I wonder how realistic this approach is, in terms of dealing with our society.

Let me give you a real world example illustrating the difference between a wholly objective approach and an approach that takes account of real people with real life experiences. Suppose that the police approach two people and say: "Look, you need to come with us and submit to interrogation or we're going to get the grand jury to indict you." How would a reasonably prudent person react to that threat? Would they feel that they've got a choice to walk away or do they feel that they've got to go with the police now and answer those questions? I'm not sure how a reasonably prudent person would perceive the situation. You can

39. See *United States v. Mendenhall*, 446 U.S. 544, 554–55 (1980) (establishing an objective test for determining whether a seizure of a person has occurred).

40. See *id.* at 554 ("We conclude that a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.").

41. See *id.* (stating that a seizure occurs only if a reasonable person would have believed he was not free to leave).

objectively argue either way. But let's relate the hypothetical to actual people—Bill Clinton and Monica Lewinsky. I can understand a lot better how those actual people might react to the police tactic of threatening indictment. If you are a Rhodes Scholar with a law degree occupying the most powerful office in the world, you're not likely to be overly intimidated by this type of threat. But if you are a twenty-three-year-old frightened intern and they are threatening you with indictment by an ominous sounding federal grand jury, do you truly feel free to ignore the threat and simply walk away?

It is certainly a laudable ideal to adopt objective universal standards and to maintain that our Constitution is colorblind. While this ideal would seem a natural approach in an ideal world, it creates unequal justice in the real world in which we live. The price for a colorblind Fourth Amendment is that the Court ignores real people and determines constitutional rights according to the perceptions of hypothetical persons, reasonably prudent or otherwise. The Court should endeavor to apply the Constitution to actual people, who must be taken with all of their personal characteristics and experiences: race, ethnicity, where they are living, and the number and nature of previous encounters they have had with police. Once the Court adopts a constitutional standard that focuses on whether a person feels free to leave, that person should be taken as he or she is, not as the Court visualizes some hypothetical person. The title of this symposium is "Race and Criminal Justice," and sometimes justice requires that the Constitution not be oblivious to race and the experiences that accompany a person's racial identity.

NOTES
