New York Law Journal
Corporate Update

WWW.NYLJ.COM

An ALM Publication

THURSDAY, JANUARY 7, 2010

CORPORATE CRIME

'Perp Walks' Undermine Presumption of Innocence

By **Howard W. Goldstein**

On June 19, 2009, two Bear Stearns executives were arrested at their homes, handcuffed, fingerprinted at FBI headquarters in Manhattan, and led off to be arraigned at the U.S. District Court for the Eastern District of New York. Their departure from FBI headquarters was photographed and videotaped, and received widespread replay in the press. The so-called "perp walk" was no surprise, as executives too numerous to mention had preceded them in the walk of shame. In fact, the perp walk is a long-standing practice in criminal cases. It was used by J. Edgar Hoover in the 1930's,[1] and its use in white-collar criminal cases is popularly credited to Rudy Giuliani's tenure as United States Attorney for the Southern District of New York in the 1980's, when four executives were arrested, handcuffed in their offices, and paraded before the waiting cameras.[2]

Commentators have noted that the perp walk traces its roots to much earlier in American history, going back to the Puritan practice of shaming,[3] in which, for example, "[a]n adulteress would be condemned to forever wear a scarlet "A"; a Puritan man convicted of having relations with a woman before marriage would be placed in the stocks or pillory."[4] But the Puritan practice of shaming and today's perp walks are different in one critical respect. The shamed Puritans had already been convicted; today's perp walkers have only been arrested and are theoretically cloaked with the presumption of innocence. Indeed, charges against two of the defendants in the first Giuliani perp walk were dropped, and the defendants in the Bear Stearns case were acquitted.

Results like these make it a propitious time to review the propriety of the perp walk—as a matter of law, policy, and prosecutorial ethics.

'Rosenberg'

The Second Circuit first addressed a constitutional challenge to a perp walk in *Rosenberg v. Martin*.[5] In that case, Rosenberg, who had been convicted of murdering two police officers, brought a civil rights action under 42 U.S.C. §1983 against Martin, an assistant chief inspector of police. Among other things, Rosenberg alleged that the police's extensive interactions with the media violated his constitutional rights. As described by the Second Circuit, Rosenberg testified at his civil trial that after his voluntary surrender and arrest, he was moved to the 66th Precinct and

> taken out of the police car a half block away from the station, where television cameras and newsmen were lined up on the street; that as he was dragged toward the cameras, Martin said "He is the killer, and he is going to burn;" and that he later saw video tapes of the scene, of Martin's remark, and of the crowd's angry response. Photographs of the booking…published in unidentified newspapers, were also received in evidence.[6]

The district judge instructed the jury that Rosenberg could recover if "Martin himself, exceeded the limits of proper police procedure and was prejudicial to the plaintiff in exposing him to defamation, misrepresentation, and public obloquy that might have affected his right to a fair trial and that subjected him to personal humiliation and apprehension of bodily harm."[7] The jury found in Rosenberg's favor.

In an opinion by Judge Friendly, the Second Circuit reversed. The court first noted that a Section 1983 claim required the plaintiff to show a violation of his constitutional rights, and not merely state statutory privacy rights or state tort claims such as defamation. The court then addressed the then newly developing right to privacy and rejected Rosenberg's claim, holding that "[t]hus far only the most intimate

HOWARD W. GOLDSTEIN *is a partner at Fried, Frank, Harris, Shriver & Jacobson.* ELIZABETH KOZLOWSKI, *an associate at the firm, assisted in the preparation of this article.*

phases of personal life have been held to be thus constitutionally protected."[8] Rosenberg's Sixth Amendment right to a fair trial claim was rejected as barred by his prior unsuccessful state and federal appeals.

'Lauro'

The Second Circuit next addressed a challenge to a perp walk in *Lauro v. Charles*,[9] another civil rights action brought under Section 1983. In *Lauro*, the plaintiff, a doorman at an Upper East Side apartment building, had been arrested for burglary, petit larceny, and possession of stolen property in connection with an alleged theft from the apartment of a tenant in his building. A couple of hours after Lauro was brought to the policy precinct, someone at the Police Department's Public Information Office called Detective Charles and told him the media was interested in the case and that Lauro should be taken for a perp walk. Lauro was handcuffed, taken out of the precinct house, driven around the block, and then taken from the car back into the precinct house so he could be videotaped by a local news station. Footage of the perp walk was subsequently shown on the local news station.

The district court granted in part Lauro's motion for summary judgment, finding that the perp walk violated his privacy rights, was conducted to humiliate him "with no legitimate law enforcement objective or justification," and therefore violated his Fourth Amendment rights. It also denied Detective Charles' motion for summary judgment on the grounds of qualified immunity.[10]

On appeal, the Second Circuit upheld the district court's finding that Lauro's Fourth Amendment rights had been violated, but reversed the district court's finding that Detective Charles was not entitled to qualified immunity on the ground that the unconstitutionality of the perp walk had not been clearly established at the time it took place.

As to the perp walk, the court, while acknowledging the prevalence of the practice, noted that

> Although a perp walk commonly occurs before any judicial determination that a suspect has actually committed the crime… or even that there is enough evidence to justify a trial, a suspect in handcuffs being led into a station house is a powerful image of guilt. Indeed, the perp walk has been described as a "ritual degradation that publicly signals [the arrestee's] change in status from an ordinary citizen."[11]

Whether dictated by the courts or as a product of their own independent decisions, prosecutors should leave the business of television production to Hollywood.

The court then concluded that privacy cases like *Rosenberg* did not control the Fourth Amendment analysis and that the court had to determine "whether what occurred in this case constitut[ed] an improper exacerbation of an otherwise lawful seizure."[12] Stating that the perp walk might "have been reasonable under the Fourth Amendment had it been sufficiently closely related to a legitimate governmental objective,"[13] and acknowledging that "[t]he interests of the press, and of the public who might want to view perp walks, are far from negligible,"[14] the court nonetheless sustained Lauro's claims, because the public was not viewing his actual transfer to the police station, but rather a "staged recreation of that event."[15] The Court expressly left for another day the constitutionality of a perp walk in which the media is advised of the time and place of a defendant's actual transfer to or from the station house.[16]

'Caldarola'

In *Caldarola v. County of Westchester*,[17] the Second Circuit decided, in yet another Section 1983 case, the question left unanswered in *Lauro*: whether a perp walk choreographed with the media, rather than a staged recreation, violated the defendant's Fourth Amendment rights. In that case, the defendant, a corrections officer, and other of his colleagues were arrested at the Department of Corrections headquarters. They were then videotaped by a County employee as they were transferred from the Corrections Department to cars which were to take them to the police station. The media was alerted to be at the courthouse where the defendants were being arraigned. The district court held that the county's activities had not violated the plaintiffs' constitutional rights.

On appeal, the Second Circuit affirmed. Taking *Lauro* as its touchstone, the court started from the premise that the photographing and videotaping of the defendants constituted a separate seizure for Fourth Amendment purposes and, therefore, had to be separately justified. The court then concluded that, unlike in *Lauro*, the County's actions served legitimate government purposes. The court noted

> The fact that corrections officers—public employees—were arrested on suspicion of grand larceny is highly newsworthy and of great interest to the public at large. Divulging the arrests also enhances the transparency of the criminal justice system, and it may deter others from attempting similar crimes. Furthermore, allowing the public to view images of an arrestee informs and enables members of the public who may come forward with additional information relevant to the law enforcement investigation.[18]

The court found it unnecessary to address whether these legitimate government interests could have been served by alternative means, but suggested that there could be situations in which the government could overstep the bounds of Fourth Amendment reasonableness.[19]

The Justifications

Both in litigation and in public statements, the government has advanced several law enforcement objectives as legitimate reasons for perp walks. But while the *Caldarola* court accepted some of these objectives, a perp walk is not necessary to achieve any of them. One can only wonder, therefore, why the *Caldarola* court, which considered the defendant's minimal privacy rights in the public parking lot in assessing the Fourth Amendment claim, did not also consider the government's alternatives in analyzing the reasonableness of the government's conduct.

First, the Government argues that the perp walk is important in advising the public about the administration of criminal justice.[20] But the government advises the public all the time through press releases, and press releases at least contain the boilerplate admonition—

never found in a perp walk—that an arrest or indictment is only a charge and the defendant is presumed innocent.

Second, prosecutors argue that the perp walk in white collar cases demonstrates to the public that white collar defendants do not get better treatment at the hands of the law.[21] But research did not disclose any studies comparing the percentage of perp walks in white collar cases to the percentage of perp walks in non-white collar cases. And, more importantly, the issue isn't whether white collar defendants shouldn't be arrested (although risk of flight, recidivism, and danger to the community are clearly relevant factors in the decision whether to permit a voluntary surrender), but whether the press should be invited to the event.

Third, prosecutors argue that perp walks help to deter white collar crime.[22] Yet, research did not disclose any empirical proof of such deterrence, and commonsense seems to dictate that if the prospect of a white collar criminal being sentenced to 10 or more years in prison isn't a deterrent, the prospect of a perp walk won't add very much.

Finally, the government argues that the media attention generated by a perp walk could encourage unknown witnesses to step forward.[23] Here again, arrests without perp walks generate plenty of publicity, and there are no statistics on the number of witnesses who have identified themselves to the Government because they saw a perp walk on television to justify this speculation as a basis for undercutting the presumption of innocence.

The Ethics of Perp Walks

When the prosecution facilitates the photographing or videotaping of an arrested person for further public dissemination, it is orchestrating "a powerful image of guilt."[24] Recognition of that fact makes the perp walk a compelling non-verbal statement.[25] ABA Model Rule of Professional Conduct 3.8 provides, however, that "the prosecutor in a criminal case shall:

> f) except for statements that are *necessary* to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused… (emphasis added).

From the prospective of their ethical responsibilities, therefore, prosecutors cannot avoid answering the question of alternative means avoided by the court in *Caldarola*. Indeed, the United States Attorneys' Manual contemplates undertaking this type of analysis. It provides that a prosecutor "shall consider" whether the rights of any party are prejudiced when the prosecutor assists the news media in photographing or videotaping a law enforcement activity, and further warns prosecutors against providing advanced information to the media when executing a warrant.[26] But in every case in which a perp walk is being considered, the question whether the walk is necessary to further the prosecutor's goals must not only be asked, but cannot be answered by speculation.

Conclusion

Choreographed perp walks have been upheld by the courts, but the justifications offered for them by the government have not been subjected to searching scrutiny. The public shaming and exposure associated with perp walks undermines the presumption of innocence. Indeed, one commentator has suggested it is a form of unconstitutional pre-conviction punishment.[27] Whether dictated by the courts or as a product of their own independent decisions, prosecutors should leave the business of television production to Hollywood.

1. Dave Krajicek, "The Crime Beat: Perp Walks," http://www.justicejournalism.org/crimeguide/chapter01/sidebars/chap01_xside5.html (last visited Dec. 28, 2009).
2. William R. Mitchelson Jr. and Mark T. Calloway, "'Perp Walk' Turning Into a Parade," NAT'L L.J., March 20, 2006, at S1.
3. Kyle J. Kaiser, "Twenty-First Century Stocks and Pillory: Perp Walks as Pretrial Punishment," 88 IOWA L. REV. 1205, 1209 (2003) (footnotes omitted) (tracing the history of perp walks to Puritan practices).
4. Id.
5. 478 F.2d 520 (2d Cir. 1973), cert. denied, 414 U.S. 872 (1973).
6. Id. at 523 (footnote omitted).
7. Id. at 524.
8. Id. at 524-25 (citing *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965); *Eisenstadt v. Baird*, 405 U.S. 438, 453-54 (1972); and *Roe v. Wade*, 410 U.S. 113 (1973)).
9. 219 F.3d 202 (2d Cir. 2000).
10. Id. at 205-06.
11. Id. at 204 (citing John Tierney, "The Big City: Even Perps May Prefer Walk of Fame," N.Y. TIMES, March 1, 1999, at B1 (quoting Prof. David Kertzer) (internal quotation marks omitted)).
12. Id. at 209.
13. Id. at 212.
14. Id. at 213.
15. Id.
16. Id.
17. 343 F.3d 570 (2d Cir. 2003).
18. Id. at 576.
19. Id. at 577.
20 See, e.g., Mitchelson & Calloway, supra note 2 (citation omitted).
21. Id.
22. Id.; see also Ernest F. Lidge III, "Perp Walks and Prosecutorial Ethics," 7 NEV. L.J. 55, 67 (2006) (citations omitted) (explaining that despite the government's deterrence justification, "in most circumstances, these rationales will not justify a perp walk." Id.).
23. *Caldarola*, 343 F.3d at 576; see also Mitchelson & Calloway, supra note 2; Lidge, supra note 22, at 67.
24. *Lauro*, 219 F. 3d at 204.
25. See Lidge, supra note 22, at 58.
26. UNITED STATES ATTORNEYS' MANUAL, §§1-7.600(B)(2) & (D), available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title1/title1.htm.
27. Kaiser, supra note 3.