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Robert J. McGuire

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## **TERRY V. OHIO: A POLICE COMMISSIONER'S MUSINGS**

ROBERT J. MCGUIRE\*

My name is Bob McGuire. I am an alumnus of the St. John's University School of Law, and I served as Police Commissioner for six years under Mayor Ed Koch in the late 1970s and early 1980's.

I said to Jim Fyfe this morning, "I feel a little bit like a butcher at an orthopedic surgeons' convention here. You know, I'm in the same general area, but I have very little substantively to offer, given the talent that's at this conference." The other thing to note is that Jim Fyfe would not have stolen fifteen minutes of my speaking time if I was still the Police Commissioner and he was a lieutenant.

Seriously, Jim Fyfe is a great example of what a New York City police officer should be. He is an outstanding criminologist and a great story teller. Indeed, his ability to tell police "war stories" and his reference to "tossing creeps" reminded me of one of my favorite stories.

We used to deal with many emotionally disturbed people—called "psychos" in the old days. One of them was a man named Luis Baez. Mr. Baez held a pair of shears and was threatening to kill his mother. About twenty cops lined up in a phalanx in an alley and ordered him to surrender. Unfortunately, he jumped down the fire escape of the tenement and came at the cops, who had nowhere to go. They all began to shoot at the same time and twenty four bullets penetrated Baez's body—he died instantaneously.<sup>1</sup> I got very upset and said, "We're no longer going to treat sick people as if they were criminals." As a result, we put in all

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\* Of Counsel, Morvillo, Abramowitz, Grand, Iason & Silberberg, P.C., New York. B.A., Iona College, 1958; LL.B., St. John's University, 1961; LL.M., New York University, 1962; Assistant United States Attorney, United States Attorney's Office for the Southern District of New York, 1962-1966; Police Commissioner, New York, 1978-1983.

<sup>1</sup> See Todd S. Purdam, *Questions Swirl Around a Fatal Shooting by Police*, N.Y. TIMES, Jan. 5, 1988, at B1.

kinds of new training and procedures for the treatment of emotionally disturbed people. In effect, we simulated the hostage-negotiating process. We started by changing the jargon—it is no longer proper to call these sick folks “psychos.” We changed from “psycho” to “emotionally disturbed person,” which in police department jargon was elided to “EDP.”

In any event, I was out for dinner one night with my former law partner, riding in my car and scanning the radio, when we heard the radio dispatcher ask if there was any unit available for an EDP run. My former law partner said to me, “What are they talking about?” I was rather smug at that time, believing that I had succeeded in changing the Department culture concerning emotionally disturbed people, so I turned to my driver, who was a detective, and said, “Tell Andy what an EDP is.” He replied in a deadpan manner, “an Emotionally Disturbed Psycho.”

I do not have a great deal of insight on the workings of *Terry*, even though I was a prosecutor and a criminal defense lawyer for many years. As Police Commissioner, I was familiar with the issue from afar, but over the last several days I have had numerous conversations with senior officials of the Manhattan District Attorney's office about the issue, and, in a sense, I am communicating their views.

They continue to be concerned about the impact of *Terry* on police conduct, although I do not believe that they would prefer some other approach. As Jim Fyfe has said, “I think we on the law enforcement side feel that in a fallible world, *Terry* is as good as you're going to get.”<sup>2</sup> These officials are, nonetheless, seriously concerned about certain issues, such as perjury or the shaping of testimony to conform to the latest judicial construction of *Terry*.

They are also somewhat concerned about the vagaries of the judicial decisions that have interpreted *Terry*. The officials feel that this contributes to a continuing source of tension in the Office, relative to their relationship with cops. As Jim Fyfe stated, “Cops are going to ‘toss’ people on the street for safety reasons even if it means that because the search is not supported by probable cause or reasonable suspicion, there is no successful prosecution.”<sup>3</sup> Police often allude to the fact that they would

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<sup>2</sup> James J. Fyfe, *Terry: A[n Ex-] Cop's View*, 72 ST. JOHN'S L. REV. 1231 (1998).

<sup>3</sup> *Id.*

rather be judged by a jury of twelve than be killed by one man with a gun on the street. Police work is a very serious life and death business, so it is questionable whether you can coerce appropriate behavior by judicial decisions in this area.

Many of you will recall the "dropsy" cases in the Manhattan District Attorney's Office in the 1960s.<sup>4</sup> There were so many cases coming into the Office where the cops testified that the suspect had "dropped" a brown paper bag on the street as the officer approached him, that District Attorney Frank Hogan went before the court and basically invited it to shift the burden of proof to the government in such cases. The New York Court of Appeals rejected that approach.<sup>5</sup> The case, however, demonstrates how serious this issue was to the District Attorney and his assistants, and how they believed that the cops were basically shaping their testimony to conform to what their view of the law was at the present time.

I do recall, during my administration, several cases in New York City which appeared to be ridiculous in light of the reality on the street. In one such case, three people, two men and a woman, in the vicinity of Times Square went into a novelty shop and bought a holster for a pistol. The three of them left the store and one of the males was holding a brown paper bag. The woman was holding a handbag. They were being observed by three plainclothes officers who considered their behavior suspicious. The three individuals then saw the three cops, began to move more quickly and broke into a run. The cops went after the three individuals, who were passing the paper bag back and forth among themselves. The police finally apprehended the three and proceeded to search them. In the handbag of the female suspect they found a loaded weapon. The court granted a motion to suppress on the grounds that there was no probable

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<sup>4</sup> See, e.g., *People v. Baldwin*, 250 N.E.2d 62, 64 (N.Y. 1969) (concluding that narcotics evidence, seized after defendant dropped an envelope containing the drugs, should be suppressed, because there was no consent, and the defendant did not abandon the envelope); *People v. Anderson*, 246 N.E.2d 508 (N.Y. 1969) (holding that seizure of heroin contained in tin box, after defendant dropped the box, was unlawful because the defendant did not abandon the box).

<sup>5</sup> See *People v. Berrios*, 270 N.E.2d 709, 713 (N.Y. 1971) ("The fact that some witnesses may lie does not require a change in the burden of proof for it is our view that [a burden shift] is no more effective in preventing perjury than the present burden of proof.").

cause to stop and frisk these people.<sup>6</sup>

You could not tell a single police officer that this was a rational decision. More importantly, many of the "dropsy" cases resulted in split decisions, and when you talked to cops and attempted to persuade them to obey the law and to testify truthfully, they would say to you, "The judges themselves don't know what the law is, so how are we supposed to know?" The cases swayed all over the place and judges were dealing with the benefit of hindsight, whereas the police were dealing with an instantaneous street decision where a mistake might result in the loss of life. I think you have to understand their perspective on this very difficult issue.

A second area that is of concern to police administrators is the tensions that are generated, particularly in minority communities, by *Terry* stops. There is no question when you talk to African Americans and Hispanics that they feel that many of these stops are due to race.<sup>7</sup> I grew up in New York and I have had cops use language to me that was not very pleasant, even if I questioned what was happening at a police scene. Police officers do not necessarily speak disrespectfully to you because you are African American or Hispanic. They may be inartfully asserting their authority in order to get people to do what they want, and that is part of police work. However, some cops go over the line. Some cops just do not know how to do things in a courteous and professional manner. There is no question that this behavior serves to exacerbate community tensions.

I recently served on Mayor Giuliani's Police/Community Relations Task Force.<sup>8</sup> We went into the communities and talked to people all over the City. We talked to the police and to members of the community. Most of the members of the task

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<sup>6</sup> See *People v. Batista*, 417 N.Y.S.2d 724 (App. Div.), *aff'd*, 417 N.E.2d 92 (N.Y. 1980).

<sup>7</sup> See generally Sean Hecker, *Race and Pretextual Traffic Stops: An Expanded Role for Civilian Review*, 28 COLUM. HUM. RTS. L. REV. 551, 551 (1997) (noting that empirical studies "support the long-standing belief in minority communities that persons of color are disproportionately forced to suffer the humiliation and invasion of privacy inherent in traffic stops"); Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 347-54 (1998) (discussing results of various state studies on the role of race in traffic stops).

<sup>8</sup> The task force was created by the Mayor in August 1997, in response to allegations that police had brutalized Haitian immigrant Abner Louima while he was in their custody. See Ellis Henican, *A Big Task Ahead for This Particular Force*, NEWSDAY, Aug. 20, 1997, at A5.

force were members of the minority community. Surprisingly, there was very little discussion about car stops. There was a lot of discussion about discourtesy, and about picking on kids—but not in the context of stops, frisks or the *Terry*-type situations. I did not think much about it at the time because I was not focusing on *Terry*, but it was enlightening to me that with the tremendous emphasis in New York on addressing quality of life offenses, which has resulted in hundreds of thousands more encounters between the police and members of the community, that there were so few *Terry* complaints as compared to fifteen or twenty years ago.

To sum up, I think we are in pretty good shape in the *Terry* area. I think where we have a lot more work to do is in the areas of teaching, training, supervision on the street, report-writing, and investigative follow-up where necessary, as is done in the corruption area. Perhaps we need to carry out some undercover operations and stings to test whether what cops are testifying to actually happened. I think there has to be much more cooperation with the prosecutors' offices and the police department. I believe there has to be cross-training of police and assistant district attorneys, so that not only are they aware of, and enlightened about, the potential problems in this area, but they know what to do if they uncover such a problem. Oftentimes prosecutors will just decline prosecution on such a case and not report the cop, even if they believe that there is overt perjury in the case. This is where there has to be much more work done and greater cooperation between police supervisors and assistant district attorneys.

That is about all I have to say on the subject of *Terry*. I will end with a quick "war story" which has nothing to do with *Terry*. In 1979, the Pope came to New York and like all other heads of state he had great security; only in his case it was led by a bishop, not an ex-cop. His name was Paul Marcincus.

I went out to JFK airport to meet the Pope, and we did have a few cops out there, I must say. You could not see a thing but blue uniforms on the runway. After the plane landed, Bishop Marcincus came down before the Pope and did not even say hello to me before he began to berate me for running a "police state" in New York City. "Get rid of the cops, it is outrageous," he said. I nodded, but did not move a single cop. For the next three days, Bishop Marcincus really went after me. I could do nothing but

keep quiet and go on with my work. I did not change the police deployment because this Pope was not going to get hurt on my watch.

Three days later, the Pope's motorcade moved from Bowling Green to Brooklyn, past the church of the Bishop of Brooklyn, who was an old friend of the Pope, on its way out to Shea Stadium for a youth rally, the Pope's last function in New York. It was pouring rain and as the Pope drove past the Bishop's cathedral, he noticed thirty handicapped children in wheelchairs in front of the church. Sure enough, the Pope stopped the motorcade, got out and began to talk to and bless the kids.

Bishop Marcincus was apoplectic. He was in the advance car with me and he jumped out and ran over to the Pope and began talking to him in Italian. The Pope waved him off and kept blessing the kids. The Bishop slowly came back to the car and got in. He was soaking wet. He looked at me and said, "He told me he wouldn't stop. If you can't trust the Pope, who can you trust?"

The quick sequel to this story is that we proceeded on to Shea Stadium, and I stood there next to a big beefy Irish cop when the Pope's armored vehicle came out onto the playing field. Miraculously, the rain stopped, the clouds parted, and the sun began to shine.<sup>9</sup> It really was eerie. All of a sudden I heard this cop mutter to himself, "Holy blankety blank, I'm going back to mass on Sunday."

Thank you all very much.

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<sup>9</sup> See David Butler, *John Paul's U.S. Triumph*, NEWSWEEK, Oct. 15, 1979, at 38.