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TERRY AND COMMUNITY POLICING

JEROME H. SKOLNICK*

In the interest of disclosure, Jim Fyfe and I are co-authors of a book.¹ Well, that's my first criticism.

Actually, I am going to say something that I was not sure I wanted to say, which is that the two war stories that were just told about stops were not *Terry*² stops.³ It is interesting that you used those illustrations as *Terry* stops, but what you had was a crime that had already been committed, and you had an identification of the perpetrator in both of those instances. Those were not about crimes that were about to be committed, which is what a *Terry* stop is all about. It's about reasonable suspicion. Jim Fyfe had a perfect right to stop those people. In those instances, the crime had already been committed.

Because I regard Jim as perhaps the most sophisticated ex-police officer there ever was, the fact that he could make such a mistake suggests, in a way, how difficult it is for police to really understand this delicate distinction in the law about crimes about to be committed. What police will do, as Professor Raymond says,⁴ is what we all do when we want to sustain a story, which is to focus on those parts of the story that will support what we want supported. And, as we know, in any legal action where facts are discussed, they are frequently in dispute. One party says it happened this way, the other party says it happened that way. This is, then, a very delicate area.

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¹ JEROME H. SKOLNICK & JAMES J. FYFE, *ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE* (1993).

² *Terry v. Ohio*, 392 U.S. 1 (1968).

³ See James J. Fyfe, *Terry: A[n Ex-] Cop's View*, 72 ST. JOHN'S L. REV. 1231 (1998).

⁴ See Margaret Raymond, *Police Policing Police: Some Doubts*, 72 ST. JOHN'S L. REV. 1255 (1998).

One of the points that Professor Raymond brought up, kind of tangentially, is really very important. This is the question of the exclusionary rule.⁵ I was at a conference a couple of years ago at Harvard Law School that Charles Ogletree and Alan Dershowitz organized on police lying. You may recall that Alan was writing and talking about police "testilying" when he was part of the Simpson defense team.⁶ Interestingly, the chief speaker at that conference was Bill Bratton, then the Police Commissioner of New York City.⁷

There was a kind of interesting agreement between Bratton and Dershowitz, and it went something like this: Alan Dershowitz said, "Look, the reason you have so much police lying is the exclusionary rule. Everybody knows that the police lie. The judges know it. The prosecutors know it, and I'd be willing to give up the exclusionary rule if we could have police truth telling." Bill Bratton said, "Well, I might agree with you about the exclusionary rule, but I also agree that there's a lot more police lying than most police are willing to concede, and we shouldn't do it. It's not worth it. It's just not right for police to lie in a courtroom."⁸

While I agree with both of them, there is no easy answer to this problem. One of the questions that didn't come up is, what would have happened if there was no *Terry v. Ohio*. Well, the evidence of the gun would have been excluded. Professor Raymond says, "So what?"⁹ But, there is a concern there. Somebody is casing a store about to commit a robbery. Should they get off scot-free because the officer didn't do the right thing? What Officer McFadden did in *Terry* seemed to me, as it did to Jim Fyfe,¹⁰ to be perfectly reasonable. It's very hard to expect a police officer to do anything other than what Officer McFadden did at the point of having reasonable suspicion that somebody is about to rob. You have to expect that police are going to do a stop and

⁵ See *id.*

⁶ See, e.g., Alan Dershowitz, *Is Legal Ethics Asking the Right Questions?*, 1 J. INST. FOR STUDY LEGAL ETHICS 15, 16 (1996).

⁷ William J. Bratton was Police Commissioner of New York City from January 1994 to April 1996. See *Police Commissioners* (visited July 8, 1998) <<http://www.ci.nyc.ny.us/html/nypd/3100/commish.html>>.

⁸ For Alan Dershowitz' perspective on Bratton's comments at this conference, see Dershowitz, *supra* note 6, at 16.

⁹ See Raymond, *supra* note 4.

¹⁰ See Fyfe, *supra* note 3.

frisk under those circumstances. The real problem with *Terry* is that police stop and frisk when it isn't as justified as it was in *Terry*.

Furthermore, I suggest to you that Officer McFadden lied, and I will tell you how. He said, "[T]hey didn't look right to me at the time."¹¹ What was it about them? Well, he described their behavior. But they were two black teenagers. Surely that was the first thing attracting his attention. Why didn't he say it? Because it wasn't politically correct, even at that time, to say it.

There's a real world out there. It's very hard to deal with that real world. I've studied cops now for more years than I even care to count. Cops are always interpreting those tight Fourth Amendment rules and often fabricating what happened to comply with the rules. They are also doing it, more likely, with people in minority communities. And, one of the problems with stop and frisk, which Tracey Maclin is going to talk about in the next session,¹² is that any review of police-community relations finds that there is hostility between the police and minority communities. A lot of that has to do with stop and frisk. Field interrogations that are excessive, that are discourteous, and that push people around, generate friction.

So, what do you do about that? Well, one answer that Jim gave, a very good answer, is that you have internal controls within the police department.¹³ The problem is that the police chief who was in Dade County replaced somebody who had never had those internal controls. And so, one of the things we do need is to have police commissioners like Bob McGuire,¹⁴ that is, enlightened police officials. This is something that we want to support.

The other thing that's interesting to me that hasn't been mentioned at all, although it was somewhat alluded to by Professor Raymond. Someone asked, "Well, are there other possibilities?" and she talked about civilian review boards.¹⁵ I'm not opposed to them. In fact, in a book that Jim Fyfe and I wrote, I

¹¹ *Terry v. Ohio*, 392 U.S. 1, 5 (1968).

¹² See Tracey Maclin, *Terry v. Ohio's Fourth Amendment Legacy: Black Men and Police Discretion*, 72 ST. JOHN'S L. REV. 1271 (1998).

¹³ See Fyfe, *supra* note 3.

¹⁴ See Robert J. McGuire, *Terry v. Ohio: A Police Commissioner's Musings*, 72 ST. JOHN'S L. REV. 1249 (1998).

¹⁵ See Raymond, *supra* note 4.

persuaded Jim that you must have some kind of civilian oversight over internal police investigations because nobody is likely to believe the police when they investigate themselves.¹⁶ The police always say things to me like, "Well, you know, lawyers investigate themselves. Doctors investigate themselves," and I say, "Yeah, nobody believes them either." So you have to have some kind of external review of alleged police misconduct.

You have something else that is now happening in police departments. You don't have as many *Terry* stops. Why not? Because we have so-called quality of life or civility policing. Now, what the police in New York have done is to enforce minor criminality, minor infractions. I'll give you an example of this. The police enforce rules prohibiting people from riding bicycles on the sidewalk. When they stop such people, they ask for identification because they're going to give them a ticket, right? Sometimes these people don't have identification. Well, if they don't have identification, we subject them to arrest. When under arrest, the police conduct a search incident to the arrest, and then they might find a gun or a knife. I saw this happen with somebody who was drinking a beer on the street, who was then searched, and a weapon was found.

So, in a sense, the NYPD has legalized stopping people by focusing upon these infractions. They stop people now for jaywalking. Well, in New York you can easily spot people jaywalking. You ask them for identification, and the scenario follows. Police have walkie-talkies nowadays. Not only do they have walkie-talkies, they have computers, and they can quickly do a warrant search. So we're living in a different policing era than the era of *Terry v. Ohio*. The era we live in now is one where police, through low level enforcement and technology, have far more control.

Quality of life policing has resulted in two things. One is increasing dissatisfaction with the police in minority communities, because of the large number of people who are being stopped. Yet at the same time, among many members of minority communities, there is increasing satisfaction with the police because crime has declined dramatically.

I called the NYPD yesterday to see what the latest homicide statistics were. In 1990, which was the highest homicide year,

¹⁶ See SKOLNICK & FYFE, *supra* note 2.

there were 2245 homicides. In 1996, there were 983. In 1997, there were 770. That's cutting it by two thirds, which is quite remarkable. In the first three months of 1997, there were 281 homicides. In the first three months of 1998, which were warmer months and so you would expect more homicides, there were 141 homicides, which projects out to 564 homicides in the City of New York. This is really quite remarkable.

Is this a result of this quality of life policing? Perhaps it is. The NYPD claims it is. The claim is buttressed by a recent study by Jeff Fagan and Frank Zimring, which found that non-gun homicides are about flat from about 1990 to 1997. The homicide reduction is in gun homicides, and guns have been taken off the street, likely because there is this frequency of stopping and searching. Evidently, people who would more likely carry guns are not carrying them.

So, it's hard to say just where we go with this. I would go in two directions. I'd affirm *Terry*. I agree with Jim when he says that police are not going to refrain from stopping suspicious people.¹⁷ Like him, I think we need to upgrade the quality of police training, and upgrade the quality of police executives. This has been done, largely as a result of Patrick Murphy,¹⁸ who started the Police Executive Research Forum twenty years ago and began to recruit police executives who allowed research and understood the problems of police-community relations.¹⁹

The other buzzword—besides quality of life policing—is police-community relations. Last week the NYPD had a conference for its commanders, about 280 of them, on police-community relations. I was the so-called keynote speaker. One of the things I noted was that what we mean by police-community relations is not entirely clear. We've always meant decentralization, which New York, with its seventy-six precincts, of course has.

What we also need is what Jim called for, which is reviewing police conduct with the community.²⁰ I think we really have to

¹⁷ See Fyfe, *supra* note 3.

¹⁸ Patrick V. Murphy was the Police Commissioner of New York City from October 1970 to May 1973. See *Police Commissioners*, *supra* note 7.

¹⁹ "The Police Executive Research Forum (PERF) is a national membership organization of progressive police executives from the largest city, county and state law enforcement agencies. PERF is dedicated to improving policing and advancing professionalism through research and involvement in public policy debate." *About PERF* (visited July 8, 1998) <<http://www.policeforum.org/home/about.html>>.

²⁰ See Fyfe, *supra* note 3.

have community representatives brought into these precincts to do the kind of review that Jim talked about: That is, call people back, find out how well the cops are doing from the people that they are serving.

There's not going to be an easy answer to crime and community. The fact is that we're going to have more crimes committed in communities where there is poverty, low education, and high immigration.

Interestingly, as I told the police commanders, in a sense the NYPD could be considered the first police department in America to start a police-community relations program. This happened in the era of 1914 to 1918 when Arthur Woods was the Police Chief of New York City.²¹ He started the play street,²² he had employment offices in the precincts. The period of 1890 to 1914 was also the period of high immigration into America from southern and eastern Europe. Arthur Woods had all city ordinances written in Yiddish, Greek, and Italian. The Irish were the cops because they spoke English, and they were empowered to police these immigrants. And, he also said something else, which was, "Take it easy on these people. They're new." He put a human face to policing. So what we really want out of community policing is to put a human face to policing.

²¹ See *Police Commissioners*, *supra* note 7.

²² Play street was "a tenement street from which traffic was cut off several hours a day to permit kids to play out-of-doors without danger." Jerome H. Skolnick, *Introduction to ARTHUR WOODS, POLICEMAN AND PUBLIC* viii-ix (Patterson Smith 1975) (1919).