"WHO'S THE MAN?": MASCULINITIES STUDIES, *TERRY* STOPS, AND POLICE TRAINING

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We men have some strange rituals.[1] One occurs on the basketball court. A player will make a move around a defender and score a basket. Then he'll shout, "who's the man?" He wants his opponent to say, "*You* are the man." This episode is a paradigmatic description of how masculinities work.[2] Men often act with the goal of impressing other men. We gain our

[1] I use "we" in this sentence because I am a man. This Article sometimes uses informal language because that is consistent with poststructuralist feminist methodology. *See* Michael Awkward, *A Black Man's Place in Black Feminist Criticism, in* BLACK MEN ON RACE, GENDER, AND SEXUALITY: A CRITICAL READER 362, 362 (Devon W. Carbado ed., 1999) (arguing for an autobiographical stance in male feminism).

[2] In short, "masculinity" refers to "the socially generated consensus of what it means to be a man, to be "manly" or to display such behavior at any one time." Deborah Kerfoot & David Knights, *"The Best is Yet to Come?": The Quest for Embodiment in Managerial Work, in* MEN AS MANAGERS, MANAGERS AS MEN 86 (David L. Collinson & Jeff Hearn eds., 1996), *cited in* Annastasia Prokos & Irene Padavic, *"There Oughtta Be a Law Against Bitches": Masculinity Lessons in Police Academy Training,* 9 GENDER, WORK & ORG. 439, 442 (2002). "Masculinities" are not always exhibited by men and may be exhibited by women. *See* Frank Rudy Cooper, *Our First Unisex President?: Black Masculinity and Obama's Feminine Side,* 86 DENV. U. L. REV. 633, 634–35 (2009) [hereinafter Cooper, *Our First Unisex President?*] (defining "femininity"). I often pluralize masculinity because "masculinity is not: rather, there are only masculinities in the plural[.]" Paul Smith, *Introduction to* BOYS: MASCULINITIES IN CONTEMPORARY CULTURE 1, 3 (Paul Smith ed., 1996).

masculine esteem and relative masculine stature from other men's acknowledgements of our masculinity. Sociologist Michael Kimmel puts it best: "[w]e are under the constant careful scrutiny of other men. Other men watch us, rank us, grant our acceptance into the realm of manhood. Manhood is demonstrated for other men's approval."[3] The need for other men's approval leads us to constantly call out, "who's the man?." Kimmel helps us see that masculinities are expressed through encounters where one man can demand that another man acknowledge him as "the man."[4]

The existence of the "who's the man?" game is revealed by studying hegemonic masculinity[5] using the literature from the field of masculinities studies.[6] To date, the legal literature on masculinities has focused on employment discrimination and equal protection.[7] This Article

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[3] Michael S. Kimmel, *Masculinity as Homophobia: Fear, Shame, and Silence in the Construction of Gender Identity, in* THE GENDER OF DESIRE: ESSAYS ON MALE SEXUALITY 25, 33 (2005) [hereinafter Kimmel, *Masculinity as Homophobia*] (explaining masculinity as a homosocial enactment); *see also* MICHAEL KIMMEL, MANHOOD IN AMERICA: A CULTURAL HISTORY (1996) [hereinafter KIMMEL, MANHOOD IN AMERICA] (providing a history of U.S. masculinity).

[4] Hence, the title of the movie, "The Man," in which actors Samuel L. Jackson and Eugene Levy vie over who will control a drug sting. The movie's poster declares, "Only one of them can be . . . the man." THE MAN (New Line Cinema 2005).

[5] The hegemonic pattern of masculinity is the definition of manhood that is dominant in a given cultural context. R.W. Connell & James W. Messerschmidt, *Hegemonic Masculinity: Rethinking the Concept*, 19 GENDER & SOC'Y 829, 846 (2005) ("The fundamental feature of the concept [of hegemonic masculinity] remains the combination of the plurality of masculinities and the hierarchy of masculinities.").

[6] The field of masculinities studies describes the ways assumptions about the meanings of manhood are used to justify particular ideas and institutions. GAIL BEDERMAN, MANLINESS AND CIVILIZATION: A CULTURAL HISTORY OF GENDER AND RACE IN THE UNITED STATES 1880–1917 at 7 (1995) (defining the field as the consideration of how ideologies about manhood gain ascension and influence behavior).

[7] For a collection of masculinities and law pieces, see the forthcoming reader, MASCULINITIES AND LAW: A MULTIDIMENSIONAL APPROACH (Frank Rudy Cooper & Ann C. McGinley eds.). *See* Larry Cata Backer, *Gendering the President Male: Executive Authority Beyond Rule of Law Constitutionalism in the American Context*, 25 FLA. INT'L U. L. REV. 341(2008) (criticizing masculinism in popular discussion of the rule of law); Deborah Brake, *The Struggle for Sex Equality in Sport and the Theory Behind Title IX*, 34 U. MICH. J.L. REFORM 13 (2001) (applying masculinities studies to Title IX); Devon Carbado, *Men in Black*, 3 J. GENDER RACE & JUST. 427 (2000) (explaining reasons for essentialism in black men's social movements); David S. Cohen, *No Boy Left Behind?: Single Sex Education and the Essentialist Myth of Education*, 84 IND. L.J. 135 (2009) (describing effects of the essentialist myth of masculinity in primary and secondary schools); Frank Rudy Cooper, *Against Bipolar Black Masculinity: Intersectionality, Assimilation, Identity Performance,*

and Hierarchy, 39 U.C. DAVIS L. REV. 853 (2006) [hereinafter Cooper, *Against Bipolar Black Masculinity*] (considering how intersectionality theory applies to black masculinity in the abstract); Cooper, *Our First Unisex President?*, *supra* note 2 (arguing that stereotypes of black men affected Barack Obama's campaign style); Frank Rudy Cooper, *Race and Essentialism in Gloria Steinem*, 11 BERKELEY J. AFR.-AM. L. & POL'Y 36 (2009) (arguing that essentialism can cause feminists to miss the impact of masculine norms); Nancy E. Dowd, *Masculinities and Feminist Legal Theory*, 23 WIS. J. LAW, GENDER & SOC'Y 201 (2008) (summarizing the relationship between feminist theory and masculinities studies); John Kang, *Manliness and the Constitution*, 32 HARV. J.L. & PUB. POL'Y 261 (2009) (arguing masculinism is rooted in the Founders' modes of thinking); Michael Kimmel, *Integrating Men Into the Curriculum*, 4 DUKE J. GENDER L. & POL'Y 181 (1997); D. Aaron Lacy, *The Most Endangered Title VII Plaintiff?: Exponential Discrimination Against Black Males*, 86 NEB. L. REV. 552 (2008); Nancy Levit, *Feminism for Men: Legal Ideology and the Construction of Maleness*, 43 UCLA L. REV. 1037 (1996) (relating masculinities studies to feminist principles); Ann C. McGinley, *Creating Masculine Identities: Bullying and Harassment "Because of Sex,"* 79 U. COLO. L. REV. 1151 (2008) (linking masculine norms and workplace bullying); Ann C. McGinley, *Harassing "Girls" at the Hard Rock*, 2007 U. ILL. L. REV. 1229 (applying masculinities studies to employment discrimination) [hereinafter McGinley, *Harassing "Girls"*]; Ann C. McGinley, *Hillary Clinton, Sarah Palin, and Michelle Obama: Performing Gender, Race, and Class on the Campaign Trail*, 86 U. DENV. L. REV. 709 (2009) (comparing identity performances of Clinton, Palin, and Obama during 2008 Presidential campaign); Ann C. McGinley, *Masculinities at Work*, 83 OR. L. REV. 359 (2004) (applying masculinities studies to the prevailing structures of workplaces); Camille A. Nelson, *Lyrical Assault: Dancehall Versus the Cultural Imperialism of the North-West*, 17 S. CAL. INTERDIS. L.J. 231 (2008) (discussing masculinity norms in dancehall music); Marc Poirier, *Hastening the Kulturkampf: Boy Scouts of America v. Dale and the Politics of American Masculinity*, 12 LAW & SEX. 271 (2003); Valorie K. Vojdik, *Beyond Stereotyping in Equal Protection Doctrine: Reframing the Exclusion of Women From Combat*, 57 ALA. L. REV. 303 (2005) (arguing for substantive equality approach to equal protection doctrine to address discrimination in all-male institutions); Valorie K. Vojdik, *Gender Outlaws: Challenging Masculinity in Traditionally Male Institutions*, 17 BERKELEY WOMEN'S L.J. 68 (2002) [hereinafter Vojdik, *Gender Outlaws*] (arguing masculinity is inscribed in the very structures of all-male institutions by means of rituals); FLOYD D. WEATHERSPOON, AFRICAN-AMERICAN MALES AND THE LAW: CASES AND MATERIALS (1998); Verna L. Williams, *Reform or Retrenchment?: Single-Sex Education and the Construction of Race and Gender*, 2004 WIS. L. REV. 15 (critiquing ideologies behind proposals for male-only education for black boys).

There are some articles on masculinities and criminal justice. *See* Katherine K. Baker, *Sex, Rape, and Shame*, 79 B.U. L. REV. 663 (1999) (identifying masculine norms as a cause of acquaintance rape); John O. Calmore, *Reasonable and Unreasonable Suspects: The Cultural Construction of the Anonymous Black Man in Public Space (Here be Dragons)*, *in* PROGRESSIVE BLACK MASCULINITIES 137 (Athena D. Mutua ed., 2006) (discussing intersectionality of blackness and masculinity in racial profiling); Angela P. Harris, *Gender, Violence, Race, and Criminal Justice*, 52 STAN. L. REV. 777 (2000) [hereinafter Harris, *Gender, Violence*] (analyzing how masculinity effects the criminal justice system); Joan W. Howarth, *Executing White Masculinities: Learning From Karla Faye Tucker*, 81 OR. L. REV. 183 (2002) (arguing that white masculinities affect the death penalty discourse); Joan W. Howarth, *The Geronimo Bank Murders: A Gay Tragedy*, 17 LAW & SEX. 39 (2008); Cynthia Lee, *The Gay Panic Defense*, 42 U.C. DAVIS L. REV. 471 (2008) (critically reviewing the

applies the masculinities studies literature to the field of criminal procedure and asks the following question: *How does masculinity affect policing?* This is an important question, given that policemen have nearly unique powers to make others acknowledge them as "the man" while ostensibly merely performing their duties.

The short answer is that officers may get "macho" with civilians.[8] Specifically, they may enact a command presence in situations where it only serves to boost the officer's masculine esteem.[9] To enact command presence is to take charge of a situation.[10] It involves projecting an aura of confidence and decisiveness.[11] It is justified by the need to control dangerous suspects.[12] A situation that does not justify enacting command presence is what I call a "masculinity contest." A masculinity contest is a face-off between men where one party is able to bolster his masculine esteem by dominating the other. A prototypical masculinity contest is a bar fight. Men will glare at each other and ratchet up their challenges until one party backs down or is subdued. Male police officers may sometimes be tempted to turn encounters with male civilians into masculinity contests.[13]

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consideration of identity in cases about the gay panic defense); Christopher D. Man & John P. Cronan, *Forecasting Sexual Abuse in Prison: The Prison Subculture of Masculinity as a Backdrop for "Deliberate Indifference"*, 92 J. CRIM. L. & CRIMINOLOGY 127 (2001) (arguing that masculine norms lead to prison rape).

[8] By "macho" I mean aggressive posturing, such as pushing people around, that is meant to establish one's masculinity.

[9] Unless otherwise specified, by "masculine esteem," I mean both men's masculine esteem in their own opinions and in the eyes of others. *See* Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1260 n.2 (2000) (contrasting "self identity," "attributal identity," and the process of "working," or providing signals about, one's identity).

[10] Mary Newman, Comment, *Barnes v. City of Cincinnati: Command Presence, Gender Bias, and Problems of Police Aggression*, 29 HARV. J.L. & GENDER 485, 491 (2006) (linking command presence to aggression) (quoting Erwin Chemerinsky, *An Independent Analysis of the Los Angeles Police Department's Board of Inquiry Report on the Rampart Scandal*, 34 LOY. L.A. L. REV. 545, 563 (2001)).

[11] Newman, *supra* note 10, at 487 (defining term).

[12] *See id.* (quoting Chemerinsky, *supra* note 10, at 563) (describing command presence).

[13] An extreme example is the Louima case in New York City, where an officer handed his gun belt to another officer and traded blows with Louima in the street. The officer later anally raped Louima with a broomstick at the station. For a general discussion of the

The insight that policemen may sometimes enact command presence in order to stage masculinity contests and boost their masculine esteem is important because it helps explain patterns of law enforcement. For instance, scholars have long noted that officers sometimes use their *Terry v. Ohio*[14] stop and frisk powers to racially profile.[15] The usual explanation for that practice is racial animus.[16] However, concentrating solely on race as an explanation for police behaviors ignores the fact that the overwhelming majority of police officers are men and the

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Louima assault, see Anthony V. Alfieri, *Prosecuting Race*, 48 DUKE L.J. 1157 (1999) (using Louima case to investigate the ethics of racialized prosecutions).

This Article does not argue that command presence is never necessary. Certainly, police officers must be able to control suspects who are acting in threatening ways. However, it opposes the indiscriminate use of command presence for the sake of demonstrating who is "the man," and argues that police officers should not stage *masculinity contests* with civilians.

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

[15] *See generally* Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956 (1999) (noting *Terry* stop and frisks are used to racially profile). A stop is a brief detention for purposes of investigating a reasonable suspicion that a crime is afoot. *Terry*, 392 U.S. at 22. A frisk is a pat down of the outer surfaces of a person's clothing for purposes of dispelling a reasonable suspicion that a person with whom the officer is lawfully engaged is armed. *Id.* at 10 & n.13; *see also id.* at 32 (Harlan, J., concurring) (explaining requirements for frisk).

Racial profiling is the singling out of racial minorities for suspicion on the basis of their race. *See, e.g.*, Andrew Taslitz, *Do We Want Citizens to Know Their Rights, and If So, How Do We Tell Them? Bullshitting the People: The Criminal Procedure Implications of a Scatological Term*, 39 TEX. TECH L. REV. 1383, 1413 (2007) (declaring disparate treatment is obvious in racial profiling). For further discussions of racial profiling, see, for example, Frank Rudy Cooper, *The "Seesaw Effect" From Racial Profiling to Depolicing: Toward Critical Cultural Theory*, in THE NEW CIVIL RIGHTS RESEARCH: A CONSTITUTIVE APPROACH 139 (Benjamin Fleury-Steiner & Laura Beth Nielsen eds., 2006) [hereinafter Cooper, *The "Seesaw Effect"*]; Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. MIAMI L. REV. 425 (1997) (describing and critiquing the link between the doctrine and racial profiling practices); BERNARD E. HARCOURT, AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE (2007) (arguing we should abandon predictive means of identifying suspects); Sherri Sharma, *Beyond "Driving While Black" and "Flying While Brown": Using Intersectionality to Uncover the Gendered Aspects of Racial Profiling*, 12 COLUM. J. GENDER & L. 275 (2003) (discussing racial profiling of women and how it changes our perception of that phenomenon and hate crimes).

[16] *See, e.g.*, I. Bennett Capers, *On Justitia, Race, Gender, and Blindness*, 12 MICH. J. RACE & L. 203, 219–20 (2006) (connecting racial profiling to racial stereotyping).

overwhelming majority of those they stop are men.[17] As David Sklansky says, "one train may hide another."[18] I contend that the desire to boost one's masculine esteem is a train traveling behind, and obscured by, the desire to boost one's racial esteem in some officers' decisions to disproportionately stop and frisk men belonging to racial minorities.

        For instance, masculinities studies helps to further explain racial profiling by noting that the hegemonic pattern of U.S. masculinity incorporates an expectation that one denigrates racial minority males.[19] So, racial profiling demonstrates that race and gender intersect; the practice can serve a dual purpose of boosting both racial and masculine esteem. Thus far, criminal procedure scholars have failed to see that the use of *Terry* stops to racially profile is a product of gender as well as race.

        If policemen are using *Terry* stops and frisks to play the game of "who's the man?" rather than just to gather evidence of crime, then we need to change the gender dynamics of policing. I propose that we do so by changing the cultures of police forces. This can be achieved by establishing extensive training programs designed to root out the attitudes and rituals that perpetuate a macho police culture.[20]

        In order to demonstrate that the *Terry* doctrine's promotion of masculinity contests is a problem that ought to be addressed by training programs, this Article is structured as follows. In Part I, I propose a comprehensive theory of how masculinities affect policing. I review the hegemonic masculinities school of thought, which is the dominant school within masculinities studies, and identifies the following background

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[17] Most police officers are men. *See* NATIONAL CENTER FOR WOMEN & POLICING, EQUALITY DENIED: THE STATUS OF WOMEN IN POLICING: 2001 1 (2002), *available at* http://www.womenandpolicing.org/PDF/2002_Status_Report.pdf (listing women police officers at 12.7%). They mostly stop men. *See generally* ELIOT SPITZER, THE NEW YORK CITY POLICE DEPARTMENT'S "STOP AND FRISK" PRACTICES: A REPORT TO THE PEOPLE OF THE STATE OF NEW YORK FROM THE OFFICE OF THE ATTORNEY GENERAL 1 (1999), *available at* http://www.oag.state.ny.us/media_center/1999/dec/stp_frsk.pdf (detailing racial profiling by the New York City Police Department).

[18] *See* David A. Sklansky, *"One Train May Hide Another": Katz, Stonewall, and the Secret Subtext of Criminal Procedure*, 41 U.C. DAVIS L. REV. 875, 877 (2008) (quoting KENNETH KOCH, *One Train May Hide Another*, *in* ONE TRAIN 3, 3–4 (1994)).

[19] Kimmel, *Masculinity as Homophobia, supra* note 3, at 38.

[20] On the reproduction of masculinist cultures, see generally Prokos & Padavic, *supra* note 2 (arguing police training programs convey hidden lessons about the primacy of masculinity) and Vojdik, *Gender Outlaws, supra* note 7 (describing rituals that inscribe masculinity in the foundations of male-dominated institutions).

principles of the hegemonic pattern of masculinities[21] in the United States: (1) men's concern with the opinions of other men;[22] (2) anxiety over whether one has proved one's manhood;[23] (3) a competitiveness reflected in a need to dominate other men and a general aggressiveness;[24] and (4) a denigration of contrast figures reflected in a repudiation of femininity and homosexuality as well as subordination of racial minorities.[25] Next, I describe two manifestations of the hegemonic pattern of U.S. masculinity: (1) a chip-on-one's-shoulder attitude known as the culture of honor stance and (2) an exaggeration of masculine qualities known as hypermasculinity. Then I identify two important aspects of the pattern of police officer masculinity that is hegemonic in the U.S.: (1) the predominance of command presence as a paradigm for police officer behavior and (2) the unofficial rule that police officers must punish disrespect. All of those aspects of masculinity come together to create and enhance the risk that policemen will enact command presence in order to stage masculinity contests with male civilians.

Having developed a comprehensive theory of police officer masculinity, Part II tests and applies that theory by considering the *Terry* decision. First, I demonstrate that a crucial part of the decision seems to be animated by the assumptions behind the hegemonic patterns of U.S. and police officer masculinity. Specifically, I suggest that part of the *Terry* Court's refusal to exclude evidence obtained from stops and frisks not based on probable cause derives from its conclusion that officers sometimes

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[21] The pattern of masculinity that is hegemonic in a particular cultural context is "normative" in the sense of serving as the ideal for which all men are supposed to strive. Connell & Messerschmidt, *supra* note 5, at 832; *see also id.* at 846 (declaring that "hegemony works in part through the production of exemplars of masculinity").

[22] Men's focus on the opinions of other men is sometimes referred to as "homosociality," which describes manhood as something one creates in one's interactions with other men. *See* Kimmel, *Masculinity as Homophobia, supra* note 3, at 33–34 (describing intra-gender perspective).

[23] Anxiety describes the insecurity men constantly feel about whether they have proven their manhood. *See id.* at 31 (declaring masculinity to be "a relentless test").

[24] Competitiveness describes the understanding that one proves one's manhood by besting other men. *See* Cooper, *Against Bipolar Black Masculinity, supra* note 7, at 859 (contending manhood is proved by besting other men).

[25] The manhood characteristic of white, heterosexual, upper-class, Christian men has been installed as the ideal and contrast figures whose identities deviate from those characteristics, particularly women, gays, and racial minorities, have had their identities denigrated. *See* Kimmel, *Masculinity as Homophobia, supra* note 3, at 37–39.

initiate encounters with citizens for reasons unrelated to evidence-gathering.[26] The Court later acknowledges that in such encounters, policemen may be "motivated by the officers' perceived need to maintain the power image of the beat officer, an aim sometimes accomplished by humiliating anyone who attempts to undermine police control of the streets."[27]

Part II also discusses how the *Terry* Court's implicit assumption that officers will inevitably engage in masculinity contests is consistent with mainstream views about police at the time. This may have subtly led the *Terry* Court to favor an answer to the question of whether officers could conduct stops and frisks without probable cause that allowed officers to shore up their masculinity. Additionally, I show that contemporary incidents of police bullying by means of *Terry* stops and frisks which appear to be solely incidents of racial profiling are actually instances where race and masculinity intersect to produce the result.

Having demonstrated the risk that police officers will turn *Terry* stops into masculinity contests, Part III proposes responding to such masculinity-based police bullying by changing the cultures of police forces. In this Part, I distinguish my views from those of legal scholar Angela Harris by arguing that the solution to masculinity-based police bullying is to train officers to enact command presence only when it is necessary, not to attempt a dramatic change from a punitive to a restorative model of justice.[28] Then I detail how training currently fails to properly instruct officers on when to enact command presence. Finally, I propose that police training explicitly address racial and gender stereotypes, and that officers be trained in how to verbally diffuse tense situations.

Having explained how to get police officers to stop initiating masculinity contests, Part IV concludes by explaining why officers themselves would be better off if they stopped bullying civilians in futile attempts to maintain their image as "the man."

Before starting the substantive analysis, it will be helpful to note that the insights in this Article are most applicable to men. After all,

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[26] Terry v. Ohio, 392 U.S. 1, 13 (1968) (contending that such purposes cannot be deterred by application of the exclusionary rule to other similar cases).

[27] *Id.* at 14–15 n.11 (quoting LAWRENCE P. TIFFANY ET AL., DETECTION OF CRIME: STOPPING AND QUESTIONING, SEARCH AND SEIZURE, ENCOURAGEMENT AND ENTRAPMENT 47–48 (Frank J. Remington ed., 1967)).

[28] *See* Harris, *Gender, Violence, supra* note 7, at 804 (calling for a shift to a restorative justice model).

masculinities are more often, though hardly exclusively, employed by men.[29] Policemen have a tendency to act in the bullying ways that this Article describes. Policewomen, because they are subject to the norms of this male-dominated field, are likely also prone to act in those ways. This Article does not, however, seek to establish the existence of those tendencies in policewomen.

I. A THEORY OF POLICE OFFICER MASCULINITY

There is one essay that describes the relationship between masculinity and the police—Angela P. Harris's *Gender, Violence, Race and Criminal Justice*—which serves as a precursor to this argument. She begins by describing the circumstances of NYPD police officer John Volpe's anal rape of Abner Louima with a broomstick in the bathroom of a stationhouse.[30] She then asserts that "men use violence or the threat of violence as an affirmative way of proving individual or collective masculinity, or in desperation when they perceive their masculine self-identity to be under attack."[31] Because policing is a male-dominated and masculine field, policemen will be prone to two phenomena: the culture of honor stance and hypermasculinity. In cultures of honor, men see insults as reducing their social standing and violence as a means of restoring their honor.[32] Harris defines hypermasculinity as a masculine identity in which physical aggression is exalted and femininity and homosexuality are denigrated.[33] For Harris, hypermasculine policing in a culture of honor leads to police brutality, mostly against men of color.[34] Louima's alleged assault on a police officer "was a threat to the masculinity of the officers in Volpe's unit and to the masculinity of New York's finest as a whole."[35] So Volpe's anal rape of Louima is best described as not just an incident of

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[29] *See* Cooper, *Our First Unisex President?*, *supra* note 2, at 634–35 (distinguishing masculinities from maleness).

[30] For a discussion of the Louima case, see Alfieri, *supra* note 13.

[31] Harris, *Gender, Violence, supra* note 7, at 781.

[32] *Id.* at 790.

[33] *Id.* at 793. *See also* discussion *infra* Part I.A.2 regarding the culture of honor stance and hypermasculinity.

[34] *See id.* at 796–98 (discussing police brutality).

[35] *Id.* at 798.

racism, but also a product of anxieties about masculinity. This Article finds Harris's analysis to be compelling but in need of significant expansion.

Whereas Harris focuses on the culture of honor stance and hypermasculinity, I will provide a more comprehensive account of the structure of masculine identities in general and the hegemonic pattern of police officer masculinity in particular. Delving deeper into the hegemonic pattern of police officer masculinity, I explain how the basic police practices of enacting command presence and punishing disrespect express masculine impulses. I will also expose the risk of police officers using command presence solely to boost their masculine esteem by initiating masculinity contests.

In the interest of explaining the impact of officers' desires to be "the man," this Article brings intersectionality theory to bear on the field of criminal procedure. Intersectionality theory was built on the insight that the intersection of race and gender causes women of color to experience the world differently than both men of color and white women.[36] As I have stated elsewhere, intersectionality theory provides the "insight that identities are always formed at the place where categories of identity meet."[37] We are all always "raced, gendered, sex oriented, and so on," all at the same time.[38] Consequently, the sense of self-identity of a man who is also black is distinct from that of a black woman or a non-black man.[39]

We can use such intersectional insights to understand why police officers choose to act in particular ways. Sherri Sharma's article, *Beyond "Driving While Black" and "Flying While Brown": Using Intersectionality to Uncover the Gendered Aspects of Racial Profiling*, provides an example.[40] Sharma argues that the primary focus of the racial profiling literature has been on "driving while black" and "flying while brown," the phenomena whereby black drivers are often suspected of being drug dealers and Arab-looking airline passengers are often suspected of being terrorists,

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[36] *See generally* Kimberle Williams Crenshaw, *Mapping the Margins: Identity Politics, Intersectionality and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991) (defining intersectionality theory); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990) (creating an anti-essentialist position from which to analyze black women's experiences).

[37] Cooper, *Against Bipolar Black Masculinity*, *supra* note 7, at 863.

[38] *Id.*

[39] *Id.* at 864 (describing how the self-identity of a black woman is distinct from that of a black man or a non-black woman).

[40] *See* Sharma, *supra* note 15.

respectively, because of stereotypes about those groups.[41] Since the literature on driving while black and flying while brown focuses on men, and since those phenomena have come to represent racial profiling in general, the racial profiling literature has become preoccupied with male victims of the practice.[42]

Sharma shows that such preoccupation, to the exclusion of female victims of racial profiling, is an incomplete approach to the issue. Consequently, she provides examples of racial profiling of women. For instance, the U.S. Customs Service strip-searched black women in search of drugs in gross disproportion to their presence in the population.[43] Sharma explains that practice as the result of the intersection of stereotypes about blacks and stereotypes about women. Blacks in general, and black women in particular, are stereotyped as drug addicts and as hyper-sexual.[44] Those stereotypes intersect with the Madonna/whore dichotomy, which categorizes all women as either "good" or "bad."[45] Having been historically hyper-sexualized, black women are presumed to be "bad" women.[46] Accordingly, their disproportionate degradation through strip-searches seemed unremarkable to Customs officials. That confluence of race and gender in the production of a practice is the type of intersectionality discussed in this Article.

For our purposes, the most relevant implication of intersectionality is that the hegemonic form of U.S. masculinity includes racism.[47] In fact, the metaphor of race and gender as intersecting may understate the significance of the relationship between those two forms of identity. The intersectionality of identity theory has been elaborated upon by post-

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[41] *See id.* at 276 (summarizing the way each phenomenon is described).

[42] *Id.*

[43] *Id.* at 283.

[44] *See id.* at 287–93 (describing the stereotypes).

[45] *Id.* at 290. On the Madonna/whore dichotomy, see generally ESTHER MADRIZ, NOTHING BAD EVER HAPPENS TO GOOD GIRLS: FEAR OF CRIME IN WOMEN'S LIVES (1997) (reporting women's narratives on fear of crime wherein they assume harm only befalls bad women). For an analysis of the good/bad dichotomy as applied to black men, see generally Cooper, *Against Bipolar Black Masculinity*, *supra* note 7.

[46] Sharma, *supra* note 15, at 290.

[47] *See infra* Part I.A.2 (describing characteristics of the hegemonic pattern of U.S. masculinity).

intersectionality   theorists   who   describe   the   cosynthesis,[48] multidimensionality,[49] and symbiosis[50] of identities. Their basic point is that categories of identity do not merely intersect; they mutually constitute one another. The meaning of race has been influenced by the meaning of gender, and vice versa.[51] For example, the construction of black men as rapacious was part of the construction of white women as in need of protection via isolation in the private sphere of the home.

   Elsewhere, I have argued that ideologies of race and gender intersect in a particular way to subject black men to particular stereotypes.[52]

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 [48] *See generally* Peter Kwan, *Jeffrey Dahmer and the Cosynthesis of Categories*, 48 HASTINGS L.J. 1257 (1997) (using a cosynthesis metaphor to describe how the intersection of narratives about race, gender, sex orientation, and age allowed Jeffrey Dahmer to convince police officers to ignore his abuse of a Laotian boy).

 [49] *See generally* Darren Lenard Hutchinson, *Identity Crisis: "Intersectionality," "Multidimensionality," and the Development of an Adequate Theory of Subordination*, 6 MICH. J. RACE & L. 285 (2001) (defining the multidimensionality metaphor).

 [50] *See generally* Nancy Ehrenreich, *Subordination and Symbiosis: Mechanisms of Mutual Support Between Subordinating Systems*, 71 UMKC L. REV. 251 (2002) (introducing symbiosis metaphor).

 [51] *See* Patricia Hill Collins, *A Telling Difference: Dominance, Strength, and Black Masculinities, in* PROGRESSIVE BLACK MASCULINITIES, *supra* note 7, at 73 ("[C]ommonsense notions about gender have long been used to construct ideas about racial difference that are central to racism in the United States. In other words, ideas about white racial normality and black racial deviancy draw heavily on ideas about gender and sexuality.").

 [52] *See generally* Cooper, *Against Bipolar Black Masculinity, supra* note 7 (applying intersectionality theory to black masculinity). All of this Author's scholarship has at least touched upon how cultural norms affect black men. *See generally* Frank Rudy Cooper, *Cultural Context Matters: Terry's "Seesaw Effect,"* 56 OKLA. L. REV. 833, 844–45 (2003) [hereinafter Cooper, *Cultural Context Matters*] (arguing that cultural context influences whether black men are racially profiled or depoliced); Frank Rudy Cooper, *Surveillance and Identity Performance: Some Thoughts Inspired by Martin Luther King*, 32 N.Y.U. REV. L. & SOC. CHANGE 517 (2008) [hereinafter Cooper, *Surveillance and Identity Performance*] (reviewing FBI surveillance of King); Cooper, *The Seesaw Effect, supra* note 15 (calling for synthesis of critical race theory and cultural studies to analyze police treatment of black men in New York); Frank Rudy Cooper, *The Spirit of 1968: Toward Abolishing Terry Doctrine*, 31 N.Y.U. REV. L. & SOC. CHANGE 539 (2007) (arguing an implicit contract grants police excessive discretion on the understanding they will only use it against marginalized groups); Frank Rudy Cooper, *The Un-Balanced Fourth Amendment: The Drug War, Racial Profiling, and* Arvizu, 47 VILL. L. REV. 851 (2002) [hereinafter Cooper, *The Un-Balanced Fourth Amendment*] (considering how stereotypes of black men help produce pro-drug-war jurisprudence); Frank Rudy Cooper, *Understanding "Depolicing": Symbiosis Theory and Critical Cultural Theory*, 71 UMKC L. REV. 355 (2002) [hereinafter Cooper, *Understanding Depolicing*] (considering why black men have been depoliced in certain contexts).

This Article will concentrate on how the combination of race and gender influences the behavior of the perpetrators of discrimination—police officers who racially profile—rather than its victims.[53] Although I am interested in how both race and gender in combination bring about profiling, I focus on the part of this equation that has barely been explored by criminal procedure scholars: masculinity. My hope is that examining the issue through the lens of masculinities studies will enable us to see that masculinity norms greatly influence policemen's behaviors.

With these goals in mind, this Part begins by identifying the hegemonic pattern of U.S. masculinity. Identifying that pattern is a two-step process of describing the basic tenets of the hegemonic masculinities school of thought and then breaking down the elements of the hegemonic pattern of masculinity in the U.S. Next, it describes the hegemonic pattern of police officer masculinity. That involves linking the common police practices of command presence and punishing disrespect with the hegemonic pattern of U.S. masculinity. Finally, this Part analyzes the risk that officers will enact a command presence solely to stage masculinity contests.

A. Masculinities Studies and the Hegemonic Pattern of U.S. Masculinity

In order to expand our understanding of the impact of masculinity on police behavior, it is necessary to understand how masculinity generally operates. Consequently, I begin by critically reviewing the hegemonic school of masculinities studies, and describing the hegemonic pattern of U.S. masculinity.

1. The Hegemonic Masculinities School of Masculinities Studies

What is the field of masculinities studies? According to an important review essay by American Studies scholar Bryce Traister, it is a branch of the field of feminist theory.[54] It draws from the fields of cultural studies, history, queer theory, and sociology.[55] Based on insights from those

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[53] *See* Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 968 (2002) (defining police as perpetrators of discrimination and the Court's jurisprudence as taking a perpetrator perspective).

[54] Bryce Traister, *Academic Viagra: The Rise of American Masculinity Studies*, 52 AM. Q. 274, 276 (2000) (calling masculinities studies "promising as a movement within gender studies").

[55] *See id.* at 274–76 (referencing several fields that masculinities studies draws upon).

fields, the field of masculinities studies presumes that men's behavior is socially constructed.[56] It is the meaning we choose to make of biological difference that creates our sense of gender.[57] An important strand of masculinities studies goes further and suggests that our performances of our gender constitute the very gender they are said to express.[58] Masculinities studies theorists agree that we develop senses of what makes someone "manly" that comport with the traditions of our particular society.[59]

Consequently, we can best define masculinities studies as the interdisciplinary field that inquires into the ways that "different ideologies about manhood develop, change, are combined, amended, contested—and gain the status of truth."[60] An ideology is a viewpoint on how the world is or ought to be.[61] It describes an abstract principle that (it implicitly argues) should be instantiated in the structure of institutions and the behavior of individuals. Ideologies are aimed at obtaining hegemony, which is consent to a particular form of social organization that is gained by means of persuasion rather than material coercion.[62] So, masculinities studies

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[56] The social construction thesis says that the meaning of identity is socially created rather than given by nature. *See* Angela Onwuachi-Willig, *Undercover Other*, 94 CAL. L. REV. 873, 883–98 (2006) (discussing examples of the social constructedness of identities).

[57] "Sociologists of gender argue that gender is not something one has but, rather, something one does." Harris, *Gender, Violence, supra* note 7, at 782. So "[d]oing gender means creating differences between girls and boys and women and men, differences that are not natural, essential, or biological. Once the differences have been constructed, they are used to reinforce the 'essentialness' of gender." Candace West & Don H. Zimmerman, *Doing Gender*, 1 GENDER & SOC'Y 125, 137 (1987).

[58] *See, e.g.*, JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY 33 (1990) (describing how gender is performatively produced); *see generally* SARA SALIH, JUDITH BUTLER: ESSTENTIAL GUIDES FOR LITERARY STUDY (2002) (explicating Butler's theory of subjectivity); *see generally* Cooper, *Surveillance and Identity Performance, supra* note 52 (summarizing the application of Butler's theories to Fourth Amendment doctrine).

[59] *See* BRENTON J. MALIN, AMERICAN MASCULINITY UNDER CLINTON: POPULAR MEDIA AND THE NINETIES "CRISIS OF MASCULINITY" 2 (2005) (identifying issues for a masculinities study of the Clinton years).

[60] BEDERMAN, *supra* note 6, at 7.

[61] *See* ANDREW EDGAR & PETER SEDGWICK, KEY CONCEPTS IN CULTURAL THEORY 190 (1999) (referring to "ways of seeing the world").

[62] *See* Cooper, *The Un-Balanced Fourth Amendment, supra* note 52, at 859 ("[A] social group will try to describe the world in a way that accounts for, but coordinates, the interests of other groups such that they will consent to a structuring of society that promotes

describes the ways in which assumptions about the meaning of manhood are used to justify particular ideas and institutions.

In accordance with Cultural Studies scholar Paul Smith's influential writing, masculinities studies scholars agree that there is no such thing as a singular masculinity; rather, there are "masculinities" in the plural.[63] Masculinities are subject positions[64] taken up by different men in different cultural contexts.[65] Any form of masculinity is always intersecting with sex orientation, race, class, and so on.[66] Because of the intersectionality of identities, there is not one form of masculine identity, but a plurality of identities, such as a working-class white masculinity, an upper-class gay black masculinity, and so on. Simultaneously, different men in those intersectional categories perform their identities differently. Consequently, leading masculinities theorists R.W. Connell and James Messerschmidt suggest that "we should understand hegemonic norms as defining a subject position in discourse that is taken up strategically by men in particular circumstances. . . . Men can dodge among multiple meanings according to their interactional needs."[67] Thus, I personally might emphasize my blackness, my heterosexuality, or my being a professor in different contexts in order to enact different forms of masculinities.

Connell and Messerschmidt's reference to "hegemonic" norms is significant. Their branch of masculinities studies, which is the dominant

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the dominant group's interests."); *see also* EDGAR & SEDGWICK, *supra* note 61 (referring to the idea that "rule must be based on consent").

[63] *See* Smith, *supra* note 2, at 3 (["M]asculinity is not: rather, there are only masculinities in the plural.").

[64] A "subject position" is a narrative framework through which an individual interprets her structural place in society. *See* ANNA MARIE SMITH, LACLAU AND MOUFFE: THE RADICAL DEMOCRATIC IMAGINARY 58 (1998) ("A 'subject position' refers to the ensemble of beliefs through which an individual interprets and responds to her structural positions within a social formation.").

[65] *See* Connell & Messerschmidt, *supra* note 5, at 835 (noting that "even in a culturally homogenous country such as Chile, there is no unitary masculinity, since patterns vary by class and generation"); Prokos & Padavic, *supra* note 2, at 442 ("Multiple forms of masculinity exist because men (and women) construct masculinity in particular social and historical contexts.").

[66] Cooper, *Against Bipolar Black Masculinity*, *supra* note 7, at 863.

[67] Connell & Messerschmidt, *supra* note 5, at 841.

branch, is called "hegemonic masculinity."[68] The notion of a hegemonic masculinity implies that there is a struggle for dominance amongst different concepts of masculinity.[69] It also implies that there is a hierarchy of masculinities.[70] Connell and Messerschmidt say that certain forms of masculinity are more honored and wield more power than others.[71] Accordingly, the dominant form of masculinity in a particular cultural context may be said to be hegemonic.

Masculinities become hegemonic due to specific historical circumstances and are always subject to being dethroned.[72] Traister shows how U.S. history reveals that hegemonic patterns of masculinities are in perpetual crisis.[73] For example, U.S. literature reveals that this country underwent a "crisis of masculinity" in the post-Revolutionary period, in the Jacksonian period, and during and after the Civil War.[74] During those crises, the pervasive hegemonic way of thinking about masculinity came under challenge.

The pattern of masculinity that is hegemonic in a particular cultural context is not "normal" in the sense that a large portion of men embody it.[75]

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[68] *See generally* HANDBOOK OF STUDIES ON MEN AND MASCULINITIES (Michael S. Kimmel et al. eds., 2005) (collecting essays utilizing the hegemonic masculinities approach). *But see* STEPHEN WHITEHEAD, MEN AND MASCULINITIES: KEY THEMES AND NEW DIRECTIONS (2002) (utilizing a discourse analysis approach to masculinities).

[69] *See* Connell & Messerschmidt, *supra* note 5, at 832 (referring to "the active struggle for dominance that is implicit in the Gramscian concept of hegemony").

[70] *See id.* at 846 ("The fundamental feature of the concept [of hegemonic masculinity] remains the combination of the plurality of masculinities and the hierarchy of masculinities."); *id.* at 831 ("The idea of a hierarchy of masculinities grew directly out of homosexual men's experience with violence and prejudice from straight men.").

[71] *Id.* at 846. Still, hegemonic authority is exercised by co-opting portions of disparate points of view so as to make the dominant view palatable to a wide range of groups. *See id.* at 835 ("Challenges to hegemony are common, and so are adjustments in the face of these challenges."); *id.* at 844 (accepting that "hegemonic masculinity appropriates from other masculinities whatever appears to be pragmatically useful for continued domination").

[72] *Id.*

[73] Traister, *supra* note 54, at 287.

[74] *Id.*

[75] Connell & Messerschmidt, *supra* note 5, at 832 ("Hegemonic masculinity was not assumed to be normal in the statistical sense; only a minority of men might enact it."); *id.* at 838 ("Thus, hegemonic masculinities can be constructed that do not correspond closely to the lives of any actual men.").

Rather, it is "normative" in that it serves as the ideal toward which all men are supposed to strive.[76] Further, the normative status of masculinity *vis-à-vis* femininity causes it to operate invisibly.[77] As Kimmel says in his essay *Toward a Pedagogy of the Oppressor* in Athena Mutua's important anthology *Progressive Black Masculinities*:

> To be white, or straight, or male, or middle class is to be simultaneously ubiquitous and invisible. You are everywhere you look; you are the standard against which everyone else is measured. . . . People tell you they went to see a woman doctor, or they say they went to see the doctor.[78]

Barbara J. Flagg refers to the inability to see one's whiteness as influencing one's behavior as the "transparency phenomenon."[79] It may be that the influence of masculinity is similarly transparent to men themselves; we might therefore refer to "masculinity's transparency." With the understanding that hegemonic patterns of masculinities are both normative and invisible, we can proceed to identify the hegemonic patterns of U.S. masculinity.

2. The Hegemonic Pattern of U.S. Masculinity

In his book, *Manhood in America: A Cultural History*,[80] Kimmel traces the development of the current hegemonic model of U.S. masculinity, "marketplace man." Marketplace man establishes his masculinity through competition with other men in civil society.[81] One quality of marketplace man is that he is concerned with how other men rate him. As I note earlier, "[m]asculinity is a homosocial enactment" in that it is created in the

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[76] *Id.* at 838; *see also id.* at 846 (declaring that "hegemony works in part through the production of exemplars of masculinity").

[77] *See* Collins, *supra* note 51, at 79 (stating that "hegemonic discourses of American masculinity operate as unquestioned truths").

[78] Michael Kimmel, *Toward a Pedagogy of the Oppressor*, *in* PROGRESSIVE BLACK MASCULINITIES, *supra* note 7, at 63, 64. Consequently, the privilege of ignoring one's gender is a luxury only men own. *Id.* at 65.

[79] *See generally* BARBARA J. FLAGG, WAS BLIND, BUT NOW I SEE: WHITE RACE CONSCIOUSNESS AND THE LAW (1998).

[80] KIMMEL, MANHOOD IN AMERICA, *supra* note 3.

[81] *Id.* at 17.

competition that occurs between men.[82] While the accumulation of the cultural objects that are taken to denote manliness seems to be about impressing women, it is actually about impressing other men.[83] This is the homosocial aspect of masculinity; masculinity is constructed in interactions between men.[84]

A second quality of marketplace man is that he is not only homosocial but also anxious. He is chronically insecure that he has not sufficiently proved that he is as masculine as he should be.[85] That is so because the rules of hegemonic masculinity[86] are unrealizable.[87] Manhood is a relentless test of how close you are to the ideal.[88] Other men are the ones who evaluate men's performances.[89] Consequently, men are constantly suffering from anxiety that other men will unmask them as insufficiently manly.[90]

The homosociality and anxiety that are constitutive of marketplace masculinity reveal a third quality of the hegemonic pattern of U.S. masculinity: competitiveness reflected in a need to dominate other men. The indicia of manhood—money, power, women, and so on—are scarce resources; you can always have more, and they gain their value from the fact that other men are denied them. To resolve one's anxiety over masculine esteem, then, men compete to outdo other men in collecting indicia of manhood. As I have noted in a past article discussing black masculinity, the principle that we can and should rank types of people—

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[82] *Id.* at 33.

[83] *See id.* ("We test ourselves, perform heroic feats, take enormous risks, all because we want other men to grant us our manhood.").

[84] On homosociality, see EVE KOSOFSKY SEDGWICK, THE EPISTEMOLOGY OF THE CLOSET (1991) (developing theory of homosociality through analyses of literary depictions of manhood).

[85] *See* Kimmel, *Masculinity as Homophobia*, *supra* note 3, at 36 ("Our efforts to maintain a manly front cover everything we do.").

[86] Kimmel presents four rules of hegemonic masculinity: (1) never act feminine, (2) accrue power, success, wealth, and status, (3) always hold your emotions in check, and (4) always exude an aura of daring and aggression. *Id.* at 30–31.

[87] *Id.* at 31.

[88] *Id.*

[89] *Id.* at 33.

[90] *Id.* at 35 (defining such anxiety as homophobia).

"the scaling of bodies"—is built into Western epistemology.[91] Behaviors that seek to express dominance over other men, such as aggression, are part of the project of establishing that one possesses the hegemonic form of U.S. masculinity.[92] Hegemonic masculinity is tied to hierarchy: one proves one's manhood by dominating those further down in the social hierarchies.[93]

It follows that a fourth quality of the hegemonic pattern of U.S. masculinity is the desire to denigrate contrast figures. The model for the hegemonic masculinity that men are trying to demonstrate is the masculinity of powerful white men. As Kimmel says, "Within the dominant culture, the masculinity that defines white, middle-class, early middle-aged heterosexual men is the masculinity that sets the standards for other men[.]"[94] That is the image of masculinity that is held by men in power.[95] It is also the image that is the baseline in social science studies and popular depictions of manliness.[96] Even those of us who do not fit that definition, which is the vast majority of men, cannot help but view the world at least partly through the dominant lens.[97]

Since the idealized figure of the powerful white male is the model for hegemonic masculinity, demonstrating that one fits into the hegemonic pattern of U.S. masculinity involves a repudiation of that model's contrast figures, most notably, women, gays, and racial minorities.[98] As I have noted in the context of heterosexual black men, "emulating normative white men means emulating a version of masculinity that is based on the dominance of

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[91] Cooper, *Against Bipolar Black Masculinity*, *supra* note 7, at 870–73 (explicating the concept); *see also* IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 126–28 (1990) (defining the concept).

[92] *See* Collins, *supra* note 51, at 86 (declaring that "[p]hysical dominance, aggressiveness, and the use of violence to maintain male power constitute a central feature in the definitions of hegemonic white masculinity . . ."); Cooper, *Our First Unisex President?*, *supra* note 2, at 649 (defining an expectation of aggressiveness as a masculine norm).

[93] *See* Cooper, *Against Bipolar Black Masculinity*, *supra* note 7, at 859 (describing the effects of normative masculinity upon heterosexual black men).

[94] Kimmel, *Masculinity as Homophobia*, *supra* note 3, at 30.

[95] *Id.*

[96] *Id.*

[97] *Id.*

[98] *Id.* at 25.

those below you in the identity hierarchies."[99] Most of all, masculinity is the repudiation of femininity.[100] Because homoerotic desire is depicted as feminine desire, the repudiation of homosexual men is a necessary component of hegemonic masculinity.[101] Finally, men from minority groups are repudiated as either feminized men or men so excessively masculine as to be bestial.[102] Historically, Europeans and children, black chattel bondspeople, Native Americans, the Irish, Italians, Jews, and Asian men have all been figured as demeaned Others in the construction of hegemonic U.S. masculinity.[103] That process is continued today by "white working-class men who wish to think they have a continued edge on 'Others'— people of color and white women."[104] On the whole, then, the hegemonic pattern of U.S. masculinity is characterized by homosociality, anxiety, competitiveness, and the denigration of contrast figures.

A manifestation of the hegemonic pattern of U.S. masculinity is the culture of honor stance. In cultures of honor, according to social psychologists Dov Cohen and Joe Vandello in their article *Meanings of Violence*, one must protect one's social standing by all means necessary, including violence.[105] Cultures of honor originate in situations where one's

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[99] Cooper, *Against Bipolar Black Masculinity*, supra note 7, 896 (arguing that predominant representations of heterosexual black men seek to seduce us into accepting the existing hierarchies of identity); *see also* Harris, *Gender, Violence*, supra note 7, at 785 (declaring that "masculinities of all varieties share in common the requirement that men establish themselves on the ground of what they are not").

[100] Kimmel, *Masculinity as Homophobia*, supra note 3, at 30. *See also* Athena D. Mutua, *Theorizing Progressive Black Masculinities, in* PROGRESSIVE BLACK MASCULINITIES, supra note 7, at 3, 12. ("Masculinity, the positive side of the male-female, man-woman dichotomy, is thus defined as opposing and superior to the feminine.").

[101] Kimmel, *Masculinity as Homophobia*, supra note 3, at 34.

[102] *Id.* at 38. On the depiction of black males as bestial, *see* N. Jeremi Duru, *The Central Park Five, the Scottsboro Boys, and the Myth of the Bestial Black Man*, 25 CARDOZO L. REV. 1315 (2004) (describing the bestial black male image); *see also* Cooper, *Against Bipolar Black Masculinity*, supra note 7, at 875–79 (describing the "Bad Black Man" image).

[103] Kimmel, *Masculinity as Homophobia*, supra note 3, at 38.

[104] Michelle Fine et al., *(In)Secure Times: Constructing White Working-Class Masculinities in the Late 20th Century*, 11 GENDER & SOC'Y 52, 53 (1997) (analyzing studies of the opinions of working-class white boys and men).

[105] Dov Cohen & Joe Vandello, *Meanings of Violence*, 27 J. LEGAL STUD. 567 (1998).

livelihood can easily be stolen. For example, herdsmen must adopt a tough stance that deters predators.[106] In such cultures, an insult drastically reduces one's social standing because an insult that goes unanswered suggests that its subject is unable or unwilling to protect himself and, thus, less than manly.[107] In such a situation, words become akin to the proverbial sticks and stones. People react to insults as they might to physical attacks because insults are seen as probes to determine one's manliness.[108] This links manliness to violence because a man's reputation depends on his posing a credible threat of harm to anyone who challenges him.[109] The culture of honor stance helps explain police punishment of perceived disrespect, which I detail in Part I.B, below. For now, it suffices to say that taking a culture of honor stance is one manifestation of the hegemonic pattern of U.S. masculinity because men tend to adopt this stance when they want to establish their masculinity.

Because not all men can fully achieve the hegemonic brand of masculinity, a second manifestation of hegemonic masculinity is hypermasculinity. Hypermasculinity is a manifestation of the hegemonic pattern of U.S. masculinity in the sense that it is a reaction to the norm. The theory of the hypermasculine male is that a man who is denied the stature of the normative man becomes hypermasculine to compensate for the fact that he cannot meet the masculine cultural ideal.[110] In our society, the normative man possesses "intellectual mastery, technological prowess, and rationalized control."[111] Because the class hierarchy is intertwined with the hierarchy of masculinities, men who do not possess these traits are denied access to both class privilege and masculinity.[112] Working class men who take orders or lack status in other ways often resort to hypermasculinity in an attempt to regain social status.[113] They belittle or harass weaker men,

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[106] *Id.* at 569.

[107] *Id.* at 569–70.

[108] *Id.* at 570.

[109] *Id.* at 570–71.

[110]*Id.* at 785; *see also* Karen D. Pyke, *Class-Based Masculinities: The Interdependence of Gender, Class, and Interpersonal Power*, 10 GENDER & SOC'Y 527, 531 (1996) (defining the roots of hypermasculinity).

[111] Harris, *Gender, Violence, supra* note 7, at 784–85.

[112] *Id.* at 785.

[113] *Id.*

women, and gays. So, weight-lifting, bragging about sexual exploits, and homophobic jokes can all be hypermasculine behaviors.[114] We might say that such hypermasculine behaviors are both a product of the existence of a normative masculinity and themselves a dominant way in which working-class men seek to establish their masculinity.

Not surprisingly, given the working-class backgrounds of most policemen, there is a close association between hypermasculinity and police work. That association is seen in the qualifications for the job: the size requirements, upper body strength prerequisite, and the ability to beat someone into submission.[115] Harris maintains that the hypermasculinity in policing "leads to a culture where violence is always just below the surface."[116] Men are generally on the lookout for signs of disrespect, so when a male police officer's masculinity is questioned, he may engage in police brutality.[117] Thus, the policeman's culture of honor stance and hypermasculine brutality reflect the hegemonic pattern of U.S. masculinity.[118]

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[114] *See, e.g.*, Philip J. Sweitzer, *Drug Enforcement in Crisis: Cops on Steroids*, 2 DEPAUL J. SPORTS L. CONTEMP. PROBS. 193 (2004); *see also infra* Part I.B (discussing the linkage between command presence and police officer steroid abuse).

[115] Harris, *Gender, Violence, supra* note 7, at 793–94.

[116] *Id.* at 796.

[117] *Id.* at 798.

[118] One potential objection to my analysis so far would be to say, "so what?" That is, one might simply take the hegemonic pattern of masculinity as a given, or even as the "natural" way of things. My response is that the present hegemonic pattern of masculinity needs to be changed. Legal scholar David S. Cohen provides a useful description of the problems with the hegemonic pattern of U.S. masculinity in the context of single-sex primary and secondary schooling. The first problem he points to is that boys who do not exhibit the hegemonic masculinity are harassed. Cohen, *supra* note 7, at 171. This manifests itself in verbal and physical bullying of boys who do not fit the hegemonic pattern of behavior. *Id.* A second problem is that hegemonic masculinity is consistent with domination of women. *Id.* at 172. In schools, it leads to verbal, physical, and sexual harassment of girls. *Id.* A final problem is that, because no boy can fully embody it, the hegemonic pattern of masculinity both constrains the boys who seek to adopt it and reinforces the sense of anxiety that leads to the culture of honor stance and hypermasculinity. *Id.* at 172–73. It constrains the boys who seek to adopt it because it drastically narrows the acceptable ways in which they can exhibit their identities. It creates anxiety because no boy can fully embody the standard, and they are thus left to adopt the culture of honor stance and hypermasculinity in order to reassert their manhood. *See id.* at 173 (arguing that no boy can always live consistently with hegemonic masculinity). This final problem of feeling the need to establish one's own masculinity by means of dominating other men is especially prominent in the hegemonic pattern of police officer masculinity. One might note as well that the single-sex context

B. The Hegemonic Pattern of Police Masculinity

Given what we have learned about the anxiety that is inherent in the hegemonic pattern of U.S. masculinity, we should expect policing, a paradigmatically masculine field, to reflect a desire to prove oneself. It is, therefore, unsurprising that the main component of police officer masculinity is an emphasis on demonstrating the aggressive demeanor known as command presence. A corollary of that attitude is that police officers feel the need to punish disrespect. Both enacting command presence and punishing disrespect are acts consistent with the hegemonic pattern of U.S. masculinity. Together, they constitute a hegemonic pattern of masculinity that is peculiar to police officers. The next section establishes that the adoption of command presence and punishment of disrespect are norms police officers are expected to follow.

1. "Command Presence"

One way in which the hegemonic pattern of police officer masculinity plays out at the macro level is through the definition of the job itself as masculine. As criminologist Susan Martin puts it, "[s]ince a key element of policing—gaining and maintaining control of situations—remains associated with manhood, male officers do gender along with doing dominance."[119] Similarly, criminologist James Messerschmidt notes that police officers who work on the streets define patrolling their beats as manly and administrative tasks as feminine.[120] Criminologist Steve Herbert goes so far as to define machismo, in the form of seeking opportunities to insert oneself into dangerous situations, as a central element of police culture.[121] Martin says that while the demographics of major police departments have changed significantly, police culture continues to require

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highlights the fact that gender is more than just a form of classification; it is a process of exclusion that occurs through the practices of institutions. Vojdik, *Gender Outlaws, supra* note 7, at 112 (arguing that hegemonic masculinity was so embedded in all-male military institutions that the price of equality for those women who integrate them is to be unlike most women, to be "gender outlaws").

[119] Susan Ehrlich Martin, *Police Force or Police Service?: Gender and Emotional Labor*, 561 ANNALS AM. ACAD. POL. & SOC. SCI. 111, 117 (1999) (contending police officers engage in emotional labor when interacting with suspects).

[120] JAMES W. MESSERSCHMIDT, MASCULINITIES AND CRIME 179 (1993).

[121] *See* STEVE HERBERT, CITIZENS, COPS, AND POWER: RECOGNIZING THE LIMITS OF COMMUNITY 97 (2006) (defining aspects of police culture).

Columbia Journal of Gender and Law   [Vol. 18:3]

that female officers act in masculine ways to achieve acceptance.[122] An overarching characteristic of policing, therefore, is its definition as a masculine job.

At the micro level, the masculine influence upon police officer behavior is seen in the requirement that officers demonstrate a "command presence." An officer has command presence when he projects an aura of confidence.[123] He demonstrates it by showing people that he is in charge and decisive.[124] Officers also demonstrate command presence when they proactively seek out crime.[125] Not surprisingly, command presence is linked to aggressiveness.[126] Policing based on command presence is thus antithetical to policing based on negotiation and problem-solving.[127] An emphasis on command presence has been linked to incidents of excessive force in both Cincinnati and Los Angeles.[128] Despite those problems, command presence remains a characteristic of policing throughout the country.[129]

The aggressiveness that characterizes command presence is linked to masculinity. For example, in the case of *Barnes v. City of Cincinnati*, the

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[122] Martin, *supra* note 119, at 116 (arguing that the end of homogeneity in police forces has not ended masculine norms).

[123] Newman, *supra* note 10, at 487 (defining term).

[124] *Id.* at 491 (linking command presence to aggression) (quoting Chemerinsky, *supra* note 10, at 563).

[125] *Id.* (describing command presence) (quoting Chemerinsky, *supra* note 10, at 563).

[126] *Id.* (connecting command presence to excessive force) (quoting INDEPENDENT COMM'N ON THE L.A. POLICE DEPT., REPORT OF THE INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT 83 (1991), *available at* http://www.parc.info/client_files/Special%20Reports/1%20-%20Chistopher%20 Commision.pdf [hereinafter INDEP. COMM'N REPORT]).

[127] *See id.* at 488 (detailing gender significance of command presence) (quoting THE WOMEN'S ADVISORY COUNCIL TO THE L.A. POLICE COMM'N, A BLUEPRINT FOR IMPLEMENTING GENDER EQUITY IN THE LOS ANGELES POLICE DEPARTMENT (1993)).

[128] *Id.* at 491 (blaming command presence for excessive force). For descriptions of how police swung between aggressive racial profiling and resentful depolicing in Cincinnati and Los Angeles, *see* Cooper, *Understanding Depolicing, supra* note 52 (comparing and contrasting depolicing and racial profiling).

[129] *See generally* Newman, *supra* note 10 (associating command presence with policing).

Cincinnati Police Department denied a promotion to a male police officer who cross-dressed as a female when off-duty.[130] The City's defense to the discrimination claim was that Barnes lacked a command presence.[131] The Sixth Circuit held that Barnes was actually denied the promotion due to his failure to appear masculine.[132] For instance, one of Barnes' supervisors explicitly linked his lack of command presence to Barnes' feminine grooming habits and lack of masculine mannerisms.[133] Command presence was also understood in masculine terms in Los Angeles.[134] Accordingly, command presence is not just a characteristic of policing in general, but of police officer masculinity in particular.

Consideration of the theory of hegemonic masculinity helps explain why police officers' command presence is linked to masculinity. First, requiring a dominating presence, one of the traits of the hegemonic pattern of U.S. masculinity, emphasizes the masculine nature of the job.[135] Second, enacting a command presence facilitates officers' adherence to hegemonic masculinity's admonition not to act feminine.[136] Third, and most significantly, the desire to exhibit a command presence leads many policemen to engage in practices associated with hypermasculinity. For example, Philip Sweitzer, in his article *Drug Law Enforcement in Crisis: Cops on Steroids*,[137] demonstrates that officers are particularly likely to engage in excessive weight-lifting. Sweitzer argues that the war on drugs has created a hypermasculine ideal of the police officer.[138] Because police

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[130] Barnes v. City of Cincinnati, 401 F.3d 729 (6th Cir. 2005), *cert. denied*, 546 U.S. 1003 (2005).

[131] *Id.* at 735.

[132] *Id.*

[133] *Id.* at 734–35.

[134] *See* Newman, *supra* note 10, at 488 (reviewing Women's Advisory Council criticisms of command presence as a job requirement).

[135] *See, e.g.*, MESSERSCHMIDT, *supra* note 120, at 184 (describing definition of job as masculine); *see also* Kristen A. Myers et al., *Officer Friendly and the Tough Cop: Gays and Lesbians Navigate Homophobia and Policing*, 47 J. HOMOSEXUALITY 17, 18 (2004).

[136] *See* Kimmel, *Masculinity as Homophobia*, *supra* note 3, at 31–33 (declaring repudiation of the feminine to be prime directive of masculinity).

[137] Sweitzer, *supra* note 114.

[138] *Id.* at 193.

Columbia Journal of Gender and Law   [Vol. 18:3]

officers think of themselves as often engaged in situations requiring physical force to subdue suspects, they have developed a culture of strength.[139] One product of that culture is rampant steroid abuse.[140] Sweitzer points out that steroid use is not in fact related to a bona fide occupational need, as officers often bulk up strictly for cosmetic purposes.[141] He goes so far as to argue that, for some officers, "the reason they chose to become police officers is psychologically inextricably intertwined with their bodybuilding impulse."[142] We should be concerned, then, that the occasional necessity of enacting command presence becomes an excuse for a culture of strength.[143] Sweitzer concludes that steroids "are being used to achieve a *professional aesthetic* tied specifically to presenting a physically imposing and deterring image."[144]

Ultimately, then, we ought to view the requirement of exhibiting a command presence as an aspect of the masculine nature of policing. Since officers are often free to interpret a situation as requiring either aggression or negotiation, the choice to enact the command presence can be a means of performing one's masculinity in the hegemonic way.[145] As a consequence, the norm that officers should exhibit a command presence is hegemonic in the occupation of policing and reflective of the general hegemonic pattern of U.S. masculinity.

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[139] *See id.* at 195 (noting prevalence of strength-based police athletic competitions).

[140] *Id.* (calling this a not-so-quiet secret).

[141] *Id.* at 209.

[142] *Id.* at 209–10.

[143] *See id.* at 226 (concluding the police culture of strength and toughness "predisposes police officers to steroid use"); *see also id.* at 213 (arguing that "cops on steroids are simply the natural evolution of a conscious decision by the federal government to promote military authoritarianism in drug enforcement, and the implementation of military technologies").

[144] *Id.* at 227 (emphasis in original). *See also id.* at 227 (arguing steroid use "becomes enmeshed with the officer's identity, the presentation of his physique an integral part of his personality").

[145] Martin, *supra* note 119, at 115 ("Since the character of the incident often is in the eye of the beholder, policing becomes a site for competing ways of doing gender.").

2. Policemen as Punishing Disrespect

Another expression of masculinity that is thought to be central to the task of policing is the punishment of disrespect. Punishment of disrespect stems from the fact that police officers demand deference to the badge. In doing so, they often act more out of a desire to preserve their authority than to enforce a law.[146] That attitude is explained by political scientist Harlan Hahn, who says that police officers likely find the opportunity to control other men to be a major attraction of the job.[147] But this goes beyond a general enactment of command presence, for they often punish disrespect for the police by using force.[148]

The reason police officers punish disrespect is that, for them, a challenge to their respect is a challenge to their manhood. According to Sociologist James F. Scott, officers are preoccupied with respect because within the police role "there is a distinct connotation of masculinity, virility, aggressiveness, and all the qualities considered worthy of being a man. Hence, to make depreciatory remarks about the police role is to cast aspersion upon the policemen's conceptions of themselves as men." [149] Hahn contends, "[i]n many encounters, police officers take actions primarily to preserve and protect their authority rather than to secure compliance with the law or to promote respect for law enforcement."[150] Hence, "[a]lthough 'disrespect for the police' never has been recognized by the law as a legitimate justification for the use of force or violence, many policemen adopt the attitude that force can be applied to gain deference. . . ."[151] The policeman's fear that a challenge to his authority is a challenge to his manhood is consistent with the masculine anxiety that I previously identify as a part of the hegemonic pattern of U.S. masculinity. Police punishment of disrespect is also consistent with the culture of honor

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[146] *Id.* at 463.

[147] Harlan Hahn, *A Profile of Urban Police*, 36 LAW & CONTEMP. PROBS. 449, 460 (1971).

[148] *Id.* at 465; *see also* Martin, *supra* note 119, at 115 ("The informal norms of this work culture include the expectations that an officer will . . . punish displays of disrespect for the police.").

[149] James F. Scott, *Racial Group Membership, Role Orientation, and Police Conduct Among Urban Policemen*, 31 PHYLON 5, 12 (1970).

[150] Hahn, *supra* note 147, at 463.

[151] *Id.* at 465.

stance. Again, then, police punishment of disrespect is both hegemonic in the occupation of policing and reflective of the general hegemonic pattern of U.S. masculinity.

C. The Result of the Hegemonic Patterns of U.S. and Police Officer Masculinity: Policemen as Seeking Masculinity Contests

In the previous section, I described the hegemonic pattern of police officer masculinity. In this Part, I discuss the risk that officers will stage what can be termed "masculinity contests." Masculinity contests are interactions between men where each side is subject to a masculinity challenge and only one side will be able to perform his identity in a way that bolsters his masculine esteem. A "masculinity challenge" is an interactional threat to one's manhood or a situation in which expectations about masculine behavior are unachievable.[152] Being challenged to a fight is a paradigmatic interactional masculinity challenge because backing down might lead one to be perceived as less manly. The expectation to remain unemotional in the face of tragedy is a prime example where expectations for masculine behavior might be unachievable. In both of those cases, men may feel they must act according to the paradigm in order to demonstrate they are masculine. Consistent with the theories of cultures of honor and of hypermasculinity, when men perceive challenges to their masculinity they seek ways to demonstrate their manliness.[153]

In legal scholarship, Ann C. McGinley has come closest to describing a theory of masculinity contests. In her article *Harassing "Girls" at the Hard Rock*, McGinley argues that male customers effectively play a game of "who's the man?" in casinos.[154] Using the Hard Rock casino in Las Vegas as a case study, she demonstrates that some casinos

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[152] James W. Messerschmidt, *Becoming "Real Men": Adolescent Masculinity Challenges and Sexual Violence*, 2 MEN AND MASCULINITIES 286, 298 (2000). Messerschmidt discusses the life histories of two boys who end up sexually assaulting under-aged girls. Because each boy faces teasing at school over his manliness and is told by his male figure at home that he should defend himself, but finds he cannot do so, each faces a masculinity challenge that degrades his sense of masculinity. These challenges cause the boys to seek out masculine resources, ways to demonstrate they are "manly." *Id.* at 305. Sadly, the boys Messerschmidt interviewed reconstruct senses of masculine self-worth by sexually subordinating underaged girls. *Id.* at 303.

[153] *Id.*

[154] *See generally* McGinley, *Harassing "Girls," supra* note 7 (identifying behaviors of male customers toward female employees).

intentionally create sexualized environments.[155] Men may face a challenge to their masculinity when they are beaten by a woman and respond by using whatever resources are available to them for rebuilding their masculine esteem. Utilizing some of Kimmel's work, McGinley shows that men sometimes bolster their senses of masculine esteem by either competing with other men for the women's attention or degrading women who have beaten them.[156]

It seems clear that police-civilian encounters are quite capable of presenting a greater masculinity challenge than that described by McGinley. The civilian faces a masculinity challenge because the officer's restriction of his freedom is changing him from a presumptively innocent citizen to a suspect. The civilian may be spread-eagled against a wall as peers pass by gawking. Police officers also face a masculinity challenge, however, since, as a matter of both their roles as law enforcers and their senses of self, they cannot stand any challenge to their authority.[157] That is why officers punish disrespect. Certainly, there is some legitimacy to the idea that officer safety requires that they be able to control the movements of dangerous suspects with whom they are actively engaged.[158] However, the more important reason why officers seek complete control of citizens is that their sense of masculine esteem is tied to being shown respect by citizens. When officers feel disrespected, they face a masculinity challenge. Since manhood is demonstrated for other men's approval and the overwhelming majority of both officers and suspects are male, officers may often view the police-civilian encounter as an opportunity to stage a masculinity contest.

A variety of scholars support the view that police-civilian encounters function as a sort of masculinity contest. For instance, criminologist James Hudson takes such a view of the police-civilian encounter in his article, *Police-Citizen Encounters That Lead to Citizen Complaints*.[159] Utilizing sociologist Erving Goffman's influential theories

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[155] *Id.* at 1231 (identifying the Hard Rock as the casino most interested in creating a sexualized environment).

[156] *Id.* at 1262 (describing customer dissatisfaction with losing a "man's game" to a woman).

[157] *See* Scott, *supra* note 149, at 12 (describing police as feeling that their masculinity is challenged when their authority is challenged).

[158] *See* James R. Hudson, *Police-Citizen Encounters That Lead to Citizen Complaints*, 18 SOC. PROBS. 179, 193 (1970) (arguing that police officers must be able to dominate police-civilian interactions).

[159] *Id.*

In a more recent article, Martin agrees with this framing of the male police officer against male civilian encounter as a masculinity contest. As Martin says, "Rejection of a male citizen's effort to be treated as a man may result in a 'duel of manhood,' which has a high probability of a verbal or physical confrontation since the man who backs down first fails the test of masculinity."[167] It is helpful to note that male police officer against male civilian encounters start from the premise that the officer is "the man."[168] Because that assertion is a challenge to the civilian's esteem, some civilian men may try to reassert their masculinity against the officer. According to Martin, the officer may then seek to reassert his authority:

> When young male "street dudes" bait or challenge a male officer, the officer may manage his own reaction by drawing on his age superiority and treating the challenger as too young to merit a response. Alternatively, he may dispense so called street justice, reflecting a failure to maintain emotional self-control but displaying police authority.[169]

Here, then, we are presented with the situation imagined in the *Terry* Court's explanation for why stops and frisks are not always aimed at evidence-gathering.[170] If the *Terry* Court understood its description of "maintain[ing] the power image of the beat officer"[171] to refer to what Martin calls the dispensing of "street justice," then the Court understood the encounter as a sort of masculinity contest. The *Terry* decision empowers police officers to reestablish their position as "the man" in that contest. In the process, officers emasculate suspects and elevate their own masculine esteem. The next Part more fully applies the concept of masculinity contests to the language of the *Terry* opinion.

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[167] Martin, *supra* note 119, at 118 (internal citations omitted).

[168] *Id.* at 117–18.

[169] *Id.* at 118 (internal citations omitted).

[170] *See* Terry v. Ohio, 392 U.S. 1, 14 n.11 (1968) (explaining that officers may sometimes use stops and frisks "to maintain the power image of the beat officer") (internal citations omitted).

[171] *Id.*

II. APPLYING MASCULINITIES STUDIES TO *TERRY* STOPS AND FRISKS

Having critically reviewed the field of masculinities studies and developed an original theory of the hegemonic pattern of police officer masculinity, this Part demonstrates the theory's utility by applying it to the field of criminal procedure. Specifically, it asks whether the *Terry* stop and frisk doctrine is subject to a new reading, using the lens of masculinities studies.

This reading of the stop and frisk doctrine seeks to uncover assumptions about police officer manhood in the *Terry* decision that are consistent with the hegemonic patterns of U.S. masculinity in general, and police officer masculinity in particular. This Part argues that the Court's statement about "the power image of the beat officer" reflects the homosociality, anxiety, dominance-seeking, denigration of contrast figures, culture of honor stance, emphasis on command presence, punishment of disrespect, and allowance of masculinity contests that Part I described as aspects of U.S. masculinity in general and police officer masculinity in particular. Specifically, the *Terry* Court's language suggests that it believes it is inevitable that police officers will use their stop and frisk powers to establish who is "the man" on the street. Further, the Court's belief in this inevitability is consistent with the late 1960s consensus on the police. Deciding to allow officers to maintain their power image via stops and frisks was also consistent with an emerging call for law and order. This Part argues that we should take an intersectional approach to analyzing racial profiling. Thus it provides three examples of contemporary police use of *Terry* stops and frisks to bully civilians and shows how each example, though taken from the literature criticizing racial profiling, also contains a masculinity contest.

A. How the *Terry* Decision Accepts the Hegemonic Pattern of Police Officer Masculinity

In this Part, I argue that the Supreme Court in *Terry v. Ohio* makes assumptions about police officers that lead to the creation of a harassment-friendly doctrine. Specifically, the Court accepts the assumptions behind the hegemonic patterns of U.S. and police officer masculinities as givens.

1. What Happened in the *Terry Case*

In the *Terry* decision, the Court considered a situation in which an experienced white police officer, McFadden, found that "his attention was

attracted" by two black men, Terry and Chilton.[172] The race of the suspects, though unmentioned in the opinion, was significant to their attraction of McFadden's attention.[173] In McFadden's narrative, Terry and Chilton took turns looking into a store window and then conversed with each other.[174] A white man, Katz, approached Terry and Chilton; the parties exchanged words and then Katz walked away.[175] Terry and Chilton then "resumed their measured pacing, peering, and conferring" and eventually headed in the direction Katz had taken.[176] At the eventual suppression hearing, McFadden stated that at this point, he believed the men were conspiring to rob the store they had been observing.[177] He also stated he believed the men might be armed.[178]

McFadden followed Terry and Chilton and caught up with them as they were conferring with Katz.[179] After trying to get the men to identify themselves, McFadden grabbed Terry, spun him around, and patted the outside of his clothing in search of weapons.[180] Feeling a pistol, McFadden tried to remove it, but could not do so, and ushered the three suspects into a

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[172] *Id.* at 5.

[173] *See* Cooper, *The "Seesaw Effect," supra* note 15, at 141 n.3 (highlighting the way a "Statement of the Facts" articulates the meaning of the underlying elements of the story); *see also* John Q. Barrett, *Terry v. Ohio: The Fourth Amendment Reasonableness of Police Stops and Frisks Based on Less Than Probable Cause, in* CRIMINAL PROCEDURE STORIES 295, 302–03 (Carol S. Steiker ed., 2006) (discussing how race was raised at oral argument but not discussed by the Court thereafter); Thompson, *supra* note 15, at 963–68 (criticizing the *Terry* Court's refusal to acknowledge race of parties). As Devon Carbado has noted with respect to later criminal procedure opinions, the Court's color-blindness masks a racial ideology. *See* Carbado, *supra* note 53, at 967 ("[T]he Court both constructs race (that is, produces a particular conception of what race is) and reifies race (that is, conceptualizes race as existing completely outside of or apart from the very legal frameworks within which the Court produces it.") (footnote omitted)).

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

[175] *Id.* The *Terry* opinion refuses to acknowledge Katz's race. *See* Thompson *supra* note 15, at 963–68 (criticizing the opinion's deracialization of the facts).

[176] *Terry*, 392 U.S. at 6.

[177] *Id.*

[178] *Id.*

[179] *Id.*

[180] *Id.* at 7.

store.[181] There, he retrieved Terry's pistol, patted down Chilton and retrieved a weapon, and patted down Katz and found no weapon.[182]

Terry and Chilton were charged with carrying concealed weapons.[183] They moved to suppress the guns as products of illegal seizures and searches.[184] The trial court denied the motions. It did not believe that McFadden had the requisite probable cause to justify an arrest and full-blown search.[185] The issue, therefore, was whether probable cause was required to justify McFadden's actions.[186] New York already had a statute allowing stops and frisks on less than probable cause. There were other judicial and scholarly authorities in support of a lowered standard.[187] The *Terry* trial court followed those authorities and distinguished between an arrest and a "stop," and between a full-blown search and a "frisk."[188] It found that McFadden could make the stop because, on the basis of his experience, he had "reasonable cause to believe . . . some interrogation should be made. . . ."[189] McFadden could frisk the outer surfaces of Terry and Chiltons' clothing based on his reasonable cause to believe that they were armed.[190] The trial court then convicted Terry and Chilton, who appealed unsuccessfully until the *Terry* case reached the U.S. Supreme Court.[191]

In the first section of the opinion, the *Terry* Court takes considerable time to reject the argument that stops and frisks ought to be

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[181] *Id.*

[182] *Id.*

[183] *Id.*

[184] *Id.*

[185] *Id.* at 7–8.

[186] The Court initially thought so, as Warren's draft opinion held that probable cause was required and that McFadden's information passed that threshold. *See* Barrett, *supra* note 173, at 304 (describing draft opinion as requiring probable cause for stops and frisks).

[187] *See Terry*, 392 U.S. at 10 n.3 (citing authorities).

[188] *Id.* at 8.

[189] *Id.*

[190] *Id.*

[191] *Id.* As the Court notes, Chilton died before the case reached the Court.

disallowed on the grounds that they are often used for harassment. That is the section of the opinion that exhibits the Court's concern with allowing police officers to express their masculinity. I will turn to that section of the opinion below, but first I will briefly describe how the *Terry* Court decided the case.

In the second section of its opinion, the *Terry* Court turned to the question of what degree of justification officers must show in order to stop or frisk. In short, the Court held that stops and frisks only require reasonable suspicion rather than the more traditional and more stringent probable cause standard.[192] The Court derived a new "reasonable suspicion" test from a "reasonable person" standard. It said that "the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion."[193] As I have noted elsewhere, the Court comes to that conclusion by adopting a "scope continuum" approach to the Fourth Amendment: "In our view the sounder course is to recognize that the Fourth Amendment governs all intrusions by agents of the public upon personal security, and to make the scope of the particular intrusion, in light of all the exigencies of the case, a central element in the analysis of reasonableness."[194] Police intrusions on privacy that are of significant scope, such as arrests and full-blown searches, will continue to require probable cause. Stops and frisks, because they are of limited scope, will only be tested for reasonable suspicion.[195]

With its new standard in hand, the Court determines that McFadden had reasonable suspicion to stop Terry and his compatriots because their furtive actions suggested they were casing the store for a robbery.[196] McFadden could frisk the men because it is reasonable to suspect that men who are planning a daylight robbery would be armed.[197] Ultimately, the *Terry* Court makes it very easy to conduct legitimate stops and frisks. It only does so, though, after a tortured debate in the first section of the opinion over whether all stop and frisk evidence not based on probable

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[192] *Id.* at 20 (rejecting probable cause requirement).

[193] *Id.* at 21.

[194] Cooper, *Cultural Context Matters*, *supra* note 52, at 854 (quoting Terry v. Ohio, 392 U.S. 1, 18 n.15 (1968)).

[195] *See Terry*, 392 U.S. at 26 (contrasting scope of intrusions in arrests and stops).

[196] *Id.* at 22–23 (justifying McFadden's determination to make a stop).

[197] *Id.* at 28.

cause had to be excluded because of the existence of illegitimate uses of stops and frisks.

The first substantive part of the *Terry* opinion begins by claiming that the Court will canvas "the practical and constitutional arguments pressed with great vigor on both sides of the public debate over the power of the police to 'stop and frisk.'"[198] The first section of the opinion appears to deal with the practical side of the arguments. According to the Court, the police argue that "dangerous situations on city streets" require allowing the "minor inconvenience" of a stop and frisk at the discretion of the police officer.[199] In contrast, the civil libertarians argue that we must stick to "the traditional jurisprudence of the Fourth Amendment"[200] because unfettered police discretion will lead to police officers bullying minorities.[201]

The Court converts that general debate about whether stops and frisks are necessary tools or steps toward widespread police harassment into a debate over whether the exclusionary rule is ever appropriately used to prevent police harassment. The exclusionary rule bars the prosecution from admitting unconstitutionally seized evidence during its case-in-chief.[202] The *Terry* Court begins its exclusionary rule analysis by describing the rule's primary function as the deterrence of unconstitutional police conduct.[203] The idea is to remove the incentive to engage in such conduct that would be provided if the evidence could be used in a prosecution.[204] The Court starts its *Terry* analysis, however, from the premise that it is always inappropriate to exclude evidence gained from legitimate police investigation as a means of deterring very similar conduct that is constitutionally illegitimate.[205] So the fact that police sometimes use stops and frisks to bully minorities does not justify setting a high standard for the use of stops and frisks. That premise forecloses utilizing the exclusionary rule's deterrence function as an indirect weapon against conduct that is admittedly undesirable.

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[198] *Id.* at 10.

[199] *Id.*

[200] *Id.* at 11.

[201] *Id.* at 11–12.

[202] *Id.* at 12 (describing the exclusionary rule's primary function).

[203] *Id.* (describing how the exclusionary rule operates).

[204] *Id.*

[205] *Id.* at 13.

Next, the Court argues that the exclusionary rule is not always effective as a deterrent. That is the case because "[e]ncounters are initiated by the police for a wide variety of purposes, some of which are wholly unrelated to a desire to prosecute for crime."[206] In a footnote, the Court lists four such purposes. First, the police might initiate an encounter for the purpose of guiding a drunk home, and do so "with no intention of arresting him unless he becomes obstreperous."[207] Second, the police may wish to "mediate a domestic quarrel that threatens to erupt into violence."[208] Third, police might force "a woman in an area known for prostitution" to leave as "part of a harassment campaign designed to drive prostitutes away without the considerable difficulty involved in prosecuting them."[209] Finally, police may conduct "a dragnet search of all teenagers in a particular section of the city for weapons because they have heard rumors of an impending gang fight."[210] The Court's argument seems to be that some of the uses for stops and frisks that are not aimed at prosecution are ones we would not wish to deter.

Having noted the variety of purposes for stops and frisks, the Court turns to the argument that stops and frisks are sometimes used to harass minorities. It admits that "[d]oubtless some [stop and frisk] conduct violates the Fourth Amendment," but contends that those incidents are undeterrable.[211] The exclusionary rule "is powerless to deter invasions of constitutionally protected rights where the police either have no interest in prosecuting or are willing to forgo successful prosecution in the interest of serving some other goal."[212] What might that other goal be? Here the Court refers to the "wholesale harassment by certain elements of the police community, of which minority groups, especially Negroes, frequently complain . . . ."[213] In other words, the exclusionary rule cannot deter the use

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[206] *Id.*

[207] *Id.* at 13 n.9.

[208] *Id.* at 14 n.9.

[209] *Id.* at 14.

[210] *Id.*

[211] *Id.* at 13–14.

[212] *Id.* at 14.

[213] *Id.*

of stops and frisks to violate constitutional rights where police have the goal of harassing blacks without any intent to prosecute them.[214]

My conclusion that the *Terry* Court thinks police bullying of racial minorities is undeterrable precisely because the primary motivation for the harassment is extra-judicial is supported by a footnote the Court drops when mentioning police harassment. In discussing the practice of "field interrogation" (stop and frisk) the Court declares:

> [I]t cannot help but be a severely exacerbating factor in police-community tensions. This is particularly true in situations where the "stop and frisk" of youths or minority group members is "motivated by the officers' perceived *need to maintain the power image of the beat officer*, an aim sometimes accomplished by humiliating anyone who attempts to undermine police control of the streets."[215]

Later, this Article will press upon that language to argue that police officers' masculinity is at stake in the question of whether they will be able to stop and frisk on less than probable cause. For now, it suffices to point out that the *Terry* Court's "power image" footnote explicitly links stop and frisks to the harassment of blacks without the purpose of furthering prosecution for crime. Specifically, these stops and frisks are motivated by the desire to maintain a power image on the streets. While such bullying seems to be part of the activity that the Court identified as "violative of the Fourth Amendment,"[216] it also seems to be the very activity the Court believes is undeterrable. If the police will maintain their power image regardless of whether they can prosecute, goes the argument, harassment will occur even if the exclusionary rule is applied. For the Court, the undeterrable nature of this harassment makes it an inappropriate ground for excluding evidence gained from stops and frisks that were aimed at prosecution.[217]

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[214] That analysis avoids, and maybe even begs, the question of whether officers with the mixed motive of both harassing racial minorities and prosecuting anyone upon whom they find evidence ought to be able to keep the evidence.

[215] *Terry*, 392 U.S. at 14-15 n.11 (quoting TIFFANY ET AL., *supra* note 27, at 47–48) (emphasis added).

[216] *Id.* at 14.

[217] That conclusion is a twist on the Court's premise that the existence of illegitimate uses of stops and frisks could never justify barring otherwise legitimate stops and frisks, which this Article mentioned earlier.

2. The Terry *Court's Language as Endorsing Masculinity Contests*

The *Terry* Court's argument that harassment is undeterrable tacitly endorses stops and frisks "'motivated by the officers' perceived need to maintain the power image of the beat officer'"[218]—particularly when we read the opinion in light of masculinities studies. One reason the Court makes it easy for police officers to stop and frisk civilians is that it accepts the principles of the hegemonic patterns of U.S. and police officer masculinities. While I cannot prove that the Court thought in this way, I suggest that the Justices' reasoning had the effect of accepting and reinforcing the hegemonic patterns of U.S. and police officer masculinity. This subsection traces the ways in which the *Terry* opinion accepts the assumptions of the hegemonic patterns of U.S. masculinity, in general and police officer masculinity in particular.

First, as to the hegemonic pattern of U.S. masculinity in general, it is important to remember that the *Terry* Court was implicitly aware of the homosocial nature of the police-civilian interaction. The Court was surely aware that in 1968 nearly all police officers were men. A consciousness of who came before the Court in criminal cases would have also made it aware of the fact that the police mostly stopped men. The Court thus had background knowledge that any rule it set down would govern relations between men.

A second way in which the Court acted in accordance with the assumptions of the hegemonic pattern of U.S. masculinity is that it seemed aware that police have the sort of masculine anxiety I described in Part I.A. This is seen in the Court's recognitions that policemen have a perceived "need" to maintain their power image.[219] This may be a tacit acknowledgement that policemen harbor a fear of having their authority, and thus their manhood, undermined.[220] As I noted earlier, policemen's punishment of disrespect is rooted in masculine anxiety.[221] The Court's assumption that police officers need to maintain their power image seems to accept that anxiety about one's authority is a part of manhood.

A third way in which the Court accepted that police officers will act consistently with the hegemonic pattern of U.S. masculinity is by assuming

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[218] Terry v. Ohio, 392 U.S. 1, 14–15 n.11 (1968) (quoting TIFFANY ET AL., *supra* note 27, at 47–48).

[219] *Id.* at 14 n.11.

[220] *See* discussion *supra* Part I.B (linking policemen's authority to their manhood).

[221] *See id.* (explaining why police punish disrespect).

that police officers are engaged in a competition with suspects for control of the streets. The Court made reference to the "often competitive enterprise of ferreting out crime."[222] The Court seemed to accept that police officers see themselves as involved in a competition when it framed the opinion with the police's argument that "in dealing with the rapidly unfolding and often dangerous situations on city streets the police are in need of an escalating set of flexible responses."[223] The police seem to be arguing that there are new types of criminality, perhaps what Justice Douglas calls "new forms of lawlessness," and that the Court must therefore grant the police a new tool in order to make the competition between police and suspects fair.[224] Since the Court goes beyond merely acknowledging that police and suspects are in competition with one another by accepting that the police will "humiliate" anyone who challenges their authority,[225] it seems to accept hegemonic masculinity's assumption that men are in a competition wherein they seek to dominate one another.[226]

A final way in which the Court's reasoning is consistent with the hegemonic pattern of U.S. masculinity is in its assumption that at least some officers would harass racial minorities even if they would thereby lose any evidence so gained.[227] This is consistent with the hegemonic pattern of U.S. masculinity's directive to denigrate contrast figures. At the time of *Terry*, mostly white male police forces spent much of their time pursuing men from racial minority groups.[228] Given that the NAACP put the Court on notice that police officers often harass blacks, the Court's refusal to provide an effective deterrent to that conduct suggests that it viewed denigration of

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[222] *Terry*, 392 U.S. at 12 (quoting *Johnson v. United States*, 333 U.S. 10, 13–14 (1948)).

[223] *Terry*, 392 U.S. at 10 (contrasting police contention with NAACP argument).

[224] *Id.* at 38 (Douglas, J., dissenting) (criticizing the Court for watering down the Fourth Amendment).

[225] *Id.* at 14 n.11 (describing use of stops and frisks to harass).

[226] *See supra* Part I.A. (defining qualities of hegemonic pattern of U.S. masculinity).

[227] *See Terry*, 392 U.S. at 13 (contending that the exclusionary rule cannot deter police harassment).

[228] *See* David Alan Sklansky, *Not Your Father's Police Department: Making Sense of the New Demographics of Law Enforcement*, 96 J. CRIM. L. & CRIMINOLOGY 1209, 1210 (2006) (describing composition of police forces in 1950s and 60s as "virtually all-white, virtually all-male").

contrast figures to be inevitable.[229] Therefore, the *Terry* Court likely viewed
police racial harassment as inevitable, because the alternative conclusion
would be that it saw racial harassment as actually desirable.

Furthermore, the *Terry* Court's seeming acceptance of the police
response of humiliating anyone who challenges them also accepts the
"culture of honor" stance. As Harris has noted, officers punish disrespect
because they interpret any disrespect of their authority as a threat of a
general breakdown of law and order.[230] The *Terry* Court's acceptance of
police humiliation of civilians who challenge police authority suggests that
it accepted the culture of honor stance as natural. This makes sense given
that Supreme Court Justices are a product of the very culture they are to
oversee,[231] and late 1960s culture retained significant traces of cultures of
honor.[232]

While the *Terry* Court did not seem to accept police
hypermasculinity as a necessary manifestation of the hegemonic pattern of
U.S. masculinity, the overall effect of the opinion is to allow policemen to
act in a "manly" fashion. Allowing officers to "humiliate" those who
challenge their authority still treats the police-civilian encounter as a
competition that men will inevitably try to dominate. This Article does not
argue that the Court necessarily accepted hypermasculinity, but it does
argue that allowance of police bullying is not inconsistent with
hypermasculinity.

Whereas the *Terry* Court's adoption of the perspective of the
hegemonic pattern of U.S. masculinity is epitomized by its view of the
police-civilian encounter as a competition, its adoption of the perspective of
the hegemonic pattern of police officer masculinity is epitomized by its
acceptance of police aggression. While the Court was unaware of the theory
of command presence, it was aware that police officers feel the need to

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[229] *See Terry*, 392 U.S. at 11–12 (acknowledging that the NAACP was alleging
racial harassment by the police).

[230] *See* Harris, *Gender, Violence, supra* note 7, at 798 ("Abner Louima was a direct
threat to the masculinity of the officer he was thought to have assaulted; by extension, he
was a threat to the masculinity of the officers in Volpe's unit and to the masculinity of New
York's finest as a whole.").

[231] *See* Cooper, *The "Seesaw Effect," supra* note 15, at 150 (arguing that the
change in predominant beliefs explains the shift from *Plessy v. Ferguson*, 163 U.S. 567
(1896) (upholding racial segregation) to *Brown v. Board of Educ.*, 347 U.S. 483 (1954)
(striking down racial segregation in public primary and secondary schools)).

[232] *See* Harris, *Gender, Violence, supra* note 7, at 790 & n.47 (describing
contemporary homicide doctrines as products of our culture of honor).

maintain their "power image."[233] Accepting that police officers need to dominate the streets goes beyond merely validating the police need to control dangerous suspects, which is the justification for command presence. By accepting the idea that police will "humiliate" those who merely challenge police authority, the Court tacitly endorsed preemptive strikes on those people.[234] The theory here seems to be that certain groups—young racial minority males—are likely to produce criminals, and may therefore be controlled through command presence in advance of their actual commission of a crime. Such preemptive strikes through the enactment of command presence are most likely to occur when civilians disrespect police officers. The *Terry* Court seemed to understand this, as it suggested that officers will "humiliat[e]" anyone who seeks to "undermine police control of the streets."[235] So the Court acknowledged that stops and frisks are a tool that officers use to enact a command presence and punish disrespect.

The way in which the *Terry* Court endorsed the enactment of command presence in order to punish disrespect also allows the police to express their masculinity through the initiation of masculinity contests. The Court acknowledged that the police may initiate stops and frisks for the purpose of maintaining their power image.[236] In contemporary language, the Court acknowledged that police officers sometimes initiate stops and frisks just to show certain communities who is "the man." As I noted, stops and frisks create a masculinity challenge for both the suspect and the officer.[237] Both parties will respond to the challenge by seeking to impose their will on the other.[238] The *Terry* decision empowers the officer to dominate an encounter by allowing him to stop, and usually frisk, the civilian any time he has an articulable suspicion of crime.[239] Since the *Terry* Court acknowledged that police may choose to stop and frisk civilians just to show who is "the man," it effectively allows officers to use stops and frisks

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[233] *Terry*, 392 U.S. at 14 n.11 (quoting TIFFANY ET AL., *supra* note 27, at 47–48).

[234] *Id.*

[235] *Id.* at 14–15 n.11 (quoting TIFFANY ET AL., *supra* note 27, at 47–48).

[236] *Id.* at 14 n.11 (quoting TIFFANY ET AL., *supra* note 27, at 47–48).

[237] *See supra* Part I.C (defining masculinity contests).

[238] *See id.* (describing masculinity contests).

[239] *See Terry*, 392 U.S. at 21 (defining the standard for allowing police to conduct such tests).

to boost their masculine esteem. This is consistent with my theory of masculinity contests. Specifically, the Court presumed it to be inevitable that police officers will initiate masculinity contests aimed more at boosting their masculine esteem than at uncovering crime. To further demonstrate the utility of applying masculinities studies to criminal procedure, it will be necessary to explain *why* the Court implicitly endorsed police initiation of masculinity contests. I turn to that task in the next subsection.

3. Why the *Terry* Court Accepted Police Initiation of Masculinity Contests

When deciding whether to try to deter police from "humiliating" anyone who disrespected them, the *Terry* Court implicitly faced this problem: anytime a civilian is doing something an officer finds suspicious or inappropriate within that officer's patrol area, the civilian is implicitly challenging that officer's authority.[240] We might even say the civilian's disrespect for the officer's authority challenges the officer's manhood. The civilian's provocative behavior is thus likely to result in what the *Terry* Court called an "encounter" between the officer and the citizen.[241] At the time of the *Terry* opinion, officers surely had the right to approach such a person and seek to initiate a consensual encounter.[242] So, the officer could say, "Hold it, I'd like to ask you some questions about why you're in this area." But what if "None of your business!" were the civilian's reply? It was already clear that the officer had the power to arrest such a person if he had probable cause to believe a crime was afoot and this person was involved.[243] If the officer lacked probable cause, he would have to say something like, "Never mind, do whatever you like." That would cause the officer to lose face in what the *Terry* Court thought were "often competitive" relations between police and potential suspects.[244] As Susan Estrich has noted in the rape context, courts often model confrontations

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[240] *Id.* at 14 n.11 (quoting TIFFANY ET AL., *supra* note 27, at 47-48).

[241] *Id.* at 13. As my former colleague Len Packel often noted, the *Terry* Court introduced the concept of an "encounter" in this opinion.

[242] *Id.* at 19 n.16 (noting that some police-citizen interactions do not trigger Fourth Amendment scrutiny). *See also id.* at 34 (White, J., concurring) (noting policeman's right to address questions on the street).

[243] *See Terry*, 392 U.S. at 10 (framing issue as whether evidence short of probable cause ought to allow seizure and search).

[244] *See id.* at 12 (quoting Johnson v. United States, 333 U.S. 10, 13–14 (1948)).

between men on a "boys' fight" in the playground.[245] A boy would not be
expected to back down from such a confrontation because that would make
him a "sissy."[246] So, if the *Terry* Court had not created reasonable suspicion
doctrine, an entire rubric of encounters would have required officers to
respond in an unmanly way.[247] After *Terry*, an officer who had been
challenged and who had only reasonable suspicion a crime was afoot could
grab the suspect, throw him against a wall,[248] spread his legs, and roughly
pat down his groin.[249] It would be clear who was "the man."

i. The 1960s Consensus on the Police

          Was the *Terry* Court aware that it was allowing police officers to
play a game of "who's the man?" Perhaps implicitly. This Article does not
claim to prove that assumptions about masculinity were a direct cause of the
Terry opinion, only that masculinities studies "can help to explain the
ruling, by making more understandable" certain presumptions that are
consistent with the opinion.[250] Note the fact that 1960s scholarship on

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[245] *See* Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1091 (1986) (analogizing courts'
treatment of the resistance requirement, and of criminal law generally, to typical
understanding of what boys do in schoolyards).

[246] *See generally id.* (analyzing the playground metaphor for some of rape
doctrine's assumptions).

[247] I am aware that the Court has sometimes suggested that one may walk away
from a *Terry* stop. *See, e.g., Terry*, 392 U.S. at 34 (White, J., concurring) (contending "the
person stopped is not obliged to answer"). Even though the suspect need not answer
questions, he may be "restrained briefly in the process." *Id.* One's right to walk away from a
Terry stop is limited by the fact that the officer will usually have a right to frisk the person
first. Regardless, the Court recently repudiated the idea that you need not cooperate with a
Terry stop, at least when a state statute requires you to identify yourself. *See* Hiibel v. Sixth
Judicial Dist. Court, 542 U.S. 177 (2004) (upholding arrest for refusing to identify self
during stop).

[248] *See Terry*, 392 U.S. at 17 (noting suspect may be "facing a wall with his hands
raised").

[249] Such a frisk may include sensitive palpitation of the area about the groin. *Id.* at
17 n.13 (describing frisk). The potential homoeroticism of this practice should be obvious.
As Richard Myers reminds me, police holding only reasonable suspicion in fact often
conduct "full blown" searches and then sort out the details later. *See, e.g.,* Jon B. Gould &
Stephen D. Mastrofski, *Suspect Searches: Assessing Police Behavior Under the U.S.
Constitution*, 3 CRIMINOLOGY & PUB. POL'Y 316, (2004) (describing anal search on, at best,
mere reasonable suspicion).

[250] David Alan Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699, 1728
(2005) [hereinafter Sklansky, *Police and Democracy*].

policing described officers as overly concerned with proving their masculinity.[251] The Justices were part of the intelligentsia that had reached that conclusion about the police.[252] As political scientist Robert Dahl put it, "it would appear, on political grounds, somewhat unrealistic to suppose that a Court whose members are recruited in the fashion of Supreme Court Justices would long hold to norms of Right or Justice substantially at odds with the rest of the political elite."[253] Simultaneously, the Justices were part of the status quo that must have felt threatened by the crisis of masculinity of the late 1960s. As historian Michael Flamm puts it, "[c]hanging patterns of gender relations and family structure, which eroded traditional forms of patriarchy and authority, also created sources of tension for many [United States citizens], particularly white males."[254] The hegemony of the middle-class white male model was also under attack from the black civil rights movement, among other fronts.[255] At least at the subconscious level, then, the *Terry* Court may have been aware that police officers considered their manhood to be at stake in the debate over whether they could stop and frisk people on weaker grounds than probable cause.

The *Terry* Court's concern with the group mentality of the police, as exemplified by its acceptance of the idea that beat officers seek to maintain a collective power image, mirrors a concern found in the police

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[251] *See, e.g., id.* at 1705, 1734 (quoting JAMES Q. WILSON, VARIETIES OF POLICE BEHAVIOR: THE MANAGEMENT OF LAW AND ORDER IN EIGHT COMMUNITIES 33–34, 47 (1968) [hereinafter WILSON, VARIETIES OF POLICE BEHAVIOR]).

[252] *See id.* at 1734.

[253] Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 291 (1957), *quoted in* Sklansky, *Police and Democracy, supra* note 250, at 1739. Elsewhere I have argued that a cultural trend can influence law and that law can then reciprocally reinforce that trend. *See* Cooper, *The "Seesaw Effect," supra* note 15, at 140 (calling for critical cultural theory methodology focusing on "how the particular meanings of identities are socially constructed at a given moment and then create slippages between how courts imagine doctrines and how they are applied in practice"). Here, a perceived crisis of masculinity in culture helps explain why the Court would reinforce hegemonic patterns of masculinities with its declaration that police must be allowed to protect "the power image of the beat officer." *Terry*, 392 U.S. at 14–15 n.11 (quoting TIFFANY ET AL., *supra* note 27, at 47–48).

[254] *See* MICHAEL FLAMM, LAW AND ORDER: STREET CRIME, CIVIL UNREST, AND THE CRISIS OF LIBERALISM IN THE 1960s 7 (2005).

[255] Traister says of the 1960s that "middle-class straight (and now gay) [U.S.] men faced yet a new crisis, this time the threat of second-wave feminism, black activism, civil rights, and the uncertainties of authority born of the Vietnam war." Traister, *supra* note 54, at 288.

studies scholarship of the period. For example, in his article, *Police and Democracy*, David Alan Sklansky considers the relationship between theories of democracy and the ways the Court thinks about the police. In surveying both humanities scholarship on the police and criminal procedure cases during the Warren Court era, Sklansky determines that an understanding of the police as having a group psychology, worries about how the police use their discretion, and a belief that judicial oversight of the police was necessary were hallmarks of the times.[256] Sklansky concludes that the 1960s saw the development of an understanding of the police as having a distinctive mentality, one marked by cultural conservatism, hostility to difference, and the potential for violence.[257] He does not argue that this view appears explicitly in Warren Court jurisprudence but does believe it subtly influences decisions.[258] According to the 1960s scholarship, the police were united as a group by the fact that their job isolated them from the rest of the community.[259] This caused them to create distinctive norms.[260] Even reactionary political scientist James Q. Wilson, who would later rationalize aggressive policing on grounds that blacks were genetically predisposed to be criminals,[261] believed that police officers' working-class backgrounds led them to view violence as legitimate.[262] Unfortunately, the picture of 1960s police officers as aggressive is consistent with the contemporary hegemonic pattern of police officer masculinity that I identified in Part I.B.

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[256] Sklansky, *Police and Democracy*, *supra* note 250, at 1705, 1731.

[257] *Id.* at 1733. One early 1970s article does challenge (not especially convincingly) the prevailing view that the police had a group mentality. Robert Balch, *The Police Personality: Fact or Fiction?*, 63 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 106 (1972).

[258] Sklansky, *Police and Democracy*, *supra* note 250, at 1733.

[259] *Id.* at 1732.

[260] *Id.*

[261] *See* Thomas L. Dumm, *The New Enclosures: Racism in the Normalized Community*, *in* READING RODNEY KING, READING URBAN UPRISING 178, 182 (Robert Gooding Williams ed., 1993) (critiquing JAMES Q. WILSON & RICHARD J. HERNSTEIN, CRIME AND HUMAN NATURE: THE DEFINITIVE STUDY OF THE CAUSES OF CRIME (1998)). If this Article has one quibble with Sklansky over his *Police and Democracy* article, it is that he accepts the authority of Wilson's scholarship while never explicitly mentioning its basis in racist conceptions of human nature.

[262] Sklansky, *Police and Democracy*, *supra* note 250, at 1733.

Specifically, the 1960s view of police is consistent with their engagement in masculinity contests of the type I identify above. As Sklansky notes, the Warren Court was fond of referring to "the often competitive enterprise of ferreting out crime."[263] Scholars such as Wilson argued that police officers of the 1960s were preoccupied with "maintaining self-respect, proving one's masculinity, 'not taking any crap,' and not being 'taken in.'"[264] Here is a masculinity that is consistent with Kimmel's notion of hegemonic masculinity as a relentless test requiring proof of one's manhood.[265] The 1960s consensus thought of officers as having a cynical view of the world that presumed civilians were out to pull one over on them.[266] Those inherently adversarial civilians then provided officers with an opportunity to prove their manhood by teaching civilians to show respect. The *Terry* Court's assumption that it was inevitable that police officers would seek out masculinity contests was thus implicit in the predominant 1960s understanding of police officer mentality.

ii. The Call for "Law and Order"

If the *Terry* Court was implicitly aware of those dynamics, why did it expand police discretion rather than clamping down? Sklansky provides a potential answer: "[A]s the 1960s wore on, social stability grew to seem more precarious, and consensus became, correspondingly, all the more imperative."[267] The result was a call for "law and order" to which the Court seemed to respond with its pro-police position in the *Terry* decision.

At the heart of the belief that there had been a breakdown of public order that required a strengthening of law and order was a complaint that the U.S. Supreme Court had abandoned the mainstream's interest in effective law enforcement in favor of the rights of criminals.[268] Specifically, conservatives argued that the Court should overturn a series of decisions

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[263] *Id.* at 1734 (quoting United States v. Johnson, 333 U.S. 10, 14 (1948)).

[264] *Id.* at 1733 (quoting WILSON, VARIETIES OF POLICE BEHAVIOR, *supra* note 251, at 33–34, 47).

[265] Kimmel, *Masculinity as Homophobia, supra* note 3, at 31.

[266] Sklansky, *Police and Democracy, supra* note 250, at 1733 (quoting WILSON, VARIETIES OF POLICE BEHAVIOR, *supra* note 251, at 33–34, 47).

[267] *Id.* at 1749.

[268] *See* FLAMM, *supra* note 254, at 3 (citing conservative argument that there had been a general breakdown in public order).

that, they contended, had hampered the police.[269] One way of thinking about the impact of the law and order discourse on the *Terry* Court is to think about the *Miranda* decision. The complaint that *Miranda* had handcuffed the police was a centerpiece of the law and order critique of the Court.[270] As John Q. Barrett has revealed, Chief Justice Warren initially wanted to write the *Terry* decision as a *Miranda*-type set of procedures for stops and frisks.[271] But the rest of the Court was hesitant to go back down that path.[272] While the *Terry* opinion displays some concern with the group mentality of the police and how they use their discretion, it also represents a trend towards ending the belief that police discretion could and should be contained by judicial oversight.[273]As Tracey Maclin has argued in an important essay on the *Terry* decision, a reasonable reading of the Court's reluctance to limit "stop and frisk" powers is that it was a response to the public uproar over the *Miranda* decision.[274]

This Article reinforces Maclin's view and adds the insight that the context of the 1960s masculinity crisis may have propelled an emerging law and order ideology. Just as the *Terry* decision may have been, in part, a response to the criticism of the *Miranda* decision, it may also have been, in part, a response to the ideology of law and order. As the ideology of law and order gained popularity, it influenced political actors such as the Court.[275] The call for law and order was, in part, a response to the 1960s

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[269] *See id.* (describing the conservatives' positive program).

[270] *See id.* at 55 (describing conservative criticism of *Miranda* decision).

[271] *See* Barrett, *supra* note 173, at 304 (describing Court's process of writing the *Terry* decision).

[272] *Id.*

[273] Tracey Maclin, Terry v. Ohio*'s Fourth Amendment Legacy: Black Men and Police Discretion*, 72 ST. JOHN'S L. REV. 1271, 1285 (1998) (declaring that, unlike in the past, in *Terry*, racial concerns "clearly occupied a subordinate position to the Court's overriding concern about police safety and violent crime").

[274] *See id.* at 1287 (concluding that "the *Terry* Court succumbed to pressure to weaken constitutional principle when it was clear that many politicians, and a large segment of the public, had signaled their disapproval of the Court's effort to extend meaningful constitutional protection to those who needed it the most: poor and minority persons suspected of criminal behavior").

[275] The Court is a political actor, at least in the broad sense of the term. *See* Dahl, *supra* note 253, at 291 (arguing that U.S. Supreme Court justices are part of a broad political consensus amongst the intelligentsia).

crisis of masculinity. As hegemonic manhood seemed to be under attack, conservatives called for it to be shored up. Letting police officers be "the man" on the street was consistent with law and order thinking. The *Terry* Court seems to have succumbed to that thinking.

4. Why Blame the Terry *Decision for Masculinity Contests?*

Before concluding my discussion on how the *Terry* Court accepted the hegemonic patterns of U.S. and police officer masculinity, it will be helpful to pause and address a potential objection. Some commentators might say that the *Terry* decision does not expand police officer discretion and therefore does not cause an increase in police harassment. These readers would insist that since police officers were already conducting stops and frisks prior to the *Terry* decision, the Supreme Court did not change the status quo.[276] In my view, this argument is not persuasive: by providing its stamp of approval for stops and frisks, the *Terry* Court expanded police discretion by insulating the practice from legal challenge. Before the *Terry* decision, police who stopped and frisked civilians without probable cause were taking a calculated risk that they might lose any evidence they found. After the *Terry* decision, officers knew for sure that they had the discretion to stop and frisk civilians upon mere reasonable suspicion.

Moreover, the *Terry* decision's expansion of police officer discretion increases opportunities for harassment. It creates a huge category of police activity that takes place absent significant judicial oversight. After-the-fact evaluations of stops and frisks are hampered by the inherent vagueness of the reasonable suspicion standard.[277] The consequence of the lack of judicial oversight is that stops and frisks can very easily mask illegitimate harassment. The low standard means that police may intrude upon a wider range of suspects at an earlier point in the investigation.[278] The officer can have it both ways by conducting stops and frisks upon both those whom he reasonably suspects of crime and those whom he wishes to harass. Whenever no evidence is found, the stop is invisible to the courts

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[276] *See* Barrett, *supra* note 173, at 299 (noting use of stops and frisks to search Italians in New York City prior to the *Terry* decision).

[277] *See* Cooper, *The "Seesaw Effect," supra* note 15, at 143 (arguing Court's approach to Fourth Amendment in the *Terry* decision enlarges the number of people police officers may stop).

[278] *See* Cooper, *The Un-Balanced Fourth Amendment, supra* note 52, at 885 ("The very terminology of the reasonable suspicion doctrine, therefore, prevents meaningful review of an officer's decision to stop or frisk a suspect.").

because there is no motion to suppress. Because of the *Terry* decision's creation of the reasonable suspicion standard, when evidence is found in a harassment-oriented stop, the police will often be able to keep the evidence. The higher probable cause requirement would have limited the practice of having it both ways. This was largely negated by *Terry*. After the *Terry* Court's creation of the reasonable suspicion requirement, there is an arena within which the officer can bully civilians based upon an "articulable" suspicion and still keep any evidence he finds. Considering that the hegemonic pattern of police officer masculinity may create an incentive for officers to use this free harassment zone to boost their masculine esteem, we ought to be concerned about the fact that the *Terry* opinion reveals a presumption that bullying is inevitable.

B. Contemporary Manifestations of Police Bullying

Having demonstrated the utility of masculinities studies for helping us better understand a seminal case, this Article presses for the widespread usage of masculinities-based interpretations of criminal procedure by identifying a current problem that cannot fully be analyzed otherwise. In this subsection, I provide three examples in which police officers bully civilians whom they perceive to have disrespected them or challenged their authority. Such bullying is consistent with the theory of masculinity contests that I developed earlier.[279] While there are more egregious abuses of the stop and frisk power than the ones I detail,[280] the examples chosen have the advantage of demonstrating the potential for harassment inherent in stops and frisks that are otherwise typical. In addition, each of these examples is taken from the literature criticizing the incidence of racial profiling in isolation of issues related to masculinity and gender. Accordingly, they aptly demonstrate the need for a theory of the intersectionality of race and gender in criminal procedure.

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[279] *See* discussion *supra* Part I.C (developing theory of masculinity contests).

[280] *See generally* Gould & Mastrofski, *supra* note 249 (analyzing police officer's sexual assault on civilian during search); *see also* Bernard E. Harcourt, *Unconstitutional Police Searches and Collective Responsibility*, 3 CRIMINOLOGY & PUB. POL'Y 363 (2004) (noting the "dirty hands" problem of researcher's mere observation of police officer's sexual assault on civilian during search).

1. The Examples

According to the New York State Attorney General's report on NYPD stop and frisk practices,[281] Edward Stevens, a black professor from the Virgin Islands, was *Terry*-stopped by an officer while driving his Mercedes-Benz. The officer did not tell Stevens why he had pulled him over but did question who owned the car.[282] After several minutes passed, Stevens identified himself as a professor who had to return to his school to teach a class.[283] The officer told Stevens not to rush him.[284] Twenty minutes passed.[285] Stevens then told the officer he needed to call his school to tell them he would be late.[286] The officer, visibly agitated, ordered Stevens out of his car, ordered him to place his hands on the car, frisked him, and said he had "no right to question a police officer."[287] The officer then handcuffed Stevens, took him to the police station, refused to let him call his school, and placed him in a jail cell.[288] When, upon his release, Stevens asked for documentation to justify his absence, the officer issued him a desk appearance ticket for resisting arrest, disorderly conduct, and minor infractions, none of which were traffic violations.[289] In this example, the *Terry*-stop may have been motivated by a perceived traffic violation (or just by racial bias), but the *Terry*-frisk and subsequent arrest were clearly mere punishments for questioning the officer's authority rather than responses to danger.

Nor is Professor Stevens alone in being punished for perceived disrespect. In June 2000, *Black Enterprise* reported another instance of police bullying when Washington, D.C. attorney Robert Wilkins, who is black, was *Terry*-stopped while driving home from a funeral with his

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[281] SPITZER, *supra* note 17, at 80.

[282] *Id.*

[283] *Id.* at 80–81.

[284] *Id.* at 81.

[285] *Id.*

[286] *Id.*

[287] *Id.* at 81.

[288] *Id.*

[289] *Id.*

family.[290] The officer alleged that Wilkins was speeding and demanded to search the car.[291] Wilkins identified himself as an attorney and objected to the search. The officer's response was to call for a drug-sniffing dog and to pull the whole family out of the car in the rain while officers walked the dog around the car.[292] In this example, the *Terry*-stop had occurred and the dog sniff, akin to a *Terry*-frisk, was added on to punish Wilkins for not "consenting" to a full blown search.[293]

A third example of police officers punishing civilians for perceived disrespect is provided by David Harris's ACLU report on racial profiling.[294] Police officers *Terry*-stopped the Deputy President of the Connecticut Senate, who is black, as he drove through a white area.[295] The officer asked the civilian if he knew what town he was in.[296] The civilian asked both why he was pulled over and why it mattered what town he was in.[297] The officer said he did not have to give a reason for stopping the civilian, and if the

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[290] Joyce Jones & Eric L. Smith, *Policing the Police*, BLACK ENT., June 2000, at 38.

[291] *Id.*

[292] *Id.* The officer obviously considered the initial intrusion to be a stop rather than an arrest, for a valid arrest would have entitled him to a full-blown search of both Wilkins and his car. United States v. Robinson, 414 U.S. 218 (1973) (allowing full-blown search incident to arrest without further justification for the intrusion). *But see* Arizona v. Gant 129 S. Ct. 1710 (2009) (limiting search incident to arrest of vehicle to times when suspect has access to the car or there is reason to believe evidence of the crime of arrest could be found therein). Although the issue had not been settled at the time, the dog sniff of the car was not a frisk, but "nothing." According to the current Supreme Court, this was not a "search." *See generally* Illinois v. Caballes, 543 U.S. 405 (2005) (allowing dog sniff following *Terry*-stop of car).

[293] Consent doctrine says the Fourth Amendment does not apply whenever civilians agree to the search or seizure, even if they do not knowingly, voluntarily, and intelligently waive their rights. *See* Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (requiring no warning of right not to comply). For a criticism of this doctrine, see Carbado, *supra* note 53, at 1004–25 (criticizing consent doctrine for adopting a perpetrator perspective on the Fourth Amendment).

[294] DAVID A. HARRIS, *Driving While Black: Racial Profiling on Our Nation's Highways*, AMERICAN CIVIL LIBERTIES UNION SPECIAL REPORT (1999), *available at* http://www.aclu.org/racialjustice/ racialprofiling/15912pub19990607.html.

[295] *Id.*

[296] *Id.*

[297] *Id.*

civilian made an issue of it, the officer would ticket him for speeding.[298] The punishment in this example was conditional; the civilian's *Terry*-stop would be expanded to include a (seemingly unjustified) ticket unless he ceased questioning the officer's authority.

The combined effect of these examples is to suggest that there is an unwritten rule that *Terry* stops and frisks will be initiated or expanded if a civilian questions police authority. Intuitively, this makes sense. People know that contradicting a police officer is not a good idea. Many black men have been warned that challenging an officer can get you beaten.[299] So, these examples, while not typical of police behavior, describe a possibility that inheres in the police-civilian encounter. In that sense, these examples are representative.

2. A Masculinities Studies "Re-reading" of the Examples

The above examples from the literature criticizing racial profiling beg to be read as also involving masculinity contests. In this subsection, this Article conducts that reading with two different but related points of emphasis. First, I read the examples as establishing that the rule of deference to the police leads officers to initiate masculinity contests. Second, I read the examples as establishing the intersectionality of masculinity and race in bringing about these harassing *Terry*-stops.

i. The Rule of Deference to Police Officers as a Spur for Initiating Masculinity Contests

At the outset, the officer in the first example seems to have viewed Stevens' assertion of a need to get to his school as a masculinity challenge. The twenty-minute delay—after the civilian's statement that he had to be somewhere—certainly appears to be a means of punishment for rushing the officer. The officer's visible agitation at the civilian's repeated requests to call his school seems to explain his decision to *Terry*-frisk and subsequently arrest Stevens. The incident as a whole becomes understandable in light of the culture of honor mentality. Officers may be prone to see any action they interpret as a challenge to their authority as also constituting a threat to their social standing. Police officers may feel that, as in a culture of honor, if

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[298] *Id.*

[299] *See* Carbado, *supra* note 53, at 952–54 (2002) (describing ways black men perform for the police); *see also* Jerome McCristal Culp, Jr., *Notes From California: Rodney King and the Race Question*, 70 DENV. U. L. REV. 199, 200 (1993) (discussing "rules of engagement of black malehood").

they let an infraction pass, they will be subject to constant challenges. Thus, such challenges must be met with a forceful response. Stevens' treatment seems to reflect that type of thinking.

In the second example of stops and frisks used for harassment, the dog sniff again seems to have been punishment for challenging the officer's authority. It is easy to see how an officer might consider Wilkins' identification of his profession to be an act of pulling rank. After all, officers are more typically from working-class backgrounds and lawyers are generally accorded greater social status.[300] For Wilkins, the attorney, to suggest that he knew the officer had no right to search his car implied not only a disrespect for the officer's authority, but also that Wilkins had more right to interpret the law than the officer. In so doing, Wilkins implied that he was a more important man than the officer. In this sense, the challenge to the officer's authority constituted a masculinity challenge. As our consideration of the hegemonic pattern of police officer masculinity would suggest, the officer responded to the masculinity challenge by initiating a masculinity contest that he was guaranteed to win.

In the third example of stops and frisks used for harassment, masculinity is significant in at least two ways. First, the civilian's challenge of the officer's authority constituted a disrespect of his manhood because of the connection officers often make between respect for their authority and respect for their manhood. Second, for that reason, the officer seems to have initiated a masculinity contest by putting the civilian in the position of either defending his stance or backing down. Together, then, these three examples show that police officer punishment of disrespect, which is part of the hegemonic pattern of police officer masculinity, often leads officers to initiate masculinity contests.

ii. The Intersectionality of Masculinity Contests

The fact that examples of racial profiling reveal a tendency for police officers to initiate masculinity contests strengthens the contention that there is a need for intersectionality theory in criminal procedure. In each of the three examples, race intersects with masculinity since the

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[300] *See* Fine et al., *supra* note 104, at 63 ("[T]he fire and police departments in Jersey City . . . employ a disproportionate share of white men. We began to hear these departments as the last public sector spaces in which white working-class men could at once exercise identities as white, working, and men.").

civilians were pulled over for being racially out of place.[301] The initiation of masculinity contests by the officers in these examples seems to stem from the need to dominate other men in general and to denigrate contrast figures in particular.[302] We can better understand how police use masculinity contests to boost their masculine esteem by reviewing those two needs in light of our examples.

First, these examples reveal the dominance-seeking desire that emanates from the hegemonic pattern of U.S. masculinity. As was noted in Part I.B, punishment of disrespect is part of the hegemonic pattern of police officer masculinity. Police officers want citizens to defer to the badge. In each of the three examples, the civilian "disrespects" the officer, either by rushing him, refusing his requests, or questioning his motives. Because officers link respect for their authority to respect for their manhood, those actions challenge the masculine esteem of the officer. The officers in these examples thus sought to reassert their dominance by using the tools available to them. The officer, in effect, asks, "who's the man?" So, the initiation of masculinity contests in these examples stems not just from racial animus, but also from the masculine need to dominate other men.

Second, the examples this Article has provided are not solely about manhood. They also depict how the domination of other men is intertwined with the denigration of contrast figures. A masculinity contest is sometimes simultaneously a means of conflict along another axis of identity as well as a means of affirming one's manhood. For example, Harris sees the type of police harassment that was acknowledged in the *Terry* opinion as a product of conflict between men with different identities. She says that "social stratification[s] along lines of race and class separate men from one another and engage them in relations of competition . . . ."[303] That is, the combination of the definition of masculinity as expressed through domination of others and the segmentation of masculinity into different groups through the intersectionality of identities tends towards an ongoing conflict between different groups of men. Especially in the late 1960s, when police forces were virtually all-male and all-white, the police were one distinct group of men policing another distinct group of men—virtually all

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[301] On the concept of being racially out of place, *see* Sheri Lynn Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L.J. 214, 248 (1983) (containing early discussion about the relationship between race and police officers' decisions to stop suspects).

[302] *See supra* Part I.A (defining the need to dominate other men and to denigrate contrast figures as qualities of the hegemonic pattern of U.S. masculinity).

[303] Harris, *Gender, Violence, supra* note 7, at 785.

black suspects. Consequently, competition between these racially distinguished men was unsurprising. Since one of the two groups had the power to dominate the other, these examples show the intersectionality of race and masculinity in producing police bullying.

III. TEACHING THE PROPER USE OF COMMAND PRESENCE

Having identified the sources of police bullying in both culture (Part I) and law (Part II), this Article now proposes a solution. This Part begins by defining the problem as the way police culture leads officers to enact command presence when it is not truly necessary. It then considers whether we need to reform the goals of criminal justice or just the ways police officers perform their duties. Finally, it concludes that reforming police training is a more realistic means of addressing the problem. Specifically, I will show that the current police training regime fails us, that training is capable of bringing about reform, and that the new training regime should encompass the academy, field training, and informal training.

A. The Problem

The basic problem that this Article has identified is the need for police officers to distinguish situations requiring command presence from those that do not. When suspects are threatening physical violence, officers are justified in enacting a command presence. In these cases, an authoritative tone of voice and even physical violence may be necessary to keep the situation from becoming worse. In contrast, a situation where someone is mouthing off to a cop just to show off to his friends does not require command presence. It is not that person's goal to create a dangerous situation. They may be annoying, but they do not require force. Good cops know the difference between those situations.[304]

Unfortunately, bad cops have the same power to enact command presence as good cops. Consequently, the *Terry* Court's endorsement of "maintain[ing] the power image of the beat officer . . . by humiliating anyone who attempts to undermine police control of the streets" is too broad.[305] First, why should the police be able to "control the streets"? If that term means only that the police have the authority to suppress real

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[304] *See generally* DAVID A. HARRIS, GOOD COPS: THE CASE FOR PREVENTIVE POLICING (2005) (arguing for policing that respects due process).

[305] Terry v. Ohio, 392 U.S. 1, 14–15 n.11 (1968) (quoting TIFFANY ET AL., *supra* note 27, at 47–48).

disturbances, I have no problem with it. But the term seems to refer to an ability to be beyond reproach. That meaning is suggested by the Court's acknowledgement that stops and frisks are sometimes used merely to harass civilians.[306] Further, the manual from which the Court took the phrase "control of the streets" acknowledges that a common use of stops and frisks was to break up groups of black men simply because they were black men and in a group.[307] The Court's language thus paints a picture of harassment for harassment's sake—that is, a use of stops and frisks to respond to mouthing off rather than to physical threats. Bad cops would not be unreasonable if they understood the *Terry* Court to have tacitly approved of police enactment of command presence merely to stage masculinity contests.

While it is the *Terry* stop and frisk doctrine that enables police harassment, it is how police are trained, both formally and informally, that activates that potential. In their article, *"There Oughtta Be a Law Against Bitches": Masculinity Lessons in Police Academy Training*, Annastasia Prokos and Irene Padavic show how women are marginalized in policing through the incorporation of the hegemonic pattern of U.S. masculinity into the rituals of policing.[308] They describe a female cadet's experience in a police training academy. The male cadets constantly used the phrase, "there oughtta be a law against bitches," which they had seen a suspect say in an episode of the television show *COPS* that the academy screened for training purposes.[309] That statement exemplified the training and suggests that one of the hidden lessons of police academy training is that women are outsiders in policing and there are no repercussions for treating them as such.[310] That message is consistent with the denigration of contrast figures, which I have defined as integral to the hegemonic pattern of United States masculinity. In a simple but profound sense, then, police academies teach policemen this lesson: "Hegemonic masculinity is a central defining concept in the culture

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[306] *Id.* at 13.

[307] *See* TIFFANY ET AL., *supra* note 27, at 13 ("In most instances, the officers have no grounds for suspicion other than the facts that . . . the 'suspect' is male, and that he is in an area with a high crime rate. Such areas are predominately inhabited by minority racial groups."); *see also* Maclin, *supra* note 273, at 1282 (arguing that "aggressive patrol" stop and frisk tactics were known to be focused on black men).

[308] Prokos & Padavic, *supra* note 2.

[309] *Id.* at 439.

[310] *Id.* at 446.

of police work in the United States."[311] That message about masculinity is reinforced during post-academy training, both formal and informal.[312]

When policemen are both provided discretion by legal doctrine and taught to accept the hegemonic pattern of police masculinity during their training, bullying will follow. Masculinized policemen will adopt the "culture of honor" stance and hypermasculine behavior with civilians. They will also enact command presence as a means of punishing disrespect. They will initiate masculinity contests. The problem that we face, therefore, is that the macho culture of policing triggers officers to use their *Terry* stop and frisk powers to bully civilians.

B. The Proposal

Recognizing that police bullying is a product of our way of thinking, Harris endorses a move toward a restorative justice model of policing. As I have noted, part of the problem is that the present model of policing, focusing as it does on the demonstration of a command presence, is consistent with the hegemonic pattern of masculinity. The emphasis on command presence is part of a punitive model of policing. A restorative justice model would bring together the various individuals affected by the offense and have them agree on how to repair the harm caused rather than just punish the harm doer.[313] This would reject the punitive model's preoccupation with measuring the amount of pain that must be inflicted on the harm doer in order to balance the wrong.[314] Demonstrating mastery over the harm doer would no longer be the system's goal and that change might change police officers' beliefs that they must master the potential criminal by means of a command presence. Instead, the officer's goal would be to obtain a full understanding of the situation. Dominating the suspect through command presence would be an ineffective means of accomplishing the new goal. Harris's proposal thus has the potential to reduce police bullying. Although I am in favor of a move from a punitive model of policing toward a restorative model, I am not sanguine about the likelihood of

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[311] *Id.* at 442.

[312] *See* Robert W. Benson, *Changing Police Culture: The Sine Qua Non of Reform*, 34 L.A. L. REV. 681, 682 (2001) (noting police-macho culture).

[313] *See* John Braithwaite, *A Future Where Punishment is Marginalized: Realized or Utopian?*, 46 UCLA L. REV. 1727, 1743 (1999) (defining restorative justice).

[314] *Id.*

accomplishing that shift in the short term. After all, even the move to the slightly more restorative community policing model has been resisted.[315]

It may be, though, that we can more directly affect police bullying by changing how we train police forces. This subsection will establish that new forms of training are necessary by showing that current forms of training fail to teach officers appropriate rules for enacting command presence. It will further establish that new forms of training can counter masculinism in policing. Finally, it will describe what the new training should look like.

1. The Current Training Regime Fails Us

In order to advocate for new forms of training, it must be established that the present training system is broken. I do so by showing that current training ignores the problem of masculinism in policing and even exacerbates it. For example, at present, police academies usually train extensively in the technical and mechanical aspects of policing— providing instruction on how to subdue or disarm suspects.[316] Academies have that focus because of safety concerns. However, an officer may have "little guidance as to what he *should* do when confronted by a serious verbal challenge to his authority." [317]

Not only do police academies fail to train officers on the appropriate use of command presence, they may actually provide counterproductive messages. This begins with indoctrination into the present macho police culture. During their training, cadets may be

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[315] *See generally* HERBERT, *supra* note 121, at 94–109 (describing police department resistance to community policing).

[316] *See* Alison T. Chappel et al., *Law Enforcement Training: Changes and Challenges, in* CRITICAL ISSUES IN POLICING: CONTEMPORARY READINGS 71, 73 (5th ed. 2005) ("Recruits spend 90 percent of their training on firearms, driving, first aid, and self-defense, and other use-of-force tactics even though only 10 percent of their job duties will put them in positions where they need these skills."); *see also* Quint C. Thurman, *Preparing Police Officers for Success, in* CONTEMPORARY POLICING: CONTROVERSIES, CHALLENGES, AND SOLUTIONS 165, 173 (Quint C. Thurman & Johong Zhao eds., 2004) ("The reliance on a traditional curriculum and the reluctance to incorporate new training subjects, however valuable they might be, is due primarily to the idea that policing is a particularly dangerous occupation.").

[317] JAMES Q. WILSON, THINKING ABOUT CRIME 106 (Vintage Books Edition 1983) (1975) [hereinafter WILSON, THINKING] (finding that recruits are not well trained in verbal confrontations).

Columbia Journal of Gender and Law   [Vol. 18:3]

negatively affected by the "resocializing" effects of training.[318] That is, academy training encourages cadets to adopt a worldview in which police officers are a distinct group whose actions are dictated by the dangerousness of the occupation.[319] Further, cadets are introduced to a police occupational[320] culture that is deeply rooted in machismo[321] and militarism.[322] Both ideals foster aggression and the need to dominate civilians,[323] ultimately leading to masculinity contests between officers and civilians.[324]

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[318] *See* Thurman, *supra* note 316, at 167 (finding that traditional training creates a negative mindset towards civilians).

[319] Thurman says, "Academy training serves to 'resocialize' the new recruits helping them to devalue their old way of looking at the world and replace it with a new view that fits the job and the labor force that is responsible for providing police services." *Id.*

[320] *See* Robert E. Worden, *The Causes of Police Brutality, in* POLICE VIOLENCE: UNDERSTANDING AND CONTROLLING POLICE ABUSE OF FORCE 29, 29–30 (William A. Geller & Hand Toch eds., 1996) [hereinafter POLICE VIOLENCE] (distinguishing occupation culture versus organizational culture). According to Worden:

> "The" police culture is an occupational culture, consisting of outlooks and norms that are commonly found among patrol officers in police agencies. This culture emphasizes the danger and unpredictability of the work environment, the consequent dependence of officers on each other for assistance and protection, officers' autonomy in handling situations, and the need to assert and maintain one's authority. . . . One may find variation in the *organizational* culture of police departments, even while one finds consistency in the elements of the *occupational culture.*

Id. (internal citations omitted) (emphasis in original).

[321] *See* Benson, *supra* note 312, at 682 (noting police-macho culture).

[322] According to Benson:

> Police departments have always been organized as military-style hierarchies, but in recent decades they have gone beyond organization to mimic military tactics in the streets. This means, among other things, a maximum use of force even in minor situations, use of heavy, sophisticated gear and equipment, a threatening and hostile demeanor toward the public, and a siege mentality in which the police dehumanize the citizens into enemies in a war which must be won at all costs.

Id. at 687.

[323] *See id.* (discussing police aggression).

[324] *See id.* at 683 (finding that police machismo causes hostile confrontations with the public); *see also* James J. Fyfe, *Training to Reduce Police-Civilian Violence, in* POLICE

The worst results of police cadet indoctrination into masculinism are incidents of brutality such as the Rodney King beating. The Christopher Commission, created to investigate the LAPD in the wake of the Rodney King beating, found an organizational culture that viewed police work as a male occupation requiring masculine qualities.[325] Unfortunately, "[a] corollary of that culture is an emphasis on use of force to control a situation, and disdain for a more patient, less aggressive approach."[326] Further, in *Changing Police Culture: The Sine Qua Non of Reform*, legal scholar Robert W. Benson describes the effect of police hypermasculinity as follows:

> The practical results of this police machismo are that male officers get themselves involved in hostile confrontations with the public, use of excessive force, shootings, drug dealing, and apparently as we see now in the Rampart Scandal, framing of suspects through deceit and lies.[327]

Note that Benson is basically talking about the hegemonic patterns of U.S. masculinity in general and police masculinity in particular. Policemen who need to dominate other men engage in masculinity contests with civilians that they resolve through various forms of violence.[328] Police misconduct is thus a natural result of training that reinforces masculinism.

VIOLENCE, *supra* note 320, at 165, 168 [hereinafter Fyfe, *Training to Reduce*] (discussing factors leading to confrontations). Fyfe describes the genesis of police-initiated masculinity contests:

> Unnecessary force . . . begins with police intervention into relatively minor conditions that escalate into violence because of police haste and/or inability to establish communication with the people involved. Sometimes this occurs because officers are unfamiliar with the folkways of racial or ethnic minority groups. Many brawls and much bloodshed have followed when officers have inadvertently challenged the manhood and pride of Hispanic young men during interventions in disputes and in disorderly street-corner groups.

Id.

[325] *See* INDEP. COMM'N REPORT, *supra* note 126, at 88 (describing LAPD organizational culture).

[326] *Id.*

[327] Benson, *supra* note 312, at 683.

[328] *See* Laurie L. Levenson, *Police Corruption and New Models for Reform*, 35 SUFFOLK U. L. REV. 1, 15–16 (2001) (arguing that masculinism leads to police misconduct);

Columbia Journal of Gender and Law   [Vol. 18:3

To avoid police misconduct, we will need a new form of training. As Joseph Wambaugh, a fourteen-year veteran of the LAPD, says in a 1991 interview, "police work is not about physical altercations . . . [or] about shooting people. . . . It's about talking to people and problem solving[.]"[329] So, police training that emphasizes aggression ill-prepares officers for their more common task of negotiating conflicts without an arrest.[330] This means that macho models of police training need to be reformed.[331]

2. Training Can Help Diminish Police Misconduct

If masculinist training is the problem, anti-masculinist training may provide an essential answer—adjusting the behavior of cadets and police officers.[332] Specifically, training can change the occupational culture of police departments.[333] The goal is to change the training in departments that currently teach officers to adopt an "us versus them" attitude, to always be suspicious of civilians, to view them as potential threats, and to act aggressively towards them.[334] Training can help to solve the problem

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see also Mary Ellen Gale, *Calling in the Girl Scouts: Feminist Legal Theory and Police Misconduct*, 34 LOY. L.A. L. REV. 691, 746 (2001) ("[T]he hypermasculine gendering of police work has led to corruption, excessive force, and extreme violence that harms everyone in society, as individuals and as groups, and threatens to destroy the social order it ostensibly established and enforces.").

[329] Gale, *supra* note 328, at 725 (internal quotations omitted).

[330] *See, e.g.*, STEVEN M. COX, POLICE: PRACTICES, PERSPECTIVES, PROBLEMS 129 (1996) (arguing that while law enforcement is a critical part of policing, order maintenance is more important in terms of both time spent and citizen satisfaction).

[331] *See* Mary O' Rawe, *Human Rights, Transitional Societies and Police Training: Legitimating Strategies and Delegitimating Legacies*, 22 ST. JOHN'S J. L. COMM. 199, 244 (2007) (criticizing force-driven policing models as ineffective).

[332] *See* Mitchell Caldwell et al., *If It's Broken, Fix it: Moving Beyond the Exclusionary Rule*, 83 IOWA L. REV. 669, 735 (1998) (determining that education and training appeared to positively affect understanding of the law and compliance therewith).

[333] *See* Levenson, *supra* note 328, at 15 (finding culture of police is determined by training and recruitment); *see also* Fyfe, *Training to Reduce, supra* note 324, at 166 ("The goals of training, however, go beyond the transmission of skills and techniques and the suppression of a few officers' hostile impulses. Police training also has an attitudinal component: it socializes officers into their departments and teaches them their employers' philosophies, values, and expectations.").

[334] *See* Thurman, *supra* note 316, at 167 (finding that "the traditional academy curriculum and the war stories told by police veterans help to build a chasm between those

because it is a primary source of the problem.[335] Training need not be effective in actually changing particular officers' biases and views as long as it teaches officers what conduct is acceptable while they are wearing the badge.[336]

Based on what we learned from the field of masculinities studies, the goal of training should be to get police officers to act with restraint when they face situations where their authority is questioned. Police departments may be reluctant to reform their current training because of the crowded curriculum and the difficulty in teaching abstract concepts.[337] But those police departments should be motivated by fear of lawsuits[338] and poor public opinion that could result from a lack of proper communication training.[339] Further, many police officers agree that more training is needed in order to better understand their roles, especially in using force.[340]

Although the present regime fails us, we can train officers to be reluctant to use *Terry* stops and frisks to enact command presence. Criminologist Steven Cox provides reasons for teaching such reluctance in his book, *Police: Practice, Perspectives, Problems.* He states:

> The importance of these [communication] skills is most clearly illustrated by focusing on those officers who lack them. Such officers are unlikely to get cooperation from diverse segments of the public, either because they alienate other citizens by assuming an authoritative stance as a defense for their poor communication skills, or because they cannot express clearly and convincingly

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people who are sworn to uphold the law and those other people—civilians—who are seen as potential victims, witnesses, and offenders . . .").

[335] *See* Levenson, *supra* note 328, at 15 (arguing that police aggression is a product of recruitment, training, and supervision).

[336] *See* Jerome L. Blakemore et al., *From the Classroom to the Community: Introducing Process in Police Diversity Training*, 18 POLICE STUD. 71, 76 (1995) ("Culture diversity training programs will be most effective by focusing on changing behavior, not attitudes.").

[337] Thurman, *supra* note 316, at 173.

[338] *Id.*

[339] *See* Nancy Marion, *Police Academy Training: Are We Teaching Recruits What They Need to Know?*, 21 POLICING: INT'L J. POLICE STRAT. & MGMT. 54, 75 (1998) (discussing how police officer machismo negatively affects public opinion).

[340] Editorial, *Misperceptions Feed Zero-Tolerance Scare*, BALT. SUN, Apr. 9, 2000, at 2C (finding police officers want more training particularly in the use of force).

what they want or need the public to do. They receive little input
from the public about crime or their own performances. They
routinely enforce the law in an attempt to maintain order when
their more skilled colleagues could have maintained order
without resorting to arrest. They become unnecessarily involved
in physical encounters.[341]

The key is that officers without these requisite communications
skills are more likely to enact command presence in situations where it is
not actually required. In contrast, well-trained officers can use
communications skills to defuse potentially explosive situations without
enacting command presence.[342] Education and training of both cadets and
veteran officers will likely be the most effective method of preventing
unnecessary and harmful masculinity contests because training can help
officers maintain order without enacting extreme forms of command
presence.[343]

3. The Form That Retraining Should Take

Cadet training is usually a two-step process. Cadets are first trained
at an academy and then on the streets by experienced officers known as
field training officers (FTOs). In order to effectively teach officers how to
appropriately use command presence, both phases of the training process
must be adapted. Additionally, because informal training continues once a
cadet becomes an independent officer, police departments must consider the
messages they are sending their officers by means of which behaviors they
reward and which ones they punish.

i. Academy Training

To understand what academy training should look like, we must
know what it currently looks like. As Corey Hirokawa points out in her
article, *Making the Law of the Land the Law of the Street: How Police
Academies Teach Evolving Fourth Amendment Law*, training academies

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[341] Cox, *supra* note 330, at 129.

[342] *Id.* (discussing the importance of officer communication skills).

[343] *But cf.* Susan Bisom Rapp, *Fixing Watches with Sledgehammers: The
Questionable Embrace of Employee Sexual Harassment Training by the Legal Profession*,
24 U. ARK. LITTLE ROCK L. REV. 147 (2001) (arguing that sexual harassment training is
ineffective).

respond to ambiguous legal doctrine by giving cadets standards that reflect a cautious interpretation of the law.[344] One might think that would lead to cautious officers, but instead it merely reflects the fact that "the typical police recruit is not interested in learning the intricacies of legal decisions[.]"[345] Consequently, trainers try to boil the law down into simple either/or rules.[346] Unfortunately, unlike some aspects of police training, the appropriate time to use command presence is difficult to teach through strict guidelines or rules. Officers have to use their discretion in deciding whether command presence is necessary in a situation that could be read as either threatening or benign. Consequently, the present form of academy training is ill-equipped to teach the appropriate use of command presence.

Despite the inadequacy of present academy training regimes, research suggests that police officers can be trained to make proper choices about when to use *Terry* stops and frisks to enact command presence.[347] As criminologist James Fyfe shrewdly explains in his essay *Training to Reduce Police-Civilian Violence*, "[t]he development of successful boxers, diplomats, combat soldiers, and trial lawyers demonstrates that maintaining one's temper under stressful and confrontational conditions is a skill that can be taught."[348] Citing the work of Gerald Uelemn, Fyfe notes that police shooting rates correlate strongly with the personal philosophies of police officers and the policies of their Chiefs.[349] In other words, a belief in the

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[344] Corey F. Hirokawa, *Making the "Law of the Land" The Law on the Street: How Police Academies Teach Evolving Fourth Amendment Law*, 49 EMORY L.J. 295, 297 (2000) (finding that when the law is vague, departments teach their officers overly prudent rules).

[345] *Id.* at 320.

[346] *Id.*

[347] *Id.* at 427.

[348] Fyfe, *Training to Reduce*, *supra* note 324, at 165. Fyfe continues, "For police trainers, this translates into convincing officers that they should not take personally the insults and attacks they may experience at work." *Id.* at 166.

[349] *Id.* Fyfe expresses similar views in another text:

> Police officers and the people at whom they shoot are simply actors in a much larger play. When police officers' roles in this play are defined carefully by their administrators and when the officers have been trained well to perform these roles, their individual characteristics mean little. . . .When such clear expectations are not provided, officers improvise, and often we give their performances bad reviews.

appropriateness of aggression and a lack of supervision can lead to excessive force. In line with this Article's suggestion that police indiscretion has increased as a result of the rise of "law and order" ideology, Fyfe found that "police shootings in Philadelphia had more to do with whether 'law and order' politician Frank Rizzo was Mayor than with any quantifiable measure of threats to police officers lives or safety."[350] So law and order ideology leads first to increased police discretion and then to increased police use of excessive force. We need academy training that reinforces a department-wide norm of only adopting extreme forms of command presence when it is truly necessary.

      In order to train police officers to appropriately confront civilians, academy training should teach officers how to effectively communicate with civilians who challenge their authority.[351] The Christopher Commission concluded that ideal training would "develop and employ tactics that emphasize containment and control rather than confrontation and physical force."[352] So, the training should develop calmness, self-respect, the ability to tolerate ambiguous situations, and the ability to apply legal concepts in concrete situations so that the officer can respond flexibly in the field.[353] The training must also "appeal to officers' inherent value systems by incorporating problem-solving situations that address real-life situations."[354] In his essay, *Learning the Skills of Policing*, David H. Bayley says that in order to reduce police use of excessive force, officers should be "encouraged to think reflectively about the cues that should be used to shape decisions and those that should not."[355] Trainers could involve cadets

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James J. Fyfe, *Police Use of Deadly Force: Research and Reform*, *in* POLICE PERSPECTIVES: AN ANTHOLOGY 426–27 (Larry K. Gaines & Gary W. Cordner eds., 1999) [hereinafter POLICE PERSPECTIVES].

     [350] Fyfe, *Training to Reduce*, *supra* note 324, at 166.

     [351] HEATHER MAC DONALD, ARE COPS RACIST? 147–48 (2003) (concluding that police training should concentrate on communication skills).

     [352] INDEP. COMM'N REPORT, *supra* note 126, at 105.

     [353] *See* WILSON, THINKING, *supra* note 317, at 112.

     [354] Alicia M. Hilton, *Alternatives to the Exclusionary Rule After Hudson v. Michigan: Preventing and Remedying Police Misconduct*, 53 VILL. L. REV. 47, 75 (2008).

     [355] David H. Bayley, *Learning the Skills of Policing*, *in* POLICE PERSPECTIVES, *supra* note 349, at 224, 236.

in simulations and discussions that encourage them to think about the negative consequences of prematurely enacting command presence.[356]

    In addition to those methods, the key to deterring officers from prematurely enacting command presence during *Terry* stops and frisks will be using training to instill respect for the law. As Andrew Taslitz says in his article, *The Expressive Fourth Amendment: Rethinking the Good Faith Exception to the Exclusionary Rule*, "[p]olice training at the academy and beyond must emphasize how compliance with reasonable suspicion . . . can build community trust, thus enhancing candor and assistance."[357] The various forms of police training must embed that attitude in the very culture of the police.[358]

    To accomplish that change, academy training must alert officers to the subconscious biases that might lead them to use *Terry* stops and frisks to prematurely enact command presence. Anthony Thompson's article *Stopping the Usual Suspects: Race and the Fourth Amendment* is instructive on this point.[359] Thompson uses social science research on stereotyping to demonstrate the high risk of racial profiling that was created by the *Terry* decision and then reinforced by the *Whren v. United States* decision.[360] One of Thompson's key proposed solutions is police training on racial profiling.[361] He first establishes that such training is necessary to change officers' racial biases and can be effective in doing so.[362] Next, he describes the type of training necessary: "[T]raining should include exercises that encourage officers to confront their own biases and to examine the risk of resorting to stereotypic judgments in cross-racial encounters. This training would draw on social science data to explore both the legitimate and illegitimate use of classifications in investigations."[363] Like Bayley, then, Thompson thinks that getting officers to think reflectively about why they

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[356] *Id.* at 236–37.

[357] Andrew E. Taslitz, *Expressive Fourth Amendment: Rethinking the Good Faith Exception to the Exclusionary Rule*, 76 MISS. L.J. 483, 568 (2006).

[358] *Id.* at 569.

[359] Thompson, *supra* note 15.

[360] Whren v. United States, 516 U.S. 1036 (1996) (holding that racial pretext for making a stop does not vitiate otherwise objectively valid probable cause).

[361] *See* Thompson, *supra* note 15, at 1009.

[362] *Id.* at 1011.

[363] *Id.*

act in particular ways can reduce the use of force. It is reasonable to think that if training can address racial bias, it can address macho behavior.

One specific method for officers to deal with obstreperous civilians without resorting to macho behavior seems to be particularly effective: a course called "verbal judo." The instructor teaches cadets to deflect verbal abuse and then verbally manipulate people into compliance.[364] The instructor teaches cadets not to confuse their ego with their role as an enforcer of the law: "The professional knows how to deflect verbal abuse without escalating a confrontation."[365] This training thus helps to break policemen's habit of linking respect for their authority to their masculine esteem by instead linking their esteem to their verbal capabilities.[366] In 1991, the Christopher Commission recommended that the LAPD institute verbal judo as the first class in academy training and have it serve as the foundation for other classes.[367] This method of training would most likely be extremely effective in decreasing needless masculinity contests and should be adopted by more academies. In conjunction with the anti-stereotyping training suggested by Thompson, verbal judo is the type of academy training that police departments should adopt.

ii. Field Training

In order for officers to adjust to and effectively use their new anti-stereotyping and verbal judo skills, field training officers (FTOs) must reinforce the new techniques. Because FTOs teach new officers police policies and ethics, they have an extraordinary influence on officers'

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[364] *See* MAC DONALD, *supra* note 351, at 134–35. *But see* JOHN P. CRANK & MICHAEL A. CALDERO, POLICE ETHICS: THE CORRUPTION OF A NOBLE CAUSE 222, 233 (2000) (criticizing verbal judo). Crank and Caldero question the value of verbal judo:

> We've brought this up with command officers before, and sometimes we hear 'well, we were having some problems, but we started giving classes in verbal judo.' *Verbal judo?* What are you trying to do, verbally outfight the public? A class in simple verbal courtesy would go a long way. It might give your officers the idea that police work is a public service. Wouldn't that be a good thing?

Id.

[365] MAC DONALD, *supra* note 351, at 135.

[366] *See* discussion *supra* Part I.B (identifying the hegemonic pattern of police officer masculinity).

[367] *See* INDEP. COMM'N REPORT, *supra* note 126, at 123.

conduct and attitude.[368] Unfortunately, FTOs sometimes teach new officers that their academy training is useless in the real world.[369] Field Training Officers are often the primary people who teach rookies that it is appropriate to use command presence and physical force when they are merely disrespected.[370] The FTOs must change their own views, or at least instill the same ideals as the academy, so that new officers can appropriately use the skills they have learned. In order to change the FTOs' views, FTOs could also be trained in using anti-stereotyping and verbal judo methods. For that training to be effective, however, police administrators must convince the FTOs that adopting a new view on command presence and civilian disrespect is the best course of action.[371] The combination of academy and FTO instruction on proper communication will help rookies appropriately use command presence.

iii. In-Service Training and Informal Training

Training does not end when a prospect completes his field training. Supervisors and more experienced officers informally train other officers by tolerating or punishing inappropriate aggressive behavior.[372] Therefore, in-

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[368] Alison L. Patton, *The Endless Cycle of Abuse: Why 42 U.S.C. § 1983 is Ineffective in Deterring Police Brutality*, 44 HASTINGS L.J. 753, 780 (1993) ("Field Training Officers, in particular, have a tremendous influence in defining the 'unwritten' department policies."); *see also* Sarah E. Waldeck, *Cops, Community Policing, and the Social Norms Approach to Crime Control: Should One Make Us More Comfortable with the Others?*, 34 GA. L. REV. 1253, 1295 (2000) ("Moreover, what happens in the classroom is far less important than what happens after new recruits are paired with their field training officers, who often advise them to forget their formal training and to learn what policing is really about by observing experienced officers in action.").

[369] *See* INDEP. COMM'N REPORT, *supra* note 126, at 125.

[370] Lawrence Sherman, *Learning Police Ethics, in* POLICE PERSPECTIVES, *supra* note 349, at 301 (listing punishment of disrespect as a key value that veterans teach rookies).

[371] Kenneth J. Peak et al., *Supervising the Police, in* POLICE AND POLICING: CONTEMPORARY ISSUES 37, 51–52 (Dennis Jay Kenney ed., 2d ed. 1999) (discussing how to get supervisors to adopt new attitudes).

[372] *See* Taslitz, *supra* note 357, at 569. Taslitz describes the learning process that is necessary:

> Education must, however, not be limited to the classroom. The learning process must be constant. Policy bulletins, the modeling of behavior by superiors, and clear rules to guide rookies are among the many ways to build a culture of compliance. It is the constant effort to do better that matters, as one expert on police ethics, T.E. Wren, has said: What is

service training of supervisors on communication skills should be a part of every department's curriculum. Fyfe makes this point well:

> Everything that supervisors do or tolerate, every interpretation of broad departmental philosophy, every application of specific rules and policies is a training lesson that has at least as much impact on officers' performance as what they may have learned in their rookie days. . . . Worse, when officers see firsthand that the behavioral structures in which they were schooled are routinely ignored in practice, formal training is neutralized and the definitions of appropriate behavior are instead made in the secrecy of officers' locker rooms.[373]

Therefore, supervisors and commanders must not only carefully lead their departments, they should also be trained in proper use of aggression and communication.[374] Like the training provided for FTOs, training of supervisors must convince them that it is important to promote only appropriate use of command presence.[375] Further, to ensure that supervisors send the right message, some part of their pay should be linked to a lack of incidents of excessive force.

IV. CONCLUSION: WHY BULLIES ARE NEVER HAPPY

I began this Article by noting the way in which men play a game of "who's the man?" I then traced the need to play that game to its source in the hegemonic pattern of United States masculinity. Further, I identified police officers as a class of men who may be especially prone to playing that game. Officers may be tempted to use *Terry* stops and frisks to enact command presence in order to stage masculinity contests. That is, policemen may be tempted to bully other men solely to boost their

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> needed, then, is an approach to police formation that instills a passionate commitment to the law into the most intimate parts of a policeman's personality structure and self interpretation and simultaneously incorporates this attitude with the tacit norms and expectations that bind the police fraternity together.

Id.

[373] Fyfe, *Training to Reduce, supra* note 324, at 166–67.

[374] *See id.* at 177–78 (emphasizing importance of supervisors).

[375] *See* Peak et al., *supra* note 371, at 51–52 ("It is widely held that the most challenging aspect of changing the culture of a police agency lies in changing first-line supervisors.").

masculine esteem. Accordingly, I proposed rooting out the bullying instinct
by reforming police training.

Aside from the question of whether policemen should bully
civilians, we might ask whether such actions can ever actually sate the
desire to prove one's masculinity. According to Kimmel, they cannot:

> [T]he bully is the *least* secure about his manhood, and so he is
> constantly trying to prove it. But he proves it by choosing
> opponents he is absolutely certain he can defeat; thus the standard
> taunt to a bully is to "pick on someone your own size." He can't,
> though, and after defeating a smaller and weaker opponent, which
> he was sure would prove his manhood, he is left with the empty
> gnawing feeling that he has not proved it after all, and he must
> find another opponent, again one smaller and weaker, that he can
> again defeat to prove it to himself. . . . When does it end?
> Never.[376]

So bullying is a counter-productive activity for the bully himself.
Because of the authority invested in policemen, the officer who picks a
civilian to stage a masculinity contest with is not picking on someone his
own size. So he will have to bully again and again without ever
satisfactorily proving his manhood.

The bully's conundrum demonstrates that no one really benefits
from the current structure of masculinity. Ultimately, hegemonic
masculinity is the source of the problem of police harassment of men. The
surest way to eliminate this problem is to eliminate the present hegemonic
pattern of masculinity. There was a 1971 anthology called *Unbecoming
Men* that contained a set of early thoughts on the men's movement toward
less sexism.[377] That title suggests that we ought to be deconstructing the
very concept of what it means to be a man. Likewise, the very title of John
Stoltenberg's book, *Refusing to be a Man*, suggests we can train men to
reject the present hegemonic model of manhood.[378] Unfortunately, we
cannot accomplish that task within a time frame that is acceptable to the
many victims of police bullying. But that does not mean we should not try.
In the short term, this Article recommends changing police training as we

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[376] Kimmel, *Masculinity as Homophobia, supra* note 3, at 32–33.

[377] UNBECOMING MEN: A MEN'S CONSCIOUSNESS-RAISING GROUP WRITES ON
OPPRESSION AND THEMSELVES (Mark Bradley & Lonnie Danchik eds., 1971).

[378] *See generally* JOHN STOLTENBERG, REFUSING TO BE A MAN: ESSAYS ON SEX AND
JUSTICE (1989) (criticizing the present expectations of manhood).

know it; for the long term, it endorses the unmaking of masculinity as we know it.