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Policing and the Clash of Masculinities

ANN C. MCGINLEY*

INTRODUCTION: POLICING, RACE, AND GENDER 222

I. EMPIRICAL UNDERSTANDINGS OF POLICE BEHAVIOR..... 227

A. Use of Force Studies..... 227

B. Investigations of Real Police Departments..... 229

1. Cleveland, Ohio Division of Police 229

2. Ferguson, Missouri Police Department..... 233

II. MASCULINITIES STUDIES AND CRITICAL RACE THEORY: HEGEMONY, PRIVILEGE, AND SUBORDINATION 238

A. An Introduction to Masculinities Theory 238

B. A Primer on Critical Race Theory..... 240

1. Socially Constructed but Materially Relevant... 241

2. Structural Bias Expressed Implicitly 241

3. Critical Race and Multidimensional Masculinities Theories 242

C. Using Multidimensional Masculinities to Analyze the Conflict Between Police and Black Men 242

1. Gender, Race, Class, Police Officers, and Black Suspects 242

2. Stereotypes: The Bad Black Man vs. the Good Black Man 253

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3. Performance of Masculinity by Some Black Men	256
4. "Heroes" versus "Thugs"	261
III. MASCULINITY AND POLICE SHOOTINGS:	
AGENDA FOR CHANGE.....	262
A. Recommendations for Change	265
B. Demographic Shifts and Hope for the Future	267
CONCLUSION: REFRAMING MASCULINITIES:	
REDUCING KILLINGS	268

INTRODUCTION: POLICING, RACE, AND GENDER

In 2014 and 2015, the news media inundated U.S. society with reports of brutal killings by police of black men in major American cities.¹ These stories shocked average white Americans. Until recently, the media has only sporadically covered police abuse of black citizens. It appeared, therefore, that the killings represented a recent escalation in police brutality. Media reports may reflect a significant increase of killings by the police, or increased attention to a decades-old problem, or both, but police departments do not typically keep data on police killings of civilians.² What the data that exist do show, however, is that at least for a five-month period in 2015, there was a disproportionate rate of police killings of unarmed black men. In response to the shootings of the past year, *The Guardian* conducted a study that found that in the first five months of 2015, there were 464 people killed by police in the United States.³ Of those 464, 102 were unarmed.⁴ Twenty-nine percent of those killed by police were black; 14 percent were Hispanic/Latino, and 50 percent were white.⁵ Blacks represent only 13 percent of the country's population, but were killed at a disproportionate rate of 29 percent.⁶ Even more revealing, *unarmed* blacks were killed at slightly more than twice the rate of unarmed whites (32 percent vs. 15 percent).⁷ Twenty-five percent of

1. See *infra* notes 40–49; 71–80; 271–84; 290–300; 313–26 & accompanying text.

2. Dara Lind, *The FBI Is Trying to Get Better Data on Police Killings. Here's What We Know Now*, Vox (Apr. 10, 2015, 10:31 AM), <http://www.vox.com/2014/8/21/6051043/how-many-people-killed-police-statistics-homicide-official-black>.

3. Jon Swaine, Oliver Laughland & Jamiles Lartey, *Black Americans Killed by Police Twice as Likely To Be Unarmed as White People*, THE GUARDIAN (June 1, 2015, 8:38 AM), <http://www.theguardian.com/us-news/2015/jun/01/black-americans-killed-by-police-analysis>.

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

Latinos killed were unarmed.⁸ Moreover, nearly all of the persons killed—95 percent—were men.⁹

Many members of the black community believe that the disproportionate police presence in the black community, mass incarceration of black citizens, and the killings of unarmed black men by police are related. Black communities claim that police departments have besieged them for decades.¹⁰ Due to the now infamous “War on Drugs” instituted by the Reagan administration,¹¹ and the “broken windows” strategy of policing,¹² law enforcement focuses its efforts on poor and predominantly minority urban communities.¹³ As a result, black male youths are incarcerated at a much higher rate than their white counterparts.¹⁴ Michelle Alexander has labeled the ever-increasing imprisonment of black men, “The New Jim Crow,”¹⁵ comparing the mass incarceration of black men and the consequences of a criminal record

8. *Id.*

9. *Id.*

10. Nikole Hannah-Jones, *Yes, Black America Fears the Police. Here's Why*, PROPUBLICA (Mar. 4, 2015, 9:14 PM), <https://www.propublica.org/article/yes-black-america-fears-the-police-heres-why>.

11. Andrew Glass, *Reagan Declares 'War on Drugs,' October 14, 1982*, POLITICO (Oct. 14, 2010, 4:44 AM), <http://www.politico.com/news/stories/1010/43552.html> (explaining that President Nixon first used the term “War on Drugs” in 1971, but that President Reagan vamped up enforcement in his new war on drugs in 1982).

12. This theory comes from an article published in *The Atlantic* that argued that disorder that is not addressed leads to more serious criminal activity in the area. See George L. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC, Mar. 1982. As a result of broken windows theory, a number of police departments initiated police practices that focus on misdemeanors and small crimes such as graffiti and loitering. See BERNARD E. HARCOURT, *ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING* 2 (2001). There has been significant criticism of the broken windows theory and policing strategies resulting from it. See, e.g., *id.* at 6–8 (concluding that broken windows theory and order maintenance policing are failures that have led to increased unnecessary incarceration); see also Bernard E. Harcourt & Jens Ludwig, *Reefer Madness: Broken Windows Policing and Misdemeanor Marijuana Arrests in New York City, 1989–2000*, 6 CRIMINOLOGY & PUB. POL'Y 165, 171 (concluding that the increase of misdemeanor marijuana arrests in New York City actually increased serious crime rather than decreasing it).

13. Loïc Wacquant, *Racial Stigma in the Making of America's Punitive State*, in RACE, INCARCERATION, AND AMERICAN VALUES, 57, 59, 63 (Glenn C. Loury, ed., 2008) (arguing for use of term “hyper-incarceration” rather than “mass incarceration” and noting that geography is important to hyper-incarceration); Frank Rudy Cooper, *Hyper-incarceration as a Multidimensional Attack: Replying to Angela Harris Through The Wire*, 37 WASH. U. J.L. & POL'Y 67, 70–71 (2011) (noting that “hyper-incarceration is actually targeted by gender and locale as well as race).

14. *Criminal Justice Fact Sheet*, NAACP, <http://www.naACP.org/pages/criminal-justice-fact-sheet> (last visited July 6, 2015) (stating that African Americans are incarcerated at six times the rate of white Americans, and that African Americans represent nearly one million of the approximately 2.3 million persons incarcerated).

15. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

to the laws in the U.S. South that mandated segregation of black and white citizens after the Civil War.¹⁶

American neighborhoods are still highly segregated, and the police presence in black and other minority communities far outweighs that in white communities.¹⁷ While police officers attempt to justify their focus on black communities by the high arrest rate compared to the low arrest rate in predominantly white neighborhoods, this reasoning seems circular. A similar focus on college campuses where white students predominate, for example, would likely yield arrest rates for illegal drugs that are similar to or higher than those occurring in black neighborhoods.¹⁸

There is no question that race and class play a key role in the nature of policing that occurs in poor black urban neighborhoods, but the relationship between police and their victims is not only about race, class, and communities. It is also about gender. Black *men*, especially those living in poor neighborhoods, are the common victims of police scrutiny, stop and frisks,¹⁹ arrests, incarcerations, and killings. White men are almost invariably the police personnel who kill unarmed black males in the streets. Performances of masculinity by the police and their victims contribute to this pattern.²⁰

This article uses multidimensional masculinities theory to analyze the intersection of race, gender, and class at which this problem occurs. It evaluates the crucial role gender plays in the formation, edu-

16. Nadra Kareem Nittle, *Definition of Jim Crow*, ABOUT, <http://racerelements.about.com/od/historyofracerelements/g/jimcrow.htm>. (last visited July 6, 2015) (stating that Jim Crow laws instituted in the late 1800's in the Southern United States required strict segregation between blacks and whites in restaurants, at drinking fountains, and bathrooms; Jim Crow gets its name from a song, "Jump Jim Crow," performed by a white minstrel singer in black face).

17. See ALEXANDER, *supra* note 15, at 124–26.

18. I am indebted to Frank Rudy Cooper for this insight, which he articulated in a joint talk we gave at Seattle University Law School. The research shows that blacks do not disproportionately use drugs illegally. See *id.* at 99.

19. "Stop and frisk" is the term for the police strategy of stopping persons on the street. "Stop and frisk" occurs when the police lack probable cause to arrest, but can articulate a reasonable suspicion that the person stopped is engaged in criminal activity. If the officers can meet this standard, it is legal to stop and frisk the suspect under the Fourth Amendment to the United States Constitution, which forbids unreasonable search and seizures. In *Terry v. Ohio*, 392 U.S. 1 (1968), the United States Supreme Court sanctioned "stop and frisk" based on lesser evidence than probable cause. Many believe that this decision opened the door to wholesale searches of black youths.

20. By describing the unarmed men who are killed by the police as "victims," I do not take the position that police engaged in the killings do not necessarily have a defense. It may be that at least in some cases the police officer's fears are "reasonable," when viewed from the police perspective. Nonetheless, unarmed minority men killed by the police are victims because they lose their lives where the police responsible for the killings may or may not be prosecuted.

cation, training, and work behavior of police officers.²¹ It also explains that the way *some* black men perform their masculinity may lead to stereotypical thinking by police that *most* black men are dangerous criminals. These stereotypes, once adopted by the police, either consciously or not, may lead to police officers' violence, especially when working in poor black communities. In the worst of situations, the encounters between police and black male citizens turn deadly.²² The article concludes that an understanding of masculinities studies should lead to important policy changes in the gathering of evidence, research, education, and training of police. These understandings, combined with policy changes, may help prevent further police violence perpetrated on innocent victims.²³

For purposes of this article, masculinities is: 1) a social structure that empowers masculinity over femininity and men over women; 2) a series of behaviors deemed "masculine" by society or groups of society; and 3) the actual performance or "doing" of "masculine" behaviors. This article employs multidimensional masculinities, which considers race, sex, class, and other identity characteristics along with gender, and pays careful consideration to the context of the particular situation.²⁴ It identifies masculine police practices and the masculine gender of the job of policing itself and analyzes how police departments and individual police officers respond to societal concepts of masculinity as they intersect with race and class.

The article also discusses how men in minority populations perform masculinity in public and explores how those performances interact with the police's "doing" of their masculinity, sometimes with deadly results. In essence, there is a clash of masculinities between

21. This article deals with masculinities performed by male police officers in the use of excessive force against suspects in the community. Of course, female police officers can also engage in excessive use of force. But women represent a small percentage of the police forces, especially in smaller communities, in the United States. The specific killings in the examples throughout this article were caused either exclusively by male officers, or by a group with a predominance of male officers.

22. I do not blame the victim, but I demonstrate how the complex mix of police and neighborhood masculinities may lead to tragedy. It is important to understand that hypermasculinity performed by some black men in poor neighborhoods is a response to their subordination in our society and to the way that our society undermines the masculinity of poor black men.

23. Some police who kill unarmed men of color may be intentionally racist and classist, but absent the subtle and not-so-subtle messages of what it means to be a man, and the importance of masculinity to the job of policing, many male police officers would seek ways to resolve conflicts that do not lead to the killings of unarmed minority men.

24. See ANN C. MCGINLEY & FRANK RUDY COOPER, *Masculinities, Multidimensionality, and the Law: Why They Need One Another*, in *MASculINITIES AND THE LAW: A MULTIDIMENSIONAL APPROACH* 6-7 (Frank Rudy Cooper & Ann C. McGinley eds., 2012).

the police and the minority male population that creates a dance that often leads to tragedy. *Yet all too often the victims who police kill do not display a hypermasculine performance, but because of stereotypes of black men as threatening and dangerous, police are more likely to use deadly force when faced with black male subjects, whether they are hypermasculine or not.*

Unfortunately, the importance of masculinity performances has received little or no attention in the public discussion about the killings in our streets. Even the President's Task Force and the U.S. Department of Justice ("DOJ") investigations of the Cleveland, Ohio and the Ferguson, Missouri police departments, which resulted from a series of shootings in Cleveland and the shooting of Michael Brown in Ferguson, Missouri, paid little or no attention to the importance of masculinity performances to the outcomes.²⁵ This article fills the gap.

Part I describes the empirical findings of police killings of civilians and the DOJ investigations of the Cleveland and Ferguson police departments. The data from empirical studies and investigative reports clearly show that police use excessive force in poor minority urban neighborhoods. Some of the data also support the presence of racial bias, both conscious and implicit, in the police behaviors, but the reports ignore the importance of gender.

Part II explains masculinities, multidimensionality, and critical race theories and the connections among them. It then uses this theoretical perspective to analyze how multidimensional masculinities theory can explain the conflict between police and the black community, and, in particular, the pursuit of black men by (mostly white male) police officers. Part III offers a proposal for more accountability of police departments; it posits that understandings of masculinities and how they interact with racism must inform education and trainings in the police academy. I conclude that new understandings about masculinity, combined with increased research into new models of community policing that emphasize the importance of eliminating

25. See U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIV. & U.S. ATTORNEY'S OFFICE FOR THE NORTHERN DIST. OF OHIO, INVESTIGATION OF THE CLEVELAND DIVISION OF POLICE (2014), http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2014/12/04/cleveland_division_of_police_findings_letter.pdf [hereinafter INVESTIGATION OF THE CLEVELAND DIVISION OF POLICE REPORT]; U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEP'T (2015), http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [hereinafter INVESTIGATION OF THE FERGUSON POLICE DEP'T REPORT]; PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING (2015), http://www.cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf.

hypermasculine behaviors should lead the way. With effort, these types of programs will encourage a safer environment for men of color in the United States and will lead to improved community policing for all.

I. EMPIRICAL UNDERSTANDINGS OF POLICE BEHAVIOR

A. Use of Force Studies

Police use of force is not randomly distributed throughout the community, but is concentrated in neighborhoods with a higher percentage of blacks and Latinos.²⁶ Police use of deadly force “is greatest in the most populated cities and in cities with the highest murder rates.”²⁷ Police are more likely to kill blacks in large cities with higher black murder rates and with more families headed by single women²⁸. In cities with black mayors, however, the percentage of blacks killed by the police declines.²⁹

While the race of those living in the neighborhood actually *does* predict prevalence of police killings of civilians, studies that have tried to demonstrate that race of the officer and victim affect individual police officers’ decisions to shoot or not to shoot yield mixed findings.³⁰ These studies use computer simulations in which the study subjects play the role of police, and are told to shoot using the computer keyboard or joystick if the suspect has a weapon, and not to shoot if the suspect does not have a weapon.³¹ Studies measure both reaction times and error rates. Some of these studies identify a clear link between race of the suspect and the officer’s speed and/or willingness to shoot, whereas others do not.³²

26. Kim M. Lersch, et al., *Police Use of Force and Neighbourhood Characteristics: An Examination of Structural Disadvantage, Crime, and Resistance*, 18 *POLICING & SOC.* 282, 295 (2008). This study does not have the race of the individuals against whom force was used. It merely has the neighborhood and the percentages of minorities vs. non-minorities in the neighborhood. *Id.*

27. David Jacobs & Robert M. O’Brien, *The Determinants of Deadly Force: A Structural Analysis of Police Violence*, 103 *AM. J. SOC.* 837, 853 (1998).

28. *Id.* at 854.

29. *Id.*

30. William T. L. Cox et al., *Toward a Comprehensive Understanding of Officers’ Shooting Decisions: No Simple Answers to This Complex Problem*, 36 *BASIC & APPLIED SOC. PSYCHOL.* 356, 357-58 (2014).

31. *Id.* at 358-59.

32. See, e.g., Joshua Correll et al., *The Police Officer’s Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 *J. PERSONALITY & SOC. PSYCHOL.* 1314, 1317 (2002) (demonstrating link between race of suspects and shooting); Lois James et al., *Results from Experimental Trials Testing Participants’ Responses to White, Hispanic and Black Suspects in High-Fidelity Deadly Force Judgment and Decision-Making Simulations*, 9 *J. EXPERIMENTAL*

Unfortunately, these individual studies suffer from various methodological problems because they fail, in many ways, to reflect real-life situations.³³ One of the best individual experiments methodologically corrects many of the problems in earlier studies, but its results, too, are confusing. In *Toward a Comprehensive Understanding of Officers' Shooting Decisions: No Simple Answers to This Complex Problem*, William T.L. Cox, Patricia G. Devine, E. Ashby Plant, and Lauri L. Schwartz explored the influence of suspect race, officer race, and neighborhood characteristics on the officers' shooting patterns, by using real police officers instead of students as their subjects.³⁴ The results were mixed. When measuring reaction times in response to still photographs, officers were more likely to shoot armed black suspects more rapidly than armed white suspects.³⁵ In contrast, when responding to video simulations, the opposite occurred.³⁶ When measuring error rates, the only race bias found was that subjects, responding to video simulations correctly failed to shoot unarmed black suspects more than unarmed white suspects.³⁷ There was no pattern of a tendency to shoot unarmed blacks over unarmed whites.³⁸

The most important finding of the Cox study seems to be that changing environmental factors and using more complex, active video simulations yielded different results in police shooting experiments.³⁹ This study demonstrates the complexity of using these types of experiments, even with real police officers as the subjects, to predict how officers will and do react in on-the-ground situations. It clarifies that science is far from determining whether race of officer and/or race of suspect are significant in police killings of civilians, and that there is much difficulty in attempting to measure and predict the racial effects

CRIMINOLOGY 189, 190–91 (2013) (demonstrating participants were less likely to shoot at minority suspects).

33. Many of these studies use undergraduate students at computers as proxies for trained officers in the field. Students, however, lack the training or experience of police officers and may not reflect how a police officer would react. See Cox et al., *supra* note 30, at 356. Many studies measure the effect of race of the shooter and/or the suspect without taking into account other environmental factors such as neighborhood, time of day, and context. *Id.* at 357. Many use static photographs of suspects rather than dynamic videos. The static photos do not necessarily reflect the dynamic nature of a typical situation in the field. *Id.* at 358. Some studies measure reaction time or error rates, but few studies measure both to see if there is a difference in the results. *Id.* at 360.

34. *Id.* at 358.

35. *Id.* at 361.

36. *Id.* at 362.

37. *Id.*

38. *Id.* at 362.

39. *Id.* at 363.

from these types of experiments. Fortunately, while these studies are not conclusive, we do have important theory, combined with actual investigations of real police departments that can shed further light on the problem.

B. Investigations of Real Police Departments

Given the weakness of the lab studies discussed in Subsection A above, it makes sense to take a careful look at uninterested investigations of real police departments. These investigations, completed by the Department of Justice, Civil Rights Division (“DOJ”) either in response to lawsuits brought alleging a pattern or practice of unlawful police behavior or to one or more police killings of unarmed civilians, contain valuable information about masculinity and race in police use of force. Because of limited resources, the DOJ cannot study every location where killings of unarmed men take place or even where there are serious allegations of racist police forces. But within the past two years there are two completed reports of police departments whose members have erroneously killed black unarmed civilians: Cleveland, Ohio and Ferguson, Missouri.

These two case studies represent many hours of work by DOJ investigators and attorneys who examined many witnesses and documents relating to the behavior of two Midwestern police departments, one in a large city, and the other in a smaller one. These reports provide important information about police behaviors as they occur on the ground. Although the reports do not necessarily reflect what occurs in other cities in the United States, neither should they be ignored. They provide a valuable piece of empirical evidence that tends to verify the thesis that a clash of masculinities—black and white—leads to deadly results in the streets of the United States.

1. Cleveland, Ohio, Division of Police

Cleveland, Ohio had a number of troubling incidents that led to a DOJ investigation.

Malissa Williams and Timothy Russell

In November 2012, a black couple, Malissa Williams and Timothy Russell, drove past a police station and the car backfired. The police believed that the couple had shot at the police and began a high-speed pursuit with sixty police cars and about one hundred police. Police eventually cornered the couple in a parking lot. Cleveland police

fired 137 shots into the car, killing both Williams and Russell. When police searched the car, there was no gun in the car. One officer, a white male, Michael Brelo, fired forty-nine shots into the car; fifteen of the shots occurred as Brelo stood on the hood of the car and fired down at the couple through the windshield. He was charged and acquitted of two counts of voluntary manslaughter.⁴⁰

Tamir Rice

In November 2014, two Cleveland police officers arrived at a park where it was reported that a young man appeared to waive a gun.⁴¹ Within two seconds of arriving at the park, one of the policemen, Tim Loehmann, shot Tamir Rice in the abdomen.⁴² Rice, a twelve year-old African American boy, who was playing with a toy gun, died the next day of gunshot wounds.⁴³ When Tamir's fourteen year-old sister heard the shots, she ran toward Tamir to help him.⁴⁴ Loehmann's partner, Frank Garmback, wrestled her to the ground, handcuffed, and threw her in the police car, as Tamir lay bleeding on the snow-covered ground.⁴⁵ Neither Loehmann nor Garmback made an attempt to help Tamir.⁴⁶ An FBI agent arrived four minutes later and tried unsuccessfully to resuscitate Tamir.⁴⁷ Loehmann, the rookie policeman who shot Tamir, had resigned under pressure from his previous police job in Independence, Ohio, because of his poor performance.⁴⁸ Both Loehmann and Garmback are white.⁴⁹

40. Daniel McGraw, *Cleveland Officer Not Guilty Over Deaths of Two People Shot at 137 Times by Police*, THE GUARDIAN (May 23, 2015, 1:43 PM), <http://www.theguardian.com/us-news/2015/may/23/cleveland-officer-not-guilty-shot-137-times-police>.

41. Lauren Gambino, *Tamir Rice Shooting: Cleveland Police Handcuffed Sister as 12-Year-Old Lay Dying*, THE GUARDIAN (Jan. 8, 2015, 1:27 PM), <http://www.theguardian.com/us-news/2015/jan/08/cleveland-police-handcuffed-sister-tamir-rice-lay-dying-video>.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. Dana Ford, *Prosecutors Get Tamir Rice Investigation*, CNN (June 3, 2015, 5:14 PM), <http://www.cnn.com/2015/06/03/us/tamir-rice-investigation/>; Lauren Gambino, *Tamir Rice Shooting: Cleveland Police Handcuffed Sister as 12-Year-Old Lay Dying*, THE GUARDIAN (Jan. 8, 2015, 1:27 PM), <http://www.theguardian.com/us-news/2015/jan/08/cleveland-police-handcuffed-sister-tamir-rice-lay-dying-video>.

48. Christine Mai-Duc, *Cleveland Officer Who Killed Tamir Rice Had Been Deemed Unfit for Duty*, L.A. TIMES (Dec. 3, 2014, 5:38 PM), <http://www.latimes.com/nation/nationnow/la-na-cleveland-tamir-rice-timothy-loehmann-20141203-story.html>.

49. The Cleveland Sheriff's Department finished its investigation into the Tamir Rice case, and sent the case to the prosecutor's office, which will determine whether or not to charge Officers Loehmann and Garmback in the shooting. Mitch Smith, *Prosecutor Receives Findings in Fatal Shooting of Tamir Rice by Cleveland Police*, N.Y. TIMES (June 3, 2015), <http://www.nytimes.com/2015/06/04/us/investigators-hand-over-findings-in-fatal-shooting-of-tamir-rice-by->

These are only two of a series of troubling incidents that led to a DOJ investigation of the Cleveland Division of Police (“CDP”) for potential use of excessive force. The DOJ conducted the investigation jointly with the United States Attorney’s Office for the Northern District of Ohio. Overall, the Investigation found that the CDP engaged in a pattern or practice of both deadly and less lethal force, as well as tactical errors by CDP officers that endangered themselves and the public.⁵⁰ In sum, the Report mentions four general findings:

- The unnecessary and excessive use of deadly force, including shootings and head strikes with impact weapons;
- The unnecessary, excessive or retaliatory use of less lethal force including tasers,⁵¹ chemical spray and fists;
- [The use of] [e]xcessive force against persons who are mentally ill or in crisis, including cases where the officers were called exclusively for a welfare check; and
- The [use] of poor and dangerous tactics that place officers in situations where avoidable force becomes inevitable and places officers and civilians at unnecessary risk.⁵²

cleveland-police.html. Because of fear that the prosecutor would not indict police officers, a group of community leaders in Cleveland invoked an Ohio law, 29 OHIO REV. CODE § 2935.09 (2006), which permits private citizens to file an affidavit directly with a judge to request a ruling of probable cause to charge Loehmann and Garmback in Tamir Rice’s death. Michael S. Schmidt & Matt Apuzzo, *A Rare Gambit Seeking Justice for a Shot Boy*, N.Y. TIMES, June 9, 2015, at A1. Within two days of the filing of the motion, Municipal Court Judge Ronald Adrine held that there was probable cause to arrest both Loehmann and Garmback, Loehmann for murder, involuntary manslaughter, reckless homicide, negligent homicide and dereliction of duty and Garmback for negligent homicide and dereliction of duty. David A. Graham, *‘Probable Cause’ in the Killing of Tamir Rice*, ATLANTIC (June 11, 2015), <http://www.theatlantic.com/politics/archive/2015/06/tamir-rice-case-cleveland/395420/>. The community leaders hope that the judge’s ruling will pressure the county prosecutor to work with the grand jury to indict the two men. The DOJ began an investigation into the Cleveland Division of Police (“CDP”) as a result of other instances of deadly force and found, only a few weeks after Tamir Rice’s death, that the CDP had created a pattern and practice of using unreasonable force in violation of the Fourth Amendment. See INVESTIGATION OF THE CLEVELAND DIVISION OF POLICE REPORT, *supra* note 25, at 3–7. On May 26, 2015, the DOJ settled a class action lawsuit against the City of Cleveland for a civil pattern and practice of unreasonable use of force in violation of the Fourth Amendment. *Cleveland Reaches Deal with Justice on Policing: Source*, BALTIMORE SUN (May 25, 2015), <http://www.baltimoresun.com/news/nation-world/ct-cleveland-police-justice-excessive-force-20150525-story.html>. In October 2015, it was reported that two separate outside investigators deemed the officers’ behavior in the killing of Tamir Rice reasonable. See Mitch Smith, *2 Outside Reviewers Say Cleveland Officer Acted Reasonably in Shooting Tamir Rice*, 12, NY TIMES (Oct. 10, 2015) http://www.nytimes.com/2015/10/11/us/2-outside-reviews-say-cleveland-officer-acted-reasonably-in-shooting-tamir-rice-12.html?_r=0.

50. INVESTIGATION OF THE CLEVELAND DIVISION OF POLICE REPORT, *supra* note 25, at 4.

51. TASER is the registered trademark of a weapon that fires electric current that stuns the object, often causing neuromuscular incapacitation.

52. INVESTIGATION OF THE CLEVELAND DIVISION OF POLICE REPORT, *supra* note 25, at 3.

The Investigation found systemic deficiencies responsible for the pattern or practice. In particular, it found a failure to establish “effective and rigorous accountability systems.”⁵³ Individual officers also bear responsibility, according to the Report, for their own actions.⁵⁴

Investigators were particularly troubled by the failure of police officers to report, and properly document force incidents, as well as their supervisors’ endorsement of questionable and unlawful conduct by the officers.⁵⁵ Some investigators, for example, admitted that they conduct investigations with the purpose of casting the police officer’s behavior in the most favorable light possible.⁵⁶ Many stated that they find an officer guilty of misconduct only if the evidence against the officer proves a violation beyond a reasonable doubt.⁵⁷ The Report concluded that this is an unreasonably high standard that departments use to judge police misconduct.⁵⁸ In fact, the Cleveland Report states that this standard has led to discipline extremely rarely, and when there is discipline it is often for minor procedural offenses.⁵⁹

The authors of the Report expressed special concern because a previous investigation in 2004 had identified a pattern or practice of constitutional violations and the same structural deficiencies and had made recommendations for change, but there was little or no effect.⁶⁰ The Report emphasized that the CDP’s failure to police itself had led to an inability to work with community groups and members.⁶¹ It noted that the CDP operated in a militarized fashion, which reinforces the views of community members that the CDP is an “occupying force” rather than a partner in the community.⁶²

The Report also mentioned that although investigators did not focus on CDP’s search, seizure, and arrest practices, the force investigation revealed arrests, stops, and seizures that appear to be unconstitutional, and supervisors wrongfully reviewed search and seizure reports without seeking additional information justifying the officers’ behavior.⁶³

53. *Id.* at 4.

54. *Id.*

55. *Id.* at 5.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 5–6.

61. *Id.* at 6.

62. *Id.* at 6.

63. *Id.*

The Report found a number of deadly force violations as well, including officer shootings at suspects who posed no immediate threat to officers or others,⁶⁴ and hitting people in the head with officers' guns where use of deadly force is not justified.⁶⁵ It also found excessive use of less lethal force, including use of TASER guns, chemical sprays, and strikes to bodies of suspects who pose little or no threat to the officer or the public.⁶⁶

Finally, the DOJ found that the policies were unclear, training of police was inadequate, police did not write proper force reports, and supervisors did not adequately investigate force reports.⁶⁷

The Report took no position on racial profiling, but it emphasized that there were serious issues between minority populations and the police. Interviews of African Americans revealed that the community believes that CDP officers are verbally and physically aggressive toward them because of their race.⁶⁸ Moreover, officers resisted community members' attempts to file complaints.⁶⁹ Given this, the Report recommended a "comprehensive community policing strategy" that would enable law enforcement agencies and the people they serve to create an atmosphere of trust and develop solutions to the community problems.⁷⁰

2. Ferguson, Missouri Police Department

The DOJ investigated both the death of Michael Brown at the hands of a police officer in Ferguson, Missouri and the entire Ferguson Police Department.

Michael Brown

In August 2014, a white police officer, Darren Wilson, shot and killed Michael Brown, an unarmed black teenager in Ferguson, Missouri. Wilson had noticed Brown and his friend walking in the middle of the street, and told them to move to the sidewalk.⁷¹ When Wilson realized that Brown and his friend met the description of two suspects

64. *Id.* at 14–17.

65. *Id.* at 18.

66. *Id.* at 19.

67. *Id.* at 1.

68. *Id.* at 49.

69. *Id.* at 49.

70. *Id.*

71. U.S. DEP'T OF JUSTICE, DEPARTMENT OF JUSTICE REPORT REGARDING THE CRIMINAL INVESTIGATION INTO THE SHOOTING DEATH OF MICHAEL BROWN BY FERGUSON, MISSOURI POLICE OFFICER DARREN WILSON 6 (2015) [hereinafter DOJ MICHAEL BROWN REPORT].

alleged to have stolen cigarillos, he parked his car at an angle, blocking traffic.⁷² Brown approached Wilson's police car, and there was a scuffle over Wilson's gun.⁷³ DOJ investigators credited Wilson's report that Brown grabbed Wilson's gun, and Wilson shot at Brown from his car.⁷⁴ Wilson got out of his car and chased after Brown who ran away; Brown turned around and began to move toward Wilson.⁷⁵ Wilson shot at Brown.⁷⁶ Brown was hit with six bullets in his head and torso, and died of multiple bullet wounds.⁷⁷ He was unarmed.⁷⁸ There was conflicting testimony whether Brown's hands were up in a position of surrender as he approached Wilson.⁷⁹ Wilson told investigators that Brown charged him in a threatening manner.⁸⁰

The DOJ performed two investigations: one of the incident surrounding Michael Brown's death and another into the Ferguson Police Department's [hereinafter "FPD"] use of force. It produced two reports.⁸¹ The DOJ investigation of the individual shooting of Michael Brown concluded that the evidence was insufficient to prove beyond a reasonable doubt that Officer Wilson's shooting of Michael Brown was objectively unreasonable, and that he willfully shot Brown in violation of Brown's constitutional right to be free from unreasonable force.⁸²

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at 6–7.

76. *Id.* at 7. The DOJ credited Wilson's and other witnesses' accounts that Brown was approaching Wilson because, according to the DOJ, the statements did not change over time and were consistent with the physical evidence, including the autopsy. *Id.* at 8.

77. *What Happened in Ferguson?*, N.Y. TIMES (Aug. 10, 2015), <http://www.nytimes.com/interactive/2014/08/13/us/ferguson-missouri-town-under-siege-after-police-shooting.html>; see also Emily Wax-Thibodeaux, DeNeen L. Brown & Jerry Markon, *County Autopsy: Michael Brown Shot Six Times from Front, Had Marijuana in System*, WASH. POST (Aug. 18, 2014) http://www.washingtonpost.com/politics/official-autopsy-michael-brown-had-marijuana-in-his-system-was-shot-6-times/2014/08/18/8c016ef8-26f4-11e4-8593-da634b334390_story.html.

78. Wax-Thibodeaux, *supra* note 77. The grand jury refused to indict Officer Wilson. Erin McClam, *Ferguson Cop Darren Wilson Not Indicted in Shooting of Michael Brown*, NBC (Nov. 25, 2014, 2:21 AM), <http://www.nbcnews.com/storyline/michael-brown-shooting/ferguson-cop-darren-wilson-not-indicted-shooting-michael-brown-n255391>. The DOJ also investigated to determine whether to charge Officer Wilson with criminal civil rights violations, but given the conflicting stories of witnesses, and what the DOJ believed to be evidence consistent with Wilson's self-defense allegation, it recommended against prosecuting Officer Wilson. See DOJ MICHAEL BROWN REPORT, *supra* note 71, at 4.

79. See DOJ MICHAEL BROWN REPORT, *supra* note 71, at 8.

80. *Id.* at 7.

81. INVESTIGATION OF THE FERGUSON POLICE DEP'T REPORT, *supra* note 25; DOJ MICHAEL BROWN REPORT, *supra* note 71.

82. See DOJ MICHAEL BROWN REPORT, *supra* note 71, at 9–12.

Nonetheless, the broader investigation of the FPD found that the City and Municipal Court used arrests and court dates to raise revenue rather than to protect citizens' safety. The Report, which excoriated the FPD, found numerous constitutional violations in searches, seizures, arrests, and use of force; it also highlighted a lack of training and a failure of supervisors to investigate use of force allegations.⁸³ Officers routinely made arrests without probable cause.⁸⁴

Offense reports created by the officers themselves demonstrate that the officers see criticism and insolence as grounds for arrest, and even supervisors have condoned unconstitutional practices as retaliation for lawful opposition to the police's exercise of its authority.⁸⁵

The Report also found that many of the procedures at Ferguson had a disparate impact on black citizens and that there was significant evidence of intentional discrimination. With reference to racial bias, the Report states, "Ferguson's approach to law enforcement both reflects and reinforces racial bias, including stereotyping. The harms of the Ferguson's police and court practices are borne disproportionately by African Americans, and there is evidence that this is due in part to intentional discrimination on the basis of race."⁸⁶

In particular with reference to the use of force, the Report found that the FPD engages in a pattern of excessive use of force that disproportionately harms African Americans. The overwhelming majority of the force used against community members—nearly 90 percent—is against blacks, even though blacks represent only 67 percent of the population.⁸⁷ Moreover, "85% of vehicle stops, 90% of citations, and 93% of arrests made by FPD officers" are directed at black members of the community.⁸⁸ Officers use TASERS, where less force or none at all would be advised; they also release dogs on unarmed suspects.⁸⁹ The Report lists telling statistics:

Police are 2.07 times more likely to subject African Americans to a search during vehicular stops (after controlling for non-race based variables) even though African Americans are 26 percent less likely to have contraband found on them during a search. African Americans

83. INVESTIGATION OF THE FERGUSON POLICE DEP'T REPORT, *supra* note 25, at 3.

84. See INVESTIGATION OF THE FERGUSON POLICE DEP'T, *supra* note 25, at 18.

85. *Id.* at 26.

86. *Id.* at 4.

87. *Id.* at 4–5, 28.

88. *Id.* at 4.

89. *Id.* at 28.

are 2.00 times more likely to receive a citation and 2.37 times more likely to be arrested following a vehicular stop;⁹⁰

Police officers use force against African Americans “at disproportionately high rates, accounting for 88% of all cases from 2010 to August 2014 in which an FPD officer reported using force. In all 14 uses of force involving a canine bite for which there is information about the race of the person bitten, the person was African American.”⁹¹

Police officers are more likely to give multiple citations during a single incident to African Americans; blacks received “four or more citations on 73 occasions between October 2012 and July 2014, whereas non-African Americans received four or more citations only twice during that period.”⁹²

“African Americans account for 95% of Manner of Walking charges; 94% of all Fail to Comply charges; 92% of all Resisting Arrest charges; 92% of all Peace Disturbance charges; and 89% of all Failure to Obey charges.”⁹³

“African Americans are 68% less likely than others to have their cases dismissed by the Municipal Judge.”⁹⁴

“[I]n 2013, African Americans accounted for 92% of cases in which an arrest warrant was issued.”⁹⁵

“African Americans account for 96% of known arrests made exclusively because of an outstanding municipal warrant.”⁹⁶

Investigators found evidence of intentional discrimination and racial animus based on: 1) “consistency and magnitude” of racial disparities in treatment by police and courts; 2) direct communications among police and court personnel that exhibited prejudice against blacks; 3) other communications that demonstrated courts and police harbored racial stereotypes; 4) “background and context surrounding the FDP’s disparate enforcement;” and 5) the city’s consistent use of practices known to have a disparate impact on blacks and failure to correct the situation.⁹⁷

90. *Id.* at 62.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at 63.

97. *Id.* at 70–71.

The Report also found that the use-of-force review system is “particularly ineffectual.”⁹⁸ Officers often do not report use of force at all.⁹⁹ Supervisors almost never investigate force incidents.¹⁰⁰ When they do, they do not interview witnesses or seek to review footage of a jail incident or examine videotapes from TASERS.¹⁰¹ They merely summarize the officer’s version of events.¹⁰²

Summary

In sum, the DOJ Report on the FPD is a devastating account of constitutional violations by the police directed in particular at African American community members. It blames a failure of leadership and effort to put into practice training programs for the officers, failure of supervisors to use their authority to teach officers constitutional means of conducting themselves, and failure to punish officers for acting unconstitutionally. Furthermore, the Report reveals many instances of direct evidence of persons in authority making derogatory comments about black members of the community, as well as engaging in racial stereotyping.¹⁰³ Finally, the investigation finds many members of the black community who stated that FPD officers had used racial epithets in dealing with members of the public.¹⁰⁴

These reports comprise important data points about what occurred in Cleveland and Ferguson, and may potentially indicate behaviors that are responsible for shootings in other urban settings. But they do not discuss the importance of gender—masculinity, in particular—to the results in these cities. One likely reason is that masculinity is considered so natural that it is often invisible to onlookers. Race and class are extremely important to the behaviors described in the DOJ reports, but without an understanding of masculinities, the analysis is missing the third leg of a three-legged stool. Masculinities are a hidden explanation in these reports. Part III explains masculinities theory, and how it relates to race and class.

98. *Id.* at 38.

99. *Id.*

100. *Id.* at 39.

101. *Id.*

102. *Id.*

103. *Id.* at 71–73.

104. *Id.* at 73. In response, a newly appointed City Judge ordered in August, 2015 that all arrest warrants issued before 2015 be withdrawn. See Greg Botelho & Sara Sidner, *Ferguson Judge Withdraws All Arrest Warrants Before 2015*, CNN (Aug. 25, 2015), <http://www.cnn.com/2015/08/24/us/ferguson-missouri-court-changes/>. The order states that those who received the warrants will be permitted to attend court and the judge will create payment plans, or allow persons to perform community service in lieu of payment, or forgive the warrants altogether. *Id.*

II. MASCULINITIES STUDIES AND CRITICAL RACE THEORY: HEGEMONY, PRIVILEGE, AND SUBORDINATION

A. An Introduction to Masculinities Theory

Masculinities experts are feminists who believe that a study of men and masculinities appropriately supplements feminist understandings. Both feminists and masculinities theorists believe that gender is a social construction. Although male and female bodies are different, in particular when it comes to reproductive function, femininity and masculinity do not result wholly from female and male biology.¹⁰⁵ Rather, these traits, in large part, are socially constructed through invisible structures that reinforce gender roles and societal messages to boys and girls, men, and women.

Masculinities theorists posit that men *accomplish* masculinity by working to conform to societal expectations in different contexts.¹⁰⁶ Masculinities theorists conclude that feminism neglects the hierarchical relationships among men and how those relationships affect *both* men *and* women.¹⁰⁷ While feminism may see men as an undifferentiated powerful mass that imposes its power to harm women,¹⁰⁸ masculinities theory sees a gender structure that requires men to “act like real men.”

Even though the definition of “real men” is contested and changing, the term “hegemonic masculinity” describes the ideal masculinity that has the most power at any given time and place.¹⁰⁹ In Western culture, the hegemonic masculinity focuses on competition, aggression, independence, control, and capacity for violence.¹¹⁰ It ordinarily describes the upper middle class white male professional who represents the ideal version of masculinity because of the important relationship between masculinity and breadwinning.

105. NANCY E. DOWD, *THE MAN QUESTION: MALE SUBORDINATION AND PRIVILEGE* 60–61 (2010) (noting that masculinity is a social construction, not a biological given, is a conclusion “widely held by masculinities scholars”). Feminists have similar views about femininity. That is, women’s “weakness” usually derives from unequal power structures rather than from biology. *Id.* at 2.

106. See JAMES W. MESSERSCHMIDT, *MASCULINITIES AND CRIME: CRITIQUE AND RECONCEPTUALIZATION OF THEORY* 79–81 (1993).

107. MCGINLEY & COOPER, *supra* note 24.

108. See DOWD, *supra* note 105, at 16; MESSERSCHMIDT, *supra* note 106, at 45.

109. R.W. CONNELL, *MASCULINITIES* 77–78 (2d ed. 2005).

110. JAMES W. MESSERSCHMIDT, *NINE LIVES: ADOLESCENT MASCULINITIES, THE BODY, AND VIOLENCE* 10 (2000).

Masculinities theorists argue that there is constant pressure on men as individuals to aspire to the hegemonic form of masculinity.¹¹¹ While many men attempt to conform to the societal ideal of the hegemonic male, most men find reaching the ideal an impossible goal, and “develop varied forms of accommodation, reinterpretation, and resistance to ideologically hegemonic patterns.”¹¹²

In fact, many men feel significant pressure to conform to norms of masculinity that are more respected in their local social cultures. These forms of masculinity are “subordinated” or “oppositional” masculinities. Men who accomplish subordinated or oppositional masculinities are less wealthy and powerful than men engaging in hegemonic masculinity; they perform masculine behaviors in opposition to (and at times threatening to) hegemonic masculinity.¹¹³ Often these men perform their masculinity in a more physical or powerful, hypermasculine way. Examples of men who establish their worth through hypermasculine performances are blue-collar workers in factories, policemen, and firemen,¹¹⁴ or young black men from poor urban neighborhoods who adopt the “cool pose,” a version of hypermasculinity that emphasizes toughness and invincibility.¹¹⁵

Despite their lower status, subordinated masculinities are extremely powerful in setting norms of masculine behavior in urban poor and working class communities.¹¹⁶ The victims of police violence and the police themselves predominantly hail from these communities.¹¹⁷ The victims often come from poor or working class minority urban communities; the white police predominantly come from white working class communities.¹¹⁸

But masculinities are not merely individualized competitive behaviors. Rather, masculinities, as used here, comprise a social structure based in gender and around which many institutions revolve. Men are taught from boyhood not to appear like a woman (“don’t

111. CONNELL, *supra* note 109, at 122.

112. BARRIE THORNE, *GENDER PLAY: GIRLS AND BOYS IN SCHOOLS* 106 (1993).

113. MESSERSCHMIDT, *supra* note 110, at 11–12.

114. See generally Frank Rudy Cooper, “Who’s the Man?”: *Masculinities Studies*, Terry Stops, and Police Training, 18 COLUM. J. GENDER & L. 671 (2009) (illustrating hypermasculinity in police officers); Ann C. McGinley, *Ricci v. DeStefano: A Masculinities Theory Analysis*, 33 HARV. J.L. & GENDER 581 (2010) (exemplifying hypermasculinity in fire fighters).

115. See *infra* note 270 for a description of “cool pose.”

116. MCGINLEY & COOPER, *supra* note 24, at 5.

117. MESSERSCHMIDT, *supra* note 106, at 178; *Justice on Trial*, <http://www.civilrights.org/publications/justice-on-trial/race.html>.

118. *Id.*

throw like a girl”) and not to be gay.¹¹⁹ While views of homosexuality continually change, many parents and teachers insist that boys act like boys, which means that they should not display any feminine or “effeminate” characteristics. Some of these “effeminate” characteristics include demonstrations of caring and emotions, which are associated with being a woman. (“Boys don’t cry.”).¹²⁰ Men as a group reap the “patriarchal dividend,” the privilege in power and resources of being male, but because of the pressures placed on individual men to be appropriately masculine, they often feel powerless.¹²¹

Furthermore, the intersection of masculinity with different classes and races affects the relative privilege or disadvantage that a particular man might have. Viewing subjects through the lens of masculinity combined with lenses of race and class helps explain what happens, for example, when citizens challenge the police.

Before delving more deeply into masculinities theory in the specific context of police and their victims, the next subsection discusses some primary concepts of critical race and multidimensionality theories, and how these concepts support an understanding of masculinities and race in the policing context.

B. A Primer on Critical Race Theory

Critical race theory is an interdisciplinary theory in law that draws on a number of fields in the social sciences such as history, sociology, and ethnic studies. Critical race theory posits a number of concepts, two of which are important to this article. First, race is socially constructed yet materially relevant. Second, while certain groups in society continue to express racism overtly and consciously, eliminating overt racism is not sufficient because implicit or unconscious forms of racism still remain as a result of our history that are intractable and often invisible to white people.¹²² As Michael Omi and Howard Winant conclude, race is neither merely an ideological construct, nor an objective condition.¹²³

119. See DOWD, *supra* note 105, at 62.

120. *Id.*

121. CONNELL, *supra* note 109, at 79.

122. See MCGINLEY & COOPER, *supra* note 24.

123. See Michael Omi & Howard Winant, *The Theoretical Status of the Concept of Race*, in *THE THEORETICAL STATUS OF THE CONCEPT OF RACE, IN RACE, IDENTITY, AND REPRESENTATION IN EDUCATION* 3–6 (Cameron McCarthy et al., 2005).

1. Socially Constructed but Materially Relevant

Critical race theory explains that race is socially constructed but at the same time materially relevant. Persons of different races have distinguishing physical characteristics. These physical characteristics such as phenotype are, however, not biologically determinative of personality, traits, intelligence, or other important personal characteristics. In fact, the biological difference is unimportant, but society has constructed important differences. History and its social effects have created race. That is, in the United States, because of the history of slavery, Jim Crow,¹²⁴ and discrimination, black race has a social meaning. Because U.S. society has inscribed onto black bodies a meaning that is inferior to that of white bodies, blackness is material in society even though the differences between black people and white people would not be material absent our culture.¹²⁵ Because of our history, the creation and the continuation of social categories of race, blackness is relevant in that it is associated with strong stereotypes and prejudices that affect the way that society and institutions are structured and the way individuals act within these institutions.¹²⁶

Blackness is socially constructed as inferior to whiteness.¹²⁷ But even though there is no important biological difference, many blacks have identifying physical characteristics, such as phenotype, that, combined with the social construction of race, make blackness a material disadvantage in the United States.¹²⁸ This is what critical race scholars mean when they say that race is socially constructed, but material at the same time.¹²⁹

2. Structural Bias Expressed Implicitly

The second important concept of critical race theory is that although society disapproves of overt racism, racism still exists. Anthony Greenwald and Marzarin Banaji, along with a number of other social scientists, conclude, based on significant empirical support, that implicit racism is prevalent in our society; a large percent of those who believe that they are not racist actually harbor unconscious

124. See generally ALEXANDER, *supra* note 15 (discussing the history of Jim Crow laws).

125. See MCGINLEY & COOPER, *supra* note 24, at 6–7.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

or implicit racist views.¹³⁰ This implicit bias is harmful to blacks because it affects policies and practices built into the very structure of the law and society.¹³¹ It may also be responsible for individual reactions based on stereotypes society teaches its members from birth.

3. Critical Race and Multidimensional Masculinities Theories

Critical race and masculinities theories overlap in important ways. First, like critical race scholars who believe that race is socially constructed, masculinities scholars conclude that gender is socially constructed. While there are real physical differences between men and women, the meaning and importance of the differences exist primarily because of social messages and structures. Moreover, gender itself is social: it has no meaning outside of the social context in which it exists. Multidimensional masculinities theory, which incorporates intersectionality theory's insight that unique identities form at the intersection of two or more identities,¹³² considers a person's identities as they play out in the context of a particular situation. For example, a black male employee in a blue-collar workplace such as the police force would likely have more power than a black female police officer. On the street, however, because of the nature of policing and stereotypes about black men, a black man would likely draw more negative attention from the police than a black woman. In essence, the power of the black man vis a vis a black woman differs depending on the setting.¹³³

C. Using Multidimensional Masculinities to Analyze the Conflict Between Police and Black Men

1. Gender, Race, Class, Police Officers, and Black Suspects

a. *Gendered Policing*

Police work is gendered male.¹³⁴ Law professor Angela Harris notes that the importance of hypermasculinity to police work "emerges in the very qualifications for the job" which emphasize a

130. MARZARIN R. BANAJI & ANTHONY G. GREENWALD, *BLINDSPOT: HIDDEN BIASES OF GOOD PEOPLE* 47 (2013).

131. See Justin D. Levinson, *Racial Disparities, Social Science, and the Legal System*, in *IMPLICIT RACIAL BIAS ACROSS THE LAW* 3–6 (Justin D. Levinson & Robert J. Smith, eds. 2012).

132. See generally Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 *STAN. L. REV.* 1241 (1991).

133. MCGINLEY & COOPER, *supra* note 24, at 6–7.

134. See MESSERSCHMIDT, *supra* note 106, at 175.

military metaphor in organization and rhetoric.¹³⁵ The increased militarization of the police is not accidental. It has occurred as a result of a combination of the War on Drugs by the Reagan administration, and a response to fear of terrorism as a result of the bombing of the World Trade Center in New York City in 2001.¹³⁶

Harris explains that masculine culture is deeply embedded in street policing. The police form a brotherhood that relies on a division between the police and the criminals—a mentality of “us vs. them.”¹³⁷ She likens police to what “street gangs aspire to be: sovereign protectors of turf, defenders of the innocent, and possessors of a monopoly on violence and moral authority.”¹³⁸ Even when individual policemen engage in obvious criminal behavior while on the job, there is a “blue wall of silence” and the officers close ranks to protect their member from outside investigations.¹³⁹ The code of silence makes it difficult to detect use of excessive force and to investigate it when it happens.¹⁴⁰ Fellow officers shun and ostracize those who break the code.¹⁴¹

Because police officers see themselves as guardians of “nice” (predominantly white) neighborhoods, and enforcers of the law against a “community of savages,”¹⁴² the racialized “other” becomes the symbol of criminality. Police officers enhance their own masculinity by aligning themselves with what they see as “the just” and protecting them from intrusion by racialized criminals.

135. Angela P. Harris, *Gender, Violence, Race, and Criminal Justice*, 52 STAN. L. REV. 777, 793 (2000).

136. ALEXANDER, *supra* note 15, at 74–77; Radley Balko, *A Decade after 9/11, Police Departments are Increasingly Militarized*, HUFFINGTON POST (Nov. 12, 2011, 5:12 AM), http://www.huffingtonpost.com/2011/09/12/police-militarization-9-11-september-11_n_955508.html.

137. Harris, *supra* note 135, at 794.

138. *Id.*

139. *Id.* at 795, 796.

140. See Anthony J. Micucci & Ian M. Gomme, *American Police and Subcultural Support for the Use of Excessive Force*, 33 J. CRIM. JUST. 487, 490 (2005).

141. *Id.* at 491. A recent example of the “blue code of silence” and the importance of police officers’ honor is the reaction New York City police demonstrated to Mayor Bill De Blasio when he ordered that after the Eric Garner case, that New York City police attend a three-day “re-training” program. See Conclusion *infra* for a description of the Eric Garner case. De Blasio noted that he had warned his biracial teenage son about the dangers of the police. Soon after, in an unrelated incident, two New York police officers were gunned down. Alex Altman, *Why New York Cops Turned Their Backs on Mayor de Blasio*, TIME (Dec. 22, 2014), <http://time.com/3644168/new-york-police-de-blasio-wenjian-liu-rafael-ramos/>. When the mayor spoke at the downed police officers’ funerals, many members of the police department turned their backs on him. *Id.*

142. See Harris, *supra* note 135, at 797.

Harris explains that black officers, too, engage in the most violent behavior directed at black suspects because police work gives black officers an opportunity to gain the privileges of hegemonic masculinity.¹⁴³ And, because the suspects are labeled criminals, not blacks, African American police officers can do the police work without betraying their race.¹⁴⁴

Harris speaks of police officers' gender violence in the specific context of a brutal sexual assault by New York police officers on a male suspect. Officer Volpe forced a broomstick up Haitian immigrant, Abner Louima's anus and stuck the broomstick in Louima's mouth as another officer held Louima down.¹⁴⁵ Volpe's colleagues who witnessed the attack remained silent at least until the investigation got underway.¹⁴⁶ The assault simultaneously enhanced the masculinity of the officers involved by demonstrating that their manhood was superior to that of the suspect, and also demeaned the masculinity of Mr. Louima. The other officers who witnessed the event and the police department also benefitted from the assault and the resulting silence of the officers who witnessed it. Louima, as Harris explains, represented a racialized, criminal threat to the officers' masculinity and to the masculinity of the New York City Police Department.¹⁴⁷ Volpe's assault on Louima demonstrated that he and his colleagues and the entire department were more "manly" than Louima.¹⁴⁸

The police killings of black male citizens that I describe in this article are less intimate than the violation of Abner Louima, but they equally represent gender violence. Police officers need to demonstrate their superior masculine power over those whom they patrol. The reason for many of these killings may be race- and gender-based in that white police officers refer to racialized and gendered stereotypes of black men to judge the dangerousness of the situation; the officers are too quick to resort to deadly force. Moreover, the excessive use of force enhances the masculinity of both the individual officer and his department and serves as a message to the black male "savages" that the police department is superior to them.

143. *Id.* at 798.

144. *Id.*

145. *Id.* at 778.

146. *Id.*

147. *Id.* at 798.

148. *Id.*

As law professor Leigh Goodmark notes, “[p]olicing shares a number of attributes with all-male institutions like sports teams or single sex schools: a need for dominance, an emphasis on masculine solidarity, and the insistence that others within the group be protected . . . , a focus on physical courage, and the glamorization of violence.”¹⁴⁹ Masculine traits that researchers identify in male police officers include: “combative personalities, resistance to management, a propensity toward violence and use of weapons,” stoicism, hardness, decisiveness, lack of emotion, strength, domineering and controlling personalities.¹⁵⁰ Moreover, in their work, male police officers denigrate female officers as well as women in the community as a means of enhancing their own masculinity, and that of the department.¹⁵¹

It was not until the 1970s that women entered the police force, and once they did, women were often relegated to work that was coded feminine, such as dealing with juveniles or victims of domestic abuse; women did not rise to the level of upper management.¹⁵² Even today, female police officers represent a small minority of the forces across the country. The Bureau of Justice Statistics calculates that among the largest thirteen cities, in 2007, female police officers ranged from nine to twenty-seven percent of the force with a median of seventeen percent.¹⁵³ The smaller the force, the smaller the percentages of women on the force. In local police forces and sheriffs’ offices, female officers ranged in 2007 from a low of four percent in the smallest departments and offices to a high of fourteen percent in the departments and offices of over one hundred officers.¹⁵⁴ Men doing police work have greater authority than their female colleagues.¹⁵⁵ Moreover, police work enables men to construct their masculinity.¹⁵⁶

Female and male police officers perform femininity and masculinity as they work: when men and women are partners, the men often dominate the partnerships, control the shift, and conduct interviews of witnesses and victims while the women author the reports and do the

149. Leigh Goodmark, *Hands Up at Home: Militarized Masculinity and Police Officers Who Commit Intimate Partner Abuse*, 2015 B.Y.U. L. REV. (forthcoming 2015).

150. *Id.* (citations omitted).

151. *Id.*

152. MESSERSCHMIDT, *supra* note 106, at 175.

153. LYNN LANGTON, U.S. DEP’T OF JUSTICE, CRIME DATA BRIEF: WOMEN IN LAW ENFORCEMENT, 1987–2008 3 (2010), <http://www.bjs.gov/content/pub/pdf/wle8708.pdf>.

154. *Id.* at 2.

155. MESSERSCHMIDT, *supra* note 106, at 175.

156. *Id.*

paperwork.¹⁵⁷ Male officers take domestic violence less seriously than female officers, and are often themselves responsible for domestic violence.¹⁵⁸ Female police officers experience stress caused by sex- and gender-based harassment and discrimination in these predominantly male, hypermasculine jobs.¹⁵⁹ Special paramilitary forces such as SWAT teams are particularly hypermasculine.¹⁶⁰ Extreme masculinity may prevent women from assuming equal roles on SWAT teams. Moreover, a recent study demonstrated that men generally do not believe that women are qualified for SWAT teams, but women disagree.¹⁶¹ Women have left SWAT teams because of the bad treatment received by male SWAT team members.¹⁶²

Law professor Frank Rudy Cooper explains that male police officers demonstrate two important characteristics that derive from their need to prove their masculinity.¹⁶³ The first, “command presence,” is the ability to demonstrate control over a situation. “Command presence” describes an aggressive means of policing, a masculine method of control that is antithetical to negotiation and problem solving.¹⁶⁴ Masculinity serves as a structure within policing and police forces and also governs how individual police officers perform their gender. Although an authoritative presence is sometimes necessary, especially when linked to masculinity, it is also subject to abuse. Second, police officers expect respect and male police officers construe challenges to their authority as challenges to their masculinity that deserve punishment.¹⁶⁵ Police officers often use excessive force against persons who resist arrest or show a lack of respect.¹⁶⁶

This need to punish disrespect comes from a culture of honor that requires men to act in a way that preserves and promotes their masculinity in the face of challenges coming from other men.¹⁶⁷ In fact, Cooper argues, male police officers engage in “masculinity contests”

157. *Id.* at 176.

158. See Goodmark, *supra* note 149 (explaining the problem of the prevalence of male police officers as domestic abusers).

159. MESSERSCHMIDT, *supra* note 106, at 181.

160. Mary Dodge et al., *Women on SWAT Teams: Separate but Equal?*, 34 *POLICING* 699, 707 (2011).

161. *Id.*

162. *Id.*

163. See generally Cooper, *supra* note 114.

164. *Id.* at 694.

165. *Id.* at 697.

166. See Micucci & Gomme, *supra* note 140, at 490.

167. See Cooper, *supra* note 114, at 697.

with members of the neighborhood they are policing.¹⁶⁸ These contests cannot result in both sides' retaining their masculinity.¹⁶⁹ One of the participants will cede to the other's greater power, and will emerge as less masculine.¹⁷⁰ The police officer begins with the premise that he has greater masculine power, a premise that a civilian might challenge. But when civilians do challenge the police officers' authority (and, therefore, masculinity), the police officers will reassert their authority by engaging in behavior that "emasculate[s] suspects and elevate[s] their own masculine esteem."¹⁷¹

b. *Policing in Poor Black Neighborhoods*

Besides masculine police culture there is a male pattern of policing: a "war" carried out through military type dominance and presence that translates into a high number of arrests in poor neighborhoods, and mass incarceration. The "enemy" of this war is implicitly men of color. There remains significant racial segregation in housing in U.S. cities. Particularly, the poor neighborhoods in U.S. cities are predominantly black, and in many cities, Latino.¹⁷² In 1982, the Reagan administration announced its War on Drugs.¹⁷³ A few years later, the Reagan administration "hired staff to publicize the emergence of crack cocaine in 1985 as part of a strategic effort to build public and legislative support for the war."¹⁷⁴ As Michelle Alexander, author of *The New Jim Crow* explains, the media campaign was immediately successful, with images of black crack "dealers" and "whores," all of which "seemed to confirm the worst negative racial stereotypes" about black citizens living in poor black neighborhoods.¹⁷⁵ The Anti-Drug Abuse Act, passed by Congress in 1986, established longer sentences for persons convicted of using or distributing crack cocaine than its counterpart—powder cocaine—and

168. *Id.* at 701.

169. *Id.*

170. *Id.*

171. *Id.*

172. Gregory D. Squires, and Charis E. Kubrin, *Privileged Places: Race, Opportunity, and Uneven Development in Urban America*, 147 NHI (Fall 2006), <http://nhi.org/online/issues/147/privilegedplaces.html>.

173. ALEXANDER, *supra* note 15, at 5. Research demonstrates that a combination of income inequality and racial threat by black citizens correlates with U.S. society's use of increased policing. See Jason T. Carmichael & Stephanie L. Kent, *The Persistent Significance of Racial and Economic Inequality on the Size of Municipal Police Forces in the United States, 1980-2010*, 61 SOC. PROBS. 259, 276 (2014).

174. ALEXANDER, *supra* note 15, at 5.

175. *Id.*

imposed these sentences on the possession, use, or distribution of far less potent crack than for powder cocaine.¹⁷⁶ This law disparately affected black communities because crack cocaine was more common in black communities, whereas powder cocaine was more common in white communities.¹⁷⁷ It was not until 2010 that Congress amended the law in an attempt to equalize the punishment for crack and powder cocaine.¹⁷⁸

The War on Drugs also led to increased vigilance by police of poor minority communities in major cities that has lasted over thirty-five years. Bernard Harcourt and Jens Ludwig found that by the year 2000, in New York City, for example, there was a huge increase in misdemeanor charges of smoking marijuana in public view.¹⁷⁹ The pattern of these arrests disproportionately affected African Americans and Latinos.¹⁸⁰

In large part because of the War on Drugs, including the long sentences imposed by law, the combined U.S. penal population in state and federal prisons rose dramatically from about 300,000 to more than 1.5 million from 1980 to 2013.¹⁸¹ Drug convictions account for most of the increase, and most of the drug convictions are of blacks and Latinos from poor urban neighborhoods.¹⁸² Today, the United States has the highest incarceration rate in the world.¹⁸³ Although there is a perception among U.S. citizens that poor blacks are very violent, violent crime is not responsible for the spike in imprisonment.¹⁸⁴ A recent study by Jason Carmichael and Stephanie Kent concludes that increases in size in city police forces result from income inequality, and racial threat caused by an increase in blacks living in

176. Brittany C. Slatton, *The Black Box: Constrained Maneuvering of Black Masculine Identity*, in *HYPER SEXUAL, HYPER MASCULINE?* 33, 37 (Brittany C. Slatton & Kamesha Spates eds., 2014).

177. *Id.*; ALEXANDER, *supra* note 15, at 112.

178. *Id.* To be clear, as of 2006, a much larger percentage of crack cocaine users were non-Hispanic whites (67 percent) than non-Hispanic blacks (17 percent), but crack cocaine was more prevalent in poor black communities than powder cocaine was. Kamesha Spates, *More than Meets the Eye: The Use of Counter-Narratives to Expand Students' Perceptions of Black Male Crack Dealers*, in *HYPER SEXUAL, HYPER MASCULINE?* 133, 133 (Brittany C. Slatton & Kamesha Spates eds., 2014). More illegal drugs were making their way to poor inner city neighborhoods and the War on Drugs led to arrests and convictions for drug offenses to rise dramatically. ALEXANDER, *supra* note 15, at 5–6.

179. See Harcourt & Ludwig, *supra* note 12, at 165.

180. *Id.*

181. ALEXANDER, *supra* note 15, at 6; see generally E. ANN CARSON, U.S. DEP'T OF JUSTICE, PRISONERS IN 2013 1 (2014), <http://www.bjs.gov/content/pub/pdf/p13.pdf>.

182. ALEXANDER, *supra* note 15, at 6.

183. *Id.*

184. *Id.* at 101.

segregated neighborhoods.¹⁸⁵ Thus, it appears that income inequality in the United States that surged during the Reagan administration and still increases today may have caused the increased surveillance of black neighborhoods in major cities in the United States. Such increased surveillance, in turn, likely caused the dramatic rise in arrests, convictions, and incarcerations of black citizens.

According to Alexander, the United States imprisons today a larger percentage of its black population than South Africa did at the height of the apartheid era.¹⁸⁶ The rates of drug crimes committed by blacks do not explain the disproportionate number of blacks imprisoned for drug-related offenses. Importantly, people of all races use and sell drugs at “remarkably similar rates,” but the police have concentrated on poor black communities.¹⁸⁷ Moreover, it appears that the hyper vigilance of poor black communities has not reduced serious crime in those neighborhoods. A study by Bernard Harcourt and Jens Ludwig reveals, in fact, that in New York City, increases in arrests for misdemeanor marijuana charges actually led to an increase in the severity of crime in the neighborhood, rather than a decrease that broken windows policing theorists would suggest.¹⁸⁸

The Supreme Court’s increasingly narrow interpretation of the Fourth Amendment to the United States Constitution, which guarantees the right not to submit to unreasonable governmental search and seizures, has made it easier for the police to make drug arrests.¹⁸⁹ A series of decisions by the Court has unleashed the power of the police in drug and other arrests. Primary among these decisions are *Terry v.*

185. Carmichael & Kent, *supra* note 173, at 276.

186. ALEXANDER, *supra* note 15, at 6.

187. *Id.* at 7.

188. See Harcourt & Ludwig, *supra* note 12, at 171. Because many states remove the right to vote permanently from convicted felons, a very large percentage of the U.S. urban black male population no longer has the right to vote, even in national elections. Moreover, imprisonment not only affects the franchise to vote, but also makes it extremely difficult for these men to gain employment once they are released from prison. ALEXANDER, *supra* note 15, at 149–51. Moreover, felons are not eligible for food stamps and may be evicted from public housing. If felons are homeless, their children are placed in foster care. See *id.* at 57, 145.

189. ALEXANDER, *supra* note 15, at 63–68.

Ohio,¹⁹⁰ *Schneckloth v. Bustamonte*,¹⁹¹ *Whren v. United States*,¹⁹² and *Ohio v. Robinette*.¹⁹³

These cases give broad discretion to the police to stop nearly anyone based on limited, and often, pretextual reasons. Police power to stop and frisk combines with the discretion that the police department has to determine which neighborhoods to target and which persons to stop, either on the street or in cars, to create an unreasonably intrusive presence of the police in poor black neighborhoods. The discretion results in a disproportionate number of blacks stopped and frisked.

But discretion is not the only story. There is a major increase in the amount of funding and other resources available to state and local governments to fight the War on Drugs.¹⁹⁴ The federal Drug Enforcement Agency ("DEA") funds state and local police for training, intelligence, and technical support.¹⁹⁵ These grants have led to a significant focus on minority members of the community and to countless arrests.¹⁹⁶

Policing transformed from "community policing" to "military policing" with the passage of the Military Cooperation with Law Enforcement Act, which encourages the military to give local police forces access to military intelligence, research, and weaponry for drug enforcement.¹⁹⁷ The availability of funds and equipment has led to increased militarization of police forces in poor black neighborhoods. Funds became available beginning in the late 1990s to add a military

190. *Terry v. Ohio*, 392 U.S. 1, 22 (1968) (permitting officers to stop and frisk persons upon an "articulable suspicion" but absent probable cause).

191. *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973) (holding that police do not have to prove that a person who was not in custody and gave consent to a car search after a stop for a traffic violation knew he had a right not to consent).

192. *Whren v. United States*, 517 U.S. 806, 813 (1996) (permitting officers to stop a person for a traffic violation even if it was a pretext for a drug search).

193. *Ohio v. Robinette*, 519 U.S. 33, 35 (1996) (holding that police do not have to tell suspects about their right to refuse to consent when they are subject to a pretext stop).

194. ALEXANDER, *supra* note 15, at 73.

195. *Id.*

196. *Id.* at 73-74.

197. *Id.* at 75-76. The Reagan Administration supported the Act, and subsequently, Presidents Bush and Clinton increased the provision of military equipment, technology, and training to local police officers with the understanding that the police would make drug interdiction a top priority. *Id.* at 76. President Obama increased the money available for drug enforcement through the Byrne grant program. *Id.* at 82-83.

component to support drug enforcement.¹⁹⁸ SWAT (Special Weapons and Tactics) teams formed in many localities to fight drugs.¹⁹⁹

Perhaps most influential to local police departments are the financial incentives the civil forfeiture law creates to engage in paramilitary operations.²⁰⁰ A law amended in 1984 permits local police forces to keep the majority of cash and assets seized as a result of a drug raid, granting to local police a huge stake in the illicit drug market.²⁰¹ The law gave local police departments up to 80 percent of the cash, cars, homes, and other property they collected during drug raids, even where no one was ultimately arrested.²⁰² Congress amended the civil forfeiture rules in 2000, but there is a serious question whether the reforms go far enough.²⁰³

c. *Performing Masculinities Through Work and Crime: The Importance of Class*

International statistics on the gender of perpetrators of violence uniformly demonstrate a severely unbalanced sex ratio; men perpetrate ninety to one hundred percent of the violence globally, and women are responsible for less than ten percent of violence worldwide.²⁰⁴ Criminologist James Messerschmidt explains that the most salient predictors of crime are gender and age of the “criminal.” Young men engage in crime at a much higher rate than older men or women of any age do. But there is a significant difference based on class and opportunity concerning when a man “ages out” of crime.²⁰⁵ In poor urban neighborhoods men engage in crime at higher rates, not

198. *Id.* at 73.

199. In fact, many police forces use SWAT teams to conduct raids and arrests that used to be ordinary police work. Police use new equipment and tactics learned through trainings regularly in poor neighborhoods to serve no-knock warrants on citizens in the middle of the night. *Id.* at 74–75.

200. *Id.* at 78–80.

201. *Id.* at 77.

202. *Id.* at 77–78.

203. *Id.* at 80. Michelle Alexander notes that for the first time in 2000, there was an “innocent owner” defense, but the government’s burden of proof is low – it must demonstrate only by a preponderance of the evidence that the property was involved in a drug crime, and there is no attorney’s fees provision for a person who successfully challenges the forfeiture. *Id.* at 80–82. Without attorney’s fees, most poor blacks suffering from forfeiture do not have the funds to challenge it. *Id.*

204. Lee H. Bowker, *Introduction*, in *MASCULINITIES AND VIOLENCE* xi, xiv (Lee H. Bowker ed., 1998).

205. MESSERSCHMIDT, *supra* note 106, at 109–10.

only to survive, but also to perform masculinity, and, therefore, they “age out” later than men in working class neighborhoods do.²⁰⁶

Messerschmidt posits that crime itself is a means of performing or accomplishing masculinity.²⁰⁷ Men and boys of different classes have different relationships to crime and accomplish their masculinity by engaging in different types of crimes. While upper middle class (predominately) white boys construct their masculinity through academic achievement because academic success is tied to breadwinner status,²⁰⁸ working class white boys often define their masculinity in contraposition to academics because they see physical labor as providing the only truly masculine jobs.²⁰⁹ Working class white boys use fighting as a means of demonstrating their masculine superiority over teachers and upper middle class white male students and female students.²¹⁰ Fighting is a means of “constructing an opposition masculinity as collective practice.”²¹¹ Outside of the school, working class white boys disproportionately commit hate crimes. Hate crimes are public forms of masculinity that permit working class white boys to demonstrate their masculine superiority over gays and members of other races.²¹² Police predominantly come from this social class.²¹³

Messerschmidt explains that poor and working class boys who are members of racial minorities have little or no access to paid labor.²¹⁴ They resort to disorder and violence in school to construct their masculinity in a way that differentiates themselves from the working class white children.²¹⁵ Outside of school, street gangs and street violence become means of accomplishing “opposition masculinity.”²¹⁶ “Within

206. *Id.*

207. *See id.* at 79-80 (Messerschmidt explains that gender is more than a social sign but involves activity and behavior often associated with the specific gender. He alludes to the idea that crime is a behavior that often falls into the masculine category.).

208. *Id.* at 92-93. I do not mean to “essentialize” the experiences of the groups I discuss in this subsection. Clearly, not all white middle class men or black men, etc. are the same, but these observations are generalizations based on Messerschmidt’s study of these groups.

209. *Id.* at 97.

210. *Id.* at 98 (describing a study that observed working-class British boys).

211. *Id.* at 99.

212. *Id.*

213. *Id.* at 178.

214. *Id.* at 104.

215. *Id.* at 104-05.

216. *Id.* at 105. Many boys drop out of school and engage in robberies. “Robbery provides a public ceremony of domination and humiliation of others.” *Id.* at 107. Group robberies entail greater violence and provide the opportunity to prove to friends that a boy has no fear. As Messerschmidt notes, “The robbery setting provides the ideal opportunity to construct an ‘essential’ toughness and ‘maleness’; it provides a means with which to construct that certain type of masculinity—hardman. *Id.*

the social context that ghetto and barrio boys find themselves, then, robbery is a rational practice for 'doing gender' and for getting money."²¹⁷

Because minority youths have few economic opportunities, they take longer to age-out of crime than do white working class boys.²¹⁸ Some of these minority youths join gangs as an expression of masculinity. Opposing gangs struggle for domination in a way that allows them to accomplish their masculinity.²¹⁹ In the United States, these youths live in the neighborhoods that are often targeted by the police.

2. Stereotypes: The Bad Black Man vs. the Good Black Man

The overwhelming majority of crime is committed by men. In fact, violence is considered a defining characteristic of masculinity. Police associate black men and other men of color in particular with criminality. Seeing all black men as presumptive criminals is reinforced by widespread stereotypes about black men and black masculinity. Stereotypical tropes define African American men in the United States. Sociologist Catherine Harnois states, "[T]he controlling images . . . work to justify continued racial segregation and inequality. They emphasize a kind of deviant black masculinity that is defined against a normative, middle-class, heterosexual white masculinity."²²⁰ Law professor Frank Rudy Cooper explains that our society represents black men in bipolar fashion.²²¹ Cultural images of black men include the Bad Black Man and the Good Black Man.²²² The Bad Black Man is animalistic, criminal and hypersexual.²²³ Blacks were treated as chattel during slavery, and the image of black men as beasts persists even today.²²⁴ Moreover, black men have suffered from identification with criminality and unrestrained sexuality for centuries in Europe and the United States.²²⁵ Toward the end of slavery, there was a fear that freed black men would prey upon white women,

217. *Id.* at 107.

218. *Id.* at 109.

219. *Id.* at 111.

220. Catherine E. Harnois, *Complexity Within and Similarity Across: Interpreting Black Men's Support of Gender Justice, Amidst Cultural Representations that Suggest Otherwise*, in *HYPER SEXUAL, HYPER MASCULINE?* 85, 96 (Brittany C. Slatton & Kamesha Spates eds., 2014).

221. See generally Frank Rudy Cooper, *Against Bipolar Black Masculinity: Intersectionality, Assimilation, Identity Performance, and Hierarchy*, 39 U.C. DAVIS L. REV. 853, 857-58 (2006).

222. *Id.*

223. *Id.* at 876.

224. *Id.* at 877-78.

225. *Id.* at 878.

and an expressed need for white men to “control and repress” black men in order to protect white women.²²⁶ This fear increased after emancipation of the black slaves because black men had political and property rights similar to those of white males.²²⁷

But more important, white supremacist masculinities were threatened by the freedom of black male slaves, and the perceived threat to the white male’s income and exclusive right to “pure” white women.²²⁸ Assuring that black men and masculinity did not challenge white masculinity, white male supremacists regularly lynched and castrated black men wrongfully accused of attempting sexual relationships with white women.²²⁹ Ida B. Wells demonstrated that lynching was usually related to black business success.²³⁰ Nonetheless, lynchings and castration assured the superiority of white men over black men, and white women.²³¹

The image of black man as hypersexual, violent, and bestial continues today, and appears in media portrayals of the news.²³² While there are some good depictions of blacks in society, these are not predominant or strong images in popular culture. Furthermore, when positive images do prevail in popular culture, they are dismissed as the exception, thereby reinforcing the “truth” of the negative images, and justifying the continued unequal treatment of black men.²³³

226. *Id.*

227. *Id.* at 877.

228. See James W. Messerschmidt, *Men Victimizing Men: The Case of Lynching, 1865-1900*, in MASCULINITIES AND VIOLENCE 125, 137 (Lee H. Bowker ed., 1998).

229. *Id.* at 140, 143–46.

230. See Ida B. Wells, *Lynch Law in All Its Phases*, Speech at Boston’s Tremont Temple (Feb. 13, 1893), in OUR DAY, (1893). Ida B. Wells was a black former slave, journalist, teacher, and social reformer who opposed lynching. *Ida B. Wells-Barnett*, ENCYCLOPÆDIA BRITANNICA, <http://www.britannica.com/biography/Ida-B-Wells-Barnett> (last visited July 21, 2015). She wrote a number of books. *Id.*

231. See Messerschmidt, *supra* note 228, at 147–48.

232. During the writing of this article, a 21-year-old white young man entered a historical black church in Charleston, South Carolina and gunned down nine black victims. Reportedly, before he began shooting, he blamed blacks for “rap[ing] our women.” Ralph Ellis, et al., *Shooting Suspect in Custody After Charleston Church Massacre*, CNN (June 18, 2015, 11:50 PM), <http://www.cnn.com/2015/06/18/us/charleston-south-carolina-shooting/>. A webpage created by the perpetrator before the shooting contains a racist manifesto that blames blacks for crime on whites in the U.S. See Brendan O’Connor, *Here Is What Appears to Be Dylann Roof’s Racist Manifesto*, GAWKER (June 20, 2015, 10:55 AM), <http://gawker.com/here-is-what-appears-to-be-dylann-roofs-racist-manifest-1712767241>. While this perpetrator’s views cannot be attributed to other Americans, the trope of the black or Latino criminal still pervades our culture. For example, Donald Trump, as he announced his run for the presidency of the United States, identified Mexican immigrants as “rapists.” Donald Trump, President Announcement Speech (June, 6 2015) (transcript available at <http://time.com/3923128/donald-trump-announcement-speech/>).

233. See Harnois, *supra* note 220, at 96.

Many African American men, not only those who belong to the stereotyped lower classes but also those who are middle and upper middle class, suffer intense scrutiny by the police. Consider the arrest of Dr. Henry Louis Gates, Jr., a distinguished African American Harvard Law professor, when he attempted to open his front door after arriving home from vacation. Police, responding to a complainant who believed that Gates was an intruder, went to Gates' home.²³⁴ By this time, Gates has gotten into the home, and a police officer asked Gates for his identification, which Gates provided.²³⁵ Gates' driver's license had his home address, and thereby verified he was not an intruder.²³⁶ Nonetheless, the officer asked Gates to step out onto the porch, and Gates refused.²³⁷ When Gates finally stepped out onto the porch, the officer arrested Gates for disorderly conduct.²³⁸ A report conducted on the incident blamed both men and stated that race, class, and a lack of respect for police authority were responsible for the conflict.²³⁹ The Committee investigating the incident did not even see that gender, combined with race and class, was a primary motivating factor of the incident.²⁴⁰

African American parents of all classes describe "the talk" that they feel compelled to have with their teenage sons about how to react if the police stop or try to arrest them:

If you are stopped by a cop, do what he says, even if he's harassing you, even if you didn't do anything wrong. Let him arrest you, memorize his badge number, and call me as soon as you get to the precinct. Keep your hands where he can see them. Do not reach for your wallet. Do not grab your phone. Do not raise your voice. Do not talk back. Do you understand me?²⁴¹

234. Krissah Thompson, *Arrest of Harvard's Henry Louis Gates Jr. Was Avoidable, Report Says*, WASH. POST (June 30, 2010, 1:45 PM), <http://www.washingtonpost.com/wp-dyn/content/article/2010/06/30/AR2010063001356.html>.

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

240. See Frank Rudy Cooper, *Masculinities, Post-Racialism and the Gates Controversy: The False Equivalence Between Officer and Civilian*, 11 NEV. L. J. 1, 3 (2010) (arguing that the Gates controversy occurred at the intersection of race, class, and masculinity and in the context of a police arrest); Thompson, *supra* note 234.

241. See Jeannine Amber, *The Talk: How Parents Raising Black Boys Try to Keep their Sons Safe*, TIME (July 29, 2013), <http://content.time.com/time/magazine/article/0,9171,2147710,00.html>; see also Jazmine Hughes, *What Black Parents Tell Their Sons About the Police*, GAWKER (Aug. 21, 2014, 9:37 AM), <http://gawker.com/what-black-parents-tell-their-sons-about-the-police-1624412625>.

This is a painful reality in contemporary U.S.

The Good Black Man image is also an enduring trope. Like Uncle Tom, from *Uncle Tom's Cabin*, the antebellum novel,²⁴² the Good Black Man today is assimilationist; he performs his race and gender in a way that makes white people comfortable. He avoids complaining about racism and is ingratiating and compliant.²⁴³ But, as Cooper explains, the default position for black men is that they are Bad Black Men, angry and threatening.²⁴⁴

Even if police do not consciously adopt the stereotypes of black men, the press constantly bombards society with messages about black men as dangerous, angry, and threatening.²⁴⁵ These images create attitudes about black men that may lead to differential treatment of black and white men in police encounters.

3. Performance of Masculinity by Some Black Men

There are multiple black masculinities, but the intersection of race and gender makes it clear that because of racial stereotypes, masculinity is a challenging goal for black men to attain. *Some* black youths perform their masculinity as hypermasculinity, which as expressed may bring more police attention.²⁴⁶ Harris notes that the history of slavery has contributed to black men's view of who they are. African American men have always felt "emasculated" by the culture of white masculinity because of their inability to compete for hegemonic masculinity, which includes control over their own women.²⁴⁷ Culturally, black men have been stereotyped as weak and childlike and also as dangerous and threatening but unintelligent.²⁴⁸ As a response, some African American youths have adopted the "cool pose,"

242. HARRIET BEECHER STOWE, *UNCLE TOM'S CABIN* 14–15 (1852).

243. Cooper, *supra* note 221, at 881–82.

244. Frank Rudy Cooper, *Our First Unisex President?: Black Masculinity and Obama's Feminine Side*, 86 DENV. L. REV. 633, 636, 644–45 (2009).

245. Candy Ratliff, *Growing Up Male: A Re-Examination of African American Male Socialization*, in *HYPER SEXUAL, HYPER MASCULINE?* 19, 25 (Brittany C. Slatton and Kamesha Spates eds., 2014); Kamesha Spates and Brittany C. Slatton, *Blackness, Maleness, and Sexuality as Interwoven Identities: Toward an Understanding of Contemporary Black Male Identity Formation*, in *HYPER SEXUAL, HYPER MASCULINE?* 1, 1 (Brittany C. Slatton and Kamesha Spates eds., 2014); Joshunda Sanders, *Media Portrayals of Black Youths Contribute to Racial Tension*, MAYNARD INST. FOR JOURNALISM EDUC. (May 23, 2012), <http://mije.org/mmcsi/general/media's-portrayal-black-youths-contributes-racial-tension>.

246. Ratliff, *supra* note 245, at 25–26.

247. See Harris, *supra* note 135, at 783.

248. *Id.* at 783–84.

a “rebellious” form of masculinity that opposes hegemonic masculinity and presents black masculinity as superior to white masculinity.²⁴⁹

Americans view black male youths as crack dealers, even though the vast majority of crack users—67 percent—are white and blacks are no more likely than whites to sell cocaine.²⁵⁰ Moreover, the perception of who sells drugs and arrest rates are both shaped by race.²⁵¹ This view comes from the widespread presumption of black male criminality in our society.²⁵² Even many of those black men who do deal illegal drugs, a distinct minority, are misunderstood. Black men do not decide to deal drugs out of whim, but rather, their decision often results from economic necessity.²⁵³ Many sell drugs to provide for their families who live in poverty, and have no other means to make sufficient income.²⁵⁴ A number of black men who were once drug dealers have made fame and fortune by creating and performing rap music, which describes the reasons for their former lives as drug dealers. These lyrics, although fully admitting of illegal drug use and dealing, also discuss the background in which this behavior occurs—a dysfunctional family, no help from society, a lack of education, and little or no economic opportunity.²⁵⁵ According to sociologist Kamesha Spates:

[S]elling drugs is more about survival and less about being labeled as deviant. Contrary to popular belief, many of these men entered the drug game to counter notions that black men are unable to provide for themselves or their families. Though many of them were still kids themselves, their attempts to ‘man-up’ resulted in their willingness to take desperate measures.²⁵⁶

249. *Id.* at 784.

250. Spates, *supra* note 178, at 133.

251. See, e.g., Katherine Beckett, et al., *Race, Drugs, and Policing: Understanding Disparities in Drug Delivery Arrests*, 44 *CRIMINOLOGY* 105, 105–06 (2006) (finding that blacks are significantly overrepresented in arrests in Seattle for selling drugs, disproportional to the racial and ethnic composition of those who sell drugs, and that race shapes perceptions of who and what constitutes the drug problems in Seattle and the institutional response to drugs).

252. Spates, *supra* note 178, at 133.

253. *Id.* at 142.

254. *Id.* at 143.

255. *Id.* at 144–46. bell hooks argues that men who produce rap and hip-hop music as a means of criticizing American society, however, are making money from the capitalist system and supporting white male patriarchy. See BELL HOOKS, *WE REAL COOL: BLACK MEN AND MASCULINITY* 55 (2004).

256. See Spates, *supra* note 178, at 148.

An ethnographic study by researchers Michael Pass, Ellen Benoit, and Eloise Dunlap supports Spates' conclusion.²⁵⁷ Their interviews of ninety-four low-income black men demonstrate that when asked about manhood and masculinity, the subjects' most prevalent response was that real men are responsible to provide for themselves and their families.²⁵⁸ In essence, low-income black men share the same views about the markers of manhood as their white middle-class counterparts. Yet, only thirty-six percent of the sample reported that they had legal jobs as their primary source of income.²⁵⁹ The authors concluded that poor black men provided for their households in accordance with the resources that were available to them.²⁶⁰ In other words, if necessary, black men resorted to illegal means to support their families. The authors noted, "It is clear that [the men] want to be seen as providers and protectors, responsible for people they care about, despite not having success in employment that is considered essential to the hegemonic image of masculinity."²⁶¹

Michelle Alexander argues that some black young men in poor neighborhoods embrace gangsta culture as a political act of resistance and defiance.²⁶² The black youths who embrace the stigma of criminality see their behavior as a way of lessening the demeaning stigma. As Alexander states:

For those black youth who are constantly followed by the police and shamed by teachers, relatives, and strangers, embracing the stigma of criminality is an act of rebellion—an attempt to carve out a positive identity in a society that offers them little more than scorn, contempt, and constant surveillance.²⁶³

These performances are attempts to define one's manhood, to express masculinity in a way that gives the young men power over those who pursue them, and an identity they can embrace. Unfortunately, this identity performance is often harmful to the individual, and can also increase the strength of society's stereotypes about black men living in poor minority neighborhoods. Alexander likens the gangsta culture on Black Entertainment TV to a "minstrel show" for an audi-

257. Michael Pass et al., *I just be myself: Contradicting Hyper Masculine and Hyper Sexual Stereotypes Among Low-Income Black Men in New York City*, in *HYPER SEXUAL, HYPER MASCULINE?* 165, 173 (Brittany C. Slatton & Kamesha Spates eds., 2014).

258. *Id.* at 173.

259. *Id.*

260. *Id.* at 179.

261. *Id.*

262. ALEXANDER, *supra* note 15, at 169–72.

263. *Id.* at 171.

ence of white, suburban teenagers.²⁶⁴ Law professor Athena Mutua recognizes the important anti-racist message of Kanye West and other rap musicians, but she also recommends that black men instead engage in progressive black masculinities.²⁶⁵ That is, black men, according to Mutua, need to reject patriarchal control over black women and embrace feminism.²⁶⁶ She argues that black men's embrace of concepts of ideal masculinity hurts black women, black men, and black communities.²⁶⁷ In other words, black men are harmed by "gendered racism."²⁶⁸

Even those black youths who do not engage in the black gangsta culture are often misunderstood if they engage in the "cool pose" by wearing the symbols of gangsta culture such as the hoodie, the sagging pants, the hat turned backwards. These symbols say "criminal" to white America, and likely to the police who work on the streets in the poor neighborhoods, and to other young blacks in the neighborhood.²⁶⁹ But these symbols of masculinity should not be misunderstood.²⁷⁰ Most young men, whether black or white, in poor or wealthy neighborhoods, represent themselves as masculine through clothing and other symbols that are powerful in their own local cultures. In fact, these symbols may represent masculinity in poor neighborhoods because they do represent criminality, but many boys and young men who are not involved in criminal behavior have also adopted these symbols.

Freddie Gray

Freddie Gray could have been one of these men. Gray and his sisters were raised by a disabled mother who was addicted to heroin

264. *Id.* at 168.

265. Athena D. Mutua, *Theorizing Progressive Black Masculinities*, in *PROGRESSIVE BLACK MASCULINITIES* 3, 4-5 (Athena D. Mutua, ed., 2006).

266. *Id.* at 5.

267. *Id.*

268. *Id.* at 6.

269. Gene Denby, *Sagging Pants and the Long History of 'Dangerous' Street Fashion*, NPR (Sept. 11, 2014, 8:18 AM), <http://www.npr.org/sections/codeswitch/2014/09/11/347143588/sagging-pants-and-the-long-history-of-dangerous-street-fashion>.

270. Daniel Goleman, *Black Scientists Study the 'Pose' of the Inner City*, N.Y. TIMES (Apr. 21, 1992), <http://www.nytimes.com/1992/04/21/science/black-scientists-study-the-pose-of-the-inner-city.html> (concluding that although "the 'cool pose' is often misread by teachers, principals, and police officers as an attitude of defiance," it is actually a way to maintain "integrity and suppress rage"); see also Richard Majors & Janet Mancini Billson, *COOL POSE: THE DILEMMA OF BLACK MANHOOD IN AMERICA* xi (1992) (arguing that "cool pose" is a strategy that can be used to demonstrate pride and masculinity, but can also, when used as a mask, have negative effects).

and illiterate.²⁷¹ He and his sisters suffered lead poisoning from high lead levels in the paint on the walls in their rented home in an impoverished neighborhood in Baltimore, Maryland.²⁷² By the time of his death at age twenty-five, Gray had been arrested more than a dozen times, and convicted a few times for heroin and marijuana possession.²⁷³ He had spent two years in jail.²⁷⁴ On a fateful day in April 2015, Freddie Grey walked outside in Baltimore and made eye contact with a police officer.²⁷⁵ The rest is history. Freddie began to run away and the police apprehended him and pinned him to the ground.²⁷⁶ The police dragged Grey to the back of a police van.²⁷⁷ By the time Gray arrived at the police station, he was not breathing.²⁷⁸ He was hospitalized for a week and died.²⁷⁹ His autopsy showed that Gray died from a "high energy impact."²⁸⁰ Officers had placed Gray into the van with handcuffs and ankle cuffs.²⁸¹ Contrary to policy, the officers did not belt Gray in.²⁸² This permitted Gray to hit his head due to sudden deceleration of the van. The state medical examiner's office ruled the death a homicide.²⁸³ Many believe that Freddie Gray had a "rough ride," a term commonly used by Baltimore police for the intentional placement of a suspect in a police van with handcuffs and no seat belt and making sudden stops that can cause serious injury.²⁸⁴

271. Peter Hermann & John Woodrow Cox, *A Freddie Gray Primer: Who Was He? How Did He Die? Why Is There So Much Anger?*, WASH. POST (Apr. 28, 2015), <http://www.washingtonpost.com/news/local/wp/2015/04/28/a-freddie-gray-primer-who-was-he-how-did-he-why-is-there-so-much-anger/>.

272. *Id.*

273. *Id.*

274. *Id.*

275. Stacia L. Brown, *Looking While Black*, NEW REPUBLIC (Apr. 30, 2015), <http://www.newrepublic.com/article/121682/freddie-grays-eye-contact-police-led-chase-death; Why Freddie Ran>, BALT. SUN (Apr. 25, 2015, 11:22 PM), <http://www.baltimoresun.com/news/opinion/editorial/bs-ed-freddie-gray-20150425-story.html>.

276. Brown, *supra* note 275.

277. Hermann & Woodrow, *supra* note 271.

278. *Id.*

279. *Id.*

280. Justin Fenton, *Autopsy of Freddie Gray Shows 'High Energy' Impact*, BALT. SUN (June 24, 2015, 10:25 AM), <http://www.baltimoresun.com/news/maryland/freddie-gray/bs-md-ci-freddie-gray-autopsy-20150623-story.html#page=1>.

281. *Id.*

282. *Id.*

283. *Id.*

284. Rough rides or "nickel rides" are common in other police departments, and have led to serious injuries and law suits against police departments. Manny Fernandez, *Freddie Gray's Injury and the Police 'Rough Ride'*, N.Y. TIMES (Apr. 30, 2015), http://www.nytimes.com/2015/05/01/us/freddie-grays-injury-and-the-police-rough-ride.html?_r=0. There are two pending investigations by the DOJ regarding the Freddie Gray incident; one will study the specific incident surrounding Gray's death, and the other will study the police department. See Mike Levine,

Prosecutors charged six officers with crimes ranging from second-degree murder to false imprisonment.²⁸⁵ A grand jury later indicted the officers for similar charges.²⁸⁶ The police officers were five men and one woman.²⁸⁷ Freddie Gray was black. Two of the male officers were black, as was the woman.²⁸⁸ Three male officers were white.

4. “Heroes” versus “Thugs”²⁸⁹

In sum, male police officers accomplish masculinity by acting tough in arresting poor black male suspects. This is not only an individual accomplishment, but the result of a number of structures including the normative masculine definition of militarized policing, the society’s fear of the “other,” the War on Drugs, and the increased arrests and incarceration of black men.

Individual officers, who are predominately male, usually hail from white working class neighborhoods. They reject the hegemonic white upper middle class masculinity that they cannot achieve, considering it a weak, wimpy persona. But that upper middle class white masculinity still holds significant power, and working class white men need to accomplish their own version of masculinity. In place of upper middle class masculinity, working class white male police officers create their own brand of masculinity, a tough hypermasculinity. This persona comes into contact with the black males in the poor neighbor-

Baltimore Police: DOJ Announces Federal Probe of Entire Department, ABC News (May 8, 2015, 12:44 PM), <http://abcnews.go.com/US/freddie-gray-doj-announces-federal-probe-entire-baltimore/story?id=30899279>. On May 8, 2015, the DOJ opened a civil pattern and practice investigation into the Baltimore Police Department (“BPD”). *Id.* The investigation will focus on the BPD’s use of force, including deadly force, stops, searches and arrests, and whether there is a pattern and practice of discriminatory policing. *Id.*

285. Alan Blinder & Richard Perez-Pena, 6 *Baltimore Police Officers Charged in Freddie Gray Death*, N.Y. TIMES (May 1, 2015), http://www.nytimes.com/2015/05/02/us/freddie-gray-autopsy-report-given-to-baltimore-prosecutors.html?_r=0.

286. Richard Perez Pena, *Six Baltimore Officers Indicted in Death of Freddie Gray*, N.Y. TIMES (May 21, 2015), <http://www.nytimes.com/2015/05/22/us/six-baltimore-officers-indicted-in-death-of-freddie-gray.html>. The indictments did not include false imprisonment charges, but added reckless endangerment charges. *Id.*

287. Blinder & Perez-Pena, *supra* note 285.

288. *Id.*

289. President Obama needlessly inflamed tensions in Baltimore after Freddie Gray’s death and may also have given cover to conservative whites when he designated the high school boys who, in protest, set fire to a drugstore in Baltimore as “thugs.” Subsequently, there was a vigorous national debate as to whether the term “thugs,” constitutes a racial slur. Traditionally, the term did not have a racial connotation, often referring to working class white ruffians who demonstrate hypermasculine behaviors, but more recently the term refers to black men who engage in violence. Today, the word is considered a more polite way of saying the “N-word.” See *The Racially Charged Meaning Behind the Word “Thug,”* NPR (Apr. 30, 2015), <http://www.npr.org/2015/04/30/403362626/the-racially-charged-meaning-behind-the-word-thug>.

hoods that the police officers work. In part due to inaccurate stereotypes of the bad black man, and in part due to hypermasculine performances put on by some black youths in poor minority communities, the police officers see the black youths as the “other,” “savages” that the police need to control. It is “us versus them.”

Playing the role of the hypermasculine cop whose job is to save the community from the “badasses,” some police officers absorb the message that black men are criminals, even when those black men before them do not adopt the role of hypermasculine “badass.” This stereotyping of black men may be conscious or unconscious, but in either event, it leads to the use of excessive force on black male suspects, which escalates to severe abuse and, even killings. This hypermasculine behavior by the cops actually accomplishes their own brand of masculinity because they now have vanquished evil, as they see it, in the name of society. In their minds, they are “heroes,” and their victims are “thugs.” While the majority of the cops are white and male, some women and men of color, given a sense of hegemonic power, also combine with white male police officers to constrain the “thugs.”

III. MASCULINITY AND POLICE SHOOTINGS: AGENDA FOR CHANGE

The theory of masculinities suggests that there are at least two different types of subordinated or oppositional masculinities engaged in competition for primacy on the streets in the United States. The police, whose (white) working class masculinity is subordinated to the upper middle class hegemonic masculinity, perform their masculinity in a hypermasculine, tough way, emphasizing physical strength and control, demanding respect and honor for themselves and their compatriots. When challenged, the police reinforce their masculine identities by engaging in abusive tactics toward other men who also do not meet the definition of hegemonic masculinity of the upper middle class.

These other men are often black, and because of stereotypes about black men, police view them as dangerous and threatening. These stereotypes encourage the predominantly white police officers to use excessive force to protect themselves and society; the stereotypes also justify use of excessive force against the dangerous “other.”

The use of force, in turn, enhances the masculinity of the police officers who engage in it, and of the department in which they work.

While the stereotypes of black men are rooted in history, some black men in the community themselves also engage in hypermasculine performances of black masculinity—oppositional masculinities—to counter the stigma of being poor black men. These performances by some young black men, which represent them as drug users and criminals, create forms of masculinity that oppose both the hegemonic masculinity and the hypermasculinity of the police. Ironically, these hypermasculine performances by young black men, many of which do not include illegal behavior, enhance the stereotype of most black men as criminal and dangerous, thereby reinforcing a cycle of violence between the police and black men.

What is particularly odd, however, is that the police do not merely assert their masculinity by focusing on those men who practice hypermasculinized black criminal masculinities; rather, it appears that the police do not always distinguish between the black youths who engage in hypermasculine performances and other black men in the community who do not. Thus, it appears that many black men who become victims of excessive force by police departments do not necessarily challenge the police through use of their own forms of hypermasculinity. In essence, the police seem to assume a type of criminal hypermasculinity of black men living in poor urban neighborhoods.

Walter Scott

The case of Walter Scott, a fifty-year old black man, who was gunned down by a white police officer in North Charleston, South Carolina, is a good example of this phenomenon. In April 2015, Officer Michael T. Slager, pulled over Walter L. Scott because his car had a broken taillight.²⁹⁰ Scott ran, his family believes, because he feared Slager would arrest him for failure to pay child support.²⁹¹ Slager followed Scott, and a scuffle ensued.²⁹² Scott broke away again, and Slager pumped bullets into Scott's back as he fled.²⁹³ After the eighth shot, Scott collapsed.²⁹⁴ Slager called the police and re-

290. Michael S. Schmidt & Matt Apuzzo, *South Carolina Officer is Charged with Murder of Michael Scott*, N.Y. TIMES (Apr. 7, 2015), http://www.nytimes.com/2015/04/08/us/south-carolina-officer-is-charged-with-murder-in-black-mans-death.html?_r=0.

291. *Id.*

292. *Id.*

293. *Id.*

294. *Id.*

ported that he had shot Scott, but he told the dispatcher that Scott had grabbed the policeman's TASER gun.²⁹⁵ Unbeknownst to Slager, however, an uninterested witness recorded the incident on his cellphone.²⁹⁶ The recording demonstrates that Scott was about fifteen feet away with his back turned to Slager when Slager shot him repeatedly.²⁹⁷ After Scott dropped to the ground, Slager approached and handcuffed the lifeless Scott.²⁹⁸ Slager returned to where he stood earlier, picked up an object that appears to be his TASER, and dropped it next to Scott's body, in an effort, many believe, to back up Slager's false story that Scott had grabbed his TASER.²⁹⁹ Scott, who was unarmed, died of multiple gunshot wounds.³⁰⁰

There is no indication that Scott challenged Slager's authority or that he engaged in a hypermasculine performance of his masculinity. There was no allegation that he showed disrespect. Like Tamir Rice, a twelve-year old boy who was playing in a Cleveland park, Walter Scott clearly did not perform his masculinity in a way that was threatening or oppositional to the police. While Freddie Gray, the Baltimore man who was fatally injured on his way to the police station, had a number of arrests on his record, there was no evidence at the time of his death that he had done anything to challenge the police other than making eye contact and running away. Michael Brown comes the closest to challenging the police's masculinity. His fatal mistake may have been approaching the officer's car and engaging in a scuffle over the officer's gun. By the same token, the facts are disputed in the Michael Brown case, and it is unclear whether the college-bound young man demonstrated anything close to dangerous or criminal masculine behaviors. In essence, the clash of masculinities, whether real or imaginary, led to unnecessary killings of black men.

In conflicts between police and black men, masculine structures and performances occur on both sides. That is, society often views

295. *Id.*

296. *Id.*

297. *Id.*

298. *Id.*

299. *Id.*

300. Officer Slager was charged with murder as a result of the shooting. *Id.* There is a FBI and DOJ investigation into the death of Walter Scott, but reports had not yet been released at the time this article was published. See Timothy M. Phelps & Christi Parsons, *Justice Department to Assist in Investigation of South Carolina Cop*, L.A. TIMES (Apr. 8, 2015, 12:51 PM), <http://www.latimes.com/nation/nationnow/la-na-police-shooting-feds-20150408-story.html>; *FBI Launches Investigation Into Shooting by White Police Officer*, JERUSALEM POST (Apr. 8, 2015, 2:38PM) <http://www.jpost.com/Breaking-News/FBI-launches-investigation-into-shooting-by-white-police-officer-396494>.

black men as having a failed or hyper form of masculinity. This view persists as a result of hundreds of years of treatment and attitudes toward black men. In turn, as a result of their subordination, some black men have responded with oppositional masculinities, reinforcing stereotypes about black male hypermasculinity. Some black men adopt “cool poses” that involve criminality and/or hypersexuality. The state, in turn, has reacted by employing an unprecedented militarized police presence in poor black neighborhoods. Most recently, this is the result of Ronald Reagan’s War on Drugs. While it is nearly impossible to prove cause and effect, it is undeniable that U.S. society has created the conditions under which a militarized police force kills black men at an alarming rate.

A. Recommendations for Change

As noted above, there are at least two completed investigations by the DOJ as well as a Task Force created by the President of the United States. The Task Force makes important recommendations concerning how to improve policing in U.S. cities. The Task Force recommends, for example, the following general concepts:

- Building Trust & Legitimacy;
- Policy & Oversight;
- Technology & Social Media;
- Community Policing & Crime Reduction;
- Training & Education; and
- Officer Wellness & Safety³⁰¹

All of the Task Force’s recommendations should be implemented quickly.

I fear, however, that police killings of black men will still continue without an understanding of the gendered, cultural nature of the killings. It may be more difficult to change our culture than to establish new rules about training, policing, and reviewing police behaviors. These rules are vital to assure the proper results, but education of police should include understandings about how gender—especially concepts of masculinity—lead to killings by police. Police academies should take seriously the damage that excessive hypermasculine behaviors and attitudes can create, and train their students in how mas-

301. PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING, FINAL REPORT OF THE PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING 1 (2015), http://www.cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf.

culine performances are often invisible because of how normal they seem to society. Moreover, police departments should renew these understandings about masculinity so that police officers understand the difference between acting professionally and acting masculine.

An ethnographic study of a police academy by two sociologists demonstrates that much of the behavior in the police academy training reinforces hidden beliefs in the superiority of masculinity and the inferiority of female police officers.³⁰² These trainings not only harm women, but also harm the male police officers and the departments because they teach police officers that masculinity is a vital criterion for professional police work. In fact, the messages of masculinity are invisible to many who engage in the training,³⁰³ but the training is effective. A hidden curriculum of masculinity, “taught obliquely by teachers and students, instructs students about the particular form of masculinity that is lauded in police culture, the relationship between extreme masculinity and police work, and the nature of the groups that fall ‘inside’ and ‘outside’ of the culture of policing.”³⁰⁴

Making masculinity visible to police trainees and police, and requiring their supervisors to address excessive masculine practices are necessary changes that should underlie the new rules and regulations concerning police behavior. Building the work around concepts of competence, community policing, and safety and rewarding officers who engage in safe, community practices should eliminate unnecessary hypermasculine practices and assure better relationships with the community. This proposal is consistent with the Task Force’s recommendation that police departments decrease their military models and engage in community policing.³⁰⁵

The following steps should help rid police departments of ineffective masculine policies themselves and excessive masculine behaviors that lead to unnecessary killings:

302. See Anastasia Prokos & Irene Padavic, *‘There Oughtta Be a Law Against Bitches’: Masculinity Lessons in Police Academy Training*, 9 GENDER, WORK, AND ORG. 349, 440 (2002) (concluding that the police academy training had a hidden curriculum that lauded masculinity and conveyed that male officers were superior to female officers).

303. See *id.* at 440.

304. *Id.*

305. PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING, FINAL REPORT OF THE PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING 1 (2015), http://www.cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf.

- A national database on police killings that includes the characteristics of the police personnel and the victims, such as race and gender, and the neighborhood where the killing occurred;
- Empirical research into the importance of masculinity to police officers' use of excessive force;
- Empirical research on new models for police trainings that focus on de-gendering the police force, the reduction of masculine behaviors and reactions;³⁰⁶
- Empirical research on alternative methods of supervising and investigating police use of force that would have a more productive result;
- Creation of models for police trainings and continuing education that not only encourages community policing, but that also work to reduce efforts of police to prove masculinity through the use of excessive force;
- Accountability of supervisors for a reduction of racism and masculine behaviors in the police department; and
- Affirmative hiring and promotions of black and other minority men and women in police departments.

B. Demographic Shifts and Hope for the Future

It is important to understand that there is hope for change. The demographics of police departments are changing. Where in the 1970s blacks made up about 6 percent of sworn officers in the approximately three hundred largest police departments in the United States, by 2006, in cities of over 250,000 people, 20 percent of officers were black, and 14 percent were Latino.³⁰⁷ This number rose from 18 and 9 percent, respectively in 1990.³⁰⁸ For most of the cities in the sample, the rise in ratios of minority police officers did not merely reflect a rise in the cities' minority populations. In fact, the ratio of police of-

306. As Valoria Vojdik explains, it is not sufficient merely to allow women into an all-male environment. See Valorie K. Vojdik, *Gender Outlaws: Challenging Masculinity in Traditionally Male Institutions*, 17 *BERKELEY WOMEN'S L.J.* 68, 74-75 (2002). It is necessary to change the culture so women can thrive. Masculine culture is based on the concept that men are superior to women. The culture needs to be dismantled. A positive side-effect of destroying the hypermasculine culture is that there may be less use of excessive force when it is no longer considered positive to prove oneself through the use of force.

307. David Alan Sklansky, *Not Your Father's Police Department: Making Sense of the New Demographics of Law Enforcement*, 96 *J. CRIM. L. & CRIMINOLOGY* 1209, 1213 (2006).

308. *Id.*

ficers who are of color has risen well above the ratio of blacks and Latinos in the cities' populations.³⁰⁹

Law professor David Alan Sklansky explains that these changes mean that the police force is no longer a monolithic group of persons with the same voice and same ideas. Today, what used to be an insular subculture of sameness "is itself now being transformed, segmented, and rendered more porous by the growing diversity of the police force."³¹⁰ This increased diversity has not radically changed police departments, and for operational purposes, blue (the usual color of police uniforms) is still blue (police officers' shared identity). Between service calls, however, police officers are a less cohesive group.³¹¹ This may be a good thing; there is hope that changing demographics will open police departments to important reforms.³¹²

CONCLUSION: REFRAMING MASCULINITIES: REDUCING KILLINGS

Eric Garner

In July 2014, Eric Garner, a 43 year-old, 395-pound black father of six stood on a street corner in Staten Island, New York.³¹³ Residents had complained about drug dealers who frequented the location.³¹⁴ Two plain-clothes police officers, responding to their superior's call to go to the site, approached Garner and accused him of illegally selling cigarettes.³¹⁵ They attempted to handcuff Garner, who told them to leave him alone and pulled his arms away.³¹⁶ One of the officers, Daniel Pantaleo, a white male, placed Eric Garner in an illegal chokehold and wrestled him to the ground.³¹⁷ When Garner was prone, the other white male officer applied pressure to his back.³¹⁸ Garner, cried repeatedly, "I can't breathe," as he lay on the ground under the officers' pressure.³¹⁹ Backup to the police arrived,

309. *Id.* at 1215.

310. *Id.* at 1240.

311. *Id.* at 1232.

312. *Id.* at 1240.

313. Al Baker, et al., *Beyond the Chokehold: The Unexplored Path to Eric Garner's Death*, NEW YORK TIMES, June 14, 2015, at A1.

314. *Id.*

315. *Id.*

316. Joseph Goldstein and Marc Santora, *Staten Island Man Died from Chokehold During Arrest, Autopsy Finds*, N.Y. TIMES (Aug. 1, 2014), <http://www.nytimes.com/2014/08/02/nyregion/staten-island-man-died-from-officers-chokehold-autopsy-finds.html>.

317. *Id.*

318. *Id.*

319. Baker, *supra* note 313.

including a couple of sergeants.³²⁰ One of the sergeants, a woman, reportedly told the officers to “ease up,” but they failed to do so.³²¹

The officers called for medical assistance, but the emergency medical technicians, who arrived in a few minutes, did not give Garner oxygen, even though his breathing was labored.³²² When the medical team put Garner into the ambulance, he was in cardiac arrest, and they finally gave him oxygen.³²³ But it was too late. Garner was pronounced dead approximately 45 minutes later at the hospital.³²⁴ The New York City medical examiner’s report stated that Garner died because of the chokehold and chest compression.³²⁵ Garner was unarmed.³²⁶

Garner’s treatment raises serious questions about the “broken windows” theory of policing, and the police officers’ motivations for holding him down, but it is clear that the officers acted in a hypermasculine way in their attempt to subdue the suspect. Not only did they

320. *Id.*

321. *Id.*

322. *Id.*

323. *Id.*

324. *Id.*

325. *Id.*

326. Joseph Goldstein and Marc Santora, *Staten Island Man Died from Chokehold During Arrest, Autopsy Finds*, N.Y. TIMES (Aug. 1, 2014), <http://www.nytimes.com/2014/08/02/nyregion/staten-island-man-died-from-officers-chokehold-autopsy-finds.html>; Al Baker, et al., *Beyond the Chokehold: The Unexplored Path to Eric Garner’s Death*, NEW YORK TIMES, June 14, 2015, at A1. Even though Officer Daniel Pantaleo used an illegal chokehold on Eric Garner in Staten Island, and the City’s Medical Examiner ruled Garner’s death a homicide, the grand jury in New York failed to indict Pantaleo in Eric Garner’s death. *Grand Jury Votes Not to Charge Cop in Eric Garner Death*, CBS NEWS (Dec. 3, 2014), <http://www.cbsnews.com/news/nypd-chokehold-death-grand-jury-votes-not-to-charge-cop-in-eric-garner-case/>. In July 2015, New York City settled a civil suit with Garner’s family Eric Garner for \$5.9 million. See Marc Berman, *Eric Garner’s Family Settles with New York City for \$5.9 Million*, WASH. POST (July 13, 2015), <http://www.washingtonpost.com/news/post-nation/wp/2015/07/13/eric-garners-family-settles-with-new-york-city-for-5-9-million/>. Governor Cuomo of New York announced that he was signing an executive order that called for the state attorney general to investigate all of the police killings of civilians in the state of New York. See Noah Remnick, *Cuomo to Appoint Special Prosecutor for Killings by Police*, N.Y. TIMES (July 7, 2015), http://www.nytimes.com/2015/07/08/nyregion/cuomo-to-appoint-special-prosecutor-for-killings-by-police.html?_r=0. There are other police killings of minority victims from summer 2014 through early summer 2015. One example is the shooting of Antonio Zambrano-Montes in Pasco, Washington. In February 2015, a man who was later described as “disturbed” reportedly threw rocks at the police. They pursued him on foot. He ran with his hands up and turned to face the police. The police fired 17 shots at him. Zambrano-Montes died of multiple bullet wounds. See Julie Turkewitz & Richard A. Oppel, Jr., *Killing in Washington State Offers ‘Ferguson’ Moment for Hispanics*, N.Y. TIMES (Feb. 16, 2015), <http://www.nytimes.com/2015/02/17/us/killing-in-washington-state-offers-ferguson-moment-for-hispanics.html#>. There ensued a study by the Tri-City Special Investigations Unit, which issued a report on the killing that was delivered to the prosecutor’s office. Tyler Richardson, *Investigation into Deadly Pasco Police Shooting Turned Over to Prosecutor*, TRI-CITY HERALD (May 28, 2015), <http://www.tri-cityherald.com/2015/05/28/3582370/investigation-into-deadly-pasco.html>.

subdue him; they also killed him, even though he posed no threat to the officers or to others.

Case studies suggest that training that provides individual officers with appropriate skills, combined with an organizational framework of internal and external accountability can reduce police use of force.³²⁷ Moreover, a study demonstrates that hypermasculine workplaces such as oil-rigs can become much more productive and less dangerous places when the focus is on safety and training that seeks to eliminate hypermasculine behaviors.³²⁸ More research is needed to set up programs for training of police that would focus on the positive aspects of policing and community relations.

Leadership is a key component of successful programs. These training programs, if they are to work to prevent needless police killings of black male citizens, should include education on masculinities, and how masculinity is not only built into the structure of society, but also how individuals perform to accomplish their masculinity. This self-awareness of individual police officers and their supervisors, along with new efforts to reduce the militarization of our police forces, should help reduce excessive force by police officers.

327. Tim Prenzler, et al., *Reducing Police Use of Force: Case Studies and Prospects*, 18 *AGGRESSION AND VIOLENT BEHAV.* 343, 355 (2013).

328. See Robin J. Ely & Debra E. Meyerson, *An Organization Approach to Undoing Gender: The Unlikely Case of Offshore Oil Platforms*, 30 *RES. IN ORG. BEHAV.* 3, 24 (2010).