

# Police Encounters with Race and Gender

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*There are two [ways of settling a dispute]: the one proceeds by debate [or discussion], the other by force. Since the former is the proper concern of a man, but the latter of beasts, one should only resort to the latter if one may not employ the former.*<sup>1</sup>

## INTRODUCTION

The Fourth Amendment is often regarded as a code of criminal procedure<sup>2</sup> designed, in part, to limit police discretion when interacting with the public.<sup>3</sup> But many on-the-street interactions do not amount to a seizure or search, and so do not implicate Fourth Amendment rights. These interactions, which in Fourth

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1. MARCUS TULLIUS CICERO, ON DUTIES 14 (M.T. Griffin & E.M. Atkins eds., 1991). This Cambridge translation substitutes “types of conflict,” *id.*, for “ways of settling a dispute.”

2. This famous phrase is Judge Henry Friendly’s. *See generally* Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 953–95 (1965) (describing the perils of permitting the Court to develop rules of criminal procedure that would trump state and federal legislation); *see also* Carol S. Steiker, *Of Cities, Rainforests, and Frogs: A Response to Allen and Rosenberg*, 72 ST. JOHN’S L. REV. 1203, 1205 (1998) (“Fourth Amendment law has grown very much like the common law, changing with minute modifications in the enormous range of factual scenarios that give rise to challenges to ‘search and seizure’ by state actors”).

3. *See* Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 201–02 (1993) (“[T]he central meaning of the Fourth Amendment is distrust of police power and discretion. When viewed this way, the Fourth Amendment synchronizes with other parts of the Constitution designed to limit governmental powers.” (citation omitted)).

Amendment jargon are often called “encounters,”<sup>4</sup> are thus not subject to Fourth Amendment regulation.<sup>5</sup>

Encounters outside the Fourth Amendment vary from the non- or minimally intrusive (such as “exchanges of pleasantries or mutually useful information”<sup>6</sup>), up to the very intrusive (such as asking for identification, following an individual for an extended period of time, or questioning them). At first glance, encounters afford the police a great deal of discretion. After all, Fourth Amendment doctrine has little to say about them, and even less that is not related to searches and seizures. Nonetheless, for many people, their interactions with the police during an encounter may be the only, and so one of the most important, ways in which these individuals interact with state officials.<sup>7</sup> Given their importance, it would seem that a theory of the encounter could contribute to our understanding of the power and authority of the police, as well as the liberty rights and civic duties of the citizen.

My goal, in this short Article, is to identify some ways in which encounters predictably implicate race, class, and gender, rather than to provide a full-blown theory of the encounter. The Fourth Amendment suggests that encounters need not be reasonable in the same way that stops or seizures may be. The Fourth Amendment specifies what sorts of reasons the police must have for targeting people for certain types of investigatory or order-maintenance activity. But it does not specify what sort of reasons, if any, the police might need to justify other types of activity, such as greeting, following, or questioning individuals. Furthermore, the Fourth Amendment does not specify, except (for the most part) by negative implication, the sorts of things the public may do when the police try to encounter them.

I will evaluate the encounter from the perspective of *contestatory citizenship*.<sup>8</sup> The idea behind contestatory citizenship is that the public has an important role in directly checking the actions of public officials.<sup>9</sup> When government officials seek to execute their decisions, individuals can demand that these officials produce acceptable grounds for acting. A familiar example in the Fourth Amendment

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4. See, e.g., WAYNE R. LAFAVE SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 9.4 (5th ed. 2012) (discussing “[a]ction short of a ‘stop’”). LaFave uses the term “encounter” broadly, to apply to all police-citizen contacts, *id.*, whereas I restrict the term to police actions that are not covered by the Fourth Amendment, and so exclude both stops and seizures from my use of the term “encounter.”

5. They may be subject to other forms of regulation, including certain normative and political limits on the encounter.

6. *Terry v. Ohio*, 392 U.S. 1, 13 (1968).

7. Vesla M. Weaver, *The Only Government I Know: How the Criminal Justice System Degrades Democratic Citizenship*, BOS. REV. (June 10, 2014), <http://bostonreview.net/us/vesla-m-weaver-citizenship-custodial-state-incarceration> [<http://perma.cc/3XGL-SRAG>].

8. See Philip Pettit, *Two Republican Traditions*, in REPUBLICAN DEMOCRACY: LIBERTY, LAW AND POLITICS 169, 171 (Andreas Niederberger & Philipp Schink eds., 2013) (discussing “contestatory citizenry”).

9. See *id.* at 171, 193–94.

context is the practice (formerly a requirement<sup>10</sup>) that police officers not only obtain a warrant to search or seize some person, but also show that person the warrant while executing it.<sup>11</sup> The practice of showing the target a warrant permits her to contest both the legality and the scope of the search or seizure *during* the investigatory process by challenging the police directly during the investigatory process, not merely in front of a judge after the fact.

Contestation, however, requires that the participants treat each other as having equal political standing in the investigatory or order-maintenance process. That is the allure of this model of public participation.<sup>12</sup> The government official must recognize the right of the citizen either to decline to participate or to participate as someone entitled to respect. The basic idea is a republican one: an individual need not accede to some government official's demands for compliance willy-nilly. Every individual has the political standing to participate in policing by contesting its lawful limits. Where those limits are reached, the government official must recognize the right of the citizen to decline to participate.<sup>13</sup> The official has a duty to treat the individual with respect, as someone with the sort of political standing that entitles her to demand reasons and protest when the government interferes with her person or property. This posture of respect and full participation becomes even more important where the law does lightly (at best) regulate the investigatory or order-maintenance process, which is the case during police encounters with the public.

The civilian encountered by the police may not only decline the encounter<sup>14</sup> but may also challenge the officer to provide reasons that would justify following, greeting, or questioning her. Such challenges, when made by the public, can be quite unruly. The public, who may not be particularly adept at challenging authority or may act under the stress of police investigation, may well articulate their challenges in a more-or-less clumsy or aggressive manner. Nonetheless, the police are duty-bound to tolerate the public's dissent, even if boisterous.

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10. See, e.g., *United States v. Chadwick*, 433 U.S. 1, 9 (1977), *abrogated by* *California v. Acevedo*, 500 U.S. 565 (1991).

11. Compare *Mapp v. Ohio*, 367 U.S. 643, 667–68 (1961) (Douglas, J., concurring) (discussing an instance where officers waved a purported warrant in front of the search target but immediately snatched it back from her when she took it), with *United States v. Grubbs*, 547 U.S. 90, 98–99 (2006) (indicating that an officer need not show the target the warrant prior to executing it).

12. Philip Pettit, from whose model of contestatory citizenship I draw, argues that the theory at the heart of contestatory citizenship includes an “inclusivist assumption that each is to count for one, none for more than one . . . [which] already embodies a sort of egalitarian commitment: it means that the polity is required to treat people as equals.” PHILIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* 110–11 (1997).

13. Even where the official has the legal authority to demand compliance with her instructions, the individual has the right to protest that authority. See, e.g., *City of Houston v. Hill*, 482 U.S. 451, 462–63 (1987) (“The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state.”).

14. See, e.g., *Terry v. Ohio*, 392 U.S. 1, 32–33 (1968) (Harlan, J., concurring); *id.* at 34 (White, J., concurring).

Contestation is a politically attractive means of identifying or protesting the limits of the law and of law enforcement. Challenge expresses the source of authority in reason rather than naked power. The permissible unruliness of such contestation, however, makes encounters particularly difficult (in different ways) for minorities and for women. In particular, it conflicts with a version of police authority in which the officer seeks to “maintain the power image of the beat officer.”<sup>15</sup> To the extent that an officer places her authoritarian style of policing above the right of the civilian to contest that policing and does so in discriminatory ways, the officer not only engages racial or gender or class discrimination but also denies the civilian a form of equal participation in the political community. In practice, then, the republican idea that citizens can actively contest police actions is currently the least likely to work for women and people of color. In particular, it is precisely the act of asserting political standing that is likely to trigger police escalation and hostility against these groups. Republicanism thus provides one more argument against authoritarian practices of policing by demanding that the police ground their authority in reason rather than force.

#### I. REASONABLE ENCOUNTERS?

The Fourth Amendment requires that law enforcement (indeed, any government agent) give reasons for interfering with some member of the public by searching or seizing them.<sup>16</sup> “Reasons” here means some amount of evidence sufficient to believe that some identifiable individual has been or is currently engaged in criminal activity.<sup>17</sup> A court’s ability to review such conduct is, however, limited to holding hearings to determine if the official’s conduct violated the Constitution. For the most part, then, the courts have been heavily concerned with activity that implicates the Fourth Amendment, and have had much less to say about activity that falls outside it.

The principle decision addressing the line between government activity that falls within the Fourth Amendment and that which falls outside it was *Terry v. Ohio*.<sup>18</sup> The *Terry* Court distinguished between those encounters resulting in a seizure from those that did not, and it proposed that the police could give different reasons for seizing identifiable individuals, depending on the purpose of the seizure.<sup>19</sup> It required more stringent reasons for arrests (probable cause) and

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

16. U.S. CONST. amend. IV (“The right of the people to be secure . . . against unreasonable searches and seizures . . .”).

17. *See, e.g.*, *United States v. Leon*, 468 U.S. 897, 913–17 (1984) (discussing the evidentiary standard necessary to satisfy probable cause); *Terry*, 392 U.S. at 9–13 (discussing evidentiary standard necessary to satisfy reasonable suspicion).

18. *Terry*, 392 U.S. at 16–17.

19. *Id.* at 25–26 (distinguishing between arrests justified by probable cause and stops justified by reasonable suspicion). For a more sophisticated discussion of this point, see Frank Rudy Cooper, *Cultural Context Matters: Terry’s “Seesaw Effect,”* 56 OKLA. L. REV. 833, 852–54 (2003), for a discussion of *Terry*’s impact in making the scope of an intrusion central to the reasonableness analysis.

less stringent reasons for investigative stops (reasonable suspicion and imminent danger).<sup>20</sup>

The *Terry* Court provided some thumbnail sketches of encounters to illustrate the difference between the types of activity that are, and are not, within the purview of the Fourth Amendment:

This sort of police conduct may, for example, be designed simply to help an intoxicated person find his way home, with no intention of arresting him unless he becomes obstreperous. Or the police may be seeking to mediate a domestic quarrel which threatens to erupt into violence. They may accost a woman in an area known for prostitution as part of a harassment campaign designed to drive prostitutes away without the considerable difficulty involved in prosecuting them. Or they may be conducting a dragnet search of all teenagers in a particular section of the city for weapons because they have heard rumors of an impending gang fight.<sup>21</sup>

Of the four activities highlighted by the Court, the last two plainly involve seizures under the Fourth Amendment. The first two, which involve words, not physical restraint, are more likely not seizures covered by the Fourth Amendment.

This list is not meant to be exhaustive. As the Court emphasizes:

Street encounters between citizens and police officers are incredibly rich in diversity. They range from wholly friendly exchanges of pleasantries or mutually useful information to hostile confrontations of armed men involving arrests, or injuries, or loss of life . . . . Encounters are initiated by the police for a wide variety of purposes, some of which are wholly unrelated to a desire to prosecute for crime.<sup>22</sup>

But it is the very heterogeneity of encounters that makes them so difficult for the judiciary to regulate. Unless the police officer and prosecutor seek to convict the person encountered, the case is unlikely to make it to court.<sup>23</sup> In that case, the Constitution is a poor tool to scrutinize police conduct. And just as important as the variety of types of encounter is their impact. Because they do not amount to a search or seizure, they do not implicate the core concerns of the Fourth Amendment. So even if some legally problematic encounter were to make it to court, it would not properly appear as a Fourth Amendment case.<sup>24</sup>

#### *A. Targeting and Treating Civilians*

Whom may an officer select to encounter, and how may the officer (and the person selected) behave during the encounter? While the *Terry* Court primarily

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20. *Terry*, 392 U.S. at 25–26.

21. *Id.* at 13 n.9.

22. *Id.* at 13.

23. Only if the person encountered wishes to pursue a (constitutional) tort case would she litigate misconduct that occurred during the encounter.

24. Police conduct that does not amount to a search or seizure could nonetheless fall foul of the Fourteenth Amendment's equal protection clause, for example. *See* U.S. CONST. amend. XIV.

describes the law of searches and seizure, the Court nonetheless makes two points applicable to encounters. The first is about what sort of evidence may justify governmental interference with a civilian; the second is about the ways in which a police officer may treat a civilian during that interference.

Under the Fourth Amendment, an officer may only target a civilian for a search if that officer has particularized suspicion that the individual targeted is engaged in criminal activity.<sup>25</sup> Armed with the requisite amount of evidence, the officer can target the suspect for seizure.<sup>26</sup> If the officer has sufficient evidence for a stop or for an arrest, questions arise as to how the officer may treat the civilian. The law of seizures determines how long the stop or arrest may last, and whether the officer must detain the civilian at the scene of the seizure, or may move her elsewhere.<sup>27</sup> The law of searches incident to seizure delineates a range of other ways in which the officer may treat the suspect.<sup>28</sup>

The evidentiary point goes to the reasons that a law-enforcement officer (or some other government official) must give for engaging in an encounter, as opposed to a search. To engage in a seizure, an officer must (at the very least) be able to provide some “specific and articulable facts” that a crime has been or is being committed, and that the suspect is armed.<sup>29</sup> To engage in an encounter, however, an officer may (the Court implies) rely upon a nonrational suspicion—an “inarticulate hunch[.]”<sup>30</sup> *Terry* suggests that government agents need not articulate—or be able to articulate—reasons to justify encounters outside the Fourth Amendment. Indeed, *Terry* contrasts seizures, covered by the Fourth Amendment’s demand for reasonableness, with encounters, which are not.

Thus, a police officer may think a particular person looks a little like a criminal that the officer once saw or that her behavior, though law abiding, is evasive. These reasons are weak. They do not amount to the (relatively) much stronger evidence necessary to show that the suspect is preparing to commit a crime (such as the fact that the suspect has been casing a store for the past hour<sup>31</sup>) or that the suspect is armed (such as the fact that the suspect has a suspicious-looking bulge under her coat). Outside the Fourth Amendment, however, in the context of an encounter, the police officer need not adduce strong (or perhaps any<sup>32</sup>) evidence to investigate some particular person. She may act on the sort of “hunches” about the person which the *Terry* Court condoned as permissible

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25. *Terry*, 392 U.S. at 27.

26. *Id.* at 21.

27. *See Florida v. Royer*, 460 U.S. 491, 502–03 (1983) (plurality opinion) (moving suspect to confined room and retaining ticket and luggage constituted seizure)

28. *See generally* LAFAVE, *supra* note 4, § 5.5(a) (discussing searches incident to arrest).

29. *Terry*, 392 U.S. at 22; *see also id.* at 27 (distinguishing between an officer’s “inchoate and unparticularized suspicion or ‘hunch,’” which is insufficient to justify an investigatory stop, and “the specific reasonable inferences which he is entitled to draw from the facts in light of his experience,” which is sufficient).

30. *Id.* at 21.

31. *Id.*

32. *Id.* at 27.

grounds for an encounter.<sup>33</sup> So long as she restricts her activities to following, greeting, or questioning that person, *Terry* permits police officers to target individuals for an encounter based on idiosyncratic reasons personal to each officer (the hunch) or no reason at all.<sup>34</sup>

Read permissively, *Terry* thus appears to suggest that certain government investigatory or order-maintenance activity need not be reasonable, meaning that the officer's activity need not be based upon crime-related facts about the targeted individual. If an officer need not provide these sorts of reasons, then the officer (and government officials more generally) may select individuals to be subjects of an encounter for any reason or no reason. The officer acting in an encounter thus has wide discretion over whom to stop, question, and otherwise subject to the burdens of policing.

Once a target is selected for an encounter, there remains the question of how the police officer may treat that person and how that person may treat the officer. While the law of seizures and searches incident to seizures governs the manner in which the police must treat persons seized, there is no similarly detailed constitutional code of conduct for persons encountered.<sup>35</sup> What code of conduct does apply may be gleaned from a few spare remarks here and there. For instance, in *Terry*, Justices Harlan and White went out of their way to affirm that police officers have a broad license to address questions to members of the public. This license is not particular to the police—it is “the liberty (. . . possessed by every citizen) to address questions to other persons, for ordinarily the person addressed has an equal right to ignore his interrogator and walk away . . . .”<sup>36</sup>

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33. *Id.* at 22.

34. For the most part, I am treating the encounter as if it requires a face-to-face meeting between police and individual member of the public. However, there is a bevy of investigative techniques that collect data remotely without this sort of interpersonal interaction. For example, the City of Los Angeles has recently been experimenting with drones, COMPSTAT, CCTV, and a variety of other electronic surveillance tools. *See, e.g.*, Darwin Bond-Graham & Ali Winston, *Forget the NSA, the LAPD Spies on Millions of Innocent Folks*, LA WEEKLY, Feb. 27, 2014, <http://www.laweekly.com/news/forget-the-nsa-the-lapd-spies-on-millions-of-innocent-folks-4473467>.

35. Officers need not tell civilians that they are *not* seized (i.e., that the civilian is free to leave). *See, e.g.*, *United States v. Drayton*, 536 U.S. 194, 201–06 (2002); *Florida v. Bostick*, 501 U.S. 429, 434–37 (1991); *United States v. Mendenhall*, 446 U.S. 544, 553–54 (1980). Officers are not required to tell suspects that they need not consent to searches or questioning. *See, e.g.*, *Schneckloth v. Bustamonte*, 412 U.S. 218, 231 (1973).

36. *Terry*, 392 U.S. at 32–33 (Harlan, J., concurring); *id.* at 34 (White, J., concurring) (“There is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets. Absent special circumstances, the person approached may not be detained or frisked but may refuse to cooperate and go on his way.”); *see also* *Florida v. Royer*, 460 U.S. 491, 497–98 (1983) (plurality opinion) (“[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen . . . . Nor would the fact that the officer identifies himself as a police officer, without more, convert the encounter into a seizure requiring some level of objective justification. The person approached, however, need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way. He may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds.” (citations omitted)).

In *Florida v. Bostick*,<sup>37</sup> the Court elaborated on the respective rights of police and public during the encounter process. As far as the rights of the police go: even when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual . . . ; ask to examine the individual's identification . . . ; and request consent to search his or her luggage, . . . as long as the police do not convey a message that compliance with their requests is required.<sup>38</sup>

The public may decline police encounters by refusing to cooperate with police questioning or otherwise ignoring the police and going on about their business.<sup>39</sup> From the perspective of the Court, it appears, the public refuses an encounter by declining to interact with the police.<sup>40</sup>

The *Terry* Court, however, acknowledged that encounters, though escaping constitutional scrutiny, are not always politically innocent events. The Chief Justice recognized that certain types of targeted questioning directed at discrete communities (and especially minority ones) generate "friction."<sup>41</sup> And the Court recognized that such community-targeted encounters (often going beyond questioning to involve stops-and-frisks) are particularly incendiary. Police encounters "of youths or minority group members [are sometimes] 'motivated by the officers' perceived need to maintain the power image of the beat officer, an aim sometimes accomplished by humiliating anyone who attempts to undermine police control of the streets.'"<sup>42</sup> The Court cast the problem as one in which, at the unacceptable end of the spectrum, the police engage in "wholesale harassment . . . of which minority groups, particularly [African Americans], frequently complain."<sup>43</sup>

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37. *Bostick*, 501 U.S. 429.

38. *Id.* at 434–45 (citations omitted).

39. *Id.* at 436. There is an interesting switch in *Bostick* between the target's perspective and law enforcement's. On the one hand, the Court states that "the appropriate inquiry is whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter." *Id.* at 436. On the other hand, the Court measures reasonableness from an objective standpoint, by considering what police conduct ought to have conveyed to the individual. From this perspective, the question is not what the individual in fact believed, but what she *should have* believed, given the police conduct. The issue is whether, under the totality of the circumstances, "the police conduct *would have* communicated to a *reasonable* person that he was not at liberty to ignore the police presence and go about his business."<sup>40</sup> *Id.* at 437 (emphases added). Accordingly, neither the officer's nor the suspect's actual beliefs are relevant to determine whether the suspect was seized or not. Both suspect and officer could have subjectively believed the suspect was detained, even though she was not.

40. In practice, the police sometimes regard people who ignore them as challenging them, and sanction them for "contempt of cop" by punishing them with a disorderly conduct charge. *See, e.g.*, Frank Rudy Cooper, *Masculinities, Post-Racialism and the Gates Controversy: The False Equivalence Between Officer and Civilian*, 11 NEV. L.J. 1, 15 (2010) (discussing phenomenon of "contempt of cop").

41. *Terry*, 392 U.S. at 14 n.11 (quoting PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 183 (1967)).

42. *Id.* (quoting PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *supra* note 41).

43. *Id.* at 14.



Furthermore, the right that Justices Harlan and White identify—to ignore the police—is quite different from a right to challenge the police. The right to ignore the police is compatible with the bully asserting control over her turf. In the sorts of instances that the *Terry* Court and its liberal critics worry about, aggressive questioning is used as a tactic to exert control over the public to show them who is the boss.<sup>44</sup> This sort of control demands the mandatory deference of civilians to the commands of the officer on the street. It thus places the officer in a superior position to the civilian during an encounter, because the civilian must follow the officer's directions or risk some sanction. Even if the officer's questions or requests entail only some minor interference with some individual's activities, nonetheless it is the officer's express or implied *threat* to interfere—to use state coercion to force answers to her questions or induce compliance with her orders—that produces what the *Terry* Court called the power image of the beat officer, and what, in more contemporary jargon, might be called the officer's "command presence."<sup>45</sup>

We can glimpse this power dynamic through the position articulated by the state of New York in the companion cases of *Sibron v. New York* and *Peters v. New York*.<sup>46</sup> In *Sibron*, the Court rejected New York State case law granting the police a blanket right to forcibly frisk individuals they targeted for what was euphemistically called "preventative policing."<sup>47</sup> Preventative policing, a feature of the New York Police Department's tactics for policing minorities, produced the harassing stop-and-frisk policy that the Chief Justice condemned in *Terry*.<sup>48</sup> But even when the police do not stop-and-frisk, the fact that they *could* (and routinely do so) exerts additional pressure over the target to comply.

So encounters, though they may not produce the sort of "rude invasions of privacy by state officers,"<sup>49</sup> such as grabbing people, handcuffing them, patting down their clothing, or taking them to jail, nonetheless maintains the threat of these types of contact in the background. The Fourth Amendment, however, protects only against actual interference—the taking of a suspect into custody or searching them<sup>50</sup>—not threatened interference.<sup>51</sup>

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44. See *id.* at 15.

45. See Frank Rudy Cooper, "Who's the Man?": *Masculinities Studies, Terry Stops, and Police Training*, 18 COLUM. J. GENDER & L. 671, 693–98 (2009) (discussing the manner in which police officers establish their command presence).

46. *Sibron v. New York*, 392 U.S. 40 (1968).

47. See *id.* at 63–64.

48. See *Terry*, 392 U.S. at 14–15.

49. See *Mapp v. Ohio*, 367 U.S. 643, 660 (1961).

50. See, e.g., *California v. Hodari D.*, 499 U.S. 621, 626 (1991).

51. The distinction between actual interference and possible or threatened interference, and the importance of the latter for a theory of political freedom, is a central element of Phillip Pettit's political republicanism. See, e.g., PETTIT, *supra* note 12, at 4 (characterizing domination as "being subject to the potentially capricious will . . . of another"); see also PHILIP PETTIT, ON THE PEOPLE'S TERMS: A REPUBLICAN THEORY AND MODEL OF DEMOCRACY 43 (2012) (discussing nondomination in terms of threatened interference with another).

And that is so even if the threatened interference chills conduct. People whom the police target for questioning or routinely follow alter their conduct to avoid the police or conform their behavior to ways the police might find acceptable.<sup>52</sup> Certainly, police attention can be valuable for this very reason. Some people are a public nuisance and disrupt the ability of their fellows to access or enjoy certain places safely. Gangs staking out street corners or public parks mean that families or children avoid those spaces.<sup>53</sup> Nonetheless, where the police target whole communities or classes of people, that targeting—and the implicit threat of greater police interference that goes along with it—can undermine the freedom of the public in serious ways. To avoid aggressive police questioning, law-abiding people, not only criminals, will avoid those zones in which the police patrol and respond to police officers by keeping their hands visible or avoiding “abrupt” movements.<sup>54</sup> Police targeting undermines trust in the communities they serve, causing people to avoid the police or keep conversations with law enforcement to a minimum. If too many people avoid police questioning, then the police drive away important sources of information or support that could help the police solve crime and maintain order.<sup>55</sup> The result is policing that harms the very community it is supposed to protect and undermines the very investigatory goals the police are supposed to value.

### B. *Contestatory Citizens*

Perhaps the central way in which aggressive questioning (or other forms of preventative policing) chills conduct is to inhibit contestation. Contestation is a central aspect of some versions of civic republicanism, itself a political theory that attempts to describe the nature of individual freedom.<sup>56</sup> Republicanism is not the only theory of political contestation, but it is one with ancient roots that is enjoying a contemporary revival.<sup>57</sup> I shall briefly describe some elements of the republican theory of contestatory citizenship on which this right to contest encounters might plausibly rest.

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52. Even that does not preclude police attention. *See* *United States v. Arvizu*, 534 U.S. 266, 271 (2002).

53. *See, e.g.*, *City of Chicago v. Morales*, 527 U.S. 41, 51 (1999); *see also* SUDHIR ALLADI VENKATESH, *OFF THE BOOKS: THE UNDERGROUND ECONOMY OF THE URBAN POOR* 79–81 (2006).

54. Michael Greenberg, *We're Not Going to Stand for This Anymore*, N.Y. REV. BOOKS (Dec. 16, 2014, 4:22 PM), <http://www.nybooks.com/blogs/nyrblog/2014/dec/16/new-york-after-eric-gamer> [<http://perma.cc/7EYR-FQQ5>].

55. *See, e.g.*, DAVID A. HARRIS, *GOOD COPS: THE CASE FOR PREVENTATIVE POLICING* 220–21 (2005) (discussing the link between the manner in which the police treat people and those persons' willingness to cooperate with the police).

56. The sort of civic republicanism I am interested in is “neo-Roman” republicanism. While there are different forms of republicanism, I shall refer only to the neo-Roman version. Its major contemporary exponents are Philip Pettit and Quentin Skinner. *See, e.g.*, PETTIT, *supra* note 12; 1 QUENTIN SKINNER, *THE FOUNDATIONS OF MODERN POLITICAL THOUGHT: THE RENAISSANCE* (1978).

57. PETTIT, *supra* note 12, at 6–7.

Contestation entails the process of challenging the legitimacy of some exercise of governmental power. The contestatory citizen is permitted to argue about the creation and execution of the laws, not only in formal institutions, such as a congress or a court, but also in the street (and the jury), as government officials execute those laws. On this view, contestatory “[c]itizens are . . . invigilators of government, alert to any possible misdoing and ready to challenge and contest the legislative, executive and judicial authorities.”<sup>58</sup> By providing scrutiny of the law-enforcement process, contestation helps guarantee laws that are just, not only in their inception, but in their execution too.

As an example, consider an institution long celebrated in the republican tradition: the jury. The jury is valuable to the extent that grand juries permit the jurors to decide whom to charge, and petit juries permit the jurors to determine factual guilt or innocence. In addition, juries permit jurors to determine whether to apply the law *at all*. Even if the guilty is factually guilty, the theory of contestatory citizenship would permit a juror to decline to enforce the law—to nullify it—thus directly challenging the legitimacy of the state’s authority over the defendant.<sup>59</sup>

A contemporary argument (made by Professor Paul Butler) in favor of nullification notes that some communities—African American men—have been disproportionately targeted in the War on Drugs.<sup>60</sup> Butler identifies cases in which the drug crime is relatively minor, involving possession not distribution, and which is nonviolent rather than violent. He argues that in these cases the police or prosecutor’s targeting of these individuals for punishment may be unjust, especially when race may be a factor in the decision to prosecute.<sup>61</sup> Although

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58. PETTIT, *supra* note 51, 14–15 (2012).

59. There is a fairly old debate about the value of jury nullification and the permissibility of giving nullification instructions or making a jury aware of possible punishment. That debate primarily revolves around the petit jury. *See, e.g.*, United States v. Datcher, 830 F. Supp. 411, 413 (M.D. Tenn. 1993) (discussing that “[t]he drafters of the Constitution ‘clearly intended [the right of trial by jury] to protect the accused from oppression by the government’” (alteration in original) (quoting Singer v. United States, 380 U.S. 24, 31 (1965))); *id.* (discussing that “the jury, agent of the sovereign people, had a right to acquit those whom it felt it unjust to call criminal” (quoting Everett v. United States, 336 F.2d 979, 986 (D.C. Cir. 1964) (Wright, J., dissenting))); *see also* United States v. Wilson, 629 F.2d 439, 443 (6th Cir. 1980) (jury has veto power when it disagrees with the government’s position). *Compare* United States v. Thomas, 116 F.3d 606, 614 (2d Cir. 1997) (rejecting right of jury to nullify), *with* Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995) [hereinafter Butler, *Racially Based Jury Nullification*] (one of the most ardent recent proponents of jury nullification for African American defendants charged with nonviolent drug crimes), *and* Paul Butler, *The Evil of American Criminal Justice: A Reply*, 44 UCLA L. REV. 143 (1996), *and* Paul D. Butler, *Race-Based Jury Nullification: Surrebuttal*, 30 JOHN MARSHALL L. REV. 933 (1997). Butler’s proposal has been ardently opposed by, among others, Randall Kennedy. *See* RANDALL KENNEDY, RACE, CRIME, AND THE LAW 295–310 (1997) (describing Butler’s nullification proposal as the “sabotage” of justice). Butler does not frame his defense of jury nullification as a form of contestatory citizenship. There is also some question as to whether a grand jury could nullify. *See, e.g.*, Roger A. Fairfax, Jr., *Grand Jury Discretion and Constitutional Design*, 93 CORNELL L. REV. 703, 716–18 (2008).

60. *See* Butler, *Racially Based Jury Nullification*, *supra* note 59, at 719.

61. *See id.* at 692.

Butler does not make a republican argument, contestatory citizenship might permit the jurors to determine whether to challenge the execution of the laws in such cases.

Similarly, on the street, contestation can take a number of forms. The public may protest laws by staging demonstrations, calling out officials, disobeying orders, and the myriad other ways in which people can seek to contest the legitimacy of official actions (and indeed, to contest the views of other citizens). The point of contestation is to participate in the decision-making and decision-executing process by ensuring that the public has a voice in that process, if only by challenging the official to justify her actions.

Contestation proposes a more radical form of political participation in the process of governance than we generally entertain. The more usual way in which we participate in governance is through representatives, whom we elect to pursue our interests through formal institutions, and whose collective decisions become binding upon us.<sup>62</sup> Thus bound (so the representative story goes), we ought not to contest, but obey. So when public officials seek to execute the law, we should not interfere with them as they act, but instead seek redress through the ballot or in the courtroom.<sup>63</sup>

The more radical participatory model of contestatory governance has nonetheless been tolerated (at times) in the law of criminal procedure. I have briefly mentioned its role in jury nullification. But contestation has also figured in the practice of policing under the Fourth Amendment. Consider, for example, the Fourth Amendment's historical preference for the police to obtain a warrant prior to engaging in a search or seizure. If contestation means direct participation by the public in monitoring official actions, then the warrant process certainly contains anticontestatory features. When issuing the warrant, some public official (the magistrate) represents the suspect's interests. On the representative model, there is no chance to contest the search as the warrant is executed. Participation in self-governance, even if contestatory in form, is delayed until a suppression hearing in a courtroom, in which the suspect or her defender challenges the validity of the search or seizure. On this approach, there is limited opportunity for direct scrutiny of the executive official by the public, and what opportunity there is occurs during some formal hearing.

Nonetheless, there is room in the warrant process for contestation. In one of the founding cases of modern criminal procedure, *Mapp v. Ohio*,<sup>64</sup> the Court went a long way to recognizing the value of having the public challenge government action on the ground, as it happened. And the heroine of criminal procedure contestatory citizenship is Dollree Mapp.

As described by the Court, the police searched Mapp's house for bomb-

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62. See, e.g., PETIT, *supra* note 51, at 15 (discussing the Rousseauvian idea of the "incontestable sovereign").

63. See *id.*

64. *Mapp v. Ohio*, 367 U.S. 643 (1961).

making paraphernalia pursuant—so they claimed—to a validly issued warrant.<sup>65</sup> On the more representative view of the process, the primary challenge to executive authority should have come at the initial stage of process (where the magistrate determines whether there is sufficient grounds for a warrant to issue) and at the suppression hearing, long after the search or seizure, when the suspect may finally contest the government’s activity. Dollree Mapp, however, was prepared to contest the execution of the search *as it happened, inside her home*. She initially turned the police away for lack of a warrant.<sup>66</sup> When the police returned and broke into her house,<sup>67</sup> claiming they had a valid warrant, she grabbed the paper they brandished before the police wrestled it back.<sup>68</sup> The value of the warrant, both to Mapp and to the police, was the opportunity it presented to contest the legitimacy of the government’s actions.

No warrant was produced at trial—it is likely it never existed.<sup>69</sup> Mapp’s goal, it appears, was to challenge the officer’s right to search and to limit the scope of the search to the terms of the warrant. In this way, she could participate in the government activity and ensure her voice would be heard as the warrant was executed. Or, as the Ninth Circuit put it, in a much later case, “the invalid warrant deprived the [suspects] of the means to be on the lookout and to challenge officers who might have exceeded the limits imposed by the magistrate. ‘Citizens deserve the opportunity to calmly argue that agents are overstepping their authority or even targeting the wrong residence.’”<sup>70</sup>

As the *Mapp* case demonstrates, contestation may be, to some extent, disorderly. Mapp was not quite the calm and controlled civilian scrutinizing the police, but that is because the police were not calm and controlled when confronted by her challenge to their authority. Contestation questions the authority of the police on the street, and it so puts the officer and the civilian in an adversarial relationship, making the job of the police harder than if the civilian consented or submitted to police authority. Contesting citizens, however, do not simply obey—they challenge. They follow orders not blindly but only after they have been provided sufficient reasons for doing so. Contestation thus directly undermines police command authority and forces the police to rely upon other, less authoritarian, more rational sources of legitimacy. That is, indeed, its point. It makes the “enterprise of ferreting out crime”<sup>71</sup> “often competitive.”<sup>72</sup>

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65. See *id.* at 644.

66. See *id.*

67. See *id.* at 644–45.

68. *Id.* at 644 (“She grabbed the ‘warrant’ and placed it in her bosom. A struggle ensued in which the officers recovered the piece of paper . . .”).

69. See *id.* at 645.

70. *Ramirez v. Butte-Silver Bow Cty.*, 298 F.3d 1022, 1027 (9th Cir. 2002) (quoting *United States v. Gantt*, 194 F.3d 987, 991 (9th Cir. 1999)), *aff’d sub nom.* *Groh v. Ramirez*, 540 U.S. 551 (2004). *But see* *United States v. Grubbs*, 547 U.S. 90, 98–99 (2006) (finding that even if a valid warrant to search exists, the Fourth Amendment does not require an officer to show a suspect a warrant prior to conducting the search).

71. *Johnson v. United States*, 333 U.S. 10, 14 (1948).

## II. CONTESTING ENCOUNTERS

How does contestation affect the encounter? Contestation is certainly different from Justices Harlan's and White's norm of noninterference: the civilian's right to simply walk away, which the police are powerless to interfere with.<sup>73</sup> Contestation suggests that the civilian may stay and challenge police activity. It thus envisages a more disorderly encounter than these justices did.

Given Chief Justice Warren's misgivings about the misuses of encounters to target and mistreat members of the public, a more disorderly baseline for the encounter may be a good thing. The picture of the encounter presented in *Terry* and *Bostick* (along with the other encounter cases) is too simplistic. The Supreme Court conceives of the encounter as a binary: some individual either consensually cooperates with the law-enforcement official or walks away. The encounter is smooth and happy—the police and the individual agree to chat or to go their separate ways. However, encounters need not be so orderly. On the one hand, the police may be more or less rude or aggressive in their questioning.<sup>74</sup> More importantly, the individual targeted for police questioning has the option to stand her ground and contest the law-enforcement official's authority to engage in the encounter.

From a republican perspective, robust, on-the-street challenges to police authority and legitimacy are one way in which the public can engage in the political process.<sup>75</sup> Normatively and politically, such challenges are not merely permissible but creditable expressions of political standing within the community. Contestation is one way in which communities can hold the police to account and express to government officials dissatisfaction with the laws as enacted and as enforced. Politically, government agents, including the police, should treat contestation as an important public activity.<sup>76</sup>

If the police are required to explain the basis for their encounter and tolerate

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72. *Id.*

73. See *Terry v. Ohio*, 392 U.S. 1, 32–33 (1968) (Harlan, J., concurring); see also *id.* at 34 (White, J., concurring). Justice Harlan also notes that the officer is free to walk away too, and he believes that walking away is the officer's best option when she lacks legitimate grounds to interfere with a civilian and is worried that the civilian may be armed. *Id.* at 32 (Harlan, J., concurring).

74. Stephen D. Mastrofski et al., *Police Disrespect Toward the Public: An Encounter-Based Analysis*, 40 CRIMINOLOGY 519, 520 (2002).

75. See, e.g., PETITI, *supra* note 51, at 14 (contestation preserves individual's right to challenge laws "outside the assembly" on the street).

76. One way to underscore the political value of contestation is to regard it as a component of "community policing." Stephen Mastrofski, *Community Policing: A Skeptical View*, in POLICE INNOVATION: CONTRASTING PERSPECTIVES 44, 47 (David Weisburd & Anthony A. Braga eds., 2006). Encountering the police on the street, as much as in a more formal setting, provides an opportunity for the public to make the police internalize the costs of policing on the community. *Id.* at 53. Individuals can express their perceptions of police legitimacy within their community, and air their grievances by demanding the sorts of services communities traditionally want: "greater police responsiveness [and] . . . accessibility, [that] the police knowing and appreciating what citizens want . . . better prospects in the competition for police services and . . . an expectation of civility and caring." *Id.* at 46.

questioning and even dissent by the public, encounters will move less smoothly than the Court articulates and law enforcement might desire. When individuals challenge the police, they do so in more or less sophisticated ways.<sup>77</sup> Challenges to authority can be calm and rational, or represent the frustrations of people who feel disempowered. Permissible forms of political expression may be quite emotional, conveying the toll that political action takes upon an individual's well-being.<sup>78</sup> Politically acceptable challenges include shouting at the police, swearing at them, calling them racist, and a variety of other things that protestors do under the protection of the First Amendment.<sup>79</sup> These types of political expression can be quite disorderly. They can communicate an animus towards law enforcement. But even the more clumsy or rude ways of contesting the police have a political value: that of challenging the police to justify their authority.

From the perspective of republican politics, the police have a duty not to respond in like manner. Where they lack the authority to detain some individual, the officer can always—as the *Terry* concurrences recognize—walk away.<sup>80</sup> The officer does not get the right to use force to detain or coerce some individual just because the individual expresses disagreement with or disdain for the police. On the contrary, such challenges reveal the limits of law enforcement's authority at the same time as requiring the officer to draw upon her reserves of patience and moral authority.

The officer in uniform is thus disabled from insisting on respect in the sorts of ways she could were she a layperson. Her responsibilities as an officer preclude her from engaging in the same range of activities that a layperson could draw upon to demand the political and moral standing she deserves. For example, certain emotional responses to being challenged may be rationally justified.<sup>81</sup> Any person confronted with a vocally aggressive individual, might become angry, or hurt, or otherwise upset. These are all rational emotional responses to disrespect. The

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77. See Michael D. Reisig et al., *Suspect Disrespect Toward the Police*, 21 JUSTICE Q. 241 (2004) (studying factors that make the public likely to respond with discourtesy towards the police). For a study of police discourtesy to the public, see, for example, Carroll Seron et al., *Judging Police Misconduct: "Street-Level" Versus Professional Policing*, 38 LAW. & SOC'Y REV. 665 (2004), studying public perceptions of police discourtesy.

78. Martha Nussbaum has recently argued that some emotions are politically valuable, in particular compassion and love. See MARTHA C. NUSSBAUM, *POLITICAL EMOTIONS: WHY LOVE MATTERS FOR JUSTICE* (2013). One of her examples is the contrast Franklin D. Roosevelt makes between fear and compassion. Fear, though "warranted and rational," is a narrowing emotion. *Id.* at 325. Compassion is one that can be used to motivate citizens to identify with and act upon the common good. *Id.* at 209–11. In a similar vein, Susan Bandes argues that certain types of emotion, such as empathy, are important aspects of our legal system. See, e.g., Susan A. Bandes, *Centennial Address: Emotion, Reason, and the Progress of Law*, 62 DEPAUL L. REV. 921, 927 (2013).

79. See, e.g., *City of Houston v. Hill*, 482 U.S. 451, 462–63 (1987) ("The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state.")

80. *Terry v. Ohio*, 392 U.S. 1, 32–33 (1968) (Harlan, J., concurring); *id.* at 34 (White, J., concurring).

81. See, e.g., John Gardner, *The Logic of Excuses and the Rationality of Emotions*, 43 J. VALUE INQUIRY 315, 336 (2009).

layperson can give reasons to justify why she is upset, by pointing to the distressing circumstances.<sup>82</sup> Sufficiently distressing circumstances may entitle the layperson to give vent to her anger, or her hurt, by shouting or crying or so on and so forth. But an officer is not supposed to respond emotionally in this way and so may not draw upon these resources. The *quid pro quo* for the right to use state-sanctioned force is that such force may only be used with dispassion. Emotional responses, even justified emotional responses, have no place in the officer's arsenal of ripostes.<sup>83</sup> The officer's role-related reasons trump her emotional ones. That is what makes policing so difficult: it is not and cannot be for everyone, because not everyone has the emotional capacity to restrain themselves when confronted with politically permissible but socially distasteful challenges to authority in circumstances that are often physically and emotionally challenging.

In practice, contesting policing makes police work harder than it would be absent contestation, and so contestation may raise the tension between the police and the public. In the face of disorder, the police may ratchet up their response to restore order and their authority in this contest. This ratcheting effect may, in turn, produce *more* mistreatment as the police take the individual into custody or use force to subdue her. And the ratcheting effect makes the encounter a particularly fraught event for minorities and the poor, who (for reasons I shall describe) are likely to be singled out for this type of response.

Out on the street, the police often do not recognize the public's right and political power to challenge the police's power to enforce the law (or to challenge the law itself). Law-enforcement officials routinely expect citizens to follow their instructions without question rather than contest them or walk away.<sup>84</sup> On the republican model of political participation, however, the forms of deference demanded by the police may be normatively and politically problematic. Conforming to police demands or responding to police questioning might express disengagement from the political process or submission to the police as a political inferior. Cooperating with the police in such cases could express subordinate rather than commensurate standing as a political equal.

Policing that silences women and minorities is unjust because it is discriminatory. But it is especially and additionally unjust, the contestatory model claims, because such mistreatment denies civilians a core means of participating in government. Devon Carbado explains one way in which law-enforcement officials

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82. The law of provocation sometimes acknowledges the rationality of emotions by providing a limited justification for certain violent responses to verbal insults or taunts. *See id.* at 316.

83. *See* John Gardner, *Criminals in Uniform*, in *THE CONSTITUTION OF CRIMINAL LAW* 97 (R.A. Duff et al. eds., 2013) (discussing duty of police to protect public). I have discussed the problematic nature of angry police responses in Eric J. Miller, *Detective Fiction: Race, Authority, and the Fourth Amendment*, 44 *ARIZ. ST. L.J.* 213, 236–37 (2012), with examples of cases in which the police officer inappropriately responded to disrespect.

84. Josh Bowers & Paul H. Robinson, *Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility*, 47 *WAKE FOREST L. REV.* 211, 252–56 (2012) (discussing notion of deference to police authority).



often encounter communities differently based on race.<sup>85</sup> Police officers may expect African Americans to be more criminal or dangerous and whites less so. He argues:

Because of stereotypes, the officer's interaction with the black group may be shaped by a conscious or unconscious racial investment in confirming his suspicions as to the group's criminality. His interaction with the white group is less likely to be racially invested in that way. Instead, the officer's interface with the white group is likely to reflect a desire on the part of the officer either to dispel his suspicions of the group or simply to "check things out."<sup>86</sup>

Given her different expectations when encountering different racial groups, an officer may be calmer and more tolerant with the white group and less so with the black one.<sup>87</sup>

Rather than internalizing contestation as an expression of a healthy and engaged citizen body, law-enforcement officials may externalize features of the people and places they police so as not to have to take seriously (i.e., acknowledge as politically justified) those public expressions of dissent or dissatisfaction that confront law enforcement on the street (or in public meetings or through protest).<sup>88</sup> Fourth Amendment doctrine provides a familiar example of this type of externalization, when certain neighborhoods are identified as "high crime,"<sup>89</sup> a designation that makes it easier to interpret various forms of contestation as criminal.<sup>90</sup>

Contestation allows individuals the opportunity to engage in the process of executing the laws. And it does so by respecting their dignity as persons deserving of equal treatment and respect, who can "walk tall among others and look any [including the police] in the eye, without reason for fear or deference."<sup>91</sup> One standard expression of deference is to avoid meeting another's (in this case, the police officer's) eyes. Historically—and currently—African Americans teach their children to avoid meeting the eyes of white authority figures, especially policemen (of any race). In the American South during segregation, African Americans were taught "to avoid the presumptuousness of direct eye contact, to avert a gaze wherever possible."<sup>92</sup> Republican Philip Pettit calls this the "eyeball test": it

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85. Devon W. Carbado, (*E*)*racing the Fourth Amendment*, 100 MICH. L. REV. 946, 982 (2002).

86. *Id.*

87. Carbado suggests that when dealing with white suspects, an officer's "temperament is likely to be less hostile." *Id.*

88. See, e.g., Mastrofski, *supra* note 76, at 67 n.2 (discussing ways in which police avoid public encounters with citizens who are less respectable and more likely to challenge them)

89. *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000).

90. The *Terry-Bostick* right to walk away from the police is interpreted as indicating criminal activity when the individual "flees" the police. See *id.* at 124–25 (unprovoked flight from police in a high crime neighborhood sufficient to justify reasonable suspicion).

91. Pettitt, *supra* note 8, at 173.

92. MARK M. SMITH, HOW RACE IS MADE: SLAVERY, SEGREGATION, AND THE SENSES 97 (2008); see also SHERENE RAZACK, LOOKING WHITE PEOPLE IN THE EYE: GENDER, RACE, AND

formulates one way in which republicans express the notion of equal political standing.<sup>93</sup>

Even the background threat of intolerant policing can ratchet up tension during the encounter. The way in which the police treat the public may express (consciously or not) that the officer expects the individual to behave in a certain way and that the individual is powerless to change that perception.<sup>94</sup> The feeling of powerlessness and frustration is labeled by cognitive psychologists as “stereotype threat.”<sup>95</sup> Stereotype threat predictably results in a rise in tension when performing some activity that causes the stereotyped individual<sup>96</sup> to overcompensate in ways that lead her to perform worse than she would otherwise.<sup>97</sup> On the one hand, an individual may believe that the police perceive him as dangerous, or her as disruptive.<sup>98</sup> On the other hand, the officer may enter into certain encounter assuming a lack of trust between the police and the local community, and so understand her situation as one in which she cannot persuade the recalcitrant individual to engage with her questioning in a calm and rational manner. And the political permission to challenge the officer is only likely to increase the officer’s sense of unease.<sup>99</sup>

One result is that young African Americans boys and men are sometimes trained by their parents to undermine the stereotype by acting submissively when confronted by the police.<sup>100</sup> A recent example is the “the talk” that African American parents often give their male children about complying with the police:

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

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CULTURE IN COURTROOMS AND CLASSROOMS 3–10 (1998) (discussing the ways in which African Americans looking white people in the eyes is freighted with racial and cultural meanings).

93. PETTIT, *supra* note 51, at 47.

94. Joshua Aronson, *The Threat of Stereotype*, EDUC. LEADERSHIP, Nov. 2004, at 14, 16–17 (describing how desire to disprove stereotype creates stress).

95. Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 J. PERSONALITY & SOC. PSYCHOL. 797, 798–99 (1995).

96. Really, it is the individual who perceives him- or herself as stereotyped. See CLAUDE M. STEELE, WHISTLING VIVALDI: HOW STEREOTYPES AFFECT US AND WHAT WE CAN DO 5–6 (2010).

97. Steele & Aronson, *supra* note 95, at 808–09.

98. Tanzina Vega, *Schools’ Discipline for Girls Differs by Race and Hue*, N.Y. TIMES (Dec. 10, 2014), <http://www.nytimes.com/2014/12/11/us/school-discipline-to-girls-differs-between-and-within-races.html>.

99. See Lu-in Wang, *Race as Proxy: Situational Racism and Self-Fulfilling Stereotypes*, 53 DEPAUL L. REV. 1013 (2004).

100. In *Whistling Vivaldi*, Claude Steele describes one such attempt to undermine a stereotype: the practice of an educated, middle-class African American columnist at the New York Times who when walking around his neighborhood, took to “whistl[ing] popular tunes from the Beatles and Vivaldi’s *Four Seasons*” as a means of undermining “the stereotype that young African American males in this neighborhood are violence prone.” STEELE, *supra* note 96, at 6.

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.<sup>101</sup>

The threat of escalating an encounter from questioning to arrest or physical force has chilled the legitimate political activity of contesting legal authority on the street of these African Americans. Worse, these families are forced to engage in a range of prophylactic conversations and conduct that may not even cross the minds of white families whose political standing is not stereotypically threatened by the police encounter in these ways.

Many encounters face two further problems: implicit bias and authoritarian policing. The first problem is the set of implicit biases that affect all of us when examining the actions of others. The police are not immune to such biases. And these biases have targeting and treatment impacts. The second problem is the authoritarian model of policing, dominated by a need to exert command authority over the public, which is often driven by certain ideas about masculinity. Such biases particularly affect the way officers treat the public during the encounter. Each of these features increases police scrutiny of the poor, minorities, and sometimes women, at the same time as decreasing police tolerance for challenges from these communities.

Recent insights from cognitive science demonstrate that implicit biases affect all of us, regardless of our race. But they impact us in strikingly differentiated ways. Recent insights from cognitive science demonstrate some of the ways in which all of us deploy racial and gender stereotypes when interacting with others. Professor Song Richardson, for example, argues that “people have nonconscious reactions to others that can . . . influence their behaviors.”<sup>102</sup> These reactions depend upon the “stereotypes and attitudes” that one person harbors about another.<sup>103</sup> Importantly, people are often *not aware* that they are biased in these ways: strikingly, these biases “can and often do conflict with an individual’s genuine and consciously held thoughts and feelings.”<sup>104</sup> So even law-enforcement officials who make a conscious effort to avoid stereotyping may nonetheless fall prey to unconscious stereotypes they do not know or acknowledge that they hold.

These biases are raced and gendered. For example, in a variety of contexts, whiteness engenders more positive attitudes, blackness more negative ones. Where African Americans and whites engage in the same ambiguous conduct, observers (of all races) interpret white behavior positively and African American behavior negatively.<sup>105</sup> Observers rate ambiguous physical contact between members of

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101. Jeannine Amber, *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 generally Kimberly Jade Norwood, *The Far-Reaching Shadow Cast by Ferguson*, 46 WASH. U. J.L. & POL’Y 1 (2014).

102. L. Song Richardson, *Police Efficiency and the Fourth Amendment*, 87 IND. L.J. 1143, 1147 (2012).

103. *Id.*

104. *Id.*

105. *Id.* at 1148.

different races as violent at a lower threshold for blacks than whites.<sup>106</sup> And observers' attention is more quickly drawn to the conduct of blacks than whites. All this means that an observer is more likely to notice what African Americans are doing and to view their behavior more negatively, and (where there is some sort of commotion) as more violent, than they would do when whites are under scrutiny.

We could add to Richardson's catalog a slightly different feature of policing minorities. Sometimes, the conduct is simply that the observer—in this case, the police—do not expect minorities to be legitimately present in a particular context. This is a classic feature of racial profiling: a minority male driving an expensive car must have obtained the car by illegitimate and illegal means;<sup>107</sup> the minority female walking through the lobby of the hotel cannot be a guest, but must be a prostitute on her way to work.<sup>108</sup>

In either event, targeting leads to a problem for minorities seeking to contest the fairness of the targeting decision. Contestation is adversarial and easily perceived as hostile. And minorities are more likely to be perceived as hostile even when they are not. Accordingly, contestation may result in a form of confirmation rather than disconfirmation: even when the challenge to the officer is calm and collected, the officer will perceive it as aggressive and disorderly. The result is likely to be the sort of ratcheting that results in a custodial detention or the use of force.

Richardson has, however, made another counterintuitive, but extremely powerful, point at a recent conference. She suggested that recent experiments demonstrate that when officials are confronted or challenged by minorities, then—ironically—those *most aware* of the stereotype that they are biased (i.e., those officers high in stereotype threat) are most likely to react *most harshly* and most quickly.<sup>109</sup> One explanation might be that these officials feel unable to rely upon their moral authority (because, conscious of their implicit biases, they believe this is a circumstance in which they lack moral authority) and so they turn to other sources of authority. In the case of the police, this means their physical authority or command presence.

Contestation is expressly designed to challenge this sort of command presence. It demands that officers find some other ground for their authority than

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106. *Id.* at 1149.

107. *See generally* DAVID A. HARRIS, PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK 91–114 (2002) (discussing the ways racial profiling imposes a variety of costs upon its victims).

108. *See* Joe Coscarelli, *Black Women Accused of Being Prostitutes at Standard Hotel; Free Dinner and Champagne Offered as Apology*, N.Y. MAG. (Sept. 16, 2014, 3:46 PM), <http://nymag.com/daily/intelligencer/2014/09/black-women-accused-prostitution-standard-hotel.html> [<http://perma.cc/VB5J-XXRM>].

109. L. Song Richardson, Professor of Law, Address at University of California, Irvine School of Law CLEaR Symposium on the Interplay of Race, Gender, Class, Crime and Justice: Interdisciplinary Explorations of Identity, Crime & Punishment Panel (Apr. 26, 2014).

the authoritarian demand for compliance. But Richardson's analysis suggests that such a demand is especially likely to result in a rapid and robust ratcheting up of the encounter. Contestation thus appears to be precisely the wrong approach for minority individuals attempting to avoid the sort of aggressive encounter criticized by Chief Justice Warren in *Terry*.<sup>110</sup>

The rapid and violent turn to command presence also has a gendered aspect. Professor Frank Rudy Cooper (following Angela Harris<sup>111</sup>) argues that we should characterize policing as a contest in which masculinity is deployed to determine who is in charge or who gets to exercise control.<sup>112</sup> Authoritarian control is a vital part of the encounter, where the police may seek to rely upon "interpersonal skills to gain citizen compliance," and "restore order in volatile situations."<sup>113</sup> The authoritarian command presence is "antithetical to . . . negotiation and problem-solving."<sup>114</sup> Contestation by some civilian is likely to fall foul of "the unofficial rule that police officers must punish disrespect."<sup>115</sup>

Cooper demonstrates that this masculinist response often arises in low-risk situations, in which the officer need not turn to a show of force to enforce his authority. Officers only exceptionally confront the sort of danger that requires an aggressive command presence.<sup>116</sup> The decision to assert authoritarian control over the civilian is thus the officer's choice rather than a response necessitated by the circumstances,<sup>117</sup> and is normally undertaken to "preserve . . . authority."<sup>118</sup>

Cooper presents the masculinist aspect of police authority as primarily a battle between men, one that has strong class and race aspects.<sup>119</sup> *Mapp v. Ohio* demonstrates some of the ways in which this style of policing is gendered: the officers, confronted by a recalcitrant woman, break down her door, and reach down her blouse to retrieve their "warrant."<sup>120</sup> As far as the officers are concerned, Dollree Mapp has no right to contest the search. Rather than seeking a valid warrant when first rebuffed by Mapp, the police decided to escalate the search, perhaps to teach her a lesson.

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110. See generally Kimberly Norwood, *Why I Fear for My Sons*, CNN (Aug. 25, 2014, 5:04 PM), <http://www.cnn.com/2014/08/25/opinion/norwood-ferguson-sons-brown-police> [http://perma.cc/NNW4-JFDX].

111. See Angela P. Harris, *Gender, Violence, Race, and Criminal Justice*, 52 STAN. L. REV. 777, 781–83, 794–95 (2000). For an insightful comment on Harris's article, see Camille Gear Rich, *Angela Harris and the Racial Politics of Masculinity: Trayvon Martin, George Zimmerman, and the Dilemmas of Desiring Whiteness*, 102 CALIF. L. REV. 1027, 1038–42 (2014), which provides a discussion of the structure of Harris's argument about performing masculinity.

112. Cooper, *supra* note 45, at 694.

113. Susan Ehrlich Martin, *Police Force or Police Service? Gender and Emotional Labor*, ANNALS AM. ACAD. POL. & SOC. SCI., Jan. 1999, at 111, 115.

114. Cooper, *supra* note 45, at 694.

115. *Id.* at 677.

116. See *id.* at 696.

117. See *id.*; Martin, *supra* note 113, at 115.

118. Cooper, *supra* note 45, at 697.

119. See *id.* at 672–76.

120. *Mapp v. Ohio*, 367 U.S. 643, 644 (1961).

For women and minorities, then, contesting an encounter may in fact be a quick way to escalate the situation so that they are arrested or assaulted by the police. That fact, however, has serious political consequences. It means that women and minorities may frequently be excluded from exercising their citizenship rights in an important way: by contesting the decision of the police to target them for an encounter.

I have elsewhere suggested comparing public policing in poor neighborhoods and private policing in wealthy neighborhoods, shopping centers, parking lots, and so on.<sup>121</sup> Here, the point of the comparison would be that the private police “possess no greater legal capabilities than do ordinary citizens to forcibly detain persons who are suspected of or have in fact committed a crime.”<sup>122</sup> Since one aspect of contestatory citizenship is the ability to look the police officer in the eye, as an equal, the status of private police officers as no more (and no less) than citizens, just like the people they police, should make it more likely that women and minorities are permitted to contest encounters in ways that do not result in escalation. An additional de-escalatory incentive in the private sphere is the cost of prosecution, which tends to result in the general private policing technique of moving problems elsewhere.<sup>123</sup>

Unfortunately, however, policing boundaries and moving undesirable people along is precisely the form that discrimination takes during the encounter. Indeed, for many middle class African Americans, the frustrations with private police may be more frequently experienced than those with public police, who are encountered less often. Store officers following shoppers,<sup>124</sup> hotel security guards questioning African American women conversing with men at a bar,<sup>125</sup> and many other of the myriad “microaggressions”<sup>126</sup> that consist of guards and servers questioning whether the poor or minorities belong in these private spaces suggest that, in private, as much as in public, minorities and women are treated as “deviant” in ways that even minor criminals are not.<sup>127</sup>

This fact does not, however, suggest that as a normative or political matter, contestatory citizenship is a false ideal. On the contrary, contestatory citizenship demands, not that civilians should (normatively) back down, but that the *police*

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121. See Eric J. Miller, *Role-Based Policing: Restraining Police Conduct “Outside the Legitimate Investigative Sphere,”* 94 CALIF. L. REV. 617, 672 (2006). On private policing, see generally Elizabeth E. Joh, *The Paradox of Private Policing*, 95 J. CRIM. L. & CRIMINOLOGY 49 (2004); Lawrence W. Sherman, *Policing Communities: What Works?*, in 8 COMMUNITIES AND CRIME 343 (Albert J. Reiss, Jr. & Michael Tonry eds., 1986); David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165 (1999).

122. Joh, *supra* note 121, at 64.

123. See Sherman, *supra* note 121, at 372–73.

124. See, e.g., PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 205–07 (1991).

125. See Coscarelli, *supra* note 108.

126. On microaggression, see, for example, Peggy C. Davis, *Law as Microaggression*, 98 YALE L.J. 1559, 1565–68 (1989), which describes microaggressions as constant low-level displays of superiority based on race, directed at African Americans by whites.

127. See Joh, *supra* note 121, at 63–64 (claiming that private police often tolerate minor “kinds and amounts of deviance”).

should tolerate and de-escalate police-civilian contestation. If, in fact, contestation raises the likelihood of police retaliation, then that is the fault of the police, not the civilian. It is bad policing not merely because it allows unconscious racial and gendered biases to dictate an officer's response or because these responses are discriminatory in odious ways but also because it denies the civilian a means of political expression. Police overreaction to contestation undermines not only the civilians' right to be free from state interference but also their right to participate in governance in important ways.

While reforming policing is hard, it is not impossible. The city of Chicago perhaps provides one example of an attempt to go beyond superficial community engagement and drastically change the manner in which the police interact with the public. Harvard professor of public policy Archon Fung describes the intense efforts required to change police practice on the street. In Chicago, the Mayor's Office and the Police Department reorganized the police officers into "neighborhood-sized 'beat teams,'" provided training for officers as part of a series of reforms directed at increasing partnerships with the local community, and required officers to engage in monthly meetings with local residents.<sup>128</sup> Fung's research is suggestive: the difficulty is not only in re-educating the police about the encounter, but changing their attitude to and experiences with interacting with the public in general. In place of an antagonistic and authoritarian mentality, ready to escalate, the goal is to enable the police to see the community as not only a valuable resource but also as a participant in the project of civic self-governance.

The point is not only to educate or re-educate the police but also to reach out to the public. In Chicago, the city hired organizers "to knock on doors, post posters, contact community leaders, and call and facilitate meetings."<sup>129</sup> Where police misconduct has chilled public norms of behavior to teach certain communities to avoid the police or comply at all costs with police orders, these communities need to be reassured that challenging the police is first and foremost safe but also not grounds for police to escalate their response into a seizure or arrest. Communities consistently targeted by the police are unlikely to trust the good intentions of law enforcement without strong evidence that those intentions translate into action—or better yet, the sort of non-action consistent with restraint.

## CONCLUSION

Encounters provide an opportunity for the police to engage in egalitarian, perhaps consensual, perhaps contested and unruly, interactions with the public. But the implicit bias literature suggests that the racially reflective officer may

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128. See Archon Fung, *Accountable Autonomy: Toward Empowered Deliberation in Chicago Schools and Policing*, 29 POL. & SOC'Y 73, 78, 89 (2001).

129. Archon Fung, *Beyond and Below the New Urbanism: Citizen Participation and Responsive Spatial Reconstruction*, 28 B.C. ENVTL. AFF. L. REV. 615, 619; see also ARCHON FUNG, EMPOWERED PARTICIPATION: REINVENTING URBAN DEMOCRACY 92 (2004).

perceive certain encounters escalating more rapidly and more violently than other officers. If a resort to a forceful command presence is a masculinist response, then that only goes to raise more questions about the nature of policing and low-level interactions with the public.

Given the strong democratic possibilities for encounters and the raced and gendered nature of the violent response, attention to policing styles during the encounter phase is long overdue. Policing style matters at the point at which the police engage with the public. Encounters form the front line of this decision to target members of the public and are often used to escalate policing into something more intrusive than informal badinage on the street. The ratcheting effect of contestation requires us to develop ways to de-escalate encounters to promote contestation, so as to use the encounter as a focal point of contact between state and citizen. But a theory of policing for *that* style of encounter must, I believe, include notions of equal participation and contestation that lead us down the path of civic republicanism.