

Black Masculinity and the Government

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“[T]he officer must feel with sensitive fingers every portion of the prisoner’s body. A thorough search must be made of the prisoner’s arms and armpits, waistline and back, the groin and area about the testicles, and entire surface of the legs down to the feet.”¹

Terry v. Ohio

“My body is a temple in disrepair.”²

Jericho Brown

I. INTRODUCTION: PROGRAMMING BLACK MEN AND BOYS

Black male bodies have long been the subject of special attention from the state.³ This essay focuses on two government interventions in Black masculinity, dating from the 1960s, and their continuing consequences—including for the criminal legal system, and race and gender justice.

One intervention promoted the importance of having Black men in the same homes as their wives and children, as the heads of idealized traditional families, i.e. heterosexual, nuclear, and middle-class families. The goal was to install, or restore, the Black man as the patriarch of the family and the representative of the race.

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¹Terry v. Ohio, 392 U.S. 1, 17 n.13 (1968) (quoting L.L. Priar & T.F. Martin, *Searching and Disarming Criminals*, 45 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 481, 481 (1954)).

² JERICHO BROWN, *Duplex*, in THE TRADITION 27 (2019). Brown is an African American queer poet who has been my muse for this project because he is a beautiful writer and because the bodies of Black men are one of his primary subjects.

³ Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. L. F. 139, 163 (1989).

The other intervention empowered law enforcement officers to touch Black male bodies, ostensibly as a crime control measure. The Supreme Court in *Terry v. Ohio*,⁴ affirmed the constitutionality of the practice known as “stop and frisk,” in which the police seize and search suspects who they do not have sufficient legal ground to arrest. Terry authorized a physical, aggressive, violence-adjacent form of policing intended to demonstrate that the cops—not Black men—run the streets. The Court’s decision helped lay the groundwork for race-based policing practices and mass incarceration.⁵

One way of looking at these interventions is that one sought to repair Black men and the other sought to regulate them. Both were implicitly critiques of Black masculinity, whether aimed at improving or containing it. White masculinity, on the other hand, was posited as something that Black males should strive for, or fear.

These governmental excursions in Black masculinity were based on false premises, including that there is only one way to be a man, that white male privileges would be available to Black men if they acted more like white men, and that crime can be controlled by police aggression toward Black males. Masculinity is a set of learned practices, not rooted in biology, that are historically contingent, evolve over time, and are necessarily plural. But the gender performances that these interventions intended to evoke from Black males were rooted in Anglo-American settler patriarchy. Black men were being set up to play a competition that, on its own terms, they could never win. The focus on masculinity served to blame Black men for the deprivations they suffer, discount the force of structural racism, and obscure the interests of Black people who do not identify as male, especially Black women and girls.

This essay proceeds as follows. Part II describes a project, from the presidential administration of Lydon Baines Johnson, to re-shape Black masculinity in the image of a specific kind of white masculinity. Part III examines *Terry v. Ohio* as a case about Black and white masculinities. Part IV tells the story of a city jail in which Black male inmates and Black female correctional officers engaged in relationships forged in a crucible of mass incarceration and toxic masculinity, both Black and white. Part V offers some tentative observations about what all of this means.

⁴ 392 U.S. 1 (1968).

⁵ *Id.* at 30–31.

II. THE BLACK MALE BODY IN THE HOME

“A fundamental fact of Negro American family life is the often reversed roles of husband and wife.”

The Moynihan Report⁶

In 1965, Daniel Patrick Moynihan was the Assistant Secretary of Labor in the administration of President Lyndon B. Johnson. He was responsible for implementation of Johnson’s “War on Poverty.” In that capacity, Moynihan wrote a memo called *The Negro Family: The Case for National Action* that has become known as the “Moynihan Report.”⁷

Moynihan claimed that the principal cause of Black poverty was the structure of African American families, which he famously described as a “tangle of pathology.”⁸ In his analysis, the Black community had been forced into a matriarchal structure that held back the progress of the race and imposed a “crushing burden” on Black men.⁹ The “problems” the Report noted included the higher rate of out of wedlock births among Blacks and that there were proportionally substantially more Black families in which the father did not reside in the household than white families.¹⁰

In essence the Report’s thesis was that centuries of white subordination had damaged Black masculinity. In Moynihan’s words, “[t]he very essence of the male animal from the bantam rooster to the four star general is to strut”; Moynihan’s critique was that Black men were not allowed to strut.¹¹

Almost immediately there were questions about whether the attributes of Black families described in the Report were actually “problems,” or alternatively simply benign expressions of different racial or cultural practices. Many civil rights leaders slammed the Report for what they saw as its cultural insensitivity and sexism.

⁶ OFF. OF POL’Y PLAN. & RSCH., U.S. DEPT OF LAB., *THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION* 30 (1965) [hereinafter *Moynihan Report*].

⁷ The Moynihan Report was ostensibly confidential and labeled “For Official Use Only” when it was issued by the Department of Labor in the late winter of 1965. However, its contents became widely known in the summer of 1965 and began immediately to stir enormous controversy in civil-rights circles, particularly when it became apparent that President Johnson planned to use the report as the philosophic basis for a series of new Great Society programs designed “to help the American Negro move beyond opportunity to achievement.” Thomas Meehan, *Moynihan of the Moynihan Report*, N.Y. TIMES (July 31, 1996), <https://archive.nytimes.com/www.nytimes.com/books/98/10/04/specials/moynihan-report.html> [<https://perma.cc/G5ZU-3KVL>].

⁸ *Moynihan Report*, *supra* note 6, at 29.

⁹ *Id.*

¹⁰ *Id.* at 34–35.

¹¹ *Id.* at 16.

Moynihan seems to have anticipated those kinds of critiques. He wrote:

There is, presumably, no special reason why a society in which males are dominant in family relationships is to be preferred to a matriarchal arrangement. However, it is clearly a disadvantage for a minority group to be operating on one principle, while the great majority of the population, and the one with the most advantages to begin with, is operating on another. This is the present situation of the Negro.¹²

President Johnson delivered a speech, written by Moynihan, shortly after the Report was leaked, that underscored the Report's diagnosis of the "pathology" of the African American family. The occasion was Howard University's Commencement. Johnson congratulated the graduates but lamented the "American failure" that "the great majority of Negro Americans" were falling behind white Americans.¹³ He attributed the expanding inequality to "inherited, gateless" poverty and "the devastating heritage of long years of slavery; and a century of oppression, hatred, and injustice."¹⁴

This articulation of structural discrimination, from an American president, seems ahead of its time.¹⁵ But Johnson's next move, consistent with the Report, was to shift attention, if not blame, from root causes and systemic racism.¹⁶ Johnson told the Howard grads:

Perhaps most important—its influence radiating to every part of life—is the breakdown of the Negro family structure. For this, most of all, white America must accept responsibility. It flows

¹² *Id.* at 29.

¹³ President Lyndon B. Johnson, Howard University Commencement Address (June 4, 1965) (transcript available at <https://www.americanrhetoric.com/speeches/PDFFiles/LBJ%20-%20Howard%20University%20Commencement.pdf> [<https://perma.cc/KT93-S9UZ>]).

¹⁴ *Id.*

¹⁵ President Joseph R. Biden, Jr., Inaugural Address at the United States Capitol (Jan. 20, 2021) (transcript available at <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/01/20/inaugural-address-by-president-joseph-r-biden-jr/> [<https://perma.cc/6NVB-JE9K>]); see also Shayna Greene, *Fact Check: Is Biden First President to Denounce White Supremacy in His Inaugural Address?*, NEWSWEEK (Jan. 20, 2021), <https://www.newsweek.com/fact-check-biden-first-president-denounce-white-supremacy-his-inaugural-address-1563203> [<https://perma.cc/XMF5-6MJD>] (noting that President Biden was the first president to denounce white supremacy in his inaugural address and highlighting how other presidents have addressed racism in their addresses).

¹⁶ The historian Kevin J. Mumford's theory is that "Moynihan studied the social problems of unemployment and family breakdown, rather than focusing on entrenched patterns of culture or behavior, in part because these variables mattered to policymakers in the federal government, and presumably because policy intervention could address them." Kevin J. Mumford, *Untangling Pathology: The Moynihan Report and Homosexual Damage, 1965–1975*, 24 J. POL. HISTORY 53, 54 (2012).

from centuries of oppression and persecution of the Negro man. It flows from the long years of degradation and discrimination, which have attacked his dignity and assaulted his ability to produce for his family.¹⁷

This deflection acknowledged the crime but held the victim accountable. The President told the Howard graduates, “the man of the family is supposed to be the protector and support of the family. But if he is denied education and employment, if he cannot play his role as a husband or a father, the family breaks down.”¹⁸

In Moynihan’s view, the government had a role to play in establishing for Black men a specific kind of old school masculinity. This would advance equity and justice for the entire race. The final version of the Report itself did not contain any policy prescriptions; Moynihan thought including them in the report would distract focus from his diagnosis; everyone would focus on the treatment rather than the disease. He later noted “A series of recommendations was at first included, then left out. It would have gotten in the way of the attention-arousing argument that a crisis was coming and that family stability was the best measure of success or failure in dealing with it.”¹⁹

But President Johnson, at Howard, was more expansive: he acknowledged that there were no “single easy answer to all these problems” but stated that “jobs are part of the answer. They bring the income which permits a man to provide for his family.”²⁰ He also advocated “welfare and social programs better designed to hold families together.” Johnson planned to discuss specific interventions at an important White House conference on race relations planned for shortly after his Howard University speech. After the Report was leaked, however, the firestorm of criticism it received from civil rights activists, including Martin Luther King, Jr., John Lewis, and Baynard Rustin, caused the Johnson administration to abandon formal support of it. As *The New York Times* reported, in 1966,

[A]ll of the . . . criticisms of the Moynihan report reached President Johnson, and the President reluctantly backed away from his original position. “Family stability” was not mentioned at the

¹⁷ *Id.*

¹⁸ Johnson, *supra* note 13.

¹⁹ Daniel P. Moynihan, *The President & The Negro: The Moment Lost*, COMMENTARY 31, 36 (Feb. 1, 1967).

²⁰ Johnson, *supra* note 13.

White House Conference and, furthermore, as Moynihan's critics entirely carried the day, the Moynihan Report was not even among the conference's official working papers.²¹

Still the Report made Moynihan a prominent "expert" on Black poverty. He wrote about, and gave interviews discussing, specific interventions that flowed from his analysis. They included:

* Hiring Black men to replace white and Black women teachers. Moynihan stated:

We should be paying qualified Negro males \$10,000 a year to teach in the ghetto schools, particularly to teach kindergarten and the first and second grades, for it is at this time when young Negro boys, many of whom have no father at home, most need a strong male figure in their lives.²²

* Restoring the Post Office to two mail deliveries per day, which Moynihan believed would create 50,000 new jobs, many of which could go to Black men. He wrote:

For \$5,800 a year we get a man who can take pride in being a uniformed officer of the United States Government, who raises a family, pays taxes, votes Democratic and delivers the mail. That's quite a bargain--especially when you realize that it costs \$9,000 a year to maintain one worker in the Jobs Corps.²³

* Restructuring social welfare programs like Aid to Families of Dependent Children, which Moynihan believed incentivized low-income fathers to live apart from their children.

Since 1967, the Black family dynamics that the Report described have accelerated, or "gotten worse," as some would say.²⁴ But probably not many people today would endorse the Report's claim that "[o]urs is a society which presumes male leadership in private and public affairs. . . . A subculture, such as that of the Negro American, in which

²¹ See Meehan, *supra* note 7.

²² See Meehan, *supra* note 7.

²³ See Meehan, *supra* note 7.

²⁴ Ta-Nehisi Coates, *Revisiting the Moynihan Report*, THE ATLANTIC (June 17, 2013), <https://www.theatlantic.com/national/archive/2013/06/revisiting-the-moynihan-report/276936/> [<https://perma.cc/7TFK-RYK4>]; Gregory Acs et al., *The Moynihan Report Revisited*, URBAN INST. (June 2013), <https://www.urban.org/sites/default/files/publication/23696/412839-The-Moynihan-Report-Revisited.PDF> [<https://perma.cc/L8JL-4JR7>] (highlighting that the percentage of Black children born to unmarried mothers tripled and the percentage of Black children living with mothers but not fathers doubled between the early 1960s and 2009).

this is not the pattern, is placed at a distinct disadvantage.”²⁵ To the extent that this is true descriptively, many probably would see that as the problem that needs to be fixed, rather than the Black family structure. Still, among Blacks there remains an ambivalence about whether female-headed households are an impediment to the progress of the race, and if so, whether the problem is a missing Black male body, or, alternatively, a missing second wage earner, or the fact that African American women earn lower wages and have less wealth than almost any other group. For example, in *The Audacity of Hope*, Barack Obama wrote that racial critiques of the Report exemplified how civil rights leaders “tended to downplay or ignore evidence that entrenched behavioral patterns among the black poor really were contributing to intergenerational poverty.”²⁶ Obama, echoing Moynihan’s analysis, wrote that racial uplift requires a “transformation of attitudes has to begin in the home.”²⁷

The concept of the primacy of the Black male body in the family home has had a lasting influence on racial justice interventions. For example, in 2014, former President Barack Obama established the “My Brother’s Keeper” (MBK) Task Force at the federal level.²⁸ MBK is an initiative launched to address persistent opportunity gaps faced by boys and young men of color and ensures that all young people can reach their full potential.²⁹ MBK has six milestones in mind: (1) Getting a Healthy Start and Entering School Ready to Learn; (2) Reading at Grade Level by Third Grade; (3) Graduating from High School Ready for College and Career; (4) Completing Postsecondary Education or Training; (5) Successfully Entering the Workforce; and (6) Keeping Kids on Track and Giving Them Second Chances.³⁰ The Obama Administration created these goals to create better outcomes for people of color—particularly Black boys and young men—using the Office of Management and Budget’s Evidence and Evaluation tools to provide service providers with information to steer effective changes and better utilize or shift resources.³¹ By 2016, nearly 250 communities in all 50 states

²⁵ *Id.*

²⁶ BARACK OBAMA, *THE AUDACITY OF HOPE* 254 (2006).

²⁷ *Id.* at 245.

²⁸ *My Brother’s Keeper*, WHITE HOUSE ARCHIVES (2016), <https://obamawhitehouse.archives.gov/my-brothers-keeper#section-about-my-brothers-keeper> [<https://perma.cc/G4AH-8MZJ>].

²⁹ *Id.*

³⁰ *Id.*

³¹ See David Wilkinson & Michael D. Smith, *New Announcements Helping to Achieve MBK Goals by Doing What Works*, WHITE HOUSE ARCHIVES (Apr. 1, 2016), <https://obamawhitehouse.archives.gov/blog/2016/04/01/new-announcements-helping-achieve-mbk-goals-doing-what-works> [<https://perma.cc/6B9W-WRQ6>]; OFF. MGMT. & BUDG., *EVIDENCE AND EVALUATION*, <https://obamawhitehouse.archives.gov/omb/evidence> [<https://perma.cc/CKE6-CMTX>].

accepted MBK; more than \$600 million in private sector and philanthropic grants and in-kind resources and \$1 billion in low-interest financing were committed in alignment with MBK.³²

The cultural critic Ta-Nehisi Coates wrote in 2015 that Moynihan’s “vision dominates liberal political discourse today. One hears Moynihan in Barack Obama’s cultural critique of black fathers and black families. Strains of Moynihan’s thinking ran through Bill Clinton’s presidency. “We cannot . . . repair the American community and restore the American family until we provide the structure, the values the discipline, and the reward that works gives,” “President Clinton told a group of black church leaders in Memphis in 1993 . . . In their efforts to strengthen the black family, Clinton and Moynihan-and Obama, too-aspired to combine government social programs with cultural critiques of ghetto pathology”³³

The objective is to make Black families more like white nuclear families—with the father present in the home as its leader and primary wage earner. I have a friend who describes this rationale as the “magic dick” theory. Uplifting Black men is seen as the same thing as uplifting the race. There is a specific kind of masculinity that was championed. It is cisgender, heterosexual, bourgeois, and respectable.

The Moynihan Report explicitly made the case that Black men were more injured by white supremacy than Black women. Moynihan wrote, regarding post-Reconstruction Jim Crow segregation laws, that “it may be speculated that it was the Negro male who was most humiliated thereby; the male was more likely to use public facilities.”³⁴ This was so because segregation exacted a “submissiveness” that “is surely more destructive to the male than to the female personality. Keeping the Negro “in his place” can be translated as keeping the Negro male in his place: the female was not a threat to anyone.”³⁵

The Report contained a strong subtext of blaming Black women, in part, for the plight of Black men. It recommended, during the Viet Nam War, military service for young Black men because the armed forces

³² See Press Release, Office of the Press Secretary, White House, Fact Sheet: My Brother’s Keeper – Two Years of Expanding Opportunity & Creating Pathways for Success (Apr. 22, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/04/22/fact-sheet-my-brothers-keeper-%E2%80%93-two-years-expanding-opportunity-creating> [https://perma.cc/6S62-HYHY]. With the adoption of the 2016–2017 New York State Budget, New York became the first state to accept the President’s challenge and enacted the My Brother’s Keeper initiative into law. The budget included a \$20 million investment in support of the initiative to improve outcomes for boys and young men of color. See *My Brother’s Keeper*, N.Y. STATE EDU. DEPT., <http://www.nysed.gov/mbk/about-new-york-state-my-brothers-keeper-initiative> [https://perma.cc/A6U4-RSJC].

³³ Ta-Nehisi Coates, *The Black Family in the Age of Mass Incarceration*, THE ATLANTIC (Oct. 2015), <https://www.theatlantic.com/magazine/archive/2015/10/the-black-family-in-the-age-of-mass-incarceration/403246/> [https://perma.cc/9SN5-RU43].

³⁴ See Moynihan Report, *supra* note 6, at 16.

³⁵ Moynihan Report, *supra* note 6, at 16.

represented “an utterly masculine world” that was a “dramatic and desperately needed change” from “disorganized and matrifocal family life.”³⁶ Military service would teach Black men how to be leaders because it was “a world away from women, a world run by strong men of unquestioned authority.”³⁷ The Report noted “[t]he theme of a current Army recruiting message states it as clearly as can be: ‘In the U.S. Army you get to know what it means to feel like a man.’”³⁸

The Moynihan Report had a lasting negative impact on Black women, essentially providing a justification for leaving them out of some racial justice interventions. It helps explain why President Obama offered “My Brother’s Keeper,” but there was no equivalent “My Sister’s Keeper.” It helps us understand why in today’s racial justice movements, policing and mass incarceration, especially as those issues pertain to Black males, get more attention than eviction, pay equity, or access to health care—issues that are particularly significant to Black females.

III. THE BLACK MALE BODY ON THE STREET

“There is one unmistakable lesson in American history: a community that allows large numbers of young men to grow up in broken families, dominated by women, never acquiring any stable relationship to male authority, never acquiring any set of rational expectations about the future—that community asks for and gets chaos. Crime, violence, unrest, disorder . . . are not only to be expected, they are very near to inevitable. And they are richly deserved.”³⁹

Daniel Patrick Moynihan

James Baldwin, writing in 1962, observed:

The only way to police a ghetto is to be oppressive. . . . The badge, the gun in the holster, and the swinging club make vivid what will happen should his rebellion become overt. . . . [The policeman] moves through Harlem, therefore, like an occupying

³⁶ Moynihan Report, *supra* note 6, at 42.

³⁷ Moynihan Report, *supra* note 6, at 16.

³⁸ See Moynihan Report, *supra* note 6, at 43. In 1967, Moynihan told Time magazine “When these Negro G.I.s come back from Viet Nam, I would meet them with a real estate agent, a girl who looks like Diahann Carroll, and a list of jobs. I’d try to get half of them into the grade schools, teaching kids who’ve never had anyone but women telling them what to do.” *Cities: Light in the Frightening Corners*, TIME (July 28, 1967), <http://content.time.com/time/subscriber/article/0,33009,837080-4,00.html> [<https://perma.cc/5U8V-K8RB>].

³⁹ DANIEL PATRICK MOYNIHAN, FAMILY AND NATION: THE GODKIN LECTURES, HARVARD UNIVERSITY 9 (1986).

soldier in a bitterly hostile country; which is precisely what, and where, he is, and is the reason he walks in two's and three's.⁴⁰

Three years after the Moynihan Report, the United States Supreme Court decided *Terry v. Ohio*. *Terry* is the paradigmatic Supreme Court case about Black male bodies. There is a cottage industry of legal scholarship about the case.⁴¹ For the purposes of this essay, I want to emphasize the Black manhandling aspects of the Court's decision. The decision authorizes police to act like the "strong men of unquestioned authority" that Moynihan admired.⁴² It allows the police to touch the bodies of Black men, without consent, and, in practice, at will.

Crime control was ostensibly the reason. Between 1960 and 1970, the crime rate surged by 135 percent.⁴³ This increase was largely driven by Black men, who were disproportionately the perpetrators and victims of violent crimes like homicide and armed robbery.⁴⁴ The 1960s also ushered in a series of urban uprisings, most sparked during protests of a police killing of a Black man.⁴⁵ There had been many race "riots" in the United States prior to this time, but they had mainly consisted of white people victimizing people of color. Now, in cities across the country, African Americans were employing violence, rebellion, and lawbreaking like looting and arson as a form of political protest and self-help.

In *Terry*, a police officer was patrolling downtown Cleveland in 1963 when he noticed two Black men walking up and down the street and looking in the window of a store.⁴⁶ He suspected the men were thinking of robbing the store. After the two men walked away from the store and were joined by a white man, the officer approached the men, grabbed one of them, and felt his clothing to see if he was armed.⁴⁷ When the officer's search revealed a revolver, he searched the other two men, one whom had a gun.⁴⁸

⁴⁰ James Baldwin, *Fifth Avenue, Uptown*, ESQUIRE (July 1, 1960).

⁴¹ I have made a few contributions to this industry. See Paul Butler, *Terry v. Ohio*, in CRITICAL RACE JUDGMENTS: RE-WRITTEN U.S. COURT OPINIONS ON RACE AND THE LAW 150–58 (Bennett Capers et al. eds., 2022); Paul Butler, "A Long Step Down the Totalitarian Path": Justice Douglas's Great Dissent in *Terry v. Ohio*, 79 MISS. L.J. 9 (2009); Paul Butler, *Stop and Frisk and Torture-Lite: Police Terror of Minority Communities*, 12 OHIO ST. J. CRIM. L. 57 (2014).

⁴² See Moynihan Report, *supra* note 6, at 42.

⁴³ See Steven Pinker, *Decivilization in the 1960s*, 2 HUM. FIGURATIONS (July 2013), <https://quod.lib.umich.edu/h/humfig/11217607.0002.206?view=text;rgn=main> [<https://perma.cc/L6SQ-U5ZF>].

⁴⁴ PAUL BUTLER, CHOKEHOLD: POLICING BLACK MEN 121 (The New Press ed., 2018).

⁴⁵ *Id.* at 87–88.

⁴⁶ *Terry v. Ohio*, 392 U.S. 1, 6 (1968).

⁴⁷ *Id.*

⁴⁸ *Id.* at 7.

Ohio had argued that what the police officer did to Terry prior to his arrest was so minimal—in its words “a petty indignity”—that it could not be considered a “search” or “seizure” within the meaning of the fourth amendment. The Court “emphatically reject[ed] this notion.”⁴⁹

It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has “seized” that person. And it is nothing less than sheer torture of the English language to suggest that a careful exploration of the outer surfaces of a person’s clothing all over his or her body in an attempt to find weapons is not a “search.” Moreover, it is simply fantastic to urge that such a procedure performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised, is a “petty indignity.” It is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly.⁵⁰

Indeed, the *Terry* opinion describes “stop and frisk” as a euphemism.⁵¹ For this reason I will use the more accurate “seize and search” to refer to the practice.

One might expect that the Court, having explained the effect of seize and search in such graphic terms, then would have ruled that the usual standard of probable cause applied. Instead, the Court lowered the quality of evidence required to “reasonable suspicion.” This was the first time that the Court had ever allowed a government search or seizure based on a lesser indicium of proof than probable cause.⁵² *Terry* allows the police to temporarily detain an individual if there is reasonable suspicion the person has, or is about to, commit a crime. The police are allowed to search that person if there is reasonable suspicion that the person is armed and dangerous.

In communities of color, the law of the streets is often quite different from the Supreme Court’s law. The police had been conducting seize and searches in communities of color long before the Court got around to blessing the practice in *Terry*. It started in the 1930s. When cops saw African Americans doing something they thought was suspicious—it could be driving an expensive car, socializing with white people, or just hanging out on the corner—police would routinely make them show

⁴⁹ *Id.* at 16.

⁵⁰ *Id.* at 16–17.

⁵¹ *Id.* at 10.

⁵² See *Terry*, 392 U.S. at 36 (Douglas, J., dissenting).

identification and question them about where they worked and what they were doing.

Most stops did not lead to arrests, but that has never been the point of seize and search. Rather, the benefit the police gained was a tool for “psychological warfare,” according to Orlando W. Wilson, head of the Chicago Police Department from 1960 to 1967, and one of the pioneers of modern policing.⁵³ Wilson’s idea was that seize and search was an effective law enforcement strategy because it created the impression that the authority of the police was omnipresent—that any Black man at any time was subject to being detained and felt up by the state.⁵⁴

“Field detentions” became a proactive police policy in the 1960s, not coincidentally during the time that the African American population of urban areas was increasing. The phrase “stop and frisk” was coined in New York in 1964, where the state passed a law allowing the police to temporarily detain people suspected of crime.⁵⁵

The National Association for the Advancement of Colored People believed that the *Terry* case had so much racial significance it asked the Supreme Court if it could participate in the oral argument.⁵⁶ The Court denied this request, and only a few sentences in the opinion refer to race. The Court noted that “minority groups, particularly Negroes, frequently complain” about “wholesale harassment by certain elements of the police community.”⁵⁷

The *Terry* opinion cited the President’s Commission on Law Enforcement and Administration of Justice, which reported that frisking “cannot help but be a severely exacerbating factor in police-community tensions. This is particularly true in situations where the ‘stop and frisk’ of youths or minority group members is ‘motivated by the officers’ perceived need to maintain the power image of the beat officer, an aim sometimes accomplished by humiliating anyone who attempts to undermine police control of the streets.”⁵⁸

Since *Terry* was decided, African American men appear to be among the primary targets of police seize and searches.⁵⁹ The reasonable suspicion standard is so low, and so malleable, that the police have great discretion in stopping people. This is true even when the police

⁵³ Butler, *supra* note 44, at 86.

⁵⁴ Butler, *supra* note 44, at 86.

⁵⁵ Butler, *supra* note 44, at 86.

⁵⁶ Butler, *supra* note 44, at 89–90.

⁵⁷ *Terry*, 392 U.S. at 14–15.

⁵⁸ *Id.* at 14 n.11 (quoting L. TIFFANY et al., DETECTION OF CRIME: STOPPING AND QUESTIONING, SEARCH AND SEIZURE, ENCOURAGEMENT AND ENTRAPMENT 47–48 (1967)).

⁵⁹ See Butler, *supra* note 44, at 92.

act within the dictates of *Terry*, but some police departments have exceeded even those broad limits.⁶⁰

The legal scholar Frank Rudy Cooper has described *Terry* interactions between cops and civilians as “Who’s the Man” contests.⁶¹ *Terry* requires that Black men submit their bodies to police officers, figuratively and literally. It enforces a specific kind of conformity—a politics of respectability—because, if one draws unwelcome police attention to oneself, to one’s body, one can be seized and searched.⁶² *Terry* sends the message that if masculinity is about power and authority, the police are more masculine than Black men. That is, again, the intentional design of seize and search: to communicate to Black men in a visceral way that the State is in control, and that the state will always win. In this sense *Terry* is not so much a critique of Black masculinity as an official empowerment of government agents to be more masculine—to beat Black men at their own game.

Terry did not address the vulnerability of the Black male body on the street but that has become the primary policy rationales for the proactive seize and search now employed by many police departments. Virtually all of these policies focus on Black and Latinx men, but officials justify the selective enforcement using data that suggests the disproportionate risk of those men for gun violence.⁶³ In this view, Black male bodies are subject to seize and search because of Black male conduct: the police are using harsh tactics to save them from themselves.

IV. THE BLACK PATRIARCH IN JAIL

“The powers that be are giving the Black Woman a false sense of empowerment by creating wicked laws to send the Black Man to prison and the Black Woman to the work force. . . . The Black Woman naturally serves the Black Man by . . . Consoling him[,] Cooking for him[,] Rearing their children.”⁶⁴

⁶⁰ See *Floyd v. City of New York*, 959 F.Supp.2d 540 (S.D.N.Y. 2013) (holding that the NYPD’s use of “stop and frisk” was not based on reasonable suspicion and discriminated against African Americans and Latinos and therefore was unconstitutional as applied); Order at 1, *Bailey v. City of Philadelphia*, 374 F. App’x 305 (3d Cir. 2010) (ordering in 2019 that the city of Philadelphia implement a pilot program to end racial bias in “stop and frisks” by police officers); BUTLER, *supra* note 44, at 96.

⁶¹ Frank Rudy Cooper, “Who’s the Man?": *Masculinities Studies, Terry Stops, and Police Training*, 18 COLUM. J. GENDER & L. 671 (2009).

⁶² Paul Butler, (*Color*) *Blind Faith: The Tragedy of Race, Crime, and the Law*, 111 HARV. L. REV. 1270, 1273–74 (1998).

⁶³ See Butler, *supra* note 44, at 26–27.

⁶⁴ ERIC MARCELL BROWN, *THE BLACK BOOK: EMPOWERING BLACK FAMILIES AND COMMUNITIES* 30–32 (2008).

In 2013, federal prosecutors charged correctional officers and inmates at the Baltimore City Detention Center (“BCDC”) with racketeering conspiracy. All of the charged correctional officers were women and all of the charged inmates were men. Everybody was Black. Forty of the forty-four people eventually prosecuted were convicted, including twenty-four correctional officers. Most of the defendants pled guilty.⁶⁵

According to the indictment, many BCDC guards entered relationships with inmates. The relationships were various combinations of romantic, sexual, and business.⁶⁶ Correctional officers smuggled phones and drugs into the prison for the inmates.

About 65 percent of the correctional officers at the jail were Black women. There were more female than male jailers because men from the community had a difficult time getting jobs at BCDC because they had criminal records, had not graduated from high school, or could not pass the required employment or drug tests.⁶⁷

One inmate, Tavon White, had five children with four different jailers at the facility. According to the indictment, White gave one of these women a diamond ring.⁶⁸ The three mothers of his other children received cars.⁶⁹

White was the leader of the Baltimore branch of the Black Guerilla Family (“BGF”), which is, after the Bloods and the Crips, the largest predominately African American gang in the United States. BGF started in 1966 as a prison movement based on the teachings of Marcus Garvey. Its goals were (1) to promote Black power, (2) to maintain the dignity of prison inmates, and (3) to overthrow the government of the United States.⁷⁰

One way of reading the story of the Baltimore City Detention Center is as an example of the patriarchal ethos of the Moynihan Report

⁶⁵ Press Release, U.S. Dep’t of Just., U.S. Att’ys’ Off. Dist. of Md., BGF Leader Tavon White Sentenced To 12 Years in Prison in Baltimore Jail Racketeering Conspiracy (Feb 9, 2015), <https://www.justice.gov/usao-md/pr/bgf-leader-tavon-white-sentenced-12-years-prison-baltimore-jail-racketeering-conspiracy> [<https://perma.cc/PQ86-FFBE>]; Brenda V. Smith & Melissa C. Loomis, *After Dothard: Female Correctional Workers and the Challenge to Employment Law*, 8 FIU L. REV. 469, 498 (2013).

⁶⁶ Jeffrey Toobin, *This Is My Jail*, NEW YORKER (Apr. 7, 2014), <https://www.newyorker.com/magazine/2014/04/14/this-is-my-jail> [<https://perma.cc/RCD8-SKAB>].

⁶⁷ *Id.*

⁶⁸ *Thirteen Correctional Officers Among 25 Black Guerilla Family Gang Members and Associates Indicted on Federal Racketeering Charges*, FEDERAL BUREAU OF INVESTIGATION (Apr. 23, 2013), <https://archives.fbi.gov/archives/baltimore/press-releases/2013/thirteen-correctional-officers-among-25-black-guerilla-family-gang-members-and-associates-indicted-on-federal-racketeering-charges> [<https://perma.cc/AAK7-6JVN>].

⁶⁹ *Id.*

⁷⁰ *The Black Guerrilla Family and Human Freedom*, SAN FRANCISCO BAY VIEW (Feb. 11, 2015), <https://sfbayview.com/2015/02/the-black-guerrilla-family-and-human-freedom/> [<https://perma.cc/5ACS-F4XR>]; See Brown, *supra* note 64.

run amuck. The men at BCDC strutted like roosters: they asserted their dominance over Black women, ran businesses, and attempted to provide for their families. These practices were intentionally masculinist. In 2008, Maryland prison inmate and BGF member Eric Marcell Brown published *The Black Book: Empowering Black Families and Communities*. The *Black Book* is sometimes referred to as BGF's "bible." It contains parts that sound like they were ripped from a Black nationalist version of the Moynihan Report, including critiques of Black women in the work force.⁷¹ The *Black Book* includes profoundly misogynist passages, including that when a wife is "disobedient," the husband first should "verbally reprimand her," then "refuse to sleep with her," "beat her lightly," and "if these are not effective, the next step is divorce."⁷²

But the BCDC story can also be read as the culmination of Moynihan's concerns about the fragility of Black masculinity, exacerbated even more by the dynamics created by mass incarceration. In this version, Black women were paid, by the government, to be the official overseers of Black men. They obtained jobs that were difficult for Black men to get and they used that power to exploit Black men, sexually and financially.

The traditional legal view is that sex between guards and inmates is inherently coercive because inmates are not able to freely consent.⁷³ One reason it is difficult for some people to see the inmates as survivors of sexual assault is because of the construct of the Black male as criminal—a construct furthered by *Terry v. Ohio*.

In a *New Yorker* article about the BCDC prosecution, Jeffrey Toobin wrote "[c]ynical and devious men succeeded in dominating women who were nominally their keepers."⁷⁴ But the women portrayed more agency in their relationships with their charges than Toobin allows. In a wire-tapped phone conversation, one correctional officer said:

When I came back in the jail, I'm like, shit, I'm not going to stop making my money. You feel me? I seen what the fuck was going on, asked a few people what was up and who was who and what was what. I am just about my money. You hear me? I love money. I love it. I swear to God.⁷⁵

⁷¹ See Brown, *supra* note 64 ("The powers that be are giving the Black Woman a false sense of empowerment by creating wicked laws to send the Black Man to prison and the Black Woman to the work force. . . . The Black Woman naturally serves the Black Man by . . . Consoling him[,] Cooking for him[,] Rearing their children").

⁷² Brown, *supra* note 64, at 39.

⁷³ Margaret Penland, *A Constitutional Paradox: Prisoner Consent to Sexual Abuse in Prison Under the Eighth Amendment*, 33 MINN. J. OF LAW & INEQ. 507, 516 (2015).

⁷⁴ *Id.*

⁷⁵ *Id.*

Another officer, in another phone call that was intercepted by prosecutors described her relationship with an inmate this way: “Me and my sisters we was talking right. . . . So I said you know what makes me stay with him? Sex! It’s that I have two babies by him. Leave him for what? No one’s going to give me sex like that.”⁷⁶

The legal scholar Brenda Smith, writing about female guards who enter relationships with male inmates, noted:

“They spoke of all of the benefits of partnering that they were denied in relationships outside of custodial settings and that they had access to inside. They spoke of being protected from other inmates and staff in a hostile work environment. They described male inmates’ physical and emotional availability. They also described feeling in control of the relationship, even if that control was illusory given the hostile work environment, the risk of discovery, and the potential administrative and criminal sanctions.”

There is truth in both narratives: At BCDC, Black men exploited vulnerable Black women and Black women exploited vulnerable Black men. The exploitation was enabled by the structural racism identified in the Moynihan Report, and advanced by the toxic white masculinity that the Report promoted, and the toxic Black masculinity of *The Black Book*. Regardless of whether BCDC is a story about the assertion of Black masculinity or the demasculinization of Black men, the story ends the same way. It ends the same way as many other narratives about the government response to the precarity of Black lives : Black people - men and women- got locked up.

V.

“[I]t is one of the ironies of [B]lack-white relations that, by means of what the white man imagines the [B]lack man to be, the [B]lack man is enabled to know who the white man is.”⁷⁷

“Men roam shirtless, as if none ever hurt me.”⁷⁸

Black men need help. Our bodies remain at risk, from the state, and from each other. Murder is the leading cause of death of young Black men. One in one thousand Black men and boys will be killed by

⁷⁶ *Id.*

⁷⁷ James Baldwin, *Stranger in the Village*, in *NOTES OF A NATIVE SON* 159, 167 (ed. 1984).

⁷⁸ Brown, *supra* note 2, at 27.

the police.⁷⁹ Black men are incarcerated at five times the rate of white men.⁸⁰ African American men are more likely to have dropped out of high school, and less likely to have graduated from college, than Black women or white men.⁸¹ Our unemployment rate also exceeds those groups.⁸²

It seems irrefutable that, as the Moynihan Report posits, centuries of entrenched white supremacy have denigrated Black masculinity. The difficult questions now are what exactly is the evidence of damage and what the appropriate remedies should be.

In venturing down this road, I want to be careful not to view African American men through the “lens of damage” that some scholars have decried. Most Black men will not be incarcerated. Some studies have demonstrated that Black men play a more active role in the lives of their children than similarly situated white men.⁸³ Despite the “endangered species” narrative that is sometimes used to describe African American men, we are alive, if not quite well.⁸⁴ Many are thriving. This is no small accomplishment, and it seems as possible to credit our masculinity for our achievements as to denigrate it for our failures.⁸⁵

⁷⁹ Frank Edwards et. al, *Risk of Being Killed by Police Use of Force in the United States by Age, Race-Ethnicity, and Sex*, 116 PROC. NAT'L ACADEM. OF SCI. 16793 (2019).

⁸⁰ Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity*, THE SENT'G PROJECT (2021), <http://cdn.cnn.com/cnn/2021/images/10/13/the-color-of-justice-racial-and-ethnic-disparity-in-state-prisons.pdf> [<https://perma.cc/ANE3-NP8C>].

⁸¹ See Cristobal de Brey et. al, *Indicator 17: High School Status Dropout Rates*, NAT'L CTR. FOR EDUC. STAT. (Feb. 20, 2019), https://nces.ed.gov/programs/raceindicators/indicator_rdc.asp [<https://perma.cc/K46H-XG5U>] (discussing high school graduation rates among different racial and gender groups); Cristobal de Brey et. al, *Indicator 23: Postsecondary Graduation Rates*, NAT'L CTR. FOR EDUC. STAT. (Feb. 20, 2019), https://nces.ed.gov/programs/raceindicators/indicator_red.asp [<https://perma.cc/EL9R-8L8Z>] (discussing college graduation rates among different racial and gender groups).

⁸² Harry J. Holzer, *Why Are Employment Rates So Low Among Black Men?*, BROOKINGS INST. (Mar. 1, 2021), <https://www.brookings.edu/research/why-are-employment-rates-so-low-among-black-men/> [<https://perma.cc/R29K-PVAQ>]. It is important to note that this is not a claim that the problems of Black men are worse than the problems of Black women. See Paul Butler, *Black Male Exceptionalism? The Problems and Potential of Black Male-Focused Interventions*, 10 DU BOIS REV. 485 (2013).

⁸³ Jo Jones & William D. Mosher, CTRS. FOR DISEASE CONTROL, *Fathers' Involvement With Their Children: United States, 2006–2010*, 70 NAT'L HEALTH STAT. REPORTS 1 (Dec. 20, 2013); Charles M. Blow, *Black Dads Are Doing Best of All*, N.Y. TIMES (June 8, 2015), <https://www.nytimes.com/2015/06/08/opinion/charles-blow-black-dads-are-doing-the-best-of-all.html?rref=collection%2Fcolumn%2Fcharles-m-blow&gwh=7E95A8B347F2172E6EECA50CA3E673D7&gwt=pay&assetType=opinion&r=0> [<https://perma.cc/87HA-NXAJ>]; Gretchen Livingston and Kim Parker, *Eight Facts About American Dads*, PEW RESEARCH CTR. (June 12, 2019), <https://www.pewresearch.org/fact-tank/2019/06/12/fathers-day-facts/> [<https://perma.cc/GL2P-39ER>].

⁸⁴ See Butler, *supra* note 44, at 487–91.

⁸⁵ See Mumford, *supra* note 16, at 66–67 (noting that Black feminists reacted to the Moynihan report using a similar analytical lens).

The term “blaming the victim” was first used as the title of a book criticizing the Moynihan Report.⁸⁶ Indeed, Black male programming too often rests on stereotypes about Black men and women. In his commencement address at Howard in 1965, President Johnson announced that he would be holding a White House Conference titled “To Fulfill These Rights” with the object to “help the American Negro fulfill the rights which, after the long time of injustice, he is finally about to secure.”⁸⁷ At this conference in 1966, A. Phillip Randolph, a prominent voice of the Civil Rights and Labor Movement, described the Black community this way:

Thus, men plagued with forced idleness, women have to carry the burden of providing the income, and at the same time caring for their children. Is it any wonder that alcohol and narcotics and gambling and various forms of antisocial action are found in the black ghettos? And is it any wonder that children and youth are damaged emotionally and mentally?⁸⁸

Much of the Black male programming emanating from the Moynihan Report rehearses this analysis. President Barack Obama stated that the concept of his signature racial justice project, the “My Brother’s Keeper” initiative, came to him after the death of Trayvon Martin.⁸⁹ Martin was seventeen years old when he was gunned down by George Zimmerman, a self-proclaimed “neighborhood watchman.”⁹⁰ Martin’s death inspired the movement for Black lives.⁹¹

Obama did not explain why the killing of an unarmed Black teenager by a white and Latinx man motivated him to establish an achievement program for men of color. But his other remarks, at the White House rollout of My Brother’s Keeper, were more revealing. The nation’s first Black president observed that growing up, “I didn’t have a dad in the house. And I was angry about it. . . . I made bad choices. I got high without always thinking about the harm that it could do. I didn’t always take school as seriously as I should have. I made excuses.”⁹²

Some Black male programs are premised on the same construction of the Black man as threatening and dangerous as seize and search.

⁸⁶ WILLIAM RYAN, *BLAMING THE VICTIM* (1971).

⁸⁷ See Johnson, *supra* note 13.

⁸⁸ A. Philip Randolph, Address at the White House Conference “To Fulfill These Rights” (June 1, 1966).

⁸⁹ BUTLER, *supra* note 44, at 149–50.

⁹⁰ BUTLER, *supra* note 44, at 149–50.

⁹¹ BUTLER, *supra* note 44, at 237.

⁹² President Barack Obama, Remarks by the President on “My Brother’s Keeper” Initiative (Feb. 27, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/02/27/remarks-president-my-brothers-keeper-initiative> [<https://perma.cc/4WJK-5ADF>].

Other interventions supported by these programs can be seen as implicit behavioral critiques of Black masculinity as dysfunctional or pathological.

Still, if Black masculinity consists of some cultural and behavioral practices common to many Black men, it should not be off-limits to interrogate these practices. Black men are about 6.5 percent of the population of the United States but are responsible for approximately half of all murders.⁹³ Black men commit more murders, in absolute numbers, than Latino men, who slightly outnumber us, and white men, who greatly outnumber us.⁹⁴ Because violent crime is mainly intra-racial, Black men are also about 50 percent of homicide victims.⁹⁵ For young Black women and men, homicide is one of the leading causes of death, and in most cases the perpetrator is a Black men.⁹⁶ Stopping violent crime by Black men is for Black people a matter of life and death.

As noted in Part 2, the Johnson administration intended to use the Moynihan Report to institute a series of policy initiatives that would have, ostensibly, helped Black men. But Johnson abandoned this effort, because of activism that was largely led by Black men.⁹⁷ One reason was that they were appropriately concerned that a focus on repairing or improving Black masculinity would deflect a more deserving critique of white masculinity and/or structural ant-Black racism. The Obama administration's My Brother's Keeper project seems intended as a progressive intervention, but its framing, which rhetorically excludes girls even when some actual MBK programs do not, reinforces these problems.

⁹³ BUTLER, *supra* note 44, at 120.

⁹⁴ BUTLER, *supra* note 44, at 120.

⁹⁵ BUTLER, *supra* note 44, at 120.

⁹⁶ BUTLER, *supra* note 44, at 131.

⁹⁷ See Meehan, *supra* note 7 ("Originally, as he suggested in a speech at Howard University on June 4, 1965, President Johnson had planned to use the Moynihan Report as the Government's official analysis of the Negro problem at the White House Conference on Civil Rights ('To Fulfill These Rights'), which was held in Washington early last month, but Moynihan's critics quickly mounted a campaign to discredit the report. At various forums around the country, such Negro civil-rights leaders as Bayard Rustin, Martin Luther King Jr., John Lewis and Floyd McKissick angrily spoke against the report. ['My major criticism of the report,' noted McKissick, 'is that it assumes that middle-class American values are the correct values for everyone in America Moynihan thinks that everyone should have a family structure like his own. Moynihan also emphasizes the negative aspects of the Negroes and then seems to say that it's the individual's fault when it's the damn system that really needs changing.'] Meanwhile, a strongly worded critique of the report, written by a Boston psychologist named William Ryan, was published in *The Nation*, and another, written by Dr. Benjamin Payton, of the National Council of Churches, appeared in *Christianity and Crisis*. Then, in November, 1965, Dr. Payton organized a pre-White House Conference in New York of some 100 prominent religious and civil-rights leaders at which it was resolved that "the question of 'family stability' be stricken entirely from the agenda. Instead, proposed Dr. Payton's influential group, the conference should concern itself with 'quality integrated education' and with equal rights in jobs, job-training programs and housing").

Is there a way of addressing the effects of patriarchy and white supremacy that is not inevitably anti-female or anti-queer, that acknowledges the diversity of masculinities, and that recognizes the intersectional identities of Black men? We have yet to see one. Until we do, masculinity, in any form, remains a problematic site for government tinkering.