

***BARNES V. CITY OF CINCINNATI:* COMMAND PRESENCE, GENDER BIAS, AND PROBLEMS OF POLICE AGGRESSION**

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I. INTRODUCTION

In 1999, Philip Barnes was denied promotion to sergeant in the Cincinnati Police Department (“CPD”) for failure to appear “masculine.”¹ Barnes filed suit in the United States District Court for the Southern District of Ohio under Title VII and the Equal Protection Clause, and in 2005, he won his anti-discrimination lawsuit against the City of Cincinnati.² The years between Barnes’s demotion and the final decision of the Sixth Circuit were marked by controversy, violence, and protest.³ During this period, gender discrimination was not the only objectionable practice alleged to have taken place at the CPD.⁴ Consideration of the gender discrimination experienced by Barnes offers a way to understand the larger divisions between police departments and the communities they serve.

This Comment will examine *Barnes v. City of Cincinnati* and place it in the context of other protested practices at the CPD. The “command presence” that Barnes was singled out for lacking will be analyzed and shown to relate both to gender discrimination and police aggression.⁵ Examining *Barnes* through the lens of command presence offers a new perspective on the problems faced by police departments and suggests new paths to resolution.

II. THE GENDER SIGNIFICANCE OF COMMAND PRESENCE

Philip Barnes began working as a police officer with the CPD in 1981.⁶ Barnes dressed as a man while on duty and dressed as a woman when not

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¹ *Barnes v. Cincinnati*, 401 F.3d 729, 735 (6th Cir. 2005), *cert. denied*, 126 S. Ct. 624 (2005).

² *Id.* at 733.

³ *Cincinnati Officer is Acquitted in Killing That Ignited Unrest*, N.Y. TIMES, Sept. 27, 2001, at A14.

⁴ Francis X. Clines, *Cincinnati Mayor Imposes a Curfew*, N.Y. TIMES, Apr. 13, 2001, at A12.

⁵ *Barnes*, 401 F.3d at 734.

⁶ *Id.* at 733.

working.⁷ In 1998, he applied for a promotion to police sergeant.⁸ In order to qualify for the promotion, Barnes took the requisite evaluation exam, earning a grade that placed him 18th out of 105 officers.⁹ Upon passing the exam, officers entered the Sergeant Field Training Program, a probationary period during which new sergeants were evaluated by their superiors.¹⁰ Normally, supervisors observed probationary sergeants, rating their performance based on eighteen different criteria.¹¹

Barnes, however, was not placed in the standard program. Instead, new procedures were devised for evaluating him.¹² His supervisors created special forms for his evaluation, prohibited him from going into the field alone, forced him to wear a microphone at all times, and placed a video camera in his police car.¹³ None of the other probationary sergeants were evaluated in this way, and one of the supervising sergeants admitted that the procedures were created for the specific purpose of failing Barnes.¹⁴ Barnes testified that being singled out during the probationary period was embarrassing.¹⁵ The stress he suffered prompted a referral to a department psychologist who advised that Barnes would benefit from regular counseling.¹⁶

Nearly a year after passing the sergeant's exam, Barnes officially failed the probationary program.¹⁷ His supervisors' reports detailed problems such as dishonesty on more than one occasion, improper grooming standards, and a lack of "command presence."¹⁸

After being informed that he had failed the probationary period, Barnes filed suit against the City of Cincinnati, challenging his demotion under Title VII of the Civil Rights Act of 1964 and under the Equal Protection Clause of the Fourteenth Amendment.¹⁹ The jury returned a verdict for Barnes, awarding damages of \$320,511.²⁰ On appeal, the Sixth Circuit upheld the verdict, agreeing that Barnes had unlawfully been denied his promotion.²¹ In November 2005, the Supreme Court denied certiorari.²²

⁷ *Id.* The Sixth Circuit describes Barnes as a "pre-operative male-to-female transsexual" at the time of the events. *Id.* The court also uses the masculine pronoun to refer to Barnes, who was named Philip while he worked for the CPD. Barnes now goes by the name Philecia, but for purposes of consistency, this Comment will use the same references as the court. *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Barnes*, 401 F.3d at 735.

¹¹ *Id.*

¹² *Id.* at 734.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Barnes*, 401 F.3d at 734.

¹⁶ *Id.*

¹⁷ *Id.* at 735.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Barnes*, 401 F.3d at 733.

²¹ *Id.*

The supervisors' evaluations singled Barnes out for a lack of "command presence." While command presence may seem like a desirable characteristic for a sergeant to possess, an examination of the police department's understanding of the term reveals that the term carried no precise meaning. The circuit court pointed out that:

According to Sergeant Shearer, command presence means that an individual "projects a certain image of confidence." Several other officers testified that Barnes lacked command presence, which, according to them, meant that he did not have the respect of his subordinates . . . [n]early every evaluator who spoke to Barnes's "command presence" defined the term differently.²³

Because of this ambiguity, the concept of command presence has serious implications for gender roles in police forces, allowing lack of command presence to stand in as a cover for other, more subjective criteria. An expert witness in *Barnes* testified on the subject, stating that "employers who use subjective factors like 'command presence' to evaluate an employee are engaged in stereotyping."²⁴

Although none of Barnes's superiors testified that his lack of command presence was directly related to his transsexual status, one of his superiors made it clear that others did not respect him because he sometimes wore makeup on duty, had arched eyebrows, and had manicured nails—all grooming habits associated with femininity.²⁵ Barnes's supervisor filed an official complaint detailing his failure to meet grooming standards, which the supervisor admitted was connected to his lack of "masculine" characteristics.²⁶ The supervisor explicitly told Barnes that he should not wear makeup and should act in masculine ways if he hoped to pass the probationary period.²⁷

This points to the conclusion that Barnes's supervisors believed that his lack of masculine characteristics corresponded to a lack of some quality essential to being a police officer, which they, in turn, labeled "command presence." Though the court did not explicitly evaluate the term or identify it as a cover for gender discrimination, it implicitly identified it as such by rejecting the city's argument that Barnes's demotion was justified on the grounds of lack of command presence.²⁸ Associating command presence with masculinity has consequences for female police officers hop-

²² *Barnes v. Cincinnati*, 126 S. Ct. 624 (2005) (cert. denied).

²³ *Barnes*, 401 F.3d at 734.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 735.

²⁷ *Id.*

²⁸ *Barnes*, 401 F.3d at 735.

ing to be promoted to sergeant and for non-gender-conforming police officers as well.

The negative gender implications of command presence have been analyzed and documented by feminist scholars, as well as by those who study the criminal justice system. In 1993, the Women's Advisory Council ("WAC") to the Los Angeles Police Department ("LAPD") analyzed gender treatment within the Department.²⁹ In examining the promotional practices and culture of the LAPD, WAC observed that "[w]omen applicants are measured against a gender biased vision of a good police officer or supervisor that includes criteria like physical stature as an element of 'command presence' sought by evaluators in oral interview boards."³⁰ The WAC Blueprint includes a copy of a Performance Evaluation Report used by the LAPD. One category of the evaluation, under the heading "Leadership Capabilities" is "Demonstration of Command Presence."³¹ The command presence criterion, therefore, is not unique to the CPD.

Moreover, the use of command presence as an evaluative criterion is more than a gender equity problem. After noting the use of command presence as a hiring and promotional factor, WAC recommended that the LAPD "[r]eview all promotional examination criteria for gender bias. This includes criteria such as the definition of 'command presence' . . . and other commonly used terms. Clear emphasis must be placed on community policing skills like negotiation and problem solving."³² That is, important criteria that could be used to evaluate key skills have been ignored in favor of criteria such as command presence. A police department's reliance on command presence and other gender-biased criteria is a possible indicator of that department's general policing methods.

While the *Barnes* decision is a clear victory for those striving to end gender discrimination, there may be more at stake. In particular, problems of police department aggression can be tied to command presence and other forms of gender discrimination. The next sections will focus on ways in which the *Barnes* decision may benefit police and community relations. The consequences of *Barnes* in this arena may be subtle, but are promising nonetheless.

III. TIMOTHY THOMAS AND THE CINCINNATI POLICE DEPARTMENT

Barnes's lawsuit was not the most prominent legal battle the CPD had faced in recent years, and gender discrimination was not the only type of

²⁹ THE WOMEN'S ADVISORY COUNCIL TO THE L.A. POLICE COMM'N, A BLUEPRINT FOR IMPLEMENTING GENDER EQUITY IN THE LOS ANGELES POLICE DEPARTMENT (1993) [hereinafter WAC Blueprint].

³⁰ *Id.* at 39.

³¹ *Id.* at app. C.

³² *Id.* at 41.

discrimination alleged to have taken place.³³ In April 2001, Officer Stephen Roach was one of several police officers pursuing Timothy Thomas, an African American teenager with fourteen warrants for his arrest, on foot through a Cincinnati neighborhood.³⁴ The pursuit ended when Officer Roach shot and killed Thomas in an alley.³⁵ Thomas turned out to have been unarmed, and the warrants for his arrest were issued for relatively minor infractions, such as traffic violations.³⁶ Riots erupted in the days after the shooting in protest of perceived racial profiling and discrimination on the part of Cincinnati police officers.³⁷

Officer Roach was eventually acquitted of negligent homicide in the shooting.³⁸ The legal effects for Cincinnati, though, were severe. The Civil Rights Division of the Department of Justice (“DOJ”) investigated the police department. The DOJ examined all recorded uses of force, as well as policies in place regarding use of force. The product of that investigation was a Memorandum of Agreement that called for revisions of the department’s policies on the use of force to minimize aggressiveness.³⁹ The agreement also specified that the CPD train its officers in “de-escalation techniques that allow officers to make arrests without using force.”⁴⁰

Only a month before the shooting of Timothy Thomas, the American Civil Liberties Union (“ACLU”) filed a class action suit against the CPD on behalf of African American residents and other residents who were subject to the use of force by Cincinnati police officers.⁴¹ The ACLU lawsuit led to a settlement arrangement (the “Cincinnati Collaborative Agreement”).⁴² A major goal of the Cincinnati Collaborative Agreement was to “foster[] an atmosphere throughout the community of mutual respect and trust among community members including the police.”⁴³ In order to achieve that goal, the CPD agreed to adopt a new style of policing known as community problem oriented policing (“CPOP”). The Cincinnati Collaborative Agreement described CPOP as “one form of police work that seeks resolution of troublesome circumstances in the community.”⁴⁴ CPOP emphasizes resolution, not confrontation and aggression. “A law enforcement response is

³³ *Cincinnati Officer Is Acquitted*, *supra* note 3, at A14.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ Clines, *supra* note 4, at A12.

³⁸ *Cincinnati Officer Is Acquitted*, *supra* note 3, at A14.

³⁹ Memorandum of Agreement between the U.S. Dep’t of Justice and the City of Cincinnati, Ohio and the Cincinnati Police Department, pt. IV (Apr. 12, 2002), <http://www.usdoj.gov/crt/split/Cincmoafinal.htm>.

⁴⁰ *Id.* ¶ 81(h).

⁴¹ Clines, *supra* note 4, at A12.

⁴² *In re Cincinnati Policing*, No. C-1-99-317 (S.D. Ohio Apr. 11, 2002) (describing the settlement agreement), available at http://acluohio.org/issues/police_practices/finalsettlement.pdf.

⁴³ *Id.* ¶ 10.

⁴⁴ *Id.* ¶ 20.

always a possibility, but may not be required. Rather, a range of options is explored.”⁴⁵

In 2005, the Rand Corporation published a report of its finding from a city-sponsored study of the CPD’s response to and implementation of the Cincinnati Collaborative Agreement.⁴⁶ The report noted that while general community support of the CPD existed, in certain neighborhoods, satisfaction with the police force among African Americans was lower than among white residents.⁴⁷ The report suggested that the under-representation of African Americans and women on the police force might be connected to the problem, stating, “the disparity [in hiring or promoting African Americans and women] likely raises questions in this community about the CPD’s legitimacy and inhibits its inability to improve its interaction with the community.”⁴⁸

The past few years have arguably been a time of crisis for the CPD, for reasons that may seem unrelated to Officer Barnes’s lawsuit. The findings of the Rand Corporation study, as well as the content of the two aforementioned agreements, emphasize that a move away from aggression, and toward inclusion and problem solving, is critical to improving the CPD’s culture and policies. Those are not only goals for the CPD, but they are also legally enforceable commitments. The following section examines how eliminating the type of discrimination that motivated Barnes’s demotion can lead to achieving lowered police force aggression and increased community cooperation.

IV. COMMAND PRESENCE AND POLICE AGGRESSION

The problems associated with command presence are not limited to gender discrimination. There is evidence that the concept of command presence may implicate larger problems with police tactics in general, as well as mistrust of police by the communities they aim to protect.⁴⁹ Command presence was subject to special scrutiny in the wake of the videotape evidence of L.A. police officers beating Rodney King during his arrest, and the subsequent riots in Los Angeles.⁵⁰

The Christopher Commission, an independent investigation of the LAPD initiated after the Rodney King incident, published its own critique of the police department’s culture. The report observed that “[o]ne recently promoted lieutenant . . . testified that LAPD training emphasizes

⁴⁵ *Id.* ¶ 22.

⁴⁶ K. JACK RILEY ET AL., POLICE-COMMUNITY RELATIONS IN CINCINNATI (2005).

⁴⁷ *Id.* at xxix.

⁴⁸ *Id.*

⁴⁹ INDEPENDENT COMM’N ON THE L.A. POLICE DEP’T, REPORT OF THE INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT 84 (1991), available at <http://www.parc.info/reports/pdf/christophercommission.pdf>.

⁵⁰ RILEY, *supra* note 46, at 20.

'command presence' that can lead to inappropriate confrontations on the street."⁵¹

Another incident also sparked inquiry into the practices of the LAPD. In the 1990s, extreme corruption and misconduct were discovered among police officers from the Rampart Division of the LAPD.⁵² The misconduct included corruption, theft, and the shooting of unarmed gang members.⁵³ Professor Erwin Chemerinsky completed an in-depth study of the LAPD's internal investigation of Rampart. Chemerinsky observed that the culture of the department instructed officers in the following way: "You are in charge, you have to show everyone you are in charge. Be decisive. Have command presence. Seek out the crime."⁵⁴

Finally, another analysis of the LAPD's investigation after the Rampart incident used the phrase "command presence" to describe how the police were perceived in the community. The investigation concluded that "the police consider residents living in high crime areas as potential criminals, instead of possible victims; in turn, those people fear, resent, and distrust the police 'command presence.'"⁵⁵

Both investigations tied command presence to police aggression. Based on its investigation, the Christopher Commission made recommendations for improvement, connecting the problems of command presence and police aggression to the problems of gender discrimination within the police force: "[b]ecause the Commission heard persuasive evidence that most female officers use a style of policing that minimizes the use of excessive force and inappropriate confrontations, the continued existence of discrimination against female officers can deprive the department of specific skills, and thereby contribute to the problem of excessive force."⁵⁶

That is, hiring and promoting officers who use less aggressive techniques decrease police aggression overall and contribute to a better relationship between the police department and the community. Based on this evidence, the Commission recommended that the LAPD take steps toward providing equal opportunities for female police officers.⁵⁷

Legal scholars have joined the call for broadening the criteria used to hire and promote employees in all types of jobs. Professors Susan Sturm and Lani Guinier published their recommendations for improving equality in hiring and promotion in a wide variety of fields:

⁵¹ INDEPENDENT COMM'N ON THE L.A. POLICE DEP'T, *supra* note 49, at 99.

⁵² Terry McDermott, *Rafael Perez: The Road to Rampart*, L.A. TIMES, Dec. 31, 2000, at A1.

⁵³ *Id.*

⁵⁴ Erwin Chemerinsky, *An Independent Analysis of the Los Angeles Police Department's Board of Inquiry Report on the Rampart Scandal*, 34 LOY. L.A. L. REV. 545, 563 (2001).

⁵⁵ Thomas M. Riordan, *Copping an Attitude: Rule of Law Lessons from the Rodney King Incident*, 27 LOY. L.A. L. REV. 675, 727 (1994).

⁵⁶ INDEPENDENT COMM'N ON THE L.A. POLICE DEP'T, *supra* note 49, at 83.

⁵⁷ *Id.* at 92.

Including people with different tendencies, styles, and approaches enhances flexibility and expands the repertoire of skills and functions that an institution can effectively pursue. Diversity offers new ideas and approaches that can enhance institutions' capacity to perform and innovate. The example of the Los Angeles Police Department . . . illustrates this theory.⁵⁸

Awareness of the command presence criteria and associated gender problems have thus become insights into the ways policing can be improved.

Professor Mary Anne Case also pointed to the LAPD as both a locus for serious change and an encouraging example for other departments throughout the country: "If the proposed reforms are implemented and the LAPD in fact becomes more effective, this evidence, too, can be used by women in other cities to challenge the standards imposed by their police forces."⁵⁹ Police aggression and gender discrimination, therefore, are opportunities for progress, potentially leading to improvements in both gender equality and police legitimacy and effectiveness.

The LAPD and the CPD share critics who would push them toward less aggressive and confrontational policing styles. Indeed, both departments face serious public pressure and legal penalties as incentives to make those changes.

V. CONCLUSION

The decision in *Barnes* is a victory for gender equality. It also has implications for the CPD that affect more than just promotional procedures and treatment of gender. The discriminatory use of command presence to create a more masculine police force is connected to an aggressive policing style that has alienated so many in the community. If the CPD responds to *Barnes* by reevaluating its command presence criteria, it will be forced to consider a diverse set of qualifications and skill sets in its police officers. The CPD should adopt a less aggressive approach—one that will lead to fewer incidents of use of excessive force and increased respect from and collaboration with the community. Not by coincidence, these are the same goals that the CPD professes to hold—and is committed to achieve—in its agreements with the DOJ and the community groups led by the ACLU.

⁵⁸ Lani Guinier & Susan Sturm, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953, 1024–25 (1996).

⁵⁹ Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 90 (1995).