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How Masculinities Distribute Power: The Influence of Ann Scales

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HOW MASCULINITIES DISTRIBUTE POWER: THE INFLUENCE OF ANN SCALES

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ABSTRACT

Ann Scales's scholarship on masculinities in relation to sexual assault and militarism prompted us to consider exactly how power is distributed by assumptions about what is masculine. For instance, men privileged by association with hegemonic masculinities—those most dominant and preferred—are sometimes excused for acts of violence against people who are denigrated as unmasculine or excessively masculine. In one set of examples, communities excuse football players for sexual assaults on grounds that "boys will be boys." The implication is that boys should be allowed to act out before taking on adult responsibilities, and that they need to do so in order to become men. Moreover, the "boys will be boys" narrative suggests the victims were asking for it. In another set of examples, certain types of men are granted exemptions from the normal rules of self-defense because they are seen as manly protectors of their communities. Men such as George Bush and George Zimmerman are allowed to preemptively strike men such as Saddam Hussein and Trayvon Martin because the latter's denigrated masculinities suggested they were asking for it. Scholars should continue to explore the ways such hierarchies of masculinities distribute privileges and vulnerabilities.

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I. INTRODUCTION: MULTIDIMENSIONAL MASCULINITIES THEORY THROUGH THE PRISM OF ANN SCALES

Masculinities distribute power. One way to demonstrate this fact is to ask a few questions: Who must fear walking alone in secluded places at night? Who must fear encounters with the police? Who is thought to look like a corporate leader? The answers—women,[1] poor minority men,[2] upper-class white men,[3] respectively—are revealing. Women and minorities are disempowered by their vulnerabilities while majority men are empowered by their status identities.[4] Being a woman or a certain type of man is disempowering. Being a man, especially a specific type of man, has material benefits. Assumptions about what behavior is appropriately manly distribute power by creating and reinforcing hierarchical relationships among people.

One scholar who understood the importance of masculinities was Ann Scales. Before the live portion of this Symposium, we knew Ann and her work but had not yet felt the full force of her presence. Hearing Ann's close friends speak at this Symposium gave us a sense of Ann's deep but impish intellectual curiosity. She would, therefore, have been proud of this Symposium. It was that most rare of occasions where profound analytical rigor was met with equal parts of emotional caring. We feel lucky to have been invited to speak about Ann's work on masculinities and have learned much in the process.

Scales's scholarship helps us understand both why men act in aggressive ways and why some men are more likely to be granted exemptions from criminal law sanctions while other men are more likely to be victims of those exemptions. In *Student Gladiators and Sexual Assault:*

1. *See, e.g.*, ESTHER MADRIZ, NOTHING BAD HAPPENS TO GOOD GIRLS: FEAR OF CRIME IN WOMEN'S LIVES *passim* (1997) (discussing women's beliefs that they can avoid harm by being good).

2. *See, e.g.*, Frank Rudy Cooper, *"Who's the Man?": Masculinities Studies,* Terry *Stops, and Police Training*, 18 COLUM. J. GENDER & L. 671, 676 (2009) (discussing conflicts between police and male suspects).

3. *See, e.g.*, Ann C. McGinley, *Hillary Clinton, Sarah Palin, and Michelle Obama: Performing Gender, Race, and Class on the Campaign Trail*, 86 DENV. U. L. REV. 709, 712 (2009) (discussing why leadership looks masculine).

4. *See* Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. CONTEMP. LEGAL ISSUES 701, 707 (2001) (distinguishing status identities from performative identities).

A New Analysis of Liability for Injuries Inflicted by College Athletes, she explores sexual assaults on female college students by football players, and the courts' and society's reaction to them.[5] In *Soft on Defense: The Failure to Confront Militarism*, she concludes that military values that derive from concepts of masculinity provide certain men with exemptions from the usual rules.[6] Scales's analyses are consistent with the principles of multidimensional masculinities theory that we helped develop in our edited collection, *Masculinities and the Law: A Multidimensional Approach*.[7]

In the edited collection, we explained that "multidimensional masculinities theory assumes that law distributes power by relying upon assumptions about human behavior that reproduce preexisting social relations."[8] This theory draws from masculinities scholarship, which has its origins in sociology and social psychology. It also draws from critical race theory, feminist legal theory, and multidimensionality theory.[9] The original masculinities scholars were men who responded to feminist arguments by examining men's identities. They agreed with the premise of feminists that society views women as inferior to men, but they believed that feminists often see men as an undifferentiated mass.[10] They posited that it was incorrect for feminists to see men as undifferentiated because not all men fully adopt the hegemonic, or dominant, form of masculinity,[11] and men are not equally privileged by that masculinity.[12] The hegemonic masculinity in U.S. society has generally reflected the types of masculinity embodied by well-educated, middle-class, straight, white, Christian men.[13] Most men, however, cannot fully achieve this type of hegemonic masculinity.[14] Their inability to live up to the expectations of hegemonic masculinities puts them in a penalty status[15] and leads to attempts to perform masculinity in a way that compensates for their penalty status.[16] Since masculinity is not a biological imperative but a social

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5. Ann Scales, *Student Gladiators and Sexual Assault: A New Analysis of Liability for Injuries Inflicted by College Athletes*, 15 MICH. J. GENDER & L. 205 *passim* (2009).

6. Ann Scales, *Soft on Defense: The Failure to Confront Militarism*, 20 BERKELEY J. GENDER L. & JUST. 369, 379, 389 (2005).

7. MASCULINITIES AND THE LAW: A MULTIDIMENSIONAL APPROACH (Frank Rudy Cooper & Ann C. McGinley eds., 2012).

8. Ann C. McGinley & Frank Rudy Cooper, *Introduction* to MASCULINITIES AND THE LAW: A MULTIDIMENSIONAL APPROACH, *supra* note 7, at 1, 1.

9. *Id.* at 2.

10. *Id.* at 3–4.

11. *Id.* at 5.

12. *Id.*

13. *See id.*

14. *See id.*

15. *See* Frank Rudy Cooper, *Masculinities, Post-racialism and the Gates Controversy: The False Equivalence Between Officer and Civilian*, 11 NEV. L.J. 1, 22 (2010) ("Penalty status is the condition of already having something about your identity that makes your masculinity suspect.").

16. *See* Frank Rudy Cooper, *Against Bipolar Black Masculinity: Intersectionality, Assimilation, Identity Performance, and Hierarchy*, 39 U.C. DAVIS L. REV. 853, 900 (2006) (discussing effect of being "one down" in hierarchies); Nancy Ehrenreich, *Subordination and Symbiosis: Mech-*

construct, men can craft their masculine identities through behaviors, albeit while subjected to societal pressure to perform in particular approved ways.[17] In light of their observation of the pressures men are under to perform their masculinities in hegemonic ways, masculinities scholars accepted that men as a group are powerful, but also saw that individual men often feel powerless.[18] This powerlessness, they argued, comes not from women or feminism, but from societal pressure on men to compete to prove their masculinity to themselves and others.[19]

In the West, the most important proofs of masculinity have been showing that one is not feminine and not gay.[20] One means of asserting those qualities, and thereby promoting one's masculine esteem, has been by demonstrating sexual prowess.[21] Women often become props or pawns in this proof.[22] Young men engage in group homosocial behaviors that use women as sexual objects to bond with other men. For instance, Michael Kimmel explains that some young men watch pornographic videos together[23] and others engage in group sexual assaults or harassment of women.[24] Men's acquisition of women can also be used to gain masculine esteem relative to other men.[25] Moreover, groups of young men engage in hazing, harassment, and even sexual assault of other young men in order to establish group norms, enforce loyalty, secure silence about aberrant behavior, or force weak or effeminate males out of the group.[26] Especially in neighborhoods and workplaces where achieving the hegemonic masculinity is nearly impossible, members of the community might engage in hyper-masculine behaviors such as sexual harassment or fighting in order to prove their masculinity.[27] Whereas those who can perform a preferred masculinity are privileged, those whose performances of masculinity are denigrated become more vulnerable to violence.

Multidimensional masculinities theory recognizes that concepts of masculinity interact with other identity concepts in different ways in var-

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anisms of Mutual Support Between Subordinating Systems, 71 UMKC L. REV. 251, 291–92 (2002) (discussing partly-denigrated men's temptation to engage in compensatory subordination of others).

17. NANCY E. DOWD, THE MAN QUESTION: MALE SUBORDINATION AND PRIVILEGE 60 (2010).

18. *Id.* at 63.

19. *See* McGinley & Cooper, *supra* note 8, at 3–4.

20. DOWD, *supra* note 17, at 62.

21. *See* MICHAEL KIMMEL, GUYLAND 206–07 (2008) (discussing how "hooking up" is an effort to determine a man's status compared to other men).

22. McGinley & Cooper, *supra* note 8, at 3–4.

23. KIMMEL, *supra* note 21, at 186–87.

24. *Id.* at 237–40; Ann C. McGinley, *Creating Masculine Identities: Bullying and Harassment "Because of Sex,"* 79 U. COLO. L. REV. 1151, 1218–19 (2008).

25. *See, e.g.*, Katharine K. Baker, *Sex, Rape, and Shame*, 79 B.U. L. REV. 663, 693 (1999) (arguing that some young men are so intent on proving their masculinity through sexual conquest that the woman's consent becomes irrelevant to them).

26. McGinley, *supra* note 24, at 1219–30.

27. *See* McGinley & Cooper, *supra* note 8, at 5.

ious legal contexts.[28] Identities are intertwined and co-constituted.[29] We are all simultaneously gendered, raced, classed, and so on. The intersecting nature of our identities means that being male and white and rich can be very different from being male and black and poor, even in the same social context. Moreover, what is deemed masculine changes as one moves within different social groups or social spheres.

Part II of this Essay analyzes the law's and society's reactions to sexual assaults, which often include the "boys will be boys" narrative. That is, people sometimes assume it is natural for boys to be raucous, and use that assumption as a basis for excusing anti-social and even criminal behavior. Part II also considers how these reactions construct a narrow, hegemonic form of masculinity that governs the appropriate response to victims of sexual assault and harassment. Part III then discusses the law of self-defense in international law and domestic criminal law. It demonstrates that exemptions from the usual rules are deployed based on concepts of preferred and denigrated masculinities that are not only gendered, but also raced and classed. Our prime example is (presumptively) white[30] neighborhood watch captain George Zimmerman's slaying of unarmed black teenager Trayvon Martin. Part IV concludes that masculinities protect some—mostly upper-class white—men and victimize other—often poor, racial-minority—men.

II. "BOYS WILL BE BOYS"

Ann Scales understood that men sometimes commit assaults to boost their own or their group's masculine esteem and that men and women sometimes forgive that behavior because of their assumptions about what it means to be masculine. In *Student Gladiators and Sexual Assault: A New Analysis of Liability for Injuries Inflicted by College Athletes*, Scales discusses the problem of members of athletic teams (primarily football teams) gang raping young women.[31] She debates the possibility of legal liability of universities for the behavior of the student athletes.[32] She demonstrates that Title IX of the Education Amendments of 1972, which prohibits gender discrimination in education, has onerous standards to meet, and that it is nearly impossible to get injunctive relief under Title IX.[33] Her solution is to use state constitutional law, especially in states with equal rights amendments, to find universities liable for encouraging the rape culture in athletic programs.[34] *Student Gladiators* is

28. *Id.* at 2.
29. *Id.*
30. Zimmerman is technically half Latino. He is white-skinned and, we would contend, white-acting.
31. Scales, *supra* note 5, *passim*.
32. *Id.* at 236.
33. *Id.* at 236–37, 239.
34. *Id.* at 261–69.

an interesting article in particular because of its acknowledgement of the cause of gang rape by football players: societal norms of masculinity.[35]

A. Societal Norms of Masculinity: Simpson v. University of Colorado[36]

Scales focuses on the story of *Simpson v. University of Colorado*, a case where the plaintiffs—female students at the university—alleged that they were raped repeatedly by football team members and recruits.[37] According to the allegations, the plaintiffs decided to stay at home one evening.[38] A roommate, who was also a tutor for the football team, invited a group of football team members and recruits to their apartment for a party.[39] Simpson, who knew none of the players, was allegedly raped by multiple football players in her room while simultaneously another roommate, who was too drunk to consent, was harassed and assaulted by three other players and recruits.[40] After the two women publicized their rape allegations to the university community, they faced hostility and threats that led to Simpson dropping out of college and the other plaintiff taking a year's leave of absence.[41] The complaint also alleged that the football coach had for years refused to change recruiting practices that included heavy use of alcohol and access to strip shows, lap dances, and prostitutes because of the fear that such limitations would lead to a recruiting disadvantage.[42] The federal district court granted summary judgment to the defendant university, concluding that there was insufficient evidence for the plaintiffs to meet the Title IX standards: that the university knew about the behavior and that it exhibited deliberate indifference to it.[43] On appeal, the Tenth Circuit Court of Appeals overturned the grant of summary judgment.[44] The case settled for more than $2.8 million to the two plaintiffs.[45]

There are many cases alleging that groups of boys or men engaged in assault or harassment of girls or of weaker, gender-non-conforming boys.[46] Frequently, the attackers belong to the same athletic team.[47] And,

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35. Scales, *supra* note 5.
36. 372 F. Supp. 2d 1229 (D. Colo. 2005), *rev'd*, 500 F.3d 1170 (10th Cir. 2007).
37. Scales, *supra* note 5, at 213–14.
38. *Id.*
39. *Id.*
40. Scales, *supra* note 5, at 213; *Simpson*, 500 F.3d at 1180.
41. Scales, *supra* note 5, at 213–14; *Simpson*, 500 F.3d at 1180.
42. *Simpson*, 500 F.3d at 1181–84.
43. Simpson v. Univ. of Colo., 372 F. Supp. 2d 1229, 1245 (D. Colo. 2005), *rev'd*, 500 F.3d 1170; *see* Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 646–47 (1999) ("[R]ecipients of federal funding may be liable for 'subject[ing]' their students to discrimination where the recipient is deliberately indifferent to known acts of student-on-student sexual harassment and the harasser is under the school's disciplinary authority." (alteration in original)); Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 285 (1998) ("[I]t would 'frustrate the purposes' of Title IX to permit a damages recovery against a school district . . . without actual notice to a school district official.").
44. *Simpson*, 500 F.3d at 1185.
45. Scales, *supra* note 5, at 216.
46. *See, e.g.*, Seamons v. Snow, 84 F.3d 1226, 1230 (10th Cir. 1996); Shafer v. Kal Kan Foods, Inc., 417 F.3d 663, 665 (7th Cir. 2005).

frequently, authority figures cover up the alleged wrongdoing or diminish its importance.[48] The assaultive behaviors themselves are horrific, but the responses afterwards by adults who are neither drunk nor acting in the heat of passion are inexplicable.

B. Social Construction of Masculinity in Our Guys

It is our theory that much of group sexual assault that occurs, and community responses thereto, result from the social construction of masculinity. That is, masculinities theorists conclude that masculinity is not a natural result of biology. Rather, it is performed by individuals in response to societal or group pressure. Masculinities scholars note that the most important indicator of manliness is that one is neither gay nor a girl.[49] Boys and young men in group situations use penetration of the vagina, the anal cavity, and the mouth as means of degrading a victim and of proving their own membership in the group. Masculinities scholars explain that masculinity is such a fragile commodity that boys and young men often engage in competitive behavior in order to prove their manhood to other boys and men.[50] It is this competition and a need to impress others that impels men and boys who act in groups to commit gang rapes and other sexual assaults. "Running a train" (gang rape) is one means of demonstrating the superior masculinity of the rapists.

These rapes are often normalized by the community. When a young woman is a victim, it is her fault for being in the wrong place at the wrong time or for being intoxicated.[51] If the victim is a man, the behavior is just "horseplay."[52] The victim is ridiculed for not taking it "like a man" and ostracized for reporting the violation to the authorities.[53] Our understanding of the community responses to sexual assault as reflecting assumptions about masculinity is supported by the cases. For instance, the *Simpson* facts resemble a case described in *Our Guys* by Bernard Lefkowitz, which we use in our book, *Masculinities and the Law: A Multidi-*

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47. *See, e.g.*, *Simpson*, 500 F.3d at 1172; *Seamons*, 84 F.3d at 1229; BERNARD LEFKOWITZ, OUR GUYS: THE GLEN RIDGE RAPE AND THE SECRET LIFE OF THE PERFECT SUBURB 16 (Vintage Books 1998).

48. *See* LEFKOWITZ, *supra* note 47, at 284–86.

49. *See id.* at 1163–64.

50. *See* McGinley, *supra* note 24, at 1163–67.

51. *See, e.g.*, Warner Todd Huston, *Fmr Pres of Local Chapter of Ohio NAACP: Steubenville Rape Victim Was 'Drunk and Willing,'* WIZBANG (Apr. 1, 2013), http://wizbangblog.com/2013/04/01/fmr-pres-of-local-chapter-of-ohio-naacp-steubenville-rape-victim-was-drunk-and-willing (discussing the culpability of the young woman from Steubenville, Ohio who was raped after she passed out at a party).

52. *See, e.g.*, Shafer v. Kal Kan Foods, Inc., 417 F.3d 663, 666 (7th Cir. 2005) (concluding that the plaintiff did not have a case even though the defendant's employee had committed four serious sexual violations against him); Linville v. Sears, Roebuck & Co., 335 F.3d 822, 824 (8th Cir. 2003) (affirming the lower court's grant of summary judgment where the plaintiff was backhanded repeatedly in the scrotum because the behavior did not occur "because of sex" (internal quotation marks omitted)).

53. *See* Seamons v. Snow, 84 F.3d 1226, 1230 (10th Cir. 1996) (internal quotation mark omitted).

mensional Approach, to illustrate the concept of "boys will be boys."[54] In *Our Guys*, a group of high school football players enticed a teenage girl whom they knew was mentally impaired to the basement of the home of two of the players.[55] Once she was there, they demanded that she remove her clothing and perform oral sex on one of the players.[56] The behavior escalated when a number of the boys inserted a broom handle, a baseball bat, and a stick into her vagina.[57] At the time, there were between thirteen and sixteen boys in the basement.[58] A few of the boys left when they saw what was happening, but not one of them reported the rape.[59] And, although rumors of the rape abounded in the school, it took weeks before one student finally reported the rape to a school official.[60] The book describes the trial of the boys who were charged with rape and sexual assault. The crime itself was heinous, and the book's study of how the town normalized the boys' behavior and shifted blame to the victim is at once fascinating and startling. Moreover, the defense lawyers' depictions of their clients' behavior as normal and the teenage girl as a promiscuous "Lolita"[61] demonstrates how law can be perverted to the ends of preserving dominant assumptions about masculinity.[62]

The boys described in *Our Guys* were a group of athletes who lived in the suburban, white-collar town of Glen Ridge, New Jersey, about forty minutes from Manhattan. The town was proud of its schools, its children, and of the community.[63] This particular group of boys had engaged in pranks and even criminal behavior for years, but they had never been subject to more than fleeting discipline. Some of them had been caught stealing money from the girls' purses at a dance;[64] many engaged in weekend parties where there was plenty of alcohol.[65] Most attended the parties and had sex with willing young girls while other boys watched from inside the closet, "a practice they called 'voyeuring.'"[66] The boys relived these bad acts by talking about them incessantly and alluding to them in their high school yearbooks.[67] The boys watched pornography as a group and may have engaged in group masturbation.[68]

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54. *See* McGinley & Cooper, *supra* note 8, at 9.
55. LEFKOWITZ, *supra* note 47, at 13–23.
56. *Id.* at 23–24.
57. *Id.* at 25.
58. *Id.* at 24.
59. *Id.* at 23–24.
60. *Id.* at 29.
61. "Lolita" is a common term for a young woman who may be a seductress. *See* VLADIMIR NABOKOV, LOLITA (Van Rees Press 1955) (creating the concept in the now-canonical novel); *see, e.g.*, THE POLICE, DON'T STAND SO CLOSE TO ME (A&M Records 1980) (referencing the book in a popular song about a potential teacher–student sexual relationship).
62. *See* LEFKOWITZ, *supra* note 47, at 361–62.
63. *See id.* at 5–6.
64. *Id.* at 177–81.
65. *Id.* at 138–39.
66. *Id.* at 184.
67. *Id.* at 185.
68. *Id.* at 183.

From the time he was in middle school, one of the boys spent much of his time in class masturbating and revealing his penis to the other students.[69] A number of the boys used racial epithets to refer to a football player who played on an opposing team, including in front of the only black member of their own football team.[70] Other boys who were marginal members of the group were thrilled to be invited to the parties and were unwilling to sacrifice their invitations by not going along with the behavior.[71]

Girls who Lefkowitz calls the "Little Mothers" took care of the boys.[72] These girls were friends whom they did not date, but the girls decorated the boys' bedrooms before games, made food for the parties, and tutored them when they needed help in school.[73] Even when the parties were over, the group of boys would arrive at one Little Mother's home and pull food out of the refrigerator and leave her to clean up their mess.[74] There was one girl who was an outsider who invited the school to her house for a party. The group totally destroyed the girl's home.[75] She was so upset that she threatened to commit suicide by jumping off a balcony. They urged her to jump.[76]

The boys' behavior was not hidden. It occurred over many years, and yet the adults in the town, parents and teachers alike, allowed it to occur.[77] The boys were lauded for being "the guys," treated as heroes because they were athletes, and never held accountable for their actions. After the rape occurred, the Little Mothers came to their defense. They told reporters that the victim was a "slut."[78] In other words, she "asked for it." Few adults had sympathy for the victim either. The school district hid behind a screen of neutrality, never willing to express judgment or to allow students to judge "the guys'" acts.[79] In fact, many members of the community expressed sympathy for the boys and regret that the publicity in the media would destroy their property values.[80] Many in the community even treated the boys as victims.[81] The rape victim and her family were, for many, invisible.[82] For instance, the father of one of the boys who inserted the broomstick into the victim's vagina reportedly stated,

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69. *Id.* at 90, 166–67.
70. *Id.* at 137–38.
71. *See id.* at 24, 143.
72. *Id.* at 144 (internal quotation marks omitted).
73. *Id.* at 144–45.
74. *Id.* at 150–51.
75. *Id.* at 153–59.
76. *Id.* at 158.
77. *Id.* at 167–71.
78. *See id.* at 270 (internal quotation marks omitted).
79. *Id.* at 270–71.
80. *See id.* at 7.
81. *Id.*
82. *Id.*

when his son was offered a plea agreement of one year in prison, "I can't see Kevin doing a year for this."[83]

C. Our Guys *as an Example of the "Boys Will Be Boys" Attitude*

The community's reaction was the classic "boys will be boys" attitude. This attitude is an important constructor of masculinity.[84] The idea is that boys are young, naturally aggressive, competitive and physically active, that they will engage in pranks and even criminal behavior, but that they will outgrow this immature behavior.[85] It is as though adulthood is a burden for which boys should be compensated in advance: "This is the best time in their lives," the adults say, "let them go." "Soon, they will be saddled with a job, a family, and a mortgage. Let them have some fun before they grow up." With these types of comments, adults normalize behaviors that would never be tolerated from girls as biological responses to the boys' growing bodies. And girls are made responsible for the boys' behaviors. If a girl whose IQ is only 49 is enticed to the boys' basement by one boy who promises that his popular brother will date her,[86] she deserves what she gets. She wanted it. Even though the "it" is a painful prodding with a baseball bat, a broom handle, and a stick.

While a number of the boys were ultimately convicted, their lawyers, who are agents of the law, also constructed their behaviors as normal masculine behavior. One of the defense lawyers, Michael Querques, repeatedly impugned the victim's reputation, calling her "Lolita" and arguing that the boys were helpless when put up against the seductress.[87] In his view, the boys needed protection from her; it was not the other way around. "Boys will be boys," he said.[88] "Pranksters. Foolarounds. Do crazy things. Experiment with life and disregard their parents. Boys will be boys."[89] And, despite the presence of a New Jersey Rape Shield Law, the judge ruled that much of the victim's sexual history was admissible evidence to prove whether she was capable of consenting to the behavior that occurred in the basement.[90] The court thus welcomed the "she asked for it" defense. This ruling led the way to the introduction of much humiliating evidence that destroyed the victim's reputation.[91]

In the trial and outside the courtroom, the defense lawyers engaged in misogynist behavior that mirrored that of their clients. Outside the courtroom, defense attorney Tom Ford referred to a distinguished female

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83. *Id.* at 341 (internal quotation marks omitted).
84. *See* McGinley & Cooper, *supra* note 8, at 9 (claiming "they learned from their parents and the community that their behavior was acceptable").
85. *Id.* (noting the assumption that "the boys will outgrow it").
86. LEFKOWITZ, supra note 47, at 20.
87. *Id.* at 361–62, 396, 445 (internal quotation marks omitted).
88. *Id.* at 362 (internal quotation marks omitted).
89. *Id.* (internal quotation marks omitted).
90. *Id.* at 334.
91. *Id.* at 334–35, 377, 382.

prosecutor as a "[b]ush," a crude reference to the female anatomy.[92] He also commented on the testimony of a female police investigator: "See what a witch she is. Did you see the slit in her skirt? Did you see her blouse? She just used those looks to seduce that poor kid."[93] Querques also referred to the female detective as "[t]hat bitch" and stated, "Who's gonna believe her?"[94] Outside the courtroom, Querques called the victim a "pig" and contended that the boys needed protection from her.[95] In court, he opened and spread his legs because he wanted "to show the jurors how she was enjoying it."[96] A newspaper covering the trial reported that some of the defense attorneys referred to two representatives of the National Organization of Women (NOW) who attended the trial as the "Twin C–s."[97] This behavior by the defense attorneys, combined with the judge's ruling, demonstrates a strong attitude that boys (at least white, suburban boys) should not be bothered by cases like this.

D. Similarities between Our Guys *and Scales's Description of* Simpson v. University of Colorado

Coach Barnett also displayed the "boys will be boys" attitude at the University of Colorado. According to Scales's account, Barnett tolerated or covered up a number of incidents of sexual harassment and alleged rapes during his career.[98] Perhaps the most interesting is the story of a team member, Katie Hnida, who "was recruited by Barnett's predecessor" as a place kicker for the all-male team.[99] Hnida was subject to sexual harassment, about which her father complained, and after the rapes were alleged, Hnida came forward to allege that she too had been raped by another team member.[100] Subsequently, Coach Barnett demeaned her in a news conference, in which he was discussing the alleged rapes on the team, stating that "Katie was a girl, and not only was she [] a girl, she was terrible."[101] As Scales implies, this is an odd response to a rape allegation.[102] Perhaps by discrediting Hnida as a player, Barnett believed that he established her as a liar. More likely, by claiming that Hnida was a bad kicker, the coach was distancing her from the real boys; the real players who sexually assaulted her to prove their masculinity. Both in the Colorado cases and in the Glen Ridge case, adults who should know better—teachers, superintendents, parents, coaches, and defense lawyers—

92. *Id.* at 384 (internal quotation marks omitted).
93. *Id.* at 391 (internal quotation marks omitted) (referring to the victim as the "poor kid" and asserting that the female police officer used her charms on the victim to encourage her to lie about the assault (internal quotation mark omitted)).
94. *Id.* at 393 (internal quotation marks omitted).
95. *Id.* at 445 (internal quotation marks omitted).
96. *Id.* at 446 (internal quotation mark omitted).
97. *Id.* (internal quotation mark omitted).
98. Scales, *supra* note 5, at 214.
99. *Id.*
100. *Id.*
101. *Id.* at 215.
102. *See id.*

minimized the bad behavior of the responsible male athletes and blamed the female victims.[103]

E. Male Victims and Social Construction of Masculinity

We observe similar adult responses when young men are the victims of a group of male harassers. When young women are victims, adults blame the victim: "she shouldn't have been at that party"; "she shouldn't have been wearing that outfit"; "she shouldn't have had so much to drink." In essence, it was the young woman's fault that she was assaulted.[104] She invited the assault. She wanted it. In the male victim cases, the victim is expected to endure the attack and not complain about it because the attack was merely hazing or roughhousing.[105] The attack of young men by a group of other young men is, in essence, a way of imposing group values on the weakest or newest member of the group. In these cases, the male victim of sexual assault, rape, or harassment is ridiculed for not being a "real man." He is expected to "take it like a man" and not complain. If he does complain, he proves that he is a girl, not a real man.

In *Seamons v. Snow*,[106] for example, the plaintiff, Brian Seamons, was a football player at a Utah high school.[107] In full view of the entire team, five of his upper-class teammates assaulted Seamons in the high school locker room.[108] They grabbed Seamons "as he came out of the shower, forcibly restrained" him, and bound him, nude, "to a towel rack with adhesive tape."[109] They also taped Seamons's genitals.[110] A teammate then brought Seamons's former girlfriend "into the locker room to view him."[111] Seamons complained to the coach, other administrators, and the high school principal.[112] "The coach brought Brian before the" whole team and demanded that he apologize to his teammates for betraying them by reporting their behavior.[113] When he refused, Seamons was dropped from the team.[114] The five players who taped "Brian were per-

103. LEFKOWITZ, *supra* note 47, at 7–8, 492–93.

104. *See, e.g.*, Alexander Abad-Santos, *The Steubenville Rape Case is Back—Are Parents at Party Houses to Blame?*, WIRE (Apr. 8, 2013), http://www.thewire.com/national/2013/04/steubenville-parties-suits/63995/; Huston, *supra* note 51.

105. *See* Seamons v. Snow, 84 F.3d 1226, 1230 (10th Cir. 1996); *see also* Deborah L. Brake, *Sport and Masculinity: The Promise and Limits of Title IX*, *in* MASCULINITIES AND THE LAW: A MULTIDIMENSIONAL APPROACH, *supra* note 7, at 207, 218–23 (describing cases where groups of male athletes sexually assaulted women and/or men).

106. 84 F.3d 1226.

107. *Id.* at 1229.

108. *Id.* at 1230.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

mitted to play in the next football game."[115] Finally, the school board cancelled the last game of the season, a playoff game.[116]

Seamons brought suit for violation of his civil rights and for violations of Title IX, which prohibits gender discrimination in education. Most likely because of the strict standard for institutional liability under Title IX—proof of notice and deliberate indifference to the violation of the individual's federal rights—Seamons's suit focused on the behavior of the coaches and the administration in response to the physical attack.[117] Courts applying Title VII hold that discrimination based on a person's failure to live up to stereotypes attached to one's gender is discrimination occurring "because of [] sex."[118] There was good reason to assume the *Seamons* courts would apply this definition to the Title IX cases as well.[119] The lower court granted the defendants' motion to dismiss the Title IX cases and concluded that the coach and administrators did not create a hostile educational environment because their behavior did not occur because of sex.[120] The Tenth Circuit agreed.[121]

In concluding that Seamons's harassment was not "because of sex," both the lower court and the court of appeals ignored key evidence that Seamons's treatment was the result of assumptions about masculinities. Seamons's complaint alleged that the coach had told Seamons that the behavior was "hazing" and that "boys will be boys."[122] Moreover, Seamons alleged that the other administrators treated Seamons poorly because of his failure to live up to male stereotypes. According to the complaint, they told him that he "should have taken it like a man."[123] Nonetheless, the *Seamons* courts, and the law in general, implicitly construct the appropriate masculine behavior by determining that sports team harassment is legitimate and resistance to it is not.

Media reports on the incident reveal that the adult community also censored Seamons's behavior and supported that of his teammates.[124]

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115. *Id.*

116. *Id.*

117. *See id.*

118. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) (plurality opinion) (quoting City of L.A., Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978)) (concluding that it would be discrimination because of sex to refuse to promote the plaintiff because she was too aggressive for a female).

119. *See, e.g.*, Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 636, 647 (1999) (concluding that school districts may be liable for sexual or gender-based harassment of their students); *see also* Erin Kate Ryan, Note, *A "Queer" by Any Other Name: Advocating a Victim-Centered Approach to Title VII and Title IX Same-Sex Sexual Harassment Claims*, 13 B.U. PUB. INT. L.J. 227, 237–38 (2004) (arguing that *Davis* indicated its intent to incorporate the *Price Waterhouse* sex-stereotyping standard into Title IX cases).

120. *Seamons*, 84 F.3d at 1230–31.

121. *Id.* at 1232–33.

122. *Id.* (internal quotation marks omitted).

123. *Id.* at 1230 (internal quotation marks omitted).

124. Vaughn Roche, *Football Hazing Penalty Splits Tiny Utah Town: Student Is Threatened After His Complaint Ends His Team's Season*, L.A. TIMES, Nov. 22, 1993, MN, at 5.

Although there was support for Seamons, he was the object of criticism and threats. Just as assumptions about appropriate masculinities distributed cultural power in Glen Ridge and at the University of Colorado, masculinities distributed cultural and legal power in the *Seamons* cases. For example, one woman called his home repeatedly to tell him that she planned to burn down his house.[125] When the police tapped the phone, they discovered that the caller was the grandmother of another football player.[126] Many adults may feel a strong sense of injustice when boys' normalized behaviors are disrupted.

But let us complicate this narrative a bit. The "boys will be boys" attitudes may excuse criminal behavior of white, middle-class football players living in a New Jersey suburb or Utah. They may even extend to athletes and recruits at the University of Colorado who are not white, but they will not protect boys growing up in poor neighborhoods in Latino or black communities who have not been accepted as members of university athletic teams. Instead, even as potential victims, boys with a denigrated masculine identity often find their victimhood questioned because of their failure to perform their masculinity in a preferred way. Seamons evidently performed his masculinity inadequately because he did not demonstrate appropriate toughness: by reporting his assault to authorities, he violated a code of masculinity. Black and Latino victims in poor neighborhoods, too, have a denigrated masculinity, but unlike Seamons, they perform their masculinity in a manner that is too intense. In fact, the white community and the police often consider black and brown boys who live in poor neighborhoods to be hyper-masculine and dangerous. As potential perpetrators, then, they do not enjoy the same benefit of the doubt granted by the "boys will be boys" narrative. This is said to cause their own victimhood.

Ironically, then, black and Latino male victims may actually be treated like girls who are victims of sexual assaults. By performing their gender in an inappropriate way, they "ask for it." In this case, the "it" is police harassment and brutality coupled with white indifference or even tacit support. As legal scholar Ian Haney-López notes, "For many Americans, racial disparities in the criminal justice system not only fail to evoke a sense of moral outrage, but engender instead a belief in the basic fairness of the world as currently organized."[127] The assumptions that largely-racial-majority police forces act for good reasons and that racial minorities are crime-prone are built into some people's understandings of the world. The treatment of certain perpetrators as "our guys" and certain victims as "asking for it" helps ensure the hegemony of white, middle-class masculinity.

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125. *Id.*

126. *Id.*

127. Ian F. Haney-López, *Post-racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CALIF. L. REV. 1023, 1064 (2010).

III. MULTIDIMENSIONAL MASCULINITIES AND EXEMPTIONS FROM THE USUAL RULES

One way of thinking about the "boys will be boys" narrative is that it is a way that we justify a call for an exemption from the usual rules when particular types of boys and men act out, especially if they do so against girls or women or certain other types of boys and men. At the University of Colorado, we were asked to deploy an exemption from the normal rules of sexual assault and rape because football is a big business operating in a very competitive environment. As one of Coach Barnett's successors at Colorado, Dan Hawkins, famously screamed in response to a claim that he did not give his players enough time off: "It's Division I football! It's The Big 12! It ain't int[ra]murals!"[128] In other words, we should excuse football players' misbehavior because football is really important. In Glen Ridge, we were supposed to grant the same exemption because the boys were young and should be allowed to enjoy themselves before having to grow up. In *Seamons*, we were explicitly asked to exempt the harassment and sexual assault because this is how boys become men. These are, then, exemptions claimed in the name of masculinity. This part of the Essay utilizes another Ann Scales essay to advance a theory of masculine exemptions. It then uses the Zimmerman slaying of Martin to show how certain privileged men are allowed to position themselves as protectors of the community. Those men are exempted from the normal rules when they commit acts of violence against others whose masculinities are denigrated.

A. A Theory of Masculine Exemptions

In addition to her use of masculinities theory in analyzing gang rape, Scales criticizes the masculinist assumptions at the heart of American militarism. In her important essay, *Soft on Defense: The Failure to Confront Militarism*, Scales defines militarism as "the manifestation at every level of policy—military and otherwise—of the logic of war."[129] That logic includes the idea that every policy of all kinds "must be measured by its effect on military capability and readiness."[130] We must win, no matter the cost. Militarism, defined as the requirement that we win all wars regardless of the means necessary, leads to the promulgation of a set of exemptions from the normal rules. Dropping a nuclear bomb would usually be seen as overkill, but it is deemed to have been necessary to subdue the Japanese.[131] We usually try to balance liberty against

128. Optimum00, *Dan Hawkins*, YOUTUBE (Feb. 22, 2007), http://www.youtube.com/watch?v=9S3RbRifTSk (containing audio of Hawkins's rant as played on an episode of *The Best Damn Sport Show Period*). Of course, by focusing on football, we do not mean to suggest that sexual assault is not a pervasive problem elsewhere.

129. Scales, *supra* note 6, at 371.

130. *Id.*

131. *See* John Christoffersen, *Hiroshima, Nagasaki Atom Bombs Was Right Decision According to Majority of Americans: Poll*, HUFFINGTON POST (Aug. 4, 2009, 1:54PM ET),

security, but some believe that a majority of the members of the Supreme Court became "loyal foot soldier[s]" in support of the War on Drugs.[132] Preemptive strikes are usually deemed unjustified, but one was deemed necessary in Iraq to prevent Saddam Hussein from using weapons of mass destruction.[133] And so on. The insidious power of this logic is that "it is treasonous to notice it, much less question it."[134] Militarism thus operates like masculinities; it is an often-invisible assumption that drives results.[135]

The point here is that, like the "boys will be boys" narrative, militarism leads to the granting of an exemption from the normal rules. We see precisely how the military exemption works when we consider criminal law. Scales observes that "international law prescribes greater caution and self-restraint than is required in [U.S.] criminal self-defense law."[136] U.S. criminal law would normally say that if someone physically touches another with the mental state of desiring to harm him, that touching constitutes the offense of battery.[137] One defense to a battery charge is to claim self-defense. The defendant argues that although the prosecution can prove the elements of battery, the defendant can demonstrate that he was not the aggressor, that he reasonably feared his victim was imminently about to do him harm, and that he responded with proportionate force.[138] As Scales says, the United States' militarism is evident in its creation of an exemption from the imminence requirement, as well as international law, when it preemptively attacks countries like Iraq.[139] Scales demonstrated her courage as a scholar by speaking out against the Iraq War well before it was considered appropriate to do so. Then, as now, it was "treasonous to notice" U.S. militarism.[140]

The link between the granting of exemptions and norms of masculinity is highlighted by reconsidering preemptive strikes. Why does the United States grant itself an exemption from international law's ban on preemptive strikes? As University of Denver legal scholar Nancy Ehrenreich explains, we wish to bask in the "reflected masculinity" of the nation.[141] Having our nation look masculine raises our own masculine es-

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http://www.huffingtonpost.com/2009/08/04/hiroshima-nagasaki-atom-b_n_251108.html?view=print&comm_ref=false.

132. California v. Acevedo, 500 U.S. 565, 601 (1991) (Stevens, J., dissenting) ("[T]his Court has become a loyal foot soldier in the Executive's fight against crime.").

133. *See* Scales, *supra* note 6, at 380–81(criticizing the preemptive strike on Hussein).

134. *Id.* at 371–72.

135. *See generally* Michael Kimmel, *Integrating Men into the Curriculum*, 4 DUKE J. GENDER L. & POL'Y 181, 183–85 (1997) (explaining how masculinities invisibly influence law and culture).

136. Scales, *supra* note 6, at 381.

137. *See* MODEL PENAL CODE § 211.1 (2012).

138. *See id.* § 3.04 (stating requirements for self-defense); *see also id.* § 3.09 (requiring reasonableness for deadly force).

139. Scales, *supra* note 6, at 381.

140. *Id.* at 372.

141. Nancy Ehrenreich, *Disguising Empire: Racialized Masculinity and the "Civilizing" of Iraq*, 52 CLEV. ST. L. REV. 131, 132 (2005).

teem, even if we are women. In the second Iraq War, President George W. Bush implicitly acknowledged that he was going to war because Saddam Hussein "tried to kill my dad."[142] We as a country go to war to protect the family that is the United States. Bush's reasoning is an extension of the usual logic that we go to war to protect women and children.

Part of the reason it is treasonous to challenge militarism may be that its call for an exemption from the usual rules is grounded in a need to bask in the reflected masculinity of the nation. To challenge the exemption is not just to challenge militarism, but also to challenge the United States' symbolic manhood. After all, what kind of man does not defend his family's honor? A "wimp." An accusation hurled at both George H.W. Bush and his son, George W. Bush.[143] Symbolically, when the United States was attacked on September 11, 2001, the United States' family honor was attacked, as was the masculinity of the nation. We were challenged and defeated by a small group of radicals from the Middle East. We could not maintain our masculinity as a nation without retaliating. That is why, even though there was no proof that Saddam Hussein was involved in the September 11 attacks, we granted ourselves an exemption from the normal rules of self-defense.

Let us now think about when an exemption from the usual rules is not granted. Battered women sometimes attack their batterers, but rarely do they satisfy the traditional self-defense standard. Normally physically smaller and weaker than, as well as afraid of, their batterers, battered women sometimes launch preemptive strikes. Those preemptive strikes run afoul of self-defense law's imminence requirement.

If the United States can hypothecate weapons of mass destruction as grounds for attack, why do battered women lose when they launch preemptive strikes? Perhaps because, as legal scholar Susan Estrich and others have pointed out, the self-defense requirements reflect "boys' rules" in that they imagine a prototypical schoolyard fight.[144] So self-defense law rewards people for being appropriately manly. In the schoolyard, people would think a boy is justified in flattening the local bully if, and only if, the bully is threatening the boy right then and the boy doesn't respond to a punch with a bazooka. Similarly, in the schoolyard fight, boys are supposed to confront their bully face to face (or expected to just "take it like a man," as in the *Seamons* case above). When a battered woman instead stabs her batterer in the back or while he

142. HectorzHouse, *Bush "This Is the Guy Who Tried to Kill My Dad,"* YOUTUBE (Nov. 30, 2006), http://www.youtube.com/watch?v=uL6OGwsp9_o.

143. Carl M. Cannon, *Romney, Bush and Newsweek's "Wimp Factor,"* REAL CLEAR POL. (Aug. 2, 2012), http://www.realclearpolitics.com/articles/2012/08/02/romney_bush_and_newsweeks_wimp_factor.html (critiquing the "wimp" accusation (internal quotation marks omitted)).

144. Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1091 (1986) (internal quotation marks omitted) (coining the term "boys' rules").

is sleeping, the harm is not deemed to be imminent. The requirement that the harm one reasonably feared be imminent does not make sense when imposed on battered women. Battered women are constantly, reasonably in fear that they will soon be harmed again. So gender is certainly at work in that the exemption from self-defense rules is granted to men in battle with other men, either literally or figuratively, but not to women unless they can make out a special battered women's syndrome defense.[145] Women are underprivileged, even when most obviously justified in using violence. Thus, exemptions are granted not only because some men are privileged by the hegemonic masculinity, but also because women and some other men are denigrated.

B. A Case Study: George Zimmerman Slays Trayvon Martin

To explore the interplay between privilege and denigration in the granting of masculine exemptions, it is helpful to think about a complicated example where the exemption is both granted and withheld based on a combination of privileges and disabilities. George Zimmerman's slaying of Martin provides such a case study. What we find is that Zimmerman was privileged both by his race and the masculine role he was playing, while Martin's race-gender combination made him more readily available to be seen as having "asked for it." Shifting lenses, from the difference gender makes to the difference race and gender make together, allows us to see the utility of a multidimensional masculinities approach.

Consider the facts of George Zimmerman's alleged murder of Martin. Shortly before 7:15 p.m. on February 26, 2012, in Sanford, Florida, white-skinned, half-Latino neighborhood watch captain George Zimmerman called the police.[146] He told the dispatcher there had been break-ins in his gated community recently, so he was following a "real suspicious guy."[147] When that guy, seventeen-year-old black youth Trayvon Martin, started to run, the dispatcher told Zimmerman, "[W]e don't need you to [follow Martin]."[148] Two minutes later, Zimmerman killed Martin with one shot to the chest at close range.[149] The Sanford police quickly

145. *See* Angela P. Harris, *Gender, Violence, Race, and Criminal Justice*, 52 STAN. L. REV. 777, 790 n.47 (2000) ("The criminal doctrines of 'heat of passion' manslaughter and self-defense provide insight into local and national cultures of male honor.").

146. Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-racial Society*, 91 N.C. L. REV. 1555, 1557 (2013). Zimmerman's complicated racial identity is noted by Sifat Azad. Sifat Azad, *George Zimmerman Race: White, Latino, or Jewish? In the Trayvon Martin Case, It Shouldn't Matter*, POLICYMIC (Mar. 23, 2012), http://www.policymic.com/articles/5925/george-zimmerman-race-white-latino-or-jewish-in-the-trayvon-martin-case-it-shouldn-t-matter. For other insightful views on the Martin case, see L. Song Richardson & Phillip Atiba Goff, *Self-Defense and the Suspicion Heuristic*, 98 IOWA L. REV. 293, 316–17 (2012), and the materials cited in *Trayvon Martin Case Bibliography*, U. FLA. LEVIN C. L., http://www.law.ufl.edu/_pdf/academics/centers/csrrr/Trayvon_Martin_Bibliography_by_medium.pdf (last visited Dec. 9, 2013).

147. Lee, *supra* note 146, at 1557 (internal quotation mark omitted).

148. *Id.*

149. *Id.* at 1557–58.

released Zimmerman without charges under Florida's National Rifle Association-created "Stand Your Ground" Law, which grants "immun[ity]" from prosecution for shooting someone unless there is "probable cause" that the shooting was "unlawful."[150] A jury of his peers acquitted Zimmerman on the state criminal charges.[151]

In this context, we see Zimmerman as having been granted an exemption from the usual requirements of self-defense. There were at least three ways the Sanford police could have found probable cause that Zimmerman violated the self-defense rules. These bases should have been obvious given the Supreme Court's definition of probable cause. Probable cause is based upon a "common-sense" assessment when considering "the totality-of-the-circumstances."[152] The quantum of evidence required is that there is a "fair probability" that a crime is afoot and this suspect is involved.[153] A "fair probability" is a low standard.[154] It can be found even when there is a mere 33% chance of criminality. For instance, in *Maryland v. Pringle*,[155] the Court upheld a determination of probable cause even when assuming that only one of three suspects committed the crime and that each was equally likely to have done so.[156]

Zimmerman seems to fall within the probable cause standard because he admittedly shot Martin and seems to have violated the rules for asserting self-defense. First, by pursuing Martin, Zimmerman violated the rule that one not be the initial aggressor.[157] While Florida does not have a clear prohibition on being the initial aggressor, Zimmerman's pursuit seems all the more unlawful in light of the dispatcher's instruction not to follow Martin. Moreover, Zimmerman could easily have been found not to have been reasonably in fear of death or serious bodily harm from the slighter and unarmed Martin, even after allegedly having been knocked down (in what would surely be lawful self-defense by Martin against his pursuer).[158] Finally, Zimmerman's deadly response to the knockdown seems not to have been a proportionate response.[159]

Why, then, did the Sanford police refuse to charge Zimmerman with Martin's murder, and thereby grant Zimmerman an exemption from the usual self-defense requirements? It could have been a result of Zimmer-

150. *Id.* at 1559. *See* FLA. STAT. §§ 776.012, 776.032 (2013) (providing immunity from prosecution for self-defense unless there is "probable cause" the response is "unlawful").

151. Lizette Alvarez & Cara Buckley, *Zimmerman Is Acquitted in Trayvon Martin Killing*, N.Y. TIMES, July 14, 2013, at A1.

152. Illinois v. Gates, 462 U.S. 213, 238 (1983). Florida sets its criminal procedure law as exactly the same as Supreme Court law. *See* State v. Hankerson, 65 So. 3d 502, 506 (Fla. 2011).

153. *Gates*, 426 U.S. at 238.

154. Blalock v. State, 98 So. 3d 118, 121 (Fla. Dist. Ct. App. 2012).

155. 540 U.S. 366 (2003).

156. *Id.* at 368.

157. *See* MODEL PENAL CODE § 3.04(2)(b)(i) (2012) (stating bar on being aggressor with deadly force).

158. *See id.* § 3.09(2) (withholding imperfect self-defense from unreasonable attackers).

159. *See id.* § 3.04(2)(b) (limiting crimes warranting deadly force).

man's privileged racial status. As legal scholar Cynthia Lee's insightful article on the case says, "Had Zimmerman been an African American man who followed and then shot an unarmed Caucasian teenager during a fistfight, it is unlikely that police would have released Zimmerman without any charges."[160] Lee thus proposes implicit racial bias as the explanation for the exemption. Implicit bias is the set of subconscious assumptions an observer draws because of the status of the subject.[161] Lee explicates the extensive evidence that most people's default position is to assume that blacks are crime prone.[162] Unless police officers are primed to acknowledge that race is a factor in their decision making, says Lee, they will subconsciously explain the facts based on the black-man-as-criminal stereotype.[163]

Another way that race played into Zimmerman's immediate release was the geographical context. As legal scholar Bennett Capers has pointed out, there is a racialized policing of space.[164] Black men in particular are closely surveilled and often harassed when they are racially "out of place."[165] Zimmerman, as a watch captain, participated in the policing of space. Gated communities, such as the one in which Zimmerman killed Martin, are often especially vigilant about excluding people who are racially out of place.[166] It should not surprise anyone that incidents like this one occur more frequently in the U.S. South, which has traditionally been more racist than other parts of the country.[167] Implicit bias against blacks and the racialized policing of space go a long way toward explaining the Sanford Police Department's uncritical acceptance of Zimmerman's fear of Martin as reasonable. Accordingly, Zimmerman's white appearance, which probably matches his self-perception, might explain his being granted an exemption from the normal self-defense rules.

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160. Lee, *supra* note 146, at 1566.

161. *See* JERRY KANG, IMPLICIT BIAS: A PRIMER FOR COURTS 1–2 (2009), *available at* http://www.americanbar.org/content/dam/aba/migrated/sections/criminaljustice/PublicDocuments/unit_3_kang.authcheckdam.pdf.

162. Lee, *supra* note 146, at 1569–86.

163. *Id.* at 1580–86. *See generally* Frank Rudy Cooper, *We Are Always Already Imprisoned: Hyper-incarceration and Black Male Identity Performance*, 93 B.U. L. REV. 1185 (2013) (arguing attributed identity of black men as criminal in culture and law has led black men to incorporate the possibility of being imprisoned into their self-identities).

164. *See* I. Bennett Capers, *Policing, Race, and Place*, 44 HARV. C.R.-C.L. L. REV. 43, 43–47 (2009) (detailing police enforcement of segregated uses of space).

165. *Id.* at 69–70 (internal quotation marks omitted). *See also* Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 969 (2002) (describing racialized police harassment).

166. *See* Haney-López, *supra* note 127, at 1037 (discussing racism in gated communities).

167. Anyone with knowledge of U.S. history and present culture should require no footnote here. Consider, for instance, the White Citizen councils formed after the *Brown* decision threatened to desegregate the South and the regional disparities in white voting for the first black major party nominee for President. *See also* Tamara F. Lawson, *"Whites Only Tree," Hanging Nooses, No Crime?: Limiting the Prosecutorial Veto for Hate Crimes in Louisiana and Across America*, 8 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 123, 144–55 (2008) (detailing racist use of space at a Southern high school and the local District Attorney's racist treatment of its students).

While several scholars have noted the operation of Zimmerman's racial privilege, few have noted the way he benefitted from his gender status. Here is where Zimmerman's role as "watch captain" should be considered. He saw himself as the protector of his gated community. As legal scholar Valorie Vojdik explains in her chapter in the book *Masculinities and the Law*, men's role as protectors of women is constitutive of the common understanding of the nation as masculine.[168] As we noted with respect to the bombing of Iraq, nations have often been seen as protectors in whose reflected masculinity we may all bask. At the micro-level, the National Guard, the police, and even neighborhood watches draw upon the legitimacy of their roles as masculine protectors. Zimmerman's figurative likeness to the military and police for his community could have subtly led the Sanford Police Department to grant him an exemption from the normal self-defense rules.[169] That Zimmerman is both male and (presumptively) white heightens the implication that the Sanford Police saw him as a legitimate protector rather than a reckless vigilante. In that sense, Zimmerman's gender privileged him in his confrontation with a racially distinct intruder. So Zimmerman was privileged by race and gender; especially so in the context of a Southern, gated community.

The identity of the person he was following also seems to have been crucial in allowing Zimmerman not to act with restraint. As Lee says, "It is unlikely that Zimmerman would have thought Martin was 'real suspicious,' 'up to no good,' and 'on drugs or something' if Martin had been [w]hite."[170] If Zimmerman's victim had been white, would the Sanford Police have been as likely to set him free? Probably not. A study found that there are racial disparities in how Florida's Stand Your Ground immunity is applied.[171] Zimmerman's exemption was relational; he could be overprivileged because Martin was underprivileged.

Reinforcing the sense that Martin's race–gender combination made him more readily accepted as the villain in Zimmerman's story is the fact that Martin was acting appropriately. He was minding his own business when Zimmerman started stalking him. Even in Zimmerman's narrative, Martin only hit Zimmerman after Zimmerman chased him. In fact, this sounds like a good scenario for Martin to have claimed self-defense against Zimmerman. The cultural legitimacy of Martin's actions extends as well to his exercise of masculinity. He was acting as we might expect

168. *See* Valorie K. Vojdik, *Masculinities, Feminism, and the Turkish Headscarf Ban: Revisiting* Şahin v. Turkey, *in* MASCULINITIES AND THE LAW: A MULTIDIMENSIONAL APPROACH, *supra* note 7, at 270 (explicating masculine assumptions in the Islamic headscarf debate).

169. Perhaps the police were also granting him the exception because he was a quasi-lawman based on his watch captain status.

170. Lee, *supra* note 146, at 1565–66.

171. *See* Rmuse, *Stand Your Ground's Hideous Double Standard of Prosecuting African-Americans*, POLITICUSUSA (Apr. 15, 2012, 10:00 AM), http://www.politicususa.com/whites-only-stand-your-ground.html (arguing that Stand Your Ground Laws are disparately applied).

a man to do: walking where he pleased.[172] Seeing Martin's actions as inappropriate requires implicitly drawing on the idea that he was racially out of place. Because he was a young black male, the Sanford Police readily understood Martin's presence in a gated, white community as questionable despite the appropriateness of his response to being pursued by Zimmerman.

We can sum up the insights of this inquiry with another question: Would Zimmerman have shot Martin if Martin had been a black girl? The idea that Martin could be a girl is complicated, in large part because some female masculinities involve girls looking like black boys. Consider for example, Snoop from the critically acclaimed television show, *The Wire*.[173] She is a baggy-pants-wearing drug war assassin who presents as very masculine. But assuming the female Martin was not that type of girl, what result? It seems to us that the female Martin would not have been shot. She might have been assumed to be a thief,[174] but she would not have pricked Zimmerman's masculine esteem. She would not have been such a threat to the purity of Zimmerman's community. As a consequence, Zimmerman would have been less likely to hunt her down and shoot her. Nor would the Sanford Police have been as likely to credit Zimmerman's self-defense claim. As a young black woman, the female Martin would have faced other threats, but she would have been more likely to live another day.

Thus, it seems that both the law and society did not give Martin the benefit of any doubt about his intentions because he was a young black male. The "boys will be boys" exemption did not apply to him. When Zimmerman pulled the trigger, he was acting like a man by protecting his neighborhood from an intruder. His behavior mirrored that of the U.S. military when we preemptively attacked Iraq. In this sense, narratives about preferred and denigrated masculinities empowered Zimmerman to kill Martin in contradiction of the usual self-defense rules.

C. Similarities Between "Boys Will Be Boys" and Exemptions to Self-Defense Rules

The assumption of Martin's wrongful presence brings us back to the "boys will be boys" narrative. Some boys do not have the privileges of the University of Colorado or Glen Ridge rapists. Some boys—black boys, for example—are presumed criminal. The predominant narrative about black boys is also based on a sociobiological narrative. Black boys are presumed to be more agitated. An example of this presumption is the

172. As we noted in the Introduction, *see supra* p. 182, this is not a privilege that women have, at least not without risking being depicted as having "asked" for harassment.

173. *The Wire* (HBO 2002–2008).

174. *See* Sherri Sharma, *Beyond "Driving While Black" and "Flying While Brown": Using Intersectionality to Uncover the Gendered Aspects of Racial Profiling*, 12 COLUM. J. GENDER & L. 275, 280–93 (2003) (detailing racial profiling of women of color).

movement for teaching black boys separately from girls, which legal scholars Verna Williams and David Cohen have criticized.[175] We also see this presumption in the ways that black boys are disproportionately punished for initial infractions in school, which implies that even as small children they are already incorrigible.[176] Another example of the belief that black boys are presumed to be criminal is the disproportionate punishment, instead of rehabilitation, that juvenile courts mete out to boys of color, which University of Denver legal scholar Rashmi Goel has documented.[177] All of these assumptions depict black boys as presumptively bad and inherently dangerous.[178] They are "failed men" as Devon Carbado describes it.[179] Consequently, black boys are not accorded the "boys will be boys" exemption.

Another link between the "boys will be boys" narrative and the granting of exemptions from the self-defense rules is that, like women who are in the wrong place, victims such as Hussein and Martin are depicted as having "asked for it." Racial otherness seems to have done the work of blaming the victim in both cases. Like Seamons, they were seen as performing their masculinity in an inappropriate manner. While Seamons was insufficiently masculine, Hussein and Martin were presumed to be excessively masculine. In all three cases, the denigrated masculinities of the victims were crucial to the ability of privileged men to commit violence against them.

IV. CONCLUSION: PREFERRED MASCULINITIES, RACE, AND CLASS

Ann Scales's work acknowledges the importance that our society places on invisible concepts of masculinity when we judge individual, group, and even our nation's actions. With reference to Scales's articles and through the use of masculinities theories, we have analyzed the law's and society's reactions to sexual assault of young women and men, as well as the exemption that some boys receive from the usual rules for criminal assaultive behavior through the "boys will be boys" narrative. This narrative is particularly strong where the boys who are accused of criminal sexual assault perform the most preferred form of masculinity. Female victims are blamed for inviting the assault, whereas male victims are blamed for not "taking it like a man." The assault, then, enhances the

175. *See* David S. Cohen, *No Boy Left Behind? Single-Sex Education and the Essentialist Myth of Masculinity*, 84 IND. L.J. 135, 174 (2009); Verna L. Williams, *Reform or Retrenchment? Single-Sex Education and the Construction of Race and Gender*, 2004 WIS. L. REV. 15, 21–26 (2004).

176. *See* Ruth Zweifler & Julia De Beers, *The Children Left Behind: How Zero Tolerance Impacts Our Most Vulnerable Youth*, 8 MICH. J. RACE & L. 191, 201–02, 204–07 (2002) (citing statistics on disproportionate school punishment of blacks).

177. *See* Rashmi Goel, *Delinquent or Distracted? Attention Deficit Disorder and the Construction of the Juvenile Offender*, 27 LAW & INEQ. 1, 28–40 (2009).

178. *See* Cooper, *supra* note 16, at 857–59 (explicating bipolar black masculinity thesis).

179. Devon W. Carbado, *Masculinity by Law*, *in* MASCULINITIES AND THE LAW: A MULTIDIMENSIONAL APPROACH, *supra* note 7, at 51, 53 (discussing the social construction of black men as having "surplus" or "failed" masculinity (internal quotation marks omitted)).

masculinity of the perpetrators by demonstrating their superiority over the victims—both male and female. But the "boys will be boys" narrative is available only to those boys who behave consistently with the preferred modes of masculinity. Racial minority boys and men, especially those living in poor communities, are considered to perform a dangerous, hyper-masculine identity that precludes them from the benefit of the doubt expressed in the "boys will be boys" narrative. And, because of the presumption of dangerousness of some males, white males may enjoy exemptions from the self-defense rules if they harm people with denigrated masculinities.

Ann Scales reminds us that this distribution of power occurs in a similar way when we consider military and national power. Even though the U.S. military has significantly more might than its Iraqi and other Middle Eastern opponents, we presume that our weaker foes are exceedingly dangerous, and we take an exemption from the rules by engaging in preemptive strikes. As Zimmerman's killing of Martin shows, the exemption results from both the privileging of some boys and men as well as the denigration of women and certain other men. We may not use the term "boys will be boys" when condoning preemptive strikes, but we excuse masculine demonstrations of power based on our fear of "the other." Power, then, is distributed to and among men based on race, class, and the performance of masculinity. Scales's work reminds us that when masculinities distribute power, lives stand in the balance.