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## SECTION 3

# GENDER, SEXUALITY AND THE LAW

## “The Violence of Gender, the Gender of Violence: Law, Gender and Violence”

Lisa A. Crooms,  
Howard University School of Law

### Introduction

The law defines narrowly the space where gender and violence collide. There, sex and gender are synonyms, and legal sex/gender is presumptively both heterosexual and about women. Consequently, important differences between sex and gender are obliterated, the legal identity of all but heterosexuals is erased, and the various ways that men are gendered are obscured. This is the background against which the law defines gender-based violence as violence against women in general and male violence against women in heterosexual contexts in particular.<sup>1</sup>

This essay offers an alternative framework in which to analyze sex, gender and violence beyond the law's current discourse and its “gender-based violence = male violence against women in heterosexual contexts” formulation. Rather than see gender-based violence as only involving presumptively female victims, this alternative analysis begins with the idea that virtually all violence is gendered. Under this analysis, focusing solely on the victim's gender is no

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1. These heterosexual contexts are either acts, in the case of rape and other sexual assault, or relationships, in the case of domestic violence and sexual assault between men and women as spouses or intimates, as well as that violence facilitated by these heterosexual relations, e.g. incest.

longer warranted; attention must also be paid to the relationship between the perpetrator's gender and the violence. This alternative analysis is not meant to deny the reality of either the violence suffered by many women at the hands of men or the predominance of men as perpetrators of violence.<sup>2</sup> Rather, it is designed to make explicit the connections between violence, which is largely a young male phenomenon, and destructive ideas about masculinity that terrorize entire communities. This essay proposes that we look anew at the relationship between gender and violence because violence may most productively be analyzed in terms of gender beyond the law's current focus on women as victims.

The remainder of this essay is organized as follows. Part I uses U.S. Supreme Court opinions to demonstrate how the law not only defines sex as gender and vice versa, but also conceptualizes its sex/gender as primarily a condition for women in heterosexual contexts. Part II turns specifically to the legal conceptualization of gender-based violence as male violence against women in heterosexual contexts and explores some of the limitations of this legal conceptualization. Part III introduces Black Feminist Thought and Critical Race Feminism, central to which are the ideas of intersectional identities and interlocking oppressions that operate in an overarching "matrix of domination." This section concludes with an alternative analytical framework for gender-based violence in which the perpetrator's gender is relevant. This analytical shift represents Black Feminist Thought and Critical Race Feminism as praxes that seek to interrogate fully the relationship between identity, op-

2. While a full discussion of the debate about sex and gender as matters of "nature," "nurture," or both is beyond the scope of this essay, it is important to note that the debate is hampered by the tendency of many feminists and others to avoid considering fully the biology that might be at work in gender because of concerns about biological determinism. As Carol Smart notes in *FEMINISM AND THE POWER OF LAW*, the desire of some feminists to avoid seeing any biology in gender for women while casting men as biologically-driven oppressors is problematic. This is clearly a double standard that does very little to further our understanding of the relationship between biology, on the one hand, and social constructions and conventions, on the other hand. Research exploring the prevalence of male aggression and violence, as well as female subordination and relative submissiveness, across both societies and species suggests that it may be more fruitful to abandon the "nature/nurture" dichotomy and to adopt an analysis that sees both nature and nurture as legitimate factors in the ways that sex and gender are both experienced and produced on continuums similar to the lesbian continuum discussed by Adrienne Rich in her essay *Compulsory Heterosexuality and Lesbian Existence* included in *BLOOD, BREAD AND POETRY: SELECTED PROSE, 1979-1985* (1986). See also MICHAEL P. GHIGLIERI, *THE DARK SIDE OF MAN: TRACING THE ORIGINS OF MALE VIOLENCE* (2000) and RICHARD WRANGHAM & DALE PETERSON, *DEMONIC MALES: APES AND THE ORIGINS OF HUMAN VIOLENCE* (1996).

pression, and violence in light of the intra- and inter-gender hierarchies under which multiple masculinities and femininities co-exist.<sup>3</sup> Finally, Part IV uses two stories of gender-based violence to illustrate not only the limits of the current legal definition of gender-based violence, but also the possibilities of the alternative analytical framework proposed in Part III.

## Sex, Gender and Law

For almost 25 years, the U.S. Supreme Court has been crafting a constitutional jurisprudence of sex and gender, central to which is the eliding of these two related, but distinguishable, concepts.<sup>4</sup> The Court's refusal to recognize constitutionally protected individual rights in contexts outside of heterosexuality further limits sex/gender, so that, as a legal matter, sex/gender is presumptively heterosexual. For example, while constitutional privacy is broad enough to include the rights of heterosexual couples and women in matters related to reproduction, it has been construed to exclude homosexual acts between consenting adults.<sup>5</sup> An additional, but entirely understandable, limitation concerns the specificity of the law's sex/gender, which casts it as primarily a matter for women oppressed by men, both institutionally and individually.<sup>6</sup> In many situations, patriarchy, male supremacy and, in the most

3. According to Michael S. Kimmel, "[t]he difference between male and female sexuality reproduces men's power over women, and, simultaneously, the power of some men over other men, especially of the dominant, hegemonic form of manhood—white, straight, middle-class—over marginalized masculinities." Michael S. Kimmel, *Clarence, William, Iron Mike, Tailhook, Senator Packwood, Spur Posse, Magic... and Us in TRANSFORMING A RAPE CULTURE* 119, 123 (1993).

4. See e.g. *G.E. v. Gilbert*, 429 U.S. 125 (1976), *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979), *Harris v. Forklift Systems Inc.*, 510 U.S. 17 (1993) (addressing legal sex/gender in the context of employment discrimination); *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982) and *U.S. v. Virginia*, 518 U.S. 515 (1996) (doing the same in the context of public education); *Califano v. Westcott*, 443 U.S. 76 (1979) and *Heckler v. Matthews* 465 U.S. 728 (1984) (same in the context of government benefits); *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464 (1981) (criminal law, statutory rape, and sex/gender under the Fourteenth Amendment's Equal Protection Clause).

5. Compare *Bowers v. Hardwick with Griswold v. Connecticut and Eisenstadt v. Baird*. See also, Robert S. Chang & Jerome McCristal Culp, Jr., *Nothing and Everything: Race, Roemer, and Gay, Lesbian and Bisexual Rights*, 6 WM. & MARY BILL OF RTS. J. 229 (1997) (describing the Supreme Court's opinion in *Roemer v. Evans* as recognizing individual rights despite, not because of, orientation).

6. This limitation is due, in large part, to the historical specificity of women's subordination and the role that the law plays in facilitating that subordination. For example, in

extreme cases, misogyny operate to construct male domination and female subordination as natural and, consequently, beyond legal redress. The Court's attempt to remedy the legally cognizable injuries resulting from this triumvirate of women's oppression are careful not to disturb the largely artificial line between public and private that marks the boundaries within which the law may properly operate and beyond which the law may not reach. These remedial efforts are further limited by the formal equality and sex- and gender-neutrality currently in fashion, which allow both men and women to pursue claims of sex/gender discrimination under laws commonly understood to protect women's rights.<sup>7</sup> Sex- and gender-neutral language, however, is interpreted in sex- and gender-specific ways that render sex/gender a woman's issue with which the vast majority of men rarely have to be directly concerned. While the messages are mixed, it is clear that what is largely absent from this legal discourse is an explicit analysis of the various ways in which men are gendered, the intra-gender hierarchy of masculinities, and how these two things are manifested in the law.

In the 1996 case of *Oncale v. Sundowner Offshore Services, Incorporated*, the Court concluded that same-sex sexual harassment was actionable under Title VII of the Civil Rights Act of 1964 provided that the claimant could show that not only was he harassed because he was a man, but also no women were or would have been treated in the same way. In reaching its conclusion, the

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*Orr v. Orr*, 440 U.S. 268 (1979), the Court concludes that the sex-specific language of the challenged statute violated the Equal Protection Clause of the 14th Amendment because it not only relied on the gender-based roles of husbands and wives, but also rested on a presumption of female dependence. The Court went on to state that it "would initially approach the 'compensation' rationale [offered by the State] by asking whether women had in fact been significantly discriminated against in the sphere to which the statute applies a sex-based classification, leaving the sexes 'not similarly situated with respect to opportunities in that sphere.'" It must be noted, however, that the likelihood that the law will assign legal liability for women's injuries resulting from even its limited sex/gender oppression is linked to how the causal chain between act and injury is constructed. See e.g. *infra*, discussion of *Personnel Administrator of Massachusetts v. Feeney*.

7. Beginning in the 1980s, the Court's anti-discrimination cases have embraced neutrality and eschewed the idea of group rights and "protected classifications." For example, Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment based on, *inter alia*, sex. While many of the Court's Title VII cases have focused on the statute as a remedy for the employment discrimination suffered by women, as a class, the law has been interpreted so that it is consistent with formal equality and sex/gender-neutral so that it "protects men as well as women." *Oncale v. Sundowner Offshore Services, Incorporated*, 523 U.S. 75 (1998) citing *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 682 (1983).

Court interpreted Title VII as both sex/gender-neutral and sex/gender-specific, i.e. sexual harassment in employment can be experienced by both women and men, but it must be experienced specifically because of the claimant's sex/gender.

The Court's interpretation of Title VII, however, is both neutral and specific in another way. In reversing the lower court's interpretation of Title VII as excluding same-sex sexual harassment, the Court provides no guidance to help the lower court overcome the limited understanding of sexual harassment on which its reversed decision was based. The full implications of this failure on the part of the Court may best be appreciated in terms of the legal precedent of sexuality and sex/gender. Title VII's same-sex sexual harassment is heterosexual by default because Title VII's sex does not provide rights to sexual minorities on the basis of sexuality and sexual orientation. Title VII's prototypical sexual harassment victim is a heterosexual woman harassed by a heterosexual man. As such, victimization is primarily cast as a matter of femaleness because sex/gender is thought to be about women and data overwhelmingly show that women are harassed by men.

While Oncale's heterosexuality was not an issue, his legal credibility as a victim of sexual harassment would seem to turn on his ability to approximate the position of the law's presumptively female victim of sexual harassment. The law's gender narrowness would cast Oncale as a female surrogate in a case of heterosexual sexual harassment who was harassed because of his sex, i.e. male. By focusing on Oncale's sex-specific vulnerability to this sexual harassment, the law misses the larger context of the intragender hierarchy of masculinities in Oncale's workplace under which Oncale was both deemed the most devalued man and sexually harassed because of his status. This hierarchy also allowed Oncale's harassers to define their masculinity in terms of their ability to harass Oncale without compromising their legal heterosexuality by engaging in homoerotic acts.<sup>8</sup> In addition, understanding Oncale's harassment as a function of contested masculinities avoids making victimization turn on femaleness by seeing the gender at work in the production of masculinities under which Oncale could be (indeed, had to be) harassed. Unfortunately, this type of analysis is unlikely to feature in those cases which cite *Oncale* as precedent. It is more likely that the credibility of male victims of same-sex sex-

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8. Oncale was restrained by two co-workers while his supervisor "placed his penis on Oncale's neck, on one occasion, and on Oncale's arm, on another occasion." Oncale was also threatened with rape by the same two co-workers and had a bar of soap pushed into his anus by his supervisor as he was restrained by one co-worker in the shower. *Oncale v. Sundowner Offshore Services, Inc.*, 83 F.3d 118, 118-119 (1996).

ual harassment will be contingent on their status as female surrogates in what would otherwise be heterosexual harassment by men.

*Personnel Administrator of Massachusetts v. Feeney* (442 U.S. 256 (1979)) demonstrates the limits of the Court's sex/gender in a context where it failed to analyze explicitly the connections between maleness, the military and the law on which the plaintiff's claim turned. Helen Feeney used the Fourteenth Amendment's Equal Protection Clause to challenge the constitutionality of Massachusetts' sex-neutral veterans' preference law. The Court deemed the statute constitutional because it extended a preference to veterans because they were veterans rather than because the class of veterans was overwhelmingly male. Because Helen Feeney proffered no direct evidence of intentional sex/gender discrimination by Massachusetts, the Court denied her relief. If the case involved sex/gender discrimination, according to the Court, then it was that of the federal government which enjoys considerable discretion to act in matters related to raising armies, conducting wars and defending "national security." According to the Court, Helen Feeney could not hold Massachusetts liable for the admittedly discriminatory policies of the Federal government.

In dispensing with Feeney's legal claim, the Court defines the gendered nature of the military—the overall context in which the preference operates—as legally irrelevant. Indeed, the Court rejects the idea that the "veterans' preference is 'inherently non-neutral' or 'gender-based.'" While it recognizes the culpability of the federal government in "prevent[ing] all but a handful of women from becoming veterans," it focuses on intentional discrimination (or the lack thereof), which shields the State from liability for using a preference that is integrally linked to "historical[ly] gender-based federal military personnel practices..." In this way, the Court not only leaves Helen Feeney and other women without a legal remedy, but also fails to address the maleness on which the military relies as a legal matter of sex/gender.

## Sex/Gender, Violence and Law

The Court's missteps in its construction of sex/gender and its accompanying analysis have particular implications for the legal treatment of violence as a function of gender. First, eliding sex and gender to produce sex/gender and limiting legally legitimate sex/gender to heterosexuality means that gender-based violence is most commonly understood in terms of male violence against women victims in heterosexual contexts. Moreover, because this jurisprudence is largely remedial and attached to real issues of historical and contemporary male domination and female subordination, when violence is

analyzed as a legal matter, sex/gender neutral language tends to be interpreted in sex/gender-specific ways so that the credibility of male victims of gender-based violence may be compromised by the mutual exclusivity of maleness and victimization, which is presumed to be female.

To explore this more fully, consider the Violence Against Women Act of 1994 (VAWA) and the recent Supreme Court case of *Morrison v. U.S.* in which VAWA's constitutionality was challenged. As enacted by Congress, VAWA provided a civil rights remedy to those victims of crimes of violence motivated by gender, which it defined as "crime[s] of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender."<sup>9</sup> While the Act's definition of crimes of violence motivated by gender is sex- and gender-neutral, VAWA's title, as well as the congressional record on which the Act is based, are sex- and gender-specific. That is, crimes of violence motivated by gender are those crimes of violence committed by perpetrators who are men against victims who are women in explicitly heterosexual contexts. To see this result as perfectly understandable, one need only look to the history which laws such as VAWA are intended to respond. Here, women have been subordinated by male domination operating at both an individual and an institutional level which, for the majority of the time, has been constructed as the result of largely extra-legal conduct protected by privacy, family and patriarchal prerogatives.<sup>10</sup>

During its 1999–2000 term, the Supreme Court considered the constitutionality of VAWA in light of Congress' power both "to regulate [c]ommercer... among the several states"<sup>11</sup> and "to enforce, by appropriate legislation, the provisions of [the Fourteenth Amendment]."<sup>12</sup> While the constitutional issues raised in *Morrison's* case did not turn on the specific facts of Christy Brzonkala's substantive claim, it is important to note that she was allegedly raped by two football players, only one of whom was mildly disciplined because of, *inter alia*, notice issues rather than issues of Brzonkala's credibility. Virginia Polytechnic Institute's mishandling of Brzonkala's rape as a student disciplinary matter led her to pursue a civil rights claim under VAWA, which had been

9. VAWA 42 USC §13981, Chapter 136. Violent Crime Control and Law Enforcement; Violence against Women; Civil Rights for Women (1994).

10. See also *United Nations Declaration on Violence Against Women* (using a similar approach to remedy women's injuries at the hands of male perpetrators based on the reality that men and the law have conspired to place many of these injuries beyond the proper reach of the law).

11. U.S. CONST., ART. I, §8.

12. U.S. CONST., AMEND. XIV, §5.

passed about two weeks before Brzonkala was raped.<sup>13</sup> The Court concluded that VAWA's civil rights remedy could not properly be viewed as an appropriate exercise of congressional power. Consequently, the Court struck down VAWA's civil rights remedy as unconstitutional.

In his dissenting opinion, Justice Souter provides an example of the Court's production of sex/gender as a matter primarily concerned with women vis-à-vis men and heterosexuality. As noted by Souter, "while [VAWA's] civil rights remedy limits its scope to 'crimes of violence motivated by gender'... the meaning of 'motivated by gender' has not been elucidated by lower courts, much less by this one."<sup>14</sup> Souter, however, opts for a definition of "motivated by gender," central to which is "the problem of violence against women." Construed in this way, Souter sees VAWA as an appropriate exercise of Congressional power supported by ample evidence of the impact and the prevalence of male violence against women in heterosexual contexts. This violence is gender-based because of the perpetrator's animus towards the victim's female sex/gender.

This definition, however, leaves no room to consider the relationship between the perpetrator's gender and the violence, because this relationship is omitted from the legal analysis. Consequently, little serious thought is given to the connection between violence and the production of masculinities. Here, not all men are constructed as equal and this becomes the source of the gender-based oppression that too often manifests itself in the flashes of violence between men that are rarely seen as matters of gender.

## Using Black Feminist Thought/Critical Race Feminism to Construct a New Analytical Paradigm

The remainder of this essay makes the case for expanding gender-based violence to include not only the relationship between the violence and the perpetrator's gender, but also violence involving male victims. In this analysis, the presence or absence of gender-based violence no longer turns on the presumed femaleness of the victim. Rather, gender becomes the central aperture through which all violence is seen, the genders of both the victim and the perpetrator are relevant, and violence beyond heterosexual contexts is included on its own terms. In other words, this alternative analysis begins from a point of inclusion rather than exclusion, which is a central principle on which both Black Feminist Thought (BFT) and Critical Race Feminism (CRF) are based.

13. See generally, Patrick Tracey, *Christy's Crusade*, MS. 53 (Apr./May 2000).

14. *U.S. v. Morrison*, 120 S.Ct. 1740, 1760 (fn. 2) [Souter, dissenting].

BFT is an ideological stance that simultaneously intervenes in two discourses of identity and oppression. On the one hand, it challenges mainstream feminism's tendency to de-emphasize differences among women and to ignore the sites of power from which some women either can or do oppress other women and some men. On the other hand, BFT challenges the men in communities of color who see their racial and ethnic struggle in terms of the white supremacist patriarchy which continues to deny them the manhood their "colored" patriarchies should guarantee. Chief among the things they are denied is their right to exercise patriarchal prerogatives and privileges vis-à-vis women of color without fear of the government intrusion with which many communities of color must constantly and disproportionately contend. In this way, BFT gives voice to the experiences and epistemologies of black women in contexts where both are often either ignored or cast as something beyond the proper bounds of sex, gender or race.

One of BFT's central principles is that identity is intersectional. That is, BFT's identity forms at the interstices of multiple axes, rather than along a series of severable and parallel single axes. For example, BFT rejects the idea of identity as either sex/gender or race and replaces it with an identity that is both sex or gender and race [and class and ethnicity and sexual orientation/sexuality, etc.].

BFT's other central principle is that oppressions operate in an interlocking fashion as part of "the matrix of domination." This matrix recasts oppression's fundamental issue as "the social relations of domination regardless of either the identity of the individuals involved or the specific systems of oppression that drive the particular domination in question."<sup>15</sup> Although the real and substantive differences between the ways oppressions are experienced are not denied, these differences "become less important, and the overarching objective is understanding the commonalities of oppressive relations between 'groups [that] possess varying amounts of penalty and privilege in one historically created system."<sup>16</sup> In this way, neither patriarchy nor white supremacy, for example,

15. Lisa A. Crooms, *Indivisible Rights and Intersectional Identities or, "What Do Women's Human Rights Have To Do With the Race Convention?"*, HOWARD L.J. 619, 622 (1997).

16. *Id.* quoting Patricia Hill Collins, *Black Feminist Thought: Knowledge, Consciousness and the Politics of Empowerment* 225–26 (1990). *supra* note— at 225–26. This approach "should not be understood to deny that there are substantively different types of oppressions. For example, the violence of racist hate crimes committed by white supremacy is quite different from manifestations of the ableism with which the physically disabled must contend." Crooms, *supra* note 15— at 622.

can be analyzed independently, but must, instead, be viewed as working in concert in one multi-layered and historically-created system of oppression.

CRF represents the marriage of BFT principles with legal analysis and theory.<sup>17</sup> Like BFT, CRF intervenes in discourses in which race is normatively gendered male and gender is normatively sexed female and raced white. Both BFT and CRF embrace the complexities of identity and oppression, which can make oppressor and oppressed highly situational statuses. They challenge us to interrogate and to revise the assumptions on which our understanding of identity and oppression is based. They also implicitly call on us to move beyond focusing on gender as a matter of the multiplicity of women, which many of its adherents have explored and to consider, at the very least, the multiplicity of men as well.

A rigorous application of BFT and CRF principles allows us to see gender more completely, i.e. as a matter of both inter- and intra-gender hierarchies. Using BFT and CRF in this way reveals gender not to be an issue solely for women. Adhering to BFT and CRF principles compels us to include men in our gender analysis and theory because they are gendered in ways that are highly problematic and destructive for both themselves and their communities. The intersectional identity paradigm, the “both/and conceptual stance” and the “matrix of domination” also mean that being a victim of gender-based violence can no longer be the exclusive province of women. Rather, some men, particularly young black and Latino men, are victims of violence that is gendered to its core. Consequently, CRF and BFT implore us to explore the relationship between gender and violence beyond oppressive male perpetrators, oppressed female victims and heterosexuality. They push us to consider gender-based violence in terms of not only the gender of the victim, but also that of the perpetrator.

This shift should yield the following results. As an initial matter, it should facilitate a more complete understanding of the relationship between gender and violence that is contingent on neither the victim’s gender nor presumed heterosexuality. This, in turn, should allow us to see the gender in virtually all violence, without fear that doing so will mean gains for men at the expense

17. Critical Race Feminism, as a legal theoretical stance, not only has roots in the oppositional discourses of Critical Legal Studies, Critical Race Theory and Feminist Legal Theory, but also represents an analysis that is, itself, oppositional within these discourses. Its method includes multiple consciousness and a bottom-based focus, which illuminates the position of the ignored and disempowered to challenge the biases and privileges left unaddressed by Critical Legal Studies, Critical Race Theory and Feminist Legal Theory. See generally CRITICAL RACE FEMINISM: A READER (Adrien K. Wing, ed., 1997).

of women in the law’s zero-sum game of sex, gender and violence. Rather, focusing more intently on the gender in virtually all violence should mean that gender-based violence against women is no longer relegated to the margins of the violence discourse. This should create a sounder basis for both analytical and remedial purposes. This should also allow us to assess better the efficacy of and justice in not just those measures designed to protect women from men, but also current “Law and Order” initiatives which include mandatory minimum sentences, the growing prison-industrial-complex, and the brutal shows of police force crucial to “zero tolerance” campaigns. We can develop a gender critique of the criminalization of young black and Latino men that fuels lawmakers’ efforts to fight crime, particularly the “War on Drugs.”

In addition, using gender this way requires us to revisit the basic premises on which the law’s treatment of sex, gender and violence is based, of which VAWA is just one example. It would allow us to confront John Oncale’s sexual harassment not as a matter of sex/gender-neutrality and -specificity, but rather as a matter of Oncale’s devalued position in a workplace ordered around an intra-gender hierarchy of masculinities. It would permit Helen Feeney’s claim to be assessed explicitly in terms that make legally relevant both the military’s gender (male) and the impact of this gendering on both men and women.

## Seeing The Gender in Violence: Two Stories

### *Story I—The Murder of Grace Edwards*

Everybody called her mom. No one would intentionally hurt her. Grace Josephine Edwards was a fixture in her neighborhood, east of the Anacostia River, beyond the Washington, D.C. featured on the maps tourists eagerly clutch as they make their way from the Washington Monument through Dupont Circle to Georgetown. In Ms. Edwards’ neighborhood, the sounds of gunshots mix with the cursing and posturing of young black men trying both to keep it real and to watch their backs which, under some circumstances, is virtually impossible to do successfully.

A 76-year-old stroke survivor, Edwards was out at 6:30 a.m. for her early morning walk. She thought the morning was the safest time of day. On this morning, however, the 5100 block of 10th Place, S.E. was far from safe. Thirty minutes earlier, Nakia Roy spotted his girlfriend, Nacheta Harris, on the back of Edward Settles’ motorcycle. This sighting started a chain of events that both included an exchange of gunfire and Roy’s punching Harris in the face and culminated in Edward’s death. These events were chronicled in newspaper ar-

ticles with titles like, *Another Grandmother Gone*, by journalists who cited Edward's death as evidence of changes in the rules of engagement. Elders were no longer off-limits in the violence of the streets.

These rules are the subject of Elijah Anderson's ethnography, *Code of the Street: Decency, Violence and the Moral Life of the Inner City*. Although Anderson studied Philadelphia's Germantown Avenue, much of what he describes is universal for those in "the depths of the inner city—the so-called hyper-ghetto—[where] people...are very much socially isolated from mainstream America."<sup>18</sup> According to Anderson,

...street culture has evolved a "code of the street," which amounts to a set of informal rules governing interpersonal public behavior, particularly violence. The rules prescribe both proper comportment and the proper way to respond, if challenged. They regulate the use of violence and so supply a rationale allowing those who are inclined to aggression to precipitate violent encounters in an approved way.<sup>19</sup>

"At the heart of the code," Anderson continues, "is the issue of respect."<sup>20</sup> Indeed, "[t]he rules of the code...provide a framework for negotiating respect."<sup>21</sup> While one who is sufficiently respected enjoys a certain amount of personal security, "in the troublesome public environment of the inner city, as people increasingly feel buffeted by forces beyond their control, what one deserves in the way of respect becomes ever more problematic and uncertain."<sup>22</sup> As Anderson sees it, "[t]he inclination to violence [among many poor inner city residents] springs from the circumstances of life among the ghetto poor—the lack of jobs that pay a living wage, limited basic public services...the stigma

18. Anderson at 26. Anderson, however, may have underestimated the reach of "the code." Indeed, the alleged criminal exploits and general thuggery of multi-million dollar businessmen Suge Knight and Sean "Puffy" Combs, as well as the tragic assassinations of the Notorious B.I.G. and Tupac Shakur are evidence that "the code" is no longer limited to those who Anderson describes as being socially isolated from mainstream America. See e.g. Steven Daly, *The Player King*, VANITY FAIR 130 (AUG. 2000) (describing Combs as both a "talent spotter with street cred whose Bad Boy label and underworld connections drew him into a gang war that may have killed Tupac...and Biggie..." and an "East Hampton music-mogul friend of Donald Trump, Ronald Perelman and Martha Stewart").

19. ANDERSON at 33.

20. *Id.*

21. *Id.*

22. *Id.*

of race, the fallout from rampant drug use and drug trafficking..."<sup>23</sup> This is a world marred by a "profound sense of alienation from mainstream society and its institutions felt by many poor inner city black people, particularly the young."<sup>24</sup>

To see the gender at work here, one need only recognize that "many of the concerns of...young men relating to respect and identity have come to be expressed in the concept of manhood," i.e. "assuming the prerogatives of men with respect to strangers, other men and women—being distinguished as a man."<sup>25</sup> Anderson identifies "an existential link between the idea of manhood and one's self-esteem" so that "for many inner city youths, manhood and respect are two sides of the same coin; physical and psychological well-being are inseparable and both require a sense of control, of being in charge."<sup>26</sup> For those whose manhood is tested, "one of the most effective ways of gaining respect is to manifest nerve."<sup>27</sup> While nerve is shown "by taking another person's possessions, messing with someone's woman, throwing the first punch, 'getting in someone's face,' or pulling a trigger,...[t]rue nerve expresses a lack of fear of death."<sup>28</sup> Many of Anderson's interviewees, "fe[lt] that it [was] acceptable to risk dying over issues of respect. In fact, among the hard-core street-oriented, the clear risk of violent death may be preferable to being dissed."<sup>29</sup>

One of the code's primary functions is to order proper relations under the intra-gender hierarchy of masculinities at work in communities such as the 5100 block of 10th Place, S.E. and Germantown Avenue in Philadelphia. Here, definitive manhood is that which the most respected command and to which all aspire. This manhood is rare, remains out of reach for most men, and is the manhood beneath which all others fall within this community's hierarchy of masculinities. It is also the manhood for which groups of rival men contend in skirmishes that often temporarily reorder the hierarchy until another challenge is launched.

The code, however, operates in other ways that demonstrate its connection with the mainstream. First, the code can be seen as a ghetto adaptation of the rules according to which masculinities operate in mainstream society. The cen-

23. *Id.*

24. *Id.*

25. Anderson at 91.

26. *Id.*

27. *Id.* See also GEOFFREY CANADA, *FIST, STICK, KNIFE, GUN*, (1996) (describing "heart" in terms similar to those used by Anderson to talk about nerve).

28. ANDERSON at 92.

29. *Id.*

trality of respect to mainstream ideas about masculinity is integrally linked to wealth and the conspicuous consumerism associated with unquestionably powerful men.<sup>30</sup> This consumerism features prominently in “the code of the street” and its obsession with expensive designer wares that only drug dealing and hustling can buy. Second, the code has also been mainstreamed through the black cultural production, which has been embraced by young people across races, ethnicities and classes. While those who literally live and die by the code are, indeed isolated and alienated as subjects, they have been woven into the cultural fabric of the mainstream as objects.

What Anderson’s study and analysis make clear is that gender is central to understanding the violence that ended Grace Edwards’ life. Although her death involved a male perpetrator, female victims, murder and domestic violence, male gender-based violence against women is only part of the story’s sub-plot. Consequently, we cannot call either Roy’s violence against Harris the proximate cause of Edwards’ murder or Edwards a victim of a man’s violence against a woman in a heterosexual context.

Gender, however, is clearly at work in the violence that claimed Edwards’ life. This gender is a function of respect, being dissed and seeking vengeance in the name of masculinity and in accordance with the rules of “the code.” Roy and Settles understood the code because it both defined and threatened their status within the intragender hierarchy of masculinities operating in the 5100 block of 10th Place, S.E. Settles asserted his status through his nerve, i.e. riding in broad daylight with Harris, Roy’s girlfriend, on the back of his motorcycle. The damage Settles did to Roy’s status was ameliorated by not only his willingness to handle his business, i.e. discipline Harris, but also his nerve, i.e. pulling a trigger. Edwards died as an innocent victim caught in the crossfire of a dispute, which, according to the code, tested Roy’s manhood and warranted a violent resolution.

Seeing Grace Edwards’ murder as the result of gender-based violence reveals the limitations of measures such as VAWA either to understanding gender-based violence or to crafting solutions to address this type of violence. The

30. In a recent interview published in *Ms.* magazine, Susan Faludi talks about the masculinity-related anxiety felt by the mostly white men featured in her book, *STIFFED: THE BETRAYAL OF THE AMERICAN MAN*, in terms of “fear of losing face” and respect. Faludi also notes the problems with questioning manhood as disempowering because “to say out loud, ‘There are no reins in my hand’ is a great humiliation.” Faludi concludes that “[m]asculinity seems to be a very insecure suit of clothes that can be ripped away at any moment... Everything seems to revolve around whether you are man enough.” Gloria Jacobs, *The Male Box*, *MS.* 63, 68–69 (Apr./May 2000).

larger context of poverty, alienation and hypermasculinity in the inner-city makes it clear that tougher sentencing, more prisons and more extreme shows of police force are neither just nor likely to reduce the type of violence that ended Edwards’ life. Any solutions must begin with an acknowledgement that complete disregard for the sanctity of human life is the lesson Roy and Settles learned well from a country that continues to treat them and those who look most like them as inherently dangerous and ultimately disposable. In many respects, the gender-based violence that killed Grace Edwards is a by-product of the criminalization and devaluation of communities of color, which help to justify “the ritual sacrifice of [their] constitutional rights”.<sup>31</sup>

### *Story II—Sexual Assaults in Central Park and the National Puerto Rican Day Parade*

Throngs of people celebrated in the streets during New York’s annual National Puerto Rican Day Parade. The City displayed its diversity as all kinds of people joined the revelry. The seemingly intractable divisions of race, ethnicity and class for which New York has become a metaphor were temporarily erased. But the day turned ugly when a group of young men decided to grope, strip and, in some cases, sexually assault almost 60 women at the south end of Central Park—apparently undeterred by the presence of either video cameras or the police. In the weeks that followed, the details were filled in and 28 men were indicted because they chose to commit very public acts of sexual violence against unsuspecting women.

According to published accounts, the most serious attacks occurred in Central Park South where

self-appointed ‘scouts’...signal[led] to the larger group when they spotted women who fit their calculus of sexual appeal...“Yo, yo here comes a good one!” they would call out as unsuspecting women approached. Several older women got through. For the young and attractive, nearby fences helped form a natural chute into which they were steered. There was yelling of “Get ‘em, get ‘em,” and chants of “Go, go, go,” and misogynistic curses and more young men joined the mob...and some of these men began to tear at shirts, to pull on bras, to tug on shorts.<sup>32</sup>

31. Kathryn Russell, *What Did I Do to Be So Black and Blue? in POLICE BRUTALITY* (Jill Nelson, ed. 2000).

32. David Barstow & C.J. Chivers, *A Volatile Mixture Exploded into Rampage in Central Park*, *N.Y. TIMES*, June 17, 2000 at 1.

These published accounts also noted that members of the New York Police Department, neither protected the women from attack nor appeared concerned about “the rampant use of marijuana and alcohol.”<sup>33</sup> It was hard to believe that it happened in New York, “...a city where the tiniest crimes have long been vigorously pursued...in the environs of an event...patrolled by four thousand officers.”<sup>34</sup>

Almost immediately following the melee, questions were raised about the reported police inaction. Some claimed that the attacks were not treated seriously because of police and societal attitudes about gender-based male violence against women.<sup>35</sup> For this group, the presence of female victims, male perpetrators and sexual violence virtually guaranteed that the attacks would be ignored. Others tried to understand the police’s failure to act in light of the reported belief that department higher-ups did not want to see “any confrontations between a largely white police force and Hispanic paradegoers.”<sup>36</sup> For this group, the presence of ostensibly Puerto Rican men at a Puerto Rican parade patrolled by the NYPD virtually guaranteed that major transgressions would be ignored as the police attempted to curry favor with a community which, under normal circumstances, is terrorized by the NYPD’s institutionalized brutality and violence.

While the answer to the question of what happened on that hot Sunday in New York is most probably a combination of misogyny and police inaction, this does not mean that gender is relevant to the former and not to the latter. Employing a rigorous gender analysis facilitates a more complete understanding of the ways that gender and violence work in tandem. Gender’s role in the sexual attacks, as well as the police inaction, is best assessed within a context featuring the production of masculinities, particularly within Puerto Rican communities, and the intra-gender contests between men of color, on the one hand, and the NYPD, on the other hand. Rafael Ramírez’s, *What It Means to Be a Man: Reflections on Puerto Rican Masculinity* provides important insights into both.

According to Ramírez, “[s]exuality, competition and power are elements that constitute the masculine ideologies...in all the societies through time and space in which...men have imposed [their] hegemony.”<sup>37</sup> Among Puerto Ri-

33. Kevin Flynn, *Lower Morale, Yes. But Apathy?; Police Say They Are As Diligent As Ever, and the Numbers Agree*, N.Y. TIMES, June 28, 2000 at 25.

34. *Id.*

35. C.J. Chivers, *Suspension Cites Lax Response to Groping*, N.Y. TIMES, June 27, 2000 at B1.

36. *Id.*

37. RAMÍREZ at 42.

cans, a man is constructed as “an essential sexual being” who “should enjoy his sexuality, declare it, boast about it, feel proud about it, and, above all, show it.”<sup>38</sup> These same communities construct women as “objects of pleasure, so long as men abide by the taboo of incest and give the respect that is expected toward those women who are part of the family.”<sup>39</sup> A real Puerto Rican man “pursues, punishes, repudiates, or devalues those women who reject him or pay no attention to his demands.”<sup>40</sup> Indeed, “[s]exual harassment and violence against women are evidence of this orientation toward conquest and the use of sexuality in its aggressive articulation of power with pleasure.”<sup>41</sup> Conquest “is also influenced by class and color differences and the relative power or influence that a man might have or believe he can have over a woman, or the relative equality that allows him to make the initial move.”<sup>42</sup> The rules of engagement prohibit a Puerto Rican man from “try[ing] to seduce or conquer a woman who is socially or economically superior to him, unless the encounter occurs in a neutral environment, where class, power, or privilege differences are not involved or are minimized, or unless she sends signals that she is willing.”<sup>43</sup>

The masculinity which most Puerto Rican men produce requires “real” men to “approach others by showing that [they] handle [them]selves with authority and are invulnerable and respectable, which are demonstrations of power that [their] masculinity bestows on [them].”<sup>44</sup> For these men, “to be a man whom others respect and to be respected is [one] of the basic demands of... masculinity.”<sup>45</sup>

Being a man also means “always...be[ing] on guard so as not to lose [their] masculinity or have it questioned.”<sup>46</sup> To this end, “men...compete among [them]selves to validate [their] constantly threatened masculinity.”<sup>47</sup> Ramírez calls this dance the “constant competition and validation of masculinity” in which all non-marginalized Puerto Rican men participate.<sup>48</sup> This competition is “basically influenced by mechanisms of power; on oc-

38. *Id.* at 44–45.

39. *Id.* at 45.

40. *Id.* at 46.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 63.

45. *Id.* at 66.

46. *Id.* at 64.

47. *Id.*

48. *Id.*

casation power and respect become synonymous.<sup>49</sup> According to Ramírez, these public contests are particularly important for the production of Puerto Rican masculinities because their “ethnology stresses the importance of respect in enculturation.”<sup>50</sup> Like the black communities studied by Elijah Anderson, Ramírez’s Puerto Rican communities define respect as “the appropriate comportment in social encounters, in both the manner of behaving and the reaction to how others behave.”<sup>51</sup> Like Anderson’s code, this respect, is central to the structure of the intragender hierarchy of Puerto Rican masculinities, particularly in terms of who commands it, who threatens it, and who lacks it.

Finally, Ramírez considers the connection between masculinity and the police. To make his point, he recounts the story of “the notorious case of Cerro Maravilla, in which two young men who were *independentistas* were murdered by the police in 1978” and eyewitness testimony “of one of the policemen urinating on one of the cadavers after killing the young man.” For Ramírez, this act was “[u]ndoubtedly... a demonstration of his power and his intent to devalue the defeated.”<sup>52</sup> It is important to our analysis of gender and violence that this demonstration of power was by a member of a “police force... whose weapons and representation of the authority of the state allow law enforcement officers to be considered an occupation of power,” i.e. masculinity.<sup>53</sup>

In New York, where the attacks took place, relations between the police and black and Latino communities are part of a history in which these communities were understood to be properly controlled by the police.<sup>54</sup> These police officers act according to a code that both encourages brutality and rallies behind violent cops who brutalize individuals with impunity. In addition, police discretion usually means that young blacks and Latinos are more likely to be diverted into the criminal justice system than their white counterparts, who

49. *Id.* at 66.

50. *Id.*

51. *Id.*

52. *Id.* at 58.

53. *Id.* at 63.

54. Derrick Bell describes this in terms of “*de facto* authorization” of police control over Black and Latino communities. Derrick Bell, *Police Brutality Portent of Disaster and Discomforting in POLICE BRUTALITY* 88, 92 (Jill Nelson, ed. 2000). See also Robin D.G. Kelley, “Slangin’ Rocks... Palestinian Style”: *Dispatches from the Occupied Zones of North America in POLICE BRUTALITY* (Jill Nelson, ed. 2000) (recounting the history of police brutality as carried out by both public and private actors against Black communities); KRS-One, *Sound of Da Police on RETURN OF THE BOOM BAP* (1993).

are more likely to be taken home to be disciplined by their parents.<sup>55</sup> For example, a recent study notes that “minority youths were disadvantaged at every stage of processing through the justice system. They were more likely to be arrested, charged, detained before trial, transferred to the adult system and incarcerated than were white youths, even for similar offenses.”<sup>56</sup> Moreover, the predominant racial and ethnic makeup of the police department (primarily Irish- and Italian-American), means that race and ethnicity are central parts of the intragender hierarchy of masculinities under which relations between the police and the policed are formed.<sup>57</sup> Add to this Mayor Rudy Giuliani’s “zero-tolerance” crusade, under which New York City has become a focal point for state violence in the form of police brutality against young black and brown men which much too often turns fatal.<sup>58</sup> This, oddly enough, is the New York City in which the NYPD allowed young black and brown men to attack scores of women on an oppressively hot Sunday afternoon.

Using Ramírez’s work to analyze the events at the Puerto Rican Day Parade, it becomes apparent that his ideologies of masculinities help to understand not only the sexual attacks but also the apparent incongruity between the police inaction on that Sunday and the police terrorism with which these communities must contend virtually everyday. What follows is not meant to suggest that the Puerto Rican masculinities which both Ramírez describes and the events in New York illustrate are embraced by all Puerto Rican men. Rather, it merely recognizes the central role of those masculinities in the sexual attacks in New York’s Central Park. This position is consistent with that taken by the more progressive members of New York’s Puerto Rican community who see the attacks as a function of a “consciousness that ‘being a man’ is... about dominating women... [and not] about serving and protecting the community.”<sup>59</sup>

55. E.g. Lieutenant Arthur Doyle (Retired), *From the Inside Looking Out: Twenty-nine Years in the New York Police Department in POLICE BRUTALITY* 171, 175 (Jill Nelson, ed. 2000).

56. Kristin Choo, *Minor Hardships*, ABA JOURNAL 20 (Sept. 2000).

57. E.g. Ishmael Reed, *Another Day at the Front: Encounters with the Fuzz on the American Battlefield in POLICE BRUTALITY* 189, 193 (Jill Nelson, ed. 2000). This is the case regardless of the actual race or ethnicity of the officers involved. Black and Latino officers are often involved in incidents of brutality in Black and Latino communities. These officers can be seen as acting in the interests of those the police protect who, under most circumstances, are neither Black nor Latino. See also KRS-One, *Black Cop on RETURN OF THE BOOM BAP* (1993).

58. E.g. Ron Daniels, *The Crisis of Police Brutality and Misconduct in America: The Causes and the Cure in POLICE BRUTALITY* 240, 243 (Jill Nelson, ed. 2000).

59. Statement of the National Congress for Puerto Rican Rights (June 2000).

Returning to Ramírez's analysis, first, the connection between Puerto Rican manhood and sexuality, as well as the importance of both conquest and control to that masculinity, as produced, played a key role in creating the conditions that gave rise to the attacks. The victims were seen as fair game because they were not perceived as women these men were bound to respect. The violence was the manifestation of masculine ideologies that encourage pursuit and, in some cases, conquest by violence of those women who dare either to rebuff their pursuers or to be caught unaware in unprotected space. Central Park South was the neutral ground on which all divisions of class, color, race and ethnicity were leveled, paving the way for this group of men to attack almost 60 women with impunity. This was clearly a case of gender-based violence, as a matter of both male violence against women in heterosexual contexts as well as the relationship between the violence and the gender of both the perpetrator and the victim.

Second, the masculinities produced in the attacks in Central Park almost demanded that those attacks take place in front of the police who, under most circumstances, have no regard for the respect to which these men believe they are entitled. Considered in the larger context of well-documented police brutality and terrorism against communities of color, the sexual attacks become an assertion of manhood in the face of the male institution that is often responsible for maintaining intra-gender hierarchies under which most Puerto Rican men occupy positions that lack value and respect. Because the police department, like the military, is an institution of masculine authority and power, choosing to attack women in full view of members of the NYPD was clearly a bold exercise of warped and misguided masculinities under which the women became the objects on and through which these masculinities were produced. The limited effectiveness of this exercise of masculine power is clarified by the context of police brutality and terrorism that mark everyday lives in communities of color. The police chose not to act because they had the power to do so. This choice made that Sunday an extraordinary day.

That extraordinariness, however, was short lived as investigations proceeded, arrests were made and indictments were handed down. This is where the trope on which justifications for the "gender-based violence = male violence against women" begins to falter and is replaced by the trope in which the criminal justice system is hostile toward communities of color, displaying a particular vengeance for young black and Latino men. As the National Congress for Puerto Rican Rights notes, "[g]iven the NYPD's history of racial profiling and indiscriminate 'sweeps' of young men of color, we should remain vigilant against innocent men being railroaded in this case and against the Mayor using this to justify increased police harassment of young men of

color."<sup>60</sup> This reality of racially disparate treatment of people of color by law enforcement officials means that measures such as VAWA may become part of the criminal justice system's arsenal to be selectively deployed in ways that ultimately protect the interests of those who are white, male, heterosexual and middle-class. This approach evidences the inherent contradictions in "calls for increased policing, police presence and enhanced criminal penalties as a solution" for the poverty and violence with which many communities of color must contend.<sup>61</sup> As Stanley Crouch observes, this contradiction is the result of experiences with racist police and policing, on the one hand, and fears that "children, male and female, might become gunshot victims of gang violence, intentionally or accidentally."<sup>62</sup> Crouch continues, "no one hates violent black youth criminals more than black youth, because these knuckleheads are the people who might attack or kill a kid for something as trivial as 'eye fornication'—looking at them in a way that they don't like."<sup>63</sup> History, however, tells us that more laws and stiffer penalties are likely to increase the numbers of people of color who are both victimized by racial profiling and police violence and feed the burgeoning prison-industrial-complex. Less likely, however, is that these measures will pierce the veil of privilege that protects those whose maleness and/or whiteness and/or heterosexuality and/or socio-economic class shields them from being held responsible for their violence, regardless of the sex or gender of their victims. "While the NYPD must be held accountable for the inaction of officers... we must simultaneously continue to challenge the further criminalization of our communities as an easy solution to violence."<sup>64</sup>

## Conclusion

What the foregoing should make clear is that we must change the ways in which we understand the relationship between gender and violence. While defining gender-based violence as male violence against women in heterosexual

60. *Id.*

61. The Audre Lorde Project, *Statement on Central Park and 116th Street Festival Attacks* (June 2000).

62. Stanley Crouch, *What's New? The Truth, As Usual in POLICE BRUTALITY* 165 (Jill Nelson, ed. 2000).

63. *Id.*

64. The Audre Lorde Project, *Statement on Central Park and 116th Street Festival Attacks* (June 2000).

contexts has yielded good results for some women, it has done so by recounting a partial understanding of the criminal justice system under which more laws and stiffer penalties are seen as necessary to demonstrate society's taking that violence seriously. The alternative analysis offered in this essay is intended to address not only this male violence against women, but also all other violence which can be viewed as being connected to the gender of either the perpetrator or the victim. In this way, it changes the violence discourse by making gender central to, rather than marginal in, the law's understanding of violence.

The analytical shift advanced in this essay should allow us to illuminate the workings of gender in contexts beyond what is currently understood to be gendered. Only if we begin to see gender and victimization as something with which both women and men must contend, will we be able to move toward real solutions to the dangerous and problematic ways in which gender is produced and maintained. If, however, we fail to make this shift, then we will continue to marginalize women and gender in the discourse of violence, as well as to encourage lawmakers to incarcerate disproportionate numbers of blacks and Latinos based on ideas about the inherent criminality and culpability of black and brown people. We can ill afford to concede the terrain on which the law defines gender and violence to those who would have us either ignore or misconstrue the injuries suffered by all who have to contend with the gender of violence and the violence of gender. Expanding the analysis of gender-based violence beyond its current limitations may be the most productive way to overcome the intensely polarized identity politics that characterize the space in which identity and oppression are both produced and contested.

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