Boys, Masculinities and Juvenile Justice

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Abstract

Culture and tradition are part of the macrosystem of ideas and beliefs that have a dramatic effect on children and families. One aspect of culture is gender beliefs, values and roles. Feminist analysis has explored the incorporation of gender in a wide range of structures, challenging gender bias and advocating reform of a range of laws, structural systems, and social practices. Masculinities analysis, an outgrowth of feminist analysis that focuses on men as gendered subjects, provides a perspective to consider those areas in which men are disproportionately present either in positions of power and privilege, or in positions of disadvantage. The juvenile justice system is a place where boys are the primarily objects of the system. Yet it is a system that rarely considers boys as gendered subjects. This article examines the perspective that masculinities scholarship would bring to evaluating and reforming the juvenile justice system.

Culture and tradition have a critical role in family law reform, and in the ecology of family law. Culture and tradition are part of the overarching values embraced, reflected, challenged and changed in society, and law is an important means for reinforcing fundamental values. Law usually reflects and follows cultural values and norms, although occasionally law attempts to lead society to achieve a core societal value.[1] Thus, for example, American law values families as the core social unit of society, protecting their privacy and providing significant material and ideological support for families. At the same time, principles of equality are an aspiration of American law, although inequalities remain normative. Culture and tradition thus may include bias and prejudice that affect the structure of legal systems and the application of legal rules. The interaction of values (including culture and tradition) with law and legal systems, therefore, has a significant impact on whether law supports

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1) *See generally* Nancy E. Dowd, *Law, Culture and Family: The Transformative Power of Culture and the Limits of Law*, 78 Chicago-Kent L. Rev. 101(2003) (symposium issue on law and culture).

or undermines families and individuals.

An ecological model of family law makes this interaction between family law, culture and tradition very clear. My colleague, Professor Barbara Bennett Woodhouse, another contributor to this symposium, articulates this model as a way of looking at family law and thinking productively of the role of law and the necessity of considering interlocking systems when we focus on either the present state of the law or proposed reforms.[2] In the ecological model, you must envision an interlocking series of systems that interact with each other to impact the child at the center. The *microsystems* are most immediate, those elements that have direct impact on the child, such as family, peers, and neighborhood. Those systems interact with each other, in harmony or dissonance, and those overlaps are the *mesosystems*. If they act harmoniously, this will serve the best interests of the child if they support positive, healthy outcomes. These systems that directly affect the child are embedded in a broader set of structures, which function at the level of *exosystems*. These are structures like schools, the wage work environment, the justice system (including the juvenile justice system), and government at all levels. At this level the structures of these systems have an indirect but very significant impact on the child, the family and the micro- and meso- systems. Finally, the *macrosystem* includes culture, ideas, concepts, biases, and tradition. This is the belief system within which all other systems are framed. Thus, for example, in American culture individualism and privacy are very strong values, and gender, race and class biases remain very strong. Both are aspects of the *macrosystem*. The role of law within this ecological model is like that of water or air in a natural ecosystem: it flows at all levels, as an important carrier, supporter, and enforcer of the *macrosystem* that is felt at every level of the ecology of family and children.

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2) See Barbara Bennett Woodhouse, *Individualism and Early Childhood Education in the U.S.: How Culture and Tradition Have Impeded Evidence-Based Reforms*, in this volume. *See also* Barbara Bennett Woodhouse, *Cleaning Up Toxic Violence: An Ecogenerist Paradigm*, in HANDBOOK: CHILDREN, CULTURE AND VIOLENCE 415-436 (Nancy Dowd, Dorothy Singer & Robin Fretwell Wilson eds.) (Sage Publications 2006); Barbara Bennett Woodhouse, *Reframing the Debate About the Socialization of Children: An Environmentalist Paradigm*, in 2004 UNIVERSITY OF CHICAGO LEGAL FORUM 65-85 (2004); Barbara Bennett Woodhouse, *Ecogenerism: An Environmentalist Approach To Protecting Endangered Children*, 12 UNIVERSITY OF VIRGINIA JOURNAL OF SOCIAL POLICY & LAW 409-447 (2006).

In this article I focus on a specific aspect of the macrosystem and its impact on one exosystem, and ultimately on children and families. I focus on masculinities, the structure of our beliefs, expectations, and lived out realities about men and boys. I consider how an understanding of this part of culture and social realities can help us analyze the particular exosystem of the juvenile justice system, and how this ultimately affects boys (and secondarily, girls). The juvenile justice system operates within a cultural commitment to equality and liberty. But those values co-exist with constructions of masculinities that undermine the achievement of either of those values.

My hypothesis is that the juvenile justice system is one that we have constructed as a gender-specific system to manage, control and respond to boys. It reflects and operates upon assumptions about masculinities, and reflects masculinities norms. Yet we rarely think about or discuss this system as a gendered system. Rather, we simply assume it. I contend that where the genders are asymmetrically represented, it is critical to consider gender analysis, both of the over- and under- represented group. It may be that most of family law requires such analysis, as there are other areas of disproportionate gender representation, so this analysis is not limited to the juvenile justice system. This approach is consonant with the work of Professor Martha Fineman, who has articulated the importance of a gender-specific model of reform that reflects the lived realities of care.[3]

This article suggests what masculinities analysis, as part of feminist analysis, might expose. I focus on an area that is gendered male in a way that disserves, I argue, boys and men because it reinforces traditional gender norms and expectations, and ignores and rejects more effective rehabilitative and restorative goals for juvenile justice. Ultimately, I suggest that we imagine how the juvenile justice system might be differently structured if we challenged the underlying assumptions and structures of the existing system.

In order to better illustrate my analysis, in Part I, I present the story of an

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3) *See generally* Martha Albertson Fineman, The Autonomy Myth: A Theory of Dependency (New York: New Press 2004); Martha Albertson Fineman, The Neutered Mother, The Sexual Family, and Other Twentieth Century Tragedies (New York: Routledge 1995); Martha Albertson Fineman, The Illusion of Equality: Rhetoric and Reality of Divorce Reform (Chicago: U. of Chicago Press 1991). For her contribution to this volume, see Martha Albertson Fineman, *Religious Resistance to Family Law Reform in the United States*, in this volume.

actual case in the juvenile justice system, the case of Lionel Tate. In Part II of the article, I will set out the general parameters of the juvenile justice system (the exosystem that I am focusing on, in the ecological model). In Part III, I will discuss the general parameters of masculinities scholarship, and the questions that it suggests that we ask. In Part IV, I will discuss what we might learn from a masculinities perspective about the impact of this aspect of culture on assessing what reforms are needed in the juvenile justice system.

I. The Story of Lionel Tate[4]

Lionel Tate has the distinction of being the youngest American ever sentenced to life in prison without parole (what some critics call "death in prison") for a crime committed when he was 12 years old. In 1999 Lionel was at home with his mother and his 6 year old cousin. His mother, a police officer, went upstairs and fell asleep. Lionel was playing with his cousin and was showing off some wrestling moves that he had seen on television. Lionel was big for his age, 166 pounds; his cousin was 46 pounds. Tragically, as a result of his actions, his cousin was accidentally killed. Nevertheless, Lionel was criminally charged under the child abuse statutes. His mother was offered a plea bargain whereby he would have served a three year term for second degree murder, but she turned it down, believing he would be acquitted. Instead, he was convicted, and the trial judge imposed the harshest possible sentence, life imprisonment without parole. Lionel was then age 14.

Lionel came from a family where there had been significant family disruption, and he had exhibited misbehavior and disruptive behavior in school. These mental health issues were consistently unaddressed. He was shuffled back and forth between his divorced parents, who were living in two different states. He had only recently come back to live with his mother when the incident occurred that caused the death of his cousin.

One other very important fact about Lionel is that he is African American. This is a significant part of his story because of the disproportionate

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4) The story of Lionel Tate is based on news accounts as well as the lengthy chapter about Lionel in Barbara Bennett Woodhouse, Hidden in Plain View: The Tragedy of Children's Rights from Ben Franklin to Lionel Tate 288-300 (Princeton: Princeton University Press 2008).

representation of black boys in the juvenile justice system, and thus the particular dangers for black boys of coming into contact with that system, which will be outlined further below.

Lionel's case drew national and international attention because of his age at the time of the crime. On appeal the prosecutor joined with the defense arguing for greater leniency in the sentencing. Nearly three years after the trial, an appeals court overturned the conviction on the basis that his mental competency to stand trial had not been evaluated. The prosecutor then offered the original plea bargain again, and it was accepted, but with time served, he was to serve one year of house arrest and 10 years probation.

The story does not end there, however, because Lionel had a difficult time staying out of trouble. Less than a year after his original sentence was overturned, Lionel was discovered out of his house with a knife. He was placed on zero tolerance probation for an additional 5 years. He violated that probation less than a year later, in an incident involving a pizza delivery. Allegedly Lionel called and ordered pizza, and when the delivery person arrived, he had a gun in his hand. The pizza man dropped the pizzas, ran, and called the police. Lionel was charged with armed robbery. He eventually admitted that he possessed a gun (remember that his mother was a police officer), which was enough to constitute a violation of his probation, and ultimately was sentenced to 30 years in prison for the gun possession charge. He subsequently pled no contest to the pizza robbery, and was sentenced to 10 years, to run concurrently with his 30 year sentence for gun possession. By the time he leaves prison, if he is not eligible for parole, he will be nearly 50.

Throughout this case, he was not offered any mental health treatment, counseling, or other services to enable him to succeed on his original sentence, nor was his family engaged in any program to help improve the family dynamics that affected his ability to change his behavior.

Lionel's case is not an isolated one. The Equal Justice Initiative, a nonprofit organization dedicated to identifying and reforming issues of unequal justice in the adult and youth criminal justice system, issued a report in 2008 focusing on "death in prison" sentences for crimes committed by minors when they were under the age of 16.[5] The report identified 75 cases nationwide of

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5) Equal Justice Initiative, *Cruel and Unusual: Sentencing 13 and 14 Year Olds to Die in Prison*, http://eji.org/eji/ (last visited February 20, 2009).

juveniles sentenced to life imprisonment for crimes committed at age 12, 13, 14, and 15. Most, but not all, of the cases involve boys. A disproportionate number of the cases involve black boys. The haunting photographs of these children bring home, as words may not be able to do, the inhumanity and injustice of this practice. Children have also been detained as terrorists. According to a report of the Center for the Study of Human Rights in the Americas, since 2001 twelve inmates under age 18 have been incarcerated at the American detention center in Guantanamo.

Lionel's case, and others like it, are extreme examples of how the juvenile justice system treats boys. But the extreme cases are simply part of a continuum; they are not exceptional. In addition, Lionel's case is an example of the particularized treatment of black boys in the juvenile justice system. Again, this is pervasive, not exceptional. By examining this case from a masculinities perspective, we may expose how the macrosystem of culture constructs this powerfully gendered and raced system.

II. General Parameters of the Juvenile Justice System

Juvenile courts were created roughly a century ago, beginning in 1899 in the state of Illinois. Their creation reflected a core understanding: children are different than adults and their cases should be handled differently.[6] Children are dependent, they have different cognitive and emotional abilities compared to adults, and they have different understanding than adults.[7] The two basic kinds of cases that juvenile courts handle are delinquency and dependency cases. Delinquency cases are those in which minors commit acts that would be crimes if they were adults, and also include crimes that are unique to children, that is, status offenses (running away from home, curfew offenses, ungovernability). Dependency cases are those in which children are abused or

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6) Sanford J. Fox, *Early History of the Court, in* THE JUVENILE COURT, THE FUTURE OF CHILDREN, Volume 6, No. 3. (David and Lucille Packard Foundation Winter 1996), *available at* http://www. futureofchildren.org/pubs-info2825/pubs-info_show.htm?doc_id=77761 (last visited February 21, 2009); Sacha M. Coupet, *What to Do with the Sheep in Wolf's Clothing: The Role of Rhetoric and Reality About Youth Offenders in the Constructive Dismantling of the Juvenile Justice System*, 148 U. PA. L. REV. 1303, Part I (2000) (history of juvenile justice system).

7) *Id.*

neglected by parents or other caregivers, and the court must find ways to provide care for them. My focus here is on the delinquency side of the juvenile justice system. Delinquency cases are roughly 65% of the juvenile court caseload, with the remainder roughly equally divided between status offenses and abuse and neglect.[8]

As a result of a series of U.S. Supreme Court decisions beginning in the 1960s, juveniles have procedural due process rights similar to, although not identical to, those of adult criminal defendants.[9] Nevertheless, the process and administration of cases is quite different, with a high degree of discretionary, subjective judgments at each phase of the system. The process begins with referrals, primarily from law enforcement agencies, but also including social service agencies, schools, parents, probation officers, and victims. After arrest, roughly one-third of the juveniles are diverted (that is, they agree to enter a program to address their underlying problem, such as drug education); of the remaining juveniles, half become the subject of a petition to the court, and the other half are dismissed, diverted or handled informally through voluntary agreement or informal probation. Thus, at this early stage, subjective factors come into play regarding the direction or resolution of a case. Nearly sixty percent of the juveniles who enter the juvenile justice system never return a second time, but of those who do, each reappearance increases the rate of recidivism.[10] Once the subject of a petition, or even if diverted, the system in theory should treat the juvenile in an individualized and rehabilitative manner. These goals reflect the recognized differences between children and adults, particularly the differences in culpability and the potential for change. Empirical data demonstrate that the most effective programs are community based as opposed to residential placements, and that highly structured programs are better than counseling or general supervision.[11]

The goal of the juvenile justice system, however, has shifted away from rehabilitation since the 1990s. Concerns and fears about juvenile crime,

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8) Howard N. Snyder, *The Juvenile Court and Delinquency Cases, in* THE JUVENIEL COURT, supra note 6.

9) In re Gault, 387 U.S. 1 (1967); In re Winship, 397 U.S. 358 (1970); Kent v. United States, 383 U.S. 541 (1966); McKeiver v. Pennsylvania, 403 U.S. 528 (1977).

10) Snyder, *supra* note 8.

11) *Id.*

juvenile violence and "super-predators" led to various "reforms" to shift cases from the perceived "lenient" juvenile justice system to adult court.[12] The trend is encapsulated in the phrase "adult time for adult crime." States enacted legislation making it easier for prosecutors to try children as adults in adult criminal court. Since 1992, all but one state has enacted laws making it easier to permit transfers, which now account for roughly 200,000 transfers annually.[13] Critics have pointed out that transfer has not achieved any increase in public safety or youth accountability. There is actually an increase in recidivism, and adult prisons focus on punishment rather than rehabilitiation. They also lack treatment for mental health, substance abuse, or special education issues, and put youth at risk for assault, especially sexual assault, while in prison. Because of the lack of empirical support for the practice of transferring youth from the juvenile to adult system, and because this practice is contrary to a wealth of developmental data, some argue that this practice should should be deemed unconstitutional.[14]

At the same time that transfer to adult court increased, the "get tough" mentality also resulted in an increase of arrests and more serious consequences within the juvenile justice system. As the Annie E. Casey Foundation reported in its 2008 report on the juvenile justice system, the system became transformed into one characterized by bias, disparities, and harshness.[15] Forty percent of kids referred were status offenders, and more kids were arrested in school settings based on "zero tolerance" school policies adopted in the 1990s.[16] Punitive policies became dominant with no better, and arguably worse, outcomes. "Tragically, virtually all of these "get tough" practices violate what we know about youth development and behavior, and all are producing worse, rather than better, outcomes for youth, communities and taxpayers."[17] The Casey report identifies six deficiencies in the system: blurring or ignoring differences between adults and juveniles; increasing incarceration, which is costly and ineffective; ignoring the role of families as

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12) Christopher Mallett, *Death Is Not Different: The Transfer of Juvenile Offenders to Adult Criminal Courts*, 43 Crim. Law Bulletin 3 (2007).

13) *Id*.

14) *Id*.

15) Annie E. Casey Foundation, Juvenile Justice (2008), available at http://www.aecf.org/

16) *Id*.

17) *Id*. at 4.

positive agents for change; prosecuting with increasing propensity minor cases rather than diverting them or resolving them informally; failing to serve kids who need different kind of help, such as assistance with mental health or learning disabilities; and continuing severe patterns of persisting disproportionate minority involvement in the juvenile justice system.[18]

The racial disparity noted in the Casey report is a critical piece of the juvenile system (and the adult system as well). "By virtually every means of measurement, African American, Latino, and Native American children receive much harsher treatment than do European American children. They are more likely to be arrested, charged, to receive more severe sentences, and to stand trial as adults."[19] Black males are disproportionate at every phase of the system, and countless studies indicate that no factor other than race explains the disparity. One in three black males is in the juvenile system; they are 25% of those arrested, half of those tried as adults, and half of those housed in prisons.[20]

Although the media often focuses on violent crimes when committed by juveniles, the bulk of criminal cases are crimes against property (larceny, vandalism, and motor vehicle theft).[21] Overall, the juvenile crime rate is falling, especially the violent crime rate. Juveniles are involved in one quarter of all violent victimizations not including murder over the past 25 years.[22] Children are both victims and perpetrators in crimes. On a daily basis, 9 children are homicide victims; 20 die from firearms; 4000 are arrested, 180 for violent crimes and 367 for drug offenses, and 17,000 are suspended from school.[23] Children are more at risk for victimization than any other group, because they are children. Children 12-19 are victims in three of ten crimes, one in four thefts. Gun-related deaths are the leading cause of death of African

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18) *Id.*

19) Kenneth B. Nunn, *The Child as Other: Race and differential Treatment in the Juvenile Justice system*, 51 Depaul L. Rev. 679, 683 (2002). *See also* Theresa Glennon, *Evaluating Institutional Practice and the African American Boy*, 5 J. of Health Care Law & Policy 10-67 (2002); Barry C. Feld, *the Transformation of the Juvenile Court – Part I: Race and the "Crack Down" on Youth Crime*, 84 Minn. L. Rev. 317 (1999).

20) Nancy E. Dowd, *Introduction* to Children, Culture and Violence, supra note 2, at ix.

21) Snyder, *supra* note 8.

22) PBS Frontline, Juvenile Justice: Basic Statistics, http://www.pbs.org/wgbh/pages/frontline/shows/juvenile/stats/basic.html (last visited February 15, 2009).

23) Dowd, *supra* note 20.

American and Hispanic youth under 18.[24]

The juvenile justice system deals overwhelmingly with boys. Most of juvenile crime involves boys. In 2006, boys were 70% of all arrests; in 2004, they were 75% of those prosecuted; in 2003, they were 85% of those in residential placement, and stayed almost twice as long in those placements as compared to girls.[25] Between 1994 and 2004 there was a 21% increase of youth held in adult jails; almost all of that increase represented male offenders.[26] Girls are not absent from the system: they represent one in four arrests. But their offense pattern is different, with offenses focused on sexuality and disobedience to parents, and therefore they are disproportionately charged with status offenses.[27] When they are convicted of status offenses, they are more harshly treated than boys. In addition, if girls move deeper into the system, they are more harshly sanctioned than boys.[28]

The juvenile justice system should be understood as a system that focuses on and deals with the behavior of boys. The system was created and has functioned for that purpose throughout its history. Yet this aspect of the juvenile justice system has largely been assumed, or ignored. The increase in the presence of girls has raised gender concerns, but oddly, it has not triggered an examination of how the system is gendered for boys. In the next section, I suggest that masculinities scholarship, which examines gender issues related to boys, is a useful tool to uncover how the juvenile justice system functions and whether it serves boys well.[29]

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24) *Id*.

25) Fact Sheet, boys and Juvenile Justice, http://www.aspe.hhs.gov.

26) *Id*.

27) John M. Macdonald & Meda Chesny-Lind, *Gender Bias and Juvenile Justice Revisited: A Multiyear Analysis*, 47 CRIME & DELINQUENCY 173, 173-174 (2001).

28) *Id*. at 178-179. *See also* AMERICAN BAR ASSOCIATION AND NATIONAL BAR ASSOCIATION, JUSTICE BY GENDER: THE LACK OF APPROPRIATE PREVENTION, DIVERSION AND TREATMENT ALTERNATIVES FOR GIRLS IN THE JUVENILE JUSTICE SYSTEM (2001).

29) The analysis here is part of a larger project on the impact of masculinities scholarship on feminist legal analysis to be published by New York University Press, THE MAN QUESTION: FEMINIST JURISPRUDENCE, MASCULINTIES AND LAW (forthcoming).

III. Masculinities Scholarship

Masculinities scholarship, which studies boys and men as gendered subjects, suggests a way of thinking about the juvenile justice system that can make the invisibility of gender visible, and challenge whether the juvenile justice system imposes a norm of masculinity that disserves boys, society, and more broadly disserves justice. This perspective challenges the notion that the predominance of boys in the juvenile justice system reflects something core and unchanging, or essential and biological, in boys' nature that explains the demographics. This perspective also questions the substance, procedure, and goals of the system as gender regulation. My analysis uses the ecological model to explore the interaction between masculinities and juvenile justice with the aim of better serving boys, undermining the racial bias fostered by masculinities norms that harm black boys, and rethinking the place of girls within a system that ignores the gender issues of boys.

Masculinities scholarship began in the 1970s and 1980s in the US, UK and Australia, located particularly in the discipline of sociology.[30] It was an outgrowth of feminist analysis, as well as linked to the emergence of gay and lesbian scholarship. Feminist scholarship focused gender analysis on women, developing theories of inequality and exposing practices that disadvantaged women and/or assumed the centrality of men. This rich, complex, differentiated scholarship across disciplines including law understandably focused on women and girls, although its implications were much broader. Nevertheless, men tended to be an undifferentiated, essentialist group within feminist analysis, described and analyzed in terms of men's general condition, and and general gender advantage.

Masculinities scholars, inspired by the models of feminist analysis, began to explore the meaning of manhood, masculinity and gender for men.[31] They examined men as gendered subjects. Instead of seeing men as a single entity, they explored differences among men, as relationships between men are

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30) The description of masculinities scholarship I this section is drawn from Nancy E. Dowd, *Masculinities and Feminist Legal theory*, 23 Wisc. Journal of Law, Gender & Society 201 (2008).

31) *Id.* at 207.

critical to the construction of masculinities. In addition to exploring men's privilege, they uncovered men's subordination and the hierarchies among men. "Asking the man question" has a number of different consequences, but particularly important for boys and juvenile justice is that it exposes where men are disadvantaged by the existing gender system. Men and boys are the dominant victims of violent crime.[32] "Men often pay a price for their privilege …. In addition, how the price of privilege can be exacted, even when privilege itself may not be enjoyed, exposes the complex way in which gender hierarchy is sustained. …[A]sking about men [also] exposes the relationships *between* men …. Relationships among men are critical to men's position in the gender system, and have an enormous impact on male-female relationships as well."[33]

It is important to emphasize, however, that exploring men and boys as gendered beings should not lead to the conclusion that gender operates the same as it does for girls and women, that the analysis exposes the same patterns, although perhaps in different places, now that we are examining men. To the contrary, masculinities scholarship makes it clear that men as a group and women as a group are very differently situated with respect to gender. Men as a whole, as a group, are more powerful, privileged and elevated in a hierarchy that separates men and women. Masculinities scholarship, then, is not the same as feminist theory. It is quite asymmetrical, and particularly is more descriptive and lacking an analysis of power and domination.

Robert Connell, a leading masculinities scholar, defines masculinity as "simultaneously a place in gender relations, the practices through which men and women engage that place in gender, and the effects of these practices in

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32) Men are more commonly victims of violent crime, with the exception of sexual assault. For example, 79% of murder victims are male. http://www.ojp.usdoz.gov/bjs/cvit_v.htm#gender (Department of Justice) (last visited July 23, 2008). "The U.S. homicide rate for males age 15-24 is the highest among developed countries, and is 8 times higher than the rate of the next-highest country." Nancy E. Dowd, *Introduction ix* to HANDBOOK OF CHILDREN, CULTURE AND VIOLENCE (Nancy E. Dowd, Dorothy G. Singer & Robin Fretwell Wilson, eds., 2006). For a longer catalogue of statistical harms, including men's higher rate of suicide, lower life span, greater likelihood of death from heart disease, and higher rate of committing crime, especially crimes of violence, see JOHN BEYNON, MASCULINITIES AND CULTURE 77-79 (2002).

33) Dowd, *supra* note 30, at 205 (emphasis added).

bodily experience, personality and culture."[34] He focuses on how masculinity is practiced in a way that embodies inequality and dominance. His core concept of hegemonic masculinity is one of a dominant norm: "[T]he configuration of gender practice which embodies the currently accepted answer to the problem of the legitimacy of patriarchy, which guarantees (or is taken to guarantee) the dominant position of men and the subordination of women."[35] Hegemony means cultural dominance and support, rarely dominance that is violently claimed. Connell argues that patriarchy has crumbled, but it has reinvented itself. Connell sees men's dominance as being reinforced by the state, creating the "*patriarchal dividend*": "the advantage to men as a group from maintaining an unequal gender order."[36] Dominance is pervasive and taken for granted; it is this latter characteristic that supports the idea that patterns are natural or given.[37] There is complicity by those who do not meet the hegemonic standard: indeed, few men meet the definition of hegemonic masculinity, but most men benefit from it by reaping the patriarchal dividend.[38]

The core conclusions of masculinities scholarship can be summarized in the following propositions:[39]

> 1. Men are not universal or undifferentiated. Thus, the study or examination of men as gendered beings exposes multiple masculinities, not a single construction of masculinity.
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> 2. There is a hierarchy among men that is especially linked to race, class and sexual orientation, and to the interplay of privilege and disadvantage. In some instances the intersection of gender with other factors almost entirely trumps gender privilege. Nevertheless, it appears that despite the hierarchy, men remain wedded to the concept of masculinity, even when they do not benefit from it, or the benefit is reduced. In this respect the hierarchies among men expose the

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34) R.W. CONNELL, MASCULINITIES 71 (2nd ed. 2005).

35) *Id*. at 77.

36) R.W. CONNELL, GENDER 142 (2002).

37) *Id*. at 143.

38) R.W. CONNELL, *supra* note 34, at 81.

39) This summary is drawn from Dowd, *supra* note 30, at 228-238.

functioning of hegemony.

3. Men pay a price for privilege. Although men benefit as a group from the patriarchal dividend, it does not come without cost. The most obvious example of this in the juvenile justice area is that men and boys are the most frequent victims of crime.

4. Masculinity is a social construction. Masculinity is not born, it is made. Although there are physical differences between men and women, what it means to be a man is not hardwired, it is socially taught. Changes in concepts of manhood, differences across cultures, and historical shifts exemplify this reality. As psychologists teach us, there are more differences among men and among women, than between men and women. We remain powerfully committed to concepts of gender difference, but our concept of "man" and "woman" is created, not dictated.

5. Hegemonic masculinity is the dominant and most valued form of masculinity. Although there are multiple masculinities (e.g., by race, class, sexual orientation or by concepts of fatherhood, work, etc.), within our cultural system there is a favored norm of manhood, one that few men achieve but all are committed to. This norm tends to be negatively stated and nonegalitarian; it sustains men's privileged position.

6. The patriarchal dividend is the benefit all men receive from the dominance of men in the gender order.

7. The two most common defining statements of masculinity are imperative commands: do not be like a woman and do not be gay. Thus, masculinity has negativity at its core, not an affirmative sense of identity.

8. Masculinity is as much about relation to other men as it is about relation to women. Both, however, are hierarchical relations.

9. Men, although power-ful, feel power-less. The hierarchical relationship among masculinities explains this, as well as the demand of masculinity that it constantly be proved. Masculinity is "the Big Impossible," that which is never assured or completely achieved, but always to be demonstrated.

10. The spaces and places that men and women inhabit and work within on a daily basis are remarkably different.

11. Masculinities study exposes how structures and cultures are gendered male. It makes it possible to identify how things are gendered, in order to support the goal of antisubordination for women and reconstructing masculinity for men.

12. Men have little incentive to sacrifice privilege in pursuit of feminism's equality project; masculinities theory and analysis points to the importance of conceptualizing a different model of manhood.

While much of masculinities scholarship has focused on adult men, there are also scholars who have specifically focused on boys. It is this literature that particularly supports the view that masculinities are a social construction. For example, it is well established in this literature that young boys are emotionally open and expressive, but as they mature they are taught to suppress emotion and empathy.[40] As adolescents, boys experience a very stressful testing period: "A boy lives in a narrowly defined world of developing masculinity in which everything he does or thinks is judged on the basis of the strength or weakness it represents: you are either strong and worthwhile, or weak and worthless."[41] The pressure to conform and the narrow boundaries of what is acceptable makes adolescence a critical time in the development of masculinity. Peers are extremely critical to this process. In effect, boys are heavily policed at this age by their peers, and the dominant masculinity is even more traditional than the standard of adult dominant masculinity norms. School is a major site where masculinity is practiced and policed, with some dramatic effects. Boys do poorly in school in comparison to girls as a group. This includes:

> lower grades, being held back more, a higher drop out rate, lower test scores, more behavior problems, a disproportionate share of being labeled learning disabled or emotionally disturbed, a disproportionate rate of school suspensions and involvement as a victim or perpetrator of violence, a higher rate of suicide, and a lower likelihood of attending college. Most significantly, as boys construct their masculinity,

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40) *See generally* WILLIAM S. POLLACK, REAL BOYS: RESCUING OUR SONS FROM THE MYTHS OF BOYHOOD (1998); DAN KINDON ET. AL, RAISING CAIN: PROTECTING THE EMOTIONAL LIFE OF BOYS (1999).

41) KINDON ET. AL, *supra* note 40, at 78.

particularly in adolescence, the demands of masculinity conflict with achieving in school. Masculinity norms thus have a major impact on boys' achievement, and on grades, test scores, repeating grades and dropout rates. In addition, the norm of male-male gender violence is very high, ranging from punking and bullying to physical violence, all the way to the extreme of school shootings and death. Male violence toward females is also very high at school, and male subordination of girls is part of the masculinity norm. Structurally and culturally, schools reinforce dominant masculinities, often unintentionally but sometimes explicitly.[42]

Finally, violence is a core attribute of masculinity, for both men and boys, and in the adolescent period the most traditional concept of masculinity, including violence, is strongly reinforced. Scholars of crime and violence view masculinity as demanding the performance of violence as a core attribute of masculinity. "Crime by men is not simply an extension of the 'male sex role.' Rather, crime by men is a form of social practice invoked as a resource, when other resources are unavailable, for accomplishing masculinity."[43] This norm is especially prevalent in adolescence and obviously brings boys more frequently in contact with the juvenile justice system.

IV. The Implications of Masculinities Scholarship for Boys and Juvenile Justice

What are the implications of this scholarship for family law reform, and specifically for boys and juvenile justice? Consider the variety of ways masculinities scholarship exposes cultural imprints on the system of family law or family law reforms. First, there are places that we assume a female norm or preference. Caretaking, or combining work and family, are examples. Although the words are neutral, we assume that we are talking about women's care, and women's combination of work and family, because

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42) Dowd, *supra* note 30, at 244-245.

43) James W. Messerschmidt, Masculinities and Crime: Critique and Reconceptualization of Theory 85 (1993).

women's caretaking is the social and actual norm. This renders men invisible in many respects. It also perpetuates a gendered norm by failing to consider the relative positions and reasons for the differential average positions of men and women. Gender preference itself may be a double edged sword, as it imposes assumptions about care and supports those for women, but at a cost, and only to some extent; it may give men greater freedom, but at a cost of failing to support them as fathers. It also triggers resistance, which we see in the fathers' rights movement, which is constructed using equality and neutrality norms, and absolute rights, rather than care as the focus.

Conversely, there are areas where we assume men as the objects of the system, but do not recognize them as gendered subjects, and they are invisible in a different way; we simply assume they are the subjects, and don't ask about gender. This is the case with the juvenile justice system: we assume it is dominantly populated by boys, so girls surprise us. When we think about gender in the system, some recognize that the structure assumes boys and it may not be a good system for girls, but this recognition has not led to an inquiry about the gendered construction of the system and its effects on boys.

Finally, the tendency has been to see gender as *either-or* rather than as *both-and*. We tend to approach gender analysis as requiring the identification of one subordinated group rather than seeing subordination among both boys and girls, both men and women. Thus, for example, in education, gender issues long focused on girls; when boys' educational issues were raised, then the concern became that those issues deflected from addressing concerns regarding girls. The approach was as if gender is a zero sum game, and that means one or the other. This also leads towards adopting "gender neutral" solutions that assume the situation of boys and girls is the same and the goal is to make them the same, when the gender issues may be different and require gender specific responses in order to get to equity or equality.

The juvenile justice system is a good example of these patterns. We have generally not focused on gender at all, rendering gender invisible. When we do focus on gender, we focus on girls and exclude boys, because we think we can only focus on one rather than both. It is a system that presumptively is about boys, but we do not talk about gender or masculinity. The examination of the system as gendered on behalf of girls has not led to an examination on behalf of boys.

If we do look at it from a masculinity perspective, what do we see? The

harsh punishment characteristic of the current system reflects the view of boys as dangerous and inherently violent. Boys of color are particularly dangerous, as are gay boys and lower class boys. So the hierarchy of masculinities is evident in those who come into the system and how they are treated.

The strong shift to more punitive outcomes, the shift to treating boys as if they were adult men, the view of boys as superoffendors particularly identified by race as hypermasculine all reflect assumed masculinities and stereotypes of boys that fly in the face of developmental data to the contrary.[44] The strength of the cultural norm of masculinity overcomes empirical data. Moreover, the justification of harsh punishment as necessary in order to control boys silently sanctions the worst offenses within confinement, most notably prison rape, leaving them unchallenged and permitted as a part of punishment.

What masculinities analysis most strongly exposes is how we have constructed the juvenile justice system to essentialize and biologize boys' presence and propensity, denying that masculinties are socially constructed, and therefore denying our social responsibility for the pattern. This essentialism also reinforces difference and hegemony. It is the ultimate power, the power to transcend the rules. It reinforces at the personal level the danger men pose to each other and to women. It reinforces the hierarchy among men and of men over women. The juvenile justice system therefore reveals how hegemony works. Its reinforcement of hegemony benefits boys/men who are not criminals.

The system demonstrates the power of social construction: the pattern of boys in the system feels and acts like a biological, hard wired norm. It is no mistake that boys commit crimes or that they engage in acts of violence because their task at this stage requires that they do so in order to take their place among men. The system also perfectly reflects the hierarchy among boys and men by its racial configuration: black boys are disproportionate in the

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44) *See, e.g.*, David e. Arrendondo, *Child Development, Children's Mental Health and the Juvenile Justice System: Principles for Effective Decision Making,* 14 Stanford Law & Policy Review 13 (2003); Elizabeth S. Scott & Thomas Grisso, *Developmental Incompetenceis, Due Process and Juvenile Justice Policy*, 83 NC. Law Review 793 (2005). This is the data the U.S. Supreme Court found convincing as the basis for holding the juvenile death penalty unconstitutional in Roper v. Simmons, 543 U.S. 568 (2005).

system, and the identity of juvenile defendants is strongly racialized. Those who have noticed and critiqued this pattern are absolutely right that this represents the continuing harsh price of racism.[45] I would argue in addition that this price is easier to exact because it is taken from a male body: race makes black bodies the most dangerous and stigmatized, but this is overlaid on assumptions about boys that makes males the object of punishment.

The punishment or rehabilitation of boys, moreover, is not with the goal of making them better or different men with a different sense of masculinity. Rather, the system reinforces traditional notions of masculinity rather than challenging them, at the very time when those traditional notions are the focus of adolescent masculinities and contribute to the actions of boys. Admittedly, effective means of confronting boys may have to operate within masculinities if they are to be effective. That creates a tricky gender context for rehabilitation. Ultimately, the lens of masculinities exposes the biases in a gendered system not of juvenile justice, but of boys' justice. Most significantly, it raises the question not only of when and how we sanction boys (and which ones more than others), but also what our model is that we rehabilitate them to be (or fail at that goal).

Through the lens of masculinities analysis, the story of Lionel Tate becomes a predictable tale of harsh outcome and ultimate failure because he was a black boy. The system is designed not to save him, but to send him deeper in. Before his fateful night with his young cousin, his needs were ignored because he was written off as a boy; once his cousin was killed, he easily fit into a familiar stereotype of danger that is exacerbated for black boys. The trial judge dehumanized him consistent with the long tendency of treating black boys not as "our" children but as "other." Although he was formally given a second chance when his harsh lifetime sentence was appealed, his reprieve was undermined by the failure to give him the help to remove him from the presumption of dangerousness. By the time he began to serve his long prison sentence, he had grown from a tearful 12 year old into a fearsome 19 year old, the epitomy of dangerousness without redemption.

We expect Lionel's case to end this way. In a less dramatic way, when we enter the courtrooms of the juvenile justice system, we are not surprised that

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45) *Supra* note 19.

mostly it is boys that are there, and more of them are black than would be proportionate to the population. We expect this to be a place where we will find boys; it is part of our cultural norms of masculinity. If juvenile justice is to do justice, however, this strongly gendered system should trigger analysis and careful consideration. We must examine and reform the gendered norm and operation of the system so that this system is not the price paid for being a boy, or the punishment for being a girl.