The Masculinity Mandate: #MeToo, Brett Kavanaugh, and Christine Blasey Ford

Ann C. McGinley
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BY ANN C. McGINLEY*

I. INTRODUCTION: THE HEARING

The fall 2019 Senate Judiciary Committee hearings involving Dr. Christine Blasey Ford’s testimony about then-Judge Brett Kavanaugh’s alleged behavior at a high school party gone awry and his emotional testimony in response will be etched in American minds for the foreseeable future. Dr. Blasey Ford accused then-teenager Brett Kavanaugh of sexually assaulting her in an upstairs bedroom as his friend, Mark Judge, egged him on. At the hearing, Blasey Ford’s trembling voice and respectful demeanor softened the bite of the substance conveyed: she was 100 percent sure that she had been sexually assaulted and that Brett Kavanaugh was the attacker. Blasey Ford’s occasional lapse into technical explanations using psychological terms established her competence. The combination of vulnerability and competence led to the widespread belief that Blasey Ford’s testimony was credible.1 After Blasey Ford testified, Kavanaugh came out swinging, accusing the Democrats of corrupting the process and categorically denying that he had sexually assaulted anyone.2 For the second time in three decades, the country was left with many questions about fairness, process, and sexual assault/harassment, and the role they should and do play in the nom-

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This essay uses identity performance and multidimensional masculinities theories to analyze the hearings, specifically to consider the gender, race, and class performances of the participants, and how partisans and non-partisans interpreted those performances. This examination demonstrates that the judgment concerning masculinity and femininity performances and their appropriateness is, to a certain extent, in the eye of the beholder. By the same token, public interpretations are not arbitrary. Rather, at least in this context, power differentials based on gender, race, and class appear to have influenced the public reaction to these performances and the interpretation of what constitutes appropriate masculine and feminine behavior. Moreover, the perceived appropriateness of these behaviors governs who the winners and losers will be. In this case, upper-middle-class white males won while women of all races and classes lost. Although it was not immediately obvious how class and race influenced the process because both main participants are of a similar class and race, deeper analysis demonstrates that white, upper-middle class, male power affects how the participants were perceived and judged. Class, race, and gender were certainly present in the calculation of winners and losers.

Part II of this essay establishes the theoretical basis for my analysis, explaining masculinities, identity performance, and multidimensional theories. Part III uses these theories to analyze the various performances as well as the public reactions to those performances. Finally, this essay concludes that gender, race, and class affect judgments in this context, and the Senate should write rules to assure that a fairer and more accurate process takes place in the future in the hopes of breaking the strangleholds of traditional gendered, raced, and classed power.

II. MASCULINITIES, IDENTITY PERFORMANCE, AND MULTIDIMENSIONAL THEORIES

The Kavanaugh hearings clearly illustrate the power of performing masculinity on the national stage. Masculinities theory posits that gender is a social structure that imposes consequences on those who do not comply;  


4. For a discussion of multidimensional masculinities theory, see generally Ann C. McGinley & Frank Rudy Cooper, Masculinities, Multidimensionality and Law: Why They Need One Another, in MASCULINITIES AND THE LAW: A MULTIDIMENSIONAL APPROACH 1 (Frank Rudy Cooper & Ann C. McGinley eds., 2012).

5. See Patricia Yancey Martin, Gender as Social Institution, 82 SOC. FORCES 1249 (2004); Bar-
masculinity itself is a social construction—not a biological imperative.\textsuperscript{6} In fact, masculinities scholars note that boys in our culture learn to act in a way that is defined as masculine, even if it is not natural for them to do so.\textsuperscript{7} There are serious consequences for boys and men who buck the masculinity mandate\textsuperscript{8}—the social demand that men fulfill societal expectations of masculinity. Gender non-conforming men are ridiculed, harassed, and seen as outsiders.\textsuperscript{9} Performing masculinity as is expected has its rewards, but even those who comply with the masculinity mandate do so at a price.\textsuperscript{10} They must continuously perform their masculine identities, by denying and hiding certain emotions deemed to be feminine. The mottos go: Boys don’t cry; fathers don’t take primary responsibility for children; real men don’t show fear.\textsuperscript{11}

Masculinities theory relies in part on identity performance theory, a concept that individuals perform their identities in order to earn acceptance. Professors Devon Carbado and Mitu Gulati explain identity performance theory in \textit{Acting White: Rethinking Race in “Post Racial” America}.\textsuperscript{12} They posit that in a work world where the dominant culture is male, heterosexual, and white, employees with outsider identities perform their identities to gain advantage in the workplace, but these performances also have costs to

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\textsuperscript{6} See Nancy E. Dowd, \textit{The Man Question: Male Subordination and Privilege} 26, 60-61 (2010) (explaining that masculinity is a series of practices that one constantly performs).

\textsuperscript{7} See Ann C. McGinley, \textit{Masculinity at Work: Employment Discrimination Through a Different Lens} 23-24 (2016).

\textsuperscript{8} I am coining this term—the “masculinity mandate”—to describe the strong pressure on men and boys to conform their behavior to society’s expectations of them. These expectations differ depending on the intersectional identities of the individual boy or man (age, race, sexual orientation, class, etc.); thus, masculinities theorists talk about “masculinities” in the plural when describing masculine behaviors. See infra notes 18-19 and accompanying text.

\textsuperscript{9} See McGinley, supra note 7, at 5-6.

\textsuperscript{10} See Dowd, supra note 6, at 58-60.

\textsuperscript{11} See Plan Int’l USA, \textit{The State of Gender Equality for U.S. Adolescents} 4-5 (2018), <https://www.planusa.org/docs/state-of-gender-equality-summary-2018.pdf> (finding in survey of more than 1,000 children from 10-19 years old that one-third of boys believed that society wants boys to hide their feelings and another 34 percent answered that society wants boys to be strong and tough, to “be a man” and “suck it up”); Gideon Burrows, \textit{Childcare: Why Don’t Men Pull Their Weight}, Guardian (July 2013, 7:42 AM EDT), <https://www.theguardian.com/lifeandstyle/2013/jul/05/childcare-men-pull-weight> (stating that it is a myth to say that men have taken on equal responsibilities for childcare and noting that 90 percent of fathers would not take additional paternity leave if they could, but also detailing social and structural barriers to men’s caring for their children full-time); John M. Kang, \textit{Manliness’s Paradox, in Masculinities and the Law: A Multidimensional Approach}, supra note 4, at 136, 142-44 (explaining that soldiers run into battle to avoid the criticism of being called cowardly).

\textsuperscript{12} Devon W. Carbado & Mitu Gulati, \textit{Acting White: Rethinking Race in “Post Racial” America} (2013).
By comparison, masculinities theory posits that masculinity itself is an identity performance that is demanded by society; different groups in society approve of different types of performances, and individuals tend to perform the masculine identities that are favored by the groups to which they belong. These performances, which may be conscious or unconscious, often take a toll on the individual.

Masculinity is fragile. It is defined more by what it is not than by what it is. "Real" men and boys are not girls; they are not gay. Because masculinity is fleeting, many boys and men perform their masculine identities individually and in groups, in schools, on the streets, and in workplaces in order to reinforce their own masculinity and that of their group.

Masculinity is not monolithic. Multidimensional masculinities theory, whose roots lie in feminist legal theory, critical race theory, and critical race feminism, among other theories, explains that there are multiple masculinities that develop along at least two axes: first, the varying identities of the individual performing masculinity, and second, the context of

13. Id. at 27-34 (describing the various performances as racial comforting, strategic passing, exploiting stereotypes, providing discomfort, selling out, and buying back); id. at 35-45 (describing the costs of identity performances).
14. See Ann C. McGinley, Policing and the Clash of Masculinities, 59 HOW. L. REV. 221, 242-47; 256-59 (2015) (examining the different forms of masculinity performed by male police officers and young black men living in neighborhoods targeted by the police).
15. See DOWD, supra note 6, at 58-60.
16. Id. at 62. There is a strong current among progressive young adults that resists the binary classification of sex as male and female. I recognize and applaud this movement and understand that not all persons fit into the binary that society has established. Clearly, persons are born intersex as well as male and female; moreover, trans and other non-cisgender persons may live on a gender spectrum and perform their genders in different ways depending on their preferences. See, e.g., Amanda Montañez, Visualizing Sex as a Spectrum, Sci. AM. (Aug. 29, 2017), <https://blogs.scientificamerican.com/sa-visual/visualizing-sex-as-a-spectrum/>; Ritch C. Savin-Williams, What Everyone Should Know About Genderqueer and Nonbinary, PSYCHOL. TODAY (July 29, 2018), <https://www.psychologytoday.com/us/blog/sex-sexuality-and-romance/201807/what-everyone-should-know-about-genderqueer-and-nonbinary>. The gender regime that I describe—an imposition of masculinity on boys—is particularly harmful to those individuals who do not wish to, or who cannot, alter their bodies or genders to perform as society expects. It is difficult to explain gender theory given that much of it—at least the language used—relies in large part on the binary that has previously been accepted, but I hope to avoid essentialism in my analysis. The binary itself is essentialist, and to some extent, so is much of masculinities theory. But this theory is receptive to all persons, whether cisgender or not, and should be supportive if we can find a language that works to describe the reality that is society's pressure on persons who are perceived to be men and boys to perform masculinity in particular ways given their particular identities (racial, age-based, sexual orientation, etc.) in certain contexts. I will leave for another day the effort to create a language that is more inclusive should this essay fail to do so.
17. See McGinley & Cooper, supra note 4, at 2-7 for an explanation of these influences.
18. For purposes of this article, the term "masculinities" means: a complex social structure that is embedded into organizations such as workplaces and schools and in society in general; the construction of masculine identities through performance in different contexts; and a set of practices and active engagement in these practices by persons who reinforce the gender hierarchy. See, e.g., McGINLEY, supra note 7, at 17.
the situation in which the performance occurs. This means that in order to understand behaviors, societal expectations of those performances, and the lenses through which society interprets behaviors, we must consider not only the sex, gender, sexual orientation, and gender identity of the individuals involved but also race, class, immigration status, national origin, and other identities. We must also examine the context—expectations of masculinity performances and the performances themselves will vary depending on whether the individuals involved are at work, at school, in public spaces, or, in this case, testifying at congressional hearings.

While different socio-economic groups express preferred masculinity in different ways, common among all socio-economic groups is the use of sexual and sex-based harassment of women as a means of proving their masculinity to themselves and others. Workplaces are key locations for proving masculinity because men’s sense of identity often derives from the work they do. In blue-collar workplaces that are predominantly and traditionally male, women are denigrated by off-color jokes, Playboy calendars, and negative comments about women’s unsuitability for the job. Men group together to prove masculinity by harassing women new to the job in sexual and non-sexual ways. The raucous misogynist atmosphere can be raw and public and perpetrated by groups of (mostly) men. Masculine performances include humiliating unwelcome workers, often in sex or gender-specific ways, to undermine their competence and drive them from the workplace and to reinforce the masculinity of the male harassers in their own eyes and those of their co-workers.

While workplaces are rife with gender performances, such behaviors appear much sooner in boys’ lives. Gender norms are ubiquitous, and

19. McGinley & Cooper, supra note 4, at 2.
20. See McGinley, supra note 7, at 24-25; see also McGinley, supra note 14, at 251 (explaining that men are responsible for more than 90 percent of violence internationally, compared to their female counterparts who commit only about 10 percent of violent acts; that engaging in crime is a masculine performance; that a large percentage of young men of all classes commit crimes, but the types of crimes men commit vary depending on their class status, and middle- and upper-class young men tend to “age out” of crime sooner because of the availability of paid work).
22. McGINLEY, supra note 7, at 29-32.
24. Female acolytes are sometimes also involved in the harassing behavior in an effort to enhance their own power and protection.
young children are aware of gendered expectations. From preschool on, boys from all social and racial backgrounds feel pressure to prove their masculinity. Boys are admonished not to be a “girl,” in other words, not to be weak. In schools, sexual and sex-based harassment is rampant, both at the college and university levels and from kindergarten through high school to the college and university levels. But many have ignored the gender messages sent regularly to boys and girls from birth. In schools, boys are encouraged to demonstrate their masculinity and to hide their feminine characteristics. One way of doing this at the middle and high school levels is through sex and sex-based harassment. Groups of boys join to harass both girls and other boys. Similar to the workplace, the goal of harassing boys and girls is to elevate the masculinity of the harassers, to prove their own masculinity, and to set group gender rules. As we shall see in Part III below, the tale told by Dr. Blasey Ford is consistent with the research concerning young men’s behavior in a world where there is a strong masculinity mandate.

III. ANALYZING THE SUBSTANCE AND SHIFTING THE LENS

A. Contrasting Demeanors, Tones, and Public Reactions

An analysis of demeanor, word choice, tone, behavior, and content demonstrates that both Blasey Ford and Kavanaugh performed their gender, either consciously or unconsciously, at the Judiciary Committee hearings. These performances were not only gendered but also race- and class-based, and were interpreted by the audience in the room and the viewing public through gendered, racial, and class-based lenses.

1. Dr. Christine Blasey Ford’s Testimony

Research demonstrates that women are generally categorized as nice but incompetent or competent but unduly aggressive (“bitchy”). Female leaders gain acceptance only if they are able to walk the fine line between these two extremes, and white, middle-class women may employ an ex-

26. See PLAN INT’L USA, supra note 11, at 4-5 (finding in a 2018 survey of 1000 children ages 10-19 that 82 percent of boys surveyed had heard someone tell a boy that he was acting like a girl, which they interpret to mean that the boy is “emotional, crying, sensitive, weak, feminine, and moody/dramatic – and implicitly unbecoming”).


28. See Ann C. McGinley, Masculinities at Work, 83 ORE. L. REV. 359, 387 & 387 nn.102-04 (2004) (describing studies and theories of social scientists finding that female leaders are judged more harshly than their male counterparts are).
tremely narrow set of behaviors to be considered both competent and personally acceptable.\textsuperscript{29} They must perform their femininity but do so carefully and not excessively to avoid the “incompetent” label. They must also avoid appearing unduly masculine and forceful while at the same time demonstrating stereotypically masculine competence. This is a high order, but Dr. Blasey Ford successfully accomplished this goal. Her testimony was replete with femininities, but at the same time she demonstrated her competence in her field, psychology, which was related to the substance of her testimony about memory lapses.

Dr. Blasey Ford gave what was generally regarded as very credible testimony\textsuperscript{30} that inebriated teenagers Brett Kavanaugh and his friend Mark Judge pushed her, a fifteen-year-old girl, into a bedroom at a party, locked the door, and turned up the music.\textsuperscript{31} Blasey Ford testified that Kavanaugh sexually assaulted her, groping her through her clothing, pushing her onto the bed, getting on top of her and pinning her down so she could not get up, and trying to rip off her clothing.\textsuperscript{32} She stated that he put his hand over her mouth to silence her as she tried to scream, which made it difficult for her to breathe.\textsuperscript{33} She testified that she tried to escape, but Kavanaugh was too heavy. She feared he “was accidentally going to kill [her].”\textsuperscript{34} Etched in her memory was the “uproarious laughter between the two and their having fun at [her] expense.”\textsuperscript{35} When the opportunity came, Blasey Ford testified, she escaped into a bathroom across the hall as the drunken boys, laughing and

\begin{itemize}
\item \textsuperscript{29} Women of color have even more difficulties as leaders because of ingrained stereotypes. See Janis V. Sanchez-Hucles & Donald D. Davis, \textit{Women and Women of Color in Leadership: Complexity, Identity, and Intersectionality}, 65 AM. PSYCHOLOGIST 171 (2010).
\item \textsuperscript{31} The tapes of the hearings referred to in this article come from C-Span and refer to testimony of both Professor Blasey Ford and then-Judge Kavanaugh. Where applicable, citation will be to the minutes and seconds of the recorded testimony. See generally Kavanaugh Assault Hearing Testimony, \textit{supra} note 2; \textit{Supreme Court Nominee Brett Kavanaugh Confirmation Hearing, Day 1, Part 1}, C-SPAN (Sept. 4, 2018), <https://www.c-span.org/video/?449704-1/brett-kavanaugh-confirmation-hearing-day-1-part-1-cspan>; \textit{Supreme Court Nominee Brett Kavanaugh Sexual Assault Hearing, Professor Blasey Ford Testimony}, C-SPAN (Sept. 27, 2018) [hereinafter Blasey Ford Testimony], at 35:18-37, <https://www.c-span.org/video/?451895-1/professor-blasey-ford-testifies-sexual-assault-allegations-part-1>.
\item \textsuperscript{32} Blasey Ford Testimony, \textit{supra} note 31, at 35:44-36:01.
\item \textsuperscript{33} Id. at 36:11-36:18.
\item \textsuperscript{34} Id. at 36:26-36:30.
\item \textsuperscript{35} Id. at 1:10:08-1:10:41.
\end{itemize}
talking loudly, pinballed their way down the narrow stairway.36 Somehow Blasey Ford escaped down the stairs and out the front door. She explained that because of the trauma, she insisted, nearly thirty years later, in 2012, on having two front doors in her remodeled home, to allow for an emergency escape route.37

Blasey Ford’s testimony before the Senate Judiciary Committee was credible and her manner gracious. She admitted to being “terrified” to testify, but she emphasized that she believed it was her civic responsibility to tell the truth about what had happened.38 She attempted to put everyone around her at ease. She asked quietly for caffeine, and only many minutes later, when no one had brought her coffee, did she ask again.39 Once she had her coffee, she willingly let the Republican chair decide when to take a break.40 She politely offered more nuanced responses to correct the record and to ensure that her testimony was accurate.41 She seemed apolitical, interested in pleasing her interrogators, including the Republicans, and her questioner, Rachel Mitchell, a sex crimes prosecutor from Arizona who had been designated by Republicans to serve as Special Counsel. The Republicans had appointed Mitchell to ask questions for them, evidently for fear that they would be perceived as bullying Blasey Ford as their predecessors had done with Professor Anita Hill during the hearings for then-Judge Clarence Thomas’s nomination to the Supreme Court.42

During the Blasey Ford testimony, the frightened fifteen-year-old child seemed to emerge: her surprise at the boys’ raucous laughter, her terror that she might die from the attack, her shame after-the-fact, and her fear that her parents would learn that she had gone to a party where there was alcohol and no adult.43 Even in 2018, after she had notified the Washington Post anonymously of the assault, she hid her shame and protected those around her, whispering over the phone from her car as she interviewed lawyers to represent her so that her parents, whom she was visiting, would

36. Id. at 36:48-37:29.
37. Id. at 39:02.
39. Id.
40. Id.
43. Id.
not hear her. And only well into the testimony did we realize that she had been in the D.C. area in August 2018 in part to attend her grandmother's funeral, and that she had sat for a polygraph exam at the airport in D.C. the day after the funeral as she waited for her plane home. As a result of the publicity, she testified, her immediate family had suffered more than she could have imagined; they were forced to move out of their home and to spend time separated from one another in response to threats.

Strongly stating that she was 100 percent sure that her assault occurred and the attacker was Brett Kavanaugh, Blasey Ford used a polite manner, quiet tone, and submissive behavior to communicate her story. She emphasized her civic duty and that she merely wanted to help. She modestly declined to opine about whether Kavanaugh should be appointed; that was not her role, she acknowledged, but she asserted that she believed that the decision makers should have the information that she conveyed in making their decision.

As an appropriately feminine woman, Blasey Ford exposed her vulnerability—she was “terrified” about testifying—and she explained why she had not come forward sooner. She was concerned for her family’s privacy. Like a responsible wife and mother, she worried about her children and husband, who suffered as a result of the threats and, ultimately, had to abandon their home. Her voice was soft, trembling, and slightly childlike. She was polite to all who questioned her and showed that she was trying assiduously to answer the questions completely and honestly. When asked to review a letter she had written, for example, Blasey Ford took the request seriously, reading it carefully and making small changes to assure its accuracy. She listened to questions and answered them, it appears, to the best of her ability—without guile, without interrupting, and without evasion. Her demeanor matched what she was saying: she was humble and apparently truthful with no ulterior motives.

When she described the alleged sexual assault, Blasey Ford demonstrated the sorrow, confusion, and fear that one would expect of a young girl under the circumstances. She testified credibly that when Kavanaugh covered her mouth she feared he would accidentally suffocate her. She openly admitted that the assault was life-changing, throwing her off track for years in her studies. Remarkably, in keeping with what would be expected of a modest woman, despite all that she had suffered, Blasey Ford showed no signs of anger at anyone: her alleged attackers, the politicians

44. Id.
45. Id.
46. Id.
surrounding her, or even the press that had invaded her space. She was friendly and soothing, forgiving and motherly; she showed no signs of the stereotypical figure of the man-hating radical feminist.

Despite her feminine demeanor, Blasey Ford’s testimony was forceful, confident, and compelling. She displayed her educational background when asked how she interpreted her memory lapses. She went into a technical description of the brain’s processes, explaining that her memory of the boys’ laughter was “indelible in the hippocampus.”\(^{47}\) Because of her obvious competence in her field, Blasey Ford was considered credible, but only because her psychological references combined with the tone, language, and demeanor of the perfect middle-class white mother and wife, accomplished in her own career but not threatening of others.\(^{48}\) Even Fox News anchor Chris Wallace labeled her performance as credible, and noted that her testimony was likely devastating to Judge Kavanaugh’s chances of appointment to the Court.\(^ {49}\) And then things changed: Judge Brett Kavanaugh took the stand.

2. Judge Brett Kavanaugh’s Testimony

After Dr. Blasey Ford’s testimony, Judge Kavanaugh took the floor and came out swinging.\(^ {50}\) He did not claim that Blasey Ford was lying, merely that she was confused about who had assaulted her.\(^ {51}\) He saved his powder for a partisan attack on the Democrats, whom he claimed were taking revenge over President Trump’s election. In particular, Kavanaugh accused the Clintons of a conspiracy to prevent his appointment to the Supreme Court.\(^ {52}\) But he did not only say this; he yelled it; he cried; he sniffled; he contorted his face.\(^ {53}\) Throughout his testimony, Kavanaugh repeated many times that those who were at the alleged party did not corroborate Blasey Ford’s testimony: in fact they refuted it, he argued. He repeat-
ed that he was innocent; he had never blacked out from drinking; he had never assaulted a woman; he has always had many female friends; he was a great champion of women’s careers. His family and his reputation were utterly destroyed by the process. And, he emphasized that the Democrats held the information secretly for forty-five days and then pounced in an effort to defeat his nomination.

Kavanaugh’s language, tone, and behavior drew a sharp contrast to that of Blasey Ford. Where Blasey Ford carefully employed descriptive yet non-aggressive language in a polite, helpful tone, and submitted willingly to questioning, Kavanaugh was angry, evasive, aggressive, and, at times, belligerent. He called the hearings a “circus,” the process “an outrage,” and “grotesque” and his treatment “character assassination.” He labeled the allegations of another woman a “joke,” a “farce.” The whole thing was “nonsense,” and his female friends knew they would be “vilified” for supporting him. Judge Kavanaugh’s tone was often loud and his behavior disrespectful. He refused to answer Senator Durbin’s request that he ask for an FBI investigation. He yelled at and interrupted Senator Feinstein. He challenged Senator Klobuchar when she asked him about his drinking and responded with questions of his own, demanding that she answer (he later apologized); he raised his voice to Senator Leahy, who had asked him a question about a page in Kavanaugh’s high school yearbook that contained references to drinking and sex. He stated, “No, no, no.... I am going to talk about my high school record if you are going to sit here and mock me.” Finally, it appears that Judge Kavanaugh lied under oath when he denied blacking out while drinking as a teenager and when he interpreted comments on his yearbook page indicating sexual exploits and

54. Id.
55. Id.
56. Id. at 10:35.
57. Id. at 55:48.
58. Id. at 10:45.
59. Id.
60. Id. at 57:29.
61. Id. at 54:35.
62. Id. at 37:38.
64. Kavanaugh Assault Hearing Testimony, supra note 2, at 56:56.
65. Id. at 1:43-49.
66. Id. at 1:09:05-17.
drunkenness. His opening statement was very partisan, especially his assertion that the Blasey Ford accusations were the revenge of the Clintons against him. In contrast, Blasey Ford demonstrated none of the defensiveness or offensive behavior that characterized Kavanaugh’s statement and answers to Democratic senators’ questions.

Augmenting the tension, Republican senators (all white men) made statements, some emotional and raw, about the process. For example, Senator Hatch declared the process a “national disgrace” and defended Judge Kavanaugh, saying, “[t]his man is not a monster.” Senator Graham yelled and jabbed his finger and called the process “crap,” a “charade.”

3. Public Response to Blasey Ford and Kavanaugh Testimony

While it appears that most of the public and press responses favored the credibility of Blasey Ford and commented on the lack of professionalism of Judge Kavanaugh, there were some responses that varied. On one hand, Steve Denning of Forbes argued that Blasey Ford was professional, while Kavanaugh was emotional, unjudicious, and out-of-control. He opined that given his performance at the hearing, Kavanaugh should not be confirmed. Likewise, Richard Wolfe of the progressive newspaper The Guardian, questioned whether Kavanaugh would or should survive the hearings, given a performance that was “jarringly unbalanced and at times unhinged.” A number of writers contrasted the different expectations and treatment of male and female witnesses; the different treatment of a white woman versus Anita Hill, who was accused of “erotomania”; and Kavanaugh’s rambling, angry, tear-filled defense of patriarchy.

68. Brett Kavanaugh’s Opening Statement: Full Transcript, N.Y. TIMES (Sept. 27, 2018), <https://www.nytimes.com/2018/09/26/us/politics/read-brett-kavanaugh-s-complete-opening-statement.html>. The assertion that the Clintons were responsible for the opposition was particularly odd and seems to have absolutely no basis in fact. If during her confirmation hearings, then-Judge Sonia Sotomayor had said that opposition to her was all a plot by anti-Hispanic bigots or litigants who’d lost before her, she would have been vilified as hallucinatory. This indicates a double standard that applies to white men and women of color.
69. Kavanaugh Assault Hearing Testimony, supra note 2, at 1:50.
70. Id. at 1:23:27:19.
But conservative Internet writers were pleased that Kavanaugh had stood up to his questioners. They saw his emotion and that of Senator Graham as appropriate: he did not deserve the treatment he received, they argued.\textsuperscript{74} John Nolte of the right-wing news site \textit{Breitbart} ridiculed conservative Fox News for stating that Blasey Ford’s testimony was credible and argued that it was far from credible, pointing to what many others believe were minor discrepancies in Blasey Ford’s narrative.\textsuperscript{75}

Given these press responses, it is interesting that Kavanaugh was approved by the Senate after a truncated FBI investigation following the hearing.

\textit{B. Truthful Testimony?: The Masculinity Mandate}

1. The Young Brett Kavanaugh: Performing Masculinity: “Cultures of Silence” and “Boys Will Be Boys”

The masculinity mandate would have encouraged a young Brett Kavanaugh to demonstrate his masculinity to his friends and others to prove himself and gain status for his group. One way of doing this, as the research explains, is to engage in sexually harassing behavior or sexual assaults, especially in the presence of others.\textsuperscript{76} The allegations in this case are consistent with numerous tales of boys in the same social class and race as Brett Kavanaugh and some at about the same time in history.\textsuperscript{77} Blasey


\textsuperscript{76} See e.g., \textsc{Michael Kimmel}, \textit{Guyland: The Perilous World Where Boys Become Men} 238 (2008) (explaining that the gang bang confers status to young men and the group); \textsc{Bernard Lefkowitz}, \textit{Our Guys: The Glen Ridge Rape and the Secret Life of the Perfect Suburb} 22-25, 281-82 (1997) (describing the gang rape with a baseball bat of an intellectually disabled teenage girl by a group of popular, middle-class, white high school male athletes, the group status and solidarity reinforced by group sexual behaviors such as masturbation and watching pornography (“circle-jerks”), watching surreptitiously while classmates engaged in sexual behaviors (“voyeuring”), having younger girls perform oral sex upon a number of boys, and humiliating girls); \textsc{Peggy Reeves Sanday}, \textit{Fraternity Gang Rape: Sex, Brotherhood, and Privilege on Campus} (2d. ed. 2007).

\textsuperscript{77} See e.g., \textsc{Kimmel}, supra note 76, at 238; \textsc{Lefkowitz}, supra note 76, at 22-25, 281-82; \textsc{Sanday}, supra note 76.
Ford’s testimony is consistent with what social scientists know about teenage boys’ behavior, even those (or especially those) raised in upper-middle-class white families with considerable privilege, as Kavanaugh was. By participating in group sexual behavior, even illegal sexual assault, boys perform their masculinities and heighten their group status. In fact, even when engaging in individual sexual behaviors with young women, many young men consider how that behavior will impress their friends. In essence, sexual assault is a means of gaining status and masculinity. Even though he denied the sexual assault, the male-bonding behaviors that Judge Kavanaugh described in his testimony—drinking beer, lifting weights, practicing football—and the telltale descriptions in his yearbook page (as well as the fictitious reports in Mark Judge’s later novels) are consistent with a need to perform and prove masculinity to Kavanaugh’s male friends. In fact, research demonstrates that all-male environments such as schools and athletic teams are rife with masculinity performances as well as an attitude that boys and men are superior to girls and women.

Furthermore, there is a “culture of silence” about boys’ violent sexual assaults of young girls and boys. This culture thrives because of witnesses’ fears that they will be victimized if they speak up. Given this reality, it would not be surprising that a victim of sexual assault in 1982 would keep it to herself, and that teens attending a party where a sexual assault occurred would never report the assault if they were aware of it at the time. It also explains why those who attended deny as adults any memory of attending such an event. Thus, the avowed failure to remember the party is understandable, especially given that the FBI did not have an opportunity

78. See e.g., KIMMEL, supra note 76, at 238; LEFKOWITZ, supra note 76, at 281-82.
79. KIMMEL, supra note 76, at 25-26 (describing a young man who felt he had to have sex with a girl in order to impress or satisfy his male friends).
80. Id. at 238 (describing the research of anthropologist Peggy Sanday concerning fraternity gang rapes). Even where there is no physical harassment to reinforce masculinity, many men bond to express their masculinity in male spaces. One example is “locker room” talk, which then-candidate Trump claimed as a defense to the Access Hollywood tape that recorded the future president bragging that he had sexually assaulted women. See Meghan Kencally, What Trump Previously Said about the 2005 “Access Hollywood” Tape that He’s Now Questioning, ABC NEWS (Nov. 27, 2017), <https://abcnews.go.com/US/trump-previous-2005-access-hollywood-tape-now-questioning/story?id=51406745>. One would expect that men would be ashamed of touting this type of behavior—whether fictional or real—because of its degrading attitude toward women as sexual objects with no sexual agency.
81. See David S. Cohen, Keeping Men Men and Women Down: Sex Segregation, Anti-Essentialism, and Masculinity, 33 HARV. J. L. & GENDER 509, 544-49 (2010) (explaining how sex segregation in schools, sport, and fraternities reinforces the hegemony of men’s power and establishes negative attitudes and behaviors toward women, specifically views that men are superior to women, discussions of women as sex objects, and ultimately, increased sexual violence towards women).
82. KIMMEL, supra note 76, at 61-62.
83. Id.
to probe the alleged partygoers’ memories in interviews before the hearings, and even after the hearings, interviews that seem to have been cursory remain sealed from the public.\textsuperscript{84}

While group sexual assault is a common means of gaining status and performing masculinity, clearly not all men or boys engage in these assaults, and our society has an inconsistent reaction to these behaviors. First, society purports to be shocked by the allegations when they are raised. This is due, in large part, to vast underreporting of sexual violence engaged in by young men. An example of this shocked reaction occurred in the Kavanaugh affair surrounding allegations furthered by a Julie Swetnick that Kavanaugh was part of a group that she observed engaging in a “train” (gang rape) of drunk girls at a number of parties.\textsuperscript{85} While these allegations are shocking and may be false,\textsuperscript{86} many dismissed the allegations out of hand, assuming that “nice boys” like Kavanaugh do not engage in these kinds of behaviors. Nonetheless, there are many stories of gang rapes and “trains” in fraternity parties that were perpetrated by “nice boys.”\textsuperscript{87} The “culture of silence” reported by sociologist Michael Kimmel, would explain why these stories appear to be rare and extraordinary.\textsuperscript{88} Second, and in contradiction to the first reaction of disbelief, society expresses the sentiment that this behavior is common and therefore, boys should not be held accountable for their actions. These two contradictory beliefs were present in the public reaction to the Kavanaugh hearings. While many saw the allegations as unbelievable, they argued alternatively that even if Kavanaugh perpetrated the sexual assault, he should not be responsible for common behavior of teenage boys years later.\textsuperscript{89}

\textsuperscript{84} Each of the individuals (or their lawyers) alleged to have attended the party submitted a statement saying they do not remember attending a party of the type described by Dr. Christine Blasey Ford. See generally Kavanaugh Assault Hearing Testimony, supra note 2. After the hearing, the President ordered a limited FBI investigation, and the FBI questioned those who allegedly attended, but the scope of the questions and the results of the FBI investigations were never made public. See, e.g. Brett Samuels, FBI Concludes Interview of Mark Judge, Hill (Oct. 2, 2018), <https://thehill.com/regulation/court-battles/409437-fbi-concludes-interview-of-mark-judge>.


\textsuperscript{87} See supra note 76.

\textsuperscript{88} KIMMEL, supra note 76, at 61-62.

The belief that the behavior is common and should therefore not be penalized is expressed in the adage, “boys will be boys.” While research demonstrates that violence is predominant in young men’s upbringing of all classes, a societal response to middle-class white boys’ sexual violence and other illegal behavior (especially when perpetrated by popular athletes in groups) normalizes their anti-social behavior and presumes that these boys will outgrow their criminal tendencies. Society’s permissive attitude of “boys will be boys” does not apply to all boys, however. It is reserved for middle- and upper-middle-class boys who are predominantly white. Black and Latino boys, especially those raised in poor neighborhoods, do not benefit from the assumption that their behavior is a phase to be outgrown. Instead, even when these boys are very young, they are tried as adults, incarcerated, and punished disproportionately for their behavior.

Kavanaugh benefitted from the “boys will be boys” adage. Even though most observers viewed Blasey Ford as credible, many shifted to the alternative argument: even if it happened, we shouldn’t punish Kavanaugh for illegal behavior that he engaged in thirty-six years ago when he was a teenager. In other words, “boys will be boys.” And, given Kavanaugh’s apparently clean record as an adult, this adage would protect an adult who made mistakes as a teen from their continuing repercussions. But an even more curious dispensation was given to Judge Kavanaugh. Now as an adult, Kavanaugh testified in a way that many believe is untruthful, but he was not only forgiven; he was also given a seat on the Supreme Court. Thus, his confirmation ignored not only his childhood crimes but also what appears to be his lying about his childhood aggression (or perhaps his lack of memory of it based on his drinking) in sworn testimony in a hearing before the Senate Judiciary Committee. This reaction is particularly surprising because it demonstrates Kavanaugh’s privilege, an excuse that would likely not have been accorded to others and should not have been accorded to him. Lying, especially by lawyers and judges, is particularly condemned by law, rules of procedure, lawyers’ codes of professional responsibility,

90. An important example of the “boys will be boys” attitude in white, middle-class America appeared in response to a gang rape of an intellectually disabled teenage girl by a group of male high school athletes in the New Jersey suburbs, the subject of Our Guys. Parents, school teachers and administrators, and to some extent law officers, looked the other way as a group of white, middle-class boys engaged in escalating criminal behavior ranging from simple theft, to rampant underage drinking, to destruction of property, to indecent exposure, to gang rape. Even after the boys engaged in the unthinkable act of luring a young, intellectually disabled girl into a basement to commit the group crime, many parents and school officials believed that the boys’ behavior was not criminal and that the girl, who was clearly incapacitated by her limited intellect, was to blame. See generally Lefkowitz, supra note 76.


92. See Blumenthal & Bendery, supra note 67.
A job applicant for a legal or judicial post should be expected to demonstrate utmost honesty in his interviews (especially when under oath).

2. Judge Kavanaugh: An Adult Performing Masculinity

The masculinity mandate would also drive the adult Judge Kavanaugh to respond forcefully to the accusations that he had sexually assaulted another teenager when he was in high school. And Judge Kavanaugh did respond forcefully. But his response did not convince many that he was innocent. First, his story of spending all of his spare time with his buddies working out, practicing football, drinking beer, talking about girls, etc., seems like the description of a privileged kid’s summer spent bonding with his male classmates. This alone, of course, is not wrong and certainly not all males who engage in bonding use sexual harassment or assault to do so, but what Judge Kavanaugh portrayed as an innocent, normal environment is actually one that can generate competition to prove one’s masculinity to the group. And there was evidence from his yearbook page that the boys’ behavior may not have been as innocent as he portrayed it to have been at the hearing.94

More important, Kavanaugh’s emotional, over-the-top angry performance seemed to be that of a man who believed he was entitled to the job of Supreme Court Justice. His sense of entitlement dominated his story about how he worked hard at Yale University, and ultimately at Yale Law School, the top-ranked law school in the country.95 There was no self-awareness that working hard alone does not get someone (and did not get him) into the position he held. As the white male son of two lawyers (one a judge), he attended private schools in Washington, DC, and an elite private university for both undergraduate and law school. This upbringing, along with intelligence, gave Kavanaugh an extreme edge over the vast majority of others his age. His privilege, combined with his own hard and very competent work and perhaps even some lucky breaks, landed him where he

93. See, e.g., 18 U.S.C. §§ 1621-23 (2012) (false statements and perjury); Fed. R. Civ. P. 11 (exposing lawyers to sanctions for making frivolous claims to the tribunal); MODEL CODE OF JUDICIAL CONDUCT r. 1.2 (AM. BAR ASS’N 1990) (Promoting Confidence in the Judiciary); id. r. 2.2 (Impartiality and Fairness); id. r. 2.4 (External Influences on Judicial Conduct); MODEL RULES OF PROF’L CONDUCT, r. 3.1 (AM. BAR ASS’N 1983) (Meritorious Claims and Contentions); id. r. 3.3 (Candor Toward the Tribunal); id. r. 3.4 (Fairness to Opposing Party and Counsel); cf MODEL CODE OF JUDICIAL CONDUCT r. 4.1 (Judge should not engage in political or campaign activity that is inconsistent with the independence, integrity, or impartiality of the Judiciary); id. r. 4.2 (Similar admonition regarding campaign activities).

94. See Blumenthal & Bendery, supra note 67.

95. Kavanaugh Assault Hearing Testimony, supra note 2, at 2:24:35-44.
was. But he showed no recognition of this. Instead, when credibly accused of sexual assault, he employed a deep anger to fight back. Contrast this reaction to that of his accuser: assuming the veracity of her story, she should have been angry that she had suffered for more than thirty-five years from the event and the skepticism she faced when she finally told her story. But while Kavanaugh seemed to think he was entitled to the job and was angry that he had to defend himself, Blasey Ford saw her testimony as her civic duty.

As to the reception of Kavanaugh's defense, most opinion writers saw him as unhinged, angry, and entitled, but more conservative commentators (from Breitbart, for example) and a number of Republican senators saw his anger as justified and proof of his innocence. Here lies another contradiction. Clearly, if Judge Kavanaugh is innocent of the accusations, our society would expect him to deny the accusation categorically, but a forceful response does not make a person innocent. Notably, President Trump has equated strong denials of sexual violence with innocence. In fact, the advice that Trump, who himself has been accused of at least thirteen sexual assaults, gives to friends accused of sexual abuse is "deny, deny, deny." In essence, the denial is the exoneration even if it is untruthful. An admission, according to Trump, is a sign of weakness, of a less masculine man. A denial demonstrates strength. The contradiction is that some would consider a man more manly in the positive sense if he takes responsibility for his actions, tells the truth, and apologizes sincerely to the victim and to society. Only toxic forms of masculinity would require a man never to admit his weaknesses or sins.

3. Shifting the Lens: What Result?

One method for analyzing gender performances is to shift the lens to investigate how gender performances would play out were they performed by individuals in other identity groups, and vice versa. For example, when examining race, one may consider whether gender, combined with race, had an effect on the performance, the audience's reaction, and the out-

96. See, e.g., Jenna Johnson, Trump Lavishes Praise on Rob Porter, Former Top Aide Accused of Domestic Violence, WASH. POST (Feb. 9, 2018), <https://www.washingtonpost.com/news/post-politics/wp/2018/02/09/trump-lavishes-praise-on-rob-porter-former-top-aide-accused-of-domestic-violence/?utm_term=.d6010a50d972> (indicating that White House aide must be innocent because he had denied abusing his ex-wives, in spite of photographs of former wife with bruised face and testimony from another wife that she had to get a temporary restraining order to keep Porter away).

When examining how a person performs gender, shifting the lens to consider how the performance would have been received if by a person of a different sex yields revealing results. Here, I shift the lens to consider how society would have received Dr. Blasey Ford’s and Judge Kavanaugh’s testimonies if their demeanors, tones, styles and behaviors at the hearing were reversed. Moreover, I shortly consider race and class in this analysis as well.

As noted above, Blasey Ford’s gender performance hit the right note because it conformed to how a white middle-class woman is expected to behave. Consider how her testimony would have been received had she performed in the same way as Judge Kavanaugh did. Although Kavanaugh’s performance was criticized by many, his primarily masculine performance never would have been acceptable if performed by Blasey Ford or any other woman. Had Blasey Ford yelled, cried, and acted entitled as Kavanaugh did, she would have been considered a “hysterical” woman, irrational, and untrustworthy. In essence Blasey Ford’s credibility depended on a performance that was feminine and soft, not overly clinical or serious, but also competent and not overly emotional. Kavanaugh’s backers considered him more credible because he not only vigorously denied the allegations but also did so in an indignant and, many would say, exaggerated way. It is this aspect of Kavanaugh’s testimony that is particularly interesting. Men and boys of his race and class are ordinarily expected to control their emotions. His performance demonstrated that he could cry, sniffle, and otherwise display his emotions because their source was anger, not sadness. His outrage stemmed (presumably) from his unfair treatment in the process. In other words, his performance was masculine in that it demonstrated strength, not weakness. And, it appealed to the most important judge: President Trump, who praised his performance. The president has often expressed his disdain for weakness, and Kavanaugh’s absolute denials adhered to Trump’s philosophy regarding how a man faced with an accusation of sexual impropriety should act.

But, how did Kavanaugh’s tears not demonstrate weakness? As noted above, masculinities theorists as well as society in general recognize that boys are not usually permitted to cry because crying denotes femininity and

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100. See Smith, supra note 97.
weakness. Rumor has it that while President Trump approved of Kavanaugh’s belligerent performance, Trump did not like Kavanaugh’s crying. ¹⁰¹ There has been some recent change in society’s judgment with regard to men who cry, however. When Edmund Muskie cried in 1970 on the campaign trail in New Hampshire because journalists had criticized his wife, he had to remove himself as a presidential candidate, but, more recently, men such as Barack Obama, George Bush, and John Boehner have all tear ed up in varying circumstances and have gotten away with it. ¹⁰² Nonetheless, it seems that Kavanaugh maintained his masculinity by accompanying tears with anger and aggression. Had he acted submissively and victimized in a less aggressive way, his crying may not have gone over well. If he were a woman, there is a serious question whether crying would have been acceptable.

Similar to Kavanaugh’s, Blasey Ford’s testimony was also received well in part because of her race and class. ¹⁰³ Like Kavanaugh, she belonged to a privileged class of children who hung out at the country club practicing their diving in the summer. Had she been a black woman, there may have been less acceptance of the truth of her accusation. Consider the testimony of Anita Hill, straightforward, calm, self-possessed, and presumably honest, but Professor Hill was accused openly by committee members of fabricating her testimony. ¹⁰⁴ Part of the problem, some would say, was Professor Hill’s serious demeanor. However, although she did not perform her gender in as gentle and halting way as did Blasey Ford, Professor Hill never displayed anger or frustration. Black women, however, suffer from two stereotypes that were relevant to the Thomas hearings: first, they are often considered highly sexualized, and therefore open to sexual advances; second, they are often considered angry and revenge-seeking. ¹⁰⁵ Both of these stereotypes were evident in Professor Hill’s treatment.

What if Kavanaugh had adopted the more measured, frightened, gen-

¹⁰² Id.
¹⁰³ See Bratskeir, supra note 48.
¹⁰⁵ See Regina Austin, *Sapphire Bound!*, 1989 WISC. L. REV. 539, 539-40, 569-70 (Jezebel was the “wanton, libidinous” Black female slave whose lack of morals excused white owners’ sexual exploitation of them; Sapphire is the stereotypical “black bitch” who is tough, emasculating, and domineering); Kersti Myles, *Jezebels and Jungle Bunnies: How the Stereotypes of Black Women Shape Legislation, the Legal Profession and Feminist Jurisprudence*, 10 MOD. AM. 3 (2017) (describing the hyper-sinful and hyper-sexual stereotypes of black women Sapphire and Jezebel).
tle, and compliant means that Blasey Ford employed in her testimony? He actually did something similar to this when he appeared on Fox News in an interview a few days before the Senate hearing. Although stating many of the same themes he would emphasize in his testimony at the hearing the next day—he claimed that he never assaulted anyone, that he focused on his studies in high school, and that all he wanted was a fair process—his demeanor and tone were much more subdued, not aggressive or angry. Many criticized his demeanor in his interview, but those who criticized him did so for his “choir boy” claims and his outright denials, which actually may be easy to prove wrong. In essence, Kavanaugh left his story open to refutation. He was also considered stiff and not terribly convincing, but there seemed to be no attacks on his performance as gendered. But the Fox News performance, rumor has it, was not pleasing to President Trump. It was crucial for Kavanaugh to convince Trump not to withdraw his nomination. It appears that was one reason why the judge decided to put on the emotional, jarring performance he did at the hearings. And, as mentioned above, a number of male Republican senators matched his emotions with their own anger.

Not only was Kavanaugh’s performance at the hearing gendered, it was also classed and raced. As noted above, Kavanaugh’s private prep school, Yale University, and country club references clearly identified him as from a privileged environment. Moreover, a black man in the same position as Kavanaugh (even one from a wealthy class) could never appear as angry. As explained by Professor Frank Rudy Cooper, black men must perform their anger in careful ways to assuage fears that they are dangerous or the Bad Black Man. Multidimensional masculinities theory explains


107. Id.

108. Id.


110. The obvious comparison is then-Judge Clarence Thomas’s response to Anita Hill’s testimony at his Senate Judiciary Committee hearing accusing him of sexually harassing her. While Judge Thomas denied the allegations and compared them to a “high-tech lynching for uppity blacks who in any way deign to think for themselves,” his demeanor was contained, cool, and surgical. See Thomas Second Hearing Day 1, Part 4, C-SPAN (Oct. 11, 1991), <https://www.c-span.org/video/?22099-1/thomas-hearing-day-1-part-4>. This was very different from the sloppy, tearful, angry denials of Judge Kavanaugh.

111. See Frank Rudy Cooper, Our First Unisex President?: Black Masculinity and Obama’s Feminine Side, 86 DENV. U. L. REV. 633, 633 (2009). Consider how carefully Obama performed his gender to avoid being considered an angry and dangerous black man, performances that led Professor Cooper to call him the first unisex president. Id.
the differential expectations and treatment of gender and race performances that were evident in the Kavanaugh hearings. Although right-wing pundits vigorously denied that race played a role in the Kavanaugh hearings, such denials ignore the intersectional privilege of whiteness and male gender that benefitted Kavanaugh, a privilege that makes race invisible for many white people. Blasey Ford also benefitted from her class and race—she was considered credible in part because of her excellent education and career and because as a white woman she was given the benefit of the doubt—but her gender placed her in an inferior position to Kavanaugh. Although some argued that it was a “he said,” “she said” situation, there was an opportunity to do much more probing to verify her story; the Republicans declined to do so. Ultimately, because they would not have gotten the votes for confirmation, the Republicans agreed to a time-limited, and resource-limited, partial FBI investigation—one that did not even include interviews of a number of persons who came forward offering information. Kavanaugh’s demeanor, combined with the obvious falsity of his claims that he had never blacked out and his refusal to admit the true meaning of his yearbook page, raises serious concerns about his sworn testimony before the committee. In essence, his performance may have included perjured testimony and raised questions about his judicial temperament. Thus, it was not only his behavior as a seventeen-year-old that should have doomed him, but also his questionable testimony, demeanor, tone, and behavior during the hearing. But even when faced with what some would say was a perfect witness against him, the weaker Kavanaugh ultimately prevailed.

C. Tactics and Proof Standards

A complete analysis of the politics and tactics employed by Republicans and Democrats leading up to Justice Kavanaugh’s appointment is beyond the scope of this article. There were, however, some tactics and pro-

112. See e.g., Eli Rosenberg, A Ride on Fox News’s Roller Coaster of Emotions During the Kavanaugh Hearing, WASH. POST (Sept. 27, 2018), <https://www.washingtonpost.com/arts-entertainment/2018/09/27/how-fox-is-reacting-fordkavanaugh-hearing/?utm_term=.6fb7d9a8e316> (noting that Tucker Carlson accused the Democrats of bringing up race when race has nothing to do with the Kavanaugh hearings); see also Kavanaugh Hearing a Race Issue – Tucker Carlson 9/27/18, YOUTUBE (Sept. 28, 2018), <https://www.youtube.com/watch?v=N5gqK5Jb32o> (recording of Tucker Carlson’s Fox News program on Sept. 27, 2018 in which he denies that race has anything to do with the hearings).


114. See Blumenthal & Bendery, supra note 67.

115. Id.; Wolfe, supra note 72.
cedural arguments that were evident in the hearing itself. First, Kavanaugh and Republicans emphasized repeatedly the lack of process because the Democrats had held Blasey Ford's letter in secrecy for forty-five days after its receipt. The Democrats, especially the Ranking Member, Senator Feinstein, defended the decision to avoid publication of the letter because Blasey Ford had asked for secrecy. A fair and accurate process would have included an extensive investigation into the claims made by Blasey Ford, potential corroborating witnesses, and potential defenses that Judge Kavanaugh made about his high school experiences. This did not happen. Ostensibly, given the failure to investigate, the hearing's purpose was merely to judge the credibility of the two witnesses. Given this ostensible purpose, it is ironic that even though most would agree that Blasey Ford’s testimony appeared more credible, Kavanaugh prevailed. The question is why, especially in light of the #MeToo movement. Traditional power, tactics, and process seemed to at least partially answer the question.

A tactic used by Kavanaugh and the Republicans was not to question whether Blasey Ford was telling the truth, but to assert that she had mistaken the identity of the attackers. This tactic gave senators cover for voting for Kavanaugh without impugning the honesty of a very credible witness. In the #MeToo era, this tactic was clever because it avoided victimizing the alleged victim more than was necessary, thereby also avoiding a backlash from women who may have been angered by accusations that Blasey Ford was not telling the truth.

A second tactic was to assert strongly that there was no evidence that Kavanaugh had sexually assaulted Blasey Ford. Even though the process had been established to pit one witness against the other, the burden, a standard of which was never articulated, fell on Blasey Ford and the Democrats. And, Republican senators repeatedly classified Blasey Ford’s sworn testimony as “allegations” and “assertions.” They argued that Blasey Ford’s testimony was not even evidence. Even first-year law students know that this assertion is not accurate. Sworn testimony is evidence and needs no corroboration (even in criminal trials) if it is credible. And many Republicans, including President Trump and Fox News Anchor Chris Wal-

116. See generally Kavanaugh Hearing: Transcript, supra note 38.
117. Id.
118. Id.
119. Id.
lace, found Blasey Ford credible.121 Americans are convicted and jailed every day based on sworn eyewitness testimony, and in those cases the standard is proof “beyond a reasonable doubt,” clearly a higher standard than should be applied in a nomination hearing. In fact, while there was no evidence at the hearing that Blasey Ford was lying, there was significant evidence that the judge was not telling the truth.122

IV. CONCLUSION: PROCESS RESPONDING TO POWER?

In the #MeToo era, the utter failure of Blasey Ford’s testimony to rock the pre-established conclusion that powerful gendered, classed, and raced interests would prevail may be disappointing, but is not necessarily surprising. Perhaps the Republicans played the game better than the Democrats did. But the bottom line is that masculine power prevailed, and it likely did so over truth. Democrats, in light of #MeToo, have castigated their own, but the Republicans have failed to follow suit. Senator Al Franken, for example, was urged by his female Democratic colleagues to resign from the Senate because of allegations of sexual improprieties, which at least on appearances seemed less serious than those of others—especially Republicans—who have held onto their jobs. The most obvious example is President Trump, who despite thirteen allegations of sexual assaults and other improprieties concerning women (e.g., payments to women to remain quiet about their affairs with him) has resisted opponents. His mantra “deny, deny, deny” when faced with accusations seems to have protected him and Brett Kavanaugh as well. Combined with a skewed process that did not adequately search for the truth, Kavanaugh’s angry denials rewrote the narrative, thereby creating a new truth. #MeToo will be an utter failure if denials alone are believed and there is no viable way to find the truth.

In essence, the invocation of authoritarian masculinity that we saw in this process has presumptive power in many contexts other than the judicial confirmation process. If masculinity concepts are not subjected to studied, rational scrutiny that goes deeper than cultural stereotypes or reliance on status quo bias, it will always be the default, at least in a situation where there is only one accuser. Consider the situation of a woman who reports sexual harassment at work. Before #MeToo, in many workplaces, the alleged perpetrator’s macho denial would have been taken at face value, and often it still is. A single victim’s testimony has not been considered suffi-

121. See Fox News’ Chris Wallace Calls Ford’s Testimony a Disaster for the GOP, supra note 1; David Jackson, supra note 99.
122. See, e.g., Blumenthal & Bendery, supra note 67.
ciently probative, especially because she has the burden of proving its truth. Only when multiple victims come forward are they believed. A perpetrator’s masculinity performance, then, is like a get-out-of-jail-free card that works at least for isolated instances of wrongdoing: the sexual assaulter’s “one bite rule.”

In the Supreme Court context, the only possible way to resist masculine power’s stranglehold on Supreme Court appointments is to assure that the process followed by the Senate—whether a Republican or Democratic majority—is established beforehand to assure thorough investigations into and vetting of the candidates. Democrats were pre-ordained to fail in the Kavanaugh case. There was insufficient investigation; the process was made to appear unfair to the accused, and an untenable burden was placed on the victim to prove the truth of her statements despite the Republicans’ refusal to permit a thorough investigation by the FBI. Moreover, Republicans had a majority in the Senate, which would vote on Kavanaugh’s appointment, and a majority is all he needed to win his seat on the Supreme Court. This failed process guaranteed that masculinity would prevail. Given that, it confirms that the masculinity mandate still reigns.