Introduction

Bullying Masculinities

In late October 2013, the news broke that National Football League (NFL) Miami Dolphins’ right tackle, Jonathan Martin, walked out on the team and checked himself into a mental health institution in Miami. The original story stated that Martin had gone “AWOL” and insinuated that Martin could not take the pressure in professional football (Smith 2013). Within days, the story changed. News sources reported that Martin’s teammates had repeatedly bullied him under the leadership of Richie Incognito, an experienced thirty-year-old Caucasian guard. Martin, a twenty-four-year-old African American player who was in the beginning of his second professional season, suffered serious emotional depression as a result. The initial response by the media was skeptical. How, commentators asked, can a 315-pound, 6’5” tackle for the Miami Dolphins be bullied (Dahl 2013)? Many opined that the harassment involved was merely locker room banter—roughhousing and hazing—which all football players endure. In fact, a majority of Jonathan’s teammates—both black and white—seemed to express this sentiment. Other members of the NFL suggested that it is all in the game. One has to be tough. Richie and the others never meant to harm Jonathan. It was all in good fun (Murtha 2013; Phillips 2013). Boys will be boys.

Reports also emphasized that Martin’s elite educational and personal background may have made him too “soft” to endure the rough-and-tumble atmosphere of a major league football locker room (Brinson 2013). Martin had graduated from a private high school and Stanford University; his parents were Harvard graduates who raised Martin in an upper-middle-class household, a fact to which some commentators attributed Martin’s inability to stand up to roughhousing in the NFL.

A few days after the initial reports of bullying, the text of a voice-mail that Richie Incognito had left on Martin’s phone on April 6, 2013,
emerged. In the voicemail, Incognito stated, “Hey, wassup, you half-nigger piece of shit. I saw you on Twitter, you been training 10 weeks. I’ll shit in your fuckin’ mouth. I’m gonna slap your fuckin’ mouth. I’m gonna slap your real mother across the face [laughter]. Fuck you, you’re still a rookie. I’ll kill you” (Wells et al. 2014, 99).

The voicemail caught the attention of management because it raised serious concerns about race and violence in the NFL; when the Dolphins discovered the voicemail, the team suspended Richie Incognito from play (Wells et al. 2014). The NFL hired Ted Wells, a well-known African American white-collar criminal defense lawyer who practices at the respected law firm of Paul, Weiss, Rifkind, Wharton & Garrison in New York City, to conduct an investigation into the facts surrounding the Martin/Incognito affair. After interviewing more than one hundred witnesses and with the help of a consulting psychologist, an expert in matters relating to workplace dynamics, Ted Wells and his colleagues published the Report to the National Football League concerning Issues of Workplace Conduct at the Miami Dolphins (2014; hereafter, Wells Report), which made factual findings but did not take a position on issues of legal liability. Wells and his colleagues had constant access to an expert psychologist, Dr. William H. Berman. The use of an expert in psychology was forward looking and important because many of the behaviors involved, especially those of the alleged victim, belied common expectations. The Wells Report documents serious verbal abuse, including bullying, mistreatment, and racial epithets directed toward Jonathan Martin, with Richie Incognito as the leader of a group of players who picked on Martin. It also documents similar serious verbal abuse of at least one other player and racist bullying of a trainer of Japanese origin. While the report concludes that upper management was unaware of the abuse and was serious about furthering respect among the players, it also suggests that at least two coaches knew of and/or participated in the abuse.

The Martin/Incognito story captured the media’s attention because of the specter of a physically large professional football player who was unable to protect himself from childish antics of his teammates. Most were concerned about the racist comments directed at Martin. Issues of race and class were front and center. Here we had a white, lower-middle-class guard from New Jersey who was harassment a black player who had
Majored in classics at Stanford. The situation appeared to be a type of "reversal" in American society: here the young black male victim came from a more well-to-do and better-educated family than his white tormenter. Some compared Martin's background to that of Barack Obama, the well-educated but introverted black president of the United States.

In fact, the racism displayed was somewhat confusing to commentators. Other black members of the team goaded Martin for not being "black enough" (ibid., 31). Incognito and others—black and white—made derogatory and despicable comments daily about Martin's sister and his mother, announcing in crude terms that they were going to have sex with them. When asked about racism, many black teammates denied that it existed. Martin felt helpless to respond to the abuse because of his gentle manner, his belief that a response would only encourage more abuse, and the team's ethic of no "snitches" (ibid., 37).

The report documents a complicated relationship between Martin and Incognito, a relationship that may have led many to misunderstand what was happening. It finds that Martin and Incognito were close friends, but that Richie Incognito presented two different sides to Martin. At times, he was the protective mentor who helped Martin develop as a player, but at other times he engaged in serious abuse and bullying of Martin, knowing that he was damaging his colleague.

Martin's responses, too, were somewhat ambiguous. He often remained silent when offended. At other times, he laughed off the abuse and/or participated in the repartee in a half-hearted effort to fit in and diminish the abuse. The one thing Martin did not do is talk to management about the abuse, even though he engaged in a running commentary with his parents about his emotional difficulties caused by his teammates' bullying, and he had notified some members of management of his depression. One reason for nondisclosure was the "no snitches" ethic. The other was that Martin felt deeply ashamed that he wasn't strong enough to respond to the harassing behavior on his own (ibid.). In essence, Martin had absorbed the message: he was weak, not man enough to stand up for himself.

The report is particularly insightful because it documents the authors' initial doubts, many of which mirrored those of the general public and media commentators, and explains how and why the authors resolved those doubts with the help of the expert advice of a psychologist who
specializes in workplace relationships. The report explains that it is not uncommon for victims of abuse to react as Martin did—to try to ignore the behavior in the hope that it will go away.

The Martin/Incognito story drew enormous interest from the public. For this reason, it is particularly noteworthy that the discussions surrounding the incident focus on race and class, but never acknowledge the issue of gender. For those of us who study masculinities theory, the locker room antics demonstrate a clear case of gender-based discriminatory harassment, in addition to race- and class-based harassment. Because the behavior occurred among men exclusively, however, the sex-discrimination/gender-based-harassment part of this story was and still is invisible to many. Most observers conceive of sex- or gender-based harassment victims as members of the “other” sex from the perpetrators. Even when members of the same sex engage in harassment against members of their own sex, many people tend to believe that the behavior occurs because of sex or gender only if there is a sexual motivation of a gay or lesbian perpetrator or if it is demonstrated that the perpetrator treats members of the two sexes differently from one another. Where women mistreat other women but not men, for example, this phenomenon is known as the “Queen Bee Syndrome” or “Mean Girls” and is attributed to jealousy or fear of losing one’s exclusive place with the men.

When there are only men in a workplace or other environment, many conclude that the behavior is mere hazing or roughhousing that is insignificant and typical of male-on-male relationships. It happens everywhere—on male sports teams in school, in fraternities, on professional sports teams, at camp, in all-male workplaces—and, although some of the behavior is trivial, the law tends to excuse much more serious behavior because our society believes that it is normal or natural. Most people do not understand that the behavior occurs because of sex or gender and that it is sufficiently severe or pervasive to alter the conditions at the victim’s school or workplace. In other words, the behavior satisfies the standards that the 1964 Civil Rights Act uses for determining whether illegal discrimination occurs.

The Martin/Incognito story demonstrates that as observers of others’ behavior, people often use shortcuts that do not necessarily reflect reality, even though they believe that they do. Society presumes that
victims are not victimized if they respond to harassing behavior in a manner that common sense indicates is unnatural. Unfortunately, common sense often betrays human beings when it comes to human behavior. Social science research demonstrates that victims often respond to harassment and bullying in ways that intuition would not predict. The Martin/Incognito story and the Wells Report validate lawyers’ use of expert social scientists such as Dr. Berman to help them and the courts understand human behavior. Many legal scholars have advocated the use of social science research to help judges and juries explain behavior of parties before them, but courts have been reluctant to do so. This is not surprising given the lack of training of most lawyers and judges in the social sciences and the law’s emphasis on reason over emotion.

But judges regularly reach conclusions on the basis of their own untrained common sense of how people should or do act in certain situations. These conclusions often stand in stark contrast to the research results. In complex situations involving motivation, intent, and perception, social science research is often crucial in helping judges and the fact finders figure out what happened and why.

Masculinities studies are particularly helpful in explaining behaviors that occur in all-male or predominantly male environments. Masculinities theorists posit that masculinity is not a biological given but a social construction of how men should appear and behave. It causes many, if not most, men to engage in performances of masculinity to prove their worth to other men. The locker room scene at the Miami Dolphins is a vivid example of how concepts of masculinity affect behaviors. Society encourages men to demonstrate their masculinity to other men. Men engage in intense competitions to prove their worth. Their relationships are homosocial; other men serve as their audience for their behaviors and must be convinced of their masculinity (Collinson 1988). To prove their masculinity and achieve power and status, men demean other men, especially those they perceive to be effeminate or soft, engage in competitive, crude group behavior, and, where women are present in small numbers, harass women to prove their masculinity to other men. Richie Incognito’s behavior is a classic example of the performance of masculinities. When he was alone with Jonathan Martin, he ordinarily treated him as a friend—there was no opportunity to prove his manliness to others under these conditions. But when there was an audience,
Incognito used Martin as a foil to prove his own toughness to the other men on the team.

Courts have struggled with the enforcement of Title VII law, which prohibits discrimination because of sex, including discriminatory harassment that alters the terms or conditions of employment for the victim. In particular, in harassment cases, especially those happening among men, like the public that ignored the gendered aspects of Martin’s treatment, courts do not always see the gendered aspect of the behavior. Consequently, they conclude that the behavior did not occur “because of sex.” This conclusion represents a grave misunderstanding of the reasons for the behavior and an underestimation of Title VII violations as they occur in the workplace.

Of course, it is not only men who suffer in predominantly male environments. Women and girls also succumb to harassing gender-based treatment. But courts have at times concluded that even their treatment does not occur “because of sex” where the antifemale behaviors, jokes, and pornographic pictures existed in the workplace before women were hired. Some courts reason that the harassing behavior was present when the workplace was exclusively male. It follows, they conclude, that the behavior cannot occur because of the newly hired women’s sex. An understanding of masculinities theory can help courts realize that although the male behavior is dominant and even commonplace, when it becomes sufficiently severe or pervasive to alter the terms or conditions of employment at work, it may be illegal under Title VII. It does occur because of sex or gender, either because the person targeted does not live up to gender stereotypes or because the perpetrators are attempting to police the boundaries of male behavior and masculinity in the workplace.

Without the understanding that men are not all equally positioned, women as a group will never achieve equality. Perhaps even more crucial for this book, masculinities studies help explain that workplace structures are themselves masculine and that masculine structures and behaviors are conflated with work. Women who attempt to assimilate into the masculine workplace must work harder because their lived experiences are often different from those of the men. Moreover, masculinities theory can explain that women, too, perform masculinities that may be harmful to other women or men. Because the behaviors are conflated
with work and management techniques, often the gendered nature of the behavior is invisible.

Feminist legal theorists who engage with masculinities theory not only analyze the ways masculinities harm men but also ask how society might break down gender segregation and social gender barriers to the benefit of both men and women. We use masculinities theory to understand the social pressure on men, and to consider how social construction of men’s roles can cause women’s inequality. We argue that it is necessary to understand masculinities theory and the pressure that the gender order places on men in order to understand why women have had such difficulty achieving equality (Dowd, Levit, and McGinley 2012). Often, an understanding of masculinities helps to explain men’s behaviors that harm women. These understandings permit us to suggest workable law reform that benefits men, women, and families.

While the Martin/Incognito story mirrors others in blue-collar workplaces such as the atmosphere at the oil rig where Joseph Oncale allegedly was seriously harassed by male coworkers in the shower (Oncale v. Sundowner Offshore Services, Inc. 1998), masculinity performances are not limited to blue-collar environments. In fact, even in the most elite law firms, there are masculinity performances that affect the working conditions of those harmed. In white-collar workplaces such as law firms, men tend to prove their masculinity in different, less physical ways than do men in blue-collar workplaces. White-collar workers often confuse performance of masculinity with work. Men engage in careerist behavior—working nonstop, acting aggressively, and engaging in self-promoting behavior—as a means of proving their masculinity.

For example, this book discusses the case of Ariel Ayanna, a male associate in a Boston law firm who sued the firm, alleging that he was fired because of his role as caretaker of his wife and children. Ayanna alleged that the firm expected men to work extremely long hours and to be available and visible even when there was no pressing work to be finished, and even when there was a crucial need for Ayanna to be with his family (Ayanna v. Dechert LLP 2012). These allegations are consistent with sociologist Richard Collier’s study finding that law firms have cultures that demand bodily presence, visibility, and performances of hypermasculinity (Collier 2013).
As is obvious from the description of white-collar masculinities, masculinity performances do not always include harassing behaviors; they may also involve informal behaviors or expectations that affect the victim’s career in the particular firm. These behaviors may be subtler than the reprehensible treatment that Jonathan Martin endured, but they, too, may create gender- or sex-based discrimination that is illegal under Title VII. To the extent that the expectations affect employees’ careers and their employers cannot prove a legitimate defense, there may well be a violation of Title VII.

Finally, multidimensional masculinities theory, which is examined more thoroughly throughout the book, helps legal theorists and practitioners understand that we should not consider only gender and class when analyzing work situations and masculinity. Other identity factors and the context of the situation will come into play. As legal theorists and practitioners reconsider the Martin/Incognito affair, we cannot ignore the importance of race, combined with gender and class, in the context of professional football. For example, while the Wells Report recognized the harm Martin suffered because of the behavior of his football colleagues in ridiculing and telling false sexual stories about Martin’s mother and sister, it does not mention that it is particularly problematic that teammates directed this behavior at two black women. Historically, black women suffer from false stereotypes of hypercarnality and sexually aggressive behavior. When Martin’s teammates taunted him with imagined sexual escapades with his mother and sister, there was an underlying racist tinge to the behavior. One way of seeing this more clearly is to shift the lens by imagining how society would judge this behavior if the racial makeup of the players were different. If black professional football players made similar statements about a white teammate’s white mother and sister, serious racial divisions might have arisen on the team. But in Martin’s case, no one questioned the behavior at the time. To understand the situation, therefore, we need to shift the lens from race and class in the first instance to gender and then back to race to have a more complete understanding of the dynamics at the Miami Dolphins.

Another example of the intersection of race, gender, and class is Martin’s black teammates’ insistence that he was “not black enough.” Some observers would conclude that these remarks are not based on race be-
cause of the identity of those making the remarks. Others would argue that because blacks can discriminate against other blacks, these remarks do indicate discriminatory motive. Even if observers would interpret these remarks as racially motivated, however, many of them would not connect these remarks to gender and class. Masculinities theory helps explain that the comment that Martin was “not black enough” is gendered because it relies on the stereotype of black men as threatening and dangerous—the bad black man. In the case of professional football, the stereotype has a positive connotation because the job of football requires players to be tough, threatening, and dangerous to the opponents. The stereotype relates to men, not to women, and to the way a black man performs his masculinity. Masculinities theory demonstrates the importance of certain masculine characteristics to black men. Moreover, the stereotype relates to poor or working-class blacks who come from minority neighborhoods who perform their masculinity in a more threatening manner. Thus, the remark is also about Martin’s upper-middle-class presentation of a more cultured and less tough masculinity. By shifting the lens various times, observers can understand the multidimensionality of this comment. If the comment were made by white teammates, there would be little doubt that it was racially motivated. If the comment were made about a black woman, those making the comments would probably not mean that she was not tough enough or that she was not enough of a “bad-ass.” It would have a different meaning. Courts should engage in similar lens shifting to understand the cases before them and to explain the proof to juries.

Martin’s situation, therefore, demonstrates that lawyers and judges should use masculinities studies to understand the gendered and racial motivations for harassing behaviors in the workplace. Assuming the applicability of Title VII of the 1964 Civil Rights Act to a hypothetical lawsuit that Martin would bring against the Dolphins and/or the NFL, Martin’s lawyers and the judge assigned the case should focus on masculinities theory and research to understand how to apply Title VII’s prohibitions of a hostile work environment occurring because of sex and race. This is particularly important because under federal law there is no protection against general bullying and harassment in the workplace, and there is only sporadic coverage under state law. In essence, horrific behaviors, even criminal behaviors, do not provide recourse against an
employer unless the employee proves under Title VII that the harassment was discriminatory on the basis of sex, race, or other protected characteristic.

In Jonathan Martin’s hypothetical case against his employer, his lawyer would allege sex- and race-based harassment that creates a hostile work environment. In harassment cases, courts focus on whether the harassing behavior is sufficiently severe or pervasive to alter the plaintiff’s employment and whether it occurred “because of sex.” It is noteworthy that the Wells Report never even mentioned sex or gender. The gender-based harassment was invisible to the authors of the report. Masculinities theory can help courts see the gendered content of the behavior that is invisible to most observers. In this case, the court would also probably have trouble determining whether the behavior occurred “because of race.” Indeed, even though Martin’s teammates made offensive racist remarks, including remarks about shooting black people, the consultant’s report declined to decide whether the behavior that took place was motivated by racial animus (Wells et al. 2014, 32). Masculinities theory would help Martin prove that the harassment was based on both race and sex, in addition to class.

More generally, this book proposes the use of masculinities studies to sharpen courts’ understanding of discrimination under Title VII. My approach is both theoretical and pragmatic. It explains how masculinities theory can help lawyers, judges, and legal academics understand why the courts’ views of motivations for specific workplace behaviors are often limited by their own personal experiences. It encourages courts to understand the unconscious bases for discriminatory behavior and treatment and to consider masculinities theory to determine whether illegal discriminatory behavior has occurred. It discusses how courts should use masculinities theory to help juries interpret behaviors to determine whether sex discrimination occurs. As Martin’s case demonstrates, masculinities theory is particularly helpful in the sex- or gender-based harassment cases where the plaintiff must prove that the behavior occurred “because of sex” and that it was sufficiently severe or pervasive to alter the victim’s terms or conditions of employment. But it is equally important in sex discrimination claims proved under disparate treatment or disparate impact analysis where stereotypes and implicit biases affect not only individual decision making but also the
processes and structures in the workplace that further or limit an individual’s success at work.

Part I of the book introduces the reader to research on masculinities and multidimensional masculinities theory, and discusses generally how this body of research and theory can help in the analysis of cases arising under Title VII of the 1964 Civil Rights Act, which forbids employment discrimination because of race, color, gender, national origin, and religion. Chapter 1 examines the origins of masculinities theory and its relationship to workplace behaviors, as well as its potential use in explaining why certain behaviors should constitute sex- or gender-based discrimination.

Part II describes Title VII law in sex- and gender-based hostile work environment cases and examines how courts can use masculinities theory to explain why and how a particular environment may violate Title VII. Chapter 2 discusses the history and interpretation of sex- and gender-based harassment law. Chapter 3 analyzes how masculinity studies can aid in establishing that the harassing behavior occurred because of the victim’s sex. Chapter 4 uses a methodology of multidimensional masculinities theory—shifting the lens—to consider the proper standard for determining whether harassing behavior is sufficiently severe or pervasive to constitute an illegal workplace environment.

Part III analyzes Title VII law in disparate treatment and disparate impact cases and suggests how masculinities theory can help in resolving interpretive problems in those types of cases. Chapter 5 examines the history of Title VII jurisprudence and the doctrinal and proof differences between disparate treatment and disparate impact causes of action under Title VII. Chapter 6 discusses the requirement that plaintiffs prove intent to discriminate in disparate treatment claims and analyzes the different possible definitions of intent under the statute. With the background of the intent requirement in mind, chapter 7 analyzes various circumstances in which masculinities theory can enlighten a disparate treatment case. Chapter 8 evaluates disparate impact causes of action under Title VII and demonstrates that masculinities theory can aid lawyers and judges to understand disparate impact causes of action.

Part IV analyzes practical ways for legal actors to use masculinities research in litigation, and discusses how employers should prevent discrimination based on masculine structures and practices. Chapter 9 pro-
poses concrete ways in which the courts should become educated about masculinities theory and other relevant social science research. It also discusses how lawyers and judges, through use of expert testimony and jury instructions, can convey to juries an understanding of the complicated gender- and sex-based behaviors in workplaces that should create liability under Title VII. The conclusion summarizes the theory, application, and admissibility of masculinities research and suggests that employers should educate themselves about masculine practices and structures, and alter their workplaces to eliminate them.