

# LESSONS FROM THE DOLPHINS/ RICHIE INCOGNITO SAGA

By Kerri Lynn Stone\*

## INTRODUCTION

On the fiftieth anniversary of the passage of Title VII, scholars are observing a period of reflection and evaluation.<sup>1</sup> However, it is important for us to do more than reflect upon the interpretations, doctrines, and frameworks promulgated by the courts. It is necessary to evaluate the overall efficacy of Title VII with a focus on its primary goals—the eradication of the entire spectrum of workplace discrimination motivated by sex, race, color, religion, and national origin, and the transition of the workplace into an environment that can attract and retain employees without alienating or even inadvertently winnowing them out because of their protected class status.<sup>2</sup> The law aims to prevent overt and covert prejudices and biases, all too present in society, from bleeding into the workplace and operating to deprive others of the opportunity to earn a living and participate fully in public life.<sup>3</sup>

However, Title VII, as scholars are all too aware, has its limits. When practices that are not expressly proscribed threaten to undermine or subvert the goals of Title VII, it is time to reconsider greater regulation of the workplace.<sup>4</sup> In that vein, much has been written recently about the so-called “glass ceiling”

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<sup>1</sup> Kerri Stone, *Introduction*, 8 FLA. INT’L U. L. REV. 263, 263–66 (2013); Erika Birch, *50 Years Out from Mad Men: Are Things Really That Different?*, STRINDBERG & SCHOLNICK, LLC (May 20, 2013), <http://www.idahojobjustice.com/articles/item/36-50-years-out-from-mad-men-are-things-really-that-different>; see also Bill Lucey, *The Legacy of the March on Washington: 50 Years Later*, HUFFPOST POLITICS (Aug. 27, 2013, 2:28 PM), [http://www.huffingtonpost.com/bill-lucey/the-legacy-of-the-march-o\\_b\\_3824474.html](http://www.huffingtonpost.com/bill-lucey/the-legacy-of-the-march-o_b_3824474.html); Richard Wolf, *Equality Still Elusive 50 Years After Civil Rights Act*, USA TODAY (Feb. 6, 2014, 12:54 PM), <http://www.usatoday.com/story/news/nation/2014/01/19/civil-rights-act-progress/4641967/>. See generally Jack M. Beermann, *The Unhappy History of Civil Rights Legislation: Fifty Years Later*, 34 CONN. L. REV. 981 (2002).

<sup>2</sup> 42 U.S.C. § 2000e-2(a) (2012).

<sup>3</sup> See generally Kerri Lynn Stone, *Clarifying Stereotyping*, 59 U. KAN. L. REV. 591 (2011) (explaining the role of Title VII in employment discrimination liability on the basis of stereotyping, prejudices, and biases).

<sup>4</sup> See Deborah Brake, *The Limits of Title VII as a Rights-Claiming System*, PITT L. MAG., Spring 2007, at 8, 8 (“Title VII of the Civil Rights Act of 1964 promises to root out hidden and sophisticated discriminatory practices as well as overt and explicit ones. But as bias becomes more subtle, it becomes more difficult to detect.”).

and the woefully low numbers of women and minorities who have ascended to positions of authority, high earning power, and prestige in the American workplace.<sup>5</sup> It has become clear that while overall numbers of women and minorities present in the workplace in all capacities have risen dramatically since the enactment of Title VII, with the labor force participation rate for African Americans at 61.5 percent in 2012 and the rate for Hispanics at 66.4 percent,<sup>6</sup> still today in the Fortune 500 Companies, just 14.3 percent of Fortune 500 Company Executives are women,<sup>7</sup> and a mere 16.6 percent of board seats are held by women.<sup>8</sup> A meager 4.6 percent of Fortune 500 Company CEOs are women,<sup>9</sup> and of the top earners in Fortune 500 companies, just 8.1 percent are women.<sup>10</sup>

According to a 2012 census conducted by the Alliance for Board Diversity, racial minorities held just 16.3 percent of Board Seats at Fortune 100 Companies.<sup>11</sup> According to a report released in 2014 by the National Association of Women Lawyers (“NAWL”), approximately 66 percent of all new male equity partners are lateral hires, while half of new female equity partners are recruited laterally.<sup>12</sup> The report notes that that figure is important because “lateral hiring continues to dominate the process by which big [law] firms move lawyers into equity partnership.”<sup>13</sup> Additionally, although women represent 47

<sup>5</sup> Fred W. Alvarez, *Affirmative Action Enforcement: Confronting the Glass Ceiling*, C874 A.L.I.-A.B.A. 191, 193 (1993) (“Demographic studies show that women and minorities have entered the American workplace in record numbers over the last decade but have failed to reach the upper levels of management.”); Martha C. White, *Top Boardrooms: No-go Areas for Women, Minorities*, NBC NEWS (Aug. 16, 2013, 1:51 PM), <http://www.nbcnews.com/business/top-boardrooms-no-go-areas-women-minorities-6C10936005>; see also Ramona L. Paetzold & Rafael Gely, *Through the Looking Glass: Can Title VII Help Women and Minorities Shatter the Glass Ceiling?*, 31 HOUS. L. REV. 1517, 1519 (1995) (discussing how Title VII has been effective in dealing with the “glass ceiling” problems women and minorities face). See generally Mark S. Kende, *Shattering the Glass Ceiling: A Legal Theory for Attacking Discrimination Against Women Partners*, 46 HASTINGS L.J. 17 (1994) (discussing the glass ceiling problem faced by women law partners).

<sup>6</sup> U.S. BUREAU OF LABOR STATISTICS, REPORT 1044, LABOR FORCE CHARACTERISTICS BY RACE AND ETHNICITY, 2012, at 2 (2013), available at <http://www.bls.gov/cps/cpsrace2012.pdf>.

<sup>7</sup> *2012 Catalyst Census: Fortune 500 Women Executive Officers and Top Earners*, CATALYST (Dec. 11, 2012), <http://www.catalyst.org/knowledge/2012-catalyst-census-fortune-500-women-executive-officers-and-top-earners>.

<sup>8</sup> *2012 Catalyst Census: Fortune 500 Women Board Directors*, CATALYST (Dec. 11, 2012), <http://www.catalyst.org/knowledge/2012-catalyst-census-fortune-500-women-board-directors>.

<sup>9</sup> *Women CEOs of the Fortune 1000*, CATALYST (Jan. 15, 2014), <http://www.catalyst.org/knowledge/women-ceos-fortune-1000>.

<sup>10</sup> *2013 Catalyst Census: Fortune 500 Women Executive Officers and Top Earners*, CATALYST (Dec. 10, 2013), <http://www.catalyst.org/knowledge/2013-catalyst-census-fortune-500-women-executive-officers-and-top-earners>.

<sup>11</sup> ALLIANCE FOR BD. DIVERSITY, MISSING PIECES: WOMEN AND MINORITIES ON Fortune 500 Boards 2 (2013), available at [http://theabd.org/2012\\_ABD%20Missing\\_Pieces\\_Final\\_8\\_15\\_13.pdf](http://theabd.org/2012_ABD%20Missing_Pieces_Final_8_15_13.pdf).

<sup>12</sup> STEPHANIE A. SCHARF ET AL., NAT’L ASS’N OF WOMEN LAWYERS, REPORT OF THE EIGHTH ANNUAL NAWL NATIONAL SURVEY ON RETENTION AND PROMOTION OF WOMEN IN LAW FIRMS 9 (2014), available at <http://www.scribd.com/doc/209609716/NAWL-Eighth-Annual-Survey-on-Retention-and-Promotion-of-Women-in-Law-Firms> [hereinafter NAWL REPORT].

<sup>13</sup> *Id.*

percent of associates, 38 percent of counsel, 29 percent of non-equity partners, and 64 percent of staff attorneys, as the blog “Above the Law” put it:

Women aren’t making equity partner because they lack business and have high attrition rates. About 44 percent of firms say the problem is that women aren’t developing business, while 38 percent say women tend to leave sooner. Another 11 percent of firms say the problem is that women lack sponsors and mentors, while 10 percent cite work/life balance issues.<sup>14</sup>

Finally, according to the NAWL report, in the so-called “Am Law 100” firms, women of color only made up 2 percent of equity partners, and men of color make up 4 percent of equity partners.<sup>15</sup> Clearly, true gender and racial parity, especially in the upper echelons of employment, has been elusive, and, according to some, unattainable.<sup>16</sup>

## I. WORKPLACE BULLYING

It is thus necessary to look beyond those things, like sexual and racial harassment, that Title VII has been interpreted to proscribe, and identify those strands of workplace culture or custom that may alienate or disproportionately winnow out from the workplace members of those groups which Title VII was passed to protect. One such strand that eludes capture by Title VII’s proscriptions is workplace bullying.<sup>17</sup> Indeed, it has been posited that even so-called “equal opportunity” abuse that is not directed at a victim because of her protected class status may nonetheless be received and absorbed differently by the sexes as groups, resulting in abusive workplace cultures hostile to and exclusive of women and minorities.<sup>18</sup> Thus, any reflection upon the progress made and the challenges created by Title VII must include the state of workplace bullying in America with a critical eye toward its impact on historically excluded groups that Title VII was passed to protect.

Bullying, despite its common association with juvenile, schoolyard taunting that “strong” adults should be able to tolerate, is a phenomenon that erodes

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<sup>14</sup> Staci Zaretsky, *New Study Reveals Women Earn Much More than Men in Biglaw (Just Kidding!)*, ABOVE L. (Feb. 27, 2014, 1:22 PM), <http://abovethelaw.com/2014/02/new-study-reveals-women-earn-much-more-than-men-in-biglaw-just-kidding/>.

<sup>15</sup> NAWL REPORT, *supra* note 12, at 6.

<sup>16</sup> See, e.g., Derrick Bell, *Racial Equality: Progressives’ Passion for the Unattainable*, 94 VA. L. REV. 495, 516 (2008); Nancy M. Modesitt, *Reinventing the EEOC*, 63 SMU L. REV. 1237, 1238 (2010) (“The EEOC is an agency that has failed in its mission to eradicate discrimination in the workplace. Even if its mission is impossible, as there are those who would argue that discrimination cannot be completely eliminated through existing legal systems . . .”).

<sup>17</sup> Jason Habinsky & Christine M. Fitzgerald, *Office Bully Takes One on the Nose: Developing Law on Workplace Abuse*, N.Y. L.J. (Jan. 21, 2011), <http://www.newyorklawjournal.com/id=1202478811723>, excerpt available at <http://www.workplacebullying.org/2011/01/21/nylj/> (“Generally, the law offers no protection to such a victim as long as the alleged bully can show that his or her actions were not motivated by the victim’s status as a member of a protected class. Currently, there are no federal, state or local laws providing a cause of action for an individual subject to a non-discriminatory abusive work environment.”).

<sup>18</sup> See Kerri Lynn Stone, *From Queen Bees and WannaBes to Worker Bees: Why Gender Considerations Should Inform the Emerging Law of Workplace Bullying*, 65 N.Y.U. ANN. SURV. AM. L. 35, 59 (2009).

adult employees' feelings of well-being and impairs their performance.<sup>19</sup> It is an entitlement to this feeling of well-being and dignity, and an acknowledgment that a workplace permeated with abuse palpably affects the terms and conditions of one's employment, that underlie the law's recognition that sexual and racial harassment are actionable under Title VII of the Civil Rights Act of 1964.<sup>20</sup> This is so despite the fact that a victim may retain her employment, status, and salary while harassment is occurring.<sup>21</sup> Notwithstanding the retention of these things, where class-based, severe or pervasive enough (actionable) harassment is found, a victim's terms and conditions of employment are recognized as having been altered in an unlawful, tangible way.<sup>22</sup> Mere "bullying" is wholly lawful, and alleged harassment will not rise to the level of actionable harassment, and thus be rendered mere bullying where either (1) the nexus between sex, race, or other protected class membership and the behavior is too tenuous, or (2) the behavior does not rise to a certain threshold level of severity or pervasiveness.<sup>23</sup>

## II. THE ANTI-WORKPLACE BULLYING MOVEMENT

The Anti-Workplace-Bullying movement, spearheaded by Professor David Yamada and the Healthy Workplace Institute, founded by Dr. Gary Namie and Dr. Ruth Namie, has been working for over a decade to promote the passage of state anti-workplace-bullying legislation—the Healthy Workplace Bill.<sup>24</sup> This legislation's goal is to prohibit behavior in the workplace, regardless of its discernible or demonstrable motivation, that is egregious, demeaning, humiliating, and causes palpable harm to its victims' well-being. This law would promote and ensure employees' dignity and sense of well-being in the

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<sup>19</sup> David C. Yamada, *The Phenomenon of "Workplace Bullying" and the Need for Status-Blind Hostile Work Environment Protection*, 88 GEO. L.J. 475, 480 (2000) (defining and explaining workplace bullying); *The WBI Definition of Workplace Bullying*, WORKPLACE BULLYING INST., <http://www.workplacebullying.org/individuals/problem/definition/> (last visited Apr. 14, 2014) ("Workplace Bullying is repeated, health-harming mistreatment of one or more persons (the targets) by one or more perpetrators. It is abusive conduct that is: threatening, humiliating, or intimidating, or work interference—sabotage—which prevents work from getting done, or verbal abuse.") (emphasis omitted).

<sup>20</sup> Title VII comes into play before the harassing conduct leads to a nervous breakdown. A discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers. Moreover, even without regard to these tangible effects, the very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion, or national origin offends Title VII's broad rule of workplace equality.

*Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993).

<sup>21</sup> 42 U.S.C. § 2000e-2(a)(2) (2012).

<sup>22</sup> *Id.*

<sup>23</sup> *Why U.S. Employers Do So Little*, WORKPLACE BULLYING INST., <http://www.workplacebullying.org/individuals/problem/employer-reaction/> (last visited Apr. 14, 2014) ("Most workplace harassment and mistreatment (80 [percent]) is completely legal. Remarkably, a hostile work environment is actionable (illegal) only in very few situations.")

<sup>24</sup> See generally *Quick Facts About the Healthy Workplace Bill*, HEALTHY WORKPLACE BILL, <http://www.healthyworkplacebill.org/bill.php> (last visited Apr. 14, 2014).

workplace, irrespective of protected class status.<sup>25</sup> Regrettably, although it has been introduced in twenty-six states since 2003, it has not been enacted in any jurisdiction.<sup>26</sup> Scholars and commentators have set forth several theories as to why this has been the case,<sup>27</sup> ranging from critiques of the Bill's language as vague—thus engendering too much employer liability and unduly interfering with employers' business decisions by trammeling their managerial discretion, to its projected inability to stem workplace bullying.<sup>28</sup> Others have expressed reservations about the floodgates of litigation that they believe the legislation would open, and still others have voiced opposition to the legislation because of the blow they believe it would deliver to the at-will presumption in employment law.<sup>29</sup> Indeed, in 2012, in the wake of the New York Senate's passage of a version of the Bill, Mayor Michael Bloomberg's office issued a statement in opposition to the Bill's enactment.<sup>30</sup>

In actuality, these fears are misplaced and largely unfounded. The Healthy Workplace Bill's prohibition on bullying would limit managerial discretion no more than the law's current prohibition on actionable harassment does. Moreover, the Bill's standard for actionable behavior is extremely high, allowing, as the Act's webpage describes, "action only when mistreatment is so severe that it impairs a worker's health," and "mak[ing] the perpetrator more than a harmless, laughable jerk," but, rather, a "walking occupational health hazard[ ]."<sup>31</sup> The term "workplace bullying" is not in the statute.<sup>32</sup> Furthermore, the Bill requires a plaintiff to demonstrate harm to her health, documented by a medical professional, and it insulates conscientious employers from liability where they have remedial and preventative measures in place.<sup>33</sup> Workplace offenders, however, may be sued in their individual capacities; this provides a personal deterrent to would-be offenders.<sup>34</sup> The failure of any jurisdiction to enact the Bill into law speaks volumes about society's attitude toward the plight of workplace bullying victims and its inattentiveness to the connection between workplace bullying and workplace equality.

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<sup>25</sup> *See id.*

<sup>26</sup> *The Healthy Workplace Campaign*, HEALTHY WORKPLACE BILL, <http://www.healthyworkplacebill.org/index.php> (last visited Apr. 27, 2014).

<sup>27</sup> *See, e.g.*, Florence Z. Mao, *Is Litigation Your Final Answer? Why the Healthy Workplace Bill Should Include an ADR Provision*, 21 J.L. & POL'Y 679, 697–700 (2013).

<sup>28</sup> *See* Suzanne Lucas, *Why Workplace Bullying Should Be Legal*, CBS MONEY WATCH (Mar. 23, 2011, 9:09 AM), [http://www.cbsnews.com/8301-505125\\_162-44941976/why-workplace-bullying-should-be-legal/](http://www.cbsnews.com/8301-505125_162-44941976/why-workplace-bullying-should-be-legal/).

<sup>29</sup> Mao, *supra* note 27, at 698–99; E.J. McMahon & James Copland, *New York's Latest Job Killer: A New Bill Would Give Workers Broad Rights to File Suit When Fired*, NY DAILY NEWS (May 18, 2010, 4:50 PM), <http://www.nydailynews.com/opinion/new-york-latest-job-killer-new-bill-give-workers-broad-rights-file-suit-fired-article-1.446041>.

<sup>30</sup> R.M. Schneiderman, *State Anti-Bully Law Would Let Workers Sue for Nastiness*, METROPOLIS (May 14, 2010, 6:18 PM), <http://blogs.wsj.com/metropolis/2010/05/14/state-anti-bully-law-would-let-workers-sue-for-nastiness/>.

<sup>31</sup> *Frequently Asked Questions About the Healthy Workplace Bill*, HEALTHY WORKPLACE BILL, <http://www.healthyworkplacebill.org/faq.php> (last visited Apr. 15, 2014).

<sup>32</sup> *Quick Facts About the Healthy Workplace Bill*, *supra* note 24.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

## III. THE EVIDENCE

Scholarship in this area is replete with studies of and conclusions about the harm that workplace bullying does, not only to individuals' well-being, but to organizations' morale, productivity, reputation, and efficiency.<sup>35</sup> Individual stories, especially when they are about individuals that are famous (or infamous) capture the public imagination, facilitate discussion, and compel sentiment. But it is important to recall the prevalence of workplace abuse and bullying across states, income levels, and types of workplaces. Specifically, workplace bullying has gone largely unchecked, while actionable workplace harassment has increased from past years by 7.2 percent.<sup>36</sup>

To date, the impact of bullying on women and minorities has neither been fully recognized nor fully explored. For example, while it has been documented that women and minorities report being bullied far more frequently than do other employees,<sup>37</sup> one can only speculate as to the implications that these increased incidents have upon things that are harder to capture, like the effect of unreported bullying on confidence in the workplace, performance evaluations, and victims' willingness and ability to participate in mentoring and networking opportunities, among other things. Indeed, both the direct and indirect ramifications of bullying and their disproportionate impact on historically disadvantaged groups can barely be captured, let alone studied, when so many victims of bullying either don't self-identify, or refuse to do so publicly.<sup>38</sup>

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<sup>35</sup> Workplace bullying can have serious, even devastating, effects on targeted individuals. Psychological effects include stress, depression, mood swings, loss of sleep (and resulting fatigue), and feelings of shame, guilt, embarrassment, and low self-esteem. More severe effects can include Post-Traumatic Stress Disorder, which, left untreated, may cause an individual to react violently against either the bully or anyone else who happens to be in the vicinity. Physical effects include reduced immunity to infection, stress headaches, high blood pressure, and digestive problems.

Workplace bullying also is very bad for business. . . . An employer may suffer direct costs, indirect costs, and opportunity costs as a result of abusive work environments. Direct costs include a significant increase in medical and workers' compensation claims due to work-related stress and the costs of lawsuits emerging from abusive work situations.

Yamada, *supra* note 19, at 483.

<sup>36</sup> Catherine Rampell, *More Workers Complain of Bias on the Job, a Trend Linked to Widespread Layoffs*, N.Y. TIMES, Jan. 12, 2011, at B4, available at <http://www.nytimes.com/2011/01/12/business/12bias.html> ("Accusations of workplace discrimination—which workers file with the [Equal Employment Opportunity Commission] when they think they have been unfairly treated based on their race, sex or other so-called protected categories—soared to 99,922 in the year ended Sept. 30, [2010] from 93,277 in the previous year. That was an increase of 7.2 percent, and the highest level of new discrimination cases ever recorded.").

<sup>37</sup> GARY NAMIE, WORKPLACE BULLYING INST., THE WBI U.S. WORKPLACE BULLYING SURVEY 5–6 (2010), available at [http://workplacebullying.org/multi/pdf/WBI\\_2010\\_Natl\\_Survey.pdf](http://workplacebullying.org/multi/pdf/WBI_2010_Natl_Survey.pdf) (bullies target 58 percent of women); *Race and Workplace Bullying: 2010 WBI Survey*, WORKPLACE BULLYING INST. (Sept. 6, 2010), [http://www.workplacebullying.org/2010/09/06/race\\_2010\\_wbi/](http://www.workplacebullying.org/2010/09/06/race_2010_wbi/) ("[R]esearch findings from the 2010 Workplace Bullying Institute . . . regarding the effect of race on the experience of workplace bullying [reveal] Hispanics report the highest rates [40.2 percent], African-Americans second highest [38.6 percent, and] Asians the lowest [13.5 percent].").

<sup>38</sup> See C.C.H. HUMAN RES. COMPLIANCE LIBRARY, EXPERT GUIDANCE: MANAGING EMPLOYER RISK RESULTING FROM BULLYING ¶ 70,539 (2013), available at 2012 WL 5469459 ("Studies show . . . that 40 percent of bullying targets don't ever tell anyone.").

Champions of civil rights have retained their focus on Title VII, but even as they critique its failings and failures and lament the limitations of the frameworks and doctrines that it has engendered,<sup>39</sup> little to no attention has been paid to workplace bullying.

Until recently, workplace bullying has typically been relegated to the realm of petty nuisances, seemingly inextricably linked in the public imagination to juvenile behavior usually confined to the schoolyard or sandbox.<sup>40</sup> Consequently, employees are reluctant to complain about workplace bullying because they fear that they will be perceived as lacking the wherewithal, strength, or maturity to thrive in the modern world, let alone in the modern workplace.<sup>41</sup> Proponents of Title VII and its use as a mechanism for creating and protecting equality of opportunity are remiss in failing to recognize the critical link between abusive workplace culture and women and minorities' failure to professionally thrive.<sup>42</sup>

#### IV. A FOOTBALL SCANDAL HIGHLIGHTS WORKPLACE BULLYING

##### A. *The Breaking Story*

Over the past few months, the issue of workplace bullying has been thrust into the spotlight by, of all things, a widely publicized scandal involving players on the Miami Dolphins football team.<sup>43</sup> On October 28, 2013, Jonathan

<sup>39</sup> See, e.g., Mark R. Bandsuch, *Ten Troubles with Title VII and Trait Discrimination Plus One Simple Solution (A Totality of the Circumstances Framework)*, 37 CAP. U. L. REV. 965, 967–1062 (2009); Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII as a Rights-Claiming System*, 86 N.C. L. REV. 859, 859 (2008).

<sup>40</sup> Suzanne L. Martin, *Equal Opportunity Is Not the Law*, NEV. EMP. L. LETTER, Aug. 2007, at 3 (“To date, thirteen states have proposed antibullying initiatives . . . and nine of those states are considering enacting antibullying legislation during the 2007 legislative session that would make what used to be considered schoolyard antics unlawful.”); see also Daniel Calvin, Note, *Workplace Bullying Statutes and the Potential Effect on Small Business*, 7 OHIO ST. ENTREPRENEURIAL BUS. L.J. 167, 169 (2012) (“Schoolyard bullying and workplace bullying are similar and both deserve attention from our legislators.”).

<sup>41</sup> See Joel H. Neuman & Robert A. Baron, *Social Antecedents of Bullying: A Social Interactionist Perspective*, in BULLYING AND HARASSMENT IN THE WORKPLACE: DEVELOPMENTS IN THEORY, RESEARCH, AND PRACTICE 201, 218 (Ståle Einarsen et al. eds., 2d ed. 2011) (“Importantly, norms of toughness make it less likely that victims will complain, since doing so would, no doubt, be viewed as a sign of weakness.”).

<sup>42</sup> See John E. Richardson & Linnea B. McCord, *Are Workplace Bullies Sabotaging Your Ability to Compete?*, 4 GRAZIADIO BUS. REV. (2001), <http://gbr.pepperdine.edu/2010/08/are-workplace-bullies-sabotaging-your-ability-to-compete/> (“Because bullies are cowards and are driven by deep-seated insecurities and fears of inadequacy, they intentionally wage a covert war against an organization’s best employees—those who are highly-skilled, intelligent, creative, ethical, able to work well with others, and independent (who refuse to be subservient or controlled by others).”).

<sup>43</sup> *Richie Incognito Threatened Jonathan Martin, Used Racial Slur to Refer to Dolphins Teammate: Reports*, HUFFPOST SPORTS (Nov. 05, 2013, 8:06 AM), [http://www.huffingtonpost.com/2013/11/04/richie-incognito-jonathan-martin-racial-slur-threats\\_n\\_4213340.html](http://www.huffingtonpost.com/2013/11/04/richie-incognito-jonathan-martin-racial-slur-threats_n_4213340.html); Daily Mail Reporter, *Profane Video Surfaces of NFL Lineman Richie Incognito Using the N-word at Bar—As He Is Suspended from Dolphins Over ‘Racist Bullying of Teammate’*, MAIL ONLINE (Nov. 6, 2013, 1:09 PM), <http://www.dailymail.co.uk/news/article-2487953/Dolphins-lineman-Richie-Incognito-filmed-using-N-word-profane-video-rant.html>.

Martin, the Dolphins' starting right tackle, abruptly walked out of practice and away from his burgeoning career as an offensive lineman. According to Martin, he had been bullied by fellow teammate Richie Incognito.<sup>44</sup> Almost immediately after quitting the team, Martin checked himself into a hospital and requested mental health treatment.<sup>45</sup> Suddenly, sports fans and Americans inclined to dismiss workplace bullying as a "real" issue, were forced to take notice.<sup>46</sup> The public's need to know the details of what drove Martin to these decisions became virtually insatiable. If bullying was thought of as something that only the weak could not tolerate, what were people to make of a six-foot-five, 312-pound, Stanford-educated football player<sup>47</sup> willing to identify as a victim whose inability to withstand his workplace abuse cost him his career? How and why did workplace bullying go from something routinely dismissed by those who thought that being "tough enough" to flourish in US boardrooms, break rooms, and locker rooms was necessary to display basic competence, to something that seemingly stopped the National Football League cold in its tracks?

The Dolphins scandal provides a model of important lessons about the significance of workplace bullying and its relationship to Title VII's goal of eradicating workplace exclusion and discrimination. A brief review of the facts is both necessary and instructive to those who champion civil rights.

#### B. Media Coverage of Martin's Allegations

On Wednesday, October 30, 2013, reports circulated that Jonathan Martin had left the Miami Dolphins suddenly and without warning.<sup>48</sup> The next day, the Associated Press reported that Martin left the team to address emotional

<sup>44</sup> James Walker, *Jonathan Martin Leaves Dolphins*, ESPN NFL (Oct. 31, 2013, 1:59 PM), [http://espn.go.com/nfl/story/\\_id/9904868/jonathan-martin-miami-dolphins-leaves-team](http://espn.go.com/nfl/story/_id/9904868/jonathan-martin-miami-dolphins-leaves-team).

<sup>45</sup> *Jonathan Martin Checked into Hospital to Deal with Emotional Distress: Report*, HUFFPOST SPORTS (Nov. 6, 2013, 10:40 PM), [http://www.huffingtonpost.com/2013/11/06/jonathan-martin-hospital-dolphins\\_n\\_4228098.html](http://www.huffingtonpost.com/2013/11/06/jonathan-martin-hospital-dolphins_n_4228098.html).

<sup>46</sup> Richard Drake, *Richie Incognito of the Miami Dolphins: No Better Than the Average Bully in the Workplace*, ARK. TIMES (Nov. 11, 2013, 12:17 PM), <http://www.arktimes.com/StreetJazz/archives/2013/11/11/richie-incognito-of-the-miami-dolphins-no-better-than-the-average-bully-in-the-workplace>; Wilson Elser & Scott Sweeney, *Incognito No Longer: Workplace Bullying Legislation Again at the Forefront*, LEXOLOGY (Nov. 20, 2013), <http://www.lexology.com/library/detail.aspx?g=8e4e73ae-ba57-44a2-8375-a8e23c9429f6>; Aaron Gordon, *Richie Incognito and Jonathan Martin Are Everywhere*, PAC. STANDARD (Nov. 18, 2013, 8:00 AM), <http://www.psmag.com/culture/bullying-racism-work-nfl-richie-incognito-jonathan-martin-everywhere-70095/>; Cindy Krischer Goodman, *Dolphins' Locker Room Isn't Only Workplace with a Bully*, MIAMI HERALD (Nov. 5, 2013), <http://www.miamiherald.com/2013/11/05/3733858/dolphins-locker-room-isnt-only.html>; John S. Sarrett, *Richie Incognito Case Demonstrates Importance of Workplace Anti-Bullying Policies*, JOHN S. SARRETT BLOG (Nov. 14, 2013), <http://www.sarrettlaw.com/blog/richie-incognito-case-demonstrates-importance-of-workplace-anti-bullying-policies/>.

<sup>47</sup> *Jonathan Martin Stats*, ESPN NFL, [http://espn.go.com/nfl/player/stats/\\_id/14975/jonathan-martin](http://espn.go.com/nfl/player/stats/_id/14975/jonathan-martin) (last visited Apr. 15, 2014).

<sup>48</sup> Ryan Wilson, *Report: Dolphins OT Jonathan Martin 'Gone AWOL' from Team*, CBS SPORTS.COM (Oct. 30, 2013, 6:47 PM), <http://www.cbssports.com/nfl/eye-on-football/24162910/report-dolphins-ot-jonathan-martin-gone-awol-from-team> ("Martin was the victim of a prank in the cafeteria who . . . 'flipped out, smashed a food tray on the ground, took off, and they haven't seen him since.'").



issues,<sup>49</sup> and by November 3, as information started leaking that Martin had been bullied, the Dolphins released a statement claiming “[t]he notion of bullying is based on speculation and has not been presented to us.”<sup>50</sup>

That same day, the Miami Dolphins acknowledged that they had been notified of alleged “player misconduct,” and issued a statement denying that bullying had, in fact, led to Martin’s departure.<sup>51</sup> The team then announced that it had decided to suspend Incognito for “conduct detrimental to the team,” affirming its commitment to “creat[ing] a safe and professional workplace for all players.”<sup>52</sup> The Dolphins proclaimed: “We believe in maintaining a culture of respect for one another and as a result we believe this decision is in the best interest of the organization at this time.”<sup>53</sup> Apparently, in the time that transpired between the initial statements and the turnaround, it had been revealed that Incognito addressed Martin in a voicemail as follows: “Hey, whassup, you half n—— piece of s——. . . (I want to) s—— in your f——ing mouth. (I’m going to) slap your real mother across the face. . . I’ll kill you.”<sup>54</sup> Other voicemails, e-mails, and texts sent between the two resonated with a similar tenor.<sup>55</sup>

From then on, the story was nationwide headline news. Bullying was on the lips and minds of everyone from journalists to commentators, with hun-

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<sup>49</sup> AP: *Emotional Issues to Keep Dolphins T Jonathan Martin Out for Week 9*, USA TODAY (Oct. 31, 2013, 3:29 PM), <http://www.usatoday.com/story/sports/nfl/dolphins/2013/10/31/jonathan-martin-emotional-issues-out-week-9-bengals/3327929/>.

<sup>50</sup> Armando Salguero, *Dolphins: Not Under Investigation, No Bullying Concern*, MIAMI HERALD BLOG (Nov. 3, 2013, 9:51 AM), [http://miamiherald.typepad.com/dolphins\\_in\\_depth/2013/11/dolphins-not-under-investigation-no-bullying-concern.html](http://miamiherald.typepad.com/dolphins_in_depth/2013/11/dolphins-not-under-investigation-no-bullying-concern.html).

<sup>51</sup> Anwar S. Richardson, *Miami Dolphins Deny Bullying Led to the Departure of Jonathan Martin*, YAHOO! SPORTS (Nov. 3, 2013, 9:30 AM), [http://sports.yahoo.com/blogs/nfl-shut-down-corner/miami-dolphins-deny-bullying-led-departure-jonathan-martin-143019868-nfl.html?soc\\_src=mediacontentstory](http://sports.yahoo.com/blogs/nfl-shut-down-corner/miami-dolphins-deny-bullying-led-departure-jonathan-martin-143019868-nfl.html?soc_src=mediacontentstory); see also Press Release, Miami Dolphins, Miami Dolphins Statement on Jonathan Martin (Nov. 3, 2013), available at <http://www.miamidolphins.com/news/press-releases/article-1/Miami-Dolphins-Statement-On-Jonathan-Martin/4d417b72-ad82-4ec9-8ce2-1ce6d2a560b2>.

<sup>52</sup> Press Release, Miami Dolphins, Miami Dolphins Statement on Richie Incognito (Nov. 3, 2013), <http://www.miamidolphins.com/news/press-releases/article-1/Miami-Dolphins-Statement-On-Richie-Incognito/d359fa31-80ec-48a8-ae66-cbdebc36bfbf>; Larry Fine, *Players Found on All Sides in Dolphins’ Harassment Case*, YAHOO! SPORTS (Nov. 5, 2013, 5:22 PM), <http://sports.yahoo.com/news/players-found-sides-dolphins-harassment-case-222240653-nfl.html>.

<sup>53</sup> Press Release, Miami Dolphins, *supra* note 52.

<sup>54</sup> *Slurs in Incognito’s Messages*, ESPN NFL (Nov. 5, 2013, 9:09 AM), [http://espn.go.com/nfl/story/\\_/id/9926139/richie-incognito-miami-dolphins-used-slurs-messages-jonathan-martin](http://espn.go.com/nfl/story/_/id/9926139/richie-incognito-miami-dolphins-used-slurs-messages-jonathan-martin).

<sup>55</sup> Armando Salguero, *Incognito Voicemail and Tweets to Martin*, MIAMI HERALD BLOG (Nov. 4, 2013, 12:43 PM), [http://miamiherald.typepad.com/dolphins\\_in\\_depth/2013/11/incognito-voicemail-and-tweets-to-martin.html](http://miamiherald.typepad.com/dolphins_in_depth/2013/11/incognito-voicemail-and-tweets-to-martin.html) (last visited Apr. 15, 2014) (“Incognito left a voicemail in April, the transcript of which reads as follows: ‘Hey, wassup, you half-n——r piece of (expletive). I saw you on twitter, you been training ten weeks. Want to (expletive) in your (expletive) mouth. I’m going to slap your (expletive) mouth. Going to slap your real mother across the face. (laughter). You’re still a rookie. I’ll kill you.’”).

dreds of news stories being published about the incident and its aftermath.<sup>56</sup> Media outlets investigating the incident soon began to report on “Incognito’s history of bullying, an apparent disdain for rookies and his usage of racial slurs, including some specifically directed at Martin.”<sup>57</sup> What played out in the story from then on was a long, convoluted narrative, punctuated by rapid vacillations in sentiment on the part of just about everyone from the two players’ Dolphins teammates to the media outlets themselves. In fact, by December 2013, according to USA Today, “[m]any Dolphins players praised Incognito as a great teammate and seemed baffled by the situation,” and, “[s]ome players around the league have been more critical of Martin than Incognito, who has been suspended indefinitely by the Dolphins.”<sup>58</sup> In late November 2013, the Dolphins announced Incognito wouldn’t play again that season, but would continue to be paid.<sup>59</sup>

### C. *The Timeline*

The timeline of those events that transpired between the time period surrounding Martin’s departure from the team and December 2013, looked something like USA Today’s version, reprinted below. What is particularly fascinating are the palpable shifts in sentiment, both from and toward those involved in the situation, even as ordinary Americans from around the country were both bombarded with media coverage of “workplace bullying” and had the topic on the tips of their tongues and at the forefront of their thoughts.<sup>60</sup>

Nov. 4: The public began finding signs of Incognito’s disdain for rookies.

Nov. 4: Sources told USA TODAY Sports that the Dolphins were considering cutting Incognito. An executive from another team said “I think he can file his retirement papers.”

Nov. 5: As Brent Schrotenboer discovered, Incognito’s reputation as a bully goes all the way back to 2002, his freshman year at Nebraska. Incognito picked on walk-on offensive lineman Jack Limbaugh.

Nov. 5: The NFL Players Association said it would support “all players” in the Miami mess. In an awkward spot, the union would support a grievance filed by either Incognito or Martin.

Nov. 5: Some players around the league began blaming Martin for breaking the code of locker room conduct.

Nov. 6: Despite racially charged voicemails and video, players have come to the defense of Incognito, with quarterback Ryan Tannehill going as far as to say that Incognito and Martin were good friends. “We joke with each other. You can’t have

<sup>56</sup> A Google search of the phrase “Richie Incognito bullying Jonathan Martin” yielded over 200 news stories. Search for “Richie Incognito bullying Jonathan Martin”, GOOGLE, <http://www.google.com> (last visited Mar. 20, 2014).

<sup>57</sup> *Timeline of Dolphins’ Alleged Bullying Saga Between Richie Incognito and Jonathan Martin*, USA TODAY (Dec. 17, 2013, 12:34 PM), <http://www.usatoday.com/story/sports/nfl/2013/11/07/richie-incognito-jonathan-martin-bullying-miami-dolphins/3466755/> [hereinafter *Timeline*].

<sup>58</sup> *Id.*

<sup>59</sup> Dan Hanzus, *Richie Incognito’s Suspension Will Continue with Pay*, NFL (Nov. 29, 2013, 8:38 PM), <http://www.nfl.com/news/story/0ap2000000289749/article/richie-incognitos-suspension-will-continue-with-pay>.

<sup>60</sup> See *supra* note 46 and accompanying text.

thin skin around here,” defensive tackle Randy Starks said. “We’re trying to clear Richie’s name. He’s getting a bad rap.”

Nov. 7: USA TODAY Sports spoke to a number of NFL players about the league’s hazing dilemma. “Jonathan Martin is a 6’5 320 pound dude.” Giants safety Antrel Rolle said. “I think he should be able to stand up for himself.”

Nov. 7: Martin’s lawyer released a statement claiming his client “endured harassment that went far beyond the traditional locker room hazing.”

Nov. 8: Jonathan Martin will meet with the NFL’s representative investigating the offensive tackle’s allegations of workplace harassment.

Nov. 8: Police report details Incognito’s alleged “inappropriate behavior” in 2012 with a woman, who was a golf club volunteer.

Nov. 9: Dolphins coach Joe Philbin says team dealt with Incognito after 2012 golf course incident.

Nov. 10: Incognito speaks for the first time since the allegations and his suspension in an interview with Fox Sports.

Nov. 11: Dolphins owner Stephen Ross speaks publicly, offering his support of Martin.

Nov. 14: Incognito files a grievance against the Dolphins.

Nov. 23: Ted Wells thanks the Dolphins for “complete cooperation” in the bullying investigation.

Nov. 29: Incognito makes a deal that cuts his financial loss to a maximum of two game checks.

Nov. 30: Martin is officially placed on the non-football illness list.

Dec. 16: Incognito’s season comes to an end, but paychecks don’t.<sup>61</sup>

On February 12, 2014, with the publication of a report commissioned by the NFL investigating Martin’s allegations of bullying, Incognito took to the social media website twitter, tweeting, among other things, “Dear Jon Martin. . . . The truth is going to bury you and your entire ‘camp’. You could have told the truth the entire time.”<sup>62</sup> In what looked like a further attempt to both humiliate Martin and clear his own name, Incognito tweeted “FACT: Jonathan Martin told me he thought about taking his own life in MAY 2013 b/c [sic] he wasn’t playing well. Told me he felt worthless.”<sup>63</sup> Still seemingly wanting to somehow engage with the public, he also said “I’m guilty of being a loyal friend and good teammate. I apologize for my poor language and rude remarks. I’ve never denied it.”<sup>64</sup> Defiant, he also wrote “I’m ready to move on with my life and career. I’ve been dragged through the mud for months by my ‘best friend’. #betrayed #railroaded.”<sup>65</sup>

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<sup>61</sup> *Timeline, supra* note 57.

<sup>62</sup> Richie Incognito, TWITTER (Feb. 12, 2014, 11:48 AM), <https://twitter.com/68INCOGNITO/status/433689056547835904>.

<sup>63</sup> Richie Incognito, TWITTER (Feb. 12, 2014, 12:17 PM), <https://twitter.com/68INCOGNITO/status/433696415470985216>.

<sup>64</sup> Richie Incognito, TWITTER (Feb. 12, 2014, 12:07 PM), <https://twitter.com/68INCOGNITO/status/433693912385847296>.

<sup>65</sup> Richie Incognito, TWITTER (Feb. 12, 2014, 11:42 AM), <https://twitter.com/68INCOGNITO/status/433687557759455232>.

*D. The Report to the National Football League Concerning Issues of Workplace Conduct at the Miami Dolphins (The “Report”)*

Soon after the scandal broke, and, according to the Report, at the request of the Dolphins, NFL Commissioner Roger Goodell made it known that the NFL had retained a law firm to conduct an independent investigation into the claims made and to prepare a report, to be made public, for the Commissioner’s review. The retained attorneys were directed to refrain from engaging in “judgments about whether the conduct [reported upon] g[ave] rise to legal liability on the part of any person or entity.”<sup>66</sup>

The Report, authored by Ted Wells of the law firm Paul Weiss, was published on the morning of February 14, 2014.<sup>67</sup> Authors like Emily Bazelon of Slate.com called it “the best report on bullying I’ve ever read,” and “the opposite of a whitewash,” and lauded the “openness of Jonathan Martin” in participating in the investigation as “the kind of honest reckoning that can help other victims of bullying.”<sup>68</sup> An unflinching account and evaluation of what occurred, the more than 140-page report concluded that Incognito and two other members of the Dolphins, John Jerry and Mike Pouncey, bullied and harassed Martin, another offensive lineman, and an assistant trainer on the team. The abuse included “racial slurs and other racially derogatory language[,] . . . homophobic name-calling[,] . . . improper physical touching[,] and] . . . taunt[s toward Martin] on a persistent basis with sexually explicit remarks about his sister and his mother and at times ridiculed with racial insults and other offensive comments.”<sup>69</sup>

The report also detailed what it termed an “odd but seemingly close friendship” between Martin and Incognito that seemed as complex as it did troubling:

Not only did both linemen report that they enjoyed socializing together, the evidence also shows that they often communicated in a vulgar manner. Incognito contends that the conduct about which Martin complains was part of locker room banter meant in good fun and that Martin was a willing and active participant in verbal sparring, never letting on that he was hurt by it. Martin claims that at times he participated in off-color joking with Incognito and others in an attempt to fit in, with the hope of reducing the treatment he found offensive. . . .  
 . . . [Martin] described their relationship as “bipolar.” For example, in text messages to Incognito and others, Martin referred to Incognito as bipolar—not in a clinical sense, but to express the concept that at times Incognito behaved as his close friend and at other times treated him abusively.<sup>70</sup>

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<sup>66</sup> THEODORE V. WELLS ET AL., REPORT TO THE NATIONAL FOOTBALL LEAGUE CONCERNING ISSUES OF WORKPLACE CONDUCT AT THE MIAMI DOLPHINS 6 (2014), available at <http://ht.cdn.turner.com/si/images/2014/02/14/PaulWeissReport.pdf> [hereinafter WELLS REPORT].

<sup>67</sup> Doug Farrar, *Report on Richie Incognito-Jonathan Martin Saga: History of ‘Persistent Bullying, Harassment and Ridicule’ Within Dolphins*, SPORTS ILLUSTRATED AUDIBLES (Feb. 14, 2014), <http://nfl.si.com/2014/02/14/richie-incognito-jonathan-martin-report/>.

<sup>68</sup> Emily Bazelon, *The Best Report on Bullying I’ve Ever Read: The NFL’s Amazing Investigation of the Miami Dolphins Locker Room*, SLATE (Feb. 14, 2014, 6:23 PM), [http://www.slate.com/articles/sports/sports\\_nut/2014/02/wells\\_report\\_richie\\_incognito\\_the\\_nfl\\_s\\_investigation\\_of\\_the\\_miami\\_dolphins.html](http://www.slate.com/articles/sports/sports_nut/2014/02/wells_report_richie_incognito_the_nfl_s_investigation_of_the_miami_dolphins.html).

<sup>69</sup> WELLS REPORT, *supra* note 66, at 1.

<sup>70</sup> *Id.* at 2.

But the report ultimately concluded that the facts that it set forth failed to “support the view of Incognito and his teammates that this conduct was all good-natured fun among friends.”<sup>71</sup>

To further compound matters, the report concluded that Martin may have responded to the abuse with a heightened sensitivity engendered by his having been bullied and his having suffered the mental effects of bullying previously.<sup>72</sup> Thus, with his bullying at Incognito’s hands, Martin experienced a resurgence of his depression and even thought about suicide twice in 2013, the report recounted.<sup>73</sup>

The report observed that there had been a “pattern of harassment,” noting that even after Martin’s departure, “Incognito made a number of telling entries in a notebook used to keep track of ‘fines’ the offensive linemen imposed on each other in their ‘kangaroo court’ (typically for trivial infractions such as arriving late to meetings).”<sup>74</sup> In the notebook, “Incognito recorded a \$200 fine against himself for ‘breaking Jmart,’ awarded another lineman who had been verbally taunted a \$250 bonus for ‘not cracking first,’ and wrote down a number of penalties against Martin for acting like a ‘pussy.’”<sup>75</sup> Further, Incognito seemingly knew that his behavior was wrong; a week after Martin’s departure from the team, he texted two teammates, saying, “They’re going to suspend me[.] Please destroy the fine book first thing in the morning.”<sup>76</sup>

Perhaps most importantly, the report confirmed that the abuse endured by Martin was “consistent with a case of workplace bullying,” noting that “even big, strong athletes are not immune from vulnerability to abusive behavior.”<sup>77</sup> In addition to frequent use of the n-word toward Martin, Incognito also, according to the report, called him a “stinky Pakistani” on the day that Martin walked away from practice and the team.<sup>78</sup> The report also details “ceaseless racial ridicule,” targeting an Asian assistant trainer, further evidence of the racist overtones of the hazing and bullying that went on.<sup>79</sup> In one recounted hazing incident, Martin was assessed a \$10,000 “fine” by the players for a bogus reason intended to help fund a team trip; although other players were “fined” for bogus reasons, Martin, unlike many others, actually paid his, and it was by far the highest amount paid by anyone.<sup>80</sup>

The report ultimately rejected “the notion that Martin simply ‘walked off the job,’ ” or “ ‘cracked’ under the pressure of playing in the NFL.” Instead, it found that Martin “fell victim, at least in part, to persistent taunting from his own teammates.”<sup>81</sup> It concluded that:

[T]he treatment of Martin and others in the Miami Dolphins organization at times was offensive and unacceptable in any environment, including the world professional

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<sup>71</sup> *Id.* at 4.

<sup>72</sup> *Id.* at 2.

<sup>73</sup> *Id.* at 3.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 3–4.

<sup>77</sup> *Id.* at 17.

<sup>78</sup> *Id.* at 15, 25.

<sup>79</sup> *Id.* at 22–23.

<sup>80</sup> *Id.* at 39.

<sup>81</sup> *Id.* at 26–27.

football players inhabit. A young football player who has the skills to play at the highest level, and who also happens to be quiet and reserved, should have the opportunity to pursue a career in the NFL without being subjected to harassment from his teammates.<sup>82</sup>

It adroitly noted that “Martin’s vulnerabilities do not excuse the harassment that was directed at him. That the same taunts might have bounced off a different person is beside the point. Bullies often pick vulnerable victims, but this makes their conduct more, not less, objectionable.”<sup>83</sup>

## V. LESSONS FROM THE FOOTBALL SCANDAL

Workplace scholars, particularly those who focus on workplace bullying and its detriments, have followed the Dolphins scandal with substantial interest.<sup>84</sup> It is particularly thought provoking, however, to extract valuable insights from this story as it has unfolded and to see what larger lessons can be gleaned from it as legal and other scholars reflect upon workplace dynamics and fifty years of Title VII’s regulation of the workplace. The saga of Martin and Incognito, who, unlike most other American employees, are famous, wealthy, and known for being physically strong, has captured the public’s interest in bullying in a way in which the same scenario played out against the backdrop of a workplace on Main Street or Wall Street probably never would have. These lessons can best be presented in a series of questions.

### A. *Why Did It Take This Incident to Make People Pay Attention to Workplace Bullying?*

When a high profile celebrity, known for his physical and mental toughness and his status as a macho athlete retreated from abuse that was not physical, but rather mental and emotional, literally walking away from a career that brings with it fame and fortune, people were riveted. The juxtaposition of the effect bullying had on this football player with society’s perceptions that “bullying” is a phenomenon that should be relegated to the schoolyard and that those who can’t tolerate it are simply too weak to hack it in the “real world,” was jarring. Indeed, as Emily Bazelon and Josh Levin of Slate.com put it, “[a]t more than 300 pounds, Jonathan Martin doesn’t seem like a victim out of central casting.”<sup>85</sup>

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<sup>82</sup> *Id.* at 5.

<sup>83</sup> *Id.* at 4.

<sup>84</sup> Kerri L. Stone, *Why Does It Take a Richie Incognito for Us to Start Talking About Bullying?*, HUFFPOST MIAMI (Nov. 16, 2013, 12:35 PM), [http://www.huffingtonpost.com/kerri-l-stone/post\\_6167\\_b\\_4276891.html](http://www.huffingtonpost.com/kerri-l-stone/post_6167_b_4276891.html). See also Bazelon, *supra* note 68; Linda K. Greaves, *Business Viewpoint: Bullying at Work Should Not be Ignored*, TULSA WORLD (Nov. 28, 2013, 4:12 AM), [http://www.tulsaworld.com/business/business-viewpoint-bullying-at-work-should-not-be-ignored/article\\_aacf0585-3b7b-52e3-9a50-3f5b9cdfaac9.html](http://www.tulsaworld.com/business/business-viewpoint-bullying-at-work-should-not-be-ignored/article_aacf0585-3b7b-52e3-9a50-3f5b9cdfaac9.html); Frank Kalman, *Bullying, Bigotry and a Bill to Prevent Picking on All Personnel*, WORKFORCE (Jan. 5, 2014), <http://www.workforce.com/articles/20172-bullying-bigotry-and-a-bill-to-prevent-picking-on-all-personnel>.

<sup>85</sup> Emily Bazelon & Josh Levin, *NFL Bullies: Could the Dolphins’ Suspension of Richie Incognito Change the Culture of Pro Football?*, SLATE (Nov. 4, 2013, 4:19 PM), <http://>

But this seeming disconnect between the stereotyped victim and Martin is instructive. Anyone can be a victim of workplace bullying that strips away both their will and their ability to perform their job satisfactorily, and thus to continue their career.<sup>86</sup> Martin's success and fame did not make him immune to the harms that befall bullying victims.<sup>87</sup> The report notes that not unlike many other bullying victims, Martin's "inability to make them stop the insults drove him into depression and led him to contemplate suicide on two occasions in 2013," despite the fact that before joining the Dolphins he'd had no significant mental health history.<sup>88</sup>

Richie Incognito, by contrast, was by all accounts a bully who *was* straight out of central casting.<sup>89</sup> And there are lessons to be learned from that too. Incognito had made somewhat of a career and built a professional persona out of his "bully" reputation.<sup>90</sup> Moreover, Incognito's record of bullying, which dates back to his days as a college football player over a decade ago, looks to have been tolerated (and, as will be discussed, perhaps, at least to some extent, stoked) in various of his professional situations, right up until this incident.<sup>91</sup>

According to Emily Bazelon and Josh Levin at Slate.com:

Incognito, it seems, has spent his life training for the role of locker-room villain. It would take too long to recount all of his alleged on-field and off-field misdeeds, but

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[www.slate.com/articles/sports/sports\\_nut/2013/11/richie\\_incognito\\_suspended\\_how\\_the\\_nfl\\_abets\\_locker\\_room\\_bullies.html](http://www.slate.com/articles/sports/sports_nut/2013/11/richie_incognito_suspended_how_the_nfl_abets_locker_room_bullies.html).

<sup>86</sup> See David Yamada, *Workplace Bullying Is Bad for Business*, WBJOURNAL.COM (Apr. 19, 2012, 1:52 PM), <http://www.wbjournal.com/article/20120109/PRINTEDITION/301099992/workplace-bullying-is-bad-for-business> ("Organizations where workplace bullying is common are likely to experience lower productivity and morale, higher absenteeism and turnover rates . . .").

<sup>87</sup> See Ted Hesson, *Do Big Muscles Make You Immune to Bullying?*, FUSION (Nov. 15, 2013, 6:32 PM), <http://fusion.net/justice/story/big-muscles-make-immune-bullying-228342>. ("[M]artin's size could come into play if he decides to bring the case to court, according to Tamara Lave, a law professor at the University of Miami. . . . [A] jury might take Martin's complaints more seriously because of his size, and because he's a football player, who are typically thought of as super-tough. 'The fact that you have a 300-pound man who feels so threatened and uncomfortable that he leaves, that's an indication of how serious it was.'")

<sup>88</sup> WELLS REPORT, *supra* note 66, at 13–14.

<sup>89</sup> See Robin Abcarian, *Just as We Thought: Richie Incognito Bullied Jonathan Martin*, L.A. TIMES (Feb. 14, 2014, 12:53 PM), <http://www.latimes.com/local/abcarian/la-me-ra-report-miami-dolphins-jonathan-martin-bullied-by-richie-incognito—20140214,0,7766892.story#axzz2tzyvgk7Z>.

<sup>90</sup> Brent Schrottenboer, *Richie Incognito's Bully Reputation Goes Back to 2002*, USA TODAY (Nov. 5, 2013, 11:11 AM), <http://www.usatoday.com/story/sports/nfl/2013/11/05/incognito-bully-accusations-nebraska-freshman/3439819/>.

<sup>91</sup> It was early 2002—long before Incognito was accused of similar behavior with the Miami Dolphins. Incognito was just a freshman at Nebraska, but that didn't stop him from picking fights or harassing teammates, in this case a non-scholarship offensive lineman named Jack Limbaugh. Incognito plowed into Limbaugh's back during practice, knocking him to the ground for no apparent reason.

*Id.*; see also Mike Berardino, *Richie Incognito, the NFL's 'Dirtiest Player,' to Visit Dolphins*, SUN SENTINEL (Mar. 15, 2010), [http://articles.sun-sentinel.com/2010-03-15/sports/fl-dolphins-incognito-visit-0315-20100314\\_1\\_richie-incognito-nfl-miami-dolphins](http://articles.sun-sentinel.com/2010-03-15/sports/fl-dolphins-incognito-visit-0315-20100314_1_richie-incognito-nfl-miami-dolphins) (stating that Incognito "earn[ed] a reputation for nastiness"); Sean Leahy, *Rams Won't Discipline Incognito for Taunting Fans*, HUDDLE (Nov. 24, 2008, 6:42 PM), <http://content.usatoday.com/communities/thehuddle/post/2008/11/784983/1#.UtS0jFRDt8E>.

here's a brief sketch. As an undergrad at Nebraska he was ejected from a game for fighting and was spotted spitting on another player. (Years later, an NFL player would also accuse Incognito of spitting in his face.) Off the field, he was found guilty of a misdemeanor assault charge, and eventually left the Nebraska team after being indefinitely suspended for violations of team rules. With his first NFL team, the Rams, he was once fined \$25,000 for berating an official. The Rams cut him in 2009 when he head-butted two opponents in the same game, drawing two [fifteen]-yard penalties and \$50,000 in fines. In recent years, the Texans' Antonio Smith accused Incognito of trying to break his ankle, then became so incensed at the Dolphins player this preseason that he ripped Incognito's helmet off and swung it at him. And this August, Incognito was reported to have punched a security guard, though he was never charged or arrested.<sup>92</sup>

Bullies are frequently repeat-offenders whose behavior may even be rewarded where others with legitimate or even superior perspectives or knowledge shrink back in fear. When this happens, the bullies become emboldened, and the bullying is further fueled and will escalate.<sup>93</sup> Incognito is not alone in having bullying behavior foretell other abusive and additionally unlawful behavior. In fact, even early-stage, typical schoolyard bullying has been shown to be a gateway of sorts, predictive of anything and everything from anti-social behavior and aggression, to violent adult behavior, to criminal activity.<sup>94</sup>

To ignore a bully who engages in egregious and harmful behavior simply because the behavior has not yet reached the point of being unlawful is short-sighted. The pathology of a bully is typically such that the same sense of inflated entitlement, aggression, and lack of empathy or regard for social norms that engenders the bullying behavior can lend itself to an escalation of that behavior into acts like physical violence, actionable race- or sex-based harassment, or other acts of theft or violation that can result in a multitude of injuries, including distinct harms to women and minorities in the workplace.<sup>95</sup> At the very least, it is the best practice for an employer who cares about equality of opportunity in the workplace to condemn workplace bullying and to craft policies that will deter and combat it.<sup>96</sup>

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<sup>92</sup> Bazelon & Levin, *supra* note 85.

<sup>93</sup> See William Friedlander, *Bullying Basics*, TRIAL, March 2013, at 14, 15–16, available at <http://www.justice.org/cps/rde/justice/hs.xsl%20/20254.htm> (“The U.S. Department of Health and Human Services (HHS), on its website [www.stopbullying.gov](http://www.stopbullying.gov), defines bullying as unwanted aggressive behavior that involves a real or perceived power imbalance and is repeated, or has the potential to be repeated, over time. The power imbalance can be one of physical strength, popularity, status, peer support, or access to potentially hurtful information. The repetition marks a pattern or intentionality in hurtful conduct that distinguishes it from an accident or angry outburst.”).

<sup>94</sup> See James Maguire, “*Everyone Does It to Everyone*”: *An Epidemic of Bullying and the Legislation of Transgression in American Schools*, 16 NEW CRIM. L. REV. 413, 433 n.62 (2013).

<sup>95</sup> See *infra* text accompanying note 180 (discussing how bullying can be a gateway toward criminal behavior).

<sup>96</sup> See generally Kerri Lynn Stone, *Floor to Ceiling: How Setbacks and Challenges to the Anti-Bullying Movement Pose Challenges to Employers Who Wish to Ban Bullying*, 22 TEMP. POL. & CIV. RTS. L. REV. 355 (2013) (discussing workplace bullying policies). See also Maureen Duffy, *Preventing Workplace Mobbing and Bullying with Effective Organizational Consultation, Policies, and Legislation*, 61 CONSULTING PSYCHOL. J.: PRAC. & RES. 242, 248 (2009) (“It is in an organization's best interests to take seriously the issue of work-



The fact is that bullying occurs routinely throughout the boardrooms and break rooms of America.<sup>97</sup> Its usual failure to attract and garner the kind of public sentiment and attention that it should means that those actively engaged in its investigation or in examining its effects are too few and too unheeded. However, the headlines spawned by the Incognito case, including “Is the NFL a Breeding Ground for Bullying? Incognito Story Reveals Bigger Problem,”<sup>98</sup> and “NFL Bullies: Could the Dolphins’ Suspension of Richie Incognito Change the Culture of Pro Football?”<sup>99</sup> show a willingness of the media to probe the entirety of the NFL to discern the source of the abuse-centered culture and the harm at issue. They also evince an, albeit probably temporary, societal interest in and concern about adults who haze and bully one another in the course of earning a living and going about daily life.<sup>100</sup>

*B. Why Didn’t the Bullying in This Case Garner Any Attention Until Its Racial Elements Became Known?*

Initially, it seemed bizarre that the Dolphins went from announcing that “[t]he notion of bullying is based on speculation and has not been presented to us as a concern,”<sup>101</sup> to condemning Incognito’s behavior publicly in the span of one day.<sup>102</sup> That turnaround, it seems, is due to the fact that only after the explicitly racist content of the harassing messages and statements were made known, minds began to change.<sup>103</sup> The bullying only became problematic enough to require a response like suspension in the eyes of the Dolphins once certain sentiments and words were revealed as having been used and expressed.<sup>104</sup>

So, it is worth noting that while this was the incident—splashed across headlines and news scrolls for so many weeks in 2013—that got people talking and thinking about workplace bullying as a real problem, Incognito’s behavior

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place culture by preventing bullying and mobbing, if only to protect itself from the high costs of absenteeism, sick leave, staff turnover, litigation, and negative publicity through failure to do so.”).

<sup>97</sup> GARY NAMIE, WORKPLACE BULLYING INST., 2013 WBI SURVEY: BULLYING BY INDUSTRY 4 (2013), available at <http://www.workplacebullying.org/multi/pdf/WBI-2013-Industry.pdf> (40 percent of bullying occurs in the corporate and small business sector).

<sup>98</sup> Maria Burns Ortiz, *Is the NFL a Breeding Ground for Bullying? Incognito Story Reveals Bigger Problem*, FOX NEWS LATINO (Nov. 6, 2013), <http://latino.foxnews.com/latino/opinion/2013/11/06/incognito-story-raises-awareness-larger-problem/>.

<sup>99</sup> Bazelon & Levin, *supra* note 85.

<sup>100</sup> Ross McGuinness, *Richie Incognito ‘Bullied’ Dolphins Teammate: When Does Hazing Become Harassment?*, METRO (Nov. 7, 2013, 3:02 PM), <http://metro.co.uk/2013/11/07/richie-incognito-bullied-dolphins-teammate-when-does-hazing-become-harassment-4177208/>.

<sup>101</sup> Richardson, *supra* note 51.

<sup>102</sup> See Gary Mihoces, *Dolphins Players Defend Incognito, Question Martin in Bullying Case*, USA TODAY (Nov. 6, 2013, 8:31 PM), <http://www.usatoday.com/story/sports/nfl/dolphins/2013/11/06/miami-dolphins-jonathan-martin-richie-incognito-locker-room/3458891/> (“The Dolphins organization, after initially putting out a statement that nothing of the sort had gone on, ended up suspending Incognito, one of Miami’s most popular teammates.”); see also Bazelon & Levin, *supra* note 85; Richardson, *supra* note 51.

<sup>103</sup> See Bazelon & Levin, *supra* note 85.

<sup>104</sup> *Id.*

was only seen as truly problematic by the Dolphins once its racist nature was revealed to the organization.<sup>105</sup> Although the overt racism displayed is particularly despicable, the behavior should have been seen as problematic well prior to that. This is true not only because of the insidiousness of bullying itself, but because, as will be discussed below, when bullying crosses racial lines, the complex interplay between racism and workplace bullying necessitates a more searching look into what occurred.

*C. How Has the Racial Dynamic Eroded?*

This question is largely rhetorical. The racial implications and dynamic in this case should not have been permitted to dissipate, and the report essentially concludes as much.<sup>106</sup>

In addition to all of the racial epithets hurled at Martin, many of the taunts, Martin recounted, had to do with his not being “black enough,” a reference, the report said to the Stanford graduate’s “upper-middle-class upbringing, reserved nature and intellectual interests.”<sup>107</sup> The report expressly declined to conclude as to whether the abuse inflicted on Martin was motivated by racial animus,<sup>108</sup> but the complex interplay between and inextricable intertwinement of bullying and racial tension when they are both alleged to be present, was not lost on the investigators as they recounted that Incognito told them:

that he and Martin previously had used the word “nigga” (which Incognito claimed was different from “nigger”) and discussed its social meaning in private conversations; and that they were close enough to joke around in this manner. Incognito also argued that Martin did not communicate to him that he was offended by racially charged statements, and this assertion, for the most part, appears to be accurate; Martin conceded that he typically “laughed off” or ignored such remarks, even when he was deeply offended.<sup>109</sup>

The report concluded nonetheless that “Incognito knew or should have known that calling Martin a ‘nigger’ was well out of bounds.”<sup>110</sup>

It noted, however, that the issue of race as a motivating factor in the bullying was further complicated by the fact that two of Incognito’s co-tormentors were, respectively, black and biracial, and that at least one of the trio’s other victims was white.<sup>111</sup> Calling the bullying trio “equal-opportunity harassers,” the report attached significance to the fact that Martin was accused by bullies who were, themselves, people of color, of not acting “black enough,” something that the report inexplicably concluded did “not seem to demonstrate racial animus.”<sup>112</sup> The report posited that “[p]resumably, they would not have followed Incognito’s lead if they thought he had selected Martin for abuse out of racial animus.”<sup>113</sup> This does not comport with the law and doctrines of employ-

<sup>105</sup> *Id.* (discussing the racist nature of Incognito’s comments to Martin).

<sup>106</sup> *See* WELLS REPORT, *supra* note 66, at 32.

<sup>107</sup> *Id.* at 1, 11.

<sup>108</sup> *Id.* at 32.

<sup>109</sup> *Id.* at 30.

<sup>110</sup> *Id.* at 31.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

ment discrimination, which both recognizes same-race discrimination<sup>114</sup> and same-race harassment,<sup>115</sup> and sees protected class-based stereotyping as evidence of race-based discrimination, irrespective of the race of the individual engaging in the stereotyping.<sup>116</sup> While the report said that this stereotyping bespoke a “problematic attitude toward racial identity and socio-economic differences . . . that reinforce[s] crude racial stereotypes,” it inexplicably declined to discern a demonstration of racial animus simply because the comments came from teammates who were, themselves, people of color.<sup>117</sup>

Interestingly, the report did attach significance to text messages sent by Incognito to another player, that, while having nothing whatsoever to do with the Martin-Incognito dispute, evinced clearly racist attitudes and “arguably reflect deep-seated racial hostility.”<sup>118</sup> Viewed under the lens of the law, the notion that such hostility might have undergirded the abuse aimed at Martin is undercut by the so-called “stray comment” doctrine in employment discrimination law. This doctrine severs comments made outside of the context of an adverse employment decision from yielding insight or helping to generate a conclusion as to an underlying, discriminatory motivation for the decision.<sup>119</sup> The more one looks at this case, the report, and what the law does with gendered and racialized exchanges, the more all of the disconnects become apparent.

It should not be lost on those who study racial dynamics in the workplace that, as 2014 started, much of the racial component of this story that initially fueled media commentators and sparked both outrage and interest<sup>120</sup> had all but faded. While comments published in November accused Incognito of “deploy[ing] his ‘white male privilege card’ that allow[ed] him to use racial slurs nonchalantly toward his Black teammates,”<sup>121</sup> the passage of time seemingly brought more of a public acceptance of the conflict between the players as being both two-sided and rife with complexities that transcend racial tension or discrimination. This is a mistake.

Only a few commentators have even questioned why the public appeared to have lost its indignation at this incident and to have written off a victim like

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<sup>114</sup> *Williams v. Wendler*, 530 F.3d 584, 587 (7th Cir. 2008) (“There can . . . be ‘racial’ discrimination within the same race . . .”).

<sup>115</sup> *Covalt v. Pintar*, No. H-07-1595, 2008 WL 2312651, at \*8 (S.D. Tex. June 4, 2008) (“[I]t is possible for individuals of the same race to discriminate against or harass one another based on race.”).

<sup>116</sup> *Kimble v. Wis. Dep’t of Workforce Dev.*, 690 F. Supp. 2d 765, 776 (E.D. Wis. 2010) (explaining that race-based “stereotyping can constitute evidence of discrimination”).

<sup>117</sup> WELLS REPORT, *supra* note 66, at 31.

<sup>118</sup> *Id.* at 32.

<sup>119</sup> *Hunt v. City of Markham, Ill.*, 219 F.3d 649, 652 (7th Cir. 2000) (“All that these [stray remarks] cases hold—all they could hold and still make any sense—is that the fact that someone who is not involved in the employment decision of which the plaintiff complains expressed discriminatory feelings is not evidence that the decision had a discriminatory motivation.”) (emphasis omitted).

<sup>120</sup> Jonathan Wynn, *Football and the Performance of Race*, EVERYDAY SOC. BLOG (Nov. 22, 2013), <http://www.everydaysociologyblog.com/2013/11/football-and-the-performance-of-race.html>.

<sup>121</sup> Rashad Grove, *Race, Bullying, and Masculinity*, URBAN CUSP (Nov. 20, 2013), <http://www.urbancusp.com/2013/11/race-bullying-masculinity/>.

Jonathan Martin.<sup>122</sup> One commentator noted the irony in the public's dismissal of Martin as weak, even as it reviled African American player Richard Sherman after he gave an impassioned interview following a big game:

Ironically, the same folk that are calling Sherman a thug are the same folk that called Jonathan Martin a "sissy" for taking a professional and personal stand against harassment. The same critics who are deploring Sherman's [sic] "thuggish behavior" are the ones who called Martin, a Stanford educated scholar of Classics, soft for leaving the Miami Dolphins. Does this make any sense?! Martin experienced everything from an alleged physical assault to vile racist commentary, but he's soft for leaving a work situation that most people in their right mind wouldn't put up with?! And then, when a player like Richard Sherman demonstrates the sought-after "aggression" (I call it realness) society expects in football, he is the subject of ridicule?!<sup>123</sup>

Incognito has acknowledged that his use of the n-word was wrong,<sup>124</sup> and declared that his voicemail was "intended to 'shock' Martin, who had skipped a voluntary offseason workout," and that all he had wanted was for Martin to "call [him] back."<sup>125</sup> By doing this, he provided a new narrative that took the focus away from both race and bullying: "When the words are put in context, I understand why eyebrows got raised. But people don't understand how Jon and I communicate with each other."<sup>126</sup>

For the media, scholars, and society to ignore the inextricable link between race and other protected class memberships and the power dynamic that underpins bullying and harassment, however, is foolhardy.<sup>127</sup> And yet, by allowing the racial dynamic in this story to first be made an undercurrent and then to largely drop out of the picture, the media and society have permitted an arguably large part of the essence of what transpired here to simply fall away. It is impossible to look honestly at a bullying situation with an underlying racial dynamic, or, as in this case, an explicit racial dynamic evinced by Incognito's statements and the abuse Martin endured, and not see a multidimensional prob-

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<sup>122</sup> See, e.g., Kevin Beckford, *Richard Sherman, Jonathan Martin, and Society's Failure to Acknowledge the Multidimensionality of Black Men*, HUFFPOST BLACKVOICES (Jan. 25, 2014, 4:01 PM), [http://www.huffingtonpost.com/kevin-beckford/richard-sherman-jonathan-martin\\_b\\_4634896.html](http://www.huffingtonpost.com/kevin-beckford/richard-sherman-jonathan-martin_b_4634896.html).

<sup>123</sup> *Id.* (citations & emphasis omitted).

<sup>124</sup> *Richie Incognito: 'I Am Not a Racist'*, FOX SPORTS (Nov. 11, 2013, 8:44 PM), <http://msn.foxsports.com/nfl/story/Richie-Incognito-Miami-Dolphins-Jonathan-Martin-Jay-Glazer-full-transcript-111013> ("Incognito: I'm not a racist. And to judge me by that one word is wrong. In no way, shape or form is it ever acceptable for me to use [the n-word], even if it's friend to friend on a voicemail. I regret that.").

<sup>125</sup> Grove, *supra* note 121.

<sup>126</sup> Lindsay H. Jones, *Dolphins' Richie Incognito Got Threatening Text from Jonathan Martin*, USA TODAY (Nov. 10, 2013, 2:53 PM), <http://www.usatoday.com/story/sports/nfl/2013/11/10/richie-incognito-interview-jonathan-martin/3489073/>.

<sup>127</sup> Janeille Zorina Matthews, *The Color of Sexual Harassment and the Public/Private Divide*, 4 HASTINGS RACE & POVERTY L.J. 181, 182-83 (2006) ("Workplace harassment is about keeping women out of particular economic spheres; and, beyond that, it is also about keeping *particular* women out of particular economic spheres. So workplace harassment is not explicitly or exclusively about race or gender. However, race and gender are the mechanisms through which the power dynamic is maintained. Using a single-axis analysis ignores this reality.").

lem. The racial component of this story should have remained a focal point in the public dialogue.

*D. How Has Richie Incognito Garnered and Retained So Much Support?*

The changing media and societal perceptions of Incognito and the insights gleaned into his psyche and behavior shed light on Incognito's strange journey from "character," to villain, to almost-victim.<sup>128</sup> Not long after the narrative of the story depicted Incognito as the perpetrator of egregious, bullying behavior and Martin as a dignified, empathetic victim, it changed, and Martin emerged in some media representations as a participant in the culture that he says drove him out of his sport, who soured and turned on a former friend and "big brother figure."<sup>129</sup> Incognito, in contrast, garnered public support from many of his teammates, and started to emerge in some media depictions as an innocent "character" who was being scapegoated for Martin's problems.<sup>130</sup>

Further, in the immediate wake of the incident, media outlets began reporting that far from the antagonistic relationship that Martin had indicated he'd had with Incognito, the two were actually "best friends," or "brothers," who regularly engaged in hyperbolic banter with one another.<sup>131</sup> According to USA Today, "[n]ot long after these revelations, some Dolphins players stepped up—to defend Incognito! This is the way of life in the locker room, they affirmed. The words don't mean to us what they mean to you."<sup>132</sup> A 2014 online article observed that:

When the locker room doors finally opened and the players could be heard, there was only one voice—and it was united. Those players supported the bully, who was being banished for his behavior, and crushed the victim, who had fled. The people who work in that workplace, the ones who know it better than we do and better than the lawyer who spent a few hours there talking to them, all sided with the disgraced, and they did so loudly and angrily and with the harmony of a choir, even as the entire organization sank deeper into the scandalized sewage with every syllable. There wasn't a single dissenter, in fact. . . .

<sup>128</sup> See, e.g., Bradley Ryder, *Miami Dolphins: Is Richie Incognito Becoming the Victim in Bullying Incident?*, YAHOO! SPORTS (Nov. 7, 2013, 3:52 PM), <http://sports.yahoo.com/news/miami-dolphins-richie-incognito-becoming-victim-bullying-incident-205200484—nfl.html>; see also Rick Chandler, *Ricky Williams: 'Maybe Jonathan Martin Doesn't Belong in the NFL'*, SPORTS GRID (Nov. 5, 2013, 7:32 PM), <http://www.sportsgrid.com/nfl/ricky-williams-maybe-jonathan-martin-doesnt-belong-in-the-nfl/> ("I think they're both victims."); HLN After Dark Staff, *Richie Incognito: Bully or Victim?*, HLN (Nov. 11, 2013, 6:27 PM), <http://www.hlnv.com/article/2013/11/11/richie-incognito-miami-dolphins-nfl-hazing>.

<sup>129</sup> See Tannehill, *Incognito and Martin Like Friends, Brothers*, CHI. TRIB. (Nov. 6, 2013, 6:53 PM), <http://www.sportsnetwork.com/merge/tsnform.aspx?c=chicagosports&page=nfl/news/news.aspx?id=4637618> [hereinafter *Tannehill*].

<sup>130</sup> Larry Elder, *Richie Incognito: White Scapegoat for NFL Culture of Bullying*, TOWNHALL (Feb. 20, 2014, 12:01 AM), <http://townhall.com/columnists/larryelder/2014/02/20/richie-incognito-white-scapegoat-for-nfl-culture-of-bullying-n1797527/page/full>; Mike Foss, *Ex-Dolphins Teammate: 'Incognito Was Made a Scapegoat'*, USA TODAY SPORTS (Nov. 7, 2013, 10:31 AM), <http://ftw.usatoday.com/2013/11/ex-dolphins-teammate-incognito-was-made-a-scapegoat/>.

<sup>131</sup> See Tannehill, *supra* note 129.

<sup>132</sup> Stephen Mansfield, *Incognito Scandal's Manly Men: Column*, USA TODAY (Dec. 22, 2013, 4:39 PM), <http://www.usatoday.com/story/opinion/2013/12/22/incognito-martin-bullying-nfl-column/4167505/>.

... The players in that locker room think Martin is a soft, whining quitter who caused all this because he wasn't tough enough for their survival-of-the-fittest workplace.<sup>133</sup>

Incognito, himself, has fueled the perception of Martin as weak and unworthy of sympathy as he tried to rehabilitate his own image and recast the narrative.<sup>134</sup> According to the report, Incognito flatly rejected the notion that his taunts were the catalyst that drove Martin from the team on October 28, 2013; rather, Incognito claimed, Martin fabricated his claims "to cover up an impulsive decision to flee from football" that was actually motivated by performance, confidence, substance abuse, and mental health issues.<sup>135</sup> These claims, the investigators maintain, look to have been, indeed, "real factors, not issues Incognito has manufactured out of whole cloth."<sup>136</sup>

However, by deflecting attention away from his role in what went on and trying to capitalize on harming Martin's image as a weak victim, Incognito behaved as a prototypical bully in the aftermath of bullying allegations. Perhaps the report answered critics of Martin best when it concluded that "[t]o the extent that certain players believe that the locker room should have regulated itself, there is a fundamental problem with self-regulation when the very perpetrators of the harassment are in fact leaders of the team."<sup>137</sup> The lesson here is clear: just as society and the media were susceptible to the caricatures of Martin and Incognito generated by Incognito's own characterizations and his teammates' support, so might a workplace and supervisors be manipulated into turning on, rather than aiding a bullying victim. Therefore, vigilance in the handling of personnel matters tinged with allegations of bullying should be handled carefully.

#### E. *So, Was This a Friendship That Went Bad, or Not?*

Emily Bazelon, commenting on the report, characterizes the complex, uneasy friendship between Martin and Incognito:

Even as he struggled with [his] emotions, Martin built a friendship with Incognito. That's the right word, and the investigators capture how that can be in all its complexity. Both Martin and Incognito called their relationship "bipolar." One on one, they shared real warmth and even trust. Martin told Incognito about his mental-health struggles; Incognito counseled him to stay away from drugs so he could be a

<sup>133</sup> Dan Le Batard, *Where's Support for Jonathan Martin?*, ESPN NFL (Feb. 15, 2014, 8:29 PM), [http://espn.go.com/nfl/story/\\_/id/10462076/why-miami-siding-richie-incognito-not-jonathan-martin-victim](http://espn.go.com/nfl/story/_/id/10462076/why-miami-siding-richie-incognito-not-jonathan-martin-victim) (emphasis omitted).

<sup>134</sup> See Armando Salguero, *News and Opinion on Jonathan Martin Interview*, MIAMI HERALD BLOG (Jan. 29, 2014, 12:10 PM), [http://miamiherald.typepad.com/dolphins\\_in\\_depth/2014/01/hfirst-the-news-although-in-this-case-there-is-precious-little-of-that-in-his-interview-with-nbc-dolphins-offensive-tackle.html](http://miamiherald.typepad.com/dolphins_in_depth/2014/01/hfirst-the-news-although-in-this-case-there-is-precious-little-of-that-in-his-interview-with-nbc-dolphins-offensive-tackle.html) ("At the risk of sounding unsympathetic, Jon Martin, your weak act is officially old. Go away. Just do what you did best as an offensive lineman on the field and back away. Just do what you did when you left your teammates unexpectedly during the season and simply disappear."); Jim Trotter, *NFL Personnel Question 'Coward' Martin for Not Challenging Incognito*, SPORTS ILLUSTRATED (Nov. 4, 2013, 6:22 PM), <http://sportsillustrated.cnn.com/nfl/news/2013/11/04/nfl-personnel-question-jonathan-martin-richie-incognito/>.

<sup>135</sup> WELLS REPORT, *supra* note 66, at 25.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 34.

better player. In front of other players, though, the intimacy was grist for Incognito's mill of cruelty. And because they were friends—the kind who went to strip clubs together—Incognito knew Martin well enough to suss out his weak points. . . . This explains how, after Martin left the team and Incognito texted him to ask how he was feeling, Martin wrote, “It’s insane bro but just know I don’t blame you guys at all.” He blamed himself and he was still, emotionally, under Incognito’s thumb, seeing what the bully wanted him to see.<sup>138</sup>

Text messages, revealed in the report to have been exchanged between Martin and Incognito on November 1, 2013, a few days after Martin’s departure, further evince the complex relationship the two had, even as the world was starting to report on and talk about the unfolding bullying scandal and the rift between the former teammates:

Incognito: How u doing buddy? Feeling better?? I miss us

Martin: Wassup man? The worlds gone crazy lol I’m good tho [sic] congrats on the win

Incognito: Thanks dudeIt’s [sic] unbelievable all the attention this is getting. All that’s important is that you feel better and know we miss u dude

Martin: Yeah I’m good man. It’s insane bro but just know I don’t blame you guys at all it’s just the culture around football and the locker room got to me a little.<sup>139</sup>

When investigators questioned Martin about his apparent absolution of Incognito, he said that “when he sent these messages to Incognito, he truly believed that Incognito was one of the players who had driven him from the team, but at the time, he blamed himself for leaving, feeling that he was simply too sensitive and that he was at fault for not stopping the abusive behavior.”<sup>140</sup> This, however, is typical behavior and a typical mindset for a bullying victim; the authors of the report were clearly well-versed with the literature on workplace bullying and its consequences, noting, among other things, that “several studies explain that targets of bullying may not report the bullying out of fear that their employers will not support them or that reporting the harassment will leave them worse off.”<sup>141</sup>

The report recites the heartbreaking contents of a letter that Martin wrote to his mother in April of 2013:

I figured out a major source of my anxiety. I’m a push over, a people pleaser. I avoid confrontation whenever I can, I always want everyone to like me. I let people talk about me, say anything to my face, and I just take it, laugh it off, even when I know they are intentionally trying to disrespect me. I mostly blame the soft schools I went to, which fostered within me a feeling that I’m a huge pussy, as I never got into fights.<sup>142</sup>

Indeed, the report details Martin’s own admission that on at least one occasion in mid-2013, his response to offensive racial comments that Incognito made to him in front of teammates was to “laugh them off.”<sup>143</sup>

The report, however, concluded that “Martin was humiliated by these insults and was not a willing participant in the verbal taunting,” and even

<sup>138</sup> Bazon, *supra* note 68.

<sup>139</sup> WELLS REPORT, *supra* note 66, at 27–28.

<sup>140</sup> *Id.* at 28.

<sup>141</sup> *Id.* at 17.

<sup>142</sup> *Id.* at 14.

<sup>143</sup> *Id.* at 100.

observed that Martin “befriended Incognito, Jerry and Pouncey in an effort to reduce their abuse and that he sometimes participated in their vulgar banter in an effort to fit in.”<sup>144</sup> The report reaffirmed that as per the investigators’ consulting psychologist, “attempting to develop a close friendship with an abusive person is a common coping mechanism exhibited by victims of abusive relationships.”<sup>145</sup>

Victims of bullying and harassment are often victimized once again when, in the course of the adjudication or other rehashing of the victims’ complaints, the victim is portrayed as having invited the abusive behavior and willingly participated in the culture that engendered it.<sup>146</sup> The natural inclination of a victim to “play along” or to avoid being seen as affected or weak by feigning acceptance of or amusement by the behavior is exploited in this manner, leaving the victim both without recourse and even potentially reputationally besmirched.<sup>147</sup> In fact, studies have shown that whether one looks at children being bullied in a schoolyard, adults being bullied in the workplace, or, indeed, victims of actionable racial or sexual harassment, it is common for victims to attempt to ingratiate themselves to their tormentors and abusers by “playing along” and engaging in and with the banter and back-and-forth that targets them.<sup>148</sup>

Interestingly, observers, be they the media or courts passing judgment on whether what occurred violated the law (even actionable harassment must be shown to be unwelcome), seem virtually blind to this phenomenon and are all too content to use this participation and these attempts to indict the victim,

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<sup>144</sup> *Id.* at 13.

<sup>145</sup> *Id.* at 18–19.

<sup>146</sup> *Cf.* PETER SHERAS, YOUR CHILD: BULLY OR VICTIM? UNDERSTANDING AND ENDING SCHOOL YARD TYRANNY 12 (2002) (stating that stereotypical victims “ask for it”).

<sup>147</sup> *See* Virpi Pöyhönen et al., *What Does it Take to Stand Up for the Victim of Bullying?: The Interplay Between Personal and Social Factors*, 56 MERRILL-PALMER Q. 143, 158 (2010) (“Defending the victimized peer is usually a challenging task because it often contains a social risk: The victim of bullying frequently carries a social stigma, whereas the bully has a lot of power within the peer group.”); Mike Chiari, *Jonathan Martin-Richie Incognito Investigation Report Released*, BLEACHER REPORT (Feb. 14, 2014), <http://bleacherreport.com/articles/1960345-jonathan-martin-richie-incognito-investigation-report-released> (stating that “Martin engaged in banter with Incognito, but Martin admitted to Wells that he did so as a defense mechanism”).

<sup>148</sup> *See* EDC, CASEL, Am. Inst. for Research, *Social and Emotional Learning and Bullying Prevention*, in BULLY: AN ACTION PLAN FOR TEACHERS AND PARENTS TO COMBAT THE BULLYING CRISIS 229, 240 (Lee Hirsch et. al. eds., 2012) (reporting that the majority of bullying victims who use problem-solving strategies often use passive strategies such as “avoiding, acquiescing to, or ignoring the bully”); Becky J. Kochenderfer & Gary W. Ladd, *Victimized Children’s Responses to Peers’ Aggression: Behaviors Associated with Reduced Versus Continued Victimization*, 9 DEV. & PSYCHOPATHOLOGY 59, 60 (1997).

Patterson et al. found that frequently victimized preschoolers were ones who reinforced their attackers by acquiescing to their demands, by crying and assuming defensive postures, and by failing to fight back. . . . Perry found that victimized children in middle school and preadolescence (4th–7th grade) were likely to reward their attackers with tangible resources and signs of distress and were unlikely to punish their attackers with retaliation.

*Id.*



concluding that he or she may have literally “asked for it.”<sup>149</sup> These observers rarely stop to look at factors such as the workplace culture into which the victim was thrust, how and by whom the behavior alleged was initiated, or whether the victim’s perceived participation was merely a way to cope or to survive. For example, in a 2000 sexual harassment case in New Jersey, the court seized upon the plaintiff’s deposition testimony when it concluded that “[i]n this case, plaintiff herself has testified that, to the extent that there was sexual banter in the [workplace], she actively participated in it,”<sup>150</sup> but it seemingly relied only upon this isolated snippet of the testimony without further inquiry: “Q: Did you participate in these topics [relationships, sex generally, who was sleeping with whom] during the course of your job as a communications operator?”

A: Yes.”<sup>151</sup>

The court also seized upon the plaintiff’s initial reluctance to report the behavior and culture that she eventually came to identify as a hostile work environment, noting that the “plaintiff testified that she never reported these allegedly hostile conversations because ‘it was never serious talk. You know, it was just like jokingly or, you know, it was never like serious.’ ”<sup>152</sup> Thus, the court found, it was, according to the record before it:

manifest that plaintiff participated in the allegedly sexually charged conversations which she now claims constituted a hostile work environment. It is also undisputed that she did not ever report them as harassment. Accordingly, the Court finds that plaintiff has not adduced evidence from which a jury could find that the sexual banter . . . was unwelcome, nor that it constituted a hostile work environment . . . .<sup>153</sup>

Thus, writing off victims of bullying or harassment too quickly or foreclosing their claims simply because they seemed to be ingratiating themselves to their tormentors is a critical mistake that courts and employers alike should avoid making.

Perhaps even more disturbing than this textbook dynamic of tormentor and victim cast as “friends,”<sup>154</sup> is the Dolphins’ own potential complicity in at least some of Martin’s abuse. According to the media, the Dolphins actually “turned to Incognito, a star lineman described even by friends as ‘crazy,’ ” in 2012 when the organization concluded that “Martin, their rookie offensive guard, was proving ‘soft.’ ”<sup>155</sup> The media reported that Incognito may have been told by coaches to “toughen up”<sup>156</sup> his victim, making the Dolphins organization

<sup>149</sup> SHERAS, *supra* note 146 (stating that stereotypes of bullying include that “bullies are social outcasts, victims ‘ask for it’ through their social ineptitude”).

<sup>150</sup> *Mobley v. City of Atlantic City Police Dep’t*, No. Civ.A.97-2086JBS, 2000 WL 363692, at \*6 (D.N.J. Mar. 30, 2000).

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> Cf. Nicki R. Crick & David A. Nelson, *Relational and Physical Victimization Within Friendships: Nobody Told Me There’d Be Friends Like These*, 30 J. ABNORMAL CHILD PSYCHOL. 599, 600 (2002).

<sup>155</sup> Mansfield, *supra* note 132.

<sup>156</sup> See *New Report Claims Miami Coaches Told Incognito to ‘Toughen Up’ Martin*, FOX NEWS (Nov. 6, 2013), <http://www.foxnews.com/sports/2013/11/06/new-report-claims-miami-coaches-told-incognito-to-toughen-up-martin/>.

somewhat responsible for the evolution of Incognito into an intolerable bully toward Martin.

We should extract from this realization that, to the extent that the Dolphins organization or any other workplace environment fosters, foments, or encourages abusive workplace behavior or hazing, workplace bullying becomes that much harder to police. All too often, the cutthroat environment of a given marketplace will translate into a workplace environment in which viciousness and cruelty are rewarded.<sup>157</sup> Once an employer furnishes an impetus for workplace bullying, it becomes complicit in the ensuing abuse.<sup>158</sup> Awareness of and concern about this is not as widespread as it should be.

*F. Should It Make a Difference That This Abuse Went on in a Locker Room and NOT in a Boardroom?*

Some would say absolutely yes, at least to some extent. Some courts and commentators have urged that in the context of actionable harassment, the workplace context, be it professional, blue collar, or inherently sexualized or otherwise coarse due to the nature of the business, should inform or even dictate the analysis of whether the behavior at issue meets the “severe or pervasive” requirement.<sup>159</sup> Even the Supreme Court has urged “careful consideration of the social context in which particular behavior occurs and is experienced by its target,” pointedly observing that:

A professional football player’s working environment is not severely or pervasively abusive, for example, if the coach smacks him on the buttocks as he heads onto the field—even if the same behavior would reasonably be experienced as abusive by the coach’s secretary . . . back at the office. The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed. Common sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff’s position would find severely hostile or abusive.<sup>160</sup>

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<sup>157</sup> See generally Darren C. Treadway et al., *Political Skill and the Job Performance of Bullies*, 28 J. MANAGERIAL PSYCHOL. 273 (2013) (suggesting that bullies are more successful at work).

<sup>158</sup> Cf. Gary Namie & Pamela E. Lutgen-Sandvik, *Active and Passive Accomplices: The Communal Character of Workplace Bullying*, 4 INT’L J. COMM. 343, 360 (2010) (“If upper management fails to intervene when employees are abused, such failure makes them complicit in employee bullying.”).

<sup>159</sup> See *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 620–21 (6th Cir. 1986) (“[I]t cannot seriously be disputed that in some work environments, humor and language are rough hewn and vulgar. Sexual jokes, sexual conversations and girlie magazines may abound. Title VII was not meant to—or can—change this. It must never be forgotten that Title VII is the federal court mainstay in the struggle for equal employment opportunity for the female workers of America. But it is quite different to claim that Title VII was designed to bring about a magical transformation in the social mores of American workers.” (quoting *Rabidue v. Osceola Ref. Co.*, 584 F. Supp. 419, 430 (E.D. Mich. 1984))); Ann C. McGinley, *Harassing “Girls” at the Hard Rock: Masculinities in Sexualized Environments*, 2007 U. ILL. L. REV. 1229, 1257–59 (2007).

<sup>160</sup> *Oncala v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81–82 (1998).

Even the report in the instant case noted that in evaluating what was said and done in this case “context matters,” explaining that “the communications of young, brash, highly competitive football players often are vulgar and aggressive.”<sup>161</sup> It noted that even the investigators at the outset of the investigation did not anticipate uncovering “behavior that society might anticipate in, say, an accounting firm or a law office,” and that “[f]or better or worse, profanity is an accepted fact of life in competitive sports, and professional athletes commonly indulge in conduct inappropriate in other social settings.”<sup>162</sup> It even acknowledged that “good-spirited goading often contributes to team bonding.”<sup>163</sup>

Nonetheless, the report concluded that “the behavior of Martin’s teammates exceeded the bounds of common decency, even in an environment that often features profanity and mental and physical intimidation.”<sup>164</sup> Explicitly finding that the “culture of the Dolphins Offensive Line” failed to “excuse the mistreatment of Martin,” the report cited the bullies’ barbs about “who among their teammates would ‘break first’ in response to verbal taunting” as “further evidence that they knew their words might cause emotional distress.”<sup>165</sup> Noting that “while the freewheeling, ‘anything goes’ atmosphere characterized much of the Dolphins offensive line culture may be a factor in explaining what happened to Martin, it does not justify it.”<sup>166</sup>

The brutal hazing described in the report is incredibly gendered in many ways, even though it took place among men only. In that sense, though it is drawing attention that hazing in other contexts could never draw, it is not different from a great deal of other workplace hazing. Workplace scholars should seize upon the opportunity to emphasize and explore the dynamics of hazing, bullying, power, sex, and race while these topics are ripe, in the headlines, and on people’s minds. Hazing has been defined as “an activity that a high-status member orders other members to engage in or suggests that they engage in that in some way humbles a newcomer who lacks the power to resist, because he or she wants to gain admission into a group.”<sup>167</sup> Cultures of hazing, though sometimes lamented by special interest groups and in the media,<sup>168</sup> have a rich and complex relationship with protected class status that the law and mainstream media have yet to fully realize and act upon.

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<sup>161</sup> WELLS REPORT, *supra* note 66, at 7.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 32–33.

<sup>166</sup> *Id.* at 33.

<sup>167</sup> HANK NUWER, *WRONGS OF PASSAGE: FRATERNITIES, SORORITIES, HAZING, AND BINGE DRINKING* xxv (2001).

<sup>168</sup> See generally *Empowering People to Prevent Hazing*, HAZINGPREVENTION.ORG, <http://www.hazingprevention.org/hazing-information/hazing-definitions.html> (last visited Apr. 17, 2014); *INSIDE HAZING*, <http://www.insidehazing.com/> (last visited Apr. 17, 2014); *NAT’L HAZING PREVENTION WEEK*, <http://www.nationalhazingpreventionweek.com/home> (last visited Apr. 17, 2014); Hank Nuwer, *Greek Letters Don’t Justify Cult-Like Hazing of Pledges*, STOPHAZING.ORG, <http://www.stophazing.org/supporting-documents/cult-like-hazing-by-hank-nuwer/> (last visited Apr. 28, 2014).

According to Professor Ann McGinley, “[m]en use sexual, gendered, and neutral means of harassment in order to demonstrate their own masculinity.”<sup>169</sup> Indeed, she posits that hazing and bullying, even when not explicitly sexist, or even necessarily directed at any women, “occur in order to assure the male gender identity of the exclusively male group, and to create unity and to assure that women and outsider men do not join the club.”<sup>170</sup> She concludes that “[t]his behavior, perhaps more than any other, in sex-segregated workforces maintains the status quo of segregation between men’s jobs and women’s jobs.”<sup>171</sup>

It is significant that throughout the report detailing Martin’s abuse at Incognito’s hands are references to not only threats and comments made about Martin’s sister and mother, but to Martin’s being called names that refer to various parts of a woman’s anatomy, or a slur for a gay man, and it is difficult to extricate the abuse from the sexist, misogynist context in which it was embedded.<sup>172</sup> Martin himself, in letters to his parents, even referred to himself disparagingly by using words like “bitch” and “pussy,” further showing the pervasiveness of using such references to connote weakness.<sup>173</sup>

So, yes, as one commentator has noted, ensconced as it was in the culture of professional football, the abuse may have been predictable, but its having taken place in a locker room does not, as the report concluded, excuse it.<sup>174</sup> Yes, in the words of one commentator, “you can see how somebody as unstable, lopsided and rewarded as Incognito would wonder if it isn’t his very job description to be a bully,”<sup>175</sup> but this is precisely the problem with workplace cultures in which hazing, misogyny, and abuse are rife and pervasive to begin with.

One legal scholar has recently posited that the law’s excusal of what would otherwise be actionable harassment where the workplace is inherently sexualized due to the nature of the work (1) unfairly allows nonsexualized workers in these workplaces to be harassed; and (2) highlights why the very existence of such workplaces operates to thwart and contravene the objectives and premise of Title VII.<sup>176</sup> One might say that there is something, too, inher-

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<sup>169</sup> Ann C. McGinley, *Creating Masculine Identities: Bullying and Harassment “Because of Sex”*, 79 U. COLO. L. REV. 1151, 1182 (2008).

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> WELLS REPORT, *supra* note 66, at 12 (“The ‘you’re my bitch’ comments added to name-calling that had begun in 2012, Martin’s rookie season, when Incognito, Jerry and Pouncey began regularly calling Martin a ‘cunt,’ a ‘bitch,’ a ‘pussy’ and a ‘faggot.’ Martin was not surprised to hear these words used by football players, but believed they were frequently hurled at him with demeaning intent. The evidence shows that these words—at least at times—were spoken to Martin in a cutting tone or with the intent to humiliate him. According to Martin, these types of taunts were a routine part of his life with the Dolphins.”).

<sup>173</sup> *Cf.* Toni Calasanti et al., *Ageism and Feminism: From “Et Cetera” to Center*, NWSA J., Spring 2006, at 13, 15 (“Feminists have analyzed how terms related to girls and women, such as ‘sissy’ and ‘girly,’ are used to put men and boys down and reinforce women’s inferiority.”).

<sup>174</sup> *See generally* Le Batard, *supra* note 133.

<sup>175</sup> *Id.*

<sup>176</sup> *See generally* Lua Kamál Yuille, *Sex in the Sexy Workplace*, 9 Nw. J.L. & Soc. POL’Y. 88 (2013).

ently wrong with a workplace in which people presuppose that the culture of violence and hazing gives rise to defensible, gendered abuse.

## VI. CONCLUSION

What is ultimately to be gained by looking at the large and diffuse issues of workplace inequality and abuse through the prism of this news story? The Incognito/Martin scandal is useful to reflect upon as Title VII turns fifty because it captures and holds people's attention long enough to focus them on the complex and largely unexplored relationship between workplace bullying and workplace inequality.

Workplace bullying, at least as it is captured by the Healthy Workplace Bill,<sup>177</sup> ought to be made unlawful. The affronts that it poses to workplace health and safety for all people are manifest. Bullying, and workplace bullying in particular, is a topic that has been readily dismissed in and by society.<sup>178</sup> Yet, even as scholars and other commentators decry the failure of Title VII, the rich and complex relationship between race, sex, power, workplace abuse, and popular perception continues to be largely ignored.

Thus, in the second place, the relationships between workplace bullying, sexism and racism warrant further exploration and consideration. People generally don't tend to see bullying as particularly gendered or racialized until it becomes explicitly so. This is a mistake. The myopia evinced by the Dolphins' and the public's general lack of concern for bullying until that bullying took (takes) on explicitly racist (or explicitly sexist) overtones is dangerous for several distinct reasons. Even "neutral" bullying arguably has an inordinate, disproportionate impact on historically excluded groups like women and racial minorities.<sup>179</sup> Moreover, bullying often precedes or is linked to actionable abusive behavior. At the very least, employers should be on the lookout for bully-

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<sup>177</sup> See generally HEALTHY WORKPLACE BILL, <http://www.healthyworkplacebill.org/> (last visited Apr. 17, 2014).

<sup>178</sup> See Brady Coleman, *Pragmatism's Insult: The Growing Interdisciplinary Challenge to American Harassment Jurisprudence*, 8 EMP. RTS. & EMP. POL'Y J. 239, 309 (2004) ("American researchers have until very recently ignored workplace bullying . . ."); Kathy Kadilak, *Workplace Bullying: Pervasive and Often Ignored*, LOUDOUNTIMES.COM (Jan. 4, 2014), [http://www.loudountimes.com/news/article/workplace\\_bullying\\_pervasive\\_and\\_often\\_ignored010413](http://www.loudountimes.com/news/article/workplace_bullying_pervasive_and_often_ignored010413) (stating that "workplace bullying is pervasive and not yet adequately addressed").

<sup>179</sup> See, e.g., Kamaldeep Bhui et al., *Racial/Ethnic Discrimination and Common Mental Disorders Among Workers: Findings from the EMPIRIC Study of Ethnic Minority Groups in the United Kingdom*, 95 AM. J. PUB. HEALTH 496 (2005); Wizdom Powell Hammond et al., *Workplace Discrimination and Depressive Symptoms: A Study of Multi-Ethnic Hospital Employees*, 2 RACE & SOC. PROBS. 19 (2010), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2867471>; Stone, *supra* note 18, at 49–50 ("[W]omen are affected differently than men by workplace bullying. Women who are bullied are more likely to quit their jobs than are men. Women, more than men, tend to become subject to increased bullying as they move up the management ladder. Bullies target women more frequently than men. Female targets are actually sabotaged by bullying more frequently than are male targets. A higher percentage of bullied women suffered stress-related health harm than male targets.").

ing as a “gateway” behavior, sending up a flare that arguably more egregious, unlawful behavior will likely ensue from the same source.<sup>180</sup>

Moreover, even if bullying behavior never morphs into anything actionable, it can impact all victims, emotionally, professionally, and even physically, disadvantaging them.<sup>181</sup> Research and scholarship have suggested that women and minority group members both claim to be bullied more than and suffer distinct harm from other people in the workplace.<sup>182</sup> There is also a good deal of abusive behavior that, while somewhat gendered or racialized, falls short of the legal requirements for proscription under Title VII.<sup>183</sup> Where bullying takes on a gendered or racist overtone without rising to the level of actionable harassment, the impact that it can have on women and minorities in the workplace, who are left without recourse, is virtually incalculable.<sup>184</sup>

<sup>180</sup> See, e.g., Maguire, *supra* note 94, at 434 n.62 (“Bullying can turn into criminal activity after school.”); see also Doris Bender & Friedrich Lösel, *Bullying at School as a Predictor of Delinquency, Violence and Other Anti-Social Behaviour in Adulthood*, 21 CRIM. BEHAVIOR & MENTAL HEALTH 99, 104 (2011) (“Within its limits, the study clearly showed that bullying at school was a strong predictor of later delinquency, violence, aggression and related undesirable life outcomes.”); Susan Carter, *The Bully at School: An Interdisciplinary Approach*, 35 ISSUES COMPREHENSIVE PEDIATRIC NURSING 153, 153 (2012) (“Studies demonstrate that bullying in school is a ‘gateway’ behavior toward future criminal behavior.”); Dan Olweus, *Bullying at School and Later Criminality: Findings from Three Swedish Community Samples of Males*, 21 CRIM. BEHAVIOR & MENTAL HEALTH 151, 154–55 (2011) (“The number of convictions for the ‘average bully’ was thus more than four times higher than that for the ‘average non-bully.’ . . . The former school bullies were heavily over-represented in the crime registers. Some 55 [percent] of them had been convicted of one or more crimes and as many as thirty-six [percent] had been convicted of at least three crimes in the [eight]-year period from age [sixteen] to [twenty-four].”).

<sup>181</sup> See *supra* part III (discussing how bullying affects women and minority groups differently). Physical and emotional symptoms of bullying include “musculo-skeletal disorders, psychosomatic problems, increased risk of incident cardiovascular disease, and may be correlated with increased blood pressure[,] . . . cardiovascular problems, adverse neurological changes, immunological impairment, fibromyalgia, . . . chronic fatigue syndrome[,] . . . depression, anxiety, and . . . PTSD.” Susan Harthill, *Workplace Bullying as an Occupational Safety and Health Matter: A Comparative Analysis*, 34 HASTINGS INT’L & COMP. L. REV. 253, 266 (2011).

<sup>182</sup> See Coleman, *supra* note 178, at 259. See also McGinley, *supra* note 169, at 1178–79. Women, [a British study] found, were more likely to be targets of bullying.

. . . .

. . . [W]omen and men perceived the behavior differently. Some men, but no women, denied the existence of bullying altogether. . . . Women are more likely to seek social support, or to report to their manager, than to go to personnel. They use a more ‘avoidance/denial’ coping strategy, which may be counterproductive because it encourages the bully to escalate the bullying over time.

*Id.* (citing Ruth Simpson & Claire Cohen, *Dangerous Work: The Gendered Nature of Bullying in the Context of Higher Education*, 11 GENDER, WORK & ORG. 163 (2004)). GARY NAMIE, WORKPLACE BULLYING INST. & ZOGBY INT’L, U.S. WORKPLACE BULLYING SURVEY 12–16 (2007), available at <http://workplacebullying.org/multi/pdf/WBISurvey2007.pdf> (finding that 45 percent of bullied women quit compared to 32.3 percent of bullied men who quit and that female targets suffered stress-related health harm 52.6 percent of the time versus 35.6 percent for male targets).

<sup>183</sup> See McGinley, *supra* note 169, at 1180–82.

<sup>184</sup> See Stone, *supra* note 18, at 50–51; McGinley, *supra* note 169 (“[R]esearch shows that as women move up the management ladder, they become subject to increased bullying; this

The Incognito/Martin case got everyone from the media to Main Street talking about workplace bullying. The fact that the bullying splashed across headlines and screen crawls was directed toward a celebrity known for his physical and mental toughness made the issue, like the victim, larger than life for a short time. This is what makes this case such an excellent springboard to begin examining workplace bullying and all of its effects.

Society still attaches a shameful stigma to one's identifying as a victim of workplace bullying or to making a complaint.<sup>185</sup> This further impedes research and discussion of the ramifications of bullying. While individual stories, especially about famous people, capture the public imagination and compel sentiment, it is important to recall the prevalence of workplace abuse and bullying across states, income levels, and types of workplaces. We need to translate our interest in the Dolphins' locker room into action in the boardrooms and break rooms of America.

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research demonstrates that it is not merely organizational power that is responsible for bullying.”).

<sup>185</sup> See generally Kurt Schimmel & Jeananne Nicholls, *Workplace Cyber Bullying: A Research Agenda*, in *BULLYING IN THE WORKPLACE: CAUSES, SYMPTOMS, AND REMEDIES* 223, 225 (John Lipinski & Laura M. Crothers eds., 2014) (stating that “a stigma exists against reporting incidences of workplace bullying in an official manner”); cf. Daniel B. Weddle, *Bullying in Schools: The Disconnect Between Empirical Research and Constitutional, Statutory, and Tort Duties to Supervise*, 77 *TEMP. L. REV.* 641, 661 (2004) (stating in reference to children who are victims of bullying that “victims are unwilling to report such harassment even to their parents because of the stigma attached to it and the fear of reprisals.”).