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### The Masculinity Motivation

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## ESSAY

## The Masculinity Motivation

Ann C. McGinley\*

## Introduction: A #MeToo Dilemma and the Courts

The first reports emerged in October 2017 in the *New York Times*<sup>1</sup> and the *New Yorker*<sup>2</sup> that dozens of women had accused movie producer Harvey Weinstein of sexual violence. Since then, hundreds of women and men have come forward to accuse famous men in entertainment, politics, and other industries.<sup>3</sup> #MeToo emerged as an online movement of millions of women and men who declared that they had suffered sex-based harassment.<sup>4</sup>

The victims who declare “#MeToo” demonstrate bravery at a critical moment, and their stories must be heard and believed. The #MeToo movement will vindicate victims’ rights, however, only if law and society prevent and remedy sex-based harassment. To produce lasting change, society must

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1. Jodi Kantor & Meghan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017), <https://perma.cc/4FCJ-WWFM>.
2. Ronan Farrow, *From Aggressive Overtures to Sexual Assault: Harvey Weinstein’s Accusers Tell Their Stories*, NEW YORKER (Oct. 10, 2017, 10:47 AM), <https://perma.cc/WU8C-5KDA>.
3. See, e.g., Adam Edelman & Dartunorro Clark, *Al Franken Resigns, Blasts Republican Hypocrisy on Sexual Misconduct*, NBC NEWS (Dec. 7, 2017), <https://perma.cc/V835-B9YD>; Ellen Gabler et al., *NBC Fires Matt Lauer, the Face of ‘Today,’* N.Y. TIMES (Nov. 29, 2017), <https://perma.cc/AAR2-A49M>; Mike Miller, *Kevin Spacey Accused of Sexual Misconduct by Eight House of Cards Employees: Report*, PEOPLE (Nov. 2, 2017, 9:34 PM), <https://perma.cc/VMF8-63QX>.
4. Actor Alyssa Milano borrowed the term and posted it online. Emma Brockes, *Me Too Founder Tarana Burke: ‘You Have to Use Your Privilege to Serve Other People,’* GUARDIAN (Jan. 15, 2018, 00:57 EST), <https://perma.cc/2P3W-29PX>.

recognize that sex-based harassment frequently results from a desire to prove the perpetrators' masculinity, rather than to pursue sexual pleasure/gratification. And it happens to men and boys as well as women and girls.

#MeToo's focus on women as victims and men as perpetrators defines the problem too narrowly: It assumes that harassment is caused by romantic or sexual desire, and it ignores serious harassment by men of other men. While most victims are women who suffer egregious behavior by men, there is a substantial minority of male victims who endure serious harassment in our schools and workplaces. Research demonstrates that most male victims are harassed by other men or boys. Relatively few endure harassment by individual female perpetrators.<sup>5</sup>

When harassment occurs among men and boys, courts often fail to recognize it as illegal sex discrimination under Title VII of the 1964 Civil Rights Act<sup>6</sup> and Title IX of the Education Amendments of 1972,<sup>7</sup> federal statutes that forbid sex discrimination and harassment in employment and education. Courts normalize egregious behaviors among boys by opining that "boys will be boys"<sup>8</sup> and characterize harassment among men as "roughhousing" and "horseplay."<sup>9</sup>

Society and courts ignore that harassing behaviors and the motives behind them are nearly identical in schools and workplaces. Moreover, the motives driving same-sex harassment are often the same as those causing sex-based harassment of women and girls. These motives include proving the perpetrators' and their group's masculinity, punishing those who do not adhere to gender expectations, and upholding conventional gender norms. I call this phenomenon the Masculinity Motivation.

While law often follows social change, in the #MeToo era courts should take the lead. With education, society should follow. Courts should broadly define "because of sex" under Titles VII and IX by clarifying that harassment

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5. See Paula McDonald & Sara Charlesworth, *Workplace Sexual Harassment at the Margins*, 30 WORK, EMP. & SOC'Y 118, 119, 123, 129 (2016).

6. Pub. L. No. 88-352, tit. VII, 78 Stat. 241, 253-66 (codified as amended at 42 U.S.C. §§ 2000e, 2000e-1 to -16, 2000e-17 (2016)).

7. Pub. L. No. 92-318, tit. IX, 86 Stat. 235, 373-75 (codified as amended at 20 U.S.C. §§ 1681-1688 (2016)).

8. See Ann C. McGinley & Frank Rudy Cooper, *Identities Cubed: Perspectives on Multidimensional Masculinities Theory*, 13 NEV. L.J. 326, 336-37 (2013) (discussing the meaning of the "boys will be boys" trope).

9. See *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81-82 (1998) (encouraging lower courts to distinguish roughhousing and horseplay from sexual harassment); *Shafer v. Kal Kan Foods, Inc.*, 417 F.3d 663, 666-67 (7th Cir. 2005) (concluding that four sexually-based attacks by one male on another constituted roughhousing but not sex discrimination); cf. Brenda L. Russell & Debra Oswald, *When Sexism Cuts Both Ways: Predictors of Tolerance of Sexual Harassment of Men*, 19 MEN & MASCULINITIES 524, 537 (2016) (finding that men were much more tolerant of sexual harassment of men than women were).

motivated to denigrate the victim for not complying with gender stereotypes and/or to raise the harassers' masculinity, occurs because of sex.

### **Hostile Working Environments and the Masculinity Motivation**

#### A. Courts and Social Stereotypes

Thirty-four years after the Supreme Court decided *Meritor Savings Bank, FSB v. Vinson*,<sup>10</sup> sexual harassment continues to dominate in many workplaces and educational institutions. In *Vinson*, the Court held that sexual harassment violates Title VII by creating a hostile working environment based on sex if it "alter[s] the conditions of [the victim's] employment."<sup>11</sup> The Court held subsequently in *Gebser* and *Davis* that students harassed by peers or teachers have a Title IX cause of action against the school district.<sup>12</sup> In both schools and workplaces, harassment must be severe or pervasive, and occur because of the victims' sex or gender, to be illegal. In both contexts, injuries can be severe, including job and career loss, inability to attend school, emotional distress, and even suicide.<sup>13</sup>

In theory, Titles VII and IX protect males and females from sex discrimination regardless of whether their harassers are men or women, boys

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10. 477 U.S. 57 (1986).

11. *Id.* at 67 (second alteration in original) (quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (1982)).

12. *See Davis ex rel. LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 643-50 (1999) (concluding that a recipient of federal education funding can be liable for damages caused by peer student harassment if it is severe or pervasive, occurred under control of the school, the school had actual knowledge, and the school acted with deliberate indifference); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 283-84 (1998). The actual knowledge and deliberate indifference standards make institutional liability under Title IX even more difficult than Title VII. *See, e.g., Stiles ex rel. D.S. v. Grainger County*, 819 F.3d 834, 848 (6th Cir. 2016) (concluding no deliberate indifference even though school did not stop the harassing behavior that included many batteries by students within school's control); *Doe v. Bd. of Educ.*, 605 F. App'x 159, 167-68 (4th Cir. 2015) (concluding that despite alleged escalation of harassing incidents of which the school was aware, the school was not liable because it was not clearly deliberately indifferent); *Kelly ex rel. C.K. v. Allen Indep. Sch. Dist.*, 602 F. App'x 949, 953 (5th Cir. 2015) (concluding the school had no actual knowledge); *N.K. v. St. Mary's Springs Acad. of Fond Du Lac Wis., Inc.*, 965 F. Supp. 2d 1025, 1028-29, 1035-36 (E.D. Wis. 2013) (concluding that there was insufficient evidence of deliberate indifference where the sixth-grade student's mother repeatedly complained about escalating harassment of the boy on the football team and on Facebook), *appeal dismissed*, No. 13-2988 (7th Cir. June 9, 2014).

13. *See, e.g., Oncale*, 523 U.S. at 77 (job loss); *Grainger County*, 819 F.3d at 840 (transfer to another school); *Carmichael v. Galbraith*, 574 F. App'x 286, 288 (5th Cir. 2014) (suicide); *Reed v. Kerens Indep. Sch. Dist.*, No. 3:16-CV-1228-BH, 2017 WL 2463275, at \*1 (N.D. Tex. June 6, 2017) (suicide).

or girls.<sup>14</sup> Courts more readily find illegal harassment under both statutes, however, where the perpetrators are men or boys and the victims are women or girls. Societal stereotypes about interactions between men and women influence, perhaps unconsciously, how judges interpret behaviors,<sup>15</sup> and judges conceptualize the motive for sex-based harassment as sexual attraction to the victim.<sup>16</sup> This view misinterprets the reasons why sexual harassment of boys and men takes place, and may also confuse the source of women's and girls' harassment.

Indeed, much harassment occurs because of sex, but not necessarily because of the perpetrator's romantic or sexual interest in the victim.<sup>17</sup> Although the Supreme Court recognizes that motivations other than romantic interest cause same-sex harassment, courts deciding cases under Titles VII and IX often underestimate harassing behaviors that occur because of sex where there is no apparent sexual motive.<sup>18</sup> This in turn, often leads courts to incorrect assessments regarding whether the conduct violates Titles VII or IX.

### B. Learning from Masculinities Theory

Research on masculinity helps debunk the common assumption that male-on-male sex-based harassment ordinarily is harmless, normal roughhousing among heterosexual boys and men. Masculinities theory posits that masculinity is a social construct whose most important tenets are, "Don't be a girl, and don't be gay."<sup>19</sup> Boys and men who are feminine or "girl-like" are considered inferior. Masculinity must be achieved and maintained, and men perform to prove their

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14. See *Oncale*, 523 U.S. at 79-80; *Morgan ex rel. R.M. v. Town of Lexington*, 823 F.3d 737, 745-46 (1st Cir. 2016) (dismissing the Title IX complaint for failure to allege that the behavior occurred because of sex but citing to *Oncale* when stating that a plaintiff need not prove romantic interest to pursue a sexual harassment claim, and not challenging the proposition that behaviors by boys against other boys could potentially occur because of sex).

15. See Nancy Gertner & Melissa Hart, *Implicit Bias in Employment Litigation*, in *IMPLICIT RACIAL BIAS ACROSS THE LAW* 80, 87 (Justin D. Levinson & Robert J. Smith eds., 2012) (arguing that judges act with implicit bias when they dismiss complaints and grant summary judgment in employment discrimination cases).

16. See Vicki Schultz, *Open Statement on Sexual Harassment from Employment Discrimination Law Scholars*, 71 STAN. L. REV. ONLINE 17, 18-22 (2018).

17. See Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1686-89 (1998).

18. See ANN C. MCGINLEY, *MASCULINITY AT WORK: EMPLOYMENT DISCRIMINATION THROUGH A DIFFERENT LENS* 46-80 (2016) (explaining how courts could conclude that harassing behaviors occur "because of sex" under Title VII); see also, e.g., *Town of Lexington*, 823 F.3d at 745-46, 745 n.7 (affirming dismissal of Title IX complaint alleging that middle school boy had been harassed on numerous occasions by other boys who pulled down his pants, sexually assaulted him at school, and threatened him with death, and concluding that pulling down boy's pants "seems clearly to be an adjunct to the bullying on the basis of other [than sex] considerations," and that the allegations of sexual assault and death threats were not sufficiently specific); *infra* notes 26, 32, and 33.

19. See NANCY E. DOWD, *THE MAN QUESTION: MALE SUBORDINATION AND PRIVILEGE* 62 (2010); see also MCGINLEY, *supra* note 18, at 22-24.

masculinity to other men<sup>20</sup> and to assure they will not be victims of taunting or harassment.<sup>21</sup> Rather than an essentialist rendering of what masculinity is or should be, masculinities theory recognizes that there are many forms of masculinity that are in competition with one another and are often mediated by race, class, national origin, sexual orientation, gender identity, and other characteristics, but in most workplaces and schools certain forms of masculinity prevail as more acceptable and powerful.<sup>22</sup>

Courts erroneously conceive of behaviors as simple bullying and ignore gender-based motives. Simple bullying without a gender motive is not illegal under Titles VII or IX. But behaviors that courts dismiss as simple “bullying” are often the same as those that meet the definition of “sexual” or “gender-based” harassment under the law.<sup>23</sup> Moreover, if we look closely at the behavior, we recognize a distinct gender motive in most of these cases. An illustration from a Title IX case will suffice.

In *K.S. v. Northwest Independent School District*, classmates ridiculed a sixth-grade boy because he had large breasts, calling him “titty boy” and “Teddy titty baby.”<sup>24</sup> Students touched and twisted his breasts in the locker room, hallways, and other parts of the school.<sup>25</sup> According to the court, however, this behavior was insufficient to notify the school of “anything more than middle-school bullying.”<sup>26</sup> These “bullying” behaviors, however, should constitute illegal

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20. See DOWD, *supra* note 19, at 63; cf. Michelle Birkett & Dorothy L. Espelage, *Homophobic Name-Calling, Peer-Groups, and Masculinity: The Socialization of Homophobic Behavior in Adolescents*, 24 SOC. DEV. 184, 201 (2015) (finding that masculinity and gender play significant roles in gender norms within peer groups).

21. Cf. MCGINLEY, *supra* note 18, at 22-29.

22. See DOWD, *supra* note 19, at 57-58, 60-62; see also BERNARD LEFKOWITZ, OUR GUYS: THE GLEN RIDGE RAPE AND THE SECRET LIFE OF THE PERFECT SUBURB 72-73, 126-29 (1997) (describing masculinity of athletes in middle school and high school); David L. Collinson, *‘Engineering Humour’: Masculinity, Joking, and Conflict in Shop-Floor Relations*, 9 ORG. STUD. 181, 190-91 (1988) (describing blue-collar masculinities on the shop floor).

23. See Ann C. McGinley, *Creating Masculine Identities: Bullying and Harassment “Because of Sex,”* 79 U. COLO. L. REV. 1151, 1191-92 (2008) (concluding that the behaviors involved in male-on-male bullying and harassment are the same); see also Dorothy L. Espelage et al., *Longitudinal Associations Among Bullying, Homophobic Teasing, and Sexual Violence Perpetration Among Middle School Students*, 30 J. INTERPERSONAL VIOLENCE 2541, 2544, 2554 (2015) (concluding that “[b]ullying is in many ways a gendered phenomenon” and finding that male behavior characterized as bullying escalates to sexual harassment later on). Although social scientists distinguish between bullying and sexual harassment, the gendered bullying they describe meets Title VII’s and Title IX’s definition of behavior occurring “because of sex.” Although it may prove too much to consider all bullying to be masculinities-based, a full appreciation of the animating forces behind bullying suggests that most of it results from the Masculinity Motivation and, if properly understood, would be actionable pursuant to Titles VII and IX.

24. 689 F. App’x 780, 781 (5th Cir. 2017) (per curiam).

25. *Id.*

26. *Id.* at 787 n.8; see also *Doe v. Torrington Bd. of Educ.*, 179 F. Supp. 3d 179, 185, 197-98 (D. Conn. 2016) (finding taunting and comments such as “faggot,” “fat ass,” “pussy,” “bitch,” and

sexual and gender-based harassment. They are unwelcome, severe, pervasive, and they occur because of the plaintiff's failure to comply with expectations and stereotypes of how a boy should look and act. In other words, they occur because of the victim's perceived failed masculinity. "Harassing those who violate prescribed gender norms helps to sustain male privilege and power and serves to preserve the status quo while maintaining the division of labor among the sexes."<sup>27</sup>

Moreover, masculinities theory posits that perpetrators seek to enhance their own power in school—to make the boys more masculine and, when girls are involved in this type of harassment, to uphold the gender hierarchy of how boys and girls should look, act, and interact. Masculinities studies explain that boys and men symbolically turn other boys and men into girls or women by harassing and assaulting them sexually. By converting male victims into symbolic females, the harassers denigrate the victims and demonstrate their superiority to each other and the victims.<sup>28</sup>

### C. Fact Patterns from Schools and Workplaces

Harassment of boys in schools by other boys is remarkably similar to that in adult workplaces where male victims are harassed by male co-workers. Compare the facts in a Title VII case, *Oncale v. Sundowner Offshore Services, Inc.*,<sup>29</sup> and a Title IX case, *Thomas v. Town of Chelmsford*.<sup>30</sup>

*Oncale*:

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"baby," insufficient to conclude that the behavior occurred because of sex); J.H. v. Sch. Town of Munster, 160 F. Supp. 3d 1079, 1092-93 (N.D. Ind. 2016) (calling a male high school student names such as "cunt," "pussy," and "bitch" is insufficient evidence to show it occurred because of sex); Eilenfeldt *ex rel.* J.M. v. United C.U.S.D. #304 Bd. of Educ., 84 F. Supp. 3d 834, 838, 842 (C.D. Ill. 2015) (dismissing complaint where harassers called junior high student "rapist," "pedophile," and "child molester" and concluding that the victim was not harassed for being male or insufficiently masculine and that it was "nothing more nor less than schoolyard cruelty and near-arbitrary animosity").

27. Brenda L. Russell & Debra Oswald, *When Sexism Cuts Both Ways: Predictors of Tolerance of Sexual Harassment of Men*, 19 MEN & MASCULINITIES 524, 528 (2016).

28. See Paula McDonald & Sara Charlesworth, *Workplace Sexual Harassment at the Margins*, 30 WORK, EMP. & SOC'Y 118, 129 (2016) (noting that findings of male-on-male sexual harassment supported the view that the purpose of such harassment is to enforce traditional heterosexual male gender roles and that complaints by men in the study included taunts about "apparently unmasculine" conduct and "insinuations" that victims were gay); cf. Kathryn J. Holland et al., *Sexual Harassment Against Men: Examining the Roles of Feminist Activism, Sexuality, and Organizational Context*, 17 PSYCHOL. MEN & MASCULINITY 17, 18 (2016) (citing Jennifer L. Berdahl, *Harassment Based on Sex: Protecting Social Status in the Context of Gender Hierarchy*, 32 ACAD. MGMT. REV. 641 (2007)).

29. 83 F.3d 118 (5th Cir. 1996), *rev'd*, 523 U.S. 75 (1998).

30. 267 F. Supp. 3d 279 (D. Mass. 2017).

Oncale alleges that the harassment included Pippen and Johnson [coworkers] restraining him while Lyons [a supervisor] placed his penis on Oncale's neck, on one occasion, and on Oncale's arm, on another occasion; threats of homosexual rape by Lyons and Pippen; and the use of force by Lyons to push a bar of soap into Oncale's anus while Pippen restrained Oncale as he was showering on Sundowner premises.<sup>31</sup>

*Thomas:*

Matthew was on his bunk [at football camp for school] when Z.D. came over to him, held him down, and started twisting his nipples. K.M. joined in and lifted Matthew's feet so that he could not move. G.C. grabbed Matthew by his arms and legs, and they dragged him into the shower area. G.C. and Z.D. held Matthew down while K.M. tried to insert the end of a broomstick into Matthew's anus. Matthew screamed and resisted, but nobody came to his assistance. Then, K.M. and Z.D. held down Matthew while G.C. inserted the end of the broomstick into Matthew's anus. No adult was nearby during this approximately twenty-minute episode.<sup>32</sup>

These horrific fact patterns are not atypical of workplace and school-based same-sex harassment. Often the behaviors include lewd language, calling the boy or man a "girl" or words that imply that he is insufficiently masculine or homosexual—such as "faggot," "pussy," etc.—and physical batteries of sexually-identified body parts—e.g., grabbing the chest, buttocks, or genitals, and inserting foreign objects into the victim's anus, or threatening to do so.<sup>33</sup>

When the harasser is a group of men or boys, and the victim is a man or boy, the behavior is often sexualized, and the motive or cause of harassment is

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31. *Oncale*, 83 F.3d at 118-19. Oncale also quit his job because he was afraid that his coworkers and supervisors would force him to have sex. *See id.* at 119; Ann C. McGinley, *Oncale v. Sundowner Offshore Services, Inc.*, in *FEMINIST JUDGMENTS: REWRITTEN OPINIONS OF THE UNITED STATES SUPREME COURT* 415-16 (Kathryn M. Stanchi et al. eds., 2016).

32. *Thomas*, 267 F. Supp. 3d at 290 (citations omitted). This was only one of a number of violent episodes, including post-incident bullying and harassment at school and social media postings. The complaint also alleged other incidents of a teacher ridiculing the victim for telling his parents, and another teacher permitting additional harassment to occur in the school hallways. *See id.* at 291-95.

33. *See, e.g.*, *Stiles ex rel. D.S. v. Grainger County*, 819 F.3d 834, 841-46 (6th Cir. 2016) (alleging that a middle school student was called names such as "faggot," "BJ" (short for "blowjob"), "pussy," "pedophile," "f\*\*\*ing faggot," and "homo," was picked up and dropped, had his ribs fractured from being jumped upon by a classmate, had his face slammed into a locker, and so on); *Carmichael v. Galbraith*, 574 F. App'x 286, 288-91 (5th Cir. 2014) (alleging football team stripped middle school boy, put him nude in a trash can, called him "fag," "queer," and "homo," videotaped the event, and put it on YouTube, which led to his suicide); *Oncale*, 83 F.3d at 118-19; Nancy Chi Cantalupo, *Masculinity and Title IX: Bullying and Sexual Harassment of Boys in the American Liberal State*, 73 MD. L. REV. 887, 889 (2014) (citing a *Bloomberg* study that documented more than forty incidents of male high school athletes who alleged they were sodomized by their teammates in 2012 and 2013, compared to about three such alleged incidents a decade earlier).



a desire to police the masculinity of the group to assure that its members prove and maintain their own masculinity and that of their affiliates.<sup>34</sup> Thus, the behavior occurs because of the sex or gender of both the victims and perpetrators.<sup>35</sup> The perpetrators reinforce their own masculinity and that of their group (work unit, school group, etc.) by picking on those whom they consider to be unacceptably feminine or who are unwilling to join the group to bully and harass others. Group behaviors are key: While boys and men may not engage in harassing behaviors when alone with other men, they often join a group that harasses a male victim.<sup>36</sup>

Segregation of genders in school programs and workplaces reinforces beliefs that boys and men are superior to women and girls.<sup>37</sup> In schools, boys on all-male sports teams, especially football or basketball, prove their masculinity by excelling in the sport, and the sport remains masculine by driving out those who do not perform their masculinity in acceptable fashion.<sup>38</sup> Hazing of the newest members of the teams will also assure the masculinity of the program. In segregated workplaces, especially blue-collar workplaces, harassment takes similar forms and serves the same purpose.<sup>39</sup>

Unfortunately, courts frequently fail to recognize this behavior as violating Title VII and Title IX. They often conclude that the behavior is normal roughhousing, horseplay, hazing, or bullying and does not occur “because of sex.”<sup>40</sup> Or courts conclude that the evidence was insufficient to show that the bullying was based on sex or gender.<sup>41</sup>

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34. Empirical research supports masculinities theory. *See* Holland, *supra* note 28, at 23 (citing Deborah Lee, *Hegemonic Masculinity and Male Feminisation: The Sexual Harassment of Men at Work*, 9 J. GENDER STUD. 141 (2000) (finding support for theories of harassment as means of regulating traditional masculinity norms and gendered status quo in workplaces)); Lee, *supra*, at 153-54 (finding that heterosexual men who violate masculinity norms suffer from sexual harassment and are perceived like women).

35. *See* MCGINLEY, *supra* note 18, at 67.

36. *Cf.* MCGINLEY, *supra* note 18, at 5-6 (noting that Richie Incognito did not harass Jonathan Martin when they were alone, but used harassment of Martin to prove his own masculinity to their teammates).

37. *See* Cantalupo, *supra* note 33, at 922-40.

38. *See* Deborah L. Brake, *Wrestling with Gender: Constructing Masculinity by Refusing to Wrestle Women*, 13 NEV. L.J. 486, 489 (2013) (stating that football and basketball are considered the most masculine sports and that wrestling may be perceived as having troubles with its masculine credentials).

39. *See generally* Collinson, *supra* note 22, (describing masculinities practiced on the shop floor).

40. *Cf.* McGinley, *supra* note 23, at 1156-58.

41. *See, e.g.,* Doe v. Torrington Bd. of Educ., 179 F. Supp. 3d 179, 198 (D. Conn. 2016); J.H. v. Sch. Town of Munster, 160 F. Supp. 3d 1079, 1092-93 (N.D. Ind. 2016).

D. Sexual Orientation Discrimination and the Future of Title VII

Until recently, U.S. courts of appeals uniformly held that Title VII did not ban discrimination based on sexual orientation.<sup>42</sup> They reached this conclusion even though discrimination against individuals for failing to conform to gender expectations is prohibited sex discrimination.<sup>43</sup> The failure to recognize sexual orientation discrimination as a subset of sex discrimination has created confusion as courts attempt to distinguish between harassment motivated by the victim's sexual orientation and harassment motivated by the victim's failure to conform to gender stereotypes. This distinction, which is not common in Title IX cases, makes no sense. Research demonstrates that many people do not distinguish between men who are feminine and men who are gay.<sup>44</sup> And when they do, some admit that the terms "fag" and "faggot" were not directed at the individual because they thought he was gay but because he was feminine.<sup>45</sup> A feminine straight man may be more unsettling to many people's sense of gender appropriateness than a masculine gay man.

Recently, a few circuits and the Equal Employment Opportunity Commission have concluded that discrimination based on sexual orientation is

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42. See Ann C. McGinley, *Erasing Boundaries: Masculinities, Sexual Minorities, and Employment Discrimination*, 43 U. MICH. J.L. REFORM 713, 732-44 (2010) (discussing cases distinguishing discrimination based on sexual orientation and that based on sex stereotyping).
43. *Id.* at 733; see *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250-52 (1989) (plurality opinion) (holding that it is illegal sex discrimination to take employment actions on the basis of sex stereotypes), *superseded in other part by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 29 and 42 U.S.C.); MCGINLEY, *supra* note 18, at 40-41 (explaining that courts conclude that sexual orientation discrimination is not prohibited by Title VII, but that making employment decisions based on a failure to conform to gender expectations is illegal under the statute).
44. See Verónica Caridad Rabelo & Lilia M. Cortina, *Two Sides of the Same Coin: Gender Harassment and Heterosexist Harassment in LGBTQ Work Lives*, 38 L. & HUM. BEHAV. 378, 386 (2014) (finding that the distinction between harassment based on a victim's gender nonconformity and his sexual orientation is "more myth than reality," and that harassing acts are virtually indistinguishable for LGBTQ employees); cf. Michael S. Kimmel, *Masculinity as Homophobia: Fear, Shame and Silence in the Construction of Gender Identity*, in RACE, CLASS, AND GENDER IN THE UNITED STATES: AN INTEGRATED STUDY 59, 89-90 (Paula S. Rothenberg ed., 7th ed. 2007) (describing men's reactions to fear of being perceived as gay based on dress and behaviors that are considered to be feminine). Gender nonconformity is perceived more negatively among boys than girls. See Alexa Martin-Storey, *Gender, Sexuality, and Gender Nonconformity: Understanding Variation in Functioning*, 10 Child Dev. Persp. 257, 257, 259-60 (2016) (suggesting that gender nonconformity rather than sexual orientation alone accounts for increased reports of harassment among sexual minorities).
45. See, e.g., *N.K. v. St. Mary's Springs Acad. of Fond Du Lac Wis., Inc.*, 965 F. Supp. 2d 1025, 1034 (E.D. Wis. 2013) (concluding that where there was testimony from students that terms such as "fag" and "faggot" were not used to mean that the victim was homosexual, and there was evidence that harassment occurred because of the victim's perceived gender nonconformity, there was sufficient evidence of a Title IX claim), *appeal dismissed*, No. 13-2988 (7th Cir. June 9, 2014).

illegal discrimination based on sex under Title VII.<sup>46</sup> It is unclear whether the Supreme Court will agree, but if sexual orientation discrimination occurs “because of sex,” then there should be no justification for a holding that sex-based harassment did not occur because of sex. I fear, however, that courts will continue to characterize the harassment as “normal roughhousing,” “hazing,” or “bullying” under Titles VII and IX.

There is some support for this fear in the Title IX cases, where courts do not distinguish between harassment based on sexual orientation and gender non-conformity, perhaps because the victims are children who may not have a known sexual orientation. Instead, courts hold that the behavior was not gender-based at all—it was a form of bullying.<sup>47</sup> Thus, even if the law changes to protect sexual orientation discrimination under Titles VII and IX, the courts may seek new justifications for denying liability of employers and schools for male-on-male sex-based harassment.

### **Conclusion: #MeToo, Courts, and Social Change**

A successful response to the #MeToo movement must recognize that toxic masculinity causes sex-based harassment, especially harassment perpetrated by groups of boys and men. This behavior is not about romantic interest in the victim; it is a means of establishing a man’s membership in the group, and of denigrating the victim. Harassment also polices the masculinity of the school group or workplace to assure its status in the hierarchy of masculine over feminine. Society must recognize these motivations if it is to overcome harassment that harms both women and men. Besides recognition, it must educate its youth, teachers, and employers about the dangers of toxic forms of masculinity.

The law should take the lead in defeating the Masculinity Motivation by acknowledging that harassment of men, women, girls, and boys occurs because of sex and is not normal behavior. Excuses such as “boys will be boys” or that harassing behavior is merely “roughhousing,” “hazing,” and “bullying” should no longer survive. Currently, cases demonstrate that the most vulnerable students and employees suffer at the hands of other students and employees. A number of the cases demonstrate, too, that teachers, coaches, administrators, and supervisors participate in the harassment or enhance the damage done to victims.<sup>48</sup> The law can take the first step by recognizing that much if not most

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46. *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 112-13 (2d Cir. 2018) (en banc); *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 351-52 (7th Cir. 2017) (en banc); *Baldwin v. Foxx*, No. 0120133080, 2015 WL 4397641, at \*15 (E.E.O.C. July 15, 2015). *But see* *Evans v. Ga. Reg'l Hosp.*, 850 F.3d 1248, 1257 (11th Cir. 2017) (holding that sexual orientation discrimination is not prohibited by Title VII), *cert. denied*, 138 S. Ct. 557 (2017).

47. *See, e.g., supra* note 26.

48. *See, e.g., Stiles ex rel. D.S. v. Grainger County*, 819 F.3d 834, 851 (6th Cir. 2016) (concluding it was not unreasonable for school officials to believe accounts that the victim played a role

of bullying in schools occurs because of sex under Title IX, and that same-sex harassing behaviors often occur “because of sex” due to the Masculinity Motivation under Title VII.<sup>49</sup>

Women and girls are also victims of toxic masculinity at work and school. Boys harass or assault girls and brag about it to their friends.<sup>50</sup> Rapes or assaults are posted on social media.<sup>51</sup> Girls and women, in essence, become the pawns that boys and men use to prove their own self-worth.<sup>52</sup> When courts and society recognize the role that the Masculinity Motivation plays in same-sex harassment of males, they should also consider that much harassment of women and girls is also motivated by toxic masculinity. This recognition should lead to better understanding, a loosening of the courts’ “because of sex” doctrine, and greater accountability of employers and schools for damaging harassment that occurs because of sex.

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in the harassment); *Thomas v. Town of Chelmsford*, 267 F. Supp. 3d 279, 290, 292-94 (D. Mass. 2017) (noting that the victim’s coach told the victim that anal rape was “part of growing up”; his Spanish teacher ridiculed him for telling his parents about the attack; his science teacher yelled at him and said he was an “instigator” who caused trouble and she was “sick of it”; his coaches refused to discipline other students who ridiculed the victim in sports tryouts; and the dean told two boys who complained about the victim’s harassment that they should “man up” and that the harassment was “boys just being boys”).

49. It should also abolish the actual notice and deliberate indifference standards under Title IX. See *supra* note 12 (describing use of actual notice and deliberate indifference standards for establishing liability).

50. See MICHAEL KIMMEL, *GUYLAND: THE PERILOUS WORLD WHERE BOYS BECOME MEN* 186-87, 237-40 (2008) (describing how young men watch porn together, engage in gang rape, and then celebrate it together afterward); LEFKOWITZ, *supra* note 22, at 22-27, 167-71, 180-81, 185 (describing high school athletes and their efforts to prove their masculinity through sexual conquests).

51. Richard A. Oppel Jr., *Ohio Teenagers Guilty in Rape that Social Media Brought to Light*, N.Y. TIMES (Mar. 17, 2013), <https://perma.cc/7DVG-ZL2S>.

52. See Ann C. McGinley & Frank Rudy Cooper, *Introduction to MASCULINITIES AND THE LAW: A MULTIDIMENSIONAL APPROACH* 1, 3-4 (Frank Rudy Cooper & Ann C. McGinley eds., 2012).