CHANGING SOCIAL NORMS? TITLE IX AND LEGAL ACTIVISM COMMENTS FROM THE SPRING 2007 *HARVARD JOURNAL OF LAW & GENDER* CONFERENCE

INTRODUCTION

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We've come a long way. 2007 marked the thirty-fifth anniversary of Title IX, the legislation designed to provide women and girls equal educational opportunities, and three and a half decades later it is clear that Title IX served as a catalyst for extraordinary progress for countless female students. But with progress came backlash, resistance, and stagnation. In the spring of 2007, the *Harvard Journal of Law and Gender* hosted a conference titled, "*Changing Social Norms? Title IX and Legal Activism*," which explored Title IX's successes, current challenges, and potential to institute fundamental change in the future.

Title IX of the Education Amendments of 1972 established, *inter alia*, that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[1] In practice, Title IX is best known for its influence on high school and collegiate sports, but its reach extends far beyond the playing field. Advocates have utilized Title IX to address sexual harassment and sexual assault on campus, facilitate the entry of women into non-traditional fields, and ensure equal educational opportunity. In each of these areas, the numbers speak to the great strides that have been made, but they also point to glaring inequities that must still be rectified.

Athletics

In 2007, *Ms Magazine* noted, "[t]hough the word 'sports' did not appear in . . . Title IX, the law has become synonymous with increased opportunities for girls in athletics."[2] In the 1971–72 school year, fewer than

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[1] 20 U.S.C. § 1681 (1972).
[2] *The Triumphs of Title IX*, Ms., Fall 2007, at 42, 42.

300,000 girls,[3] or one in twenty-seven,[4] played high school sports. By the 2005–06 academic year, that number had jumped to over 2.9 million[5] or almost fifty percent.[6] At the collegiate level, although fewer than 32,000 female students participated in athletics in 1972, almost 171,000 women played college sports during the 2005–06 season.[7] Women made up forty-four percent of Division 1 college athletes in 2004, compared to a mere fifteen percent in 1971.[8] Furthermore, in 1974 University of Tennessee's women's basketball coach Pat Summitt earned $8,900 a year. In 2004, she became the first women's college coach to earn a salary of over a million dollars a year.[9]

While female athletes undoubtedly enjoy far greater opportunities thanks in large part to Title IX, the story does not end there. At the high school level, while over 2.9 million girls participate in athletics, that number still trails the 4.2 million high school boys who also play school sports.[10] On college campuses, women have only now caught up to the levels of participation that men reached before Title IX's passage.[11] The National Women's Law Center reports, "[w]omen in Division I colleges, while representing 53% of the student body, receive only 44% of the participation opportunities, 37% of the total money spent on athletics, 45% of the total athletic scholarship dollars, and 32% of recruiting dollars."[12]

These remaining inequalities do not go unnoticed; however, coaches and others well-posed to raise a challenge do not always have the freedom to do so. Around the same time Pat Summitt became the first coach of a women's team to earn over a million dollars, Roderick Jackson—an Alabama high school girls' basketball coach and Conference participant—was fired for raising Title IX complaints on behalf of his team.[13] Although Jackson heroically took his case all the way to the Supreme Court and won the right for coaches to bring claims in response to any retaliation they face for de-

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[3] Nat'l Women's Law Center, Barriers to Fair Play 1 (June 2007), *available at* http://www.nwlc.org/pdf/BarriersToFairPlay.pdf (internal citation omitted) [hereinafter Barriers to Fair Play].

[4] Michele Kort, *Play On: The Sporting Side of Title IX*, Ms., Fall 2007, at 47, 47.

[5] Barriers to Fair Play, *supra* note 3.

[6] Kort, *supra* note 4.

[7] Barriers to Fair Play, *supra* note 3.

[8] Kort, *supra* note 4.

[9] *Then and Now*, Ms., Fall 2007, at 10, 12.

[10] Nat'l Women's Law Center, The Battle for Gender Equity in Athletics in Elementary and Secondary Schools 1 (June 2007), *available at* http://www.nwlc.org/pdf/Battle%202007.pdf (internal citation omitted).

[11] Nat'l Women's Law Center, Title IX and Women's Athletic Opportunity: A Nation's Promise yet to be Fulfilled 1 (2007) ("While 170,384 men played college sports in 1971-1972 (Title IX was passed in 1972), only 170,526 women played college sports in 2005-2006"), *available at* http://www.nwlc.org/pdf/Nation%27s%20Promise%202007.pdf.

[12] *Id.* at 1-2.

[13] Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 172 (2005).

manding Title IX compliance, it is likely that countless others across the country continue to face retaliation on a regular basis.

The examples above illustrate that, for Title IX to challenge sex bias in sports on a deeper level, the legislation must extend beyond increasing the female participation rate; Title IX must address a "wider range of practices that preserve male privilege in the structures of sport."[14] As the conference moderator, Professor Deborah Brake, points out, "despite massive shifts in female sports participation, there has been a good deal of 'preservation through transformation,' as the opportunity structures have regrouped to preserve the central features of male privilege in sport."[15] The "preservation through transformation" framework, first expounded by Professor Reva Siegel, argues that discrimination is not static in form but can adapt to new legal requirements.[16] Consequently, Professor Siegel contends, "efforts to reform a status regime bring about changes in its rule structure and justificatory rhetoric," allowing "status-enforcing state action [to evolve] in form as it is contested."[17] By defining the problem in only one way, discrimination is allowed to continue so long as it adapts to the legal framework and simply manifests itself in different forms. Evaluating legislation through the "preservation through transformation" framework allows one to see whether the changes made have simply been in a new *form* of discrimination, or whether discrimination has truly been reduced. Professor Siegel points to the way current equal protection law focuses on whether or not state actions are "race-conscious" or "gender-conscious," while ignoring the way the state continues to indirectly regulate the status of women and minorities,[18] and conference participants were asked to apply these ideas in the context of Title IX.

Conference participants pointed, in particular, to the blaming of Title IX for cuts in men's sports as an example of the "preservation through transformation" concept. Although colleges and universities claim to make these cuts in order to comply with Title IX's requirements, Title IX provides numerous alternative avenues for compliance. Significantly, the Department of Education's Office for Civil Rights ("OCR"), the agency charged with enforcing Title IX, specifically discourages cutting male sports for Title IX compliance. OCR's 2003 Clarification Letter explains:

> OCR hereby clarifies that nothing in Title IX requires the cutting or reduction of teams in order to demonstrate compliance with Title IX, and that the elimination of teams is a disfavored practice. Because the elimination of teams diminishes opportunities for stu-

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[14] Deborah Brake, *Revisiting Title IX's Legacy: Moving Beyond the Three-Part Test*, 12 AM. U.J. GENDER SOC. POL'Y & L. 453, 459 (2004).

[15] *Id.*

[16] *Id.*

[17] Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1113 (1997).

[18] *Id.* at 1143–44.

> dents who are interested in participating in athletics instead of enhancing opportunities for students who have suffered from discrimination, it is contrary to the spirit of Title IX for the government to require or encourage an institution to eliminate athletic teams.[19]

Nevertheless, schools too often choose to cut men's "non-revenue" sports in order to avoid funding new opportunities for women that would pull some funds away from "revenue" sports (such as football and men's basketball).[20] In other words, schools prioritize certain men's teams over others,[21] provide no new athletic opportunities for women, and use women's athletics as the scapegoat for the loss of men's teams.[22] In addition, allowing schools to comply with Title IX by cutting men's sports teams reinforces the devaluation of women's sports by making clear that adding women's teams is not worth the necessary restructuring.[23]

Not only do schools unnecessarily blame Title IX for their decisions to cut male sports, but the impression that such cuts have increased since Title IX is unfounded. The National Women's Law Center reports:

> The rate of decline of men's wrestling teams during the four years from 1984–1988 . . . when Title IX was not being enforced in athletics . . . was almost 4 times as high as the rate of decline during the 18 years since 1988 (1988–2006), when Title IX's application to athletics programs was firmly reestablished.[24]

Nevertheless, the backlash against Title IX in the media and politics caused by those cuts that have occurred has led to further depreciation of women's sports, undercutting the very values that Title IX was meant to represent.[25] The inequality of women's sports is thus essentially preserved, only in a different form; while the number of athletic opportunities for women has increased, the respect given to these sports has much farther to go. Title IX has certainly led to a greater acceptance of female athletes; however, there

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[19] Office for Civil Rights, Dep't of Educ., Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance (2003), *available at* http://www.ed.gov/about/offices/list/ocr/title9guidanceFinal.html. For more information on the fallacy of the revenue/non-revenue distinction, see Ellen Staurowsky, Comments from *Harvard Journal of Law & Gender* Conference *Changing Social Norms? Title IX and Legal Activism*, 31 Harv. J.L. & Gender 396 (2008).

[20] Brake, *supra* note 14, at 466.

[21] According to the National Women's Law Center, "football and men's basketball consume 74% of the total men's athletic operating budget at Division I-A institutions, leaving other men's sports to compete for remaining funds. Nat'l Women's Law Center, Title IX and Men's "Minor" Sports: A False Conflict 1 (2007), *available at* http://www.nwlc.org/pdf/Men's%20Minor%20Sports%20June%2007.pdf [hereinafter Title IX and Men's "Minor" Sports].

[22] Brake, *supra* note 14, at 467.

[23] *Id.*

[24] Title IX and Men's "Minor" Sports, *supra* note 21, at 2.

[25] Brake, *supra* note 14, at 469.

still exists a deep bias in the structure of sports, which fuels a refusal to accept women as truly equal athletic participants.[26]

Higher Education

A look at Title IX's impact on women in higher education exposes similar trends. In the years before Title IX's passage, women were underrepresented in higher education generally, and they were practically absent from non-traditional fields. Women made up less than twenty percent of collegiate faculty members before Title IX's passage but in 2006 represented nearly forty percent of full time and nearly fifty percent of part-time faculty members.[27] Women accounted for approximately forty percent of all undergraduate students just before Title IX passed and by 2005 women represented almost sixty percent of college students.[28] In addition, before Title IX, educators often accepted and recognized gender stereotypes by steering girls away from upper-level math and science classes as well as excluding them altogether from math and science clubs.[29] Among undergraduate degree recipients, women made up less than ten percent of business students, less than thirty percent of biological science majors, less than fifteen percent of physical science and computer science majors, and at most one percent of engineering students in the 1970–71 school years.[30] In comparison, in 2005, female undergraduates earned fifty percent of business degrees, over sixty percent of biological science degrees, over forty percent of physical science degrees, over twenty percent of computer science degrees, and almost twenty percent of engineering degrees.[31] Within graduate programs, women now earn nearly fifty percent of doctoral degrees, compared to only fourteen percent in 1970.[32] In traditionally male-dominated graduate programs, women comprised only one percent of doctoral dental degrees, one percent of master's degrees in engineering, and under two percent of master's degrees in mathematics in 1970.[33] Today, women represent between forty and fifty percent of graduates students in dentistry,[34] medicine, and law.[35]

Despite the progress in educational opportunities, women and men continue to be plagued by divisions along traditional gender lines and by a lack

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[26] *Id.* at 482.

[27] Caryn McTighe Musil, *Scaling the Ivory Towers*, Ms., Fall 2007, at 43, 43–44.

[28] *Id.* at 43.

[29] NAT'L COALITION FOR WOMEN AND GIRLS IN EDUC., TITLE IX AT 35: BEYOND THE HEADLINES 15 (2008), *available at* http://www.ncwge.org/PDF/TitleIXat35.pdf [hereinafter TITLE IX AT 35].

[30] *Title (IX) Wave: How it Affected Women in College*, Ms., Fall 2007, at 45, 45.

[31] *Id.*

[32] Musil, *supra* note 27, at 44.

[33] *Id.* at 43–44.

[34] Jeanne C. Sinkford, Richard W. Valachovic & Sonja Harrison, *Advancement of Women in Dental Education: Trends and Strategies* 67 J. DENTAL EDUC. 79, 80 (2003), *available at* http://www.jdentaled.org/cgi/reprint/67/1/79.pdf.

[35] Musil, *supra* note 27, at 44.

of opportunities for women in education. According to a study of several states conducted by the National Women's Law Center,

> female students make up 96% of the students enrolled in Cosmetology, 87% of the students enrolled in Child Care courses, and 86% of the students enrolled in courses that prepare them to be Health Assistants in every region in the country. Male students, on the other hand, comprise 94% of the student body in training programs for plumbers and electricians, 93% of the students studying to be welders or carpenters, and 92% of those studying automotive technologies.[36]

In addition, although the number of women in non-traditional fields has grown substantially, particularly among undergraduate students, women still lag far behind men in attaining doctoral degrees. For instance, women only earn approximately nineteen percent of doctoral degrees in engineering and engineering technologies.[37] A report released by the Government Accountability Office revealed that federal agencies, such as the National Science Foundation and the Department of Education, were not sufficiently investigating the level of compliance with Title IX in this area.[38] While organizations such as NSF have begun conducting selective Title IX reviews since the report, more investigation is needed, particularly to see whether the culture and climate in math and science departments is creating barriers to women.[39] In addition, although all students can enjoy far greater numbers of female professors, women comprise only thirty-four percent of the faculty at institutions offering doctoral degrees.[40] Similarly, while the number of female college presidents has grown substantially (from three percent pre-Title IX to twenty-three percent in 2006), a large proportion serve at community colleges and only four percent of college presidents are women of color.[41]

In Professor Brake's application of the "preservation through transformation" concept to Title IX, she recognizes that the lack of leadership opportunities in athletics is one manifestation of this disconcerting phenomenon.[42] The percentage of coaches of women's college teams who are female has dropped from ninety percent in 1972 to just forty-four percent in 2002.[43] Before Title IX, women held virtually all the administrative lead-

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[36] Nat'l Women's Law Center, Title IX and Equal Opportunity in Vocational and Technical Education 3 (2002), *available at* http://www.nwlc.org/pdf/career%20ed%20report%20for%20june%206%20press%20event3.pdf.

[37] Musil, *supra* note 27, at 44.

[38] U.S. Gov't Accountability Office, GAO-04-639, Women's Participation in the Sciences Has Increased, but Agencies Need to Do More to Ensure Compliance with Title IX (2004) *available at* http://www.gao.gov/new.items/d04639.pdf.

[39] Title IX at 35, *supra* note 29, at 25.

[40] Musil, *supra* note 27, at 44.

[41] *Id.* at 43–44.

[42] Brake, *supra* note 14, at 459.

[43] *Id.* at 460.

ership positions in intercollegiate women's athletics, but, now that the management of men's and women's athletics has been unified, women have been relegated to token leadership positions.[44] Since Title IX does not recognize the declining role of women in athletic leadership and coaching as a form of inequality for female athletes, the leadership structure marginalizing women's role in sports is left untouched.[45] The "preservation through transformation" framework can be applied to women's gains in higher education as well. Statistics illustrate that women's progress in higher education has not managed to fundamentally transform the gender disparities in academic leadership. Rather, men continue to make up a disproportionate number of doctoral students in math and science fields, and women hold fewer than twenty percent of college faculty positions in computer science, mathematics, physical sciences, and engineering.[46] Unfortunately, women make up only twenty-six percent of the tenured faculty at universities granting doctoral degrees.[47] At large universities, tenured professors serve as important leaders and role models, both on campus and in the media or community at large, and the continued under-representation of women in higher education cannot be masked by the other successes of Title IX.

Sexual Harassment and Sexual Assault

Title IX also requires schools to adequately respond to sexual harassment and sexual assault on campus. When students experience sexual harassment on school campuses, the hostile environment often prevents these students from obtaining equal educational opportunities.[48] The Supreme Court first recognized that sexual harassment could be considered gender discrimination prohibited under Title IX in 1992.[49] In 1997, OCR issued a Sexual Harassment Guidance, making schools at every level of education aware that Title IX requires an educational environment free from sexual harassment.[50] This Guidance, revised in 2001, states that under Title IX, "[a] school has a responsibility to respond promptly and effectively to sexual harassment."[51] OCR requires schools to implement a sexual harassment policy, to designate a Title IX Coordinator to ensure Title IX compliance in all areas including sexual harassment prevention,[52] and to provide adequate

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[44] *Id.* at 460–61.
[45] *Id.* at 461.
[46] TITLE IX AT 35, *supra* note 29, at 24.
[47] *Id.* at 37.
[48] *Id.* at 41.
[49] Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 75 (1992).
[50] U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES, (1997) *available at* http://www.ed.gov/about/offices/list/ocr/docs/sexhar01.html.
[51] *Id.* at 18.
[52] LEGAL MOMENTUM, LEGAL RESOURCE KIT: SEXUAL HARASSMENT IN THE SCHOOLS 6 (2008).

grievance procedures for victims of sexual harassment.[53] If a student files a complaint with OCR, the office will also look at whether the school appropriately investigated the student's claims and whether the school "has taken immediate and effective corrective action responsive to the harassment."[54] By filing a Title IX complaint with OCR instead of pursuing a private suit for money damages, a student victim of sexual harassment will be able to utilize the OCR's administrative enforcement standards, as opposed to the more limited standards for private suits addressed below.[55]

Despite the legal requirements Title IX places on school administrations, sexual harassment and assault continue to be rampant, particularly on college campuses. A Department of Justice report warns, "[c]ollege campuses host large concentrations of young women who are at greater risk for rape and other forms of sexual assault than women in the general population or in a comparable age group."[56] Estimates of women who will be the victims of rape or attempted rape during college range from one in four[57] to one in five.[58] In addition, more than 3 in 5 men and women in college have experienced sexual harassment.[59] Harassment pervades the elementary through high school levels as well. A study by the American Association of University Women ("AAUW") reported that eight out of ten students experienced some form of sexual harassment at school, and that this harassment usually began between sixth and ninth grade.[60] Legal Momentum reports that "the majority (83%) of girls experience verbal or physical harassment" and "66% of 10th and 11th grade girls and 63% of 8th and 9th grade girls experience physical harassment."[61] If "61% of students who experienced physical harassment experienced it in the *classroom* (emphasis added),"[62]

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[53] U.S. Dep't of Educ. Office for Civil Rights, Sexual Harassment: It's Not Academic, *available at* http://www.ed.gov/about/offices/list/ocr/docs/ocrshpam.html. The grievance procedures for sexual harassment victims can be the same procedures set up for all Title IX complaints, but OCR suggests using separate procedures specifically tailored to sexual harassment claims as that is often much more effective. *Id.*

[54] U.S. Dep't of Educ., Office for Civil Rights, Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, Or Third Parties 14 (2001) *available at* http://www.edu.gov/about/offices/list/ocr/docs/shguide.pdf.

[55] *Id.* at 5.

[56] Bonnie S. Fisher, Francis T. Cullen & Michael G. Turner, The Sexual Victimization of College Women iii (2000) *available at* http://www.ncjrs.gov/pdffiles1/nij/182369.pdf.

[57] Robin Warshaw, I Never Called It Rape: The Ms Report on Recognizing, Fighting, and Surviving Date and Acquaintance Rape 2 (1998).

[58] U.S. Dep't of Justice, Office of Justice Programs National Institute of Justice Report, Sexual Assault on Campus: What Colleges and Universities Are Doing About It 2 (2005) *available at* http://www.ncjrs.gov/pdffiles1/nij/205521.pdf.

[59] *Legal Resource Kit*, *supra* note 52, at 4.

[60] American Association of University Women, Hostile Hallways: Bullying, Teasing, and Sexual Harassment in Schools 4 (2001), *available at* http://www.aauw.org/research/upload/hostilehallways.pdf.

[61] Legal Momentum, *supra* note 52, at 2.

[62] *Id.* at 3.

one must question how effective Title IX has been in preventing this behavior.

Beyond the statistics, there is evidence of "preservation through transformation" in the changing legal requirements. After the Supreme Court's decision in *Franklin* established that sexual harassment at school constituted gender discrimination under Title IX, the Court created multiple requirements for students' claims to be successful. In *Gebser v. Lago Vista Independent School District,* the Court held that a student's private action for damages against a school for sexual harassment by a teacher could only prevail if the student proved the school had "actual knowledge" of the harassment and responded with "deliberate indifference."[63] Additionally, the landmark case *Davis v. Monroe County* increased the liability of schools by providing that students could bring Title IX suits for damages when students are subject to peer sexual harassment, not just sexual harassment by a teacher.[64] However, the Court reinforced the high standards in *Gebser* of actual notice and deliberate indifference, adding that the harassment must be of a sort that is "so severe, pervasive and objectively offensive" that it effectively denies the student equal access to educational opportunities.[65] While, on the one hand, the Court took a step forward in gaining more recognition for sexual harassment liability under Title IX in *Franklin* and *Davis*, on the other hand the Court also imposed the *Gebser/Davis* procedural requirements on claimants. Since students with claims are required to meet such a high standard, Title IX becomes a less effective tool for change and places the burden squarely on the shoulders of the students.

By requiring the student to prove that the school had "actual notice" and acted with "deliberate indifference," schools enjoy practical immunity from liability. For example, instead of taking measures necessary to address sexual harassment on campus in the best way possible, schools can instead focus on the minimal actions necessary to avoid liability under the "deliberate indifference" standard.[66] Colleges and high schools can continue to treat sexual harassment as a problem between individuals, instead of a systematic problem on campuses; so long as the procedures minimally adapt to pass the "deliberate indifference" standard, the status quo will be maintained.[67] The requirement that schools have "actual notice" of the harassment also effectively shields schools from liability because students often fail to comply

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[63] 524 U.S. 274 (1998).
[64] 526 U.S. 629 (1999).
[65] *Id.* at 651.
[66] *See* Doe v. Dallas Indep. Sch. Dist., 220 F.3d 380 (5th Cir. 2000) (holding that actions and decisions by officials that are merely inept, erroneous, ineffective or negligent do not amount to deliberate indifference).
[67] *See* Manfredi v. Mount Vernon Bd. of Educ., 94 F. Supp. 2d 447 (S.D.N.Y. 2000) (finding that moving a student accused of touching another student to a different classroom was enough to defeat the victim's Title IX claim); Dallas Indep. Sch. Dist. 220 F.3d at 384 (finding that schools may avoid liability under a deliberate indifference standard by responding reasonably to the risk of harm, even if the response is unsuccessful).

with reporting requirements. In a climate where, according to Legal Momentum, "less than 10% of all students report incidents of sexual harassment to a college or university employee, and only 7% of those reported to someone they knew to be a Title IX coordinator,"[68] Title IX's reliance on reporting must be called into question. If Title IX is to reach its full potential by changing the social norms that underlie cultures of sexual violence, it must not allow schools to turn a blind eye to the behavior on its campuses by pointing to the lack of reporting or a lack of notice of such behavior. Instead, the legal framework must be adjusted to recognize the current barriers to reporting. "[W]omen may believe they are responsible for the harassment, may be afraid of retaliation, or may accept the unwelcome behavior as the norm,"[69] and so women must demand that schools actively prevent sexual harassment. Without this adjustment, women risk allowing the legal remedy provided to victims of sexual harassment to preserve and entrench the very culture it seeks to eliminate, especially when the existence of the law may prevent victims from taking further action and demanding serious responses.

Disturbingly, although in 2004 OCR found that many schools failed to comply with Title IX requirements, the Office merely sent reminder letters to those institutions not in compliance.[70] In fact, a school's Title IX violation has never actually led to the withdrawal of federal funds.[71] While OCR's expressions of commitment to addressing sexual harassment, like the Sexual Harassment Guidance mentioned above, facially demonstrate a commitment towards gender equality in schools, we risk allowing old discriminatory practices to manifest themselves in a new form due to the lack of adequate enforcement. Ultimately, it is not clear if *Davis* is a step forward or a step back.

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Professor Siegel's concept of "preservation through transformation" provides a useful template for evaluating Title IX's progress over its thirty-five years of existence. The *Harvard Journal of Law and Gender* Conference, *Changing Social Norms?: Title IX and Legal Activism*, brought together a variety of speakers, including academics, coaches, and Title IX advocates, in the hopes of parsing out whether or not the underlying gender inequalities have been preserved in new forms, or whether Title IX has made significant progress in changing underlying gender norms on school campuses. While the "preservation through transformation" theory is a useful tool, it is certainly not the only way to interpret Title IX's thirty-five years of

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[68] LEGAL MOMENTUM, *supra* note 52, at 4, 5.
[69] *Id.* at 5.
[70] *Id.* at 6.
[71] *Id.* at 5.

history. Through discussions by those in the field, the Journal hoped to examine whether Title IX's implementation has actually changed gender norms or whether it has merely changed the face of discrimination, allowing opponents to continue biased treatment of women by navigating through and around the legal requirements of the statute. In the end, because Title IX is a legal reform effort aimed at changing deep-seated understandings of how gender operates in an educational environment, and inevitably in society more broadly, careful consideration of its implementation is integral to guiding future legal agendas pertaining to gender equality. The Journal would like to extend its gratitude to all of the conference participants for contributing to the thoughtful remarks that follow.

Comments from the Spring 2007 *Harvard Journal of Law & Gender* Conference

Held at Harvard Law School

Edited and Abridged by Megan Ryan*

Opening Remarks by Conference Organizers, Alexis Kuznick and Megan Ryan

Even after thirty-five years in existence, Title IX is still widely misunderstood. We hope this Conference sheds some light on how Title IX is actually implemented in practice and how it has had an impact on people's lives. Inspired by Deborah Brake's article, "Revisiting Title IX's Feminist Legacy,"[1] we decided to focus on a larger theme for this conference; namely, examining whether or not Title IX makes substantive changes in social norms.

Introduction by Dean Elena Kagan

As you all know, it is the thirty-fifth anniversary of Title IX, and some of us in the room remember a world without Title IX and realize the great difference that it's made in women's lives. For example, Mr. Imus might continue to have his job had it not been for these changes. But there are more significant changes and differences as well, which you'll hear about today from two wonderful panels; the first on sexual harassment and sexual assault issues, and then the second on athletic issues and Title IX's impact on that field. So with that, I just want to thank you all for being here, and I hope you have a wonderful afternoon.

Panel 1: Title IX and Sexual Harassment/Sexual Assault

Speakers: Deborah Brake, Diane Rosenfeld, Holly Hogan, Baine Kerr, Linda J. Wharton, Verna Williams. Moderated by Deborah Brake.

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* J.D. 2008, Harvard Law School. This is an adapted version of the conference transcript, edited with the help of all the speakers. The hope is that the changes made, such as the addition of citations, will make the remarks all the more informative and insightful. The copy of the original, unedited transcript is on file with the editor, Megan Ryan.

[1] Deborah Brake, *Revisiting Title IX's Feminist Legacy: Moving Beyond the Three-Part Test,* 12 Am. U. J. Gender Soc. Pol'y & L. 453 (2004).

DEBORAH BRAKE[2]

Now, on the thirty-fifth anniversary of Title IX, it is a good time to think about some of the larger themes that have shaped Title IX's legacy these past three and a half decades, such as the connection between law and social change. It is a complicated relationship, as what looks like legal progress or law reform does not always translate into gains in social justice. Professor Reva Siegel has shed important light on the relationship between law reform and, in particular, antidiscrimination law and social stratification.[3] Her basic theory, which she terms "preservation through transformation," is that law reform and legal doctrine on discrimination law can often legitimize subordination because the subordinating practices can change shape to conform to the legal and social developments. In its new form, the subordinating practice can continue to enforce social stratification in its new, now legitimated form. By shape-shifting in response to legal doctrine, subordination can sneak beneath it.

Professor Siegel uses this paradigm to show how overt racial segregation has been replaced by new, legitimated practices and principles, including color-blindness and discriminatory intent requirements, which step in to sustain and preserve the prior stratification. In my own work, I have looked at "leveling down" as one phenomenon of preservation through transformation.[4] An example of leveling down in the Title IX context is where, instead of the girls getting new facilities and benefits, the boys' facilities are taken away. Leveling down is an example of preservation through transformation because it conforms to the anti-discriminatory standards of law. It is legal, it is legitimated, it is not "discriminatory;" yet it maintains the subordination by devaluing female athleticism and scapegoating women in sports. Law reform and social change have a complicated relationship, as further exemplified by the following examples:

First, although we have long discarded overt notions relying on women's reproductive roles to bar them from sports participation, recent reports have revealed widespread practices by universities requiring female athletes to give up their athletic scholarships if they become pregnant.[5] And I wonder, have we done enough to make sports work for women?

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[2] Professor of Law, University of Pittsburgh School of Law. J.D., Harvard Law School. Prior to teaching, Professor Brake worked at the National Women's Law Center.

[3] *See* Reva B. Siegel, *Discrimination in the Eyes of the Law: How "Color Blindness" Discourse Disrupts and Rationalizes Social Stratification*, 88 CAL. L. REV. 77 (2000); Reva B. Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111 (1997); Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117 (1996).

[4] Deborah L. Brake, *When Equality Leaves Everyone Worse Off: The Problem of Leveling Down in Equality Law*, 46 WM. & MARY L. REV. 513 (2004).

[5] *See, e.g.*, Associated Press, *Reports Prompt NCAA to Review Pregnant Athletes Policies*, ESPN.com, May 18, 2007, http://sports.espn.go.com/ncaa/news/story?id=2875521.

Second, Penn State's women's basketball coach resigned when she settled a lawsuit alleging that she had discriminated against lesbian players on the team. And while I am delighted that the issue was brought to light, I wonder, have we done enough to combat homophobia in women's sports?

Third, the Fourth Circuit *en banc* recently overturned a decision dismissing a sexual harassment lawsuit brought against the most winning women's soccer coach at UNC.[6] And while I am delighted that the district court's decision was overturned, I wonder still, are legal standards getting at the problem?

I will close my short remarks with a quote from Professor Martha Nussbaum, who reminds us that when we talk about social norms, we need to be careful not to overstate the case or we may lose our opportunities for creative action. "People are constrained by social norms," she states, "but norms are plural and people are devious."[7] It is an invitation to be devious, and I hope that is what we can do today in thinking about how to further social change through law.

DIANE ROSENFELD[8]

Good afternoon. We are at an important, encouraging moment in history, where actually Don Imus cannot say that the basketball team at Rutgers is a bunch of "nappy-headed hos;" that instead, the outcry was serious enough that he lost his position. But what I really want to look at is the sexualized violation of women in sports, because athletics is an important lens through which to look at gender issues in our culture.

Sport is a sub-culture within our country's culture of sexualized violence. Rape by athletes, specifically multi-perpetrator athlete rape, is a huge problem, as exemplified by books such as *Out of Bounds: Inside the NBA's Culture of Rape, Violence and Crime*.[9] This same sports culture intentionally sexualizes strong women athletes in order to degrade and objectify them. Finally, athletics in this country breed a sense of male entitlement that animates athlete violence against women and contributes to general violence against women on college campuses.

Title IX is intended to level the playing field for women in sports, but the lesser known provisions of Title IX have to do with sexual harassment and sexual assault.[10] For example, Title IX requires schools to have policies

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[6] Jennings v. Univ. of N.C., 482 F.3d 686 (4th Cir. 2007).

[7] MARTHA NUSSBAUM, SEX AND SOCIAL JUSTICE 14 (1999).

[8] Lecturer on Law, Harvard Law School. L.L.M., Harvard Law School; J.D., University of Wisconsin Law School. Ms. Rosenfeld formerly served as Senior Counsel to the Violence Against Women Office at the U.S. Department of Justice. She currently teaches courses on Gender Violence, Law and Social Justice, as well as a seminar on Title IX.

[9] JEFF BENEDICT, OUT OF BOUNDS: INSIDE THE NBA'S CULTURE OF RAPE, VIOLENCE AND CRIME (2004).

[10] Title IX, Education Amendments of 1972, 20 U.S.C. § 1681 (1972).

on campus sexual assault.[11] And the heart of Title IX is equal access to educational opportunities, which expands beyond athletics alone.[12] Without a commitment to addressing rape and sexual assault on campus, schools cannot truly provide equal access to educational opportunities for women. A rape-tolerant campus is not complying with Title IX's requirement of equal education opportunities.

The upside is that since schools operate like little universes, they can become sites for change by implementing rules and policies to combat rape and sexual assault on campus. Three policies are required: (1) mandatory preventative education, (2) survivor support services, and (3) prompt and equitable adjudication procedures for cases.[13]

As to the first policy, mandatory education programs, it is not specified what must be included. However, this opens the door to schools to set the norm that rape is absolutely not tolerated, and any finding of guilt will result in expulsion. Right now, however, I would say consequences at schools are insufficient. Part of the reason for this is that schools operate mostly out of fear of being sued by men accused of rape, but they are not afraid of being sued by the female victims demanding justice. We must change the balance, change the equation, and provide legal advocacy to victims against the schools in order to succeed.

The enforcement arm for complaints against schools is the Office of Civil Rights ("OCR") of the Department of Education, which enforces Title IX's campus sexual assault policies. Therefore, if someone has been injured or raped at school, and the school has done nothing, the victim can bring a complaint to OCR which is more accessible than private litigation and therefore a great way to force a change. Another enforcement tool is the Clery Act,[14] which requires schools to report crime levels on their campuses. A watchdog group, Security on Campus, monitors these reports to see how many rape cases schools have and how they have disposed of the rape cases.

The prevalence rate of campus sexual assault, not taking underreporting into account, is estimated at one in four women of college-age years, a stun-

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[11] Office For Civil Rights, Dep't Of Educ., Revised Sexual Harassment Guidance: Harassment Of Students By School Employees, Other Students, Or Third Parties 19 (Jan. 2001), *available at* http://www.ed.gov/about/offices/list/ocr/docs/shguide.pdf.

[12] Title IX states that, "no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681 (1972).

[13] *See* Office on Violence Against Women, Dep't of Justice, Grants to Reduce Domestic Violence, Dating Violence, Sexual Assault, and Stalking on Campus, *available at* http://www.ovw.usdoj.gov/campus_desc.htm (last visited May 19, 2008).

[14] Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, 20 U.S.C. § 1092(f) (2000) (requiring collection and reporting of statistics on crimes occurring on or near college campuses).

ning statistic.[15] It's a problem at every campus, and any school that reports no sexual assaults is not addressing them appropriately. Schools need to provide victims with a safe place to report and incentives to report, not incentives to stay silent.

Since sexual assault is particularly a problem in the sports world, as there have been many multi-perpetrator sexual assault cases involving athletes at so many different schools, I believe coaches should be required under Title IX to affirmatively address what's going on by proactively teaching their players about gender equality. They should confront and recognize as a reality that college athletics are contributing to this culture of sexual assault and rape.

In closing, we can change things through the use of Title IX. An example from Harvard University shows how enforcement tools like OCR can make a difference. Harvard's policy on sexual assault used to require independent corroboration for sexual assault claims before Harvard would investigate your case, a standard that is difficult to meet. A lawsuit was filed with the OCR claiming violation of Title IX, and as soon as they were under investigation, Harvard began to put in place important services such as the Office of Sexual Assault Prevention and Response to provide support services for survivors.[16] By increasing understanding of Title IX, what it requires and what it provides, we can clearly make improvements. There is so much strong potential within Title IX; with the right attitude, it's a great tool to create social change and to change the norms that prevent women from attaining equal access to educational opportunities. Thank you.

HOLLY HOGAN[17]

Like Diane, I have seen what Title IX can do, and it is a very important tool to combat the abundant rape and sexual assault on campuses. Diane told you that one in four women on college campuses will be the victim of rape and other forms of sexual assault.[18] Even more alarming is that women attending college are at a much higher risk for sexual assault than women in the same age bracket that are not attending college.[19] This goes completely

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[15] M.P. Koss, C.J. Gidycz & N. Wisniewski, *The Scope of Rape: Incidence and Prevalence of Sexual Aggression and Victimization Among a National Sample of Students in Higher Education,* 55 J. CONSULTING & CLINICAL PSYCHOL. 162 (1987).

[16] Harvard College, Office of Sexual Assault Prevention, http://www.fas.harvard.edu/~osapr/ (last visited May 19, 2008).

[17] J.D. 2005, Harvard Law School. Holly Hogan is currently an attorney at Kerr & Wagstaffe in San Francisco, CA. She has assisted attorneys representing plaintiffs in the Title IX lawsuit against the University of Colorado for rapes committed by football players, and college rape survivors through the Department of Education, Office for Civil Rights Title IX complaint process.

[18] ROBIN WARSHAW, I NEVER CALLED IT RAPE: THE MS. REPORT ON RECOGNIZING, FIGHTING, AND SURVIVING DATE AND ACQUAINTANCE RAPE 2 (1988).

[19] ATLA Annual Convention Reference Materials, *Crime on College Campuses: Institutional Liability for Acquaintance Rape,* 1 ANN. 2004 ATLA-CLE 499 (2004).

against the idea behind women going to college and having equal access to educational opportunities.

A common concern among rape survivors is that they are terrified to run into the perpetrator again. I worked with a rape survivor whose perpetrator was relocated to a different dorm hall while the investigation was pending, but since there was only one dining hall, she still saw him all the time. The school did nothing more to help, so what did she do? She stopped eating dinner, showcasing how rape victims are denied an equal educational experience. They stop going to classes he is in, stop participating in extracurricular activities where he might be seen; stop attending social events because he might be there. This, combined with rape trauma syndrome and the depression and anxiety that rape victims experience, certainly affects the victim's grades and educational experience.

When the school does nothing about sexual assault, it is essentially stepping into the shoes of the discriminator. What Title IX does is to require schools to deal with the fact that rape and sexual assault do happen on their campuses, recognize that they have a negative impact on the rape survivor's educational experience, and accept that they are ultimately affecting women's rights to equal opportunities in education. Title IX has an impact on forcing schools to deal with sexual assault, and hopefully reduces the incidences of sexual assault on college campuses as a result.

What does Title IX require of schools, and what can a student expect from their school as a result of Title IX? First, schools actually have to have sexual assault policies that allow for prompt and equitable resolution of complaints.[20] But they must do more than just have hollow policies; they must have responsive actions, such as conducting unbiased investigations about sexual assault on college campuses. It is surprising to hear what often happens to rape victims while a campus investigation is taking place, such as college investigators giving the perpetrator the opportunity to look at all the evidence the victim submitted without providing the victim the same opportunity. Schools must attempt to provide investigations free of a negative attitude towards the rape victim.

Schools also need to recognize that they cannot rely on the criminal justice system to take care of the discriminatory impact of rape on their campus. The criminal justice system is about society's interest in punishing and preventing recidivism. A campus administration, on the other hand, should be about controlling who is a part of the campus community and fixing the discriminatory impact that is being created by a rape or a sexual assault.

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[20] OFFICE FOR CIVIL RIGHTS, DEP'T OF EDUC., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES 19 (Jan. 2001), *available at* http://www.ed.gov/about/offices/list/ocr/docs/shguide.pdf.

While it is important for colleges to promptly respond to rape and sexual assault claims, the investigation process does take some time. This means schools must make reasonable accommodations to protect the victim, such as placing the perpetrator and rape survivor in different dorms and different classes. It means eliminating the discriminatory environment while the investigation is pending, and providing a fair hearing when the time comes. These requirements are very basic; it simply means treating both parties equally throughout the process.

If schools fail to provide these services, victims can take the private lawsuit route or go through the Office of Civil Rights complaint process. When notified of a possible violation, OCR will investigate the complaint for the student and will work with the school to try and get voluntary compliance. If that does not work, OCR will issue a findings letter describing the factual and legal basis for the violation. If the school still does not comply, OCR will either refer the case to the Department of Justice or will initiate an administrative enforcement proceeding that could cost the school its federal funds.[21]

Why do schools continue to violate women's rights in light of the fact that they can be held legally liable under Title IX? The answer could be that they are just not valuing female students as much as they value male students, particularly when that male student is an athlete who brings in a lot of money to the school. It could be the result of rape myths, such as believing that a girl who lets a boy into her dorm at eleven o'clock at night "was asking for it." It could simply be that schools view the campus disciplinary process as a criminal proceeding, and are bending over backwards to assist the perpetrator to guarantee that he does not sue them. Title IX is meant to counteract this last point by equaling out the litigation playing field, so that schools start to be equally afraid of the rape survivor suing them.

In conclusion, for Title IX to be more effective it needs to be utilized more often, essentially making schools more afraid of suits by rape survivors, and hopefully as a byproduct increasing the awareness of these issues on campuses. Each additional Title IX lawsuit and each additional OCR investigation makes it so that women have a better opportunity to have equal access to education. So there is hope for Title IX, it just needs to get used more to make schools really realize what they need to do when it comes to rape survivors.

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[21] *See OCR's Complaint Resolution Procedures*, http://www.ed.gov/about/offices/list/ocr/complaints-how.html (last visited May 19, 2008).

BAINE KERR[22]

Five years ago I was just a typical ignorant male lawyer; I did not know that Title IX provided a way to find institutional responsibility for sexual assaults. I had never handled a sexual assault case and didn't know anything about it. But then our firm took on the University of Colorado football player rape case, *Simpson v. University of Colorado.*[23] The central event in the case was that a student, Lisa Simpson, was brutally sexually assaulted by two recruits as players stood around cheering them on at a recruiting event. Seven women total were sexually assaulted or harassed in some form that recruiting weekend, including a female scholarship athlete who was raped and did not tell anyone until almost two years into the case proceedings. While the survivors were clearly traumatized, for the team it was almost a way to welcome the recruits. It was done to show the football recruits a "good time," so they would come to the university and continue the great football team. It is as if the rapes were simply in the pursuit of that goal.

Once the case was filed, it generated multiple parallel investigations and inquiries into the University of Colorado football program, including a law enforcement task force organized by the Colorado attorney general to investigate sexual crimes in the football program. There was a state audit of the football program's finances, which revealed they had been used for prostitutes to be sent to the hotel rooms of visiting high school recruits, among other things. Congressional hearings, national publicity, and a media firestorm followed close behind.

The topic here today is how Title IX can change social norms by making changes on the ground. At the University of Colorado, the president, chancellor, athletic director and football coach all lost their jobs as a result of this case. There were sweeping changes in campus policies, such as implementing much stricter football recruiting rules. There have even been some national changes, such as the NCAA creating a recruitment task force that has abolished, among other things, the practice of having female student escorts for visiting high school recruits at Division 1-A schools. These were all direct results of our case. In 2003, we had an all-day mediation with the magistrate judge, who said to the university, "you'd better start getting reasonable here, because I predict that this case is going to create a scandal that will dwarf the Air Force Academy scandal," which was going on at that time, "and there will be calls for legislative hearings and Congressional investigations and there may even be grand jurors." He essentially, like Cassandra predicting misfortune and doom, told the University of Colorado what was going to happen; but also like Cassandra, who was cursed by

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[22] J.D., University of Denver School of Law. Baine Kerr is an attorney at Hutchinson, Black & Cook LLC in Boulder, Colorado. He was the lead lawyer in Simpson v. Univ. of Colo. Boulder, 372 F. Supp. 2d 1229 (D. Colo. 2005).

[23] 372 F. Supp. 2d at 1229.

Apollo not to be believed, was completely ignored. And it all did come to pass, as shown by the changes made at the University of Colorado mentioned above. While we lost on a summary judgment motion at the district court level just a month before trial, we have appealed to the Tenth Circuit and hope to get the grant of summary judgment overturned.[24] Regardless, the changes on the ground caused by this lawsuit showcase how Title IX can be implemented to make real advances on college campuses. Our case continues to develop, and perjury investigations of Gary Barnett, the former coach, are underway, so things are hopping in our case, and we are hoping for the best.

LINDA WHARTON[25]

The ability of student victims of sexual harassment to bring and win money damages against schools under Title IX is a very important tool. This is especially true in times like these when the Office for Civil Rights' ("OCR")[26] enforcement of Title IX leaves much to be desired.[27]

The background here is that in the late 1990s, the Supreme Court held in *Gebser v. Lago Vista Independent School District*[28] and *Davis v. Monroe*

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[24] The Tenth Circuit did eventually overturn the grant of summary judgment and remanded the case. Simpson v. Univ. of Colo. Boulder, 500 F.3d 1170 (10th Cir. 2007). In December 2007 Lisa Simpson and the University of Colorado announced a $2.5 million settlement that also requires the University to hire Title IX advocate and law professor Nancy Hogshead-Makar for five years to serve as an independent Title IX advisor to monitor women's safety issues, including sexual harassment and assault, gender discrimination, and Title IX compliance; to conduct policy reviews and recommend policy changes to the Chancellor; and to advocate for students in sexual harassment proceedings. The settlement also requires a five year appointment by the University of a sexual assault prevention coordinator. Baine Kerr reports that early signs point to the non-monetary components of the settlement serving as models for Title IX dispute resolution nationally. AAUW, *LAF Plaintiff Settles Discrimination Suit with University of Colorado at Boulder for $2.5 Million* (Jan. 4, 2008).

[25] Associate Professor of Political Science, Richard Stockton College of New Jersey; J.D., Rutgers Law School. Prior to teaching, Professor Wharton was the managing attorney at the Women's Law Project in Philadelphia, and she currently serves as a consultant on issues of gender equity in education and is an active member of the Gender Equity Advisory Committee to the New Jersey Department of Education.

[26] The U.S. Department of Education's Office for Civil Rights has primary responsibility for enforcing and interpreting Title IX.

[27] *See, e.g.*, NAT'L WOMEN'S LAW CENTER, *Slip-Sliding Away: The Erosion of Hard-Won Gains for Women Under the Bush Administration and an Agenda for Moving Forward 5* (Apr.2004), (*available at* http://www.nwlc.org/pdf/AdminRecordOnWomen2004.pdf) (finding that the administration had "taken a number of steps backward" on polices that guarantee equal opportunity for girls and women at school, noting, for example, that the Department of Education had "archived a guidance on sexual harassment, making it unavailable to victims of harassment, parents, schools, and the public"); National Women's Law Center, *Barriers to Fair Play 2* (June 2007) (*available at* http://www.nwlc.org/details.cfm?id=3061&section=athletics) (finding that "OCR enforcement efforts fell short of the proactive steps necessary to ensure true gender equity in sports").

[28] 524 U.S. 274 (1998).

County Board of Education[29] that to recover damages in a private action against a school district for either teacher-student or peer sexual harassment, the plaintiff must show that the school had actual knowledge and then acted with deliberate indifference towards the harassment. The Court imposed a heavy burden on student victims of sexual harassment, refusing to hold schools accountable under the same standards that are applicable under Title VII in workplace harassment cases. Yet the Court also left open many questions about what this standard actually meant. How broadly or narrowly lower courts interpreted the Court's *Gebser/Davis* standard in future cases would greatly affect Title IX's effectiveness in this area. From the outset, there was a clear danger that courts would apply these standards so strictly as to exclude from liability all but the most egregious cases.

In the years since *Gebser* and *Davis*, the lower courts have had a lot of opportunities to apply and interpret these standards, and the bottom line is that the results are mixed. Some lower courts are broadly and generously applying the *Gebser/Davis* "actual knowledge and deliberate indifference" standard, but many have narrowly construed this standard and raised the bar disturbingly high for students, offering woefully little protection. The courts that have applied this narrow construction have done so in at least four aspects of the *Gebser/Davis* framework: (1) notice, (2) actual knowledge, (3) deliberate indifference, and (4) actionable harassment.

First, the *Gebser/Davis* standard requires that the student provide notice of the harassment to someone in the school district with authority to take corrective action.[30] Forcing a student to come forward and directly report sexual harassment is itself an onerous burden, but the additional burden here is that the notice has to go to a specific person, and who that person is was not resolved by the Supreme Court. The prevailing view among the lower courts is that, where the harasser is a teacher, notice to another teacher or a counselor is not adequate because they do not have authority over a colleague.[31] Some courts say that notice to a principal is adequate in these situations,[32] but others require notice to the superintendent or the school

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[29] 526 U.S. 629 (1999).

[30] *Gebser*, 524 U.S. at 277 ("damages may not be recovered . . . unless an official of the school district who at minimum has authority to institute corrective measures on the district's behalf, has actual notice of, and is deliberately indifferent to, the teacher's misconduct"). *See also Davis*, 526 U.S. at 633 (damages may be recovered in cases of student-on-student harassment only where the school district "acts with deliberate indifference to known acts of harassment in its programs or activities").

[31] *See, e.g.*, Warren ex rel. Good v. Reading Sch. Dist., 278 F.3d 163, 173–74 (3d Cir. 2002) (holding that a guidance counselor cannot be an "appropriate person" under *Gebser*); Miller v. Kentosh, No. Civ. A. 97-6541, 1998 WL 355520, at *7 (E.D. Pa. 1998) (holding that band instructors and teachers do not have "authority to take corrective action" under *Gebser*). *See also* Liu v. Striuli, 36 F. Supp. 2d 452, 466 (D.R.I. 1999) (holding that director of financial aid and director of graduate history department were not "appropriate officials" because they lacked authority over the alleged harasser).

[32] *Warren*, 278 F.3d at 171 (holding that "a school principal . . . will ordinarily be an 'appropriate person' under Title IX"); Morlock v. West Cent. Educ. Dist., 46 F. Supp. 2d

board itself.[33] Requiring notice to a principal, or even worse, some higher authority, obviously sets the bar very high for student victims of harassment. In other contexts, the law clearly imposes a duty on teachers to convey reports of harassment to higher authorities, so why isn't this the case under Title IX? Moreover, most courts have found that notice to a teacher *is* sufficient in peer sexual harassment cases because the teacher has supervisory authority over the student harasser,[34] leading to the anomalous result that a school district would be liable for a teacher's failure to remedy peer harassment but not teacher-student harassment.

The second issue is what constitutes "actual knowledge" of sexual harassment under the *Gebser/Davis* framework. What exactly does the school have to know to satisfy this requirement? A number of lower courts have held that the actual knowledge requirement is met if there is actual knowledge of a *substantial risk* of abuse to students based on prior complaints by other students, making notice of a harasser's sexual harassment of persons other than the plaintiff sufficient.[35] Other courts, however, have set the bar much higher, requiring that plaintiffs show that the school had actual knowledge of the specific harassment of the plaintiff.[36] In other words, knowledge

892, 908–09 (D. Minn. 1999) (holding that notice to school's "building principal," who also served as the official Title IX coordinator is sufficient).

[33] *See, e.g.*, Baynard v. Malone, 268 F.3d 228, 239 (4th Cir. 2001), *cert. denied*, 535 U.S. 954 (2002) (holding that a school principal "cannot be considered the functional equivalent of the school district," because a principal does not have the power to hire, fire, or suspend teachers); Floyd v. Waiters, 133 F.3d 786, 790–92 (11th Cir. 1998), *aff'd on reconsideration*, 171 F.3d 1264, 1264 (1999) (holding that notice to a superintendent is required); Rasnick v. Dickenson County Sch. Bd., 333 F. Supp. 2d 560, 566 (W.D. Va. 2004) ("while local superintendents . . . have somewhat greater authority than school principals, including the authority to temporarily suspend teachers, in the present case only the School Board could take[ ] the sole corrective measure that would have ultimately protected the plaintiffs from harm—removing [the perpetrator] as a teacher at the school").

[34] *See, e.g.*, Soriano ex rel. Garcia v. Bd. of Educ. of City of New York, 2004 WL 2397610 at *4 (E.D.N.Y. 2004) (assuming that complaint to teacher of harassment by peer was sufficient to place school on notice); Montgomery v. Indep. Sch. Dist. No. 709, 109 F. Supp. 2d 1081, 1099 (D. Minn. 2000) (holding that "because teachers ordinarily maintain at least some level of disciplinary control over their students, it is reasonable to infer that they had authority . . . to end the harassment"); *Morlock*, 46 F. Supp. 2d at 908 (holding that complaints to teachers count as notice to the school because teachers "had immediate responsibility over student discipline in their classrooms"); Murrell v. Denver Public Schs., 186 F.3d 1238, 1248 (10th Cir. 1999) (assuming that teachers constitute "appropriate persons" if "they exercised control over the harasser and the context in which the harassment occurred").

[35] *See, e.g.*, Johnson v. Galen Health Insts., Inc., 267 F. Supp. 2d 679, 688 (W.D. Ky. 2003) (finding that "the actual notice standard is met when an appropriate official has actual knowledge of a substantial risk of abuse to students based on prior complaints by other students"); Gordon v. Ottumwa Cmty. Sch. Dist., 115 F. Supp. 2d 1077, 1082 (S.D. Iowa 2000) (same).

[36] *See Baynard*, 268 F.3d at 238 (based on reports that sixth grade teacher had molested boys in the past and principal's observations of his inappropriate conduct with plaintiff, the principal "certainly should have been aware of the potential for abuse," but finding no liability under Title IX because there was no evidence that she was "in fact aware that a student was being abused"); Sherman *ex rel.* v. Helms, 80 F. Supp. 2d 1365,

of past behavior of the harasser towards other students is considered irrelevant, no matter how egregious. This narrow approach clearly undermines Title IX's objectives because it places no burden on schools to be proactive in identifying, monitoring and protecting students against abuse.

The plaintiff must also show that the school acted with "deliberate indifference to discrimination,"[37] but what level of effort counts as deliberate indifference is unclear. For example, if a school does something, but the response is ineffective, inept, inappropriate, and doesn't end the harassment, does this constitute deliberate indifference? A disturbingly high number of lower courts are interpreting the standard narrowly and would say no, letting schools off the hook when they do very little to address the harassment.[38] The better approach, and one that some courts are using, is more results-oriented and looks at whether the school's efforts were targeted at ending the harassment and whether the harassment did in fact stop.[39] Courts that adopt this approach seem to be moving closer to a Title VII standard that focuses on whether employers' actions are reasonably targeted at stopping the harassment.[40]

Finally, what constitutes actionable harassment under the *Gebser/Davis* framework? The majority in *Davis* held that to be actionable, peer sexual harassment must "be so severe, pervasive and objectively offensive that it can be said to deprive the victims of access to educational opportunities or benefits provided by the school."[41] This inquiry focuses on both the nature of the conduct and the impact on the victim. On the nature of the conduct,

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1371 (M.D. Ga. 2000) (holding that notice of harasser's abuse of students other than plaintiff is insufficient to establish actual notice).

[37] *Gebser*, 524 U.S. at 290. *See also Davis*, 526 U.S. at 648 (schools may be deemed deliberately indifferent to acts of student-on-student harassment only where their "response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances").

[38] *See, e.g.*, Rost v. Steamboat Springs RE-2 Sch. Dist., 511 F.3d 1114, 1121–24 (10th Cir. 2008) (finding no deliberate indifference where school contacted a police officer, but took no other action, against boys who coerced female student with learning disabilities into performing oral sex); Wills v. Brown Univ., 184 F.3d 20, 27–28 (1st Cir. 1999) (finding that "a reasonably firm reprimand" of a visiting professor who was allowed to remain on the faculty, although "remarkably inept", did not amount to deliberate indifference). *See also* Doe v. Dallas Indep. Sch. Dist., 220 F.3d 380 (5th Cir. 2000) (holding that actions and decisions by officials that are merely inept, erroneous, ineffective or negligent do not amount to deliberate indifference).

[39] Canty v. Old Rochester Reg'l Sch. Dist., 66 F. Supp. 2d 114, 116–17 (D. Mass. 1999) (holding that deliberate indifference turns on "whether the school takes timely and reasonable measures," including further steps if they prove inadequate) (quoting *Wills*, 184 F.3d at 25); *Morlock*, 46 F. Supp. 2d at 910 (finding that deliberate indifference can be established where the "school district took only minor steps to address harassment with the knowledge that such steps would be ineffective").

[40] *See, e.g.*, Ellison v. Brady, 924 F.2d 872, 881 (9th Cir. 1991) (holding employers liable for sexual harassment by coworkers when they knew or should of known of the harassment and failed to take prompt and appropriate corrective action "reasonably calculated to end the harassment") (*quoting* Katz v. Dole, 709 F.2d 251, 256 (4th Cir. 1983)). *Cf.* Faraher v. City of Boca Raton, 524 U.S. 775, 780 (1998) (holding that employers may be "vicariously liable for actionable discrimination caused by a supervisor")

[41] 526 U.S. at 650.

too many courts seem to require physical assault or physically threatening conduct of some kind, and will not accept humiliating conduct and sexual remarks as actionable harassment.[42] In peer harassment cases, some courts have even rejected sexual assault as insufficient because it occurred on *only* one occasion.[43] Some courts are also raising the bar high on the issue of what degree of impact on the victim is sufficient. For example, some courts refuse to find an actionable harassment, no matter how egregious the harassment, if the student cannot show concrete negative effects such as a decline in grades, or becoming homebound or hospitalized due to the harassment.[44] This is a much more onerous evidentiary burden than courts impose in workplace harassment cases.[45]

Without a doubt, these narrow interpretations of the *Gebser/Davis* standards are reducing Title IX's protections against sexual harassment to a mere shadow of what they were intended to be. Moving forward, what can we as scholars, as litigators, as advocates of Title IX do? Obviously the best protection is a strong Title IX that provides broad protection uniformly across the nation. One option, currently pending in Congress, is amending Title IX to clarify that it provides the same protection from harassment for students that employees receive under Title VII.[46] Also, in our advocacy and public education initiatives, we need to refocus attention on *why* sexual harassment is covered by Title IX. We need judges to move away from the idea that this is just "simple everyday teasing, an inescapable part of adolescence,"[47] and that schools are powerless to protect against it. We must instead emphasize the connection to sex discrimination, the harm of reinforcing subordinate sex roles, the power that sexual harassers wield, and the ability of schools to prevent sexual harassment. Finally, in view of the deficiencies in the protection currently afforded under Title IX, we need to consider state law reme-

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[42] *See* Jennings v. Univ. of N.C., 444 F.3d 255, 269–75 (4th Cir. 2006), *aff'd in part, vacated in part*, 482 F.3d 686, 695–700 (4th Cir. 2007) (en banc); Klemencic v. Ohio State Univ., 10 F. Supp. 2d 911 (S.D. Ohio 1998), *aff'd*, 263 F.3d 504 (6th Cir. 2001).

[43] *See* Ross v. Corporation of Mercer Univ., 506 F. Supp. 2d 1325, 1358 (M.D. Ga. 2007) (a "single incident [of rape], however traumatic to its victim, is not likely to be pervasive, or to have a systemic effect on educational activities"); Doe v. Dallas Indep. Sch. Dist., 2002 WL 1592694, at *6–7 (N.D. Tex. July 16, 2002) (single incident of forced manual penetration of victim's vagina does not qualify as "sufficiently severe one-on-one peer harassment").

[44] *See* Hawkins v. Sarasota County Sch. Bd., 322 F.3d 1279 (11th Cir. 2003) (where a second-grade boy sexually harassed his female classmates on a daily basis by gesturing to his genitals, telling girls to suck it, looking up their skirts, and trying to grope and grab them, the court held that since none of the girls suffered a decline in grades, none of their teachers observed any change in their demeanor or classroom participation, and they didn't tell their parents for months, they must not have been severely impacted and therefore there was no actionable harassment).

[45] *See* Harris v. Forklift Sys., 510 U.S. 17 (1993) (holding that tangible effects need not be shown to make out a case under Title VII).

[46] *See* The Civil Rights Act of 2008, S. 2554, 110th Cong. & H.R. 5129, 110th Cong. (2008).

[47] Davis, 526 U.S. at 675 (Kennedy, J., dissenting).

dies that may provide stronger protection for student victims of sexual harassment.[48]

VERNA WILLIAMS[49]

As the other panelists have already discussed, Title IX has fallen short when it comes to challenging gender norms enforced by sexual violence. I will examine what I see to be a couple of reasons for Title IX's failings.

When we started this struggle to develop a strong legal standard for sexual harassment, the tools we had at hand were a long line of cases developed in the context of Title VII.[50] We also had research demonstrating the prevalence of harassment in schools and the role that sexual harassment plays in limiting women's opportunities.[51] Finally, in 1992 the Supreme Court decided *Franklin v. Gwinnett County Public Schools*, which made damages available and included dicta stating that sexual harassment constitutes forbidden gender discrimination under Title IX.[52] After the Court's decision in *Franklin*, Title IX advocates urged the Department of Education to issue policy guidance that courts could defer to in analyzing sexual harassment cases brought under Title IX. Unfortunately, while the policy that ultimately came out was a good one, it wasn't issued until the Court had already granted certiorari in *Gebser*,[53] a factor that played a part in the standard that ultimately was articulated by the Supreme Court in that case.

In deciding *Gebser*,[54] the Court laid a faulty foundation that erroneously construed sexual harassment as an individualized harm rather than a systemic form of discrimination. At issue in the case was not just whether Title IX imposed *some* liability upon schools for teacher-student sexual harassment, but what standard should be applied. The Court had to decide whether to borrow from Title VII, where the law of sexual harassment had already been sufficiently developed, or look elsewhere. Claiming that the two stat-

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[48] *See* L.W. v. Toms River Regional Sch. Bd. of Educ., 915 A.2d 535 (N.J. 2007) (rejecting the *Gebser/Davis* standards in a student sexual harassment claim under the New Jersey Law Against Discrimination).

[49] Professor of Law, University of Cincinnati College of Law. J.D., Harvard Law School. Professor Williams was formerly the Vice President and Director of Educational Opportunities at the National Women's Law Center, where she focused on issues of gender equity in education. She was lead counsel and successfully argued before the United States Supreme Court in *Davis*, 526 U.S. 629 (1999).

[50] Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (2000).

[51] *See, e.g.*, BILLIE DZIECH & LINDA WEINER, THE LECHEROUS PROFESSOR: SEXUAL HARASSMENT ON CAMPUS (1990); JOHN LEWIS, SEXUAL HARASSMENT IN EDUCATION (1992); DAN H. WISHNIETSKY, SEXUAL HARASSMENT IN THE EDUCATIONAL ENVIRONMENT (1992).

[52] 503 U.S. 60, 75 (1992) ("Title IX placed on the Gwinnett County Public Schools the duty not to discriminate on the basis of sex, and 'when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex.'" (internal citation omitted)).

[53] 524 U.S. 274 (1998).

[54] *Id.*

utes were too distinct, the Court chose to craft a new standard for Title IX based on the statute's specific words and administrative enforcement scheme.[55] Instead of this formalistic approach, the Court should have looked to the underlying claim of sexual harassment to determine what standard would best serve Title IX's goal of eliminating sex-based barriers to education, a goal that is similar to that of Title VII. The Court should have recognized that sexual harassment in educational institutions, as in workplaces, is part of the machinery of oppression of female students and reinforces gender norms. While the Court understood this truth in the workplace environment, recognizing the myriad of ways that actions constraining gender norms can manifest themselves, it was seemingly blind to the social meaning of sexual harassment in the school context.

The choice of the Court in *Gebser* to expound a new standard, requiring actual knowledge and deliberate indifference, may have resulted from the way the case was framed. The crux of the complaint was the sexual abuse of Gebser, a female honor student, by her male teacher. It was never explicitly stated why the teacher's behavior and the school's weak response amounted to discrimination based on sex, and this led the Court to treat the case more as a child sexual abuse case instead of a sexual harassment case. Thus, instead of recognizing that harassment is a systemic barrier to education, just as it is to employment, the Court approached *Gebser* as a problem between individuals. Against this backdrop, *Gebser* was merely a tort action; the requirements for actual notice and deliberate indifference to hold the school board responsible actually seem to make sense.

With *Gebser* laying this faulty foundation, *Davis*[56] was a step in the right direction, despite its continued adherence to the high bar for institutional liability. Most likely, the fact that in *Davis* the harasser in question was a fellow student forced the Court to more fully examine the meaning of harassment in the Title IX context. As a result, *Davis* speaks more to sexual harassment as a barrier to educational opportunities, particularly to those not deemed traditionally female. For example, the Court found that damages would be appropriate when the misconduct "so undermine(s) and detract(s) from the victims' educational experience that the victim-students are effectively denied equal access to an institution's resources and opportunities."[57] Thus, *Davis* has become a counterpoint of sorts to *Gebser*, because it affirms the notion that the sexual harassment represents more than a mere tort between individuals. However, the underlying liability framework still remains a barrier to the promise of this cause of action.

In order to remedy the problems presented by the *Gebser/Davis* framework, I submit that Title IX advocates should focus more clearly upon examining and reckoning with the relationship between patriarchy and white

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[55] *Id.* at 286–88.
[56] 526 U.S. 629 (1999).
[57] *Id.* at 651.

supremacy that informs gender norms. One framework for doing this is social justice feminism.[58] While still undefined, the term re-emerged recently in connection with discussions around revitalizing the women's movement.[59] A consensus emerged around the need for the women's movement to focus on social justice feminism, and I am working with a colleague to come up with a concrete definition of the term. The basic concept revolves around improving the material condition of subordinated people's lives. More generally, it is about human rights and human dignity, and it seeks to dismantle the systems that impose "penalty and privilege" based on race, class, and similar systems of social injustice.[60] By moving towards the social justice feminism framework, perhaps the larger, systematic role of sexual harassment in sex discrimination will become clearer and lead courts away from the restrictive *Gebser/Davis* standard.

Panel 2: Title IX and Athletics

Speakers: Ellen Staurowsky, Terry Fromson, Roderick Jackson, Jocelyn Samuels, Nancy Lieberman. Moderated by Deborah Brake.

ELLEN STAUROWSKY[61]

We're here today talking about Title IX and the possibility of social change. I am coming at this issue as a sports sociologist, and I will be providing a non-legal perspective on the issue.

When we aspire to social change, we often meet a great deal of resistance. In the recent James Madison University case,[62] which I will discuss

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[58] As Kristin Kalsem and Verna Williams argue in a work in progress, feminist legal advocates have invoked this term to signal their desire to address the multiple oppressions affecting women and improve the material conditions of their lives. *See Social Justice Feminism* 22–28 (on file with Verna Williams).

[59] The Ford Foundation assembled a wide variety of women leaders to explore revitalizing the movement in response to report issued by the Center for the Advancement of Women. According to this report, women of color felt that there was a need for a strengthened women's movement to address their particular issues. The meetings, dubbed "The New Women's Movement Initiative," examined the implications of the report, and, in the process, identified social justice feminism as an organizing principle to focus the movement on better targeting issues confronting women who have been marginalized because of race, class, disability, among other things. *See* Linda Burnham, *The New Women's Movement Initiative* (Aug. 16, 2007), *available at* http://ms.foundation.org/user.assets/PDF/Program/NWMSummationFinalDraft.pdf.

[60] Patricia Hill Collins, BLACK SEXUAL POLITICS: AFRICAN AMERICANS, GENDER, AND THE NEW RACISM 3 (2005).

[61] Professor and Graduate Chair, Ithaca College Department of Sport Management and Media. Ed.D. in Sport Management, Temple University; MA in Sport Psychology/Teaching Pedagogy, Ithaca College.

[62] In September, 2006, James Madison University announced that it was cutting ten sports teams, seven men's (including track, swimming and wrestling) and three women's teams, claiming the plan was necessary to "bring the JMU Athletics program into compliance with Title IX." Press Release, James Madison University, JMU Enacts Propor-

today, we have resistance happening at a variety of levels. To set the stage for my remarks, I wish to begin with a quote from James Madison, who argued in 1822 that a necessity for a fully functioning citizenry in a democracy was access to reliable and complete information. Madison wrote, "[a] popular government without popular information or the means of acquiring it, is but a Prologue to a Farce or a Tragedy or both. Knowledge will forever govern ignorance, and a people who mean to be their own Governors, must arm themselves with the power which knowledge gives."[63] Madison's words seem prescient in light of the way this case unfolded and the resistance it has drawn. My purpose here is to examine the impact of limited information in creating a false impression of Title IX as a farcical piece of legislation that violates democratic principles of fairness and equity and the tragedy of doing so.

The issue at James Madison University started on September 29, 2006 when James Madison administrators announced a plan to cut ten sports out of their athletic program: seven men's sports and three women's sports. The institution explained these cuts as being in response to the fact that James Madison was not in compliance with any of the three standards of Title IX enforcement.[64] First, in terms of proportionality, the general student population was 61 percent female, whereas only 46.77 percent of athletes were female.[65] Second, in terms of the history of program expansion in female athletics, the last time they had added a female program was back in 2001 when they added softball. Finally, given the number of club sports, the administration felt that eventually there would be an appeal on the part of one of those club sports to come forward as a varsity sport. Therefore, they felt they would fail on all three prongs of the Title IX analysis.

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tionality Plan To Comply With Title IX (Sept. 28, 2006), http://www.jmu.edu/jmuweb/general/news/general7490.shtml.

[63] Letter from James Madison to W.T. Barry (Aug. 4, 1822).

[64] The Office of Civil Rights ("OCR") published a Policy Interpretation of Title IX that laid out the three factors used to assess whether an institution has been complying with Title IX:

> (1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
> (2) Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or
> (3) Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.

44 Fed. Reg. 239 (Dec. 11, 1979), *available at* http://www.ed.gov/about/offices/list/ocr/docs/t9interp.html.

[65] Press Release, James Madison University, *supra* note 62.

In representing the position of the institution, Andy Pettine, Vice President for Communications at James Madison University, commented, "we would not have [cut teams] if not for Title IX. There was just about no way we could add more women's programs and afford it and be in compliance."[66] Similarly, Charles King, Vice President of Finance and Administration at James Madison, in explaining the decision to employees wrote that, "we could not continue to be out of compliance with this important federal law, which requires institutions to have a percentage of varsity athletes that is about the same by ratio as the student body."[67] While these statements imply that James Madison had no choice but to cut these teams, we know that Title IX does not require that teams be cut in order to achieve compliance.[68] Further, the question is not what the University "could" afford but what it is *willing* to afford and why. Reinforcing that point, in the aftermath of James Madison's decision to cut the ten teams, Chad Colby from the Office of Civil Rights ("OCR") came forward to clarify the requirements under Title IX, stating, "we don't require teams to be eliminated or reduced. This is a disfavored practice, it's a discouraged practice."[69]

For those whose programs were cut and others following the case in the media, making sense of these competing claims is difficult. The question for me, as one of those people following the case in the media, was how did it come to pass that James Madison University, which was formerly an all-women's institution dedicated to the advancement of women's interests, come to have such a difficult time complying with Title IX? This question led me to ask, what's missing? Is there something else going on within this institution that may be affecting these cuts? These questions led me to explore James Madison University's athletic department financial data.

First, while Mr. Pettine had stated that there was no way James Madison could "afford" to add more women's programs, they were able to undertake the building of the $10 million Plecker Athletic Center during the timeframe in which program cuts were being considered.[70] Even though the project drew significant donations, they fell nearly $3 million short of their goal, and therefore had to dip into institutional reserves (i.e. tuition money paid by women and men) and other non-tax sources to support building a

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[66] *See* Elizabeth Redden, *Gender Equity or Finances*? Inside Higher Education (Oct. 3, 2006).

[67] Charles King, ADMINISTRATION & FINANCE NEWSLETTER (James Madison University, Harrisonburg, Va.), Nov. 2006, at 2, *available at* http://www.jmu.edu/adminfinance/news/wm_library/November2006.pdf.

[68] Terry Fromson & Carol Tracy, Testimony Before the Commission on Opportunity in Athletics of the U.S. Secretary of Education by the Women's Law Project, Nov. 29, 2002, at 13 (Title IX's "three-part test does not mandate a quota for schools to follow, nor does it require that schools cut men's teams in order to be in compliance with Title IX").

[69] Tim Lemke, *Group Protests Title IX*, WASH. TIMES, Nov. 3, 2006, at C1.

[70] Plecker Athletic Center, opened in spring 2005, contains mostly facilities for the varsity football team and other varsity sports. More information on this can be found at http://www.jmu.edu/development/needs/pleckerctr.shtml.

facility that was primarily meant to support the football team.[71] Second, information provided in compliance with the Equity in Athletics Disclosure Act ("EADA") for the 2005–2006 academic year revealed that James Madison football created a deficit of $800,000, whereas the overall cuts produced by those ten teams resulted in the recovery of approximately $550,000.[72] Based on this information, the institution's level of tolerance for program deficits was contingent on the program. In effect, James Madison tolerated deficits for certain teams but not for others. Third, over eighty-five percent of James Madison's athletic budget comes directly from student fees (sixty-one percent at the time being paid by female students).[73] Finally, in comparison with the average NCAA Division I-AA school, James Madison was investing more of its resources in football (thirty-three percent of their total budget compared to twenty-seven percent on average for other programs).[74]

This distribution of resources is consistent with a larger national trend where more and more of the resources available for men's programs are being used to support so-called "revenue generators" such as football and basketball. On average, almost seventy-five percent of the budget expenditures are being devoted to those sports with about twenty-five percent being used to cover all other men's sports. As a result, this economic model is squeezing out men's sports that are not revenue generators.[75] It should be noted that, as pointed out above, at James Madison the football program was carrying an $800,000 deficit in 2005–2006.[76] Men's basketball also carried a deficit of $70,000 while women's basketball, in contrast, reported a profit of over $90,000.[77]

The assertion that Title IX was responsible for the elimination of programs at James Madison obscures the reality that those cuts were the result of a corporate restructuring process within the athletic department rather than about Title IX compliance."[78] Evidence to support such a conclusion is revealed in the fact that the Colonial Athletic Association, the conference that James Madison is a member of, was beginning a new football confer-

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[71] Press Release, James Madison University, Suntrust Bank Donates $100,000 for JMU Athletic Center (Dec. 15, 2003), *available at* http://web.jmu.edu/mediarel/PRthisRelease.asp?AutoID=333.

[72] James Madison University Equity in Athletics Disclosure Report 2005–2006, *available at* http://ope.ed.gov/athletics/.

[73] Mark Alesia, NCAA Financial Reports Database 2004–2005 (2006), *available at* http://www2.indystar.com/NCAA_financial_reports/.

[74] NCAA Division IAA Equity in Athletics Disclosure Reports 2005–2006, *available at* http://ope.ed.gov/athletics/.

[75] Donna Lopiano, James Madison University and Title IX: Myths and Facts (2006), *available at* http://www.womenssportsfoundation.org/cgi-bin/iowa/issues/disc/article.html?record=1158.

[76] James Madison Equity in Athletics Disclosure Act Report 2005–2006, *available at* http://ope.ed.gov/athletics/.

[77] *Id.*

[78] *See* Bill Pennington, *At James Madison, Title IX Is Satisfied, but the Students Are Not*, N.Y. Times, Oct. 7, 2006, at D1.

ence for the fall of 2007; surely, this factored into James Madison's choices. Further, for a smaller NCAA Division IAA athletic program with a modest budget of $21 million (compared to, say, Ohio State with a budget of $104.7 million), other economic realities of the big-time college football market such as athletic costs rising at rates higher than inflation without an ability to rein them in would also be a consideration.[79] In combination, these factors contribute to the scenario that developed at James Madison where more money was going towards football and men's basketball, less money was being spent on other men's sports, and there remained inequalities in women's sports that had gone unaddressed.

The importance of understanding the distinction between downsizing in athletic programs to accommodate the demands of the ever expanding commercial interests of college sport versus Title IX compliance efforts lies in the insight it provides relative to the relief sought by those who suffer program losses. Whereas the James Madison case became a symbol of "Title IX run amuck," the positioning of the university to participate in a more competitive football conference clearly contributed to the decisions made in reallocating resources and streamlining their program. The nuances involved in this case provide insight regarding the political ease with which Title IX becomes the culprit all too often in explaining restructuring decisions where women's athletic programs either gain nothing from the events that unfold or where women's sports are cast in the role of economic dependents who have little value of their own. By sorting through these issues, the source of the cuts in men's programs resides with the draining of resources away from men's minor sport programs into the men's revenue producers, which does not fall under Title IX's purview.

At the same time, calls for Title IX reform emanating from those alleging male harm perpetuate the very sex discriminatory stereotypes that prompted the passage of the legislation to begin with. In the aftermath of JMU's announcement, an organization called Equity in Athletics, Inc. ("EIA"), a group representing the aggrieved JMU athletes, brought suit against the U.S. Department of Education and James Madison University.[80] In their complaint, EIA argued, in part, that the three part test of Title IX compliance should be set aside because women inherently have less interest in participating in sport than men.[81] These assertions surely do not respect the interests of the women who were on the three women's teams that were cut at James Madison, the two-thirds of women surveyed by James Madison who had participated in high school sports, the female members of club teams that had not been granted varsity status, or perhaps most significantly, the majority of women students on the JMU campus who were proportion-

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[79] *See* Steve Wieberg & Kelly Whiteside, *Why Bigger is Better at Ohio State,* USA TODAY, Jan. 23, 2007.

[80] Equity in Athletics, Inc. v. Dep't of Educ., 504 F. Supp. 2d 88 (W.D. Va. 2007).

[81] *Id.*

ally contributing more to the athletic department through student fees and the bailout required to cover the costs of building the Plecker Athletic Center.[82]

In the end, colleges and universities reserve the authority to determine priorities that best serve their interests. At the same time they have an obligation to avoid misleading the public about their motives for doing so. Recognizing the role of misinformation in controversies that erupt over the distribution of resources within athletic programs is helpful in holding institutional decision makers accountable while also appreciating where remedies may lie for those affected by program cuts. The power to resolve these issues does not rest in calls to reform Title IX but in efforts to educate the masses as to its requirements.

TERRY FROMSON[83]

I was in high school before Title IX, and I can tell you unequivocally, things are a whole lot better now. I have no memory of women being treated as serious athletes back then, and even though there may not be gender equity in sports, female athletes are at least taken more seriously today. Having said that, there are still many opportunities for institutions to evade equity requirements in sports. While enormous progress has been made in changing people's attitudes about female athletes, there is still much more to be done. I will focus on two specific issues facing female athletes today: (1) the experiences of the students, parents and coaches that are at the core of Title IX activism in athletics, and (2) the data itself.

First, it is important to recognize what student-athletes experience as Title IX activists and litigants and how it affects their parents and coaches. As advocates for these students, it is important to consider how we can continue to make the process easier for them, and hopefully make it more possible for activism to occur. Since courts provide the most visible arena for Title IX activism, bringing about athletic equity relies on student athletes to act as plaintiffs in those cases. Thanks to the efforts of student-athletes in the early 1990's, who set the legal precedent we rely on today, results can now be achieved much more quickly. For example, the Brown University student-athletes who were the plaintiffs in *Cohen v. Brown University*[84] had to endure many years of litigation to obtain conclusive results. The important role played by precedent is illustrated by the case of *Choike v. Slippery*

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[82] JAMES MADISON OFFICE OF INSTITUTIONAL RESEARCH, SURVEY OF STUDENT INTERESTS IN ATHLETICS, FITNESS, AND SPORTS ACTIVITIES (2000), *available at* www.jmu.edu/instresrch/resrchstud/Athletics/Report%202000.pdf.

[83] Managing Attorney at the Women's Law Project, Philadelphia. Ms. Fromson was co-counsel for the plaintiffs in *Choike v. Slippery Rock Univ. of Pa.*, 2007 U.S. Dist. LEXIS 57774 (W.D. Pa. 2007).

[84] 809 F. Supp. 978 (D.R.I. 1992); 991 F.2d 888, (1st Cir. 1993) ("Cohen I"); 101 F.3d 155 (1st Cir. 1996). ("Cohen II"), *cert. denied*, 520 U.S. 1186 (1997).

Rock University,[85] a case in which the Women's Law Project represented the plaintiffs. In *Slippery Rock,* we represented a group of field hockey, women's swimming, and women's water polo players whose teams were cut in January of 2006.[86] The school voluntarily reinstated the field hockey team after we sent a demand later. Within ten months' of filing the action, the parties had entered into a comprehensive settlement that addresses proportionality and treatment concerns going forward. In the world of litigation, this is an incredibly fast pace. Without the established precedents created by the courageous efforts of those who came before, it could not have been done.

It is important to recognize just how challenging it is to be a plaintiff in a lawsuit while in high school or college. First is the question of whether students are aware of their rights under Title IX. Then there is time commitment that litigation requires. Student-athletes have a grueling schedule to begin with, filled with training and competitions as well as keeping up with their classes, so finding the time to dedicate to litigation is no small feat. On top of this, litigation is not always pleasant: our clients have faced retaliation, isolation from their peers, and disparagement. These challenges are multifold for middle and high school students. It is not an easy process, so it is no surprise that even with the level of noncompliance that exists that we do not have more litigation.

What can we do short of litigation to bring schools into compliance? One avenue is to file a complaint with the Office of Civil Rights ("OCR") of the Department of Education, which is authorized to enforce Title IX.[87] Anyone can file such a complaint, not just a student. Filing a complaint will result in an investigation and possibly a positive outcome. Alternatively, the filing of an OCR complaint and investigation can lay the foundation for further negotiations outside of the OCR process.

Another way is to encourage and assist parents to take an active role in addressing athletic inequities in the schools their children attend. I have provided assistance to a number of parents who have discovered that schools are shortchanging their daughters. One high school refused to add a volleyball team for the female students despite the fact that the girls were significantly underrepresented in the athletic opportunities provided and demonstrated a strong interest in volleyball. A middle school provided each of the three boys' grades with their own soccer team but offered no soccer opportunities at all to the girls. The schools may not have understood their obligations under Title IX. By educating the parents, the parents were able to educate the schools and accomplish their goal of expanding opportunities for girls. In each of these cases I helped the parents understand Title IX and

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[85] 2007 U.S. Dist. LEXIS 57774.

[86] *Id.* at *2–*3.

[87] *See* OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., REGULATIONS ENFORCED BY THE OFFICE FOR CIVIL RIGHTS, *available at* http://www.ed.gov/policy/rights/reg/ocr/index.html (last visited May 19, 2008).

collect and analyze data and then develop a strategy to achieve their goal. There are lots of things they can do—write to their principal and school board, make presentations at school board meetings, submit petitions signed by parents and students, involve the community and the media. Without entering the courtroom, the parents succeeded in getting their school districts to add volleyball and soccer. In secondary school districts, parents can play an invaluable role in making equality happen.

Finally, the Equity in Athletic Disclosures Act ("EADA")[88] annual reports provide invaluable data regarding Title IX compliance of colleges. The Women's Law Project has used the EADA reports to educate ourselves and the public and to evaluate compliance in individual educational institutions. In 2003, we studied the annual reports of 112 Pennsylvania colleges and universities in order to gauge the level of compliance among Pennsylvania's schools. We learned that more than half of those schools underserved women by more than ten percent in athletic opportunities,[89] and that, on average, sixty cents was spent on female athletes for every dollar spent on male athletes.[90] As a result of publishing this report, we have heard from students who want to bring their schools into compliance.

A word of caution about the data reported by schools is necessary, however. The data should not be accepted on its face if it shows that a school is in compliance. EADA reports are not audited. We and other Title IX advocates have learned that EADA reports may not accurately report actual athletic participation as defined by Title IX.[91] Schools may be reporting a capped number for their male teams that does not count all athletes who actually receive coaching on a regular basis throughout the year and thus undercount male athletic participation. On the women's side, reported participation numbers may reflect a higher than appropriate squad level that overstates the true level of regular participation. The bottom line is that while the EADA provides important information, it is important to look beneath the numbers, examine team rosters (often posted online) over time as

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[88] 20 U.S.C. § 1092(g) (2000).

[89] WOMEN'S LAW PROJECT, GENDER EQUITY IN INTERCOLLEGIATE ATHLETICS: WHERE DOES PENNSYLVANIA STAND? 26 (Nov. 2005), *available at* http://www.womenslawproject.org/reports/GenderEquityNov05.pdf.

[90] *Id.* at 24.

[91] Title IX defines "participant" as athletes:

> a) Who are receiving the institutionally-sponsored support normally provided to athletes competing at the institution involved, e.g., coaching, equipment, medical and training room services, on a regular basis during a sport's season; and
> b) Who are participating in organized practice sessions and other team meetings and activities on a regular basis during a sport's season; and
> c) Who are listed on the eligibility or squad lists maintained for each sport, or
> d) Who, because of injury, cannot meet a, b, or c above but continue to receive financial aid on the basis of athletic ability.

Office for Civil Rights, Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test (Jan. 16, 1996), *available at* http://www.ed.gov/print/about/offices/list/ocr/docs/clarific.html.

well as competition results, and talk to students to determine whether a school is actually in compliance or not.

RODERICK JACKSON[92]

I will be discussing the facts of my case, *Jackson v. Birmingham Board of Education.* From there I will address my perception, as a plaintiff, of the overall judicial system, and whether I feel that my rights were truly vindicated in the process.

The case began in 1999 when I was hired as the girl's basketball coach at Jackson-Olin High School in Birmingham. Immediately upon arrival, I noticed some discrepancies in the way my team was treated in comparison with the boys' team. It was affecting the performance of my team, and I realized that if I did not say something, I would be shortchanging the student-athletes that I was charged with teaching and coaching. I went to my athletic director to bring these discrepancies to his attention, hoping that would get things corrected. Unfortunately, the athletic director happened to double as the boys' basketball coach, so needless to say he was not too helpful. Next, I went to the school principal, but she was surprisingly indifferent. I talked to the man who had coached the team before me, and his response was, "that's just the way it was." I was not deterred; I believed that abandoning my cause would have been the same as participating or engaging in the discrimination.

What followed was a long stream of grievance hearings, but my legal team and I persevered.[93] We went to the court system and lost at the district court level in Birmingham[94], and we appealed to the Eleventh Circuit.[95] At this point, I decided to change gears and appear *pro se* before the Eleventh Circuit. Unfortunately, you know what they say about a person who represents himself: he has a fool for a client. I went up against some fine lawyers, and I lost. I was about to give up, as I did not know much about what it took to get a case to the Supreme Court. This is when I got calls from the National Women's Law Center and the Southern Poverty Law Center, and the National Women's Law Center wound up representing my appeal to the Supreme Court. We were lucky enough to be granted certiorari, and Walter Dellinger of O'Melveny & Myers argued the case along with Marcia Greenberger, co-president of the National Women's Law Center. After the deci-

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[92] High school girl's basketball coach and plaintiff in the case *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005).

[93] Under Title IX, schools must provide internal grievance procedures to determine whether a particular act, policy, or practice of a recipient complies with Title IX regulations, and provide steps necessary to correct any that do not comply. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 65 Fed. Reg. 52867 (Aug. 30, 2000).

[94] Jackson v. Birmingham Bd. of Educ., 2002 U.S. Dist. LEXIS 27596 (D. Ala. 2002).

[95] Jackson v. Birmingham Bd. of Educ., 309 F.3d 1333 (11th Cir. 2002).

sion came down in March of 2005 that we had won the case, it was a great feeling.

Before the Supreme Court's decision, however, I was a layperson losing faith in the system. At the district court and appellate court levels, the judicial system did not allow me to speak up on behalf of my athletes, and the argument was that I did not have standing since I was not a part of the group being discriminated against. This argument never made sense to me, for as their coach, I experienced all the discrimination right alongside the students. When the girls were forced to practice in the cold, unheated gym, I was there. The effect of the conditions on their win-loss record concerned me and my career just as much as it concerned the athletes. Therefore, while I do think we have a system that *can* be used to get results, it is not perfect and someone in my position should not have had to go all the way to the Supreme Court to get results.

I will say that being in the hallowed halls of the Supreme Court, sitting their watching the Justices, was truly an amazing experience that I would not give up. I had no idea that my journey for more gym time, for equal access to an ice machine, and for relief from other simple discrepancies would actually turn into a Supreme Court case. While my case certainly provides a good example, these problems are still out there. Discussions of Title IX tend to focus on universities, but this discrimination is rampant at high schools. The girls' teams are getting the old fields, the old gyms, and it is not right. We need to continue to work on fixing the situation. Therefore, when other groups experiencing the unequal treatment that I experienced ask me to come speak with them, I go in a hurry; at the end of the day, continuing to work towards equal treatment for female athletes is what matters.

JOCELYN SAMUELS[96]

It is truly an honor to be here today, with all of these people who are tremendous advocates and thinkers. While listening to the other speakers, I have been thinking about the question that Deborah Brake posed at the outset: can Title IX change social norms? Can we use the law to change behavior, change expectations, and promote social justice? While I am not an academic, I think that the law can work in these ways. But often for every step forward it feels like there are two steps back. One of the problems Title IX confronts is that law can be slow in producing social change under any circumstances, since litigation often takes years, as we saw in Roderick Jackson's case. And what is particularly damaging to Title IX is the level of backlash it has produced, particularly with regard to athletics. This backlash seems to be premised on two flawed notions: (1) women are inherently and

[96] J.D., Columbia University School of Law. Ms. Samuels is Vice President for Education and Employment at the National Women's Law Center.

biologically less interested in participating in sports than men, and (2) providing women equal opportunities automatically takes away spots from men.

The second notion is not the necessary construct because athletics doesn't have to be a zero-sum game; you can accommodate more students' interests if you find ways to cut costs in other areas. Unfortunately, universities have helped perpetuate this notion by blaming Title IX for some decisions to cut male teams. The first construct is perpetuated by the fact that men typically will express more interest in sports than women. Rather than being proof of some sort of inherent lack of interest on the part of women, we view this as merely a result of the exposure to sports men have been able to get over time. Since women often have not had the same athletic opportunities that men have had, it makes sense that fewer of them express interest in sports teams. In addition, if students see the women's soccer team has old equipment and undesirable practice times, the women on campus are less likely to be interested in asking for a volleyball team that will most likely have similar limitations. Therefore the lack of expression of interest should be seen as a result of past and current unequal treatment, not as an example of women's inherent and biological lack of interest in sports. Unfortunately, today it is used as just that, as currently the Department of Education allows schools to use e-mail surveys to determine whether female students want more opportunities to play sports.[97]

In March 2005, the OCR released a clarification, on a Friday afternoon no less, "clarifying" the use of surveys in the third part of the three-part test that the OCR allows schools to use to determine whether the school is compliant with Title IX's requirements for equal participation opportunities.[98] The third part of the tests finds a school in compliance with Title IX if it is "fully and effectively accommodating the athletic interests and abilities of its students who are underrepresented in its current varsity athletic program offerings."[99] The clarification basically stated that when schools need to prove that they are "accommodating the athletic interests" of their female students, they can simply send an e-mail survey asking them if they want more opportunities to play sports. If these female students, who are bombarded with emails daily, choose not to respond for whatever reason, the

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[97] Office for Civil Rights, Additional Clarification of Intercollegiate Athletics Policy: Three-Part Test—Part Three (Mar. 17, 2005), http://www.ed.gov/about/offices/list/ocr/docs/title9guidanceadditional.html.

[98] *Id.* OCR has determined that schools can be considered compliant if they meet any one part of the following three-part test:

> (1) the percent of male and female athletes is substantially proportionate to the percent of male and female students enrolled at the school; or (2) the school has a history and continuing practice of expanding participation opportunities for the underrepresented sex; or (3) the school is fully and effectively accommodating the interests and abilities of the underrepresented sex.

Id. Because the third part of the test relies on student interests, the question of how to measure those interests has been controversial.

[99] *Id.*

school can count that as evidence that women are not interested. Combined with the problems of expression of interest explained above, this system puts a huge burden on female students to *justify* equal treatment. When the Nineteenth Amendment was passed guaranteeing women the right to vote, there was no poll to make sure they were sufficiently "interested"—it was just seen as the right thing to do. Requiring women to prove their interests in equal treatment before you offer it to them is a deeply troubling approach from a philosophical perspective.

Unfortunately, the 2005 Clarification is still in effect. It is hard to undo because OCR implemented it unilaterally, did not provide opportunity for comment, and did not explain the very complicated document, so getting people to understand it and focus on fighting it has been very hard. We have also dealt with opposition from a group called Equity in Athletics, which is comprised largely of male wrestlers and wrestling coaches, that has sued the Department of Education claiming that a policy requiring equal opportunities for women is discriminatory and violates Title IX and the Constitution. They have also threatened to sue James Madison University if they go through with their decision, which Ellen Staurowsky discussed earlier, to cut some male sports teams. In addition, the so-called United States Commission on Civil Rights will soon be holding a hearing on implementation of the new 2005 policy. However, this is a commission that has released reports advocating moves like outlawing affirmative action in all schools, so that gives you a sense about the composition of this panel.

To reiterate, it is clear that we gain victories only to have attempts made to roll them back a bit. What can we do to stem the tide and try to make more progress? One choice is litigation. Clients like Coach Jackson and the *Slippery Rock* plaintiffs, who are willing to come forward and put themselves on the line, are an invaluable element. Lawyers like Baine Kerr who are willing to represent these plaintiffs are also really important to this cause. A second choice is looking for legislative solutions, and this is a significant portion of what we at the National Women's Law Center are trying to do in Washington. The success of these solutions obviously varies depending on the current make-up of Congress. When Congress is sympathetic to the cause, using the legislature to get legislation passed can be extremely valuable, whether it's to overturn bad policies, extend the law, or simply exercise oversight. A third strategy is a kind of grassroots and public education strategy, where individuals are urged to both inform themselves about what Title IX demands and work in their communities to make sure that schools are in fact abiding by it. I would urge you all to both participate in spreading and being a member of this movement, whether by writing letters, signing petitions, or simply looking into the compliance level at your own school. This strategy has surprising power, because one of the things that has enabled us to defeat public attacks on Title IX in the past is the perception that the public supports both Title IX and a fair interpretation of it. We rely on people like you to make that message loud and clear.

NANCY LIEBERMAN[100]

What Jocelyn Samuels has said is very true. You have to be educated in order to understand Title IX and understand your rights under the law. I speak on campuses all the time, and it is surprising how many people do not even know what Title IX is. We cannot fight for our rights or expect things to happen on the Hill in Washington if those affected by the law are not educated about it.

I myself am a product of Title IX. I grew up in a poor, one-parent family in New York City, and basketball was what changed my life. It gave me the opportunity to compete, to grow into a strong and confident woman, and to play for Pat Summitt. I was given the opportunity to be the first female scholarship athlete at Old Dominion University. Clearly, Title IX directly affected my life in a positive way, and therefore I think it is important that students learn about Title IX's uses so that they too can benefit from it.

The problem is that the increasing focus on football and men's basketball at universities has meant that women's sports and Olympic-type men's sports are pitted against each other to fight over the remaining opportunities. It is not that Title IX takes opportunities away from men in sports; it is that sports like football are taking opportunities away from *both* more minor men's sports *and* women's sports. For example, when the University of Nebraska's men's football team went down to Miami for the Orange Bowl, they made sure to bring everything, including their own weight-training equipment on eighteen-wheelers, with them at a cost of $300,000.[101] That money not only could have funded women's program, but could have been used to fund men's minor sports at the University of Nebraska.

There is a myth perpetuated that men's football funds all other sports, but they are not the golden goose. One-third of all men's Division 1-A football programs lose in excess of one million dollars a year.[102] Those programs certainly aren't funding other sports if they can't even fund themselves. If you put money into women's athletics, the teams will suc-

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[100] An accomplished Basketball Hall of Famer, coach, two-time Olympian, broadcaster, and writer. Ms. Lieberman has provided commentary for ABC, ESPN, NBC, NBA-TV, and is a contributing writer to the Dallas Morning News, the New York Times, and USA Today. She is currently a full-time analyst with ESPN for men's and women's college basketball.

[101] For other examples of such spending, see NAT'L WOMEN'S LAW CTR., DEBUNKING THE MYTHS ABOUT TITLE IX AND ATHLETICS (2007), at 2, *available at* http://www.nwlc.org/pdf/Debunking%20Myths%20June%2007.pdf. The list of facts points to the hundreds of thousands of dollars spent on chartered jets for football teams, and the $3.2 million spent on equipping the University of Oregon's men's locker rooms with everything from plasma TVs to Xboxes. *Id.*

[102] *Id.* (pointing out that a 2005 study showed that almost half of Division 1-A football programs "do not generate enough revenue to pay for themselves, much less any other sports," and found that "these programs reported annual deficits averaging about $1 million").

ceed. At Old Dominion, when I played there and we won two national championships, we routinely outdrew the men's team. We were lucky enough to have an athletic director willing to put money into the women's program, and he saw the benefits of it. There are certainly allies out there working for us. In the early 1980s, NBA Commissioner David Stern told me that before he left the post of Commissioner of the NBA he would make sure we had a WNBA. He did not want it to be just another women's team in a league, he wanted it to be the fifth major sport. True to his word, David Stern started the WNBA in 1997, and I had a chance to be a part of it even though it was at the end of my career. To succeed, however, women's athletics need support. How many people in this room have a season ticket to Harvard women's basketball? We have to help build these brands if we want leagues like the WNBA to succeed as a business.

Title IX is about educational opportunities for women. It is about giving them a chance to excel, to feel good about themselves and to become confident. We must all work together to provide these opportunities for women, as there are a lot of different pieces to this puzzle. It takes a combination of advocacy, legal work, data collection and research. This conference, this panel, this discussion—it is all very important. However, discussing the problems of Title IX in here and voicing our different opinions is not going to cut it. If we want change, we need to start working together, even if we do not fully agree with each other. Every day there are people in Washington D.C. that are attempting to rescind Title IX, so we cannot get too comfortable. We must never be satisfied, and we must want more and expect more so that future generations can continue to benefit from Title IX. Thank you.

Concluding Remarks

Diane L. Rosenfeld*

I. Identifying Forms of Resistance to Title IX and Developing Strategies to Overcome Them

The 2007 *Harvard Journal of Law & Gender Conference* "Changing Social Norms? Title IX and Legal Activism," was an opportunity for educators, activists, lawyers, coaches, and players to convene and assess both the progress made toward achieving gender equality under Title IX, as well as the obstacles that remain. Conference panelists identified various ways in which educational institutions have practiced "preservation through transformation," as described by Professor Reva Siegel,[1] to maintain the status quo of gender inequality in the face of Title IX civil rights legislation intended to eliminate it.

Three distinct issues emerged at the Conference. The first involved the problem of when schools try to avoid Title IX compliance by miscounting athletic interest and participation in a way that allows them to promote traditional men's sports, such as football, while simultaneously refusing to add women's sports.[2] This counting problem is an example of preservation through transformation in which schools use numbers as justificatory rhetoric to reflect women's presumed disinterest in sports, in order to privilege and protect traditional male sports such as football.

The second issue was how to deal with the stringent standards imposed on victims bringing Title IX cases against educational institutions for sexual

* Lecturer on Law, Harvard Law School. The author would like to thank Lisa Cloutier, Mark Egerman, Terry Fisher, Sheila Gogate, Lam Ho, Holly Hogan, Julianne Johnston, Baine Kerr, Maura Klugman, Alexis Kuznick, Sandra Pullman, Meagan Rasch-Chabot, Megan Ryan, and Nicole Washington for their assistance and support of this piece.

[1] The "preservation through transformation" theory identifies ways in which dominant social structures maintain themselves in the face of civil rights legislation intended to end discrimination through instituting different justificatory rhetoric to preserve the original social structure. As applied to gender discrimination, the theory is enormously useful in the feminist effort to break down the patriarchal structures of dominance over women. *See* Reva B. Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 Stan. L. Rev. 1111, 1113 (1997); Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 Yale L.J. 2117 (1996) (exploring how legal understandings of marital and social relationships changed during the nineteenth and twentieth centuries, and how this shaped legislation); and Diane Rosenfeld, *Why Doesn't He Leave?: Restoring Liberty and Equality to Battered Women in Directions in* Sexual Harassment Law 531 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004) (arguing that battered women's shelters represent a form of status enforcing regime that keeps women in a subordinate position in which they must hide, while preserving a batterer's freedom even though he has been found responsible for intimate partner violence and is known to present a danger to his victim).

[2] *See* discussion *infra* Section II.

harassment. The requirements of "actual notice" and "deliberate indifference" set forth in the *Gebser/Davis* line of cases[3] have created a heavy burden on plaintiffs and made the protections of Title IX inaccessible to many. In response to this burden, scholars and activists are promoting legislation that clarifies existing Supreme Court doctrine in an effort to keep Title IX accessible as a remedy to gender discrimination in educational institutions.

The third issue discussed at the Conference is an area where the two primary concerns of Title IX—athletics and sexual harassment—converge. Baine Kerr, one of the Conference panelists, described recent litigation involving athlete-perpetrated sexual assaults.[4] Because of the particular way in which the competing interests converge in these cases, athlete-perpetrated sexual assault is critically important to assess when evaluating the power of Title IX to address sex discrimination.

The Conference discussions were infused with a common spirit of activism and a belief that Title IX still has the potential to be a strong vehicle for further advances in gender equality at schools. Professor Verna Williams suggested using the idea of "social justice feminism,"[5] a concept she and Krista Kalsem are currently developing that suggests that advocates "should focus more clearly upon examining and reckoning with the relationship between patriarchy and white supremacy that informs gender norms."[6] Social justice feminism suggests a practical theory for addressing the intersectionality of multiple forms of oppression in a way that would move feminism beyond its current inclination to address only one form of oppression at a time.[7] Thus, social justice feminism illuminates the multiple power arrangements at play in an educational institution's handling of Title IX issues.

As a concept, social justice feminism has both intuitive appeal and descriptive value. Indeed, some of the heroic efforts in the fight for gender justice described at this Conference serve as examples of how a social justice feminism approach can be used to inform the justice system about the concept of 'structural' gender discrimination; that is, as a phenomenon not necessarily limited to a single event, but rather the structural context of male domination in social relations that promote and allow the individual acts of

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[3] This difficulty is discussed *infra* in Section III "Clearing the Bar: The Supreme Court High Jump."

[4] *See* Section IV "Athlete Perpetrated Sexual Assault: The Conflation of Title IX's Main Concerns" *infra*.

[5] Verna Williams, Comments from the *Harvard Journal of Law & Gender* Conference *Changing Social Norms? Title IX and Legal Activism* [hereinafter "*Conference Transcript*"], 31 HARV. J.L. & GENDER 393 (2008); Krista Kalsem & Verna Williams, *Social Justice Feminism* 22–28 (forthcoming 2008) (on file with author).

[6] *Id.* at 24.

[7] *Id.* For example, Kalsem and Williams describe how critical race feminism ("CRF") provides a "'race intervention in feminist discourse, because CRF necessarily embraces feminism's emphasis on gender oppression within a system of patriarchy.' However, one of CRF's contributions to the feminist canon is its theoretical analysis of multiple oppressions, particularly with respect to women of color." *Id.* at 24 (internal citation omitted).

egregious gender animus to take place. This structural view of gender discrimination is especially evident in recent cases involving athletes with known records of sexual misconduct committing sexual assault on female students, as discussed below.[8] These cases reveal the extensive collusion among male coaches, college administrators, or officials who recruit, retain, and protect the valuable male players despite known histories of sexual misconduct. This recurrent trend speaks volumes about who and what is valued on college campuses: institutionalized forces tradeoff the bodily integrity of their female students in favor of protecting abusive male athletes.

II. Athletics as a Zero-Sum Game

Understanding the nature of resistance may help us fight it. In the sports arena, a consistent theme of opposition to Title IX is the attitude that the availability of athletic opportunities is a zero-sum game, meaning that there are a finite amount of resources available for sports, and if a school creates athletic opportunities for females, the males will necessarily suffer. But as Jocelyn Samuels noted, "athletics doesn't have to be a zero-sum game; you can accommodate more students' interests if you find ways to cut costs in other areas."[9] Underlying this view may be an attitude that men are entitled to play sports in a way that women are not. For example, when golfer Annika Sorenstam was going to play a PGA Tour event in March 2003, pro male golfer Vijay Singh said, "[s]he doesn't belong out here. She's the best woman golfer in the world, and I want to emphasize 'woman.' We have our tour for men, and they have their tour. She's taking the spot from someone in the field."[10] According to authors Eileen McDonagh and Laura Pappano,

> This wasn't just the familiar claim a female was swiping food from the table of a male breadwinner. It reminded all that athletics is more than play. Stakes are high because organized sports offer men a means for demonstrating masculinity and displaying physical power. For Singh, Sorenstam's playing hit a nerve, the gut belief that it is wrong . . . . Men playing with women upset the social order. When Singh said Sorenstam didn't belong, he expressed a cultural view that females should not compete with males. For women, the game represented a struggle for equal status.[11]

In examining the zero-sum game attitude, it is worthwhile to look at how the media portray Title IX. A study published shortly after the Confer-

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[8] *See* Section IV *infra* discussing athlete sexual assault.

[9] Jocelyn Samuels, *Conference Transcript*, *supra* note 5, at 403.

[10] Eileen McDonagh & Laura Pappano, Playing with the Boys: Why Separate is not Equal in Sports, 30 (2007).

[11] *Id.*

ence measured how sports journalists viewed Title IX and women's sports, finding that "about half of newspaper sports reporters surveyed about Title IX say it hurts men's sports, and about one-third say the law should be changed."[12] However, nearly seventy-five percent of the women interviewed disagreed that Title IX hurt men's sports, while slightly more than half of the men claimed it did.[13] If sports journalists—the ones "objectively" reporting on Title IX—believe that it hurts men's sports to have women's sports, then it is likely that these beliefs are shaping their reporting. This in turn helps perpetuate the notion that sports is a zero-sum game, so it is not surprising that this attitude is so prevalent in the public.

a. *James Madison University and the Importance of Counting*

At the Conference, Ellen Staurowsky discussed how James Madison University ("JMU") tried to achieve "preservation through transformation" by claiming that their discriminatory actions were actually *required* by Title IX. In September 2006, JMU announced that it was cutting ten sports teams: seven men's teams, including track, swimming, and wrestling, and three women's teams, claiming it was necessary to "bring the JMU Athletics program into compliance with Title IX."[14] But Staurowsky discovered that while JMU was pleading "poverty" in sport, they took in millions of dollars to build a new athletic center, mostly for varsity football and other varsity sports.[15] Moreover, she discovered that the football program was actually carrying an $800,000 deficit.[16] Here, it required only an examination of the numbers to reveal the absurdity of blaming Title IX for this scenario: JMU sacrificed men's—and women's—sports in order to preserve an exclusively male sport, football. So, it turns out that what was going on at JMU had very little to do with Title IX and everything to do with preserving a male institution, football, at any expense. If anything, the JMU example demonstrates that Title IX still gives schools too much leeway: here, they preserved an exclusively male sport running a huge deficit at the expense of ten other sports teams, some of them women's and some men's.

The JMU scenario is merely one creative use of numbers to avoid realization of the promise of Title IX. Terry Fromson, another scholar who has looked at the use of numbers to undermine Title IX, emphasizes that the

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[12] *Sports Journalists, Title IX and Women's Sports: Attitudes and Impact* (John Curley Center for Sports Journalism, Penn State) June 2007, at 1.

[13] *Id.* at 2.

[14] Press Release, James Madison University, JMU Enacts Proportionality Plan To Comply With Title IX (Sept. 28, 2006), http://www.jmu.edu/jmuweb/general/news/general7490.shtml.

[15] *Id.* Plecker Athletic Center, which opened in the spring of 2005, contains mostly facilities for the varsity football team and other varsity sports. More information can be found at http://www.jmu.edu/development/needs/pleckerctr.shtml.

[16] James Madison University Equity in Athletics Disclosure Report 2005–2006, *available at* http://ope.ed.gov/athletics/.

bottom line is that the Equity in Athletics Disclosure Act ("EADA") provides important information, but "it is important to look beneath the numbers, examine team rosters, often posted online, over time as well as competition results, and talk to students to determine whether a school is actually in compliance or not."[17] In fact, the Women's Law Project examined data collected from the EADA and found that on average, sixty cents on the dollar was spent on female athletes versus male athletes.[18] Fromson's skepticism of the data and determination to uncover the truth behind the numbers led her and the Women's Law Project to an efficient and impressive victory in *Choike v. Slippery Rock University*.[19] Slippery Rock University cut women's field hockey, swimming, and water polo teams, but the University reinstated these sports after Fromson's team sent a demand letter and secured an order for reinstatement in federal court.

b. Jackson v. Birmingham Board of Education[20]

Roderick Jackson's case is an example of how one person helped bring to life the promise of Title IX. When Jackson became the girl's basketball coach at the Jackson-Olin High School in Birmingham, Alabama, he noticed the discrepancies between his team and the boys' team.[21] Jackson noted that the girls' team was forced to practice in a cold, unheated gym, and he complained to his supervisors about the unequal treatment.[22] To the extent that the female athletes at Jackson-Olin High School felt that they were not entitled to equal facilities, based on the status quo of providing male athletes with preferential treatment, Coach Jackson's investigation likely gave his players a sense of entitlement to equality. Civil rights litigation of the kind that Coach Jackson instigated serves not only to enforce the rights guarantee by Title IX, but such litigation also reinforces the underlying principle of entitlement to equality.

III. Clearing the Bar: The Supreme Court High Jump

Title IX prohibits sexual harassment of college and university students whether the harasser is an employee or another student. Sexual harassment is "unwelcome conduct of a sexual nature . . . [and] . . . can include unwelcome sexual advances, request for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature."[23] Sexual assault, conduct that

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[17] Terry Fromson, *Conference Transcript*, *supra* note 5, at 400–01.
[18] *Id.* at 400.
[19] No. 06-622, 2006 U.S. Dist. LEXIS 49886 (W.D. Pa. July 21, 2006).
[20] 544 U.S. 167 (2005).
[21] *Id.* at 171.
[22] *Id.*
[23] Holly Hogan, Security On Campus, Inc., *Title IX Requires Colleges & Universities to Eliminate the Hostile Environment Caused by Campus Sexual Assault,* (2005) http://www.securityoncampus.org/victims/titleixsummary.html.

includes rape and other forms of sexual abuse like forcible fondling, is an extreme form of sexual harassment. Thus, a crucial issue is when an educational institution can be charged with allowing sexual harassment, which is defined to include a range of sexual violence including rape.

Several panelists at the Conference discussed concerns about the strict requirements for Title IX sexual harassment plaintiffs set by the Supreme Court in the *Gebser/Davis* line of cases.[24] In *Davis*, the Court held that student-on-student harassment is actionable only where the school acts with deliberate indifference to known acts of harassment in its programs or activities; and that the harassment must be so "severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit."[25] In *Gebser*, the Court held that "a damages remedy will not lie under Title IX unless an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of discrimination . . . and fails adequately to respond. . . . The response must amount to deliberate indifference to discrimination."[26] As Professor Linda Wharton noted, the Court left open many questions about what this standard actually means, but what is clear is that a heavy burden is now imposed on student victims of sexual harassment.[27] While some courts have applied the new standards more generously, the "actual knowledge and deliberate indifference" requirement has been construed narrowly in other lower court cases, creating a bar that is "disturbingly high" for students.[28] Part of the problem is that the actual knowledge standard might create perverse incentives for schools not to have effective reporting mechanisms.[29] As Deborah Rhode noted, "[w]hen ignorance is

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[24] It should be noted, however, that private lawsuits under Title IX are not the only enforcement mechanism. The Office of Civil Rights ("OCR") of the Department of Education is responsible for enforcing Title IX at educational institutions receiving federal funds. Unlike private lawsuits, OCR cases are relatively easy to file. While a complainant cannot get money damages against a school under this regulatory scheme, the school could be fined if it is found to be in violation of the federal regulations. Moreover, OCR confirmed its commitments to Title IX enforcement in its most recent Guidance, stating "the liability standards established in those cases (*Gebser/Davis*) are limited to private actions for monetary damages." Dep't of Educ., Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*. January 2001; 34 C.F.R. 106.8 (a) (Regulations of the Department of Education).

[25] Davis v. Monroe County Bd. of Educ., 526 U.S. 629 (1999).

[26] Gebser v. Lago Vista Indep. School Dist., 524 U.S. 274 (1998).

[27] Linda Wharton, *Conference Transcript*, *supra* note 5, at 390.

[28] *Id.*

[29] *See* Deborah L. Rhode, *Sex in Schools: Who's Minding the Adults?*, *in* DIRECTIONS IN SEXUAL HARASSMENT LAW 290, 298 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004)

> Although *Davis* clearly represents progress over the previous lower court rulings that had denied liability for peer harassment under any circumstances, it still falls short of what is necessary. Like *Gebser*, *Davis* creates an incentive for educators to avoid knowledge that might subject them to legal accountability. The problem is compounded by lower court rulings that require notice to be given to a school

bliss, and a defense to legal judgments, why should schools establish effective complaint strategies?"[30]

Wharton and others, including Jocelyn Samuels and Verna Williams, propose that legislative amendments to Title IX could clarify some of the answers to the questions left open by *Gebser*/*Davis* regarding reasonable implementation of the standards. One suggestion is to create a standard similar to Title VII that more closely resembles constructive knowledge and that would require schools to take action to halt harassment that it knows or should know about.[31]

The Court's refusal to apply Title VII's reasonable notice standard to Title IX cases is confounding,[32] but Justice Kennedy's dissent in *Davis* sheds some light on the rationale behind the decision. Justice Kennedy wrote that "[a] teacher's sexual overtures toward a student are always inappropriate; a teenager's romantic overtures to a classmate (even when persistent and unwelcome) are an inescapable part of adolescence."[33] Implicit in Justice Kennedy's statement is social support for sexually harassing behavior that negatively affects the victim's educational opportunities. It upholds a male entitlement to harass girls by dismissing it as "an inescapable part of adolescence."[34] While the attitude that "boys will be boys," which includes teasing or sexually harassing girls, explains many schools' failure to effectively prevent or address harassment, this attitude certainly does not excuse a school's failure to fully address the problem of sexual harassment.

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board member or senior supervisor with authority to ensure Title IX compliance. Given the reluctance of students to complain to anyone, such requirements often may create an unrealistic limitation on accountability where other less senior school personnel had knowledge of a problem and failed to take reasonable remedial action.

Id.

[30] *Id.* at 297.

[31] According to Deborah Rhode,

> A preferable approach would be to adopt the same standards appliable to employment cases. This was the approach that Justice Ginsberg proposed in her *Gebser* dissent. In essence, it would have imposed liability on school districts even if they lacked specific knowledge of harassment unless they had an effective policy for reporting and redressing such abuse that the complainant failed to use."

Rhode, *supra* note 29, at 298.

[32] Rhode writes:

> Under the majority's analysis [in *Gebser*], it does not matter if the school lacks adequate harassment policies. That decision stands in sharp contrast to other decisions governing workplace harassment from the Courts same 1998 term. . . . In effect, the Court has provided more protection from harassment for school employees than for students. . . . Justice Stevens' dissent noted [that] the Court's opinion creates incentives to avoid the knowledge that should trigger corrective action. Indeed, the see-no-evil/hear-no-evil attitudes already in place in many education districts may now become the legal strategy of choice. . . .

Rhode, *supra* note 29, at 297.

[33] Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 675 (1999).

[34] *Id.*

Moreover, in refusing to apply an analogy between sex discrimination in the workplace and sex discrimination in schools, Justice Kennedy simply concluded, without justification, that "schools are not workplaces and children are not adults."[35] Again, this logic belies an attitude that sexual harassment at school is just part of life rather than actionable discrimination. However, this logic is flawed. Sex discrimination in the educational context has the potential to be at least as damaging as sex discrimination in the employment context.[36] Indeed, sexual harassment in the educational context could deter women from reaching the employment setting, as education is the building block for a professional career.[37] Thus, the disconnect between interpretive standards for redressing sex discrimination under Title VII and Title IX requires a deeper analysis. The effort to use legislation to increase understanding of the important connection between workplace harassment and harassment in an educational setting is a critical effort for Title IX advocates to support.

IV. Athlete Sexual Assault: The Conflation of Title IX's Main Concerns

When athletes commit sexual harassment and assault, the conflation of gender-based discrimination is a particularly profound problem. When schools violate Title IX principles by privileging male athletes over female athletes, it creates an environment of privilege and entitlement for males and second-class citizenship for females. When schools tolerate sexual harassment and sexual assault, they create an environment in which learning opportunities are stunted, as student victims worry about their safety and security instead of their studies. Schools that tolerate athlete sexual assault, or do nothing about it when told of the situation, "step[ ] into the shoes of

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[35] *Id.*

[36] Once a student experiences a sexual assault at school, schoolwork itself can become less of a priority than just dealing with the repercussions of the act. These repercussions include: "shock, humiliation, anxiety, depression, substance abuse, suicidal thoughts, loss of self-esteem, social isolation, anger, distrust of others, fear of AIDS, guilt, and sexual dysfunction." Rana Sampson, *Acquaintance Rape of College Students, Problem-Oriented Guides for Police Problem-Specific Guides Series*, Guide No. 17, U.S. Dep't of Justice, Office of Cmty. Oriented Policing Servs., at 8, *available at* http://www.cops.usdoj.gov/files/ric/Publications/e07063411.pdf.

[37] *See, e.g.*, Phyllis L. Crocker & Anne Simon, *Sexual Harassment in Education*, 10 Cap. U.L. Rev. 541, 543–50 (1981) ("The impact of the threat implicit in the faculty member's power intensifies with his importance to the student's educational and career plans . . . . [T]he student may be led to change her career plans entirely.") (cited in Catharine A. MacKinnon, Sex Equality 1006 (2001). MacKinnon also cites the Senate Committee on Faculty Affairs, Univ. of Minn. Policy Statement on Sexual Harassment (Apr. 16, 1981). "In both obvious and subtle ways, the very possibility of sexual harassment may be deeply destructive to individual students . . . . Academic and career relationships may be poisoned by the subtle and destructive overtones of this problem." *Id.* at 1007.

the discriminator,"[38] thus amplifying the harmful effects of sex discrimination.

The recent case against University of Colorado at Boulder ("CU") involving recruitment of football players and sexual assault illustrates the complex intersectionality of several forms of discrimination. Applying a social justice feminism analysis to the case helps identify the power dynamics at play that produced an environment where sexual assault by football players and recruits was foreseeable. Social justice feminism would ask questions about patriarchy, sexism, homophobia, and racism.[39]

In this case, powerful white males helped recruit black male football players with representations of sexual access to all females. The recruits were introduced to a sexually-charged atmosphere and encouraged to believe that all women, whether paid for their sexual access (such as prostituted women or strippers) or not (co-eds), were football "groupies"' who wanted to have sex with them because they were athletes. The sexism created in this environment encourages the football players to view women as conquests. The patriarchal agreement between the coaches, the players, and the recruits seemed to converge on the express belief that as males, they were all above women.[40]

The case is significant for many reasons. First, it demonstrated the importance of a persistent and unrelenting drive to get the court to see the overall environment of male sexual privilege conveyed to football players.[41]

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[38] Holly Hogan, *Conference Transcript*, 31 HARV. J. L. & GENDER 383 (2008). Indeed, Hogan argues that athletic departments have an obligation to do additional training and affirmative education on sex discrimination in order to achieve compliance with Title IX. *See* Holly Hogan, *What Athletic Departments Must Know About Title IX and Sexual Harassment*, 16 MARQ. SPORTS L.J. 317 (2005–2006).

[39] *See* Mari J. Matsuda, *Beside My Sister, Facing the Enemy: Legal Theory Out of Coalition,* 43 STAN. L. REV. 1183, 1189 (1991).

> The way I try to understand the interconnection of all forms of subordination is through a method I call 'ask the other question.' When I see something that looks racist, I ask, 'Where is the patriarchy in this?' When I see something that looks sexist, I ask, 'Where is the heterosexism in this?' When I see something that looks homophobic, I ask, 'Where are the class interests in this?' Working in coalition forces us to look for both the obvious and non-obvious relationships of domination, helping us to realize that no form of subordination ever stands alone.

[40] Indeed, much male athletic socialization involves degrading other men by comparing them to women, and overt sexual degradation of women. *Accord* T.J. Curry, *Fraternal Bonding in the Locker Room: A Profeminist Analysis of Talk about Competition and Women*, 8 SOCIOLOGY OF SPORT JOURNAL 8119–35 (1991):

> Locker Room Talk Promotes Rape Culture: Maintaining the appearance of a conventional heterosexual male identity then, is of the utmost importance to the athlete who wants to remain bonded to his teammates . . . the perception of women as objects instead of persons encourages expressions of disdain or even hatred toward them on the part of the male athletes.

[41] This effort included the establishment of an Independent Investigative Committee established to investigate the sexual assaults, and an independent investigation by the Attorney General's Office into conflicting claims that emerged in the media regarding the rape of a third victim from that same evening in December 2001. *See Former Football*

Second, the case involved male athletes using prostituted women as entertainment and enticement to attract recruits to the team.[42] In addition to prostitution, players also made pornographic videos of themselves having sex with women, showing the films to recruits and expressly conveying the promise that such sexual access was theirs if they joined the team.[43] Third, it showed how creating this environment may lead to players committing sexual assault and presenting an overall danger to the female students.[44]

The facts of the CU case involved allegations that the school was on notice that their football team players had committed sexual assaults and presented a risk to female students at the school.[45] The Boulder County District Attorney's Office had warned the school in the past that recruiting parties set up to provide sex to the recruits must stop.[46] According to the complaint, recruiting practices of the school involved providing the recruits with drugs and alcohol; taking them to strip clubs or hiring strippers for parties; coupling them with 'ambassadors' or 'tutors' who were female coeds paid by the team to show the recruits "a good time." Football players, who were also involved in recruiting efforts, understood this to mean that they were "to try to take the recruits to parties where they could drink alcohol and have sexual relations with female CU students and other women."[47]

Baine Kerr, one of the Conference panelists, represented Lisa Simpson in her lawsuit claiming that football players and recruits of the CU football

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Player Changes His Story Regarding Alleged Victim, 9 NEWS.COM, Mar. 15, 2008, *available at* http://www.9news.com/rss/article.aspx?storyid=66397.

[42] Plaintiff Lisa Simpson's First Amended Complaint and Jury Demand [hereinafter Simpson Complaint] at ¶9, ¶19, Simpson v. Univ. of Colo. (D. Colo. March 22, 2005) (Nos. 03-RB-2495, 02-RB-2390) reads: "From 1998, or before, through 2004, female dancers were paid to perform striptease and sexual contests for CU football players and recruits at CU recruiting parties during official visits."

[43] *Id.* at ¶33.

[44] In his book on rape culture in the NBA, Jeff Benedict states:

> Many players develop an extremely warped perception of women, viewing them as nothing more than sexual prey . . . . Once (sic) source of these sexual encounters is strip clubs. . . . . make sexual gratification for athletes as easy as a layup. . . . [T]hese places tend to foster in players the false perception that the role of women is to cheerfully satisfy their demands and urges. This sometimes can lead to unforeseen problems, including crime and abusive treatment of women.

JEFF BENEDICT, OUT OF BOUNDS: INSIDE THE NBA'S CULTURE OF RAPE, VIOLENCE, AND CRIME, 93–94 (2004).

[45] *Id.* at ¶¶6–8, 18, 69.

[46] Order Granting Defendant's Motion for Summary Judgment at ¶¶ 13–14, Simpson v. Univ. of Colorado, (D. Colo. Mar. 31 2006) (Nos. 02-RB-2390, 03-RB-2495) (on file with author). The District Attorney's office was involved because on December 6, 1997, a group of teenage high school girls attended a recruiting party at a hotel and one of the girls alleged she was sexually assaulted by recruits at the party. *Id.* at ¶13.

[47] Simpson Complaint at ¶ 30 (D. Colo. May 21, 2004) (Nos. 03-RB-2495, 02-RB-2390). A week or two before the assaults, the players "made pornographic videotape of other players having sexual intercourse with CU students. At least one recruit . . . was told that he could expect similar special favors as a football player at CU." *Id.* at ¶33.

team sexually assaulted her on December 7, 2001.[48] The sexual assaults had been set-up and planned, according to the complaint.[49] A female "tutor" knew that Simpson and her roommates were going to have a "girl's night in" that involved drinking games.[50] The tutor came to Simpson's apartment, participated in the party, and asked if two football players and two recruits could come over that evening.[51] Between 11:30 and 11:45 p.m., between sixteen and twenty players and recruits arrived.[52] According to the facts on which the district court granted summary judgment in favor of CU:

> Many of the players and recruits had been drinking and smoking marijuana . . . . About 30 minutes later, some of the players and recruits decided to leave the apartment. Player #2 who was preparing to leave, was approached by the tutor. The tutor told him that he should not leave because 'it was about to go down.' Player #2 understood her comment to mean that female students would provide sexual favors to the players and the recruits.
>
> At about this time, Ms. Simpson felt very intoxicated and tired and went to her bedroom. She lay down on the bed and fell asleep. Ms. Simpson later awoke to find two recruits removing her clothes. She was sexually assaulted by the recruits as players surrounded the bed. Subsequently, several CU football layers also demanded sexual favors from Ms. Simpson. Ms. Simpson attempted to resist, but was unable to resist or leave because she was terrified and surrounded by at least five large football players and recruits.[53]

The federal district court granted summary judgment for CU, finding that no rational person could find that "(1) CU had actual notice of sexual harassment of CU students by football players and recruits before the assaults or (2) that CU was deliberately indifferent to such harassment."[54] Plaintiffs made several post-judgment motions in the district court, but were again denied relief.[55] They then went to the court of appeals, which overturned these decisions, finding that plaintiffs had made factual showings at the district court sufficient to allow a rational factfinder to conclude:

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[48] Simpson v. Univ. of Colo., 372 F. Supp. 2d 1229 (D. Colo. 2005); *rev'd and remanded* Simpson v. Univ. of Colo., 500 F.3d 1170 (10th Cir. 2007).

[49] *Id.*

[50] 372 F. Supp. 2d 1229, 1232 (D. Colo. 2005).

[51] *Id.*

[52] *Id.*

[53] Order Granting Summary Judgment at *3–4, Simpson v. Univ. of Colo. (D. Colo. Mar. 31 2006) (Nos. 02-RB-2390, 03-RB-2495). The case also involved another claim by another woman sexually assaulted at the party, and the cases were consolidated.

[54] 372 F. Supp. 2d at 1235. The court further denied motions to alter the judgment and reopen discovery. On April 24, 2007, the court denied the plaintiffs' additional motion for relief.

[55] *Id.*

> (1) that CU had an official policy of showing high-school football recruits a 'good time' on their visits to the CU campus, (2) that the alleged sexual assaults were caused by CU's failure to provide adequate supervision and guidance to player-hosts chosen to show the football recruits a 'good time,' and (3) that the likelihood of such misconduct was so obvious that CU's failure was the result of deliberate indifference.[56]

Shortly after the Tenth Circuit reinstated Ms. Simpson's claim, CU settled the case paying $2.5 million to Simpson and another $350,000 to the other plaintiff.[57] CU agreed to hire a special Title IX analyst, Nancy Hogshead Maker, to oversee the implementation of new policies and procedures regarding sex equality on campus. During the course of the lawsuit, thirteen university officials and administrators were fired, including the President of the University and Coach Gary Barnett.[58]

The difference between the district court's decision to grant summary judgment and the appellate court's reversal of that decision is an example of the difference that a social justice feminism approach makes.[59] While the district court opinion diced the facts of the case in a narrow interpretation of notice requirements, the appellate court found that the school was most definitely on notice because of a string of sexual assaults from at least 1997 until 2001 committed by football players and recruits, and that its failure to address these sexual assaults in any meaningful way contributed directly to the rapes of the plaintiffs.

Another major Title IX ruling involving multi-perpetrator sexual assaults by athletes came down shortly after the Conference. According to the complaint, Tiffany Williams, a student at University of Georgia ("UGA") received a phone call from Tony Cole, a UGA basketball player, inviting her to his room in the athletic dorm.[60] She had consensual sex with him.[61] Unbeknownst to Tiffany Williams, UGA football player Brandon Williams, whom Tiffany Williams did not know, was hiding in the closet while Cole had sex with Tiffany.[62] When Cole left to go to the bathroom, slamming the door behind him, Brandon Williams emerged naked from the closet.[63] He

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[56] 372 F. Supp. 2d at 1229.

[57] Allison Sherry, *CU Settles Case Stemming From Recruiting Scandal*, THE DENVER POST, Dec. 6, 2007, *available at* http://www.denverpost.com/snowsports/ci_7645722.

[58] The case involved allegations that Coach Gary Barnett had ignored reports of sexual harassment and assault by his players, intimidated victims from coming forward and failing to report the sexual misconduct as he was required by school policy. Simpson Complaint at ¶¶ 21, 25, Simpson v. Univ. of Colo. (D. Colo. May 21, 2004) (No. 02-RB-2390).

[59] Indeed, Professor Verna Williams was of counsel on the case.

[60] Williams v. Bd. of Regents of the Univ. Sys. of Ga., 477 F.3d 1282, 1288 (11th Cir. 2007).

[61] *Id.*

[62] *Id.*

[63] *Id.*

then sexually assaulted Tiffany and attempted to rape her.[64] As Brandon Williams was sexually assaulting Tiffany, Cole was on the phone with Steven Thomas, Cole's teammate, and Charles Grant, another football player. Cole told Thomas and Grant that they were "running a train" on Tiffany.[65] Thomas came to Cole's room, and with Cole's encouragement, sexually assaulted and raped TiffanyWilliams.[66]

Tiffany reported the rapes to UGA police, who investigated and referred the case to the Judicial Board for a hearing.[67] The panel did not hold a hearing until almost a year after the incident,[68] and it decided not to sanction Cole, Brandon Williams, or Thomas.[69]

In her suit against the University, Tiffany Williams included claims that the coaches of the basketball team were personally involved in recruiting and admitting Cole, even though they knew he had disciplinary and criminal problems.[70] For example, Cole was dismissed from the Community College of Rhode Island after allegations that he sexually assaulted two women and threatened them when they rejected his advances.[71] He pled no contest to criminal charges in connection with these assaults.[72] The coaches not only knew of Cole's previous history and criminal involvement, but they also made special accommodations for him: Cole did not meet UGA's standards for admission, but after the coach sought intervention from the UGA President, the University admitted him through a special policy and he was given a full scholarship.[73]

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[64] *Id.*

[65] *Id.* "Running a train is a slang expression for a gang rape." *Id.* For an explanation of the social and cultural significance of gang rape, see PEGGY REEVES SANDAY, FRATERNITY GANG RAPE: SEX, PRIVILEGE AND BROTHERHOOD ON CAMPUS (2d ed., 2007).

[66] *Williams*, 477 F.3d at 1288.

[67] *Id.* at 1289.

[68] UGA's failure to hold a hearing for almost eleven months was evidence of deliberate indifference, according to the court. *Id.* at 1297. This is significant for the implementation of Title IX's requirement that a school take "prompt and equitable" action to address the harassment, as the long period of delay before taking action was clearly not prompt. Further, UGA's claim that they were waiting until the criminal cases were resolved failed because "the pending criminal charges did not affect UGA's ability to institute its own procedures . . . ." *Id.* Again, this is significant because it highlights the difference between what the criminal courts can do and a school's obligation to take corrective measures. Resolution of criminal charges is not an acceptable excuse for the school's failure to either hold a hearing or to provide reasonable accommodations for the survivor.

[69] *Id.* at 1289.

[70] *Id.* at 1290.

[71] *Id.*

[72] *Id.*

[73] The complaint alleged that Harrick, a coach, had recruited Cole to attend University of Rhode Island ("URI"). When Cole could not gain admission to URI, Harrick helped him gain admission to the Community College of Rhode Island ("CCRI"). Cole was dismissed from CCRI after allegations of sexual misconduct and threats. Cole was later dismissed from the basketball team at Wabash Valley College ("WVC") in Mount Carmel, Illinois because of disciplinary problems that included whistling at a clerk.

The Eleventh Circuit reversed the district court's dismissal of Tiffany's claims.[74] Shortly after the new decision, the parties settled the case out of court. While the settlement amount has not been disclosed, it has been confirmed to be in the six figures.[75]

Another case pending in federal district court against Arizona State University ("ASU") involves disturbingly similar facts. The plaintiff in that case alleges that ASU recruited Darnel Henderson to its football team, but over the summer before his freshman year, he was expelled from the "Summer Bridge" program because of sexually harassing and threatening behavior.[76] Despite this expulsion, the coach was able to convince ASU administrators to allow Henderson to return to campus and re-enroll as a regular student.[77] Henderson was on "residential life" probation for undisclosed infractions when he sexually assaulted the plaintiff. According to the briefs in the case, Henderson tracked the plaintiff, another student whom he did not know who lived upstairs in the same dormitory, waited until she was alone in her unlocked room, then entered her room and raped her while she was unconscious.[78]

This case is similar to the UGA case in that the school knowingly recruited an athlete with a history of sexual misconduct who later sexually assaulted another student. In both cases, the coaches went out of their way to gain admission of the student athlete; pulling strings to get others higher up in the administration to approve of the admissions and even grant schol-

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> By the time Cole was dismissed from WVC, Harrick was at UGA and again recruited Cole. Because Cole did not meet UGA's standards for admission, Harrick requested that Adams, the President of UGA, admit Cole through UGA's special admissions policy. Adams is the sole decision maker when admitting an applicant under the special admissions policy. Cole was admitted under full scholarship.

Id.

[74] *Williams*, 477 F.3d at 1282. In an interesting procedural development, the court revised and republished its decision one year after the original opinion in order to address more fully some of the issues. The result in the case was the same, but the analysis was strengthened in certain ways favorable to Ms. Williams.

[75] *University of Georgia Settles Harassment Lawsuit Against Former Athletes*, (May 3, 2007), http://www.universitybusiness.com/newssummary.aspx?news=yes&postid=2680 (last accessed May 19, 2008).

[76] ASU had a Summer Bridge program for transitioning high school students to college. According to the complaint, one residential life employee continually feared for her safety because of Henderson's potential for sexual violence, another female staff member resigned her position expressly out of fear that Henderson would assault her, and yet a third female staff member moved out of the dorm and off-campus because she was afraid of him and his friends. Plaintiff's Statement of Facts in Support of Motion for Default or Partial Summary Judgment and Sanctions for ASU's Willful Destruction of Evidence at ¶¶ 5–6 [hereinafter J. K. Statement of Facts], J.K. v. Arizona Bd. of Regents (No CV06-916) (on file with author).

[77] Plaintiff asserted that "in late July, 2003, however, Koetter, the head ASU football coach, was able to convince ASU administrators to allow Henderson to return to campus and re-enroll in August as a regular student, despite the almost unprecedented history of his having already been expelled." *Id.* at 7 ¶ 32.

[78] *Id.* at 12 ¶ 65.

arships to these men despite their criminal records and propensity to commit sexual misconduct against females who would be exposed to their presence. The theme of this male buddy system in sports in which coaches and others support violent athletes regardless of the collateral consequences, is emblematic of the male privilege that underscores attitudes of male entitlement to sexual access to females (whether the females are interested or not). That the schools at CU and UGA did nothing to ameliorate the risk that a privileged male athlete with a history of sexual predation would present to female students was a key factor in the appellate court's opinion in each case. The strong precedent of these holdings should inform the current case involving ASU.

Such cases illustrate both the male athlete's special type of entitlement to sexual access to females and the increasing trend of courts to hold schools liable for these egregious assaults. Still, money matters, and schools will often privilege the rights of their profit-generating football players over the rights of their female students. However, these recent decisions against universities in cases involving allegation of athletes committing sexual assaults suggest a shift in a positive direction. Schools are no longer only concerned about being sued by the respondents in sexual harassment or assault cases; now they are considering how to avoid suits by the survivors as well. These recent cases, where millions of dollars were paid to the plaintiff/survivors, can be used to convince schools to do the right thing in terms of instituting effective campus sexual assault policies.

V. Conclusion

Nancy Lieberman's closing remarks at the Conference bear repeating:

> If we want change, we need to start working together, even if we do not fully agree with each other. Every day there are people in Washington D.C. that are attempting to rescind Title IX, so we cannot get too comfortable. We must never be satisfied, and we must want more and expect more so that future generations can continue to benefit from Title IX.[79]

This conference was a tremendous gathering of people coming together to do just that. The progression evident in the recent wave of athlete sexual assault cases should be used to convince schools to affirmatively disrupt the coupling of male athleticism with sexual entitlement. Potential liability in this area has changed the calculus such that schools must now consider the likelihood of being sued by sexual assault survivors. But most importantly, we must remember that working together to encourage schools to use their unique positions of leadership to create campuses where sexual harassment

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[79] Nancy Lieberman, *Conference Transcript*, *supra* note 5, at 406.

is not tolerated. There is much room to read Title IX aspirationally, and to work with activist student groups as well as college administrators to develop and implement truly effective policies that promote sex equality. The cases breathe new hope into the fight for elimination of obstacles to equal access to educational opportunity—Title IX's promise to women.