

**CHANGING SOCIAL NORMS?
TITLE IX AND LEGAL ACTIVISM
COMMENTS FROM THE SPRING 2007
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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 million⁵ 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-

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-

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

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%202007.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

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-

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

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 four⁵⁷ 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

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

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.

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

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.