

## CONCLUDING REMARKS

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## 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,<sup>1</sup> 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.<sup>2</sup> 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

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<sup>1</sup> 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).

<sup>2</sup> See discussion *infra* Section II.

harassment. The requirements of “actual notice” and “deliberate indifference” set forth in the *Gebser/Davis* line of cases<sup>3</sup> 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.<sup>4</sup> 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,”<sup>5</sup> 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.”<sup>6</sup> 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.<sup>7</sup> 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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<sup>3</sup> This difficulty is discussed *infra* in Section III “Clearing the Bar: The Supreme Court High Jump.”

<sup>4</sup> See Section IV “Athlete Perpetrated Sexual Assault: The Conflation of Title IX’s Main Concerns” *infra*.

<sup>5</sup> 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).

<sup>6</sup> *Id.* at 24.

<sup>7</sup> *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.<sup>8</sup> 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.”<sup>9</sup> 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.”<sup>10</sup> 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.<sup>11</sup>

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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<sup>8</sup> See Section IV *infra* discussing athlete sexual assault.

<sup>9</sup> Jocelyn Samuels, *Conference Transcript*, *supra* note 5, at 403.

<sup>10</sup> EILEEN McDONAGH & LAURA PAPPANO, PLAYING WITH THE BOYS: WHY SEPARATE IS NOT EQUAL IN SPORTS, 30 (2007).

<sup>11</sup> *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."<sup>12</sup> 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.<sup>13</sup> 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."<sup>14</sup> 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.<sup>15</sup> Moreover, she discovered that the football program was actually carrying an \$800,000 deficit.<sup>16</sup> 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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<sup>12</sup> *Sports Journalists, Title IX and Women's Sports: Attitudes and Impact* (John Curley Center for Sports Journalism, Penn State) June 2007, at 1.

<sup>13</sup> *Id.* at 2.

<sup>14</sup> 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>.

<sup>15</sup> *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>.

<sup>16</sup> 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.”<sup>17</sup> 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.<sup>18</sup> 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*.<sup>19</sup> 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*<sup>20</sup>

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.<sup>21</sup> 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.<sup>22</sup> 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.”<sup>23</sup> Sexual assault, conduct that

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<sup>17</sup> Terry Fromson, *Conference Transcript*, *supra* note 5, at 400–01.

<sup>18</sup> *Id.* at 400.

<sup>19</sup> No. 06-622, 2006 U.S. Dist. LEXIS 49886 (W.D. Pa. July 21, 2006).

<sup>20</sup> 544 U.S. 167 (2005).

<sup>21</sup> *Id.* at 171.

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

<sup>23</sup> 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/victimstitleixsummary.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.<sup>24</sup> 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.”<sup>25</sup> 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.”<sup>26</sup> 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.<sup>27</sup> 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.<sup>28</sup> Part of the problem is that the actual knowledge standard might create perverse incentives for schools not to have effective reporting mechanisms.<sup>29</sup> As Deborah Rhode noted, “[w]hen ignorance is

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<sup>24</sup> 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).

<sup>25</sup> *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999).

<sup>26</sup> *Gebser v. Lago Vista Indep. School Dist.*, 524 U.S. 274 (1998).

<sup>27</sup> Linda Wharton, *Conference Transcript*, *supra* note 5, at 390.

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

<sup>29</sup> 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?"<sup>30</sup>

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.<sup>31</sup>

The Court's refusal to apply Title VII's reasonable notice standard to Title IX cases is confounding,<sup>32</sup> 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."<sup>33</sup> 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."<sup>34</sup> 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.*

<sup>30</sup> *Id.* at 297.

<sup>31</sup> According to Deborah Rhode,

A preferable approach would be to adopt the same standards applicable 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.

<sup>32</sup> 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.

<sup>33</sup> *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 675 (1999).

<sup>34</sup> *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.”<sup>35</sup> 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.<sup>36</sup> 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.<sup>37</sup> 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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<sup>35</sup> *Id.*

<sup>36</sup> 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>.

<sup>37</sup> 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,”<sup>38</sup> 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.<sup>39</sup>

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.<sup>40</sup>

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.<sup>41</sup>

<sup>38</sup> 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).

<sup>39</sup> 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.

<sup>40</sup> 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.

<sup>41</sup> 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.<sup>42</sup> 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.<sup>43</sup> Third, it showed how creating this environment may lead to players committing sexual assault and presenting an overall danger to the female students.<sup>44</sup>

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.<sup>45</sup> 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.<sup>46</sup> 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 co-eds 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."<sup>47</sup>

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>.

<sup>42</sup> 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."

<sup>43</sup> *Id.* at ¶33.

<sup>44</sup> 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).

<sup>45</sup> *Id.* at ¶¶6-8, 18, 69.

<sup>46</sup> 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.

<sup>47</sup> 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.<sup>48</sup> The sexual assaults had been set-up and planned, according to the complaint.<sup>49</sup> A female “tutor” knew that Simpson and her roommates were going to have a “girl’s night in” that involved drinking games.<sup>50</sup> 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.<sup>51</sup> Between 11:30 and 11:45 p.m., between sixteen and twenty players and recruits arrived.<sup>52</sup> 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.<sup>53</sup>

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.”<sup>54</sup> Plaintiffs made several post-judgment motions in the district court, but were again denied relief.<sup>55</sup> 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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<sup>48</sup> *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).

<sup>49</sup> *Id.*

<sup>50</sup> 372 F. Supp. 2d 1229, 1232 (D. Colo. 2005).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> 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.

<sup>54</sup> 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.

<sup>55</sup> *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.<sup>56</sup>

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.<sup>57</sup> CU agreed to hire a special Title IX analyst, Nancy Hogshhead 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.<sup>58</sup>

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.<sup>59</sup> 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.<sup>60</sup> She had consensual sex with him.<sup>61</sup> 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.<sup>62</sup> When Cole left to go to the bathroom, slamming the door behind him, Brandon Williams emerged naked from the closet.<sup>63</sup> He

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<sup>56</sup> 372 F. Supp. 2d at 1229.

<sup>57</sup> Allison Sherry, *CU Settles Case Stemming From Recruiting Scandal*, THE DENVER POST, Dec. 6, 2007, available at [http://www.denverpost.com/snowsports/ci\\_7645722](http://www.denverpost.com/snowsports/ci_7645722).

<sup>58</sup> 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).

<sup>59</sup> Indeed, Professor Verna Williams was of counsel on the case.

<sup>60</sup> *Williams v. Bd. of Regents of the Univ. Sys. of Ga.*, 477 F.3d 1282, 1288 (11th Cir. 2007).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

then sexually assaulted Tiffany and attempted to rape her.<sup>64</sup> 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.<sup>65</sup> Thomas came to Cole's room, and with Cole's encouragement, sexually assaulted and raped Tiffany Williams.<sup>66</sup>

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

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.<sup>70</sup> 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.<sup>71</sup> He pled no contest to criminal charges in connection with these assaults.<sup>72</sup> 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.<sup>73</sup>

<sup>64</sup> *Id.*

<sup>65</sup> *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).

<sup>66</sup> *Williams*, 477 F.3d at 1288.

<sup>67</sup> *Id.* at 1289.

<sup>68</sup> 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.

<sup>69</sup> *Id.* at 1289.

<sup>70</sup> *Id.* at 1290.

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

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

<sup>73</sup> 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.<sup>74</sup> 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.<sup>75</sup>

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.<sup>76</sup> 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.<sup>77</sup> 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.<sup>78</sup>

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-

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.*

<sup>74</sup> *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.

<sup>75</sup> *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).

<sup>76</sup> 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).

<sup>77</sup> 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.

<sup>78</sup> *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.<sup>79</sup>

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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<sup>79</sup> 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.